In Praise of Awkwardness: *Kadi* in the CJEU

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'A great one gave me charge. I *must*'

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The European Court of Justice and the United Nations blacklisting regime – Background, Case-law and conflict in relation to that regime – The Kadi II case – wider constitutional dimensions of the ruling – Theoretical aspects of the dispute from rule of law perspective – The future

Introduction

Once upon a time it was taken for granted that if you committed yourself to the 'Rule of Law' and the protection of 'Fundamental Human Rights' you were embracing values that were of necessity, and by definition, universal. The first of these applied to all without fear or favour while the beneficiaries of the second qualified through their species-membership rather than through any additional feature they might have been required to have (nationality; religion; gender; etc.), however deep such an extra might be thought to be. Of course this equality has always been to some extent mocked in practice: the police beat up some guys and not others, and get away with it; the trials of some (but not others) are travesties of justice; protestors judged legitimate are protected by the authorities while others not so lucky can't get a room for their meetings and are arrested if they meet outside. The history of civil liberties across the democratic polities that emerged at the start of the last century and then fought hot and cold wars with their enemies until 1989 is in many ways the story of this mismatch between what a place told itself it was doing and what was happening in practice.[1] In those days stuff tended to take

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[1] *See* for one jurisdiction J. Mahoney, *Civil Liberties in Britain during the Cold War* (Cambridge, Cambridge University Press 1989) and K.D. Ewing and C.A. Gearty, *The Struggle for Civil Liberties*

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place beyond the law, or shabbily disguised in bad legal dress if it happened to come to public light. The real stories on freedom and liberty belonged on the streets not in the courtroom; this was where power did what was required away from the gaze of law and certainly not under its shelter. There is a virtue in such hypocrisy – it reinforces the importance of values by the covert way in which it seeks to circumvent them.

What has been happening since the end of the Cold War, and particularly since the attacks on New York and Washington on 11 September 2001, has been different to what has gone before. On the one hand, the primacy of law and of human rights protection (which has gathered such momentum in recent decades as rivals to liberal constitutionalism have fallen away) has meant that pretty well all of us now have written documents with bills of rights, independent judges and guarantees of protection against state power – and these are not designed to be merely obviously decorative (as in the past) but are supposed to bite in an American, Bill-of-rights-kind of way.[2] Law is more pervasive than it was, the niches of law-free executive power fewer and fewer.[3] On the other hand, what we mean by 'the Rule of Law' and 'the protection of Fundamental Human Rights' has been subject to intense challenge. Arguably always less secure than might have been rather complacently assumed, the universalism of both human rights and the rule of law can no longer be simply taken for granted.[4] We are being invited to leave a world where denying human rights and fair legal procedures to all is evidence of hypocrisy, and enter one where such double-standards are what the terms actually in their essence entail.[5] The underlying meaning of what it is to believe in these ideas is being directly challenged, and not by this or that dictatorship nostalgic for better times (albeit by those too of course) but – mainly and critically – by the very states whose democratic revolutions gave us these universal meanings in the first place.[6] Standing in their way in Europe are a few unelected judges from an entity that cannot even call itself a state without risking terminal offence. It is an heroic story – whether a last ditch stand or the beginning of a glorious fight-back we

(Oxford, Oxford University Press 2000), and – more generally – for a contemporary account that reflects in its critique these widespread assumptions of the past: V.V. Ramraj et al. (eds.), *Global Anti-Terrorism Law and Policy* (Cambridge, Cambridge University Press 2012).

[2] *Oxford Constitutions of the World*, <http://oxcon.ouplaw.com/> (password protected), gives a taste of the range (visited 14 Jan. 2014).

[3] For a powerful statement about the pervasive relevance of law *see* D. Dyzenhaus, *The Constitution of Law* (Cambridge, Cambridge University Press 2006).

[4] *See* generally C.A. Gearty, *Can Human Rights Survive?* (Cambridge, Cambridge University Press 2006).

[5] For a strong critique of human rights as a kind of charade *see* I. Manokha, *The Political Economy of Human Rights Enforcement* (Basingstoke, Palgrave Macmillan 2008).

[6] The broader story, and also a full version of this argument, is to be found in C.A. Gearty, *Liberty and Security* (Cambridge, Polity Press 2013).

cannot yet tell, but in the meantime what we can do is celebrate how seriously these men and women take their vocation.

Hypocrisy and heroism

On 17 October 2001, Yasin Abdullah Kadi was 'identified as being an individual associated with Usama bin Laden and the Al-Qaeda network'.[7] This was bad news for Mr Kadi because after the attacks on the US by this network the month before, the United Nations had greatly broadened the reach of its sanctions regime, to cover more and more suspects. The various Security Council resolutions in place provided 'for the freezing of assets of the organisations, entities and persons identified by the committee established by the Security Council in accordance with resolution 1267 (1999) of 15 October 1999 ("the Sanctions Committee") on a consolidated list ("the Sanctions Committee Consolidated List").'[8] Because of the way he was implicated with Al-Qaeda, Kadi got put on this list.

European regional action followed almost immediately. The EU already had its own sanctions system in place, and on 19 October 2001 Kadi was 'added to the list in Annex 1 to Council Regulation (EC) No. 467/2001 of 6 March 2001 prohibiting the export of certain goods and services to Afghanistan, strengthening the flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan […]'.[9] When the legal basis for the EU sanctions changed about six months later, he also found his way onto the new list 'imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban'.[10] By then Mr Kadi – who had presumably been finding his life suddenly narrowing all around him – had already instituted legal proceedings. He wanted all these EU regulations annulled 'in so far as [they] concerned him' on the basis that they 'were, respectively, infringement of the right to be heard, the right to respect for property and the principle of proportionality, and also of the right to effective judicial review'.[11]

What happened next will be a central part of the foundation story of the new EU if it makes it securely into the first few hundred years of the current Millennium. First his action is dismissed: the UN rules, said the General Court. There-

[7] Judgment (Grand Chamber) of 18 July 2013 in Cases C-584/10 P, C-593/10 P, C-595/10 P *European Commission, Council of the European Union and United Kingdom of Great Britain and Northern Ireland* v. *Yassin Abdullah Kadi*, n.y.r., para. 16 [*Kadi II*].

[8] Ibid., para. 6.

[9] Ibid., para. 17.

[10] Ibid., para. 17. The relevant legislative was Council Regulation (EC) No. 881/2002.

[11] *Kadi II, supra* n. 7, para. 18.

fore, short of the extreme situation of a violation of *jus cogens* (not the case here), the Security Council can do what it wants, immune from the procedural tribulations that affect lesser bodies.[12] Then, en route to the Grand Chamber, along came Advocate-General (AG) Maduro who in a simple opinion resonant with the human rights and rule-of-law traditions of the EU transformed the atmosphere by suggesting that whatever about the UN, the EU simply couldn't do what it liked (*jus cogens* apart) to people within its jurisdiction simply because another international organisation (albeit a powerful one) seemed to require it to.[13] The relevant English cliché to deploy at this point is 'cat among the pigeons'.

The Grand Chamber of the Court of Justice backed the cat, in 'essence' holding

> that the obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty, which include the principle that all European Union acts must respect fundamental rights, that respect constituting a condition of their lawfulness which it is for the Court to review in the framework of the complete system of legal remedies established by that treaty.[14]

It followed, as the judgment made crystal clear

> that the Courts of the European Union must ensure the review, in principle the full review, of the lawfulness of all European Union acts in the light of fundamental rights, including where such acts are designed to implement Security Council resolutions, and that the General Court's reasoning was consequently vitiated by an error of law.[15]

This decision was issued on 3 September 2008. The immediate problem of course was what to do with Mr Kadi. The Court gave some hints about how best to proceed – Kadi needed to have the grounds behind his listing communicated to him and should, as well, have an 'opportunity to be heard in that regard'.[16] This should have happened 'as swiftly as possible'[17] after the listing – but better late than never. The Council was given three months to sort things out, during which time the annulled regulation would be maintained.

There then began the usual sort of search for a compromise that has become a familiar part of the counter-terrorism response to inconvenient judicial interventions. Removal of the whole framework of control is never considered. Invariably the 'compromise' that is achieved shifts the law firmly onto the side of civil liber-

[12] Case T-315/01 *Kadi* v. *Council and Commission* [2005] ECR II-3649 [*Kadi I*].

[13] Opinion of AG Poiares Maduro in Case C-402/05 P *Yassin Abdullah Kadi* v. *Council of the European Union and Commission of the European Communities*, 16 Jan. 2008.

[14] *Kadi II, supra* n. 7, para. 22.

[15] Ibid., para. 23.

[16] Ibid., para. 24.

[17] Ibid., para. 24.

tarian restriction, with new structures of executive power underpinning explicit controls on freedom, all backed by ostensible but invariably tawdry safeguards of a sort that would have been deplored as unthinkable only a decade or so before.[18] Thus Guantanamo detentions have survived a succession of Supreme Court interventions and emerged at the other end protected by a second-rate due process which gives the illusion of fairness but not any kind of substance of a sort that would until quite recently have been thought essential.[19] In the same way, and to pick another well-known story from the common law world, indefinite detention of suspected international terrorists in the UK has been replaced by an intricate web of Terrorism Prevention Investigation Measures (or TPIMs) which themselves had succeeded control orders after a bout of wrangling between the legislative and executive branches.[20] These also fail to deliver any kind of due process as that term has been traditionally understood. In each of these examples the impugned counter-terrorist initiative has survived challenge, been strengthened even, by taking on the shape of a fully legal procedure, despite – on closer examination – revealing itself as lacking in the fundamentals of what we have historically meant by fair play.[21] Having deployed their trump cards the courts in both these jurisdictions have felt it opportune to show some good manners and withdraw from the fray.

The *Kadi* story seemed initially to be going along the same route. The UN sanctions regime had already been shedding bits of its draconian nature even before the 2008 ruling. A 'focal point' within the Security Council had been established in March 2007 as somewhere for those affected by these decisions to turn, especially if they were minded to try to get off the list.[22] This was helped by a decision made at around the same time that States suggesting additions to the list must provide a 'statement of case' which should 'provide as much detail as possible on the basis(es) for the listing, including (i) specific information supporting a determination that the individual or entity meets the criteria …; (ii) the nature of the information; and (iii) supporting information or documents that can be provided'.[23] States were also asked at the same time to identify bits of their statements that they would be comfortable passing on to the listed entity and any other parts that they might show interested States on request.[24]

[18] Gearty *supra*, n. 6 goes into the detail.

[19] F. de Londras, *Detention in the 'War on Terror': Can Human Rights Fight Back?* (Cambridge, Cambridge University Press 2011).

[20] For a taste of the law see the report by the UK Government's Independent Reviewer of Terrorism Legislation, D. Anderson QC, *Control Orders. Final Report of the Independent Reviewer on the Prevention of Terrorism Act 2005* (London, The Stationery office 2012).

[21] Terrorism Prevention and Investigation Measures Act 2011 (UK).

[22] UN Security Council Resolution 1730 (2006) of 19 Dec. 2006.

[23] UN Security Council Resolution 1735 (2006) of 22 Dec. 2006, para. 5.

[24] UN Security Council Resolution 1735 (2006) of 22 Dec. 2006, para. 6.

In June 2008 the publicity element was ratcheted up a bit, with a new obligation being imposed on the Sanctions Committee to make accessible on its website 'a narrative summary of reasons for listing' decisions.[25] Then after *Kadi* in September 2008, a new functionary emerged, not a judge or other independent decision-making body of course, but rather an 'Ombudsperson […] of high moral character, impartiality and integrity with high qualifications and experience in relevant fields'[26] whose job it now was to assist the Sanctions Committee in relation to delisting requests. As envisaged in the relevant Resolution, this involved a lot of information gathering, consultation, hand-holding of the appealing party, the preparation for the Sanctions Committee of a 'comprehensive report' and assisting that body in its determinations – but no independent decision-making authority.[27] In the Summer of 2011 the requirement that there be unanimity on the Sanctions Committee before a delisting takes effect was removed, and at the same time the opportunity was taken to make further procedural tweaks so as to give the Ombudsperson a somewhat stronger grip on procedures, albeit without securing any kind of original decision-making power.[28]

So far as Mr Kadi himself was concerned, on 21 October 2008 a narrative summary of reasons for his listing was duly produced by the Sanctions Committee and sent to him. This contained many very damaging assertions about his role both as a banker working closely with and part-funded by Usama bin Laden and also as someone deeply implicated in terrorism, one who 'funnelled money to extremists' and (even) in one of whose premises '[p]lanning sessions for an attack against a United States facility in Saudi Arabia may have taken place'[29] – no details of course and note the 'may'. There was much deeply prejudicial assertion of culpability along these lines. Mr Kadi responded by asking to see the evidence, asserting that none of what was said about his terrorist-inclinations was true and 'whenever he had been given the opportunity to express his point of view on the evidence said to inculpate him, he had been able to demonstrate that the allegations made against him were unfounded'.[30] This cut no ice with the Commission officials. *Kadi* duty duly discharged, the listing was confirmed on 28 November 2008.[31]

[25] UN Security Council Resolution 1822 (2008) of 30 June 2008, para. 13.
[26] UN Security Council Resolution 1904 (2009) of 17 Dec. 2009, para. 20.
[27] Ibid., annex 2 has the details.
[28] UN Security Council Resolution 1989 (2011) of 17 June 2011.
[29] *Kadi II, supra* n. 7, para. 28 for the full summary.
[30] Ibid., para. 31.
[31] Commission Regulation (EC) 1190/2008 (28 Nov. 2008).

Against the odds

Back Mr Kadi went to court, arguing – hardly surprisingly – that the process which he had undergone since his legal victory could hardly be described as the kind of 'full review' that the Grand Chamber had had in mind. The General Court agreed.[32] It was 'obvious' that it had been the intention of that court that 'judicial review, in principle full review, should extend not only to the apparent merits of the contested measure but also to the evidence and information on which the findings made in that measure are based'.[33] By citing *Organisation des Modjahedines du people d'Iran* v. *Council* in its decision,[34] the General Court expressed confidence that the Court in *Kadi* had

> approved and endorsed the standard and intensity of judicial review determined in that judgment, namely that the Courts of the European Union must review the assessment made by the institution concerned of the facts and circumstances relied on in support of the restrictive measures at issue and determine whether the information and evidence on which that assessment is based is accurate, reliable and consistent, and such review cannot be barred on the ground that that information and evidence is secret or confidential.

With dicta like this there could only be one winner. The Commission was sent back to the drawing board.

Before going there however the authorities rolled their final dice, an appeal to the Grand Chamber. All the big beasts weighed in. The Commission took a case, as did the Council. Ever-vigilant in the field of counter-terrorism, so did the United Kingdom. All wanted the judgment set aside and an order for costs against Mr Kadi. They were supported by a dozen or so Member States with over fifty names appearing among the lawyers assigned responsibility to win the appeal. Against them, five UK-based lawyers were left to argue Kadi's point of view.[35]

A line taken by some of the appellant and intervening parties was that the first *Kadi* decision had been ill-considered and should now be disregarded. The Court was unsurprisingly unsympathetic, swatting away arguments that had been rejected in that earlier decision. The case-law was now entirely clear that 'European Union measures implementing restrictive measures decided at international level enjoy no immunity from jurisdiction'[36] and that,

[32] Case T-85/09 *Kadi* v. *Commission* [2010] ECR II – 5177 (30 Sept. 2010).

[33] This is how the Grand Chamber put it in *Kadi II, supra* n. 7, para. 40.

[34] [2006] ECR II – 4665: *see Kadi II, supra* n. 7, para. 41.

[35] David Vaughan QC, Vaughan Lowe QC, James Crawford SC, Maya Lester and Professor Piet Eeckhout.

[36] Not only *Kadi I, supra* n. 12, but now also Joined Cases C-399/06 P and C-403/06 P *Hassan and Ayadi* v. *Council and Commission* [2009] ECR I – 11393 and Case C-548/09 P of 16 Nov. 2011 *Bank Melli Iran* v. *Council.*

> without the primacy of a Security Council resolution at the international level thereby being called into question, the requirement that the European Union institutions should pay due regard to the institutions of the United Nations must not result in there being no review of the lawfulness of such European Union measures, in the light of the fundamental rights which are an integral part of the general principles of European Union law.[37]

As for the substance of the human rights themselves, the Court resisted the opportunity offered it by the scores of government and EU lawyers before it to dilute the level of procedural safeguards upon which Mr Kadi could rely – in other words, to restrict *Kadi I* in a way that ignored at least its spirit and possibly also (though not implausibly so) the actual words used in that ruling. There were to be no double standards so far as fairness in the EU was concerned.

The Grand Chamber thus achieved an outcome that was both startlingly at odds with all the parties before it except Mr Kadi, and in defiance as well of the United Nations institutions (of which, of course, the judges could hardly have been unaware). It did so by the simple but highly effective device of taking the rhetoric of human rights seriously. This is what marks the decision as different from those in national jurisdictions (some already referred to[38]) where the courts settle for less after a brief blaze of civil libertarian defiance. The judges were obliged 'in accordance with the powers conferred on them by the Treaties' to 'ensure the review, in principle the full review, of the lawfulness of all Union acts in the light of the fundamental rights forming an integral part of the European Union legal order'. Quite naturally (indeed inevitably), this 'included review of such measures as are designed to give effect to resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations […]'.[39] This obligation was 'expressly laid down by the second paragraph of Article 275 TFEU.'[40] The fundamental rights guaranteed in this way included 'respect for the rights of the defence and the right to effective judicial protection'.[41] The first of these included 'the right to be heard and the right to have access to the file, subject to legitimate interests in maintaining confidentiality',[42] while the second ('affirmed in Article 47 of the Charter'[43]) required

[37] *Kadi II, supra* n. 7, para. 67.

[38] *See* text at n. 18-21 and Ramraj, Hor, Roach and Williams, *supra* n. 1.

[39] *Kadi II, supra* n. 7, para. 97, citing *Hassan and Ayadi* v. *Council and Commission*, *supra* n. 34, para. 71 and *Bank Melli Iran* v. *Council, supra* n. 34, para. 105.

[40] *Kadi II, supra* n. 7, para. 97.

[41] Ibid., para. 98.

[42] Ibid., para. 99.

[43] Ibid., para. 100.

> that the person concerned must be able to ascertain the reasons upon which the decision taken in relation to him is based, either by reading the decision itself or by requesting and obtaining disclosure of those reasons, without prejudice to the power of the court having jurisdiction to require the authority concerned to disclose that information, so as to make it possible for him to defend his rights in the best possible conditions and to decide, with full knowledge of the relevant facts, whether there is any point in his applying to the court having jurisdiction, and in order to put the latter fully in a position to review the lawfulness of the decision in question.[44]

Phrased like this, it would have made no difference if all EU states had joined the case or pooled their resources to secure the best advocate in the world: there could only be one winner. The Court pointed out that Mr Kadi had got stuck on the list in the first place because the US had decided as early as 12 October 2001 (through something called an Office of Foreign Asset Control) that he was a 'Specially Designated Global Terrorist'.[45] It was this that had produced the UN action, which in due course had generated the summary of reasons upon which the EU had to rely having nothing apart from that to go on.[46] His family and working life had been turned upside down and he had suffered the 'public opprobrium and suspicion' which such measures as these inevitably provoke.[47]

Kadi had been rolling about in this echo chamber of insinuation and innuendo for nearly twelve years, but as every criminal lawyer learns early in law school the repetition of an allegation multiple times does not make it more true. Where was the 'sufficiently solid factual basis'[48] to explain Kadi's elevation to this role of 'global terrorist'? The European judges needed this even if no one else could care less, because their law required that they check whether the 'reasons [given], or at the very least one of those, deemed sufficient in itself to support that decision, [was] substantiated'.[49] The final sections of the judgment are a devastating critique, allegation by allegation, of the unsubstantiated nature of the claims that had led to the listing of the applicant.[50] If security requires secrecy, then that could easily have been arranged: there were available to be deployed by the court various

[44] Ibid., para. 100.
[45] Ibid., para. 109.
[46] Ibid., para. 110.
[47] Ibid., para. 132.
[48] Ibid., para. 119.
[49] Ibid., para. 119.
[50] Ibid., paras. 151-162. There were some differences as between the General Court and Grand Chamber on the right approach where the EU institutions do not have the evidential base for decisions it is taking: *see* ibid., paras. 138-150. It was this that led the Grand Chamber to its detailed assessment.

> techniques which accommodate on the one hand, legitimate security considerations about the nature and sources of information taken into account in the adoption of the act concerned and, on the other, the need sufficiently to guarantee to an individual respect for his procedural rights, such as the right to be heard and the requirement for an adversarial process.[51]

But none of this had been suggested as a route out of the impasse. True, the UN system had improved since Kadi had been listed but still fell far short of what EU law required.[52] The appeal was dismissed with costs.

Nowhere is Kadi's nationality mentioned. Who is this Yasin Aabdullah Ezzedine Kadi? He was born in Cairo Egypt in 1955 but is described by the EU Commission as a Saudi Arabian national.[53] If we are to believe the web he appears to have trained as an architect in Egypt after which he moved to Chicago. He is (or perhaps was) extremely wealthy, has ties to the Saudi royal family, and became involved in banking in the 1990s. He would seem also to have been associated with the Moslem Brotherhood, a very strong opponent of the Egyptian regime then headed by Hosni Mubarak whose primary paymaster was the United States and with whose security apparatus he would have had very close links, not least in his role as the region's most important Arab defender of Israeli interests.[54] The 2001 designation sparked a range of actions against Kadi and his financial interests around the world.[55] Intriguingly, he had disappeared from the sanctions list some months before the Grand Chamber ruling:[56] Kadi had escaped the echo chamber before it could be explained to him why he had been there.

The issue remains an important one though because the United Nations can hardly afford to have a rival source of authority occupying a substantial part of the world, rejecting its authority. There will be future cases like that of Mr Kadi for whom delisting will not be judged possible. The Court addresses this in an obscure couple of paragraphs well into the substance of its ruling:

[51] Ibid., para. 125, explained further at paras. 126-129.

[52] Ibid., para. 133.

[53] See Commission Regulation (EC) No. 1190/2008 of 28 Nov. 2008, <http://eur-lex.europa.eu/Notice.do?mode=dbl&lang=en&ihmlang=en&lng1=en,en&lng2=bg,cs,da,de,el,en,es,et,fi,fr,hu,it,lt,lv,mt,nl,pl,pt,ro,sk,sl,sv,&val=483959:cs>, visited 10 Jan. 2014.

[54] The Brotherhood enjoyed a brief period in power in Egypt after the 'Arab Spring' before a military coup ended the country's experiment with democracy, albeit now without Mubarak: *see* A. Shatz, 'Egypt's Counter-Revolution', *London Review of Books*, 16 Aug. 2013: <www.lrb.co.uk/blog/2013/08/16/adam-shatz/egypts-counter-revolution/>, last visited 12 Jan. 2014.

[55] There is an enormous amount of detail at <http://911research.wikia.com/wiki/Yasin_al-Qadi>, last visited 10 Jan. 2014.

[56] On 5 Oct. 2012: UN Security Council SC/10785: <www.un.org/News/Press/docs/2012/sc10785.doc.htm>, last visited 10 Jan. 2014.

> […] if it turns out that the reasons relied on by the competent European Union authority do indeed preclude the disclosure to the person concerned of information or evidence produced before the Courts of the European Union, it is necessary to strike an appropriate balance between the requirements attached to the right to effective judicial protection in particular respect for the principle of an adversarial process, and those flowing from the security of the European Union or its Member States or the conduct of their international relations. In order to strike such a balance, it is legitimate to consider possibilities such as the disclosure of a summary outlining the information's content or that of the evidence in question. Irrespective of whether such possibilities are taken, it is for the Courts of the European Union to assess whether and to what extent the failure to disclose confidential information or evidence to the person concerned and his consequential inability to submit his observations on them are such as to affect the probative value of the confidential evidence.[57]

The judicial review which according to the Grand Chamber is 'indispensable to ensure a fair balance between the maintenance of international peace and security and the protection of the fundamental rights and freedoms of the person concerned […] those being shared values of the UN and the European Union'[58] is not, after all, the same as guaranteed rights, to evidence, to be heard, to the other side to be put to proof, to open justice, etc. Time will tell whether what the European courts are truly after is proper adversarial engagement or merely a central role for the judges in its savage dilution: or, to put it in another way (albeit crudely), 'we can't bear restrictions on due process – unless it is ourselves who decide it has to be that way'.[59]

Securing justice: Beyond good manners

However the cases turn out, nothing should detract from the European Court's willingness to make itself awkward, well beyond the bounds of normal judicial good manners. The turn to law (and its sibling necessity, 'the protection of fundamental human rights') has become such a strong feature of liberal legal systems in recent decades that whole areas of state activity previously safely outwith its reach have found themselves being dragged into the public space in order for their practitioners to be forced to provide legal accountability for their actions. The change has been particularly acute in the common law jurisdictions which have traditionally allowed prerogative power a clean run. This stopped after Watergate

[57] *Kadi II, supra* n. 7, paras. 128 and 129 (citations omitted).
[58] Ibid., para. 131.
[59] Cf. Lord Atkin in *Liversidge* v. *Anderson* [1942] A.C. 206.

in the United States,[60] and a decade or so later in the United Kingdom, under the influence of the European Convention on Human Rights with its insistence on interferences with rights needing to be 'prescribed by' or 'in accordance with' law.[61] In the immediate aftermath of the 11 September attacks, the then US president George W. Bush sought to use the need for a strong reaction to these atrocities to return to a 'commander-in-chief' model of the United States constitution, with executive power restored to the lead-role in all security matters: this was unsuccessful.[62] The United Nations blacklisting regime went down the same route, but as we have seen has also been forced to modify the unaccountable nature of its decision-making apparatus, at least to some degree, with in particular the Ombudsperson now increasingly flexing her muscles.[63] The European state model was more subtle from the start, eschewing the kind of extreme governmental powers that would raise issues of principle related to the 'rule of law' and going instead for broadly-based, state-empowering but nevertheless technically legitimate legislative sanction. This explains, for example, the mystified response of security officials to the alleged illegality of UK intelligence conduct revealed by Edward Snowden, along the lines of 'what we were doing was legal; why there was even a drop-down box on every computer where our operatives could confirm the compatibility of what they were doing with the UK Human Rights Act'.[64]

We live in a 'neo-democratic' state when the appearance of general rules and universal protection of human rights is designed to hide (or at best to obscure) a reality in which certain categories of persons (foreigners; suspected terrorists) form a discrete 'suspect community'[65] to whom the normal rules do not apply. We – the kind of people who read articles like this, who lead normal majoritarian lives, who do not rock any boats – are safe and if things go wrong we have our rights to hand to help us. Meanwhile, the others can be stopped, their property can be controlled,

[60] United States Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities (the Church Committee, 1975-1976), <www.intelligence.senate.gov/churchcommittee.html>, visited 14 Jan. 2014. The final report is at <https://archive.org/details/finalreportofsel06unit>, visited 14 Jan. 2014.

[61] *See Malone* v. *United Kingdom* (1984) 7 EHRR 14.

[62] D. Cole, 'The End of the War on Terror?', *New York Review of Books*, 7 Nov. 2013, <www.nybooks.com/articles/archives/2013/nov/07/end-war-terror/?pagination=false> (pay protected), visited 14 Jan. 2014.

[63] *See* Report of the Office of the Ombudsperson pursuant to Security Council resolution 2083 (2012) UN SC/2013/452: <http://webcache.googleusercontent.com/search?q=cache:http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/S_2013_452.pdf>, visited 12 Jan. 2014.

[64] *See* the debate between C. Huhne ('An Affront to Liberty') and D. Omand and K. Tebbit, ('In Defence of GCHQ') in *Prospect*, December 2013, p. 32-37.

[65] P. Hillyard, *Suspect Community* (London, Pluto Press 1993); G. Peirce, *Dispatches from the Dark Side* (London, Verso Books 2012).

their liberty taken away, their movement restricted, their businesses ruined, their family life inhibited or destroyed, and all without any kind of criminal charge being made against them. Instead they are made victims of an administrative process which replaces the honesty of an open trial and (in the common law world) a jury with special advocates, commissions applying special rules, secret hearings, sympathetic ombudspersons on the periphery of the action, and constantly repeated but vague and unrefutable insinuations of guilt in the place of hard evidence. If this is the way liberal democracy is drifting then the Grand Chamber is right to have nothing to do with it. As a tribunal rooted not in any national interest but in the fact of the primacy of law, it can hardly collude in the reduction of its *raison d'être* to a charade. Good luck to it in the battles that lie ahead – long may in keep its nerve.

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