'Balancing the Obligations of Citizenship with the Recognition of Individual Rights and Responsibilities – The Role of the Ombudsman', Speech by the European Ombudsman, Prof. P. Nikiforos Diamandouros, to the VIIIth Conference of the International Ombudsman Institute, Quebec City, 9 September 2004

Speech

1 Introduction

Mesdames, Messieurs, chers collègues et amis,

Je suis très heureux d'être ici, à Québec City, et d'avoir la chance de participer, tout en apprenant, ainsi que de contribuer, je l'espère, aux délibérations de ce 8ème congrès mondial de l'Institut International de l'Ombudsman.

J'aimerais remercier Mme Champoux-Lesage ainsi que M. Lewis, nos deux hôtes, de nous avoir permis à nous tous, membres de la Communauté internationale des Médiateurs, de nous retrouver, de profiter de leur chaleureuse et amicale hospitalité, de faire de nouvelles amitiés tout en renouvelant les plus anciennes, et surtout, d'apprendre l'un de l'autre, ce que tout médiateur a l'habitude de faire.

También estoy honorado y muy contento de haber recibido la oportunidad de pronunciar el discurso plenario sobre un asunto que es de especial interés para todos nosotros porque está relacionado con la manera de que nuestras sociedades van a tratar en el futuro algunos de los valores fundamentales a los cuales nosotros somos comprometidos como Defensores del Pueblo.

I understand the question in the title of this plenary session, *"Can the Recognition of Individual Rights and Freedoms Survive the Pressure to Enhance Security?"* as an invitation to say what should happen, rather than to make predictions.

For my part, the answer is an unequivocal yes, because the very purpose of enhanced security should be to provide conditions in which individuals may continue to enjoy their rights and freedoms.

No one should doubt that terrorism, in particular, is a threat to those rights and freedoms and that governments have an obligation to tackle that threat effectively. The recent tragic events in southern Russia serve as a poignant and painful reminder of this.

The subject for debate concerns the legitimacy of measures to enhance security, when those measures themselves impinge on rights and freedoms.

Such measures include surveillance, interception of communications and carrying out searches of persons and property. Public agencies may also want to keep certain kinds of security-relevant information secret.

The main rights affected by such measures are privacy and the right of public access to information and to official documents - what is often called “Freedom of Information”.

In practice, enhanced security measures sometimes also involve encroachment on the right to due process: meaning the principle that a person cannot be deprived of other rights, such as liberty, without appropriate procedures and safeguards.

2 Two kinds of balancing *The idea of balancing*

The overall title of our conference refers to “balancing”. The metaphor of balance is pervasive and persuasive in democratic political discourse: who after all would want to argue for an unbalanced approach to any issue, including the relationship between individual rights and security?

If we unpack the metaphor, we may speak of substantive, procedural and institutional aspects of “balancing”.

Substantively, the idea of balance implies that the rights and interests concerned are not absolute and that the correct way to resolve conflicts between them is by reaching a compromise.

In my view, balancing in the substantive sense is often the most appropriate response when there are conflicts between different rights and interests. (However, I think it important to distinguish immediately below in this presentation between what I shall call “ordinary” and “exceptional” balancing.)

Procedurally, the idea of balance is expressed in the figure of Justice, blindfolded and with a pair of scales, symbolising impartiality and due process. These are core values of the rule of law - itself a rich concept, to which I shall return frequently.

In the institutional sense, balancing is familiar in the idea of “checks and balances”, meaning that official power is distributed among different and countervailing institutions, to prevent the abuse that tends to result from excessive concentration of power.

Amongst the most important institutional aspects of balance is the existence of an independent judiciary, with power to make binding decisions on disputes about substantive and procedural aspects of balancing and about the boundaries of state power.

Ordinary balancing

I now come to the distinction that I promised to make between “ordinary” and “exceptional”

balancing.

As regards two of the rights affected by security measures - privacy and freedom of information - the need to strike a balance with competing rights and interests is inherent in the rights themselves. In other words, neither right is absolute.

For this reason, the demands of enhanced security can be accommodated quite easily within the ordinary framework of understanding of the relationship between these particular rights and the obligations of citizenship in a democratic society.

Most people accept, for example, that a real threat to public security - even if the risk is small in absolute terms - justifies some loss of privacy, or certain restrictions on freedom of information.

To give some obvious examples: most people are ready to be frisked and to have their bags searched before boarding an aircraft. Most people would also accept that governments and law enforcement agencies should keep certain details about counter-terrorism activities secret.

Care should be taken, however, lest the accommodation of enhanced security through “ordinary balancing” result in important policy choices being made without adequate critical scrutiny. I shall return to this point later.

Exceptional balancing

First, however, I need to explain what I mean by “exceptional” balancing.

In societies with a strong rule of law tradition, due process is not usually thought of as competing with other rights and legitimate interests.

For this reason, we do not determine the scope of due process through a balancing exercise of the kind involved in defining privacy, or freedom of information.

The criminal trial illustrates the point.

To borrow John Rawls’ terminology, the criminal trial is an example of “imperfect procedural justice.” We know what the substantive outcome should be: the guilty should be convicted and the innocent acquitted. However, we cannot design procedures and institutions that will guarantee the right outcome 100% of the time.

Since the procedural and institutional framework of the criminal trial is necessarily imperfect, changes can legitimately be proposed, debated and adopted. The outcome will be a compromise - a balance if you like - between different risks that arise from different possible sources of imperfection.

However, this does not involve balancing different legitimate rights and interests as regards the substantive function of convicting the guilty and acquitting the innocent. In respect of this central function, all rights and interests push for the same outcome. There is no need, and no room, for a balancing exercise.

This does not mean that due process is an absolute right in the sense that no derogation can ever be allowed, however extreme the circumstances.

There are absolute rights. For example, the European Convention on Human Rights forbids torture unconditionally and with no provision for exceptions (Article 3).

On the other hand, the same Convention also contains a provision (Article 15) which permits derogations from certain other rights (including liberty and fair trial) *"in time of war or other public emergency threatening the life of the nation, to the extent strictly required by the exigencies of the situation."*

In other words, a balancing of the right to due process against the needs of public security can be envisaged, but only as an exceptional and inherently temporary measure, based on the existence of a clear and present danger.

The European Convention on Human Rights was drafted in the mid-20th Century, when a clear distinction between wartime and peacetime appeared self-evident. That distinction has subsequently become blurred.

3 Two kinds of danger to rights and freedoms

The terrible events of 11 September 2001 and subsequent atrocities such as the Bali night-club and the Madrid railway bombings were undoubtedly crimes. But were they also acts of war, as the phrase "war on terrorism" suggests?

11 September led to military action against the Taleban government of Afghanistan and military operations there continue. There has also been a war against Iraq, leading to the occupation of that country.

But no one expects these wars to end the threat of terrorism. In this sense, the so-called "war" on terrorism is akin to the "war" on drugs, or even - for those of us whose memories stretch back to the 1960s, the "war on poverty". Drugs and poverty are unfortunately still with us.

The first danger

In these circumstances, a danger for rights and freedoms could arise if we apply the logic of war, which may justify exceptional and inherently temporary derogations from due process, to a struggle against terrorism that could well continue indefinitely.

The danger is that we deceive ourselves into allowing excessive and possibly discriminatory encroachments on individual rights through the false belief that they are temporary and exceptional measures.

I believe that we are likely to think more clearly and more objectively if we draft the relevant laws on the basis that they are to provide an enduring framework for the needs of public security to combat terrorism in time of peace.

This would reduce the risk of ill-considered, knee-jerk reactions to terrible events. It is said that

hard cases make bad law and this is unfortunately also true in the legislative process.

An enduring framework would also reduce the risks involved in confusing different genres. Convicting the guilty is a different activity from enhancing security to try to prevent future crimes. The two activities are not incompatible, but they are not the same. The rule of law and individual rights are both threatened when they are confused, as happens for example when politicians justify the continued detention of people who have never been charged with any crime, let alone convicted, by saying that they are guilty of heinous crimes.

The rule of law and democracy are the legal and political underpinnings of an enduring framework.

Before discussing the institutional, procedural and substantive characteristics that such a framework should possess, I will identify a second danger that a prolonged struggle against terrorism presents.

The second danger

I mentioned earlier that, as regards privacy and freedom of information, the accommodation of enhanced security through balancing of rights and interests could lead to important policy choices being made without adequate critical scrutiny. Let me explain how.

Measures rarely have a single objective. What might help in fighting terrorism may also help prevent other crimes and it is natural to use the most persuasive argument to hand. If one wants to justify an intrusion on financial privacy, for example, it is tempting to focus on the need to stop terrorists financing their activities, rather than the wish to reduce tax evasion.

The danger is that the very persuasiveness of the argument against terrorism could unbalance the institutional framework of checks and balances, creating a process of incremental drift towards excessive concentration of state power, lack of adequate scrutiny and consequent danger of abuse.

4 How to meet these dangers

I have identified dangers that arise as regards the substantive balancing of the needs of public security with individual rights and liberties. Although in many cases such balancing is legitimate in principle, it risks being distorted in practice.

To meet these problems we must re-affirm the importance of procedural and institutional balance and the enduring importance of the rule of law.

As I have mentioned, due process is a core value of the rule of law.

Institutionally, the rule of law requires scrutiny, monitoring and checking by independent persons and bodies of the legality and legitimacy of the exercise of state power, in order to ensure that it remains within boundaries and limits.

The Courts are of course, the fundamental guarantors of respect for individual rights and of the rule of law generally.

Although I shall not discuss it in detail, the decision of the US Supreme Court concerning access of the Guantanamo detainees to legal remedies forcefully, albeit somewhat belatedly, illustrates this role.

The role of ombudsmen

Wherever the rule of law and democracy are strong, however (and the two do not go together automatically or as frequently as people assume), ombudsmen can help strengthen the rule of law and enhance the quality of democracy by empowering citizens.

As ombudsmen, we are all familiar with the world-wide spread of our institution and its diversity, so I will take most elements of the story as read.

I will just recall briefly that the first ombudsman was established in Sweden in 1809 to check the legality of public officials' behaviour.

In the 1960s and early 70s, a first wave of global expansion began when older democracies such as Norway, New Zealand, the UK and France adopted the ombudsman in order to tackle citizens' problems with public administration, which expanded and took on new roles in the 20th Century, especially after the Second World War, when the welfare functions of the state grew dramatically.

In two subsequent waves of global expansion, ombudsmen were established in many newer democracies as part of a commitment to the principle of democracy and to respect human rights:

- From the mid-1970s onwards, ombudsmen were established in post-authoritarian states, such as Spain, Portugal and Greece in Europe, in many countries of Latin America and elsewhere in the world.
- After 1989, ombudsmen were established in post-totalitarian states, in countries formerly ruled by communist regimes, while the wave launched in the earlier period acquired greater momentum and brought the institution to an ever growing number of states around the globe.

The successive stages of development of the institution have produced considerable diversity in the ombudsman world. This is reflected in different names: *Ombudsman; Commissioner for Administration; Médiateur; Defensor del Pueblo; Human Rights Ombudsman; Commissioner for Human Rights.*

Most of the diversity stems from the fact that successive stages of development have involved taking on new functions and responsibilities.

The result is that the work of contemporary ombudsmen is based on three overlapping and mutually supportive elements: legality, principles of good administration and human rights.

I would also like to emphasise that as well as reacting to complaints, an ombudsman's role includes many proactive elements, such as:

- organising information campaigns to make citizens aware of their rights and how to exercise

those rights; *and*
- making recommendations and co-operating with other public authorities, in order to improve the quality of administration.

Ombudsmen's contribution to strengthening the rule of law

I believe that to meet the challenge of reconciling enhanced security with rights and freedoms requires emphasis on the link between the original focus of the ombudsman institution on legality and the newest phase of its development, which focuses on human rights.

The two are intimately connected because the principle of the rule of law requires both that the state should respect the principle of legality in all its actions and that the law must, in substance, protect the rights and freedoms that all human beings should enjoy.

As ombudsmen, we should put this philosophy into practice both in our reactive work of dealing with complaints and in our proactive functions.

I would like to point out certain characteristics of the ombudsman that specially suit the institution to this task:

First, the ombudsman is oriented towards seeking positive-sum outcomes whenever possible, and a particular kind of "balancing" is thus inherently a speciality of ombudsman.

This means that ombudsmen offer citizens a choice of remedy, with characteristics and advantages different from those of judicial remedies.

Second, the combination of flexible procedures, non-binding decisions and a proactive role allows ombudsmen to dig down into situations that it may be difficult for the courts to reach.

An ombudsman can therefore provide both an alternative non-judicial remedy for citizens and also complement the role of the courts, thereby offering reassurance to citizens confronted with pressures on their rights and freedoms that they have two lines of defence, both courts and ombudsmen.

In this way, ombudsmen can and should contribute, alongside the courts in balancing the needs of security and individual rights and freedoms, in a way that maintains and strengthens the rule of law and empowers citizens.

To be sure, the present conjuncture poses significant challenges to us all and pushes us to think hard and creatively about our role in ensuring that individual rights and freedoms can survive the current pressure to enhance security.

The way forward can be none other than a renewed and vigilant commitment to respect for the rule of law and due process, in a way that can ensure that the imperatives of security and the enjoyment of individual rights and liberties will operate within an enduring legal, institutional and political framework that is capable of fairly and reasonably balancing the needs of both.