Eighth rule of law lecture (international branch of the bar of England and Wales)

Inner Temple

2nd December 2014

The Rule of Law in Times of Turbulence – A Middle Eastern Perspective

His Excellency Awn Al-Khasawneh*[1]

At the outset, may I say how delighted I am to be here – in these beautiful and inspiring surroundings – and how honoured to have been invited to address this distinguished and learned audience. My first duty therefore – and it is a pleasant one – is to thank Chantal-Aimée Doerries Q.C., Natalie Darby, Sarah Richardson, Christian Wisskirchen and Jessica Crofts-Lawrence for the kind invitation extended to me and for their hospitality and kind help.

* * *

At the beginning of this year, I started to get "gentle reminders" from the organisers asking me to choose a title for this lecture, but all I could think of was a discouraging sentence in the preface to Lord Bingham's famous book "The Rule of Law", which I had read a few months earlier and which accurately depicted my state of mind at the time; he wrote:

> "The organisers generously offered me a free choice of subject. Such an offer always poses a problem to unimaginative people like myself. We become accustomed at school and university to being

* The view expressed in this lecture are personal and do not reflect those of any government or international organization with which the author has been associated

> given a subject title for our weekly essay, and it was rather the same in legal practice: clients came with specific problems which they wanted answered or appeared before the judge with a specific issue which they wanted (or in some cases did not want) resolved. There was never a free choice of subject-matter."[2]

My life experiences – at least those in the confines of the law- and the habits of mind that such experiences generate (or at least encourage and foster) are only slightly different from those of the late and lamented noble Lord – and hence my similar predicament.

Additionally, when one is addressing such a wise and worldly audience where every single person can, I am sure, sing happily with Ulysses:

> "Much have I seen and known; cities of men
> And manners, climates, councils, governments,
> Myself not least…",[3]

the need to say something interesting assumes a certain urgency especially when one is the eighth speaker. Being the eighth speaker is always a problem. It brings to mind the words uttered by Elizabeth Taylor's eighth husband on his wedding night:

> "I know what I am supposed to do tonight but I don't know how to make it more interesting"

[2] Tom Bingham, "The Rule of Law", Penguin Books, 2011, p.vii.
[3] Alfred lord Tennyson (find)

Two years ago, Mark Mulholland Q.C. while, speaking in this very hall on the rule of law and global terrorism, made a helpful suggestion as to what the title of the next lecture should be. He said:

> "Joseph Raz in "The Rule of Law and its Virtue" talks of the "promiscuous use" made in recent years of the expression "the rule of law". This concept of promiscuity I must confess intrigues me"[4]

This is Mulholland still speaking. He then went on to say:

> "Berlusconi Bunga Bunga, and the Rule of Law – that is the seventh annual lecture taken care of…" [5]

For my part I confess that no topic can possibly beat that topic for interest-generating, and I hope a future speaker, preferably with first-hand experience, would rise to the challenge. Alas, and I say this with a wistful heart, the life of a Jordanian Prime Minister in office while the phenomenon euphemistically referred to as the Arab Spring, was in full swing, left no time for Bunga Bunga and other joyous frivolities of latter day Romans and their – now deceased – North African Friends.

Instead I settled on the more demure title of the Rule of Law in Turbulent Times – a Middle Eastern Perspective. In defence of this title, I can confidently assert that it is jammed with action – with a mélange of actors ranging from old oriental potentates, to modern, oriental impotantates – in more senses than one – to single-minded sub-state actors, and I don't speak

[4] Mark Mulholland Q.C., "The Rule of Law & Global Terrorism – an international problem from a Northern Irish perspective", The Bar Council of England& Wales sixth annual International Rule of Law lecture – Inner Temple 18th December 2012, p.4.
[5] Ibid

of charitable organizations or environmentalists, but of groups that aim to restore the *Khilaphate* or to rebuild the Second Temple, or to bring about the end of the world – which is not likely to be a pretty sight. In other words, of fanatics who genuinely want to establish the Rule of Law not in the way Dicey conceived of the concept and Bingham sought to give it content by tying it to recognisable protected interests, but rather in the more literal and dogmatic sense of establishing the rule of their law or rather their monolithic interpretation of it. To those groups this is the only meaning of the expression "the Rule of Law"; all else is promiscuous use of language, to borrow again Joseph Raz's sentence.

* * *

Having explained the history of the title, let me now turn to the title itself. Some explanatory words are warranted:

First, I spoke, on purpose, of a Middle Eastern perspective rather than an Arab or a Jordanian perspective because I believe in the essential cultural unity of the region which is not confined to the Arabic-speaking lands but also encompasses countries like Turkey and Iran as well as Pakistan and Afghanistan. The common history, the challenge of the West, the ambivalent national and sub-national identities and the subsequent and closely-related religious revival all attest to a broad cultural homogeneity notwithstanding a mosaic-like diversity.

*

Secondly, I do not propose to detain you too long on futile attempts at finding a waterproof definition of the concept of the rule of law. We have

already seen what, in a more pristine sense, the expression means to some groups that believe a society's raison d'être is to live by Islamic law or for that matter, Talmudic law – and I am sure that some fundamentalist Christians espouse identical concepts. To all those groups the rule of law is a simple straight-forward proposition.

Additionally we should not forget that Dicey did not think of the rule of law as a universal principle. He attributed it to specific English institutions and to the role of Judges as opposed to legislative general principles of the constitution. Thus, in a celebrated passage, which I partly quote, he wrote:

> "We may say that the constitution [that is the unwritten British constitution] is pervaded by the rule of law on the ground that general principles of the constitution (as for example the right to personal liberty, or the right of public meeting) are with us as a result of judicial decisions determining the rights of private persons in particular cases brought before the courts; whereas under many foreign constitutions the security (such as it is) given to the rights of individuals results, or appears to result, from the general principles of the constitution."[6]

This is a statement with which I am in substantive agreement both with regard to the fact that the concept of the rule of law has a specific and verifiable meaning in the particular historical context of the development of English institutions of which Dicey was rightly proud, and also in regard to the fact that guarantees emphatically made in the constitutions are usually of little value in the absence of long and well-established traditions and a vigilant and courageous judiciary. The perfectly worded constitutions of

[6] Bingham, "The Rule of Law" Penguin Books 2001, p 4.

the now defunct republics of Eastern Europe would attest to this, so would the constitutions of most Arab countries.

The last point I would like to make on the definition of the rule of law, before moving on, is that it defies definition. I do not think Dicey himself expected it to be definable, for he wrote:

> "A third and a different sense in which "the rule of law" or the predominance of the legal spirit."

If the rule of law is the equivalent of the predominance of the legal spirit, then it would be well nigh impossible to define: Spirits are notoriously illusive. If forced to define it, I would venture the following eclectic definition:

> "The rule of law is the fashionable modern secular response to the concept of justice, especially suited to legal positivism; purged of the intimations of natural law and denuded of overtly moral or theological overtones."

*

The third element in the title, the temporal one, so to speak, is the reference to turbulent times. And this merits some explanation:

In point of time, the Middle East is now passing through a tumultuous period, but I cannot think of a time when that region, the cradle of civilization – and this is not a compliment given what modern civilization

has been capable of doing – was not passing through tumult and mayhem often resulting in the wholesale annihilation of communities and nations.

The Middle East is littered with archaeological finds chiselling in stone the mighty deeds of bygone despots. Consider please, dear and distinguished audience, the following sample executed at the orders of the Babylonian king Nebuchadnezzar:

> "I have left all of Phoenicia in flames, there is much wailing in Aaram, and in Judea there is lamentation. Damascus has no soul left …etc etc.."

At first glance, no sane person would view those reprehensible acts – seen as mighty deeds by their perpetrators – as contributing to the establishment or the enhancement of the Rule of Law. But in fairness, it must be said that from the point of view of strict legal positivism, Nebuchadnezzar was not breaking any extant law if we take too seriously the maxim *nullum crimen nulla poena sine lege* and certainly not if the word *lex* in the maxim is confined to written law.

This example typifies the predicament of the Middle East and perhaps of the whole world since ancient times: Codes of law, *Hammurabis* being the most famous, coexisting with unspeakable acts of violence and destruction. The Assyrians and Babylonians felt no guilt about killing and there was no need therefore to justify it. This does not mean that they did not have their own concepts of justice and law in domestic matters, for we know that since Akkadian times the notion that the king should obey the law was prevalent in Mesopotamia. According to the Akkadian Omen Series:

> "If a king respects the law, that reign will be long. He will proceed happily."[7]

Other peoples felt the need for justification through divine commandments, a prime example being the destruction of the Midianites by their next of kin the ancient Israelites on direct command from God – twice repeated to Moses for the sake of completeness over a question of worship. One sees in these examples and others a pattern relevant and ominous for our times. ISIS (so called Islamic state of Iraq and Syria, which has been described as being as Islamic as the Ku Klux Klan is Christian)[8] is basically doing the same to fellow Muslims or Muslims of a different sect and non-Muslims alike before a shocked international public opinion.
Their obsession with destroying ancient monuments is also reminiscent of old obsessions with "graven images" or the "iconoclasm" of medieval Byzantium or the "Wahhabism" of 18th century Arabia.

But the justification may not always be concocted in religious terms, and although I digress a little, I wish to mention briefly the words of Tacitus, the second century Roman historian:

> "They plunder, they slaughter, and they steal: this they falsely name Empire, and where they make a wasteland, they call it peace."[9]

These words always come to mind when I hear talk of the "responsibility to protect", lately fashionable in U.N. circles or "humanitarian intervention"

---

[7] From the omen series *Summa Alu*, Zeinab Bahrani, "Rituals of War – The Body and Violence in Mesopotamia", Zone Books 2008, p.101.
[8] Ambassador Chas W. Freeman, Jr. 23rd "The Collapse of Order in the Middle East Remarks to the 23rd Annual Arab-U.S. Policymakers Conference ", available from http://chasfreeman.net/the-collapse-of-order-in-the-middle-east/ [accessed 7 Dec 2014}
[9] *De vita et moribus Iulii Agricolae*, translation: Loeb Classical Library edition.

or worse still, the "establishment of democracy" as justification for intervention in the Middle East.

* * *

I have mentioned all these examples which seem at first glance to have only the remotest connection to the present situation in the Middle East because I can discern patterns whether with regard to the concurrence of the development of legal codes with outbursts of violence or with regard to the justification of war with divine or secular sanction. Be all of these questions as they may, I should restrict myself, given the time limitations, to more recent times and I would propose four periods as important milestones:

1. The first is the period of legislative reforms in the Ottoman Empire (the *Tanzimat*) when old concepts of law based on the Shari'a and on ancient traditions were gradually replaced by Western notions of government. Particularly noteworthy is the abandonment of the incremental development of the Shari'a on a judge-by-judge case-by-case basis, along lines similar to the historical development of the common law. Instead that slow and subtle process was replaced by what Lord Bingham referred to as "grand declarations of principle" on the civil law model.[10]

2. The second development was the division of the post-Ottoman Middle East into small and weak sovereignties obsessed with the preservation of existing regimes and hence all sharing similar over-developed security apparatus.

[10] Bingham, "The Rule of Law, p.5.

Initially the core of the Middle East – the Fertile Crescent – was placed under class A Mandates by the League of Nations. This was done in implementation of the Wilsonian notion of self-determination which nevertheless applied only to some of the former populations of the defeated Empires, while the infliction of self-determination on the British and French Empires (the so-called process of decolonisation) had to await the outcome of another World War. Ironically, in this surrealistic application of self-determination after World War I, a people who had never been colonised before were to be put under a form of tutelage.

Moreover, in carrying out their duties as mandatory powers, both the British and French governments were not always or often motivated by the declared aim of preserving the interests of the local inhabitants and preparing them for independence (a disguised form of *mission civilitrice*) for which the indigenous populations were less grateful than they were expected to be, as can be gleaned from the numerous revolts which were harshly suppressed and occasioned the first incidence of the use of poison gas.

Additionally, the two Powers were working assiduously from the early 1920s to create favourable conditions for the eventual establishment of the State of Israel in Palestine. This can be discerned for example from the 1923 Paulet-Newcombe agreement on the delimitation of Palestine and Syria, in which it was agreed that the Syrian border would stop 10 meters short of Lake Tiberias. This is like delimiting the boundary of the U.K. to stop a few meters before the sea. The only explanation for this exotic, and as far as I can ascertain, unique, delimitation method is that Lake Tiberias is the sole sweet water reservoir and had to be wholly situated within the Palestinian mandated territory.

However, when one puts aside questions of over-arching imperial policy and the aim of creating favourable conditions for the creation of Israel, the policy of the British Mandate with regard to questions relating to the rule of law at the domestic level was exemplary.

There was respect for the independence of the judiciary and in Jordan (Trans-Jordan as it was then called) the British administration was notable for being totally free of corruption, efficient, relatively nonintrusive and well tuned to local conditions.

But the old world was shattered – in previous centuries, most of the laws that were applied were not state-made or state-enacted.[11] Rather, they were developed through the jurisprudence of judges and jurists and juris-counsels.

Respected and acknowledged jurists would give opinions following earlier precedents and would distinguish them under certain conditions. Those *fatwas* were collected in compendia and judges drew on them when deciding a case. This process was repeated in every generation and resulted in a continuous and subtle reinterpretation of the *Shari'a*. By contrast, the legal role of the Caliph or the Sultan was one of occasional legislative intervention coming into play only when called for or when special needs arose.[12] Before going further, let me say that the word *fatwa* nowadays conjures up images of wild-eyed fanatics issuing statements that invariably have something to do with blood-shedding. But many classical *fatwas* were masterpieces of legal reasoning and were noted for humanity and social

[11] Occasional legislative action took place in the form of Sultanic orders and Kanons. See in general, Wael Hallaq "An Introduction to Islamic Law".
[12] Wael Hallaq, "An Introduction to Islamic Law", p.40

justice. The jurists and judges in effect became the locus of legitimacy and were often called upon to express the will and aspirations of those belonging to the non-elite classes. In such a milieu, the rule of law assumed a different meaning from those already referred to, and also from the modern liberal democratic meaning of the expression. It meant that the state saw itself as a state under the law.

Already in the 19th century, European concepts of government – particularly of the relation of state and law – were permeating the Ottoman Empire and the idea of codification – fashionable in continental Europe – coupled with notions of legal positivism – were prevalent. So a constitution was adopted in 1876 and the tenants of Islamic law were codified in the *Mecelle* between 1869 to 1876, entering into force in 1877.[13]

By the time the Mandates were established this trend had become the norm. The legitimacy of the law was now being sought in the enactments of the state that passed through a certain legislative process. The impact that this had on the status and quality of judges was enormous. They were reduced to interpreters of the will of the state.

Few people could capture those momentous changes better than Arnold Toynbee. In his seminal "Study of History" he writes:

> "It is a rule and this rule is inherent in the very nature of the declines and falls of civilizations – the demand for codification reaches its climax in the penultimate age before social catastrophe, long after the peak of achievement in jurisprudence has passed, and

[13] The Constitution was influenced by the Belgian Constitution of 1831 and the Prussian Constitution of 1850, see Gabor Agoston and Bruce Masters and , Encyclopedia of the Ottoman Empire, New York 2009.

when the legislators of the day are irretrievably on the run in a losing battle with the ungovernable forces of destruction."[14]

3. I turn now to the third period that is the period of national independence – when the status of judges was dealt a further blow shortly after the end of the Mandate period.

For a short time, the emergence of a sustainable liberal democracy was a possibility in a country like Syria for example, but soon a series of *coups d'état* brought army officers to power, while in Egypt Nasser came to power through a *coup d'état* (in Egypt there is a bad habit of calling every army coup a revolution). There and elsewhere in the Arab world it did not take long before the army officers decided to purge the judiciary; to introduce revolutionary justice; to purport to speak on behalf of the proletariat and the peasants. All power was to be concentrated in the state and the law was now blatantly no more than an instrument of the state – more accurately for those at the helm of the state. Legitimacy was now sought in a tutti-frutti of slogans ranging from liberating Palestine to ideas borrowed from National Socialism, Stalinism, Nationalism and Secularism: concepts that do not sit together well.

The decline in status and relevance of the judiciary was nothing short of disastrous for the rule of law, for I agree with Mark Mulholland Q.C. – earlier quoted on Bunga Bunga – when he says:

> "As once observed by Lord Judge, it is the judges who are the guardians of the rule of law. That is their prime responsibility and in real terms, external vigilance by the judiciary means that they are

[14] Toynbee, "A Study of History", Universal Churches, Vol. 7, London 1954, p.279.

> steadfastly alert for the first incursion by the executive into propriety."

The problem is not specific to the Middle East. Even in a democratic society with established traditions, a government that commands a majority will be tempted to encroach on fundamental liberties and consequently the mettle of which judges are made is put to the test. A telling example was when the late Prime Minister Indira Gandhi introduced restrictive laws especially in the area of preventive detention. In a celebrated case popularly known as the *habeas corpus* case, the more senior judges of the Supreme Court of India ruled in favour of the State's right for unrestricted powers of detention during 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."

That dissent 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.

The *New York Times* wrote of his opinion:

> "Submission of an independent judiciary to absolute government is virtually the last step in the destruction of a democratic society."

Happily, the Indian Supreme Court has since contributed much in upholding, indeed expanding the basic rights of Indian citizens. How I wish there were more justices like Judge Khanna in the Middle East. My sense of sadness is all the more acutely felt because the history of this region is replete with anecdotes about judges and jurists who didn't hesitate even at great peril to themselves to stand up to sword-yielding despots.

I shall mention only one episode before moving on to our present times, for this episode seems unique in showing the courage and at the same time the immense prestige that judges and jurists enjoyed.

In 1258 Hulagu, Genghis Khan's grandson, captured Baghdad and brought the Abbasid Caliphate, which was a universal state, to an end. The Mongols then ravaged Syria and sent a letter to the Mamluks of Egypt threatening the same consequences as they had visited on numerous cities and lands if they did not surrender,

The Mamluks, who were Central Asian Turkish slaves and had become the masters of Egypt, were acutely short of money to raise an army to meet the Mongols; they turned to the preeminent jurist of his time, Ibn Abdulsalam, for a legal opinion, a *fatwa*, permitting them to impose new taxes. (Islamic law does not permit the imposition of any new taxation unless there is no other way – President Reagan would have been very happy had he lived in those times, except of course for the looming Mongol threat). The old jurist, Ibn Abdulsalam, would not give an opinion unless the leading Mamluk princes sold all the gold and silver they had accumulated and unless those of them who were nominally slaves of the public treasury were manumitted in a public auction that actually took place over their protests.

Only then did he issue that opinion to raise new taxes. In the same year, the Mamluks defeated the Mongols at Ain Jalut (Goliath's Spring) in a victory that changed world history.

There are many lessons for our times from that episode; especially when we consider how the claims of external threats and national emergencies flow too easily from the official mouth.[15]

Three years ago, when President Mursi of Egypt, rather ineptly and unwisely, granted himself sweeping powers in the interim period until a new constitution was in place, the top judges of Egypt condemned this move as an attack on the independence of the judiciary. I thought at the time that the old fire that Ibn Abdelsalam had lit almost seven hundred years ago had not been totally extinguished; or that those judges were perchance inspired by Judge Khanna or by the jurisprudence of British courts – decisions like the *Belmarsh* case are widely consulted and admired. My happiness, however, was short-lived; for later when a *coup d'état* brought the army back to power the very same judges with notable and rare exceptions became the epitome of compliance and subservience when draconian powers were taken by the military in comparison to which Morsi's ill-advised decree pales. Today the judiciary of Egypt is sadly an instrument of a state not known for its subtlety: condemning youths to long prison sentences for peaceful demonstration and, earlier this year, sentencing in a summary trial 528 persons to death.[16]

We are all agreed that the independence of the judiciary is a *conditio sine qua non* for the efficacy of the rule of law. But what if the judges have been

[15] A variation on the famous line by Hafiz of Shiraz: "they flow too easily from the mouth, the words of love." Arberry, "Fifty Poems of Hafiz" Cambridge University Press, 1974.
[16] The UN has described this rise in conviction as "unprecedented".

appointed by a police state or a corrupt regime? What if they are part of what is commonly known as the "deep state"?

Sir Sydny Kentridge Q.C. wrote:

> "It [the independence of the judiciary] is secured in part by laws which give judges security of tenure, and in part by insuring as far as possible that they are persons of integrity, appointed on merit rather than by reason of political connection."

There is a dilemma here and ultimately no matter how much we praise the courage of individual judges, the rule of law depends also on the concurrent commitment of the government; on the awareness of the populous – when the Mamluks of Egypt initially – and understandably – refused to be publicly auctioned – Ibn Abdulsalam left Cairo and most of the population followed him until the ruling class relented.

The rule of law also depends on the existence of a robust Bar. I was gratified, as a matter of professional commitment, to read about the action (*action directe*) that the Bar Council, the Law Society, and the Chartered Institute of Legal Executives took, six days ago by writing to MPs urging them to protect judicial review.

The rule of law can also be severely curtailed, indeed undermined, by legislation. Consider for example a constitutional article stipulating that the right of peaceful assembly is guaranteed in accordance with the law when no law exists at the time or when the law in question is vague. Such texts exist in most Arab constitutions including the Jordanian constitution. Or consider general statements cast as constitutional provisions like: torture is

prohibited, and evidence obtained through torture is inadmissible in a court of law. The value of such a provision would only be real if the law were to shift the *onus probandi* to the state to prove that there was no torture; if the law were to provide for investigations into allegations of torture and compensation for victims of torture. A very dangerous practice also is the drafting of criminal law texts in general and elastic formulae that defy objective verification. A comic/tragic example is article 118/2 of the Jordanian Penal Code that criminalises an action "that disturbs relations with a foreign state".

In many cases in the Middle East such texts are drafted by the security services and sent to rubber stamp parliaments. When the state thinks of legal reform as no more than a *vitrine* to impress the outside world this means that it has abdicated its responsibility to uphold justice. And there is little that the judges can do to ameliorate the situation.

The contrary is true, the Human Rights Act of 1998 is thought by many commentators to have been responsible for the fact that the House of Lords adopted a different approach in the Belmarsh case from the traditional one where courts had been generally unwilling to second-guess the government, when it asserted that some step or another had to be taken to uphold national security.

* * *

4. Let me now turn to the present period, the fourth milestone as I had termed it in an attempt to give some temporal structure to this lecture, and which I fear may have become lost to wayfarers due to my many digressions. Under this heading, I shall deal with the impact of terrorism, the so-called

War on Terrorism, also dubbed the war to establish democracy in the Middle East, which reminds me of what the Duke of Wellington famously said:

> "If you believe that, you'll believe anything."

This war has been going on at least since the Soviet invasion of Afghanistan, and consisted mostly of covert (and sometimes not so covert) action by Cold War warriors intent on seizing a golden chance to hasten the collapse of a Soviet Union already perceived by incisive observers as *l'empire eclatée*.[17] The first mujahideen were mostly romantics like those who travelled to fight in the Spanish Civil War. President Reagan was generous with his praise, even comparing them with the founding fathers of the United States.[18] "What went wrong?", to use the words of Bernard Lewis. First, they splintered into sectarian groups after the defeat of the Soviets, intent on killing fellow Muslims of a different sect. This deviation owed its reasons to regional rivalries and to indoctrination. Secondly, the reality and horror of war transforms people, as you have learned in this country and in the United States from the experience of returning soldiers. Any sane and humane society seeks to rehabilitate its errant sons. But the abandonment of Afghanistan and its people was matched only by the abandonment of those persons by their own countries. And they became the object of suspicion and ill-treatment by regimes that thought they could do business as before without taking notice of the fundamental changes that have taken place in the world and in their societies. Herein lies, I think, a partial explanation for subsequent and horrendous events.

---

[17] Hélène Carrère d`Encausse, "L'empire Eclatée", Flammarion, 1978.
[18] Remarks at the Annual Dinner of the Conservative Political Action Conference March 1, 1985.

With the coming of the neo-conservatives to power in the United States, espousing a grand project to turn the existing informal American empire of the world into a formal one, which to them had become "do-able", the so-called War on Terror became an inevitability.[19] The atrocity committed on 11 September 2001 turned this war into a open and full-fledged one.

In this war, a new jargon was developed, and to a lawyer it was not a pleasant sounding one. The very titles betrayed malice aforethought to the rule of law: regime change, secret prisons, collateral damage, not going down the UN path, creative chaos, reliable intelligence, extraordinary rendition, enhanced interrogation techniques. Few would also doubt that the neo-conservatives held the rule of law in contempt, at the international level for sure, but also their own law seen by them as no more than an obstacle to be circumvented by clever lawyers, the extra-territoriality of Guantanamo being a prime example.

When the law did not permit them to carry out particularly egregious acts – for we should not forget that the United States has a long tradition of espousing the rule of law – they turned to their friends and allies to do the dirtier work for them. Unfortunately, there were too many who were too eager to oblige.

To the intelligence community in the Middle East and elsewhere, the war on terror proved a bonanza. In his book "Plan of Attack",[20] Bob Woodward explains how money flowed to regional Middle Eastern intelligence services. Equally ominously, this war was a chance for this fraternity to

[19] James P. Pfiffner, Mark Phythian, "Intelligence and National Security Policymaking on Iraq: British and American Perspectives", Texas, 2008 p.32 {emphasis added]

[20] Woodward, "Plan of Attack", Simon & Schuster 2004.

permeate all aspects of life, in effect to become the masters of the state and not the servants of the state., By contrast, the War on Terror, exposed the local population to unspeakable horrors, particularly in Afghanistan and Iraq and now Syria. In Iraq alone it is estimated that there are five million orphans, "collateral damage" in the parlance of imperial hubris. Very few of the damaged have been able to obtain redress, except in a few notable and laudable cases before British – and Canadian – courts. But how many people have access to such courts? In the Middle East itself, restrictive laws, jurisdictional obstacles, the absence of compensatory provisions in existing laws and the simple poverty of the people have effectively insured impunity to servicemen and, worse still, to mercenaries, also called, in the new Orwellian language, subcontractors.

In the meanwhile, the terrorists have metamorphosed from fighters against the "Evil Empire" into nihilists fighting against themselves, and against religious minorities that have lived peacefully under the protection of Islam for over fourteen centuries. Their interpretation of Islam makes the blood curdle, for they have reduced a great civilisation to an obsession with bloodshed and cruel punishments. Almost every week a woman or a man is stoned for adultery. Ibn Al Atheer, the great Medieval Arab historian, wrote a history of Baghdad after its fall to the Moguls. The following sentence is taken from his famous history:

> "In that year a woman was stoned in Baghdad for adultery, thus bringing to three the number of women thus stoned since the foundation of Baghdad." – in other words, in 500 years.

The choices facing ordinary people in the Middle East are very difficult. I am always reminded of the imperishable words of Yeats in his great poem "The Second Coming":

> "The best lack all conviction, while the worst are full of passionate intensity."

To complete this picture let me remind you that there are people, Jews and gentiles alike, who are currently searching for a calf with some unique bodily characteristics as a sign to rebuild the Second Temple in Jerusalem – obviously we have no monopoly on fanatics. While with similar passionate intensity the building of illegal settlements and the adoption of increasingly racist laws and measures continues, the chances of a dignified peace in the Holy Land have all but evaporated.

* * *

We may conclude from this dim picture that the rule of law is not in the best of health in the Middle East, nor that it is the uppermost consideration on the minds of ordinary citizens. I doubt whether it ever was on the minds of those at the helm of power. Instead, what seems to be on the minds of everyone are eschatological expectations and millenialistic concepts ominously shared – though in slightly different versions – by the three monotheistic religions.

As I contemplate the present untenable situation in the Middle East, I feel we are watching a replay of the "Eastern Question" – that period in the second half of the 19th century when threats and diplomacy characterised European Powers' dealings with the Ottoman Empire and their increasing

intervention into its internal affairs – with the important difference that the over-arching empire has been replaced by weak sovereignties obsessed with security.

* * *

What we see now in the Middle East is not only the result of recent events. It has its roots in classical and Biblical history and more recently in the replacement of an old tradition of government and law by an imported and alien one. The net result of this has been the reduction of the judiciary, who had been the cornerstone in upholding the respect for the rule of law, into state functionaries (*petits fonctionnaires*), notwithstanding the grand declarations in various constitutions about the independence of the judiciary. In the past few decades, the War on Terror and the concurrent decline in efficacy of small and weak states and the constant interference from outside, have brought the rule of law to new depths.

But this, I feel, is an aberration. If we are shackled, we are shackled not by the past but by the present. I have devoted a considerable part of this lecture to the history of the area as a *correctif* to the commonly-held but mistaken idea that what we see today is a reflection of our tradition and history.

At first glance, it may seem, especially as we contemplate the fate that has befallen the Arab Spring, that we are in that state best described by Matthew Arnold in his great poem, "Stanzas from the Grande Chartreuse" as

> "wandering between two worlds, one dead, the other powerless to be born".

I can only hope that in its long history; in its past cosmopolitanism; in its ability to rise again – phoenix-like – after disasters, that the Middle East region will find an inspiration to walk back from the abyss. For all the complexity of the problems, the profundity of the challenges and the malaise that permeates the region, I still find solace and hope in the poetry of Hafiz of Shiraz:

> "Joseph is back in the land of Canaan
> A little changed by the passage of time
> But he is back so have no fear
> And in this house of sadness there is a rock on which a rose will bloom
> So have no fear."

On this happier note, I wish to thank you all for your patience.