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This All-Powerful Government is Prone to Creeping Authoritarianism

History shows majority rule is no guarantee against tyranny. Post-9/11, the portents for our democracy are alarming

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In the western world, the view prevails that democracy is a better form of government than any other. Probably it is. But the assertion of the superior moral value of democratic government compared, for example, with the organisation of society according to moderate Muslim principles, ought not to be conceded without examination. In the light of Guantanamo Bay, Abu Ghraib, Falluja, the other horrors of the Iraq war, and the continuing revelations about so-called extraordinary rendition - a fancy phrase for kidnapping - the Muslim world may not be over-impressed with protestations about the rule of law. Muslims generally regard such ideas as self-serving hypocrisy. The scale of the outrage in the world of Islam is enormous. The outcome for world peace and stability is the great question of our time.

From a western perspective, the question is whether foreign governments have used 9/11 as cover to justify their crackdown on human rights. Mary Robinson, one of the great lawyers and international public servants of our time, said last month of the consequences of 9/11: "Unfortunately, what I saw and heard was undemocratic regimes using the tragedy in the United States of 9/11 to pursue their own repressive policies, secure in the belief that their excesses would be ignored. New laws and detention practices were introduced in a significant number of countries, all broadly justified by the new international war on terrorism. The extension of security policies in many countries has been used to suppress political dissent and to stifle expression of opinion of many who have no link to terrorism . . . One ambassador put it to me bluntly in 2002: 'Don't you see, high commissioner? The standards have changed.' " It is a contemporary verdict which nobody can seriously challenge.

History has shown that majority rule and strict adherence to legality is no guarantee against tyranny. Hitler came to power by democratic vote. Moreover, in Nazi Germany, amid the Holocaust, pockets of the principle of legality (for what it was worth) sometimes survived. In Nazi Germany, defendants sentenced to periods of imprisonment before the second world war were left alone during the terms of their sentences. Only when their sentences expired did the Gestapo transport them to the death camps. The role of judges in this period is, of course, part of the Nuremberg story. But at or after Nuremberg nobody had any doubt what is torture. That at the highest levels the US administration has recently persistently tried to water down what is torture is deeply depressing for our times.

In the apartheid era, millions of black people were subjected to institutionalised tyranny and cruelty in the richest and most developed country in Africa. What is not always sufficiently appreciated is that by and large the nationalist government achieved its oppressive purposes by a scrupulous observance of legality. If the judges applied the oppressive laws, the government attained all it set out to do.

In Chile, following the coup in September 1973, thousands were arrested, tortured and murdered on the orders of General Pinochet. The civilised and constitutionally based legal system of that country had not been formally altered. It was not necessary to do so. The police state created by Pinochet intimidated and compromised the judiciary and deprived citizens and residents of all meaningful redress to law.

These examples demonstrate that majority rule by itself, and legality on its own, are insufficient to guarantee a civil and just society. They demonstrate the dangers of uncontrolled executive power. They also show how it is impossible to maintain true judicial independence in the contaminated moral environment of an authoritarian state.

It is our great privilege to live under a benign constitutional monarchy which has the hallmarks of a European liberal democracy. In matters of constitutional law the way in which government is actually conducted is of great importance. For the last 25 years, the pattern has been administration by governments with large majorities. The power of such a government over the lives of people is enormous. In 1978, Lord Hailsham described the Westminster system as "an elective dictatorship".

The process he described has continued and accelerated remorselessly. Knowledgeable observers describe our system of government as becoming in substance ever more presidential.

Moreover, Britain has become a multi-cultural society in which the need to protect the rights of minorities has become ever more important. The need to protect individual rights has come centre stage. The public is now increasingly looking not to parliament but to the judges to protect their rights. In this new world, judges accept more readily than before that it is their democratic and constitutional duty to stand up for individuals against the government. The greater the arrogation of power by a seemingly all-powerful executive which dominates the House of Commons, the greater the incentive and need for judges to protect the rule of law.

However, ministers do not always understand the principle of the separation of powers so far as it affects the judiciary. The home secretary recently explained: "I have been frustrated at the inability to have general conversations of principle with the law lords . . . because of their sense of propriety. I do find that frustrating. I have never met any of them. I think there is a view that it's not appropriate to meet in terms of their integrity . . . I regret that. I think some dialogue between the senior judiciary and the executive would be beneficial."

Charles Clarke apparently fails to understand that the law lords and cabinet ministers are not on the same side. In the public interest the principle of the separation of powers requires that it should be so. A cosy relationship between ministers and law lords would be a worrying development.

One's first instinct may be that undemocratic legislation is unthinkable in our country. We should trust the government. But is that a sufficient answer when the people are entitled to expect objective accountability from those in power? It must also be remembered that absolute power encourages authoritarianism, which is a creeping phenomenon. Our government has been prone to it.

One recent example is section 81(6) of the Asylum and Immigration (Treatment of Claimants etc) Act 2004. The section replaced immigration adjudicators and tribunals with a single-tier appeal tribunal. In isolation it may be unobjectionable. But the section seeks in effect to oust the jurisdiction of ordinary courts in all but limited cases. It will preclude judicial review on the grounds of lack of jurisdiction, irregularity, error of law, breach of natural justice and any other matter. These are the very areas in which the higher courts have repeatedly been called on to assert the sovereignty of the law.

The section attempts to immunise manifest illegality. It is an astonishing measure. It is contrary to the rule of law. It is contrary to the constitutional principle on which our nation is founded that Her Majesty's courts must always be open to all, citizens and foreigners alike, who seek just redress of perceived wrongs. It is a wholly disproportionate approach to the undoubted abuses in the immigration system. Instead of addressing those abuses, the section by and large abolishes justice and due process. If such legislation is effective in this corner of the law - not even involving

the endless war against terrorism - what are the portents for our democracy? Why should the section not serve as a model in other areas?

Guantanamo Bay will forever be a historical reference point for our time. It is a stain on American justice. Only the present US administration tries to defend the utterly indefensible. Unfortunately, our prime minister is not prepared to go further than to say that Guantanamo Bay is an understandable anomaly. In its feebleness, this response to a flagrant breach of the rule of law, reminiscent of the worst actions of totalitarian states, is shaming for our country. While our government condones Guantanamo Bay, the world is perplexed about our approach to the rule of law. If the matter were within the jurisdiction of British courts, our judges would unanimously condemn it. Were our government now to condemn Guantanamo Bay, it would at last be a powerful signal to the world that Britain supports the international rule of law.

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