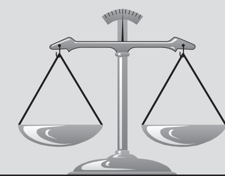

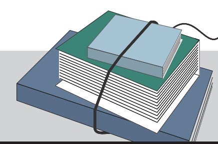

Join the Campaign for National Human Rights Institutions (CNHRI)

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).

REVIEWING *the views*

The need for global justice

ROB GAUDET

ONE of my favorite books is Plato's Republic. The main character, Socrates, discusses a concept that has become one of the foundations of western civilizationjustice. He calls it the "proper virtue of man" and says it is "more precious than many pieces of gold."

Unfortunately, we have strayed away from justice. We have been living under the philosophy of Socrates' antagonist, Thrasymachus, who argued, "justice is nothing else than the interest of the stronger." This is popularly known as "might makes right." American foreign policy has followed this course for the past 200 years. I don't mean to criticize what America has done in the name of democracy, freedom and self-preservation. However, I do think the time is right to create an International Criminal Court. World delegates met in Rome in 1998 to create an International Criminal Court to handle war crimes, genocide and crimes against humanity wherever they take place. So far, 139 countries have signed on. Among these, 43 have ratified the treaty. They look like earth's angels: Sweden, Switzerland, Norway, Luxembourg, United Kingdom, Denmark, Austria and Canada. The countries that have not signed the treaty look like a compilation of earth's bad boys: Libya, Somalia, Iraq, Pakistan and Afghanistan. The latter nations have the kind of reputations that would allow them to form a rock band and sell millions of albums to rebellious teenagers. I am not sure if that is the right company for America to be keeping. Our country has been equivocating on whether to ratify the treaty. The U.S. Defense Department heavily opposed the idea. Nevertheless, former President Clinton signed the treaty in late 2000. It hasnot been ratified, which means, basically, that we are still holding out. Retiring Senator Jesse Helms is trying very hard to block American cooperation and, more generally, to prevent any kind of movement into the 20th century (much less the 21st century) world of international affairs. He calls the ICC an "International Kangaroo Court." I suppose that should be enough to convince you that it is a good idea.

Let me tell you a true story about another charming man who opposes the ICC: former Secretary of State James Baker III. Baker III is a partner at Texas's oldest law firm, where his son, Baker IV, works in a different branch office. I met Baker III this summer when the law firm Baker Botts took dozens of summer associates to Houston for a presentation by the former Secretary of State.

At the presentation, one student asked Baker III for his views on the ICC. He replied, "it's the worst idea ever to have surfaced." I thought that was a strange response for an idea endorsed by 139 nations. I told Baker III that I disagreed with him. He tore into me like a hungry UT-Austin student tearing into a plate of ribs. Baker III was worried that the ICC would bring him into court for bombing Libya in 1988, despite the fact that the bombing was condoned by the United Nations. I told him, "the U.N.'s approval would have been part of your defense and, most likely, it would have exculpated you."

Baker III retorted, "this is the best country on earth and it is so great that everyone is moving here to be a part of it." I agreed with him and said that we should use our greatness to set up an international court. The Rome Statute of the International Criminal Court shares many features with the American judiciary. It provides for the presumption of innocence, the right to remain silent, the right against self-incrimination, the right to have legal counsel of one's choosing and the right to be informed of charges against oneself.

The ICC would not be allowed to hear cases, which have been seriously investigated by a state court. That means the military trial in the "Rules of Engagement" movie (which I do not recommend on any grounds except as an illustration of this point) would have exempted Samuel Jackson's character from the jurisdiction of the ICC.

This experience taught me a few things. One, a marine (Baker III used to be one) will always be a marine. Two, former Secretaries of State can be jerks. Three, people disagree violently when they are afraid of being hauled into court. Four, Thrasymachus's argument that "might makes right" has followers in all ages.

Americans would benefit from a forum like the ICC. If our lawyers can successfully defend O.J. Simpson against murder charges, they should have no trouble defending Baker III against charges in the ICC for the 1988 Libya bombing. Furthermore, the ICC is being shaped in our own image. It contains many features of the American judicial system. Former Ambassador to the U.N. Bill Richardson wrote in the New York Times that the U.S. has won agreement on the scope of crimes covered (we kept it narrowly focused on the most horrific crimes), led successful talks on rules of procedure and evidence and led talks on how to describe the elements of each crime. Our lawyers would be able to navigate the ICC as well as anyone. Our soldiers, too, are the most professional in the world. They would be the least likely candidates for ICC prosecution. If they do kill civilians without ample reason, then I am sure the American public would be happy to see them held accountable.

History shows (through the Persian, Inca, Aztec, Roman and Babylonian empires) that America's power won't last forever. We will be better off in the long-run if we create a level playing field while we can. We should support the ICC and throw the Saddam Husseins and Mohammar Qaddafis of the world into court. Bring them onto our own turf. On the flip side, the ICC might bring Americans into court for civilian deaths in the Middle East. I would rather see our injustices addressed by appointed judges than by self-appointed terrorists like bin Laden. The time is ripe for the ICC. It will be formally established-with or without usafter 60 nations have ratified the Rome Statute of the International Criminal Court. The number count is up to 43. U.N. Secretary-General Kofi Annan anticipates the ICC will be established in the next year. At a recent conference, he heralded the ICC as an important move toward a "world based on the rule of law." History will remember whether we stand for "justice" as defined by Socrates or follow the "might makes right" philosophy of Thrasymachus.

Courtesy: The Stanford Daily via U-WIRE

The roots of anti-Muslim rage

OMAYMA ABDEL-LATIF

THIS was meant to be the year when the UN initiated its scheme to promote "dialogue among civilisations." Instead, it is witness to a confrontation apparently pitting "Islam" against the "West." In the weeks following the 11 September attacks against the US, old theories were dusted off, and prejudices predicting "an ultimate clash of civilisations" were bruited about. Leaders of the US coalition have gone to great lengths to "win the hearts and minds of Muslims" as press reports put it. They have emphasised that "the West has no grievances against Islam." This has done little to soothe Muslim fears of a "crusade" against the Islamic world. According to one observer, the lull in the coalition military attacks in Afghanistan on last Friday, supposedly in deference to the Islamic day of prayer was a "mockery." The bombing of a mosque near Kabul the day before, an atrocity, which killed 120, according to Britain's Independent newspaper, negated the effect of all such symbolic acts.

Western governments say it is not a war against Islam. Osama Bin Laden says it is. Muslims at large are caught in the middle.

Many Muslims think the official niceties of Tony Blair and George Bush are meant only to keep the coalition intact: in reality a coalition intended to batter Muslims. According to John Esposito, director of the Centre for Muslim-Christian Understanding (CMCU) at Georgetown University, the US administration risks a backlash in the Muslim world thanks to its inconsistent treatment of Muslim sensibilities. Esposito says that many in the Muslim world see the US as a "hegemon," a kind of "neo-colonialist power," not a state engaged in a morally unimpeachable war on terror. "If they [the Muslims] start seeing the US as a colonial power jumping off from Afghanistan and moving around through the Middle East and settling old scores," says Esposito, "then the risk is that they will believe [the coalition is engaged in] a war against Islam. People will think that Afghanistan was only an excuse to get in the region."

Accompanying the strikes is a trend in foreign press writings, which amounts to what one German intellectual described as "a constant secular slander of Islam." These writings lend credence to Bin Laden's argument that the assault on Afghanistan is indeed a "war against Islam and Muslims." Elements in both the American and British press have embarked on what Edward Said described as "a wholesale demotion of a civilisation into categories like irrational and enraged." A constant stream of articles have parroted Bernard Lewis and Samuel Huntington, the writers who coined the phrases "the roots of Muslim rage" and "the clash of civilisations," by speaking about "the strategy to win the hearts and minds of Muslims," as if Muslims were a herd, incapable of variety of opinion. Other articles represent Islam as unable ever to understand or accept a US version of modernity. Such articles describe the fanaticism of Islam, the moral sickness of the Arabs and Muslims and their inherent inability to comprehend Western modernity as the rest of the world does. Last week's Time cover demanded, "Who can stop the rage?" Newsweek referred to "the roots of rage." Self-appointed experts on Islam and Muslim societies speak of "the failed societies," or "the land of suicide bombers, flag burners and fiery mullahs." All of this in lieu of proper analysis of real political grievances some in the region have, and which may, just possibly, be behind their discontent.

Contrary to Tony Blair's official praise of Islam, some British papers have bluntly suggested," yes, it is a war, and Islam is at its heart" (pace Hugo Young in Britain's Guardian). Others spoke of war against "fanatical Islam." Such writings play to advocates of an imminent clash of civilisations between Islam and the West and fuel the rage of the warmongers.

The logic, according to Professor Hassan Hanafi, chair of the Islamic Philosophy Department at Cairo University, is to prepare the moral ground for the massive acts of the US. Their intention, argues Hanafi, is not to analyse "why they hate us" but rather to use angry violent images coming from the Muslim world morally to justify US aggression against the Islamic world. "It is about who sets the rules in the global game. The strategy to win the hearts and minds of Muslims only translates into how can we control them," Hanafi told the Weekly.

Both Hanafi and Esposito reject the notion of a clash of civilisations between the West and Islam as a rehash of old imperialist theories. "There is no one West, no one Islam: and to speak of civilisations as isolated entities defies the very logic and nature of what civilisation is all about," Hanafi explained. Esposito calls the language of civilisational clash "medieval." The question, explains Esposito, is whether the United States truly believes in the promotion of self-determination and human rights for everyone, or is selective when it comes to the Middle East and the Muslim world. "If the US and Europe are really concerned about the promotion of democratisation and human rights, then they have to be consistent with regard to that policy."

Samuel Huntington originally wrote his article "the Clash of Civilisations" in 1993. Ever since, it has provided a manual to "keep the West powerful and its opponents weak and divided." Huntington advises the West, to "exploit differences and conflicts among Confucian civilisations and Islamic states, support other civilisational groups that are sympathetic to Western values and interests, and strengthen international institutions that reflect and legitimate western interests and values." The extent to which governments do, too, remains to be seen. But the omens are not good.

The opinion was first published in Al-Ahram Weekly Online

Star VERDICT *review*

Can fundamental rights be invoked against the Government and public authorities only?

DR M A FAZAL

THIS was the main question underlying the case of K M Elahi v The Government of the People's Republic of Bangladesh [2001] Star Law Reports, 21 October. In this case the plaintiff sought a declaration to the effect that political strikes (locally known as 'Hartal' or 'Bundh') involving the closure of shops, offices, factories and resulting in a total or partial paralysis of life, enforced by threats or actual violence very often causing deaths, injuries and wanton damage/destruction of property, are illegal. Here the Government was only nominally one of the respondents. Of the five respondents the Government of Bangladesh was respondent no.1 whilst the respondents nos. 2, 3,4 and 5 were the secretary-generals of the leading political parties. In substance, this petition for judicial review was aimed at political parties i.e. private groups rather than the Government or public authorities. This was made clear by Mr Justice M A Aziz when he said, "All political parties, except the one in power, appear to prefer the retention and continuation of hartal. It is interesting to note that respondent no. 1, the Government of the People's Republic of Bangladesh, though filed an affidavit-in-opposition, did not ultimately contest the rule". Therefore, although this constitutional petition was filed against the Government of Bangladesh, violent political strikes are very often resorted to by private groups and political parties normally in opposition. Even a governing party, while it is in opposition, is likely to indulge in this type of activity with the declared objective of bringing down the government unconstitutionally.

The petitioner argued that whilst the political parties and private groups have their right to hold demonstrations or protests against the government under Art. 39(2) of the Constitution, such a right cannot extend to prevent the citizens of the country from exercising their fundamental rights of attending to their business, studies and professions. The High Court Division held that political protests and general strikes are not per se illegal but while they are accompanied by threats of violence they would amount to intimidation so as to render the organisers liable under the ordinary law of the land.

Judicial remedies granted in such a case would operate upon private individuals, organisations and groups. An application for judicial review in such a case, therefore, raises a wider question: Can fundamental rights be invoked, not only against the Government and public authorities, but also against private individuals, autonomous groups and incorporated/unincorporated businesses? This is known in legal literature as the 'horizontal versus vertical' application of the fundament rights. If they have 'horizontal' effect, they will regulate relations between private individuals and organisations, in addition to having' vertical' effect governing the relations between the state and the individuals.

Horizontal versus vertical effect

This debate has arisen in the United Kingdom in the context of the Human Rights Act 1998, which enacted the provisions of the European Convention on Human Rights. Murray Hunt expressed the view that the Act will fall short being directly horizontally effective because it will not create any new private cause of action against individuals in respect of the breach of the Convention rights. [The Horizontal Effect of the Human Rights Act 1998, (1998) Public Law pp 153-189]. Sir William Wade QC, on the other hand, has argued that as s. 6 (3) makes the courts and tribunals public authorities which are required to act in a way which is compatible with the Convention rights in all cases, the courts are bound to apply and enforce the Convention provisions in all judicial proceedings including private litigation between private parties [Sir William Wade QC, 'The United Kingdom's Bill of Rights' in Constitutional Reforms in the United Kingdom: Practice and Principles (1998) pp 62-64].

There is further question as to whether the fundamental rights provisions can have both direct and indirect horizontal effects as between private parties. This question, which originated in the laws of Germany and the European Union, has arisen also in various common law jurisdictions including India, New Zealand and Canada in wider terms i.e. not restricted to the technical interpretation of s. 6(3) of the British Human Rights Act 1998. In Germany, while the Federal Labour Court has acted on the theory of unmittelbare Drittwirkung i.e. direct application of the constitutionally protected rights in the area of private law, the Federal Constitutional Court has opted for the theory of indirect influences of constitutional rights over private law (B S Markesinis, The German Law of Tort, p. 28). Thus, the Federal Labour Court has ruled that employees have constitutionally protected rights of free speech against their employers.

Referring to a ruling of the German Federal Labour Court of 1984]: "If the court ruling amounts to incorporating into contract of employment between the private parties an implied term to effect that an employee cannot be dismissed in breach of his constitutional rights then that would be the case of the constitutional provisions having an indirect influence on private law arrangements… If, on the other hand, the ruling affirms that an express contractual term cannot operate owing to its inconsistency with the constitutional rights then that would be the case of the 'direct horizontal' effect of the constitutional provisions over private law rights.

Indian sub-continent

The constitutional scheme of guaranteed rights known as 'fundamental rights' was originally designed in terms of vertical effects in India, Pakistan and Bangladesh. Thus in India important rights such as freedom of speech and expression, of assembly and association, of movement, the right to reside and settle in any part of the country, the right to practise any profession or trade, the right to life and personal liberty and the right to property have been held to be guaranteed against state actions as distinct from their violation by private individuals unless the claim of a private person is supported by acts of the state or of state instrumentality or agency [K.K. Kochunni v. State of Madras AIR 1959 SC 725 at 730]. Nonetheless there has been a movement towards the horizontal application of the constitutional rights. This has come about in a number of ways. The concept of the 'state' (which was originally defined by art.12 to include the federal government and parliament, the state governments and legislatures and local or other authorities within the country and under the control of the Government of India) was broadened so as to embrace private entities such as companies something that has been done by the European Court of Justice in the context of EU directives [Marshall v. S W Hampshire Area Health Authorities (1986) 1 C.M.L.R. 688]. Secondly, the wording of all the articles of the 'fundamental rights' does not necessarily appear to be limited to rights against the state activities only. Thirdly, ordinary legal remedies such as injunctions, declarations and damages have not been ruled out against violations of the fundamental rights by private entities groups or individuals. Fourthly, under art. 13 all the pre- and post- constitution laws are null and void in so far as they are inconsistent with the provisions of the fundamental rights. Thus where one private party terminates the rights and interests of another private party purporting to act under invalid laws the latter would have a cause of action under art. 13 of the Constitution.

Therefore a position has been reached in India under which "when any citizen or person is wronged, the High Court will step in to protect him, be that wrong done by the state, an instrumentality of the state, a company, or a co-operative society or association or body of individuals, whether incorporated or not or even an individual" [per D. P. Wadhwa J of the Indian Supreme Court in Co-Op Land Development Bank Ltd. v. Chandra Bhan Dubey (1999) 1 SCC 641 at 758]. In other words the answer to the question that this article seeks to pursue is in the affirmative in India. It is submitted that the law is the same in Bangladesh and Pakistan.

Impact of horizontal application on private law

If the fundamental rights are given 'horizontal effects' that is likely to make an impact on private law embracing both the statute law and common law. As a result various branches of private law are likely to become 'constitutionalised'. In Canada the Charter rights (the Canadian expression for the 'fundamental rights') are given only 'indirect horizontal' effect and not 'direct horizontal' effect. Even then the Charter rights are likely to make an impact on private law. Thus Cory J. of the Canadian Supreme Court stated

"Where…private party 'A' sues private party 'B' relying on the common law and where no act of government is relied upon to support the action, the Charter will not apply. I should make it clear, however, that this is a distinct issue from the question whether the judiciary ought to apply and develop the principles of the common law in a manner consistent with the fundamental values enshrined in the Constitution. The answer to this question must be in the affirmative. In this sense the Charter is far from irrelevant to private litigation whose disputes fall to be decided at common law". [Manning v. Hill (1995) 126 DLR (4th) 129 (S.C.)]

Statute law too governing private law/business law would be open to scrutiny to see if they are incompatible with the fundamental rights. Recently the English Court of Appeal declared that s.127 (3) of the UK Consumer Credit Act 1974 was incompatible with the European Convention on Human Rights. [Wilson v. First County Trust Ltd (2001) 3 ALL E.R. 229]. This case provides an example of the impact of the European Convention on Human Rights on private law. Although under the procedure of the ECHR (art.34) a complaint may be brought only against one of the High Contracting Parties i.e. a state or the government of a state, the European Court of Human Rights has already developed a substantial body of case law having a major impact on private law regulating the legal relations between private parties in the following areas of law: 1. Law of defamation; 2. family law and the related rules of succession.; 3. employment law; 4. breach of confidentiality and privacy (M A Fazal op.cit.718-727).

Concluding observations

If the fundamental rights have applications between private parties, that will have profound implications for the scope of judicial control. The remedies of judicial review for the enforcement of the fundamental rights could then be invoked in the legal proceedings between private parties. Incorporated or unincorporated businesses could have fundamental rights inter se and against the public authorities as the English Court of Appeal established recently in Wilson v. First Count Trust Ltd. (2001). [In this case, the restriction on the enforcement of the creditor's contractual rights was held to be incompatible with the right to a fair trial and the right to property under the European Convention of Human Rights]. In that event judicial review would have to operate upon a new landscape.

Dr M A Fazal is Principal Lecturer in Law, Nottingham Trent University, United Kingdom

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