



Notes for Remarks
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***Relevance, Responsibility and Rapid Response:
The Ombudsman's Adaptive Capacity***

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Promotion and Protection of Human Rights in Emergencies.
Challenges and Opportunities: Recalling Fundamental Principles
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Thank you for the privilege of your invitation to address this gathering – I am humbled by the experience assembled here. The topic before us is challenging. It brings into play complex fundamental principles that do not lend themselves to superficial analysis.

Very quickly, let me tell you I am: Ombudsman for the City of Toronto which has a population of 2.6 million, the 6th largest government in Canada. I am an intermediary for a richly diverse public making up one of the most multicultural cities in the world. Half of Toronto's people were born outside Canada, a third speak one or more of 140 languages other than English or French. Half of Toronto's people are under 25 years of age, half have lived in Canada for less than 15 years.

When I first considered the theme of this conference, my thought was: "what is there for a Canadian to say?" I soon realized this question had little merit.

I recalled the imposition of martial law on the indigenous people in the Canadian Prairies in 1885 and for decades after an uprising caused by serious violations of their human rights. There was the Winnipeg General Strike which ended when the police opened fire on the strikers.

There was the internment of 23,000 Japanese by the Canadian government in World War II although fully 80% of them were Canadian citizens – their property and money was seized and not returned.

In 1972, Canada faced the "October Crisis", militant action taken by a group of separatists. The War Measures Act was again proclaimed resulting in tanks on the lawn of Parliament, the arrest and indefinite detention of 500 Canadians, most of them union leaders, artists, scholars, students, none of whom were charged with any offence.

In 1990, 2,500 members of the army were mobilized to deal with a group of Mohawks protesting the building of a golf-course on the site of a burial ground, resulting in stand-off which lasted 78 days.

Extraordinary anti-terrorism legislation was enacted shortly after the events of 9/11 a decade ago when the government decided to protect Canadian society by limiting individual rights of people it decided were threats.

Two years ago this month, at the G20 Summit held in Toronto, 1,000 people were arrested. Just last week, an independent police review agency found that in addition to threats of terrorism or organized crime, security forces were also to prevent "embarrassment to the government."

The report concluded police had used "excessive force", ignored civil rights, and made unlawful mass arrests, overstepped their authority and searched people arbitrarily and without legal justification.

And then as if to demolish any thought that these things would never happen in Canada, as I was preparing for this event, in Quebec some 2,500 persons had been arrested over, of all things, “an increase in tuition fees”. The protesters are now bedeviling the authorities by taking to the streets every evening to beat noisily on pots and pans in the Chilean traditions of the *cacerolazo*...each night noisier than the previous. Is this an emergency which requires the suspension of human rights? The government of Quebec says yes.

So I think I can speak to the topic, and hopefully add to the dialogue we are having here. We can assume that state action will trigger events which are likely to attract the attention of both Ombudsman and Commissioners of Human Rights.

I will come back to assert that these two types of officials, at least in their classic sense, each have a role to play but that the role for each is different. What then are the standards against which state conduct is to be measured?

I suggest a few standards which are of the Ombudsman’s jurisdiction:

Was the decision to take extraordinary measures made with sufficient, reliable information?

Were all persons who should have been involved in a decision of this gravity actually involved?

Were the measures permitted proportional to the seriousness of the threat?

Were the officials carrying out the measures trained in human rights law and how to deal with situations in the least violent way possible?

Were steps taken effectively to ensure that the measures taken did not exceed what was required by the situation?

Were the actions taken always within international law?

Was the restriction of individual rights always a last resort?

Was there sufficient monitoring of minute-to-minute events so as to keep actions within the permitted boundaries?

Was the term of the extraordinary measure kept to an absolute minimum?

And a big question:

Could the government have avoided the cause of the emergency by dealing with the grievance in the first instance, rather than letting the grievance grow to the point which caused the emergency?

Or were the emergency measures invoked largely with the intention of being free of human rights constraints to make it possible to deal forcefully with a dissident segment of the population?

I'll give you a Canadian example behind that last question. It is now largely acknowledged that the invocation of the War Measures Act in Quebec in 1972 was to squelch growing dissidence and criticism of the government from some 500 persons on the Left and academia, while dealing with the 35 or so members of the Front de la Liberation of Quebec, with some of the 35 being police infiltrators.

I suggest there is also room for an evaluation as to whether the threat which triggered state action really existed, or whether the real trigger was panic? In Canada's October crisis, it is now generally acknowledged that a tool used was the creation of panic among the people which would support the imposition of stark powers, or to be a bit more kind, failure to ensure that decisions were made on the basis of facts rather than panic among officials. The government relied on a characteristic of the Canadian population: We are more concerned about maintaining peace and order than we are about guaranteeing human rights, as evidenced by the fact that the vast majority of Canadians supported the emergency measures.

But back to the question of the standards I have mentioned which can be used in the post-event investigation to determine whether decisions were properly made. In my opinion, this investigation is best conducted by the Ombudsman reporting to the legislative body.

But there are other matters best addressed from the vantage point of a Commissioner of Human Rights. I must first explain, however, that Canada does not have a full human rights apparatus in place. Canada's various human rights commissions are limited to dealing with discrimination. And while a group whose rights have been abused in an emergency situation might be from one of an identified group against whom discrimination is illegal, there will be many situations in which ordinary people from the Canadian mainstream are swept up by a broad brush. Whatever happens, there must be a balance struck between public safety and fundamental rights, a measurement difficult to achieve.

The dilemma which confronts us is when does the legitimate objective of the state to take measures necessary to protect the rights of everyone allow the state to take actions which violate the rights of some?

Frequently, this dramatic theatre will involve a confrontation between persons of authority of one ethnic, religious or cultural group or a particular political persuasion dealing with people of another group. This often means differing expectations of what should happen to "restore peace", many different views as to what constitutes appropriate action. What is required, of course, is careful, thoughtful, judicious balance between the right of all people to security and the protection of fundamental rights.

The task of the Commissioner and the Ombudsman is to use their office in a manner which will build stronger democracy, leading to government being more accountable, fairer, and to ensure that government serves all the people, particularly those who are vulnerable in some way.

It is no coincidence that emergency situations frequently involve those who are marginalized, disenfranchised. While the emergency may be dramatic, our approach can bring thoughtful reason to bear in exposing racism, discrimination, abuse of power so that corrective action can be taken.

Access to the Ombudsman cannot be a privilege accorded principally to the middle class or to the well-educated who know how to present themselves, who know how the system works, and who have enough confidence in themselves to have the courage to pursue a complaint.

Each of us as human beings have certain strengths, but we are also full of personal frailties and failings – yes, and that includes me ...and you...Ombudsman and Commissioners. We are not free of bias and prejudice that we have accumulated over the course of our lives. But if we are to be true to our mandate to serve all the people, and especially those most vulnerable, how do we ensure we act fairly in protecting the human rights of, well, of those groups against whom we are biased?

I won't begin to try and answer that question, but I urge each of you to give it deep, quiet consideration and to find the courage to answer a further two questions.

Will we shape our institutions to the full reality faced by the people we serve?

Will we serve all the people, including those who are most vulnerable, including those who may be the subject of our own bias and prejudice?

We can undertake this self-examination as we engage in the task of tailoring and configuring the basic generic attributes of our offices to fit both the overall situation in which we are operating and the particular nature of an emergency situation.

Every Ombudsman has to be custom-made to fit the reality of the jurisdiction, and every emergency needs a custom-made Ombudsman. The people cannot afford to have an Ombudsman who is not seriously, actively pro-human rights, pro-accountability, always protecting the credibility of our office and role.

Whether that happens in Hong Kong or in Copenhagen, in Tanzania or in Toronto, in Baku or Bangladesh, the objective is the same. That is what makes it possible for Ombudsman to remain united in a worldwide community, while encouraging a wide range of diverse application to our local realities.

Governments, for their part, in exercising emergency powers, must do so with an understanding that states of emergency are intended to preserve democracy and the

rule of law.

The broad question in the background of this discussion is, of course, democracy. Democracy does not allow anything to be taken for granted. True democracy is inherently fragile, constantly at risk; we must be vigilant – especially in this time of profound and rapid change at every level of society throughout the world. Democracy is always a work-in-progress, a dynamic and continuous process, not a finished product.

Human behavior, technological change, and external events interact in unpredictable ways – finding balance in democracy can be only a momentary achievement. We should always be seeking improved democracy – always trying to restore balance, and to assist in that perpetual quest, Ombudsman and Human Rights Commissioners are engaged in fulfilling their respective mandates.

Thank you for your attention.