LAW *opinion*

BATTLE IN THE WESTMINSTER PARLIAMENT

Civil liberties prevail over scare-mongering

TANIM HUSSAIN SHAWON

MPs of the Westminster Parliament saved their country on 9 November 2005 from becoming the gallows of its long-cherished civil liberties. While 'yet-to-be-democratic-proper' countries like Bangladesh have always been criticised by the western democracies for retaining draconian special power laws (the Special Powers Act 1974, as in the case of Bangladesh), the Great Britain was just about to join that class.

Following the July 7 bombing incidents in London this year, one of the first concerns aired by the civil liberty movements was that the establishment would take this opportunity to impose even harsher anti-terrorism laws in the country. It would be a particularly lucrative opportunity for the government to gain some easy support and popularity given the overwhelming concern of the people at large about the security situation, and a temptation to make the country air-tight from any further terrorist-strike. The police also made an unprecedented move by openly expressing its intention to influence the government to increase its power for detaining terrorist-suspects for as long as 90 days without any charge. The way the police and the government took up their case together and attempted to exert a direct pressure on the legislature has been particularly criticised by the media and political analysts.

In spite of all the desperations on the part of the government and the police, the long-standing civil liberties have prevailed over the scare-mongering campaign, thanks to the strength of parliamentary democracy of Westminster. Tony Blair lost his first vote in the Parliament since being elected the Prime Minister, 49 of his own MPs voting against the proposal. It may be pertinent to mention that, unlike the anti-floor-crossing provisions in the Constitution of Bangladesh (Article 70), Members of the Westminster Parliament are at full liberty to decide their own mind regarding any motion tabled in the Parliament and ignore or defy party whips on that. The MPs voting against the proposal for increasing the existing 14-day limit for detention of suspected terrorists to a staggering 90 days (which is equivalent to a 6-month imprisonment under English penal law) put forward cogent arguments against the government claims. They reminded the government that they were not obliged in any way to go by the recommendation of the police and that contrarily it was their particular obligation to weigh all proposed measures against the concerns for the civil liberties of the citizens and strike the right balance between the two.

They also said that the government and the police failed to show to the Parliament why it was necessary to detain a suspect for as long as 90 days without charge when there was not a single precedence where the police had to wait for that long a period to charge anyone. Although, the hypothetical case put forward by government found support with majority of the ordinary people (one pole suggesting 72% of them supported government proposal), it failed miserably the rigorous test on the floor of the Parliament. However, the legislators eventually increased the existing limit to a two-fold twenty eight day period, which to some civil liberty activists was still too harsh.

While it is a shame in the first place that the government of the United Kingdom did at all intend such a draconian law to be passed, it is equally reassuring to see that the legislators of the great Parliament in Westminster are still guided by their consideration of the larger welfare of the society. In the context of parliamentary democracy in Bangladesh, the legislators' constitutional obligation to blindly follow the party line in the Parliament may be reconsidered so that they can decide according to their own conscience when the nation may need them to do so.

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FOR YOUR *information*

International Day of Tolerance

16 November 2005

Secretary-General calls for active effort to learn about each other, in Message to mark international day of tolerance

Diversity has forever characterised the human condition. Yet, mankind's acceptance of it has been painfully lacking. This intolerance of the "other" remains a source of great and everyday human suffering.

That is why fighting intolerance in all its forms has been fundamental to the work of the United Nations for 60 years. The need for tolerance is greater today than at any time in the United Nations' past. In a world of intense economic competition, shifting populations and shrinking distances, the pressures of living together with people of different cultures and different beliefs from one's own are very real. The resultant backlash is evident in the rise of xenophobia and extremism across the globe. It demands our strongest response.

Building a culture of tolerance is an important start. Such a culture must necessarily be based on increased legal protection and education. But individual initiative must also play a part. Tolerance cannot simply mean passive acceptance of other peoples' perceived peculiarities. It must involve an active effort by all of us to learn more about each other, to understand the wellsprings of each other's differences, to discover what is best in each other's beliefs and traditions. Only through such a process of discovery can we come to realize that what binds us as human beings is far stronger than what divides us men.

If we hope to achieve peace in our young century, we must start respecting each other today -- as individuals who each have the right to define our own identity, and belong to the faith or culture of our choice; as individuals who know that we can cherish what we are, without hating what we are not.

In the Outcome Document of the recent United Nations World Summit, all the world's Governments tell us: "We recognise that all cultures and civilisations contribute to the enrichment of humankind. We acknowledge the importance of respect for religious and cultural diversity throughout the world. In order to promote international peace and security, we commit ourselves to ... encouraging tolerance, respect, dialogue and cooperation among different cultures, civilisations and peoples."

On this International Day of Tolerance, let us pledge to translate those words into reality; to celebrate our diversity and learn from our differences; to make use of them in strengthening the bonds of our common humanity.

Source: UN Press Release.

LAW *alter views*

Constitutionalism, parliamentary supremacy, and judicial review: A short rejoinder to Hoque

PHOTO: STAR

IMTIAZ OMAR *and* **MD. ZAKIR HOSSAIN**

IT's a welcome development that someone has tried to discourse on the ideas put forward in our article "Coup d' Etat, Constitution and Legal Conti-nuity" published in The Daily Star issues of September 17 and 24, 2005. This is Ridwanul Hoque's essay titled: "On coup d'etat, constitutionalism and the need to break the subtle bondage with alien legal thought," The Daily Star, 29 October, 2005. Hoque's attempted rebuttal of our views however displays rather his apparent failure of proper understanding of some of the fundamental doctrinal questions about constitu-tionalism, parliamentary supremacy, constituent power and the role of the court in the constitutional judicial review process, as well as the underlying spirit of our article. In his attempt, Hoque tries to rely, without context, on such diverse writers as Krishna Iyer, Henkin, and Dworkin. His understanding of some of the basic issues in the debate on the varying approaches to constitutionalism -- parliamentary supremacy and judicial review -- and their interrelationship does not evidence an adequate understanding of the core concepts of constitutional government either in the Western democracies, or in countries of the post-colonial world. The authors of Coup d' Etat, Constitution and Legal Continuity had planned to publish a journal essay based on their article, and this reply to Hoque would have been better presented in a scholarly law journal, for enlightening comparative lawyers, rather than the law section of a popular daily. However a short rejoinder is necessary for popular consumption, and to dispel the obscurities of Hoque's attempted arguments.

In the absence of the context of Krishna Iyer's statement impulsively quoted by Hoque at the end of his article, it is assumed that Iyer is talking about the Eastern tradition of human rights, and Eastern concepts on which legal systems should be based. Of these two assumed premises, the first appears to have been the context of Krishna Iyer's glib and fleeting comments on human rights. This is discussed first.

Krishna Iyer is known in Indian legal circles as a populist judge, whose apparent mission in his rather retorsive judgments, prolific extra-curial and post-curial writings, using archaic and ornate expressions of the English language, and at times making pompous statements, appears to be directed to deriving human rights from non-justiciable constitutional principles of state policy (itself a borrowing from the Irish Constitution). His ahistorical and acontextual approach is quite preposterous.

Whatever Krishna Iyer has to say, Western notions of human rights are not alien legal thought in the context of the new democracies in South Asia or elsewhere. It is true that the recognition of human rights has some roots in some of the ancient and medieval traditions of the East. For example, an internationally renowned jurist and later judge of the International Court of Justice, also from South Asia, Christopher Weeramantry, has highlighted "The Farewell Sermon of the Prophet Mohammed at Arafat" as "An Outstanding Human Rights Document" (An Invitation to the Law, Sydney, Butterworths, 1982, at 273). The concept of human rights as we know today, however, achieved its most explicit articulation in the West. In the process of its evolution, it has come to be seen as the birth-right of all people. Aversion to Western traditions and the misconceived quest for ethnocentric bias in explaining human rights cannot brush aside the now accepted universalised character of human rights.

The second assumed premise of Iyer's comment appears to be a chauvinist position that ancient Indian legal culture was superior, and reference should be made to those principles rather than to Western notions of government and politics. Again the answer to that is, because of the intervention of colonialism, post-colonial nations have to contend with alien, to use Iyer's expression, institutions of government and the legal system parliament, executive, court, federalism etc. In major respects, the institutions of government, and the basic concepts of the legal system left behind have been beneficial to the independent successor states. In the arena of individual rights as well, the colonial power abolished widow burning, permitting widow re-marriage. Surely Iyer would not reject these reforms as intrusions of alien legal thought.

It should be remembered though that some of these Western concepts of governmental institutions, and some of the core foundations of Western legal systems are based on Eastern philosophy. After reviewing the writings of Ibn Sina and Ibn Rushd in the 10th to 12th centuries, Werramantry has remarked: "Islamic philosophy ... played a significant part in stimulating ... emphasis on reason which was to lead eventually to the Renaissance and Reformation and the resulting transformation of European legal system" (An Invitation to the Law, at 32). It was since the beginning of the 12th century, after the Norman conquest of England, that the diffuse customary laws in different parts of that country was moulded into the common law of England, whence this system of law made its transmigration some seven centuries later to the newly acquired colonial territories including India. It would be infantile to say, like Iyer, that we should free ourselves from the bondage of alien legal thought. The varying dimensions of legal philosophy, and the differing bases of legal systems have had inputs from different societies, cultures, and practices, and have come to be the birthright of all nations to intellectually draw on. The challenge is to adapt the legal values and principles in the context of specific cultures and historical circumstances. We should not be engaged in foolishly trying to re-invent the wheel all over again.

The concept of the basic features doctrine proposed in the 1973 case of Keshavananda Bharati has been much touted as an innovation of the Indian Supreme Court. Reference has already been made in our original article to the precedent in the Irish case on which this doctrine is based, without however being explicitly acknowledged by the Indian Court. There is also a 1968 journal article to this effect by a leading Australian constitutional academic and writer, Tony Blackshield. In the literary, academic and judicial worlds, non-acknowledgement of prior ideas is akin to plagiarism. On a lighter note, to break the monotone of legalistics, and since this article is in the popular media, an analogy may be made to the Indian film world. Two examples may suffice; Mumbai films like Masum and Bride and Prejudice, are plagiarised versions of Erich Segal's Man Woman and Child, and Jane Austin's Pride and Prejudice. Mumbai movies have long been the opiate of the masses, and no one would seriously expect the ordinary mortals to scrutinise plagiarism; but what about literary and movie critics?

The basic features doctrine attempts to bring in the notion of a supra-constitutional norm in legal and constitutional interpretation. The doctrine of a supra-constitutional, non-positivist norm, has been known in Western jurisprudential writings for quite sometime. Hans Kelsen (Pure Theory of Law) is one example. There have also been writings on the higher, natural law, background of American constitutional law. Kelsen identified this fundamental norm as the Grundnorm. Kelsen's concept of the Grundnorm was used by the Pakistan Supreme Court in the 1958 case of State v Dosso. The problem with the doctrine of basic features is that anything can be branded as a basic feature of the Constitution. Thus in the 1976 Shukla case, during the harsh authoritarian emergency regime of Indira Gandhi, the Indian Supreme Court, not only refused to engage in judicial review of derogations from constitutional rights, but went on to identify the emergency provisions of the Indian Constitution as a basic feature of the Indian Constitution.

Some writers and commentators have been unduly enthusiastic about the basic features doctrine as laying down a limitation on the amending power (constituent power) of Parliament. However, the decision should also be seen in the perspective that the Indian Supreme Court in the 1973 Keshavananda case radically retreated from its activist position adopted in the 1967 Golaknath case. In the Golaknath case, the Indian Court declared invalid constitutional amendments that sought to foreclose judicial review of amendments relating to the constitutional right to property. In the Keshavananda case, the Court radically retreated from this position, and acknowledged the authority of Parliament to amend even the constitutional rights, and any other provision of the Constitution. The only limitation articulated by the Court was that no such amendment should alter, what it called, the "basic features" (e.g. supremacy of the Constitution, separation of powers, dignity and freedom of the individual) of the Constitution. In vacating the field of examining constitutional amendments, the Indian Supreme Court has taken recourse to the political questions doctrine. In all the cases decided during the states of emergency in 1962-1969 and 1971-1977, the Indian Supreme Court resorted to the political questions doctrine by refusing to hold invalid executive action of preventive detention, and declining to examine justiciability of executive proclamations of emergency... (Cont.)

The last part will be published on November 26, 2005.

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RIGHTS *column*

United Nations Committee against Torture considers Nepal's Human Rights situation after a decade

On November 8 10 2005, the United Nations Committee against Torture (CAT) examined the Human Rights situation in Nepal and more precisely Nepal's second report on the implementation of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.

During its dialogue with the official delegation the Committee emphasised the trend of systematic and widespread torture in the country and was deeply concerned by the large number of enforced disappearances. Moreover the Committee requested more information about incommunicado detention in army centres of detention.

The Committee raised the question of access to the place of detention and of a victim's access to justice. One of the Independent Experts cited cases of illegal arrest and torture of the people who seek legal remedy. The Committee also expressed its concerned over the attack on the independence of judiciary.

Finally, the Chairperson of the Committee was worried by the current situation in Nepal where the parliament is not functioning and tried to find out the impact of this on the overall situation of Human Rights in the country.

Responding to a series of questions raised by the Committee, Ambassador Mr. Zachary, leading the official delegation admitted that "there were gaps. But Nepal would like to see them filled and taken into account when it spoke of consolidating its efforts for the promotion and protection of human rights."

In the meantime the largest coalition of Nepalese NGO's Human Rights Treaty Monitoring Coordination Committee (HRTMCC) together with the Geneva based NGO World Organisation Against Torture (OMCT), submitted a shadow report on the violations of Human Rights in Nepal between 1992 and 2004. This report showed evidence of the wide practice of torture and others gross violations of the United Nations Convention against Torture.

The shadow report pointed out several urgent issues in order to stop torture in Nepal, including transfer of all the detainees to legal detention centres, free access for NGOs to places of detention and prompt investigation and prosecution of alleged officials involved in torture and ill-treatment cases.

"There are records of several incidences of severe cases of torture contrasted with the State report. Therefore, the government should demonstrate its willingness to offer an international surveillance to assure its commitment to the real implementation of the convention" said Kundan Aryal, General Secretary of INSEC, secretariat of the HRTMCC.

During the official NGO briefing to the Committee, Kundan Aryal called upon the Independent Experts to address matters crucial to the rule of law and human rights in the country.

"The coalition of NGOs and OMCT in Geneva await the official concluding observations and recommendations of the Committee on Nepal's situation and hope that the authorities will take urgent measures to ensure the implementation of the Convention Against Torture" said Patrick Mutzenberg from OMCT.

Source: OMCT.