# Sour rights



"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

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# LAW Vision

# The protection of minorities: A critical challenge for everyone

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HE recent press reports from different parts of Bangladesh on the alleged repression committed against the minority community, the Hindu community in particular, is regrettable and anti-human rights. In the last three decades, human rights abuses against the Hindu minority in Bangladesh have largely gone unreported. Sadly, Bangladeshi nationalism has not been fully successful to accommodate the Hindu minority with propriety. The continuance of the Enemy Property (Custody and Registration) Order II of 1965 of the then East Pakistan Government albeit, under a new name, for about thirty years in independent Bangladesh testified the deplorable trend. The infamous Vested Property Act was repealed only last year. It is also unfortunate that the present Home Minister, despite admitting 'some incidents', had, in a wholesale manner termed the press reports of repression on minority people exaggerated and unfounded.

In today's world, multi-ethnic states are the norm. The traditional nation-state, where a distinct national group corresponds to a territorial unit, has become an endangered species. Globalization and the increasing movement of people across borders threaten to kill off the nation state once and for all. However, some myths resist reality, and majority or dominant cultures in countries around the world still seek to impose their identity on other groups with whom they share a territory. The South Asia is a stark reminder of this

The state religion of Bangladesh, as incorporated in the Constitution of Bangladesh by the former dictator cum President H.M. Ershad, is Islam. The purpose was to cash in religion for heinous political gains. About 87 per cent of the population of Bangladesh is Muslim. However, the minority Hindus, Buddhists and Christians have the right to practice their religious beliefs. Article 2A of the Constitution of Bangladesh clearly states that, "... other religions may be practiced in peace and harmony in the

### International standards and monitoring

In 1992, the General Assembly adopted the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities. As the only United Nations instrument that specifically addressed the special rights of minorities, the Declaration can be viewed as a point of reference for the international community. It includes a list of rights that minorities are entitled to, including the right to enjoy their own culture without interference, and the right to participate effectively in decisions at the national level, among others. States are requested to take measures in the field of education in order to encourage knowledge of the history, traditions, language and culture of minorities existing within their territories. Also, States are asked to implement national policies and programmes with due regard for minority interests.

Multilateral monitoring of the compliance of states to their international commitments with regard to protecting minority rights has increased transparency. Within the United Nations system, this responsibility is shared by the Commission on Human Rights, the Sub-Commission on the Prevention of Discrimination and Protection of Minorities, the Committee on Economic, Social and Cultural Rights, and the Committee on the Elimination of Racial Discrimination. A Working Group on Minorities has also been established in order to review the promotion and practical realization of the Declaration. It serves as the focal point of the United Nations in the field of minority protection and is the main forum for constructive

dialogue on the treatment of minorities by Governments.

Although all of the above mentioned bodies are integral to the promotion of minority rights, it is the reports submitted on behalf of the State parties to the International Convention on the Elimination of all Forms of Racial Discrimination that provide an overview of the status of minorities within a specific country. The Committee on the Elimination of Racial Discrimination (CERD) meets twice a year to review State party reports as well as shadow reports submitted by NGOs. In extreme cases, the Committee implements early warning measures to assist Governments to prevent problems from escalating into conflicts and identify cases where there is a lack of an adequate legislative basis for defining and criminalizing all forms of

### What needs to be done at national level?

No matter how effective international mechanisms might be, and they are far from being sufficiently so at present, there is no substitute for a concerted domestic initiative of implementing national

### The Finish approach

Although no country has a perfect record on minority rights, a country like Finland for example has worked hard to implement legislation in order to promote good ethnic relations among its population. The Swedishspeaking Finns are the largest minority in Finland at 5.71 per cent of the population. The status of the Swedishspeaking Finns is exceptional compared to that of other national minorities, due to the fact that Swedish is, in addition to Finnish, an official language of Finland. In recent years, the Government has redoubled its efforts to settle the question of land ownership by the Sami, the indigenous people of Finland. Finnish, Swedish or the Sami language is taught as the mother tongue of the student, and under the new legislation, children who reside in Finland permanently, thus including immigrant children, have both the duty and the right to go to comprehensive school.

obligations towards these rights guaranteed internationally. The implementation and compliance with international human rights treaties and standards are ultimately national issues a reality, which is often lost in the midst of rapid internationalisation of human rights. Good governance plays a vital role in involving minorities in societies and protecting their rights and interests. Through recognition, dialogue, and participation, all the citizens of a diverse society can form a greater understanding of one another's concerns. The media and education have important roles to play in this regard, as do political representatives and community leaders.

Other positives action taken by States include: legislative measures that introduce higher maximum penalties for racially motivated crimes; the use of ethnic monitoring to ascertain the number of persons of particular ethnic and national origin in various kinds of employment and the setting of targets to increase the employment of persons of minority origins in fields where they were underrepresented; the establishment of new advisory bodies on matters relevant to combating racism and intolerance, including the launch-

prevent racial discrimination and increase tolerance; and the establishment of human rights institutions and ombudspersons for ethnic and racial equality.

What is happening in some parts of Bangladesh against the backdrop of peaceful parliamentary election of October 1, 2001, is not conducive to the growth of liberal democracy. The government, different political, social organisations and all concerned to come forward to resolve the problem. The government should ensure secure rehabilitation of the affected persons by providing them adequate compensation, publish reports of the incidents traced out by the government as well as taking legal actions against the offenders. Members of the society including students, teachers, social workers and scholars to take long term initiatives to strengthen communal harmony in the country. Tendency to make the minority people scapegoats for political belief must be resisted.

State authorities need to ensure that minorities enjoy the fundamental right to equality, both in written legislation and in society at large. The roles of local government, civic organizations and NGOs are important in this respect. Police, prosecutors and judges need to be more aware of what constitutes racial discrimination and racially motivated crimes and in some cases, changing the composition of police forces to better reflect the multi-ethnic communities they serve may be appropriate. It is also incumbent upon minorities to integrate themselves into their communities. Other recommendations include monitoring hate speech, promoting empowerment through education, and ensuring adequate housing and access to health care.

### Human Rights are for everyone

Politically motivated statements and multifarious propaganda are spreading misconception about the oppression and leading the crisis towards a complicated ending instead of towards a fair solution. Whatever might be the extent of the incidents, it was clear that there was oppression on the minorities and that should be stopped immediately. All concerned should also bear in mind that a single instance of act of terrorism is enough to panic the people of a whole community, at least, psychologically. The Hindu minority has little effective leadership. Its only response to the situation has been to vote with its feet. The divisive and conservative approach of the community leaders, in fact, contributes to the growth of mutual

The mere holding of periodic elections is not the only yardstick of measuring democracy or health of a society. Religious intolerance can alone destroy the fabric of harmony from the society. Any society that claims itself as democratic should have no place for communalism. As a new century begins, each segment of our society needs to ask itself certain questions. Is it sufficiently inclusive? Is it non-discriminatory? Are its norms of behaviour based on the principles enshrined in the Universal Declaration of Human Rights? Racism, racial discrimination, xenophobia and all kinds of related intolerance have not gone away. They very much persist in the new century and that their persistence is rooted in fear: fear of what is different, fear of the other, fear of the loss of personal security. And while it is recognized that human fear is in itself ineradicable, it is also maintained that its consequences are not ineradicable.

Source of Information: United Nations; Law Watch, A Centre for Studies on Human Rights Law; United

# REVIEWING the views

# Violation of fundamental rights Does it require an extension of judicial control into merits review?

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HIS question underlay the decision of the Appellate Division of the Supreme Court of Bangladesh in H.M Ershad v Bangladesh (2001) Star Law Report, 7 October. In this case the appellant (a former President of Bangladesh) challenged the validity of the seizure and impounding of his passport by the Government, in judicial review on the grounds of violations of his fundamental right as guaranteed by Articles 31,32 and 36 of the Constitution as well as on the ground of Article 13 of the Universal Declaration of Human Rights, 1948 (i.e. of the freedom of movement both within and outside the country). His petition for judicial review was rejected by the High Court Division on the ground that he had not availed himself of the alternative remedy provided by the relevant statutory provision. However, his argument as to the violation of his fundamental right prevailed with the Appellate Division of the Supreme Court, which allowed the appeal. The Government had sought to justify its action in terms of national security. The Appellate Division took the view that the seizure and impounding of the passport were prompted by an ulterior and mala fide motive. There was also a failure on the part of the Government to furnish written reasons for the action, as required by the mandatory statutory provision. This, in turn, exempted the appellant from having to resort to exhaustion of the alternative remedy. Furthermore, the impugned action suffered from a breach of natural justice and fairness. This decision could be taken as a pointer towards the proposition that violations of the fundamental rights require the court in judicial review proceedings to examine the merits of an impugned action or decision. However, the relevant principle supporting such a proposition was not articulated by the court in this case.

## Juridical basis for merits review

The twin pillars of judicial review at common law are (I) the Wednesbury Principle and (ii) the distinction between judicial control of 'legality' and 'merits'. Both these principles are highly spoken of by the English lawyers. The truth is that these two principles have stood in the way of developing an 'intensive' judicial control of administrative action. Thus, even where fundamental rights are restricted 'the threshold of unreasonableness is not lowered'. However, considering the impact of the European Convention on Human Rights in the United Kingdom under the Human Rights Act 1998 and the developing jurisprudence of the European Court of Human Rights and with particular reference to Smith and Grady v UK (1999) 29 EHRR 493, it may be said that the twin pillars of judicial control of administrative action at common law, viz. (I) the distinction between 'appeal' and 'review' and (ii) the Wednesbury Irrationality have crumbled. This analysis of the law has now been confirmed by the recent developments in

Recent developments in English Law

This trend is evident from the decision of the House of Lords in R v Secretary of State for the Home Department ex p. Daly (2001) 3 All ER 433. In this case the Home Secretary introduced a new policy on searching of prison cells requiring prisoners to be absent during the examination of their legally privileged correspondence. The House of Lords held that although any prisoner who had attempted to intimidate or disrupt a search of his cell could be excluded, no justification had been shown for routinely excluding all prisoners whether intimidatory or disruptive or not while that part of the search was conducted. This violated the prisoners' common law right and the right to respect for private and family life under Article 8 of the European Convention on Human

Lord Steyn's speech (with which other Law Lords agreed) was devoted entirely to the question of the approach the court should adopt in judicial review cases in which Convention rights are engaged. This was the issue that was first raised in Smith and Grady v UK (1999) where the European Court of Human Rights had ruled that the orthodox approach of the English Court (that the court is confined in judicial review to considering only the formal validity/ legality of the impugned decision and cannot examine its merits) had not provided the applicants with an effective remedy for breach of their Convention rights under Article 8 of the ECHR because the threshold of judicial review had been set too high. Lord Steyn addressed himself to the question as to whether the formulation of the test for the extended judicial review adopted by Lord Phillips M.R. in R (Mahmood) v Secretary of State for the Home Department [2001] 1 WLR 840 was correct. Lord Phillips approached the case assuming that the European Convention on Human Rights was in force in the United Kingdom at the time and explained the new approach to be adopted as follows.

Lord Steyn thought that Lord Phillips' formulation was couched in language of the traditional Wednesbury ground of review (Associated Provincial Picture Houses Ltd v Wednesbury Corp. [1948] I KB 223) which, in turn was adapted in terms of 'heightened scrutiny' in cases involving fundamental rights by Sir Thomas Bingham MR in R v Ministry of Defence ex p Smith [1996] 1 All ER 256 at 263 (the Smith case was successfully appealed in Smith and Grady v UK [1999]. Lord Steyn expressed the view that " There is a material difference between the Wednesbury and ex p Smith grounds of review and the approach of proportionality applicable in respect of review where Convention rights are at stake" ([2001] 3 All E R at 445). His Lordship stated at (p.446), "First, a doctrine of proportionality may require the reviewing court to assess the balance, which the decision-maker has struck, not merely, whether it is within the range of rational or reasonable decisions. Secondly, the proportionality test may go further than the traditional grounds of review in as much as it may require attention to be directed to the relative weight accorded to interests and considerations. Thirdly, even the heightened scrutiny test developed in R v. Ministry of Defence, ex p. Smith [1996] 1 All ER 257 at 263...is not necessarily appropriate to

the protection of human rights".

Judicial review of policy decisions

The above discussion suggests that judicial control is now covering new grounds so as to move into 'merits review'. However, there might be an important exception to this development. And that is the area of policy decisions. In the context of the linkage of judicial control of governmental actions with the fundamental rights, abandonment of the distinction between 'appeal' and 'review' and the replacement of the Wednesbury principle with proportionality, the question has arisen: At what point should judicial review end and the legitimate sphere of governmental action begin?

While the activist judicial intervention in the sphere of civil liberties is quite proper (because that is the legitimate field of judicial adjudication), the courts should not seek to impose their policy on economic and social issues (because normally these spheres fall within the proper jurisdiction of the executive and legislature). This approach has been vindicated by a decision in the House of Lords in R (Alconbury) v Secretary of State for the Environment, Transport and the Regions [2001] 2 All ER 929 (HL). In this case, the statutory powers of the Minister to call in planning applications and decide himself in light of the government policy (bypassing the normal planning appeals machinery) were challenged as being incompatible with Art. 6(1) of the European Convention on Human Rights which provides for a fair and public hearing by an impartial and independent tribunal. The House of Lords accepted that the Minister acting in this capacity was not an independent and impartial tribunal, but concluded that the deficiency was cured by judicial control to which his decision was open to challenge. However, judicial control of the Minister's decision in this matter need not constitute a rehearing on an application on the merits because the minister, in exercising his statutory powers in the making of a planning policy decision is answerable to Parliament and ultimately to the electorate. In other words, policy decisions in the sphere of planning law are immune from 'merits' review.

It seems that the time has arrived when judicial control needs to move from scrutiny of legality into 'merits' review of impugned decisions/actions, wherever violations of fundamental rights are involved with the exception of policy decisions in social and economic matters. This is what Lord Slynn meant when he said in the Alconbury case ([2001] 2 All ER at p. 976) that the principle of proportionality should be applied right across the board. And the proportionality test "must ultimately result in the question Is the particular decision acceptable? this must involve a review of the merits of the decision" (per Lord Ackner in R v Secretary of the Home Department, ex p. Brind (1991) 1 AC 696 at 762) leading the court to substitute its own judgment for that of the authority's on the matter.

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# LAW watch



Opportunism in the face of tragedy

# Repression in the name of anti-terrorism

**HUMAN RIGHTS WATCH** 

For the forseeable future, much of the world will understandably be focused on efforts to bring those responsible for the attacks of September 11 to justice. In the meantime, some governments may cynically try to take advantage of this struggle to justify or intensify their own crackdowns on political opponents or religious groups. In other places, leaders may exploit the situation to advance unnecessarily restrictive or punitive policies against refugees, asylumseekers, and other foreigners. Human Rights Watch will seek to report any statements or actions of this kind as they occur. Australia

On September 13, Defense Minister Peter Reith cited the attacks in he United States to justify his government's effort to prevent asylumseekers from entering Australia. His remarks came as his government successfully attempted to overturn a court decision that it had illegally detained hundreds of migrants from Afghanistan.

On September 18, Chinese Foreign Ministry Spokesman Zhu Bangzao linked Chinese support for the global campaign against terrorsm to U.S. support for China's campaign against those advocating independence for the Xinjiang Uighur Autonomous Region, a predominantly Muslim area in China's northwest. The Uighurs are the largest of



Lancer drops cluster bombs during a live fire exercise 05 November 2000. An Afghan girl injured in the US-led forces bombardment waits for medication at a hospital near Afghanistan's eastern city of Jalalabad, 14 October 2001.(L-R)

the many Turkic-speaking Muslim groups inhabiting the area. "The United States has asked China to provide assistance against terrorism. China, by the same token, has reasons to ask the United States to give its support and understanding in the fight against terrorism and separatsts." Zhu said. On October 11. Sun Yuxi, another spokesman for the Chinese Foreign Ministry, stated that the Chinese government has 'conclusive evidence" proving that "East Turkestan independent elements" have been involved in terrorist attacks and "collude with international terrorist forces." Yuxi added that "opposing East Turkestan terrorism is also a component part of the international community's struggle against terrorism." His statement marks the first time the Chinese government has referred to Xinjiang as East Turkestan, the name used by Muslims advocating independence of true autonomy for the region.

Egyptian Prime Minister Atef Abeid lashed out at human rights groups for "calling on us to give these terrorists their 'human rights," referring to documented reports of torture and unfair trials. "After these horrible crimes committed in New York and Virginia, maybe Western countries should begin to think of Egypt's own fight and terror as their new model." Egyptian security forces on September 20 arrested Farid Zahran and have since ordered him held for fifteen days of preventive detention. The authorities apparently fear that a demonstration Zahran was helping to organize for September 28 to mark the first anniversary of the outbreak of Palestinan-Israeli clashes would also raise criticism of the government's close ties with the U.S. U.S. Secretary of State Israel

On September 14, Israeli Defense Minister Binyamin Ben Elizier bragged, "It is a fact that we have killed 14 Palestinians in Jenin, Kabatyeh and Tammum, with the world remaining absolutely silent." Prime Minister Ariel Sharon called Palestinian Authority Chairman Yasser Arafat "our Bin Laden". Kyrgyzstan

On September 14, the Kyrgyz Ministry of Interior announced it had conducted a "passport control regime" against "pro-Islamic" activists in the southern part of the country. The government of Kyrgyzstan has been intensifying its harassment of political opponents, independent media, religious groups and ethnic minorities since the reelection last year of President Askar Akayev.

# Macedonia

On September 18, Macedonia Prime Minister Ljubco Georgievski said that he hopes that the attacks on the U.S. will lead NATO to change its policy towards "terrorism" in Macedonia. On September 13, the VMRO-True Party, a leading nationalist party, gloated, "After the destruction of Lesok Monastery [in Macedonia], we said that this would not end here and that sooner or later the Islamic fundamentalists and Taliban would turn against the United States." Many government officials in Macedonia have sought to portray their predominantly Muslim and Albanian opponents as terrorists. In the course of the recent conflict in Macedonia, both government and rebel forces have committed abuses against innocent civilians. On September 20, James Pardew, US Special Envoy in Macedonia, condemned the Macedonian government for seeking political gain from the tragedy.

On September 15, Deputy Prime Minister Abdullah Ahman Badawi took advantage of the attacks to praise Malaysia's Internal Security Act (ISA), which has been used to imprison pro-democracy activists, students, alleged Muslim extremists as well as supporters of jailed former Deputy Prime Minister Anwar Ibrahim. Badawi said that the attacks showed the value of the ISA as "an initial preventive measure before threats get beyond control." The ISA allows for indefinite detention without trial and allows for arrest without a warrant anyone any police officer has "reason to believe" has acted or likely to act "in any manner prejudicial to the security of Malaysia." I

On September 12, Russian President Vladimir Putin linked global efforts against terrorism to Russia's brutal military campaign in Chechnya, where Russian forces continue to engage in extrajudicial executions, arrests, and extortion of civilians. Putin said, "Bin Laden's people are connected with the events currently taking place in our Chechnya... .Our American partners cannot but be concerned about this circumstance. So we have a common foe." The conflict in Chechnya has flared up in recent days, with the rebels launching lethal attacks on Russian troops and Russian authorities announcing the arrest of 400 Chechens. In the past, many Chechens detained by Russian forces have disappeared

Human Rights Watch is an international human rights organization based in the USA.