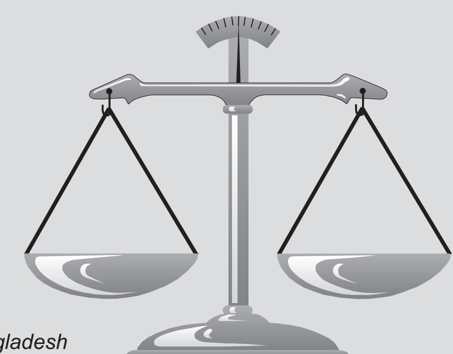

LAW & our rights

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"ALL CITIZENS ARE EQUAL BEFORE LAW AND ARE ENTITLED TO EQUAL PROTECTION OF LAW"-*Article 27 of the Constitution of the People's Republic of Bangladesh*

Star LAW *analysis*

National security laws: International legal aspects

DR. AHMED ZIAUDDIN

ONE issue that states around the world have all been struggling with is security: to define what constitutes national security, enact appropriate provisions, ensure applications and provide security.

At the outset it is important to remember that the states have duties to protect their nationals and those living within their territories including protection of their national frontiers.

In this fast evolving world, nature and actors of threats to security change frequently and unexpectedly. In fact, non-state actors, organisations, loose networks and even unconnected individuals could pose grave national security threats than ever before in present days as opposed to conventional threats emanating from another state or states which premised international relations so far.

States have responded very differently to traditional and to these new brands of national security threats and concerns largely by introducing new laws and measures, and even, on occasions, acting beyond laws.

There are widespread legitimate concerns about impacts of floods of new laws both at international and national levels on individuals and societies. Questions abound whether, on the one hand, laws intended to provide safety, security and freedom in reality are restricting freedoms, or on the other hand, restrictive measures put in place deny space and freedom that in turn create further or aggravate resentments.

Many believe that the world changed on 9/11 in 2001: bunch of young men blew themselves and the planes they were on, used those aircraft as weapons of mass destruction and killed numerous unsuspected civilians. These individuals and those associated with them committed a serious crime under international law, crimes against humanity.

Since 9/11 and even before, nations around the world experienced their own versions of 9/11, UK's 7/7 and in case of Bangladesh, the 17th August 2005 when there were synchronized bombings all over Bangladesh, except in one district. Although some would argue that enough early warnings were there but nonetheless, no country ever experienced what Bangladesh did on that day, peace time bombings in all cities and towns in a widespread and systematic manner.

South Asian nations, from Afghanistan to Bangladesh, Sri Lanka to Nepal, witnessed, experienced and suffered one major incident after another, latest being the bombing of daily commuters in Mumbai.

The Security Council of the United Nations responded quickly following the attack on US on 9/11 and passed number of resolutions and set up a mechanism to monitor implementation. The Resolution 1373 of 2001 established a Committee of the Security Council, consisting of all the members of the Council, to monitor implementation by all States of the UN the measures against terrorism. UN already had numerous resolutions and dozen or so treaties to combat terrorism, which many States did not ratify. However, because of binding nature of Security Council resolution, we notice proliferation of security laws including in countries of South Asia.

This Counter Terrorism Committee, which receives reports from the States and analyses compliance of Security Council Resolution 1373 issues guidelines and shares expertise on counter terrorism matters.

The new versions of security laws adopted in different countries have surprisingly common features, such as, newer crimes, extra-territorial application of laws, civilians tried under military commissions, monitoring of correspondences, wiretappings, preventive detentions, prolonged and indefinite detention with or without judicial process, shifting burden of proof on the accused, withholding identity of witnesses, making confessions before police admissible, giving prosecutor power to deny bail, banning of organisations, allowing preemptory actions, authorising governments to declare emergency, to designate areas for special measures, arrests without warrants, detaining members of the families of the persons sought, withholding details of disappeared individuals, use of excessive force at the time of arrest, aggressive and invasive search, shoot to kill, indemnity of security personnel against legal process, barring suspects freed on bail to visit public places, sanction of tortures, contracting out tortures, aggressive interviews, house arrest, limitation on travel within and out of the country, imposing restrictions or otherwise banning media to report, vague imprecise and wide definition of crimes, harsher punishments, more death sentences, authorising or tolerating extra-judicial executions, restricting fair trails, denying judicial review, limiting access to judiciary, reduced accountability of security forces, summary trials, reduced or denying defence rights, limiting access to lawyers and families, silencing dissenting views, orders preventing entry to particular areas, banning of public gatherings, criminalisation of political and religious activities, sanction of custodial violence, monitoring money transfers and transactions, restricting access to information and knowledge, profiling individuals and communities, relaxing data protection laws etc, and if you like, this list could go on and on and on.

This illustrates how governments around the world have responded to ensure national security concerns to ongoing and new threats. It's true that we live in a much more dangerous world than anytime before, where, because of globalisation, technology and other factors, smaller groups and even individuals could cause havoc as people of Oklahama City experienced some years back, when, a disgruntled loner brought down a federal building with fertilisers and other implements and killed hundreds.

However, the challenge is, how to approach these threats coming form all directions mixed with ideology, religion, nationalism, ethnicity, culture, economic and natural resources. One option is to adopt all or some of the measures listed above, which, in fact, numerous states have already done.

Such restrictive and repressive approach got two problems, firstly, its impacts are often for shorter periods and threats not only persist, but in cases aggravate, which then requires even harsher measures.

Take airline safety as an example, which, by the way, is still the safest mode of transport. In early seventies, few individuals evaded security, boarded planes with guns and grenades and hijacked airplanes. Of course, search and security was strengthened along with laws against hijacking. Then the 9/11 perpetrators hijacked the planes virtually without any significant weapons. Again, a host of stringent laws followed and along with procedures to secure against hijacking. Sophisticated scanners and secondary searches became routine practice, until revelation of alleged plots to use liquid explosives to blow off transatlantic flights from London. It seems, terrorists set the agenda and the governments react with restrictive measures and new laws!

The second problem is, most of these security laws contravene international norms and laws that evolved out of ashes of First and Second World Wars which resulted in monumental destructions thankfully the world has not witnessed since. It appears that states to address such threats have literally tossed off universally accepted norms, practices and mechanisms.

The Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the American Convention on Human Rights, the African Charter of Human and People's Rights, the Arab Charter of Human Rights fairly balances national security concerns and fundamental freedoms, which these restrictive laws are intended to protect.

The International Covenant on Civil and Political Rights provides derogating mechanism in case public emergency. Article 4 states, 'In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin."

In other words, derogating measures must be of an exceptional and temporary nature. Moreover, ICCPR requires that some rights cannot be derogated from under any circumstances whatsoever such as, right to life (article 6), prohibition of torture or cruel, inhuman or degrading punishment (article 7), the principle of legality in the field of criminal law (article 15), the recognition of everyone as a person (article 16), freedom of thought, conscience and religion (article 18) etc.

Torture, for example, is absolutely prohibited under Article 2 (2) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which no creative interpretation of law could justify. The provision is very clear, "No exceptional circumstances whatsoever, whether a state of war or threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture". Article 3 of the Convention also provides an absolute prohibition on expelling, returning or extraditing a person to another State where there is risk of torture.

The Convention on the Rights of the Child also applies in case of emergencies and in that, all rights of the child, meaning persons under 18 years of age, must be protected even during emergency periods.

Internal Security Forces

In addition to looking at the security laws, it is important that security forces, which often apply these laws, be examined. To address security concerns, governments create new security forces, remodel or give extra powers to existing forces. Equally, most allegations of violations are labeled against members of forces.

The United Nations Code of Conduct for Law Enforcement Officials adopted by the General Assembly was intended to have universal applicability. It certainly is an important guideline with which to measure the internal security forces, but there seems to be an absence of clearly defined international standards for accountability and operations of the internal security forces, such as, an International Convention on the Internal Security Forces.

The States obviously are duty bound to create institutions to promote and protect human rights, which is what internal security forces are supposed to do, but such laws and institutions don't have minimum set standards to reach. Human rights and other norms have set parameters, but it is important that a common universally acceptable standard is set for all, as other instruments have done.

Such a Convention could elaborate on nature of internal security forces, its legal basis, provisions relating to control of such forces, a code of conduct, recruitment and training, other operational aspects, consequences of violations of rights, monitoring and accountability by the government as well as by media and other stakeholders etc.

Both activists and experts present could take it up and discuss and endeavour to work for such an instrument.

In fine, both laws and security forces are there to protect rights and that should be operative part of any legal measures, and examined accordingly. The measuring rod of a law should be, whether it protect rights or not.

The author is Consultant, International Law.

This is the abridged version of the paper presented at the Regional Discussion Meeting on "Security and Law: South Asian Perspective," August 19-20, 2006, Dhaka.

LAW *alter views*

AMERICA'S CONSTITUTIONAL SHOWDOWN

Arguments against Bangladesh's wiretapping ordinance vindicated

CHAUMTOLI HUQ

LEAVE it up to a federal judge in Detroit, Michigan (home to one of the largest Arab communities in America) to tell the Bush administration that the Emperor has no clothes when he ruled that the government's eavesdropping programme is unconstitutional. The fancy legal garb Bush asserts he has is the inherent power under the United States Constitution to make law by executive fiat and to disregard the Bill of Rights. If there was any ambiguity as to who had the last say on the law, Judge Taylor cleared it when she wrote in ACLU. National Security Agency (NSA) (August 17, 2006): "There are no hereditary Kings in America and no powers, "not created by the Constitution". The legal issue in the decision ACLU v. NSA was whether the National Security Agency's policy of wiretapping international telephones and Internet communications is constitutional. NSA is a United States intelligence-gathering agency. President Bush authorised a programme of eavesdropping without a warrant, similar to the President of Bangladesh who amended the Telecommunication Act of 2001 authorising law enforcement to eavesdrop on telephone conversations without any legislative change in the Bangladesh Parliament. (The Daily Star, December 13, 2005). So, now that the wiretapping law has been ruled unconstitutional here in America, will Bangladesh rescind its ordinance amending the Telecommunications Act of 2001? After all, we are in a post "war on terrorism" legal era where misguided anti-terrorism laws are exported as well as other consumer goods irrespective of its local fitness. The skeptic in me says probably not, but I remain hopeful. Human rights activists never seem to benefit from this transnational flow of law. It is as if there is a spam at the imaginary jurisprudential border where we can accept at times verbatim the anti-terrorism legislative proposals from the United States, but we weed out all the constitutional limitations. I am not opposed per se to nations sharing and learning from the legal systems of its peer nations, but this sharing, dating back to colonial times, always seems to flow in one direction. Thankfully, a federal judge vindicated what constitutional scholars here and in Bangladesh have been saying: You cannot eavesdrop on private telephone conversations without a warrant. Progressive legal activists are always accused of focusing on what is bad about America. Here, in this article, I will tell you about what is good – jurists like Judge Taylor. If Bangladesh wants to follow the wonderful tradition of American constitutionalism, please read Judge Taylor's decision on the Bill of Rights and separation of powers and rescind its own unconstitutional wiretapping law.

Judiciary and the Executive

Plaintiffs in the NSA case who challenged the Bush administration's authority to eavesdrop without a warrant were journalists, researchers, and lawyers who have regular communications with persons in the Middle East for legitimate professional reasons. Plaintiffs claimed that the NSA's wiretapping programme violates their right to free speech, association and privacy as well as their Fourth Amendment right against unreasonable searches and seizures. Lawyers complained that they were unable to effectively represent their clients because the government was monitoring their calls. Researchers and journalists made similar allegations that impeded their right to associate and engage in scholarly conversations with persons in the Middle East. The Bush administration argued that the government has the legal authority to eavesdrop on the conversation of its citizens without a warrant. It relies on Congressional authorisation to use military force to address terrorism as the justification for the eavesdropping programme. But Congress only authorised war with Afghanistan.

Plaintiffs also argued that the claim violated Americans' constitutional doctrine of separation of powers. Separation of powers is a basic principle of American constitutionalism that every child in his or her civics class learns. That is that the executive, legislative and judiciary are set up to serve as checks and balances so that no one branch of government exercises greater power. The court in the NSA decision notes this: It was never the intent of the framers to give the President such unfettered control, particularly where his action blatantly disregard the parameters clearly enumerated in the Bill of Rights. The three separate branches of government were developed as a check and balance for one another. (page 24)

Here, the Bush administration not only exceeded its authorisation granted to it by Congress but also exceeded authority granted under the constitution. When a ruler is thought to be above the constitutive legal document that formed the nation, he is not a democratic ruler but a monarch.

Not surprisingly, due to Judge Taylor's sound legal decision, republicans have begun to personally criticise her as a liberal and biased judge. She is an African American jurist who was appointed to the federal bench by President Carter. Carter since his presidency had been a big promoter of constitutional rights and human rights. The New York Times editorial correctly praised when it wrote that Judge Taylor "asserted the rule of law over a lawless administration."

Lessons for Bangladesh

Bangladeshis should take heed to the district court's ruling that wiretapping without a warrant is unconstitutional. When the Government of Bangladesh passed the amendment to the Telecommunications Act, it referenced the law of the United States. The justification for eavesdropping was the same as that advanced by the United States, namely the surveillance would help in law enforcement's efforts to combat terrorism. The court has now accepted what the scholars and journalists have been saying about the unconstitutionality of the wiretapping without a warrant. We should rescind our wiretapping law. Why? Hark, there are no hereditary Kings anywhere on the globe. Not even in Bangladesh.

Chaumtoli Huq is a lawyer residing in New York.

RIGHTS *column*

International Day for the Remembrance of the Slave Trade and its Abolition

Message from Koïchiro Matsuura, Director-General of UNESCO

The International Day for the Remembrance of the Slave Trade and its Abolition is an important occasion to remind the international community of the particularity of this tragedy, of its persisting consequences for modern societies, and of the role played by both enslaved Africans and abolitionists in bringing to an end this crime against humanity.

The decision of UNESCO's General Conference in 1997 to proclaim 23 August "International Day for the Remembrance of the Slave Trade and its Abolition" was made in response to the great interest and expectations raised by the launching of the UNESCO Slave Route Project in 1994. Aware that ignoring or concealing major historical events such as the slave trade and its abolition is in itself an obstacle to mutual understanding, international reconciliation and, consequently, peace, UNESCO's Member States decided that an international day of commemoration was needed in order to increase awareness and understanding of this tragedy. As a symbol of the negation of the most basic human rights, the slave trade and slavery must be brought before the conscience of humanity. On account of the exploitation and extreme violence that characterized the slave trade, the monstrous arguments that sought to justify it and the paradoxical interactions to which it gave rise, this tragedy remains at the very centre of the burning issues of today's world. Our relationship to this past forms part of the current debates on how to deal with painful memories, construct national identities and develop new forms of citizenship.

The International Day for the Remembrance of the Slave Trade and its Abolition provides us with an occasion for common reflection, not only on the historical causes, the implications and the modes of operation of this tragedy, but also on the extraordinary intercultural dialogue among peoples it generated in Europe, the Americas, the Caribbean and the Indian Ocean -- and indeed the whole world.

Recognition of our ethical obligation to remember the victims of past injustice was strongly enhanced by the activities that took place during the 2004 International Year to Commemorate the Struggle against Slavery and its Abolition. The United Kingdom's commemoration next year of the Bicentenary of the Abolition of the Slave trade by the British Parliament will likewise reaffirm the vital need to educate new and future generations in a spirit of mutual understanding, respect and dialogue, promoting awareness and enjoyment of cultural diversity and through this helping to build the foundations of lasting peace.

Source: UNESCO.