HUMAN RIGHTS AND SECURITY: AN INHERENT TENSION?

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Monday 6th March, 2017 (Council of Europe, Strasbourg)

Excellencies,

Ladies and Gentlemen,

Dear Friends and Colleagues,

At the outset, I wish to iterate my delight to be back in Strasbourg and in these beautiful and inspiring surroundings, of which I retain imperishable happy memories for – if I may be permitted to inject a brief personal note – it was in this very building that, almost two years ago, I was informed as I finished I statement I was reading of the birth of my first grand child in distant Hong Kong,

For this delight and for the honour of participating in this roundtable discussion with such distinguished panellists, on the topical and timely subject of 'Human Rights and Security', I wish to deeply thank the Republic of Cyprus; through Her Excellency Theodora Constantinidou, Mr. Michael Karagiorgis, and last, but not least, the James Foundation created by one of my dearest and oldest friends, Jimmy Droushiotis. Of course, behind every great man there is a great woman, but now she, Athena, is sitting next to him.

I agree with my distinguished neighbour, the honourable Jean Paul Costa, that there is no opposability of security and human rights, but I am of the opinion that there is tension between the two concepts, and further, that this tension is not new. Of course, it is now particularly and acutely felt, most probably because of the phenomenon of modern terrorism

and the campaign of counter-terrorism launched by Resolution 1373 adopted by the Security Council in the immediate aftermath of 11 September 2001. It is also due to the fact that technological advances and surveillance methods have made interference in our personal lives possible to an unprecedented degree. If it is true that a nation's will to elect a president can be manipulated through technology – and I pass no judgement on the veracity or otherwise of such accusations – then the right of self-determination, itself a cornerstone and source of other human rights, can be easily imperilled.

None of this is new; two-thousand years ago, King Herod of biblical fame, motivated by fear for his life and his throne, ordered that all babies born in that year be killed. Obviously, the notions of reasonableness, proportionality and necessity, considered by modern law as the regulators of competing rights, were not the uppermost considerations on his mind. He committed his crime in the name of security. Of course, it did not work, proving that dreams, apparitions and influences by oracles had more truth than reliance on 'credible intelligence reports' of recent years. One of the foremost lessons of history is that the most irrational and dangerous reactions by a person or a group take place when that person or group are in a dominant position but fear that their position will be undermined in the medium or long-run.

Let me turn to the question of why judges are best suited to reconcile competing interests of security and human rights. Obviously, the most relevant clash of these rights happens today in the area of countering terrorism.

The phenomenon of terrorism started to elicit international reaction almost four decades ago, although the assassination of the King of Yugoslavia produced a Treaty on terrorism that never entered into force. One thinks of the Hague and Montreal Conventions dealing with crimes against civil aviation, the New York Convention against the taking of

hostages, the Rome Convention on suppressing crimes against maritime safety, etc. These conventions swept away the subtle approaches of judicial decisions in which the question of motive was paramount and in which, also, there were human rights guarantees in the intent of the accused, particularly the right to a fair trial. These were replaced with the formula *aut decdere aut judiciare* , notwithstanding that that formula, despite the aura of antiquity, was never part of international law. On the whole, those conventions shifted the delicate balance slightly to combatting the so-called terrorist crimes contained therein at the expense of ensuring human rights. It was only in the Taking of Hostages Convention that an element of human rights protection was introduced to ascertain that a fair trial in the requesting state could be ensured by the third party requested state in the territories of which the alleged offender was present. We can assert that the record of the legislative reaction was not very impressive and remained so until 11 September attack, when in Resolution 1373 of 2001, an overarching attack was launched on 'terrorism' and, though lip service was paid to human rights and fundamental freedoms, in reality this remained a theoretical proposition as questions of rendition, torture, long-term incarceration, ill-treatment of civilians, et cetera, became common place. It looked as if the cumulative achievements advanced by international law since the Second World War were lost.

What was equally ominous was that the very theoretical fabric of international law was being provocatively questioned. I think, for example, of a book written by Goldsmith and Posner in 2005. With barely hidden cynicism, they argued that the very pedigree of multilateral human rights law treaties are motivated solely by the "self-interest" of states and, as such, the treaties themselves have "little exogenous influence on state behaviour."[1] The

[1] Goldsmith and Posner, *The Limits of International Law* (OUP 2005).

motivator, instead, is argued to be that of "balancing" a concern for the security of "persons under its control and the government's own perpetration."[2] In a 'War-on-Terrorism' world, States have tended to legislate broadly and ascribe these broad powers to governmental institutions to exercise at their discretion.

Firstly, it is almost definitional that, by its very nature, legislation cannot foresee particular events and would always tend to be broadly stated in the interest of comprehensiveness and effectiveness. It naturally falls to courts to add nuance and refinement to such legislation and to introduce a balance.

Secondly, it is important to recall that when dealing with competing rights, and not with cases of rights and wrongs, the very act of balancing requires an *ex post facto* assessment and scrutiny. In the recently-decided *Belhaj* case by the UK Supreme Court,[3] the Judges were able to distinguish what had been hitherto intermingled with notions of 'state immunity' and 'acts of state' and to provide findings as to the nature of the doctrine of judicial abstention in such a way that no legislation, no matter how foresighted its drafters might be, can envisage. Certain things require the occurrence of a wrong, to be able to describe it properly and in detail, and to prescribe appropriate remedies. There might be, after all, some truth in the words of Jonathan Swift:

> *Vice is a monster of such hideous mein*
> *That to be condemned has but to be seen.*

[2] *Ibid*.

[3] *Belhaj and another v Straw and others & Rahmatullah (No.1) v Ministry of Defence and Foreign and Commonwealth Office* [2017] UKSC 3.

Do courts strike a right balance between security, on the one hand, and human rights, on the other?

Much, of course, depends on the Court in question. A Court that condemns hundreds o f people to death in one day for membership in a banned political party cannot, by any stretch of the concept of proportionality - which is admittedly not free of subjectivity - be trusted to strike that balance. I think that the best indicator of whether a fair balance has been struck is when the pronouncements by Judges have a sobering effect that sees not only the immediate effects sought from a certain legislative provision or decision by the Government but its effect on the whole legal and social system of a State and on its traditions and values. In a celebrated case, which came to be known as the *Belmarsh Case* of 2001, Lord Hoffmann of the UK Supreme Court wrote the following imperishable words:

> "This is a nation which has been tested in adversity, which has survived physical destruction and catastrophic loss of life. I do not underestimate the ability of fanatical groups of terrorists to kill and destroy, but they do not threaten the life of the nation... The real threat to the life of the nation, in the sense of a people living in accordance with its traditional laws and political values, comes not from terrorism but from laws such as these. That is the true measure of what terrorism may achieve. It is for Parliament to decide whether to give the terrorists such a victory."[4]

Similarly, when the late Indian Prime Minister, Indira Ghandi, introduced restrictive laws, particularly in the area of preventative detention, in a celebrated case, popularly-known as the *Habeas Corpus Case*, the more senior judges of the Supreme Court of India ruled in

[4] *A and others v Secretary of State for the Home Department* [2004] UKHL 96 (Lord Hoffmann), Para. 96-97.

favour of the State's right for unrestricted powers of detention during State emergency. The only dissent came from Justice HR Khanna, who stated:

> "Detention without trial is an anathema to all those who love personal liberty...a dissent is an appeal to the brooding spirit of the law, to the intelligence of a future day, when a lack of decision may possibly correct the error into which the dissenting judge believes the Court to have been betrayed."[5]

That dissent, part of which was taken from a judgment handed down by US Chief Justice Hughes in 1936, cost Justice Khanna the Chief Justiceship to which he was entitled by convention. But he became a legendary figure among the legal fraternity in India and much admired abroad.

Why are some judges braver than others and why are some courts readier to take on the Government of the day, while others are happy to be compliant? The answer – or answers – to this question are not easy to find; but I think I can advance the proposition, without too much fear of contradiction, that the existence of a strong tradition of judicial independence and integrity must be the major factor. The recent decentralised reactions to the ban on entry of citizens of seven majority-Muslim countries in the United States is a recent example of the reaction of a long-established judicial tradition to what it saw as unjustified interference by the executive into an area of fundamental rights and freedoms. That judiciary must be lauded for they acted as custodians of the legitimacy of the legal system. There are similar experiences from the Sharia scholar Wael Hallaq in numerous books on the development of

[5] *ADM Jabalpur v. Shivkant Shukla* [1976] SCR 172.

the Sharia as noting the almost total absence of legislation in the Ottoman Empire and the fact that the Judges had, in the Sharia tradition, come to act as a bulwark against arbitrary executive power and had become, with the passage of time, "the locus of legitimacy in society, the defenders of the under-privileged classes and the upholders of the rights of religious minorities."[6] Again, the ability of the judiciary to play such roles reflected their elevated status within a long tradition and their financial independence from the State. Alas, a lot of that courage and independence has been eroded in the modern secular, centralised states of the Middle East. Rebuilding lost traditions is a very difficult task, but the role that Courts play in striking that delicate and right balance between competing legitimate interests, including, as in the present debate, between legitimate security concerns and respect for human rights, is not possible without a solid foundation of a strong and independent judiciary.

The last point I wish to make is that we are living at a time of fundamental and accelerated change in international law. It is as though the arrangements that governed international law since the Second World War are giving in, and lawlessness is creeping in its place. The very foundations of international law, the non-state actors, and the open calls to extend the scope of self-defence ostensibly to deal with the threat of terrorism, all point to a loss of equilibrium and the rise of extremism on all sides and of cynicism regarding the very efficacy and relevance of law. In this bleak landscape, only courts, distinguished Courts at the national and international level, can prevent the descent to post-modern barbarism.

[6] Wael Hallaq, *The Origins and Evolution of Islamic Law* (CUP 2005).