



## Join the Campaign for National Human Rights Institutions (CNHRI)

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) will act initially as a pressure group to establish an independent National Human Rights Commission and an Office of Ombudsman in Bangladesh. Individuals and groups having proven track record of 'credible human rights work' and 'institution building experiences' are invited to join the initiative. 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>

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 network will strive to advocate for their early establishment in accordance with international standards.

If you have any query regarding the network or the issue, please do not hesitate contact us at Law Desk, The Daily Star (lawdesk20@hotmail.com; lawdesk@thedailystar.net); or Law Watch (lawwatch@msn.com; lawwatch2001@yahoo.com).

## CNHRI corner

# The Asia Pacific Forum: Coming into its own

HUMAN RIGHTS FEATURES

**N**ATIONAL human rights institutions (NHRIs) are one of the mechanisms available to address human rights violations at the national level. But their effectiveness, including enforcement of their determinations, depends to a large extent on their adherence to the Paris Principles. The Paris Principles however, represent only the lowest common denominator and have proved to be deficient in defining the mandate of national institutions.

The mandates of national institutions in the Asia Pacific region have largely been determined by the political context in which they are created. Political 'realities' and issues of national security have been employed as justifications to impose limitations on the scope of the institution's mandate. National Governments and their subsidiary functionaries many a time flout the institutions' determinations with impunity, but more often just disregard them. These concerns were most recently addressed by non-governmental organisations (NGOs) in a Consultation Meeting held prior to the sixth annual meeting of the Asia Pacific Forum of National Human Rights Institutions (APF) in Colombo, Sri Lanka, from 24-27 September 2001.

The Asia Pacific Human Rights Network (APHRN) facilitated the Pre Forum NGO Consultation. The consultation outlined six key features highlighting regional inadequacies in the existing protection and promotion mechanisms of national institutions. National institutions have failed to recognise their inherent links to the judiciary and by failing to do so, they have failed to develop an effective working relationship. The need to go beyond the Paris Principles, which impose responsibilities rather than duties, has become more critical than ever. National institutions need to develop a broader mandate that not only specifies their sphere of competence and jurisdiction but also empowers them to intervene in the relevant court cases. Thirdly, National institutions have been deficient in recognising their role in international fora as one that goes beyond mere contributions to State Periodic Reports and extends to notifying the relevant UN monitoring bodies about State behaviour. Fourthly, national institutions often do not have a transparent pro-

cess of adjudication. To ensure transparency and accountability NHRIs should have print and online editions of all research and investigation reports. National institutions often lack grassroots knowledge on human rights issues, which in no way has contributed to its credibility and efficacy. Initiatives and efforts by civil society in general and NGOs in specific are therefore indispensable. However imposing restrictions on visas and travel grants has often impeded the participation of effective NGOs.

The sixth annual meeting of the APF indicated its potential to provide a new and much-needed direction to national institutions aiming for regional human rights cooperation in the Asia Pacific. Reaffirming a decision made and supported in principle at the fifth annual meeting of the APF held in Rotorua, New Zealand in 2000, the sixth annual meeting marked the APF's coming of age in terms of constitution and structure. The formal establishing of the office of a chairperson and two deputy chairpersons and the decision to adopt a constitution marks its transition into an independent entity. It now also has access to more financial assistance apart from the Australian Government's development aid agency AusAID, funding will also be provided by the Danish aid agency, DANIDA, the Office of the High Commissioner for Human Rights (OHCHR) and the New Zealand Government and a broader mandate to implement and promote regional, multilateral and bilateral cooperation.

Since its inception in 1996, the APF has developed as a key human rights institution that mirrors the emerging regional consciousness. The number and diversity of its member institutions has continued to grow. At the sixth annual meeting, the National Human Rights Commission of Mongolia was formally admitted as a member taking the APF's membership to nine, and giving it a broader geographical identity. The meeting also, reaffirmed faith in the importance of cooperation between NHRIs and NGOs as expressed in the Universal Declaration of Human Rights, international human rights instruments and the Vienna Declaration. On 26 September, the third day of the meeting, the session was thrown open to invited non-governmental organisations (NGOs), other institutions and observers. In its capacity as a catalyst for regional cooperation, the APF provided an opportunity to the newly established national institutions of Fiji, Nepal and Mongolia in particular, and to members and other participants in the region including members of the civil society in general, to share experiences, make recommendations and work out collective strategies to enhance

individual capacities as human rights activists both at the domestic and the regional level.

While the APF has demonstrated the relevance of intensive and coordinated action among regional institutions for the promotion and protection of human rights in the Asia Pacific, much remains to be done. The challenges the region faces are daunting, given the nature and scope of problems. It is within this context that the Pre Forum NGO consultation proposed a set of recommendations intended to serve as guidelines for NHRIs in their strategies to address a range of thematic issues including HIV/AIDS and human rights, gender, racism, racial discrimination, xenophobia and related intolerance, internally displaced people, NHRI-NGO relations, regional cooperation and the work of the Advisory Council of Jurists. While the APF has taken cognisance of these recommendations, it remains to be seen whether they are followed through. The NGO community hopes that there will be a transition from previous efforts those were concentrated on, and limited to, awareness raising rather than on effective legal enforcement.

In a region that has the dubious distinction of being the only one in the world without a collective human rights mechanism, the APF can contribute its bit to the evolution of a human rights culture. The Statement of Conclusions reiterated the APF's commitment to the promotion of regional cooperation and the development of national human rights institutions in the Asia Pacific region. The APF has recognised three 'core' functions of national institutions: educative, advisory and complaint resolution and outlined certain initiatives expected to take shape in the next three years. These include regional thematic workshops on issues such as HIV/AIDS, Human Rights Education, the Media and Public Affairs, regional training programmes on Forensic Investigatory Techniques and the management of a regional staff exchange programme between APF member institutions and the APF Secretariat.

Judging by the initiatives and commitments made by the APF, there is much to look forward to. The important gauge however will be the extent to which these resolutions and commitments prevent the occurrence of human rights violations in the future. Only then will the APF deserve the dignified appellation of "national institution for the promotion and protection of human rights".

Human Rights Features is an independent, objective and analytical attempt to look comprehensively at issues behind the headlines from a human rights perspective. Send your write-ups on national human rights institutions to the CNHRI Corner, Law Desk, The Daily Star

## Star LAW report

# Hartal accompanied by threat amounts to intimidation

**High Court Division, The Supreme Court of Bangladesh**  
**(Special Original Jurisdiction)**  
**Khondaker Modarresh Elahi ... Petitioner**  
**Vs**  
**The Government of the People's Republic of Bangladesh**

... Respondent

**Writ Petition No. 1216 of 1999**  
**Before Mr. Justice Mainur Reza Chowdhury, Mr. Justice Syed J R Muddassir Husain and Mr. Justice M A Aziz**  
**Judgment: October 25, 2000**  
**Result: Rule discharged**

**Judgment:**  
**Mainur Reza Chowdhury, J:** On the application filed by the petitioner under Article 102 of the Constitution a Rule Nisi was issued calling upon the respondents to show cause as to why calling of hartal on 18.4.99 or on any other day thereafter should not be declared to have been made without any lawful authority and is of no legal effect and also in violation of the fundamental rights of citizens including the petitioner.

The petitioners case is as follows:  
The petitioner is a citizen of Bangladesh and is a practising Advocate in the High Court Division of the Supreme Court of Bangladesh. By this petition he seeks to protect his fundamental right and that of other citizens threatened to be violated by calling and observing 'hartal' on 18.4.99 as in the past, and for a declaration that calling and the holding of what has come to be known as 'hartal' is unconstitutional and therefore illegal. In the recent past the opposition parties led by Bangladesh Nationalist Party called hartal on 26.1.99. This hartal was called for 60 hours from 9 February to 11 February 1999 during which six persons died, a police Constable Tajuddin who had been wounded at Tantibazar area when a bomb hurled by picket struck him in the head. Hartal again was called for 66 hours on 23, 24 and 25 February, 1999 by the Bangladesh Nationalist Party and opposition alliance during which three persons were killed and 250 persons were injured including rickshaw puller Sukkur Dewan whose right hand was blown off by a bomb thrown by a picket in support of hartal although rickshaws were allowed to ply on the road during hartal. These incidents show "that the observance of hartal is not at all peaceful and it is an illegal activity physically restraining the citizens of the country from attending to their avocations and the traders are prevented from keeping open their shops or from carrying on their business activities. The workers are prevented from attending to work in the factories and other manufacturing establishment leading to loss in production. The organizers of hartal also indulge in wanton acts of vandalism like destruction of government property and vehicles of all kinds. The political parties have the right to hold demonstrations or protest against the Government activities, but such right cannot extend to prevent the citizens of the country from exercising their fundamental rights of attending to their business, studies and avocations, and as such the calling of hartal ought to be declared illegal. It is stated that during the observance of hartal the police force does not take any step to prevent violence and coercion and citizens are forced to remain indoors for fear of life. The petitioner submits that this court in exercise of its jurisdiction under Article 102 of the Constitution has not only the right, but also the duty to protect the citizens and their fundamental right guaranteed to them by the Constitution. The court has the duty to direct the executive to ensure the rights of the citizen's 'trampled upon by any political organization or violent minority.' Hartal also 'cause prejudice to the economic interest' of the state and therefore the calling of hartal on 18.4.99 and in future should be declared to be illegal. It is submitted by the petitioner by a supplementary affidavit that calling and holding hartal for whatever purpose is not contemplated by the Constitution as such calling hartal of 18.4.99 is without lawful authority and is of no legal effect. There is no sanction in the Constitution calling for and holding hartal and therefore it cannot be allowed to be used as a means to achieve any end by the political parties. Both the end and means must be just and proper and justifiable on legal and moral grounds. In his additional supplementary affidavit the petitioner has given an account of incidents that took place on 18.4.99 when the rule was pending. There were acts of violence and bombs blasts in which the hand of one Shahed, a helper of BRTC bus was blown off at Shahabagh. The respondent Nos 3 to 5 called half-day hartal throughout the country on 11.5.99. The hartal was observed on that

day but excesses were committed by the police. The Daily Star on 12.5.99 published pictures of the police atrocities. They show baton wielding police beating up BNP Members of Parliament and stripping a female activist of the party at Bijoynagar area. The affidavit mentions series of other incidents that took place during the hartal. It is therefore submitted that 'hartals are not observed peacefully without the incidents of violence in which the over zealous police also participate with the permission of the Government to shoot at the pickets and journalist.'

An affidavit-in-opposition on behalf of Mr Abdul Mannan, respondent No. 3, Secretary BNP has been filed inter alia stating that the writ petition was not maintainable in law.

**From the petition and the affidavit-in-opposition the main questions which arise are whether.**

**1) The calling of hartal on 18.4.99 was illegal, (2) the calling and holding of hartal is illegal as it interferes with the petitioner's and citizen's-right to work and pursue their avocation and trade or (3) whether hartal is a means of expression which is guaranteed by the Constitution.**

Mr Maksudur Rahman, the learned Advocate for the petitioner while arguing in support of the Rule has referred to the decision in the case of Bharat Kumar K Palicha and another Vs. State of Kerala and others reported in AIR 1997 (Kerala) page 291 in which the High Court of Kerala held that the calling for and holding of bundh by political party or organization involves a threat express or implied to citizen not to carry on his activities or to practise his avocation on the day of bundh. It violates the fundamental rights of the citizens. The Supreme Court of India by its judgement reported in AIR 1998 Supreme Court page 1984 upheld the judgment saying there was no right to call or impose bundh which interfere with the fundamental right of freedom of citizen in addition to causing loss in many ways. There is no decision on the matter by our Superior Court. The petition before the High Court of Kerala essentially sought relief by a declaration that the calling for and holding of what came to be known as "Bundh" is unconstitutional and hence illegal. The court proceeded by first explaining what 'bundh' is. It said: "Bundh" is a hindi word meaning 'closed' or 'locked'. The expression therefore conveys an idea that everything is to be blocked or closed. Therefore, when the organisers of a bundh, call for a bundh, they clearly express their intention that they expect all activities to come to a standstill on the day of the bundh. A call for a bundh is obviously distinct and different from the call for a general strike or the call for a hartal. The intention of the callers of the bundh is to ensure that no activity either public or private is carried on that day, ... that obviously means that it amounts to a negation of the rights of the citizens to enjoy their natural rights, their fundamental freedoms and the exercise of their fundamental rights. It is no doubt true that while calling for a bundh it is not also announced that any citizen not participating in the bundh will be physically prevented or attacked....

The leaders of the political parties who call for the bundh cannot escape by saying that they are not directly telling the citizens not to do these things under threat but if some of the participants in the bundh indulge in such activities, they can not be held responsible. Obviously, they can with reasonable intelligence foresee the consequence of their action in calling for the bundh. Nor can they pretend that the consequences that arise out of the calling for a bundh, is too remote or does not have reasonable proximity to the call they have made. ... this Court can only go by the call for the bundh itself which does not involve the call for violence or forceful prevention of people from going about their avocation. We do not think that we would be justified in adopting such an ostrich like policy. We cannot ignore the reality of what is involved when a bundh is called.

We are inclined to understand the concept of a bundh as one where people are expected not to attend to their work or to travel for any purpose nor to carry on their trades with a threat held out either express or implied that any attempt to go against the call for the bundh would result in danger to life and property. Even if there is no express or implied threat of physical violence to those who are not in sympathy with the bundh, there is clearly a menacing psychological fear instilled into the citizen by a call for a bundh which precludes him from enjoying his fundamental freedoms or exercising his fundamental rights....We are inclined to the view that the call for a bundh implies a threat to the citizen that any failure on his part to honour the call, would result in either injury to person or injury to property and involves preventing a citizen by instilling into him the psychological fear that if he defies the call for the bundh, he will be dealt with by those who are allegedly supporters of the bundh.

... the rights put forward by the petitioners in these Original Petitions to carry on their profession or business or to attend to their

offices is certainly part of the fundamental rights guaranteed to them by the Constitution...

When a citizen is coerced into not attending to his work or prevented from going out for his work or from practising his profession or carrying on his business, there is involved a violation of his fundamental right at the instance of another. From our understanding of the concept of bundh asset out above, we are of the view that there is such a violation of the rights of the citizen when a bundh is called and held.

... If this be the position and if call for the bundh and the holding of it entails restriction on the fundamental freedoms of the citizen, it has to be held that no political party has the right to call for a bundh on the plea that it is part of its fundamental right of freedom of speech and expression. Moreover, nothing stands in the way of the political parties calling for a general strike or hartal unaccompanied by express or implied threat of violence to enforce it. It is not possible to accept that the calling of a bundh alone could demonstrate the protest of a political party to a given decision or in a given situation.

No political party or organization can claim that it is entitled to paralyse the industry and commerce in the entire State or Nation and is entitled to prevent the citizens not in sympathy with its view point, from exercising their fundamental rights or from performing their duties for their own benefit or for the benefit of the State or the Nation. Such a claim would be unreasonable and could not be accepted as a legitimate exercise of a fundamental right by a political party or those comprising it...Mr. Maksudur Rahman has submitted that "hartal" called for by the political parties in our country is same as bundh referred to in the above case.

We do not entirely agree that the call for every hartal by organisers is clearly intended that they expect all activity to come stand still on the day of hartal as has been found in the case of bundh by the Kerala High Court. We cannot also say that it is always the intention of callers of the hartal to ensure that no activity either public or private is carried on that day as has been held by the Court of Kerala. So Long as the call for hartal is only a call to express solidarity with the caller of hartal to protest and there is no express or implied threat or warning it can not be said to be interfering with the right of the citizen merely because some incidents against public order occurs on the day of hartal. A call for hartal without any threat expressed or implied would in my view be an expression of protest which is guaranteed by Article 39 (2) (a) of our Constitution. But as soon as the call for hartal becomes more than a call which by use of language of threat or show of force or warning of consequence for violating the call is expressed or implied which is likely to create fear and apprehension in the mind of ordinary citizen it would cease to be an expression protected by the Constitution. Such expression accompanied with implied warning or threat would amount to intimidation. It would be an offence under section 503 of the Penal Code as it would interfere with the act of a person which is legally entitled to do such as go to work pursue his business and move about freely.

**Therefore it is my view that call for hartal per se is not illegal but where any call for hartal is accompanied by threat it would amount to intimidation and the caller for hartal or strike would be liable under the ordinary law of the land.** It is therefore my view and we agree with the ratio in the Flag Burning case that where an act is meant to be nothing but an expression of protest such an act cannot be aid to violate the fundamental right of the citizens. The

calling for hartal and not accompanied by threat would be only an expression guaranteed as a fundamental right under the Constitution. But any attempt to enforce it or ensure that it hartal is observed would make the call illegal and interfering with the individual right. It would depend on the circumstances. The petitioner in his petition has not put before us any threat express or implied made by the Bangladesh Nationalist Party (BNP) when it called for hartal on 18.4.99. We also cannot say that in future all hartal calls will be accompanied by threat or meant to force it upon the citizens, we are therefore unable to declare that the impugned hartal called on 18.4.99 and hartal to be called in future to be illegal and interfering with the fundamental right of the petitioner and other citizens of the country.

In the end I would like to refer to a news item appearing on October 22, 2000 in the Daily Star under caption "Law and our right" at page 5 which reads:-

"The Supreme Court in a Delhi stayed a High Court judgment asking the Election Commission to deregister political parties that enforce Bundhs. As Congress and CPI (M) challenged the verdict of Kerala High Court, the apex court issued notices to the Centre, the EC, State of Kerala, Director General of Kerala police and the institute which had moved in the High Court against general strike enforced forcibly."

...He submitted that under the Representation of Peoples Act there is no provision for deregistration.

"A party might call for a general Strike and its implementation through peaceful manner," he said.

The respondent raised the question of locus standi of the petitioner. The petitioner is a practising Advocate of the High Court Division of Supreme Court of Bangladesh. He has alleged that because of hartal he was unable to pursue his profession. It was also submitted by Mr. Maksudur Rahman that he is a conscious citizen and therefore he filed this writ petition as a public interest litigation. In view of the judgment of Faruque Ahmed's case by the Appellate Division we find that the petitioner claiming that he is affected by the hartal call he is therefore an aggrieved party. We are of the opinion that he has the locus standi to file the present petition.

It has been alleged that calling for hartal and observing hartal create hardship for the citizens and they are unable to pursue their profession and work out of fear. This is true and to those who are weary and fed up of hartals we would like to say what Justice Kennedy said while concurring in the Texas case "The hard fact is that sometimes we must make decisions we do not like. We make them because they are right, right in the sense that the law and the Constitution, as we see them, compel the result." We also like to say that the State need not worry that our holding will disable it from preserving the peace. We do not suggest that the Article 39(2) of the Constitution forbids to prevent imminent lawlessness which will follow from call for hartal call. In the light of our observation the rule is discharged without any order as to costs.

This is an abridged version of the judgment delivered by Justice Mainur Reza Chowdhury. In the next week, the abridged deliberations of Mr. Justice Syed J. R. Muddassir Husain and Mr. Justice M. A. Aziz of the present case will be published.

## LAWSCAPE

