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**ARAB CONSTITUTIONAL COURTS AND COUNCILS:
POSSIBLE REFORMS AND CHALLENGES IN LIGHT
OF REGIONAL CHANGES**

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REPORT

**Balancing State Interests
with the Protection of Fundamental Rights:
the experience of Italy**

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Towards Strengthened Democratic Governance in the Southern Mediterranean

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The topic that was assigned to me is a very sensitive one, in my Country, in Europe and all over the World. We are aware that among State's interests, Security is one of the most important both at national and international levels. Citizens have the fundamental right to live, work and create their family life without being threatened by armed groups, aimed at violently change national Constitutions and International peaceful relations.

What to do if an independent State is attacked by terrorist groups and its citizens feel them in danger? How can we balance the Security of our citizens with their fundamental rights and liberties?

This is a typical Constitutional issue within the competence of Constitutional Courts and Councils.

As to Article 4 of the International Covenant on Civil and Political Rights

“1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, color, sex, language, religion or social origin.
2. No derogation from articles 6 (right to life), 7 (prohibition of torture or to cruel, inhuman or degrading treatment or punishment) , 8 (paragraphs 1 and 2: prohibition of slavery), 11 (No one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation), 15 (No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed), 16 (Everyone shall have the right to recognition everywhere as a person before the law) and 18 (right to freedom of thought, conscience and religion) may be made under this provision.”

Similar provisions were enshrined in Article 15 of the European Convention of Human Rights of 1950, which is our Regional instrument of protection of fundamental rights and was of the main sources of the International Covenant of 1966.

The main questions arising from these provisions for the time being are:

- a) What can we consider a “public emergency that threatens the life of the nation”? When the provisions had been drafted, this kind of emergency was, normally, a war or a revolution, not terrorist attacks.
- b) Consequently, can terrorism be considered a public emergency in the sense of Article 4?
- c) Is there a generally accepted definition of “terrorism”?
- c) How can we consider that derogations are “strictly required”?

Being confronted by an increasing number of terrorist groups and considering also their internal public opinions - worried for attacks to civil targets - many States implemented, specially after 9/11, extraordinary and “temporary” measures, aimed to tackle this danger. It is now important to address the question of how to effectively combat terrorism while preserving the achievements of international law and national Constitutions.

To establish a general basic interpretation of Article 4 of the Covenant, we can refer to the Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant for Civil and Political Rights, an important international text which was approved by an international conference was held in Siracusa, Italy from April 30 to May 4, 1984, sponsored by the International Commission of Jurists and other important international independent associations of jurists, and (of course) on two very important documents of the Venice Commission of the Council of Europe, the Opinion on the

protection of Human Rights in Emergency Situations, adopted at its 66th Plenary Session (Venice, 17-18 March 2006) and the Report on Counter-terrorism Measures and Human Rights adopted at its 83rd Plenary Session (Venice, 4 June 2010).

We can summarize the definition of State of emergency saying that: (1) It must be actual or imminent (2) Its effects must involve the whole nation or a significant part of it; (3) The continuance of the organised life of the community must be threatened; (4) The crisis or danger must be exceptional, in that the normal measures or restrictions, permitted by the UN Covenant or the European Convention for the maintenance of public safety, health and order, are plainly inadequate.

These are the principles: but what about the practice in recent international practice? Both history and contemporary experience have shown that extraordinary measures sometimes become ordinary and that an enlarged use of criteria like effectiveness and opportunity can open the door to serious abuses that serve to erode the very foundations of the Rule of Law.

The International Commission of Jurists, and independent organisation, affirmed that Laws and measures that were implemented to combat terrorism and preserve national security have had very serious repercussions for rights relating to physical integrity. This has led to an increase in the occurrence of torture, political imprisonment without due process, enforced disappearances and extrajudicial killings. In particular, the integrity of many detainees has been threatened, along with their right to be tried by an independent and impartial court of law. Counter-terrorism measures have also been found to have a negative impact upon the enjoyment of a number of other rights, including freedom of opinion and expression, the right of assembly and association and the right to privacy. Broad groups of people – especially immigrants, refugees, asylum-seekers, political opponents and minorities – have been affected by these measures. These effects can be counter-productive.

Examining the topic, we should consider that there is neither an academic nor a generally accepted legal definition of terrorism. Various legal systems and government agencies use different definitions and these difficulties arise from the fact that the term is politically and emotionally charged.

I think that we can use as a tool the text of United Nations General Assembly of 1994 that has condemned terrorist acts using the following political description of terrorism: "Criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstance unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or any other nature that may be invoked to justify them." On the Oxford Dictionary the definition is: The unofficial or unauthorized use of violence and intimidation in the pursuit of political aims.

This lack of a general accepted definition causes difficulties when we compare different measures in different Countries.

All the difficulties of Modern States in tackling terrorist groups without derogations to fundamental rights that cannot be considered as "strictly required" were perfectly described in a judgment of the European Court of Human Rights, In the case of A. and Others v. the United Kingdom, 19 February 2009:

"The Court is acutely conscious of the difficulties faced by States in protecting their populations from terrorist violence. This makes it all the more important to stress that Article 3 enshrines one of the most fundamental values of democratic societies. Unlike most of the substantive clauses of the Convention and of Protocols Nos. 1 and 4, Article 3 makes no provision for exceptions and no derogation from it is permissible under

Article 15 § 2 notwithstanding the existence of a public emergency threatening the life of the nation. Even in the most difficult of circumstances, such as the fight against terrorism, and irrespective of the conduct of the person concerned, the Convention prohibits in absolute terms torture and inhuman or degrading treatment and punishment (see Ramirez Sanchez, cited above, §§ 115-16).

Where a person is deprived of his liberty, the State must ensure that he is detained under conditions which are compatible with respect for his human dignity and that the manner and method of the execution of the measure do not subject him to distress or hardship exceeding the unavoidable level of suffering inherent in detention (see Kudła, cited above, §§ 92-94). Although Article 3 cannot be construed as laying down a general obligation to release detainees on health grounds, it nonetheless imposes an obligation on the State to protect the physical and mental well-being of persons deprived of their liberty, for example by providing them with the requisite medical assistance”.

The Italian experience

During the seventies and the eighties of the last century, my Country had to deal with wide and very dangerous different terrorist organisation, some of communist and others of fascist inspiration, different but both aimed to a violent change of our Constitution and our legal system.

It is difficult to calculate exactly the number of attacks and victims, but we can consider (source: The Victims' Association) that from 1969 to 1988 we had 14615 attacks, at least 428 dead and more than 1.000 injured and also many kidnappings, armed attacks to prisons and police officers and even the kidnapping of Aldo Moro, at that time the most influencing MP of the majority.

Well, we did not change our Constitution and, if the Legislator introduced more severe measure in our criminal Code and procedure Law, we did not declare a general State of emergency but we succeeded in that fight. In my opinion, considering all the difficulties of the moment, the Rule of Law had been respected and, through these special but “ordinary” measures, it was possible to defeat terrorists and recover a normal pacific life.

I would like to give you an example of the balance between Security exigencies and individual rights made by our Constitutional Court in those difficult years.

In the Judgment n. 15 of 1982 concerning Articles 10 and 11 of a Law of 1979 that had prolonged the terms of detention on remand for persons accused of being members of terrorist groups, the Court held that in the balance between individual rights and National Public Order, the general interest of Security could prevail on a strict consideration of the Principle of Presumption of Innocence and the *ere fore* that that Law was not contrary to the Constitution.

For the time being in my Country we are facing other issues of balancing individual rights and general Security in cases concerning privacy, State security and classified investigations made by Intelligence Services, and the debate is open.

I am perfectly aware that for the time being the situation is different and that terrorist groups now act globally and not only in one or few Countries, but I am sure that the example of these terrible years could be usefully considered.