LAW vision

Legislating for exclusion: Australia's flight from the Refugee Convention

HUMAN RIGHTS FEATURES

IN recent months, international attention has focused on Australia's treatment of asylum- seekers. On 26 August 2001 a Norwegian freighter the MV Tampa rescued 433 asylum-seekers from a sinking Indonesian vessel; it housed the refugees for eight days while both Australia and Indonesia refused to accept them. An initial action of the Australian Government was to order SAS troops to board the Tampa in order to prevent its docking on Australian soil; more recently the Government's tactics have been legislative, but no less extreme.

By international standards, Australia has traditionally been willing to accept refugees already processed for resettlement by the United Nations High Commission for Refugees (UNHCR). However, in the lead-up to the recent federal election, a much less generous position was publicly supported and legally adopted towards refugees and asylum-seekers arriving at Australia's coastal borders 'illegally'. A series of boats carrying asylum-seekers intercepted off Australian shores, coupled with an unravelling crisis in Afghanistan which promises to send more desperate people towards Australian shores have laid emphasis on the refugee question both domestically and internationally.

Following a legal battle in the Tampa case, the Australian Federal Parliament debated the adoption of seven bills regarding immigration issues. The Government explained its introduction of these legal measures by reference to Australia's increasingly generous interpretation of the United Nation's Convention Relating to the Status of Refugees, 1951 (Refugee Convention). It alleged that through federal case law, "Australia now provides protection visas in cases lying well beyond the bounds originally envisaged by the Convention", thereby encouraging "people who are not refugees to test their claims in Australia". The resulting reforms significantly impact on Australia's immigration policy. They redefine who can qualify for refugee status, increase and specify the government's powers to prevent or remove vessels carrying "illegal arrivals", rezone which territories are considered official "migration zones," and outline a "hierarchy of rights" to certain visas which follow from the creation of these newly "excised territories". Such changes will impact on Australia's protection visa application and refugee determination process and make it increasingly difficult for those seeking asylum to have their cases heard or to have access to their rights as guaranteed by the Refugee Convention and international human rights law.

Accusing the Australian government of resorting to the "law of the jungle" and of sending asylum-seekers "into orbit", UN High Commissioner for Refugees Ruud Lubbers condemned the "Pacific solution" (as the Australian government chooses to call its recent refugee and asylum policies), urging the government to "follow international agreements rather than striking out on its own".

From of a package of six asylum-related bills passed through parliament during the week of 17 September 2001, four have proved particularly contentious in terms of their human rights implications for 'illegal arrivals'.

The Migration Legislation Amendment Act (No 6) 2001 (MLA Act) significantly narrows the definition of the term "refugee". The deliberately adaptable definition found in the Refugee Convention has now been artificially circumscribed with respect to its usage by the Federal Court and the Refugee Review Tribunal. The MLA Act introduces a new and limited interpretation of "persecution". It restricts what is understood by "serious harm" in the Refugee Convention and narrows the category of "membership of a particular social group". While the MLA Act formalises the extension of refugee status to spouses or dependants, it establishes no such extension from child to parents. This means that the parents of a child who do not directly fulfil the "fear of persecution" requirement may be expelled while the child is accorded refugee status and allowed to stay. The Act also shifts the burden of proof to applicants if their conduct after arrival creates reasons for persecution in their home country.

Most fundamentally, the MLA Act undermines the principle of non-refoulement, a bedrock of the Refugee Convention and customary international law. The principle of non-refoulement is enshrined in Article 33(1) of the Refugee Convention providing that a State can not expel or return a refugee where his or her life would be threatened on account of race, religion, nationality, membership of a particular social group or political opinion. Addressing the limited exceptions of Article 33(2) of the Refugee Convention, the MLA Act sets a low bar for the types of non-political crimes that exclude the protection of the Refugee Convention. Under the MLA Act, a person who has committed serious property damage in his or her home country can face repatriation.

A second Act, the Border Protection (Validation and Enforcement Powers) Act 2001 (BPB Act), introduces provisions regarding the detention of persons found on ships or aircraft, clarifies the powers of the arresting officer and specifies a new search power. Under the BPB Act, vessels may be prevented from arriving in or removed from Australian territorial waters using "reasonable force" if necessary if suspected of carrying "unlawful" immigrants. The BPB Act specifically excludes such people from being defined as being held in "detention", thereby effectively removing the opportunity for such people to resort to regular protection visa-claiming procedures. The BPB Act also retrospectively protects all action initiated by the government from 27 August 2001 onwards with respect to "vessels carrying unlawful arrivals". The Australian Government's actions with relation to the Tampa have accordingly been vindicated. Also included is the introduction of minimum mandatory penalties for those found guilty of human trafficking offences.

The Migration Amendment (Excision from Migration Zone) Act 2001 (MAB Act) excises certain territories from the Australian migration zone. The excised territories include the Christmas Islands, the Ashmore and Cartier Islands, the Cocos (Keeling) Islands and any other external territory, island or Australian sea or resource installation; in other words, those places that asylum-seekers arriving by boat are most likely to reach first. Under the MAB Act, people reaching Australian soil on "excised territory" are precluded from the regular process of seeking refugee status. Further, they are denied recourse to the kind of legal protection that would be required in order for them put their cases for refugee status.

Supplementing the BPB Act, the Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act 2001 (MAB II Act) gives discretionary power to officers to detain non-citizens entering or seeking entry into an "excised offshore place" if they are suspected "unlawful non-citizens". Such people may be taken to a declared country "in certain circumstances", and the MAB II Act specifies that "this does not amount to immigration detention". The Act again bars access to certain legal rights related to the entry, status and detention of non-citizens who enter Australia at an "excised offshore place". A "declared country" needs to satisfy certain itemised criteria for the Minister for Immigration but the country does not necessarily have to be a signatory of the Refugee Convention.

Another critical part of the MAB II Act deals with a "hierarchy of rights" which is "intended to deter further movement from, or the bypassing of, other safe countries". According to these provisions, "unauthorised arrivals" who may be fleeing persecution but who have bypassed other safe countries are only eligible for successive temporary protection visas and are therefore prevented from applying for any of the key protection, refugee and humanitarian visas.

The string of new Acts has tightened Australia's borders through redefinition of key terms of the Refugee Convention and the expansion of powers to refuse entry and deny access to claims for refugee status. While the Australian Government claims that the amendments "restore the application of the Refugee Convention to its proper interpretation", in truth many changes undermine the Refugee Convention. Whether this narrowing of the domestic parameters of the Refugee Convention has been motivated by a desire to curb judicial activism in asylum cases or by a pre-election appeal to xenophobia is moot. What is clear is that the provisions of the new Acts are unlikely to 'deter' unlawful asylum-seekers from trying to reach a place where they expect to escape persecution. As noted by Professor William Maley of the Refugee Council of Australia, "[t]hose being smuggled don't know about 'migration zones', and those who run the [trafficking] networks are unlikely to care".

After its re-election on 10 November 2001 a victory largely attributed to a favourable handling of the Tampa crisis it has been suggested that the Australian Government now has a mandate to pursue even tougher policies on asylum seekers. In tones reminiscent of his rebuke of the United Nations Treaty Bodies in early 2000, Prime Minister John Howard has declared that Australia will not be "intimidated" into taking a softer stance on asylum-seekers. Australia's tough stance on refugees is just that: tough on refugees. Its human cost is unacceptable; it manifests Australia's flight from an internationally acceptable refugee policy. Accusing the Australian government of resorting to the "law of the jungle" and of sending asylum-seekers "into orbit", UN High Commissioner for Refugees Ruud Lubbers condemned the "Pacific solution" (as the Australian government chooses to call its recent refugee and asylum policies), urging the government to "follow international agreements rather than striking out on its own".

As a signatory of the 1951 Refugee Convention, Australia must take heed of the principles reaffirmed in the 'Declaration reaffirming the commitment of signatory States to the 1951 Refugee Convention', adopted a ministerial meeting of Refugee Convention signatory countries in Geneva on 13 December 2001.

By an arrangement with the South Asia Human Rights Documentation Center.

HUMAN RIGHTS monitor

More Bangladeshi women become victims of rape

FARZAN HASAN

LAST week a teenage village girl in northern Bangladesh poisoned herself to death. The school girl committed suicide after harassment and threats by four young men accused of raping her six months ago. That was too much for her to bear.

"My family has already suffered much pain and insult for me. I don't want my family to suffer more," said a suicide note left by the daughter of a poor farmer, Anisar Rahman at Akhrail village in Bogra district. Arrested on charge of raping the girl six months ago the four youths from neighbouring villages were on bail when they used to threat her family to withdraw the case.

In another development last week, police were looking for an 18-year-old boy who allegedly raped a seven-year-old girl while she was alone at her home in Gabtali village in Bogra district. The boy fled after the girl cried for help. Neighbours came and found the girl bleeding on the mud floor of the house. She was since then treated in a hospital. The boy's family, which is wealthy and politically influential in the area, has been pressuring the poor girl's peasant family to withdraw the charges. The boy's family has first sought a compromise, and then threatened of dire consequences.

"Even the police come and tell us to withdraw the case. We are too poor to continue a legal battle. We guess we will have to listen to what the police say," said the girl's mother who insisted she was not named. The family is considering leaving the village as "Neighbours come and blame us for leaving the girl alone at home and thus vulnerable to the attack."

This family too does not feel interested in taking the girl's suspected rapist to court. One of the reasons is that the family is too poor to carry out the legal battle. However, the prime reason why poor families such as this one feel discouraged to take the offenders to court is that the legal process is too slow to bring the culprits to book.

This family refers to the case of Yasmin Akthar, a 16-year-old housemaid who was raped and killed by a group of nine policemen patrolling a highway in northern Dinajpur district. In 1997, two years after the incident a trial court found three of the nine accused policemen guilty of rape and murder and sentenced them to death. Four years have gone since the death sentence was handed to the three policemen. But they could not be executed because their appeals are still pending in the higher court.

The Yasmin rape and murder was one of the country's most publicised cases of sexual violence against women in Bangladesh, a predominantly Muslim nation. It had touched off street protests during which five more people were killed. In Bangladesh, courts usually take years or even decades to complete trial of domestic violence cases. The trial in the case of Yasmin's rape and murder was completed in two years mainly because of the intense media monitoring and political willingness on the part of the government.

"We always welcome tough laws that seek to stop violence against women. But laws alone do not help. The laws must be applied. Keeping the law in papers does not help women at all," said Ayesha Khanam, a leader of Bangladesh Mohila Parishad, a leading women's rights group.

Hit by a wave of growing domestic violence against women, including rape of small children the government had enacted a special law in 2000 providing for speedy trial and keeping the provision of death sentence or life imprisonment for such crimes. The country's women's and human rights groups were not happy with the special law even though it has added a new provision: a child born out of the rape will get inheritance right from the convicted family until 21 years in case of a boy and until the marriage in case of a girl. Trial must be completed within 180 days.

"The law has kept the provision of death sentence or life imprisonment. Here is one big problem with the law. Because the punishment is stringent, judges often become liberal. They don't like to hand down death sentence or life term unless they are fully convinced that the crime has really occurred," said K M Sobhan, a retired judge of Bangladesh High Court.

Others criticize the way the law has defined rape. The special law has upheld the definition of rape that existed in 1860 Penal Code made the then British colonial rulers.

"The definition of rape under this law is very limited. If a woman is tortured by the male sexual organ only then the offence is called a rape. But if the torture is carried out by foreign objects such as sticks, it will not be considered as rape. This has weakened the law a lot," said Tania Amir, a lawyer of the Supreme Court.

Bangladesh has no shortage of tough laws enacted to try to curb crimes and violence. But the need to change the society's attitude to women is hardly taken into serious consideration. Women in this male-dominated society is brought up as dependent. They are told repeatedly that they are inferior to men.

"The women feel that they are weak. Men consider women as weak. And the rapists think their victims are too weak to resist," said Tasmima Hossain, editor of women's weekly, Annanya and a former member of parliament. Tasmima, who cast her vote in favour of the special law parliament passed in recent past, said the tough provisions have failed to curb the growing violence against women because of the conservative society's attitude to women. "Our women are considered inferior, second grade citizens in this male-dominated society," she said.

Nearly a thousand women, many of them as young as six years, suffer rape violence on an average a year in Bangladesh, according to the rights groups. In five years until March 1996, more than 3,500 women became victims of rapists, according to a Home Ministry statement in parliament at that time. The number of rape victims has increased manifold in the past five years in spite of the tough laws and a rights group campaign against the violence.

"The loopholes of the law are some reasons why the rapists are not punished. But men attack women mainly because they know that women can't resist," said Tasmima Hossain. Lack of sexual education and restrictions on free mixing of boys and girls are cited to explain the growing rape violence. Most of the rape attacks are reported from the small towns and villages, where conservative societies keep boys and girls separated. Media reports on rape incidents most often than not suggest that the victim was either alone at home or was walking alone through rice fields. In some cases, young men resort to rape of a woman if she refused to marry him. A common pattern emerges from the study of the media reports on rape, the attackers and the victims. The girl is small; left alone at home; poor and helpless family and the attackers are mostly from wealthy families who control the society - either family of the village headmen and their relatives.

Many of the rape victims do not complain to police for fear of more shame or for the knowledge that no penalty will be handed to the offenders. "Our society has so many criminals who go unpunished. Therefore, those who resort to rape know very well that they would not be brought to book. If any case of filed it will take years for the police to complete the investigation. If investigation is done it will take more years to start and finish the trial," said Abdul Ahad, a law teacher.

Rape victims are also harassed during the trial. For example, the new law also allows defense lawyers to question the women about her private life and sexuality. By doing so the lawyers try to prove that the woman in question has no credibility. They resort to character assassination of the victim to prove that she has either consented to have sex or was telling lies to damage the defendant's reputation. "Thus in going to court a victim risks suffer more insult which is even worse than the rape itself," said Ayesha Khanam, the leader of Bangladesh Mohila Parishad.

Women in Bangladesh society are also vulnerable to violence by relatives or neighbours. In most cases, the rapists are people the victims know. Attackers are hardly strangers. The involvement of close relatives or family members makes it difficult for the victims to take the cases to court. Most often than not the cases are settled outside the court.

In some cases, local headmen force the rapists to marry the victims. This also does not help to punish the perpetrators. The new special law, for example, has termed a victim of a rape attack as "the raped woman." This anti-woman term also demonstrates how the male-dominated society considers the women. The society must learn to respect women and treat them equally with men. Moreover, police and other law enforces must also change their attitude. Those who have power and money feel that they can go away with committing a crime. Police are among them. There have been many instances that police raped women in their custody. Then they investigated the cases to protect them and put the blame on the innocent and helpless people.

In 1998, a nine-year-old girl was raped at a court premise in Dhaka. The girl was attacked in a room usually used by police. While the media and rights groups insisted that a police constable was responsible for raping the girl, police investigators finally charged a poor teenage hawker with the crime. The trial of the young man has almost stopped because of dispute over the police investigation.

These incidents show why it is difficult to bring the culprits to book. Meanwhile, rape violence against women continues. Dhaka newspapers continue to publish reports of women, including small girls becoming victims of rape attacks every day. "It's sometimes so depressing to read our newspapers. Reports on rape of women are everywhere in our newspapers," said Syeda Aktar, a housewife and mother of teenage girls, "I feel so ashamed of our society, its politics and administration."

News Network Feature

LAW watch

Britain faces a Constitutional earthquake

DAVID HOWELL

THE British Constitution used to be upheld as the glory of all statecraft - unwritten, ever adapting, broadening down from precedent to precedent, born of a decisive rejection of overweening executive power and royal absolutism in the 17th century and fusing crown authority and parliamentary government in an arrangement of infinite subtlety.

Here was a model of accountable governance, which everyone could admire, if not totally understand. Is it all about to be shaken to its deepest foundations?

The question is not an academic one, nor is it a crackpot query from the revolutionary margins. It has arrived, quite suddenly, at the very center of current debate. As of here and now, a clear majority of elected members of the House of Commons, Conservative, Liberal Democrat and Labour, are demanding a virtually fully elected Upper House in place of the Lords.

Unlike the Commons, which, of course, far from controlling the government, is in practice controlled by it through the party machine and the whipping system, this new elected House, or Senate, democratically legitimised in a way that the old Upper House of appointees and a few residual hereditary peers could never be, would completely overturn the present cozy balance - cozy for the executive, that is.

How has this extraordinary situation come about? Why this new determination to bring the executive to heel, even at the cost of overthrowing key constitutional precedents? After all, there is nothing new about government leaders ignoring or overriding the House of Commons, or using its huge majority to rubber-stamp anything it chooses. Lloyd George at the height of his prime ministerial power did not attend question time there for a year. Margaret Thatcher knew all about forcing highly controversial measures through a grumbling Commons, and bullying the old Lords to do the same.

The supremacy of the Commons would be directly challenged and a democratic force would be established which could bite the government regularly, frequently and painfully, and which it could neither control nor manipulate (unless the elections to it were rigged - perish the thought!).

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But two factors are new. First, it may just be that under Prime Minister Tony Blair, the present executive leadership has gone too far, too blatantly, in taking the Commons for granted. The theory of a government accountable to the Commons, which was always a fudge, may have become too visibly unglued, even for his own supporters to digest.

Second, while past political leaders could get away with this behaviour, we have moved into a revolutionary new world. All over the planet executive and bureaucratic hierarchies are being sharply challenged by increasingly empowered and informed electorates, as well as by e-enabled protest. Voters want service and ongoing accountability, not dictation and top-down arrogance. And if they cannot get it they will employ ways other than through voting and party politics to satisfy their needs.

The Westminster upheaval may therefore be part of a much wider trend. But the domestic consequences will be momentous.

First, there will be two chambers, not one, claiming the people's mandate.

Second, the Law Lords, the final court of appeal currently tucked ambiguously inside the House ofnn Lords, will have to find a home elsewhere, possibly in a separate supreme court, as some have already suggested.

Third, just as the kingly executive was chased out of Parliament in the 17th century, we could now see today's over-mighty executive distanced from Parliament and instead summoned to account by assemblies it can no longer manipulate. That could be a real gain. Members of Parliament do not make the best administrators.

But good or bad, this is where the present mood, and the new alliance of forces in British politics, could take us. Oh yes, and there is one other thing. The head of the executive, called prime minister but already more of a president than some would like, would then become fully presidential.

Where would this leave the head of state, who is the Queen and her successors? With the hereditary lords gone, in fact with the whole structure gone and replaced by a Senate, where would a hereditary monarchy fit in?

This is just one more of the seismic questions that probably very few thought about when they set out on the apparently minor matter of Lords reform - but which now look all set to start a British constitutional earthquake.

Lord Howell of Guildford, an opposition spokesman on foreign affairs in the House of Lords, contributed this comment last week to the International Herald Tribune.

Use civilian court

THE Bush administration is about to release procedural rules for its proposed military tribunals that are much fairer than originally feared. Secretary of Defense Donald Rumsfeld is considering dropping some of the disturbing provisions contemplated in the White House's November order, such as the ability of the tribunals to operate largely in secret, and to have a two-thirds majority of presiding officers sentence defendants to death. The Pentagon deserves credit for responding to some of the serious concerns of civil libertarians, legal scholars and the military's own jurists. But a better response would be to try suspected terrorists under the normal American criminal justice system.

Top Qaida leaders, wherever captured, and others directly implicated in the terrorist attacks of Sept. 11 should stand trial in a federal courtroom, prosecuted by the people of the United States for the most serious crimes ever committed on American soil. No other type of judicial proceeding could offer Americans and the rest of the world as satisfying a verdict, or a more resounding vindication of American justice and freedoms.

The administration has rightly decided to try Zacarias Moussaoui, whom it believes to be a member of Qaida who trained to participate in the Sept. 11 attack, in federal court. Hundreds of Qaida and Taliban fighters are now in custody in Afghanistan, and some of them may soon be detained at Guantá namo, the American naval base in Cuba. The administration and its coalition partners are deciding who should face criminal charges, and where. Possible venues include America's court system, new United Nations-backed Afghan courts, the home judicial systems of repatriated Arab Qaida fighters, an ad hoc international tribunal and, of course, the proposed military tribunals.

Under the rules being reviewed by Mr. Rumsfeld, the tribunals would mostly operate in public. No death sentence could be imposed without the unanimous vote of the presiding officers. Guilt would have to be shown beyond a reasonable doubt. Some appeals process would be provided. Defendants would be presumed innocent and could not be forced to testify. They could hire lawyers in addition to the one provided them.

Such rules would make the military tribunals more credible, although still less protective than civilian courts and traditional military courts-martial. Hearsay and other normally inadmissible evidence would be allowed. No means of appeal to a truly independent judicial body is being contemplated. Serious questions remain, absent congressional involvement, about their constitutionality. To try Qaida leaders in a forum of such dubious legitimacy would taint any resulting verdict in the eyes of much of the world.

Moreover, relying on military tribunals to try the masterminds of the worst crime in American history would only reinforce the warped notion of Osama bin Laden's followers that they are engaged in a legitimate war. If Qaida leaders are tried only for violating the laws of warfare, that presupposes that there is a valid underlying conflict. America's federal courts offer the preferable venue to obtain justice, and have a sterling record in handling terrorism cases. The government must treat Qaida leaders as criminals, not soldiers.

Courtesy: The New York Times

ANNOUNCEMENT

Join the Campaign for National Human Rights Institutions (CNHRI)

National human rights institutions are being set up in many parts of the world. While the powers of these institutions in the different countries vary, there seems to be a 'core concept' emerging. In many countries, such national institutions have not matched the high expectations they generated when they were first set up.

On the other hand, in some other countries, where the expectations were not so great, national institutions have yielded some positive results. The succeeding governments of Bangladesh did not keep the promises of 'establishing a number of national human rights institutions' they had made to the people.

The Law Desk has teamed up with 'Law Watch,

A Centre for Studies on Human Rights Law', to launch a Campaign for National Human Rights Institutions (CNHRI). The proposed network (CNHRI) seeks to act locally as a pressure group to establish an independent National Human Rights Commission and a credible Office of Ombudsman in Bangladesh.

The Law Desk is interested to receive your opinions, suggestions and writings on national human rights institutions. Selected entries will be published in *LAW AND OUR RIGHTS* <www.dailystarnews.com/law>

If you have any query regarding the network or the issue, please do not hesitate contact us at Law Desk, <lawdesk20@hotmail.com> or Law Watch <lawwatch2001@yahoo.com>

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