THE ROLE OF COLLABORATION OF THE OMBUDSMAN WITH THE COURTS AND JUDICIARY IN THE PROTECTION OF HUMAN RIGHTS: A CANADIAN PERSPECTIVE

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OCCASIONAL PAPER #79

ISSN 7116349

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In 1994, Marten Oosting, National Ombudsman of the Netherlands and one of my predecessors as President of the International Ombudsman Institute, wrote in "The National Ombudsman of the Netherlands and Human Rights":

> The need for governments to respect the fundamental rights and freedoms of individuals is indisputable and overriding. In countries where they are threatened, both the office of the ombudsman and the judiciary have to work hard to ensure that respect for these rights and freedoms is observed by the authorities. There will be no opportunity to make or meet higher-level demands, however much they may be required. Only when respect for fundamental human rights, particularly the traditional freedoms, is sufficiently guaranteed will there be an opportunity to consider the requirements of proper administration as well.[1]

Oosting's statement is a clarion call in particular for collaboration between the human rights ombudsman and the courts and judiciary of countries in transition to full democracy. Fundamental human rights will not be thoroughly protected in any jurisdiction until the rule of law is firmly established through the complete evolution of the courts and judges to independence from the executive and the legislature and realize their impartiality, trained competence, accessibility—particularly to human rights litigation—and general public confidence in them.

Linda Reif, Professor of Law at the University of Alberta, Edmonton, Canada and Editor of the International Ombudsman Institute, has commented favourably on the recognition of this need in Central and Eastern Europe. In her article "Building Democratic Institutions: The Role of National Human Rights Institutions in Good Governance and Human Rights Protection," she stated:

> In moving from totalitarian regimes to democratic governance, countries in Central and Eastern Europe have tried to redesign or build new government institutions. In all of these countries, the concerns have been the need to establish the rule of law, create new legislation, overhaul the practice of bureaucracies, improve the government's human rights record and change the mindset of bureaucrats and the people.[2]

In recognition of this widespread democratic and human rights movement, the International Ombudsman Institute has expanded its horizons from serving only the Scandinavian model

* Ombudsman of Ontario, Canada; President, International Ombudsman Institute. This paper was presented at the United Nations Development Programme International Round Table, Baku, Azerbaijan, November 20-21, 2003.

"classical" ombudsman institutions to admitting to full voting membership human rights ombudsman institutions such as your own. Indeed, Dr. Matjaž Hanžek, Human Rights Ombudsman of Slovenia, serves with me on the Board of Directors of the International Ombudsman Institute.

While I speak from the point of view of an ombudsman in a rather mature western democracy, founded on the rule of law, I do recognize that Canadian human rights issues today are relatively benign compared to those with which you contend. Our experiences and institutions differ greatly and I do not presume to do more than share some information which might have relevance and value to you. I am keenly aware that while our legal and government systems are different in development and often in form from most of those represented here today, Canada, the United States, and other western democracies have, post-9/11, themselves been shown to be vulnerable to government willingness to restrict human rights in the face of terrorist threat. Human rights institutions and the judiciary in my country and elsewhere in western democracies may soon be called upon to forcefully "speak truth to power" as our civil and human rights are sometimes inappropriately curtailed by governments intent on increasing security. It has been my observation that when governments react to threat, they rarely do so in the minimally necessary manner. In times of public fearfulness there are always those in government who seek opportunistic advantage in order to impose draconian, indeed totalitarian restriction or authority on the public they ostensibly serve.

In Canada, since 1982 we have had a constitutionally entrenched Charter of Rights and Freedoms which may prove to have a dramatic impact by restraining excessive government action and legislation in these perilous times. It will be our Supreme Court of Canada and our provincial Superior Courts which will take the lead in these matters but the courts will be complemented, although not reviewed, by the decisions of our national and provincial human rights commissions. The Supreme Court of Canada has shown enormous judicial independence, authority, and activism recently in curbing legislative and executive action, particularly in human rights cases. There is much Canadian debate, both public and within that court itself, about the proper limit of judicial activism in monitoring, limiting, and striking down executive and legislative action.

In Canada, neither our human rights commissions nor our classical ombudsman institutions have any role in supervising of our courts or our judiciary at any level. However, our provincial ombudsmen do have jurisdiction to review the functions of our provincial human rights commissions. Unlike in Azerbaijan, the ombudsman and human rights commissioner are separate and distinct.

My impression is that in general many of your courts more closely resemble Canadian administrative law tribunals than Canadian courts. While our administrative tribunals have adjudicative independence, they are less independent than our courts in that they are politically appointed and designed to implement government policy, in a broad sense, if not in an individual case. As Ombudsman, I have considerable jurisdiction over the functions of these bodies, not unlike that which many of you have over your courts. My Canadian ombudsman colleagues and I are constantly reviewing and monitoring tribunal delays, procedural barriers to public access, discriminatory effects in the legislation which they implement or adjudicate upon, and even circumstances of procedural error which may have resulted in a different adjudicative outcome if it had not occurred. When we find that either procedural or substantive justice has been denied by

a tribunal in these circumstances, we make a recommendation for reconsideration of a decision or, more broadly, for changes to tribunal practices and procedures or to actual legislation. In Ontario, as both a former judge and a former tribunal chairman, I have been active in the development and delivery of administrative tribunal adjudicator training and model tribunal Rules of Practice. The Rules and Practice and adjudicator training modules have been shared and widely implemented throughout our national and provincial tribunal community which includes dozens of administrative tribunals in fields as diverse as labour boards, human rights commissions and tribunals, workers' compensation, regulatory agencies, and social benefit appeal tribunals. On these many tribunals, hundreds of tribunal members preside over many thousands of cases of great significance to the public and often of the relevant national or provincial government. Administrative tribunals in Canada deliver substantive justice to more people than our courts ever do and our ombudsmen play an important role in ensuring that they do so well.

While ombudsmen oversight of the tribunal community in Canada generally operates smoothly, that has not always been the case. Earlier in the thirty-year history of the ombudsman institution in Canada, tribunals actively resisted our oversight function and challenged ombudsman jurisdiction in the courts. They were rarely successful. However, legal defeat did not in itself deter many tribunals from engaging in significantly obstructive conduct to ombudsman oversight.

Ombudsmen were compelled, by necessity and by simple professional courtesy, to undertake serious efforts at collaboration with the tribunal community. In particular, ombudsmen assured the tribunal community that the goal was not to replace tribunals or to substitute our decisions for their own, but to work together in assisting them to achieve excellence and fulfill their mandate appropriately in the public interest. We have largely succeeded and now many tribunals see ombudsmen as a benefit, assisting them to see errors or problems which they can remedy. Further, often ombudsmen are able to persuade governments to assist individual tribunals with greater resources, training or even improved legislation. Collaboration has been effective in the public interest without compromising either the proper role of the tribunals or the ombudsman.

In the absence of such a role with our courts, our interaction is inferential and complementary. Ombudsmen, human rights commissions and the courts in Canada tend to be quite deferential to the role, authority, and expertise of one another. Our courts see legislation establishing ombudsmen and human rights commissions as being the paradigm of remedial legislation, designed to provide inexpensive and ready justice for individuals, particularly in dealings with the governments to which they are subject. The courts recognize that ombudsmen are likely to have a more positive effect over time on bureaucratic behaviour than the courts themselves. Conversely, Canadian human rights and ombudsman institutions recognize that our courts are the primary authority with respect to human rights protection and civil and criminal disputes.

In my jurisdiction there is relatively little interaction between our courts on the one hand and our ombudsman or human rights commissions on the other, except when the courts are called upon to determine our jurisdiction. It is, however, recognized among the three justice bodies that ombudsman and human rights commissions share with the courts similar principles in the protection of human rights. And so, in Canada, collaboration between the courts and human rights and ombudsman institutions is largely implicit in their support for common values.

I am aware that many of you have a direct role in reviewing the functions of your courts and your judges and that many of you may test government legislation before your Constitutional Courts or, in some cases, press a complainant's case before a Superior Court. I am familiar with and (in the particular circumstances of your authority over the courts, and in the case of my jurisdiction over administrative tribunals) generally in concurrence with the Ljubljana Conclusions achieved in November 2001.[3]

In the context of human rights ombudsmen and courts in countries in transition to democracy, direct collaboration between the ombudsman and the courts and judiciary appears to be essential. The ombudsman in those countries, through their supervisory role over the courts and the judiciary, have a considerable opportunity and responsibility to work with the courts and the judges, in improving their efficiency, courtesy, and accessibility, but also in supporting them in the pursuit of greater independence, impartiality, and professional competence. Such effort will require representations to government, to the public, and to non-governmental organizations to create an agreeable climate for such development which is essential in ensuring commitment to the rule of law without which neither democratic good governance nor fundamental human rights protection can exist.

Professor Linda Reif has argued cogently that:

> … national human rights institutions should not be relied on as the sole or central means of implementing and protecting human rights or promoting good governance in public administration. National human rights institutions should be considered to be only one of a variety of democratic government institutions and non-state mechanisms that are needed in a country to promote good governance and human rights protection. The early national human rights institutions—both the ombudsman and human rights commissions—were not designed to be stand-alone mechanisms but rather were intended to act as complements to other government organs such as the legislature, the courts and administrative tribunals. In established democracies, this is the usual institutional configuration, and national human rights institutions fulfill a valuable function alongside other democratic government institutions and non-state actors.[4]

Professor Reif comments, however, that states in transition to democracy or those trying to strengthen their democratic order may find that national human rights institutions may have the lead in protection of human rights and in administrative oversight. She asserts that if the courts are weak or politicized, or if there are barriers to access, then human rights institutions will have a more important role.

Collaboration takes time with institutions recently made subject to external oversight. I respectfully suggest that your role as Human Rights Ombudsman in the Commonwealth of Independent States and elsewhere is, as set out in the Ljubljana Conclusions, not to impinge on the proper adjudicative function of the courts and judiciary, but with patience and perseverance to foster their improvement in all their procedural and adjudicative roles. Resistance and obstruction can be expected and should not dismay you or deter the firm assertion of your mandate to assist the courts and the judiciary to achieve their proper role, as dedicated to the rule of law and as trusted,

independent, and impartial arbiters of justice and principal protectors of human rights. Your challenges are formidable and sensitive but it is essential that they be undertaken with clear purpose for the ultimate achievement in the public interest of democratic good governance and fundamental human rights protection. That goal will be better met when the courts assume their proper independent position as the true third branch of government essential to the necessary checks and balances required for a fully democratic society.

Endnotes

1. (1994) 19:2 Bulletin of the Netherlands Jurists' Committee on Human Rights 1 at 1 [translated from Dutch by author].

2. (2000) 13 Harv. Hum. Rts. J. 1 at 38.

3. "The Ljubljana Conclusions" (Conclusions reached at the Conference on the Relationship Between Ombudsmen and Judicial Bodies, November 2001), online: The Greek Ombudsman <http://www.synigoros.gr/eunomia/docs/zakljuckiang.doc>.

4. *Supra* note 2 at 68.