



The freedom-security dilemma: contributions for a human rights based approach*

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Summary: 1. Setting up the context; 2. Freedom and Security; 3. Restrictions of human and fundamental rights; 4. Addressing the freedom-security dilemma: the Ombudsman's role; 5. Concluding remarks

1. Setting up the context

If there is one thing that unquestionably characterizes the late-modernity in which we live in – and the range of ideas, thoughts and narratives, spoken, written and drawn to enlighten the plural and complex stages that mark our everyday life – is the real and palpable sense that we live in a time where the traditional concept of borders no longer applies. Borders perceived not just as a physical or legal obstacle or a limit, but, likewise, interpreted under the light of a spiritual dimension of the human being. When we say that today the world has no borders we are not only referring to the circumstance that the geographical mobility at our disposal is incomparably greater than just, in a very conservative assessment, a generation ago. It is equally a self-evident reality that information – and through it ideas, opinions, beliefs, culture, values and principles – travels unbound across the globe, with the ability to reach everyone. This gives us a sense of freedom, of belonging to a global community far greater than our street, our city or our country. Nevertheless, at the

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same time the collapse of borders or restrictions to the circulation of people, information, capital, services and goods, offer new opportunities for human development and wellbeing, it also brings with it paradoxes, challenges, risks and threats.

In recent years the subject of terrorism and the related discourse regarding freedom and security have clearly dominated the public agenda and the concerns or anxieties of our community. Terrorism has evolved and no longer is enclosed in a country or region. In fact, regardless the motivation being old or new – for example nationalism, religious extremism, political purposes – the scenery set before us is that the actions of terrorist groups take place in any territory, related or unrelated with the original root of the conflict, and at any time. Because of it there is a widespread feeling of vulnerability influencing the opinions and actions of decision-makers, and, simultaneously, opinions and actions of the people. The conditions created by this context can only be described as the «perfect storm». On the one hand, the lack of thought regarding the complexity of our time tends to simplify the assessment of reality, and, as a consequence, we are offered with simplistic and ineffective answers to dense and intricate problems. On the other hand, people who feel vulnerable tend to more likely accept restrictions to fundamental rights in the name of more security, even if those restrictions are contradictory with core values and principles over which the community is founded. This has been very obvious in the answers given, for example, to the migration crisis. Either the public opinion, either the authorities have approached this issue from the point of view of security, sometimes without considering basic human rights. This type of answer creates chaos and disorder, which, paradoxically, create insecurity.

So, in order to deepen the discussion regarding the problem of security and the respect for human rights and freedoms it is essential that we unmistakably establish the matters on solid grounds.



2. *Freedom and security*

Men and women are born with a vocation for power. Human communities are born with a vocation for power. Of course, this power can always unfold in a plurality of powers, which replicate in a thousand ways. Let us look, however and decidedly, for a very specific form, the so-called political power. The power that is exercised in the *polis*, in the *res publica*, in the State's square. This power only makes sense if it is enveloped by the human *constructum* that is the law. It is here, in this sublime space of normativity, heteronomy and externality, that the political powers find the correct balance for the community development assumed by men and women in a given time and space. Leaving aside, for now, those situations of direct conflict between law and power which marks the dictatorial regimes, we must recognize that the law puts itself in all the places where justice and human rights have shelter.

Power is a piece of life manifestation which enjoys an absolutely unique feature: the consequentiality. The power, wherever it is exercised, has consequences, changes the social reality. In fact, it is only conceivable power in exercise, so the abstraction of a power other than its exercise is the negation of the notion of power itself. In addition, the power drags another no less important attribute or quality. It is innate to the exercise of power its expansion. After all, power is inherently expansive. Hardly finds itself barriers to expansion. It has therefore a fantastic property that only belongs to gases: to occupy, without rest, all the space which is granted. If it is no coincidence that the volatile and almost ethereal nature in the gas may suggest poorly defined or even indefinite realities, the power is also considered as an expandable «thing». But «thing» empirically much more concrete, because, as we have seen, the power produces effect and causes which, not infrequently, are tremendous. Hence, it is not hard to see the need to set limits to this humanly unbearable flow that would be power without constrictions. That is why



communities have tried over time not only justify the power but also to legitimize its limited exercise.

If the human being is simultaneously impulse to freedom and impulse to security, it seems reasonable to conclude that political power should be guided by a normative principle of freedom and a normative principle of security. By a legal power of freedom and a legal power of security. So the plural and crossed match between those two axis, which attract and repel each other, makes not only our way of being in the community, but also the matrix of legality itself. Certainly these opposing requirements forge an always unstable and precarious balance. Which can be broken. And so often it is. The libertarian drifts have made paths in days not far away. The securitarian drifts are here. Today. Just mention the new wave of discussion on the fight against terrorism triggered by recent events in France and Belgium. An argument that speaks again, in loud and clear voice, in favour of the adoption of a control culture which intends to monitor not only manifestly dangerous behaviours, but also the most innocuous behaviours, even those held in private space. A debate which openly reveals a society that seems to live in a fantasy world where the risk is (almost) zero.

The question raised here cannot be analysed through more or less twisted linear parameters. The problem is complex and its complexity lives precisely in this aspect: the political power and the law start from an insoluble basic paradox, since freedom can only be achieved through its restriction. Freedom is a right which is realized and densified when on it and from it we are able to deepen our own freedom, in a self-reflection of freedom for freedom. In other words: the paradox of freedom is to accept a limit to be free. Hence the issues surrounding freedom are, in principle, matter of careful balance. In this horizon, it will be impossible to omit a brief reference to criminal law. Because the criminal law carries in itself this enormous burden, often almost tragically unbearable, which is to be the last legitimate authority able to constrain or restrict the human body or the most primitive freedom, namely the freedom of movement. And if it is an undeniable



fact, it is no less certain, moreover, that the criminal law is a freedom and security order. An order of freedom power. An order of security power.

The preceding analysis now guides our attention to the legal status of security in the context of our theme. Is security, exactly as understood in several guarantees restriction programs, a fundamental human right? I think so. Not only because the democratic Constitutions explicitly place the right to security in the same evaluative degree assigned to the right to freedom. But also and mainly because freedom and security are inseparable elements of a fundamentality relationship that performs the matrix of all legal normativity. The fragility of my own self, which is open to freedom, can only be assumed as a condition of my relationship with the others if I can be safe. The same way I am a being-with-others in freedom and for freedom, I am also a being-with-others in security and for security.

Therefore, security is a condition for individual self-realization in a space of freedom. And freedom is a condition for individual self-realization in a space of security. In this sense, there is no logical or axiological preference relation between both poles. Of course, the pendulum of history swings, permanently, with more or less impetus, between those extremes points, so the different communities feel perfectly acceptable a larger or smaller displacement towards some direction. What we cannot admit is that such oscillation means the total and arbitrary crushing of the opposite side. All this shows that if a life without risk is impossible, it is also true that an infinitely insecure life is a life without freedom, since all choices are from the outset addicted. What makes our disposition to accept the common living as a territory where security cannot be pulled to the limit because then it becomes dangerous. And it becomes dangerous when dissolves or destroys the freedom.

Another important question concerns the mechanics of the balancing process now widely applied to justify the imposition of restrictions on fundamental rights. Is there any absolute limit for the balance of interests? Is there any rule of law which cannot be violated under any circumstances? Without intending to rehearse here a general theory of the imponderable goods in law, it is possible to mention at



least one rule completely immune to typical consequentialist considerations of cost-benefit analysis: the prohibition of torture.

3. Restrictions of rights and the closure of borders

As we have seen previously, security and freedom coexist in a complex and balanced relationship. Being two fundamental values to our community and for the assertion of our individual rights, freedom and security provide the essential conditions to the fulfilment of human rights. I need to be free to exercise my rights, but I also need security to do it. If I do not have one of them, I do not really have the other one. In other words, when I am not safe in an objective way, I am not truly free to choose my actions. And its opposite it is also true. To better understand this issue, we may imagine a young child in a Syrian town. Could this child freely play in the street without the imminent danger of being victim in a bomb attack? Probably not. Her option – or her parents’ option – depends on the security provided by the State and her living conditions.

The present time in which we live in is a time that challenges our conception of human rights. What we thought that it was solidly established is now threatened by some voices and some events that, anchored in the idea of securitarianism, create fear. To dissipate this fear, we have seen growing, among others, the adoption of restrictive measures in procedural rules internationally embraced as fundamental. But this is a dangerous path to take.

Different international legal instruments dedicated to human rights include a set of defence rights and procedural guarantees that are essential to ensure the presumption of innocence and the access to a fair trial, thereby prohibiting some means of evidence. For instance, it is not acceptable that a relevant criminal fact could be demonstrated on the basis of illegal wiretapping or improper access to other forms of private communication (*v.g.*, spying emails). However, if the circumstances are not typical, can we advocate the same rules in face of a terrorism



threat? Can we deny, in this special situation, the compliance of structural rules of our community as democratic and constitutional States? It is a controversial problem, situated in a grey area between the full respect for fundamental rights and necessity to provide security to (global or local) community. The solution must be found in the principle of proportionality that presides to all idea of Justice. And yes, in some cases, we can accept that our fundamental rights (as privacy in our communications) may be restricted in name of our security. But we cannot accept legislation that allows intelligence services unrestrictive access to all private communications without a judicial order (see intense discussion around the Patriot Act in the United States of America). Defending it would be a *slippery slope* and we need to take care with the situations than can admit them.

Nevertheless, we must keep always in mind that there is a common denominator to all of us that cannot be forgotten: the ban on torture and other inhuman treatments. In no circumstances a State, founded under the rule of law, is legitimated to inflicted pain or suffering on a person for the purpose of obtaining information about an imminent attack, the identification of the place where it will occur, the identity of alleged criminals and, in some cases, get a confession of a crime.

And our borders? Is it necessary to close them in name of our security? The recent and tragic events that happened in Paris and Brussels brought to discussion the need to implement new and restrictive measures to control people who cross the State's borders. It was reclaimed different procedures in order to avoid the entry of terrorists in our soil and, for this purpose, the principles that founded the Schengen Agreement have been undermined.

We can build walls around us but they are not synonymous with security. With or without a physical structure, with or without an intense control of transboundary movements, he or she who has the resolve to commit acts of terrorism will always find a way to entry. Restricting absolutely the freedom of people's movements is not a viable solution to ensure that the State's security – and,



consequently, the security of its people – is guaranteed. On the contrary, psychical, legal or other measures taken to limit the free movements of citizens can create fear and insecurity: if I know that is not easy to get in or to get out of my country, I may presume that, if I would like to leave it, I could face many obstacles at my entrance in another State. Thus, the closure of borders could represent a contradictory solution since in seeking security may deliver, instead, insecurity.

Allow me a brief note about the crucial and complex balance between freedom and security and its repercussion on human rights' restrictions and freedom's limitations. Usually, when we approach this subject, we have in mind the individual freedom. We think of people's freedom of movement through all the counties and through all the continents. But what do we have to say about the movement of capital, goods and services? As we know, terrorism is not a cost-free activity. On the contrary, the terrorist organizations need money to acquire weapons, explosives and the arsenal that they use. They have to pay bribes in exchange of information or access to closed locations. In a word, terrorism is an economic endeavour . Therefore, if terrorism needs capital, why do not we create limitations on the free movement of capitals in order to provide security? After all, each community has the power to choose freely the means which it considers the most appropriate to defend its legitimate interests and, at the same time, respecting the human rights.

After all these thoughts it is time to ask: and we? What can the Ombudsman do about the freedom-security dilemma?

4. Addressing the freedom-security dilemma: the Ombudsman's role

As we all know, as we all said, the Ombudsman is an independent and autonomous State body with its institutional framework shaped by the Constitution and by the law, anchoring its democratic legitimacy in the election by the Parliament. The primordial mission trusted to this institution is the protection of the



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intangible heritage of the community, revealed in the fundamental rights and freedoms recognized to every man and to every woman, regardless of their race, social background, religion, beliefs or choices. With this mandate, firmly bounded with the promotion and the protection of human rights, the Ombudsman cannot, refuse its responsibilities in this subject. Furthermore, the Ombudsman cannot decline that being a political agent – nonpartisan, but still a political agent – its role often proves to be decisive in ensuring the compliance and respect of public authority's actions to human rights.

This undertaking is substantially imprinted in the powers and in the legal instruments at the Ombudsman's disposal. Either from a classical standpoint – regarding the traditional activities of monitoring and evaluating the actions or omissions of public authorities; the possibility to be involved in the legislative process and to address the Parliament; or the legitimacy to challenge before the courts (special or other) the legality or constitutionality of laws – either from a more recent trend that calls the Ombudsman to pursuit new responsibilities and competences, which is a prime example the appointment to act, in many countries, as the National Preventive Mechanism in the scope of the Optional Protocol of the Convention Against Torture.

Within the exercise of all of these duties, the Ombudsman can play a decisive role as a promoter of awareness towards the recognition and solidification of human rights in the relationship that is established between the people and the State. Moreover, international human rights bodies recognize the Ombudsman with a particular status, materialized in several mechanisms that enable this institution to monitor and to verify the State's compliance to its obligations and to report independently and autonomously to the international organizations. This constitutes a powerful and influential instrument of political and social development as it encourages a true culture of accountability in the exercise of public powers, and contributes to improve wellbeing. And this expands the scope of the Ombudsman's intervention.



In fact, the twenty first century Ombudsman no longer can limit itself to intervene in the national stage. In the face of global issues that require joint actions the Ombudsman has known to gradually establish international organizations, networks or forums of intervention and discussion. The examples of the International Ombudsman Institute and the Ibero-american Federation of Ombudsman – as well as other global and regional organizations created under the auspices of the Ombudsman institution – show us how the activities regarding the promotion and defence of human rights can expand their impact, and for this reason be more effective.

This important role, in the national and international stage, is even more vital when the subjects in question are especially sensitive. The recent terrorist events that shook our communities and that filled us with compassion and with a feeling of emptiness and loss are often used as a justification to restrict fundamental rights beyond the necessary proportional measure. The Ombudsman has to be vigilant, has to be able to intervene when that line is crossed, otherwise the core foundations of our States, of our communities, crumble before our very own eyes.

The comprehensive set of institutional powers trusted to the Ombudsman, based in the strong concept of soft law – and allow me to expand this notion even further, based also in the concept of soft politics – provide a vast field of intervention. As I already mentioned, even though the Ombudsman does not legislate, does not govern or judge, its powers run horizontally across the three classical dimensions of the State. The secret in the effectiveness of its intervention lies, both, in the comprehension of the reality and ability to use the accurate strategy and mechanism to assure the respect for human rights.

5. Concluding remarks

The questions raised, the issues that we have to address are vast and difficult. We may have many doubts, we may not have all the answers. We know that the



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same fragile equilibrium between freedom and security also applies to our certainties. But, at the same time, the Ombudsman's primordial field of intervention is precisely that space of tension and fragility. For this reason, its activity is not based in hard politics but in what we can call of soft politics. A kind of politics that expresses itself in the grey areas where the solutions are not definitive and do not obey to simplistic «yes or no» scheme.

It is our duty, it is our mission to keep on deepening our thought and knowledge in order to effectively promote and protect human rights.