

## E-commerce: Challenges to the regulators

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**E**LECTRONIC commerce is the most sensational current topic of the information age that we are living in. The e-commerce mania not only brings in information revolution in the competitive world of business, trade and commerce, but also shapes up the overall financial market scenario of the domestic and global economy.

E-commerce is not an entirely new phenomenon in the financial market. Indeed within the twenty years of appearance of the world's first programmable computer in 1946, the computer had found its way into the Bank of America and beyond as a data storing machine and by the 1970s was being used as a means of communication information between businesses via their own private networks through the use of Electronic Data Exchanges (EDI).

Internet strategy and technology is shaping up to be a very serious issue for banks in many ways. Major banks, all over the world, are constantly developing new technological features which ultimately should lead to many improvements. Substantial new and important features are appearing. Also, some internet/virtual banks have already started emerging in the USA and the UK.

Moreover, with the advent of e-commerce, the securities trading activities are also affected by the contemporary reality of global village. Distance no longer insulates any one securities market from another. Screen trading in securities has made the securities trading market place to become intangible and to exist in virtual reality of telephone lines and computers. Not only does this make the size and scope of the national and international securities market 'hard to see'; it also makes regulation extremely difficult, if not impossible.

### Defining electronic commerce

According to articles 1 and 2 of the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Electronic Commerce, *electronic commerce is information generated, stored or communicated by electronic, optical congruous means, including electronic data interchange (EDI) and email, used in the context of commercial activities.*

A more discursive definition is the European one - *Electronic Commerce is about doing business electronically.*

In Australia, the Attorney General's Expert Group, in its report, "Electronic Commerce: Building the Legal Framework" defines electronic commerce as *any trade or computer transaction that is effected via electronic means; this would include such means as facsimile, telex, EDI, internet or the telephone.*

### Challenges to the regulators

The brave new electronic world is exciting as well as challenging to the regulators who have so far been dealing with paper-transactions. Under the electronic era, the regulators face a basic choice between whether the market should be left open for automatic correction or there is necessarily a need for guiding regulation to ensure safe, efficient and fair financial market. More importantly, the new age of electronic commerce gives rise to a series of important legal issues, the solution of which is a must for the smooth functioning of any particular economy.

Regulators of the world, be of a small nation or that of a big one, are posed with new challenges to deal with certain legal issues raised by elec-

tronic commerce. The major ones are discussed as follows:

**a. Should data messages be legally recognizable?** : Most of the countries of the world has no law which either explicitly recognizes or denies the general principle that information, records and signatures in an electronic form should not be denied legal effect. The prevalent laws of many countries have not yet been updated to take account of such changes in technology.

**b. Should information be in writing?** : In a paper based environment, laws require documents to be in written form for various reasons, such as to ensure tangible evidence, reduced disputes, legibility, non-alterability, authenticity, acceptability, etc. Also, writings facilitate control and subsequent audit for accounting, tax or other regulatory purposes. However, under the electronic era, the essential question is whether date messages



that are the core of electronic commerce constitute writing. The existing law of most of the countries is silent on such issue.

**c. Is electronic signature sufficient, reliable and authentic?** : Generally, a signed document denotes legal authenticity. It confers clearly defined legal rights and responsibilities on the parties who have signed it. It also represents a solid foundation upon which a commercial relationship can be sustained. However, most of the countries do not have any law as to whether an electronic signature, particularly a signature generated "cryptography", constitutes a signature.

**d. Are the originality and the integrity of the electronic messages legally assessable?** : The nature of electronic data transmissions means that every transmission of a data message is actually a copy of that message. It is not possible, therefore, for an electronic message to be an original in the strict sense. However, the term original can be interpreted in a way

to refer to a document that is in its unchanged, original form. Even following the later interpretation it is very difficult under the present legal regime to assess the informational integrity of the electronic messages as they are subject to "accidental corruption" as well as "deliberate manipulation". Consequently, the binary code data streams that comprise the elements of an electronic transaction fall outside the present legal regime.

**e. Is electronic data admissible as evidence in courts?** : Almost all developed countries of the world have legal rules which are at least adequate to permit the use of computer records as evidence and to permit the court to make the evaluation necessary to determine the proper weight to be given to the data or document. For example, the *Uniform Electronic Evidence Act 1997* of Canada, the *Civil Evidence Act 1968* and the *Police and Criminal Evidence Act 1984* of the United Kingdom, the new amendments



brought by the *Singaporean Evidence Act 1996*, the *Commonwealth Evidence Act 1995* of Australia etc. The core objective of all these laws is to further the fundamental principle that electronic records should not be discriminated against solely based on the medium chosen. However, they do not mandate the admissibility of an electronic record or an electronic signature in the event of other proper objections such as hearsay, lack of authenticity, and so on. Also, there is a question of cross-jurisdictional admissibility of electronic evidences as countries differ in rules and regulations.

**f. How can electronic data messages satisfy the legal record retention requirements?** : Certain times, the rule of law requires that a record be retained. The purpose of retaining records is generally to allow them to be produced upon demand to be used as evidence of the information contained therein, sometimes to demonstrate compliance with statutory requirements

and sometimes to justify claims entitlements. Again for this purpose, the integrity of the information contained in the record is very crucial. Now, the case of electronic data messages poses two questions: firstly, the storage of information as it is contained in a particular data message; and secondly, storage of transmittal information associated with that data message. Legal solutions to the above mentioned problems are not very easy, as more often than not electronic messages are decoded, compressed or converted in order to be stored. Moreover, in practice, storage of information and especially storage of transmittal information may often be carried out by someone other than the originator or the addressee, such as an intermediary.

**g. Will there arise contractual problems in using electronic commerce?** : Legally there is no general requirement that a contract be always in written form. But where a data message is used in the formation of a contract, should that be a valid one and hence, legally enforceable in the court of justice? This problem becomes acute in case of international securities trading where one transaction encompasses several different legal regimes. Regulators are then required to find a solution not only from their national viewpoint but also from a global perspective. In addition, there may also be a question as to what extent a party may be bound by an electronic message sent by an unauthorised person (the problem of hacking). Can the principle of 'promissory estoppel' be invoked in such a situation? In addition, the conclusion of contracts without human intervention refers to contracts formed by either two electronic agents or one electronic agent and a person. At times, the process by which a contract is concluded may even be automated, such as by reference to predetermined rules of computer program. How can a court then find 'consensus ad idem'-one of the essential elements of a valid contract-in such a case?

**h. Should the electronic payment and settlement system be regulated?** : CHIPS, Fedwire and Swift have become the foundation of international and domestic funds transfer. However, the security measures to protect these systems from misuse have not been satisfying so far. Rather there have been identified weaknesses in each of these systems. Therefore, the policy makers and financial philosophers from all over the world do feel that the lack of regulatory control over the electronic payment and settlement system may cause market disruption and eventually, systemic collapse. But, question remains how and to what extent the new regulatory regime be operative?

**i. What will be the jurisdictional coverage of the regulation?** : Making regulation is one thing and enforcement of the same is quite other, especially when, national regulations are targeted to bring in changes to a phenomenon which is essentially of global nature. Electronic commerce bridged the gap between geographic distances but the regulations are still territory specific. Therefore, conflict of laws is inevitable which results in legal uncertainty. By its very nature, the electronic commerce has the propensity to ignore sectoral, regional and national boundaries and hence, regulators will have to find out a suitable rule of the game to be applied domestically as well as globally.

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## RIGHTS corner



## Death of Jamaluddin Fakir in Gazipur

ODHIKAR

**O**N 19 April 2002, Jamaluddin Fakir (22) was tortured to death by police at the lock-up in Kapashia Thana (police station). The newspapers reported the incident the next day and Odhikar went to investigate the matter 20 April and 8 May 2002.

Jamaluddin Fakir was a resident of Torgaon village under Kapashia Thana. He was a degree examinee at the Bhawal-e-Alam College. His family said he was a very good student who got first division marks in his secondary school and higher secondary certificate examinations. He was also a member of the Chhatra League and President of the Targaon Bongotaj Smriti Library.

Jamaluddin's mother, Romiza Begum, brother Abdus Samad, maternal uncle Mojibur Rahman were interviewed. His mother stated that on the night of 17 April 2002, at approximately 12:30 am, the Officer in Charge of Kapashia Thana, Gazi Moinuddin came to their house with a police force and threatened to break the door down if they did not open it. Romiza Begum opened the door and the OC arrested Jamaluddin, took him to the police station.

Jamaluddin's elder brother, Abdus Samad, told Odhikar that on the morning of the arrest, another brother, Alam and the Union Parishad Member Aminul Islam, went to the police station with breakfast for Jamaluddin. He went to the police station again with lunch. The police took the lunch and refused to let Alam go near the lock-up. On Friday morning, the family learnt that Jamal had escaped from the police station and jumped into the river, where he drowned.

Abdus Samad said that he had learnt from various sources that Jamal was hand cuffed and tortured in a separate room at the police station. He was, allegedly, also tortured in the room of the Officer in Charge. Abdus Samad stands firm that his brother died from police torture. He also said that there is no case against his brother at the police station.



### The Police station

A high wall surrounds Kapashia Thana. On the south of this boundary is the main gate. On the north there is another gate near the riverbank. In the main police station there is a room where the duty officers sit. A narrow passage, near the table of the duty officer, links this room with the two lock-ups one for men and one for women. The distance from the lock-up to the main gate is about 30 yards. The distance from the main gate to the old boat on the Shitalakha River is approximately half a kilometer.

### The statement of the Police

The Officer in Charge (OC) of Kapashia Thana told Odhikar that on the night of 13 April 2002, there had been a dacoity at Torgaon village and a case filed in this regard at the police station. Jamaluddin was arrested under suspicion in relation to that dacoity. However, in the police records he was shown arrested at 10 am on the 18 April. The OC said that the reason for this delay was that he had spent all that night looking for the dacoits and made the entry late. He said that from 13 to 17 April he has arrested 11 more persons, under suspicion, in relation to this matter.

Jamaluddin was kept in the station lock-up for questioning. Early in the morning of 19 April, the sentry, Constable Altaf, opened the door of the lock-up for the sweeper, Ratan, to clean the toilet. At this time, the OC alleged, Jamaluddin pushed his way past Ratan and ran out of the police station, ran along the pier and jumped into the river. He said that when

reached mid-river, he could no longer swim and drowned. Ratan ran after him till the pier. At around 12 at night on 19 April, a team from the Dhaka Fire Service arrived at the site. The next morning they began to salvage the river. Jamaluddin's body was found at 8:20 that morning.

Odhikar asked the OC, Gazi Moinuddin, why he had kept Jamaluddin for questioning in the police station without the permission of the Magistrate and why the police did nothing to rescue the body the day he drowned. The OC could not give any satisfactory answer to these questions.

### Examination of the body

After the body was recovered, the first class magistrate, Abdul Quader was present at the autopsy. During the autopsy, marks were observed on the ankles, arms, chest and right side of the forehead of the body. The hands were in fists. An unnatural death case was filed in the police station bearing case number 12 dated 20.4.02. The body was then sent to Gazipur for post mortem (PM). The RMO of Gazipur Sadar Hospital, Doctors Saifuddin Ahmed, Sohel Ahmed Khan and Ahmed Hannan Bhuyan performed the PM in the presence of Tariqul Islam, first class magistrate of Gazipur.

Regarding the findings of the PM, Dr Saifuddin Ahmed told Odhikar that there were 8 to 10 marks of injury on the body. However, they were not serious enough to cause death. However, he said that any kind of injury may cause death and there was not enough evidence to prove that he died due to drowning. An independent inquiry committee needs to be held to investigate his death. The 'dom' (morgue attendant) who dissected the body told Odhikar that he saw 8 to 10 wounds on the body, which he showed the magistrate. He said that from his experience he believes that Jamaluddin was tortured to death since he did not look as if he had drowned.

### Odhikar's analysis

The police state that Jamaluddin drowned while trying to escape. This does not seem plausible after investigating the police station and surrounding area. It does not seem possible that a person can run past two men, through a narrow passage, past the room of the duty officers, out of the station and across the compound, out of the main gate and to the pier at such a short time. The police said that the sweeper Ratan was chasing him as well. From the post mortem examination the doctors have stated that there was no clear evidence that he died by drowning. Jamal's brother and maternal uncle said that Jamal was a strong swimmer who could swim across the 170 yard wide Shitalakha River. Again, even though the police said he drowned in the morning, they took no steps to recover the body all that day.

On the day of the investigation, the investigators from Odhikar observed that local supporters of the present ruling party were taking the side of the police and making statements to journalists and human rights activists to that effect.

In conclusion, it can be summarised that Jamaluddin was arrested by police under suspicion in a dacoity case and the police kept him for questioning without the permission of the magistrate. Jamal was then found drowned under conflicting circumstances with marks of injury on his body.

### Latest situation

The Ministry of Home Affairs has formed an investigation committee in this regard. Its conveyance is the Additional Divisional Commissioner of Dhaka, Mohammad Akram Ali Mridha. Members include the Additional Inspector General Md. Delwar Hossain. 13 days after the incident, on 13 May 2002, Jamaluddin's mother, Romiza Begum filed a case in court 2 of the Gazipur First Class Magistrate Court. The case is numbered CR Case No. 94/2002, under section 302/201/118/119/120/ha/34 of the Penal Code. The case has been filed against the then OC of Kapashia police station Gazi Moinuddin, the duty officer at that time A.B. Siddique, and Constable Altaf. The duty officer and Constable Altaf were suspended at the time of filing the case.

The lawyer for the petitioners Fazlul Kader, told Odhikar that the court has ordered a judicial inquiry in the matter and the first class magistrate of Gazipur, Ms. Rasheda Ferdous had been given the duty to head this inquiry. The next date for hearing this case is 8 June 2002.

Odhikar is a human rights organisation

## LAW views



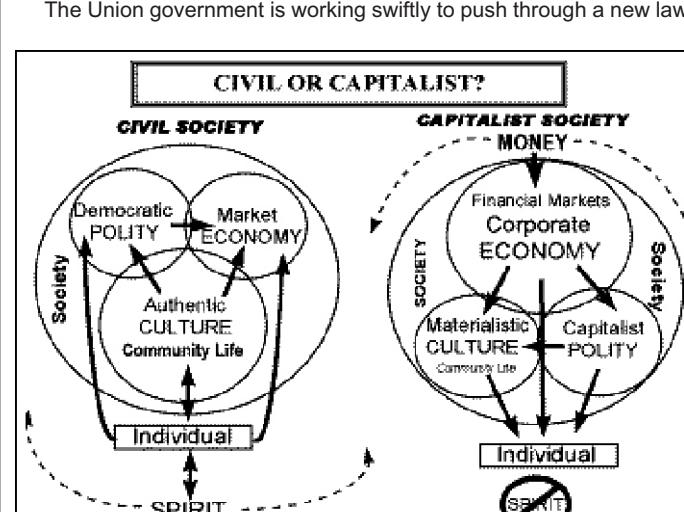
## Impact of globalisation and the role of civil society

DR SATISH KUMAR

**C**IVIL Society and political state are heading for a conflict. If the state becomes totalitarian and operates as a sole voice, then there is bound to be clash between the state and people. In fact, the good governance of the country depends on the mutual respect and understanding of each other. To establish a durable social order, there is dire need to have united sensitivity of the dual entity i.e. civil society and political state.

The people are the civil society and the republic is a political state. The state is capable of making laws. Where as the society represents the people, which select the government through indirect election. Obviously, the rule is crafted by the state; the consciousness among the people to obey the law is created by the civil society. No true secular, democratic republic will function if the civil society remains chained.

The Union government is working swiftly to push through a new law to



replace the Foreign Contribution Regulation Act. Through this, the government hopes to put in place stringent curbs to regulate the flow of foreign funds to NGOs. The Union government thinks that the major part of this fund is being misappropriated and misused. Similarly there are indications that the government might accept the recommendations of the Partha Shome Committee regarding withdrawal of tax benefits to the voluntary organisations.

Is it justified to rein the voluntary sector, which is doing the meaningful works by imposing stringent laws? It should not be undermined that voluntary initiatives sought to fulfil the challenges of nation building. It accepts the challenge to bring positive and qualitative changes, like health care, agriculture development and upliftment of deprived sections of the society.

The concept of the welfare state is failed to take care the interests of the human being from cradle to grave. It simply failed to deliver basic facilities to human being. A falls hope was created that the development and progressive states would be able to carry out a revolution from above and transform people's lives and destinies.

The concept of socialist state also got dismantled. The glaring examples are visible in Russia and other East European countries. The trend of globalisation, which picked up its speed in the early years of 1990s, brought more pain and agony than prosperity and happiness in the third world countries. If the growth of economy benefits only a small, wealthy minority, it is not development. The main purpose of development is to "remove the

sources of unfreedom and to expand the real freedoms that people enjoy".

India is one of the countries, which has been badly hit by globalisation. The number of hungry in India has been rising, accounting for one-third of the world's hungry. Today more than 320 million people in the country are living below the poverty line and nearly one third of our children are under nourished.

India, 135 million people lack access to basic health services, 171 million lack access to safe drinking water and 640 million lack basic sanitation facilities.

Moreover, low wages, low levels of skills limited access to the factors of production, malnutrition and declining status of women worsen the situation