LAW watch

First Amendment: Refuge of scoundrels

DAVID LIMBAUGH

IN these troubled times, the First Amendment free-speech guarantee has become a glorified refuge for some scoundrels. The Emmy awards program was postponed twice because of the terrorist attacks and the American war effort beginning in Afghanistan, respectively. The festivities finally took place this week amid criticism as to the propriety of having an awards show right now.

I see nothing wrong with the ceremony going forward since we are all trying to return to our normal lives. But Bryce Zabel, chairman of the Television Academy of Arts and Sciences, chose to justify the event in loftier terms.

"We're going to be seen on television in 90 countries. If there is a theme to the show, it's that the images that people will see will demonstrate two great American traditions: the freedom to assemble and freedom of expression. People will say whatever they want. That's what this is about," said Zabel.

One has to wonder just what astronomical percentage of the Hollywood and New York entertainment glitterati take themselves this seriously. Does Mr. Zabel really expect us to believe that the airing of the show was about vindicating the First Amendment?

As it turns out, the old dollar bill may have had more to do with it than the Constitution. Commercials during the show yield big bucks for CBS, and the network apparently pays the Television Academy some $3 million for broadcasting the show. I'm all for capitalism at work, but let's not cheapen the First Amendment by throwing it around so loosely. Yet that's a fairly tame example. There are others, far worse.

Many in the blame-America-first cadre are much more adept at dispensing criticism than taking it. They are a tad displeased with the suggestion that they aren't displaying exemplary patriotism. They insist that dissent is the true mark of a patriot and that their critics are chilling their speech.

One example hits close to home. Following a column I wrote criticizing the choice of pacifism in the wake of the terror attacks, I was accused of advocating the suppression of speech of all those who disagreed with me. I understood why someone would take issue with my opinion, but I was astonished at the assertion that my criticism constituted an attempt to suppress speech.

There are other examples. In an editorial, a constitutional law professor referred to Barbara Lee, the congresswoman who cast the sole dissenting vote against authorizing the use of force against the terrorists, as a hero. He implied that those criticizing Lee were violating her First Amendment rights. "It's too early to tell how free speech will weather the crisis." He continued, "Free speech protects dissent that strikes to the very heart of our national belief in our own wisdom, innocence and merit." But what does free speech protect dissent from, professor?

Criticism? I think not. No one proposed that Lee be denied her right to speak or vote against the war, for that matter. When we have this kind of sloppy invocation of the First Amendment from teachers of constitutional law, what can we expect from others?

This same phenomenon is occurring on campuses around the country. Certain university professors have been rather upset at criticism they've received for inflammatory remarks they made following the terrorist attacks. In one case, students heckled a professor who criticized U.S. foreign policy during a campus vigil. While the professors are not waving the flag, what do you suppose they are waving? That's right, the First Amendment again, even though their speech is not being suppressed.

Isn't it ironic that we have those from the academic left raising First Amendment issues when so few of them have expressed similar outrage at oppressive speech codes that exist on an estimated two-thirds of college campuses in this nation? These pious professors have no problem in outlawing speech that might offend someone.

To criticize someone's opinion is not censorship. The First Amendment does not guarantee freedom from criticism or heckling. Besides, if it did, those we criticize wouldn't be able to criticize us for criticizing them. I guess they'd just lock us up instead.

What is obviously going on here is that some who aren't used to having their opinions challenged because they are always cloaked in the mantle of political correctness are hypocritically wrapping themselves in the First Amendment instead of defending their bizarre ideas on the merits. It is these intimidators, not their critics, who are trying to silence speech.

David Limbaugh is author of Absolute Power: The Legacy of Corruption in the Clinton -Reno Justice Department.

memoir

In memory of a human rights activist

ADILUR RAHMAN KHAN

Barrister Lutfur Rahman Shahjahan

I met Shahjahan bhai (Barrister Lutfur Rahman Shahjahan) for the very first time in the winter of 1988 in Dhaka. He impressed me with his commitment towards the people of Bangladesh, interest for alternative ideas and devotion to human rights. Later I discovered I was not the only one convinced, during his long stay in England, he left a number of well wishers and friends who were equally moved with his enterprising ideas and he was indeed a popular figure within the progressive circle there. We became closely associated almost one year after in the winter of 1989, while working in the democratic movement against the autocratic rule of Lt. General H.M. Ershad and by December 1990 Shahjahan Bhai became the patron and guide of the progressive activist circle we belonged to. His inspiring speeches used to enthrall the audience. He was a stern fighter against all the vicious forces of imperialism.

Shahjahan Bhai was concerned about the rights of the oppressed and marginalized people. His area of work involved Public Interest Litigation, Alternative Dispute Resolution, Legal Aid for the poor and marginalized people and the rights of children. He was vocal about the rights of the ethnic minorities of our country and also the rights of the oppressed people of this South Asian region.

National Committee for the Protection of Fundamental Rights in the Chittagong Hill Tracts was founded in April 1992 and campaigned relentlessly to bring the peace talk to Dhaka from the border of Khagrachori. Shahjahan Bhai was the founder convenor of this organisation. He was also the convenor of the election observation committee, which was active during the Mayoral election of 1994. The said committee put forward a list of recommendations on election laws and rules based on its observations. Being the President of the Jatiyo Ainjibi Parishad, he made the organisation vocal against all the repressive laws and took a stern standing against enactment of repressive law and campaigned locally and internationally against the enactment of the Public Safety Act 2000.

Shahjahan Bhai was one of the founding Executive Members of Odhikar, a human rights organization working in Bangladesh towards monitoring and documenting violations against the civil and political rights of the people. As a legal researcher, Shahjahan Bhai did a lot of action research on street children, marginalized people and on the issues of public interest.

Through his journey of life he has set many such examples and has taken many such steps that will inspire us, encourage us and guide us to make meaningful contributions to the society. An act should be evaluated by its impact and number of beneficiaries. All the organisations he was attached to or the steps taken by them are only a mere tip of the ice burg. The results of his ventures are exemplary and he has left countless beneficiaries. Finally, as a comrade of Shahjahan bhai, I feel that the vacuum which has been created because of his untimely death will take ages to fill.

Adilur Rahman Khan is a Deputy Attorney General of the Government of Bangladesh.

RIGHTS corner

Prevention of Terrorism Ordinance 2001

Government decides to play judge and jury

HUMAN RIGHTS FEATURES

THE events of 11 September gave the Government of India the pretext it needed to launch yet another salvo in its own "strike against terror". Promulgated six years after the Terrorist and Disruptive Activities Act (TADA) lapsed in 1995, the Prevention of Terrorism Ordinance (POTO) is expected to come up for debate in Parliament during its winter session beginning on 19 November 2001. POTO is, according to the Government, "less draconian" than the defunct TADA. Other official explanations dwell on the "necessity" of new legislation to tackle "new" crimes. And for good measure, references are made to "similar" legislation in countries such as the United States of America and the United Kingdom.

Closer scrutiny, however, reveals the lack of foundation for these arguments.

The Ministry of Home Affairs (MHA) has justified POTO by claiming "an upsurge of terrorist activities, intensification of cross border terrorism, and insurgent groups in different parts of the country." Ministry officials however evidently failed to consult their own data sheets the MHA's Annual Report for the year 2000 actually revealed a decrease in terrorist incidents in Jammu and Kashmir, a state that remains the main focus of the Indian Government's counter-terrorism measures.

Most of the provisions contained in POTO can be found in statutes such as the National Security Act, 1980; the Armed Forces Special Powers Act, 1958; the Disturbed Areas Act, 1990; the Unlawful Activities (Prevention) Act, 1967; the Prevention of Seditious Meetings Act, 1911; the Anti-Hijacking Act, 1982 No. 65 of 1982; the Suppression of Unlawful Acts against Safety of Civil Aviation Act, 1982, No. 66 of 1982; the Disturbed Areas Special Courts Act 1976; the Foreign Exchange Management Act, 1999; the Prevention of Blackmarketing and Maintenance of Supplies of Essential Commodities Act, 1980; the Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988; the Indian Telegraph Act, 1885 or the Information Technology Act, 2000.

Furthermore, the few provisions that are not covered by the above Acts violate the Indian Penal Code, the Criminal Procedure Code, the Indian Evidence Act, and fundamental rights chapter of the Indian Constitution.

Assertions regarding the appropriateness of the Ordinance are therefore highly questionable.

Attempts have also been made to justify POTO by reference to anti-terrorism legislation in other countries. However, the main arguments along these lines are flawed. The United States legislation, the AntiTerrorism and Effective Death Penalty Act (AEDPA) of 1996, for example, in no way limits fundamental rights guaranteed to all defendants in the criminal process. Preventive detention on the ground of a person's potential dangerousness is prohibited. The detention of an individual, in all cases, must be pursuant to a lawful arrest based on probable cause that the individual has engaged in criminal conduct and an indictment must be confirmed by a judge or grand jury. At the trial stage, the US Constitution's guarantees of due process of law in all criminal proceedings, the presumption of innocence, the right of the defendant to an open and speedy trial and the right of the defendant to confront witnesses against him are neither suspended nor circumscribed by AEDPA.

Moreover, AEDPA provides for absolute freedom of speech and freedom of communication as enshrined in the First Amendment of the US Constitution. Under POTO, a journalist's refusal to share information, which in the views of the Investigating Officer could lead to the arrest of an alleged terrorist, is a terrorist offence.

The USA Patriot Act of 2001, enacted in the aftermath of the 11 September attacks, grants certain additional powers to the federal government and the Attorney General and establishes a new criminal prohibition against harbouring terrorists. However, it does not alter the criminal trial process for terrorism cases, nor does it accord the Executive powers immunised from meaningful judicial review.

Under the United Kingdom's Prevention of Terrorism Act 2001, the detention of an individual arrested under the Act can be extended for up to five days, but only with the permission of the Home Minister. The European Court of Human Rights has held that this provision in breach of Article 5(3) of the European Convention on Human Rights. The contrast with POTO is stark POTO provides for extension of detention for up to 180 days. Further, the Prevention of Terrorism Act allows compensation under Schedule IV for

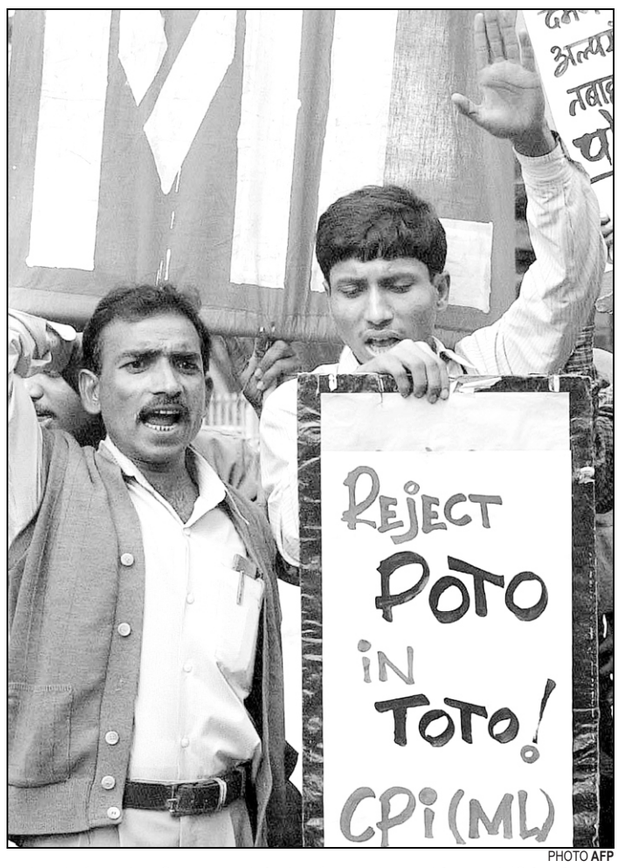

PHOTO AFP

Activists from the Communist Party of India-Marxist Lininist (CPI-ML) display placards during a demonstration against the Prevention of Terrorism Ordinance (POTO) near parliament in New Delhi 23 November 2001. The Indian government will table POTO during the winter session of parliament amidst strong protests by opposition parties, claming it is too restrictive in its present form.

wrong forfeiture of property.

What POTO seeks to do is hold the accused for a prolonged period of detention for upto 180 days without charging him, and effectively subverts the cardinal principle of the criminal justice system the presumption of innocence- by putting the burden of proof on the accused, withholding of the identity of witnesses, making confessions made to the police officer admissible as evidence, and giving the public prosecutor the power to deny bail. Moreover, little discretion is given to judges regarding the severity of sentences. While the Terrorist and Disruptive Activities (Prevention) Act was reviewed every two years, POTO is not subject to review for a period of five years. POTO is also more likely to be used for preventive detention of all peaceful dissenters than for tackling terrorism.

The definitions of terms in POTO are sketchy and therefore highly susceptible to misuse. For example, "terrorist acts" bringing about the death of any person, incur the death penalty or life imprisonment (and a fine). Conspiracy, attempts at committing or the advocating, abetting, advising, inciting or knowing facilitation of the commission of "terrorist acts" or "any act preparatory to a terrorist act" call for imprisonment of no less than five years, extendable up to life imprisonment (and a fine). Imprisonment for three years can result from any attempt to harbour and conceal a person known to be a "terrorist", unless a husband-wife relationship exists between the "terrorist" and the harbourer/concealer. Membership in "an organisation which is concerned with or involved in terrorism" (that is, according to POTO, a terrorist gang or organisation) and the holding of property derived or obtained from commission of any terrorist act is to be punished with life imprisonment and/or a fine.

SAHRDC opposes POTO, persuaded by the belief that such an instrument is not the solution to the complex problem of terrorism. Further, POTO can be used by the State to silence peaceful political dissent and to target minorities. The dismal history of national security legislation in India attests to the likelihood of such abuse.

With regard to the introduction of any anti-terrorist legislation, the following must be scrupulously adhered to:

1. Any anti-terrorist law must be subject to international scrutiny. In the absence of a regional mechanism in Asia, the Government of India should ratify the First Optional Protocol to the International Covenant on Civil and Political Rights and the Convention Against Torture. India should withdraw its reservations to Articles 20, 21 and 22 of the Convention Against Torture.
2. POTO must be subject to review by Parliament every year on the basis of a report submitted by the Review Committee to the Parliament and State Assemblies concerning the progress on every detainee's case under POTO.
3. POTO should be withdrawn from the statute books if it manifestly fails to meet its objectives.
4. POTO must contain a limited and specific definition of terrorism, such as that contained in the Prevention of Terrorism Act of the United Kingdom.
5. The time frame for detention without charge should be the same as that of other criminal offences under the Criminal Procedure Code. Sixty to ninety days is more than sufficient to gather information to charge a suspect.
6. Every detainee must be produced before a judicial magistrate within 24 hours of his or her arrest. No exceptions should be admitted to this rule. Anything short of this should entitle the detainee to immediate release and monetary compensation for wrongful arrest and detention.
7. The normal structure and jurisdiction of the courts should be restored; special courts should be abolished and the normal appeal mechanisms should be available with the normal time limits.
8. There should be a wider discretion for the magistrate to grant bail. The Criminal Procedure Code's provisions are sufficient to enable bail to be refused where appropriate in a particular case. Provision could be made for urgent appeal on any decision to a High Court by either side.
9. There should be a strict time frame for trials. There should be automatic release on bail if proceedings have not begun within 90 days of charges being filed.
10. Trials should continue on a day-to-day basis. Adjournments in exceptional circumstances should not be for more than 15 days.
11. Open hearings should be made the rule unless either party makes out a sufficient case for an in camera trial. Provisions should be made for urgent appeals to a High Court Judge if either party opposes the decision.
12. The presumption of innocence should be restored in all cases.
13. Substantial compensation should be payable for wrongful arrest and detention. The Government of India should withdraw reservations to Article 9 of the International Covenant on Civil and Political Rights.
14. Incommunicado detention should be prohibited.

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Star LAW report

'Murder' or 'culpable homicide not amounting to murder'?

Appellate Division of the Supreme Court of Bangladesh (Criminal Jurisdiction)
Nibir Chandra Chowdhury and others ... Appellants
Vs
The State ...Respondent
Criminal Appeal No. 14 of 1999
Before Mainur Reza Chowdhury, Mohammad Gholam Rabbani, Md Ruhul Amin and Mohammad Fazlul Karim, JJ
Judgment on 8 August, 2001
Result: Appeal dismissed

Judgment

Mohammd Gholam Rabbani, J: The two appellants who are the full brothers named Nibir Chandra Chowdhury and Goutam Chandra Chowdhury were placed on trial along with their father before the Court of Additional Sessions Judge, Bogra, in Sessions Case No 30 of 1993 on a charge of committing murder of one Golok Chandra. By the judgement and order dated 31.7.94 the trial court convicted them under sections 302/34 of the Penal Code and sentenced each of them to imprisonment for life and to pay a fine of Tk 15,000/= in default to Rigorous Imprisonment for 3 years each.

The convicts then filed Criminal Appeal No. 1552 of 1994 in the High Court Division who acquitted the father, but altered the said conviction of the two brothers to a conviction under section 304, Part I of the Penal Code and consequently reduced the sentence to Rigorous Imprisonment for 10 years and to pay a fine of Tk 10,000/- in default to Rigorous Imprisonement for 1 year by the judgment and order dated 12.8.98 which is impugned in this appeal.

The Fact

On the date of occurrence, victims' wife was grazing her two goats in the land of the accused when one of the brothers came there, abused her and snatched the goats. Naturally there was hue and cry which brought the other brother, their father and the victim Golok to the scene. The altercations between parties then became stronger. The two brothers dealt blows on the chest of Golok who became senseless and ultimately died in the house before the arrival of the doctor.

Earlier decisions

Leave was granted to consider the two contentions. One is that Public Witness 1 the informant, Public Witness 2 Gayatri Rani, Public Witness 3, Susanta Sarker, PW 8 Gadadhar are all relations of victim Golok Chandra and were highly interested witnesses and their statements in court are also discrepant and as such are of no evidentiary value. Other is that the accused had no intention to cause the death.

PW 1 Mira and PW 2 Gayetri are respectively widow and daughter of victim Golok. They gave consistent evidence regarding the prosecution case and they were corroborated by PW 3 Sushanta who was a member of the local Union Parishad. Their evidence proved to the hilt that the two appellants gave blows on the chest of Golok consequent to the quarrel as aforesaid. We, therefore, find no reason to disturb the concurrent finding of the Sessions Court and the High Court Division that the prosecution proved its case.

The verdict

It is also in the evidence that Golok was addicted to opium and on the fateful day he took opium and fell sick, that he had high blood pressure and that after being assaulted he was brought to the house and was given three tablets.

Thus the evidence attracts the second clause read with illustration (b) of section 300 of the Penal Code. According to the second clause the offence is murder, if the offender knows that the particular person injured is likely, either from peculiarity of constitution, or immature age, or other special circumstances, to be killed by an injury which would not ordinarily cause his death. Illustration (b) given in this regard in section 300 runs as follows:

"A knowing that Z is labouring under such a disease that a blow is likely to cause his death, strikes him with the intention of causing bodily injury. Z dies in consequence of the blow. A is guilty of murder, although the blow might not have been sufficient in the ordinary course of nature to cause the death of a person in a sound state of health. But if A, not knowing that Z is labouring under any disease, gives him such a blow as would not in the ordinary course of nature kill a person in a sound state of health, here A, although he may intend to cause bodily injury, is not guilty of murder, if he did not intend to cause death or such bodily injury as in the ordinary course of nature would cause death."

Knowledge in the second clause must be, thus, in relation to the person harmed and the offence is murder even if the injury may not be generally fatal but is so only in a special case provided such knowledge exists in relation to the particular injured person.

In the instant case there is no evidence from the prosecution side that the accused had the knowledge of the frail condition of Golok. We can now conclude that the incident took place upon a sudden verbal quarrel and in the heat of passion the two brothers gave blows on the chest of Golok without any guilty intention to cause the death and thus they committed culpable homicide not amounting to murder.

Our conclusion as above now brings us to the issue as to the propriety of the sentences, both imprisonment and fine, passed by the High Court Division. Section 304 of the Penal Code, which consists of two parts, does not create any offence, but provides for punishment of culpable homicide not amounting to murder. The first part applies to a case where there is guilty intention and the second part applies where there is no such intention, but there is guilty knowledge. Under the circumstances we hold that the appellants ought to have been convicted under Part I of section 304 of the Penal Code.

Now we consider the propriety of the quantum of the sentences. The problem of fixing the sentence is not a simple one since a number of factors in each case have got to be considered. We, however, lay down the fundamental principles regarding the sentence of fine. Penal Code fixes both imprisonment and fine for certain offences and imprisonment or fine for other offences. In the latter cases if the Court imposes sentence of imprisonment, then while imposing fine as an additional punishment the court should give its reason so that it may be scrutinized by the appellate court. **While imposing the sentence of fine the basic principles to be kept in view shall be as hereunder:**

(a) the accused has derived pecuniary gain from the crime: or
(b) the fine is specially needed to deter or correct the offender; or
(c) the victim requires pecuniary help from the offender.

Considering the law, fact and circumstances as discussed above, we find that the conviction must be altered and the sentences must be reduced while the appeal must be dismissed.

This appeal is accordingly dismissed with the order that the convictions of both the appellants are altered to a conviction under Part II in place of Part I of section 304 of the Penal Code and their sentences of RI for 10 (ten) years are reduced to the period which each of them has already undergone and the sentences of fine of Tk. 5,000/= are reduced to a sentence of Tk. 500/= in default to suffer Rigorous Imprisonment for 1 (one) month each.

LAWSCAPE

Steuart & Francis; Courtesy: The Times