HUMAN RIGHTS Monitor



Homelessness and freedom

HEN we see freedoms, liberties and life violated in other countries (say, Muslims in Gujarat or Bosnia), it evokes a moral outrage; a justifiable moral fury as the angel of death is napalmed upon men, women and children. Simultaneously, when we think of poverty or homelessness, the ethical imperatives somehow seem less keen. Most of our moral sentiments are captured by: "it would be wonderful if Bangladesh were a country without destitution, but alas..." Homelessness is gruesome, rue-some, and fulsome, and yet, we resign ourselves to accept it.

Here, I will argue that this resignation betrays any moral attachment we may have to rights or liberties. Homelessness and destitution involve a loss of liberty that is as paramount as violations of freedoms of expression, and religious choice.

To be sure, the loss of liberty is but one aspect of the nightmare of homelessness. There is also the horror of having to face the mercilessness of climate without anything but a single garb of clothing, the perpetual ache of hunger, the beatings, the loneliness, the fear, and the utter despair that accompanies being unable to care for oneself, for one's kith or kin. By emphasizing the tragic loss of liberty, it is not my intent to detract from any of

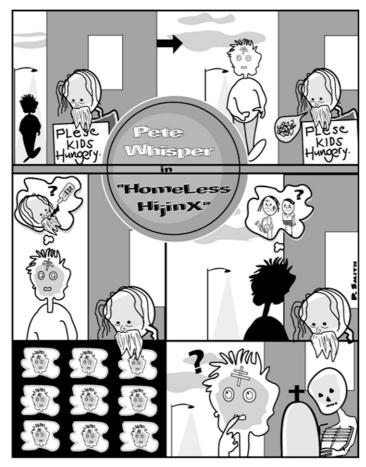
It is also not my contention here that eliminating homelessness leads to better social consequences though it is true that to provide shelter and food would lessen crime and the proliferation of disease, and would be better for all of us. Rather, my position is stronger: homelessness, in and of itself, is a robbery of life and liberty from those homeless.

Let us begin with a truism. A person is not free to do X unless there is somewhere she can do X. All actions involve a spatial component, and if one is not free to be in a certain place, there is nothing one is free to do at that place. Hence, there are causal connections between an individual's liberty and the network of property rights, which establish who can do what where. Thus, a homeless person on private property is regarded to have trespassed, unless she is permitted to be there. In a state where all property is private and property rights are legally enforced, the homeless would thus have nowhere that they could be of their own choice. The homeless are thus, dependent on common property, and the non-enforcement of property rights, their lives hanging in the delicate balance between communism and anarchy.

What we see happening in our society today is millions of people have no legal rights to be anywhere, and thus, are compelled to subsist, sleep, and care for their children in lands where property rights are unclear, where the law is blindfolded and handcuffed. It is probably the case that these shadow lands, the slums, operate under mafia networks where the little the homeless own is taxed by extorting criminals who promise a non-existing security. And then, one fine morning, these shantytowns are, without warning, torn apart and crushed by government bulldozers, leaving the millions with no choice but to scurry and find another shadow land to inhabit.

We often look at these tin gardens as an unaesthetic aspect of Dhaka city

(though the hundreds of posh houses, all aping the White House, are perhaps equally unappealing). And we support destroying the shantytowns on the grounds that they are hotbeds for crime and disease without once consid-



ering what will happen to the people that once lived there. When the plight of poverty is the ugliness of its appearance to the opulent, and not destitution itself, the shadows of evil have shut out the light of justice. Make no mistake: this is truly a tyranny exacted by a privileged group upon a less fortunate

When Marmeladov tells Raskolnikov in Dostoevsky's Crime and Punishment, "For every man must have somewhere to go," he may not have meant it as literally as I, but it is certainly true that "every man must have somewhere to turn," and sadly, we have given the homeless nowhere to go or turn; the choice is between death and destitution.

Our cities are embarrassments of riches: embarrassments because while our society can support large shopping complexes, amusement parks outside the city, and yes, now supermarkets with polite service, we claim to suddenly be short on funds when building inexpensive housing for the destitute (oddly enough, while blocks and blocks of apartment buildings lie vacant). The devil's minuet has persuaded us to choose the devastation of the poor over trusting them with life.

And yet, we claim a commitment to freedom and democracy, the foundation of which is providing individuals with a set of choices for selfdetermination, and a degree of autonomy. Now a useful distinction to be made philosophically is between positive freedoms and capabilities i.e., that which a person can actually achieve (this is usually what Amartya Sen speaks of when considering freedom) and negative freedoms and liberties i.e., that which a person is permitted to do without interference (though she may not actually be able to do it). Homelessness, as a moral catastrophe cuts lifelines to both: when one is homeless, one is both handicapped from being able to do X, and, if there is no place where one can legally do X, one is simply unfree to do X. It is hard to imagine how one could both claim to value an individual's ability to take care of herself and her family, attain her needs and goals, and then at the same time, destroy her home and provide her no location legally for her to attain any sort of autonomy. Truly, we cannot have our cake and smash it at the same time.

In the United States, the destitute poor are often criticized for succumbing to the temptations of substance abuse, and in Bangladesh, to crime. Though it is undoubtedly true that malevolence lies within some poor, as it does within some rich, the essential question to ask is what option have we left the poor. When a mother needs to steal to feed her crying baby once begging and coaxing in the hot humid streets has been met by shut air-conditioned windows, can we object since every educated parent begs, coaxes and bribes for a good school education for their child? Would the rich not do even more if their very physical being were threatened?

If we were willing to go to war for freedom, and refer to our war of independence as Liberation, we must not leave our people in shackles. Sleep, having a home, having a roof to protect one from the inclement monsoons and the merciless summer sun these are all actions basic to the sustenance of life itself. Simply because we have a place to sleep which is not a slum or within common property does not mean that we can easily decide that no one should sleep within these confines. It is true that some of our slums are run in a criminal fashion, and it is essential that the law does reach out to end extortion; but to raze the only homes of the otherwise homeess with a sledgehammer is to crush the innocent against the natural justice. Their legal rights are also violated in many forms.

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LAWSCAPE



CRC General Comment on the aims of education

SARAH ARMSTRONG

One of the fundamental obstacles to the realisation of social, economic and cultural rights is the fact that the rights themselves are considered to be vague and open-ended. The lack of understanding of the meaning and scope of the rights makes them difficult to implement and difficult to enforce.

General Comments by the various United Nations Committees provide crucial starting blocks for the process of delineating the definition, scope and core contents of the rights. During its 26th session, concluded on 26 January 2001, the Committee on the Rights of the Child (CRC) adopted its first General Comment on 'The Aims of Education'.

According to the CRC, Article 29(1) of the Convention on the Rights of the Child, which enshrines the right to education, is of 'far reaching importance' The General Comment avoids defining the right to education and instead focuses on the aims of education. The CRC states that the aims of the full potential of the child, including respect for human rights, enhanced sense of identity and affiliation, socialisation and interaction with others and with the environment'. All of these aims promote, support and protect the dignity and equal and inalienable rights that all children possess by virtue of their human-

The Committee explains that education encompasses more than just formal schooling, it must be 'child-centred, child-friendly and empowering' and it must enable children to develop their personalities, talents and abilities and to live a full and satisfying life within society. It recognizes that the right to education, as set out in Article 29(1), is concerned with the content of education as well as access to education. Specifically, the content of education should be rooted in the values that are encompassed in the Convention itself The CRC calls for a 'balanced approach to education' which reconciles diverse values and promotes dialogue and respect for difference.

The Committee subsequently highlights several of the objectives of the Convention. Significantly, for the first time, the CRC acknowledges the indispensable interconnectedness' of the Convention's provisions, something that the Committee on Economic, Social and Cultural Rights Comments. The CRC then notes that the Convention is concerned with the process by which the right to education is to be promoted and underlines the individual and subjective right to a specific quality of education. The Convention promotes a 'holistic approach' to education Continuing on the theme of the interdependence of the rights in the Convention, the Committee emphasises that education should be designed to promote the Convention's values, including peace, tolerance, respect for the environment, and the importance of education for the promotion of all other human rights and their indivisibility. The right to education includes human rights education through which children should be provided with information on the content of humar

The CRC's General Comment on the Aims of Education provides a broadbased framework within which the right to education can be conceptualised It does well at conceptualising the right to education from the point of view of the best interests of the child. Unfortunately, unlike the General Comments by the CESCR, the Comment does not go far enough in terms of outlining the specific obligations of States precise content of the right to education as outlined in Article 29(1) of the Convention remains somewhat ill-defined. This is an area in which human rights organisations can play a valuable role.

Source: Interrights Bulletin

LAW watch



E-commerce-policy options to the regulators

TUREEN AFROZ

ECHNOLOGY is a dynamic concept. It changes its norm and form in every second. Therefore, handling such an ever-changing notion of technology with a given store of knowledge at any particular point of time is undoubtedly a difficult task. Not all the future developments and consequences may be contemplated beforehand and for that matter, any attempt to regulate the electronic commerce should be flexible enough to accommodate future changes in the relevant field. My primary suggestion is that market mechanism would lead to regulatory fallacy and hence, there should be a clear set of rules and regulations to deal with the vast area of electronic commerce.

As far as the specific challenges (mentioned above) are concerned suggestion is as following:

Legal recognition: The aim of Article 5 of the UNCITRAL Model law is essentially to ensure functional equivalence between electronic and other forms of communication. Therefore, the national legislation should contain a similar provision like Article 5. which states that information: records and signatures in an electronic form should not be denied legal effect solely because it is in an electronic form.

Writing: The traditional paper based interpretation of the term, "writing" should be extended to include electronic messages. In this regard, national laws may be changed to incorporate Article 6 of the UNCITRAL Model law that expressly states that a data message should satisfy any requirements for information to be in writing.

Signature: Signature is particularly important in banking, where banks are required to carry out appropriately authorised transactions on behalf of their customers. In the banking world. there are already various types of electronic signatures in use, such as passwords or PIN systems, test-keys, cryptographic techniques such as "Digital signatures". Also, biometric techniques such as retinal scans.

thumbprint, vein checking, hand geometry, voice, signature, keystroke dynamics etc are in progress. However, what is important is that the functions of signature need to be identified when considering whether an electronic alternative could, or should, be legally acceptable in the sense of a document being "signed". Article 7 of the UNCITRAL Model law establishes an acceptable basis upon which to determine the minimum requirements for the functional equivalence of electronic signatures. Therefore the national laws can be based on Article 7's mandatory minimum but nothing should prevent the parties to adopt more stringent requirements by agreement.

Originality: In assessing integrity, the article 8 of the UNCITRAL Model law requires that the electronic information should be complete and unaltered and the reliability of the assurance as to integrity should be assessed in the light of the purpose for which the information was generated and all relevant circumstances. Therefore, it is important for the national regulators to ensure functional equivalence between data messages and paperdocuments in this area. Evidence: It is unfortunate that even the UNICTRAL Model Law does not

mandate the admissibility of an electronic record or an electronic signature in the event of objections such as hearsay, lack of authenticity etc. Article 9 of the UNCITRAL Model Law only ensures that electronic records should not be discriminated against solely based on the medium chosen. In most of the jurisdictions, the question of "admissibility" and the "probative value" of computer-based evidences are left to the courts to decide upon case by case basis. The present law, hence, is uncertain in this regard. However, the solution to this problem, in my opinion, rests not much upon the legal system but rather on the technological development. Record keeping: It is very important for banks and other financial institu-

tions to collect information and maintain records for a range of internal management purposes. Article 10 of the UNCITRAL model Law prescribes an appropriate basis for the equivalence of electronic and paper-based record retention requirements. Therefore, banks and financial institutions can be made subject to follow such procedures.

Validity of contracting online: This has been the premier obstacle to growth in electronic commerce. Security traders need the certainty of knowing that their paperless contracts formed in cyberspace are enforceable Though the issue is ultimately one of facts, Article 11 of the UNCITRAL Model Law removes uncertainties as to the validity of contracts concluded by electronic means and confirms that valid offer and acceptance can be effected by data messages. In my opinion, a similar provision should be enacted in the national regulation to avoid uncertainty.

Regulation of EFT Mechanism: CHIPS, Fedwire and Swift should have stringent security provisions and effective regulatory oversight. According to

GAO (General Accounting Office) Report 1988 (USA), there has been weaknesses in the management of software that controls access to the Fedwire system. The same report identified that the weaknesses with CHIPS included 'inadequacies within security administration and quality assurance that increased the risk of unauthorised use' while the criticisms of Swift centred around capacity problems. Therefore, there is an urgent need for scrutiny of such systems, failure of which may pose systemic threat to world finance. In my opinion, each national government and its central bank must play a leading role to protect the financial market from experiencing systemic risk. In addition, rules regarding the EFT should be made a bit more formal so that the problem of less-accountability and less-transparency may

Need for internationally harmonised domestic legislation and continuing international co-operation: Banking and securities trading activities and thus the overall financial market mechanisms should be bought under the umbrella of one harmonised set of rules and regulations. Fragmentation and disharmony between national legal systems and supervisory authority will surely lead to market disruption, even at times to collapse. However, to reach such a harmonised state of affairs, a process of continuous international co-operation is a crying need. Financial markets of today's global world do not stand in isolation; rather they are linked with each other in thousand possible ways. Therefore, each market to achieve its goal must rely upon others and only an environment of healthy competition operating under universal and harmonised rules and regulations can sustain general equilibrium in the financial markets.

Concluding Remarks

It is true that e-commerce can only flourish under a safe and predictable environment, for which regulation is of utmost necessity. However, regulation should not be the end of everything at least for achieving long-term financial market objectives. What is more importantly needed is the presence of the Responsible Market Participants who would want their markets to have a long term prospect and would dissuade themselves from behaving in a way which does not contribute to "good governance" of the global financial environment. Even the government's big- stick regulation will be a complete failure if the financial market participants remain ignorant. Hence, policies and strategies should be devised to encourage "mass awareness" among financial market participants so that they can adopt the best Codes of Conduct, come up with conscious marketwatch mechanisms and can indulge themselves in industry gossips and informal financial 'chit-chats'. We can be sure that such measures along with sound financial regulatory provisions would ultimately result in higher standards of behaviour and would achieve the longterm policy objectives of stability and growth in the

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Muslim women in India win right to divorce in court

Uttering talaq, talaq, and talaq (I divorce you I divorce you. I divorce you.) in the presence of three witnesses in the past was enough for a Muslim man in India to divorce his wife, even if his wife was not present. The basis for these divorces could be such trivial matters as the ability of the wife to cook, her appearance or answering back to her husband. This divorce practice, based on Islamic sharia law, affected Muslim women from all social classes and educational levels in the country, leaving many women destitute without any means of financial support.

Now the Mumbai High Court has ruled that Muslim men will have to divorce their wives in court, giving Muslim women the right of due process of law. This ruling will apply not only to Muslim men and women in Mumbai but to Muslims throughout India. In its ruling, the court states that a Muslim man must hire a lawyer, file a divorce petition and bring his case before a judge, who will decide, among other things, if the divorce is iustified and whether the husband must provide financial support for his wife after their marriage is annulled. The court will also assess whether the man has made an effort to reconcile with his wife as prescribed by Islam. Moreover, the man's wife must be present in the courtroom.

This ruling overcomes the silence of the government and of society in Muslim divorce cases after the case of Shah Bano 17 years ago. In this case, Shah Bano, who had been married to her husband for 43 years was thrown out of her house after her husband decided to take a second wife. Although Indian civil law entitled Shah Bano to a small amount of money from her husband, he refused to give her any financial support She took the case to court, but her husband claimed that he was bound only by Islamic law. The case was eventually decided by the Supreme Court, which set a major precedent by stating that a husband must financially assist his wife after they are divorced if she cannot support herself.

Source: Asian Human Rights Commission

RIGHTS corner

Death of Badal

On 19 May 2002, various newspapers reported the death of Badal (19), a butcher by trade, who was arrested by the police from his house in Boroipara, Narayangani, Dhaka, on the night of 07 May 2001. Odhikar carried out investigations regarding the matter, on 20, 21, 25 and 27 May and interviewed his family, police, jail authorities, the lawyer representing his family and doctors

Badal's mother, Sanowara Begum and his elder brother Shagor, alleged that at 2 am on 8 May 2002, A Sub Inspector of the Detective Branch (DB), Azharul Islam, came with a team and arrested Badal from his home. Also arrested were three other young men from his locality Jahangir, Johurul Islam and Badal Shikdar. They were told that they had been arrested in relation to a case filed under the Repression of Violence Against Women and Children Act 2000 dealing with the rape and murder of a nine year old gir called Farzana Akhtar Bobby on 15 October 2001. On examining the FIR filed in regard to the said rape case, it was observed that Badal's name had not been mentioned anywhere and that the DB of the police had been given the responsibility to investigate it.

Badal's mother, Sanowara Begum told Odhikar that after his arrest, Badal was tortured and that the DB police has demanded Taka 50,000 from each of the four arrested. Badal's family is in economic hardship. It was impossible for them to hand over that much money. However, between 8th and 9th May, they managed to give Sub Inspector Azharul Islam of the DB. Taka 30,000 by selling jewellery and pooling their savings.

Even though the four young men were arrested at 2 in the morning of 8 May, they were presented before the court on the afternoon of 9 May 2002, in disregard to legal provisions that an arrested person must be presented before the magistrate within 24 hours of his/her arrest. The whole of the 8th of May was before the police, as was the morning of the 9th. On asking the Inspector of the DB, Fazlul Karim, about this delay, he said that the police had gone to arrest another accused person on 8th May and thus did not have time to present Badal and the others before court.

On examining the case records, Odhikar investigators found that on the afternoon of 9 May 2002, the four men appeared before the Magistrates Court and the police of the DB sought for 7 days remand for them ('remand' is sought when police want to question the arrested persons further. Due to its frequent abuse, it has become synonymous for 'torture' and many bribe the police so as not to take them into remand). However, since the Magistrate did not have the case file, no remand hearing was held and the arrested persons were ordered to be taken to jail.

12 year old Jahirul Islam was one of the persons arrested with Badal. He told Odhikar that the court had granted him bail. However, even though the police were shown his bail order, he was arrested again and kept in lock-up for 2 davs and beaten. He also told Odhikar that all four of the arrested persons were put in the same lock-up and then blind-folded and taken separately away to be tortured. He alleged that Badal was tortured the most and had told them that he had been given electric shocks.

On 17 May 2002, Badal fell gravely ill and was sent to Dhaka Central Jail, for better treatment, by the Medical Officer of Narayangani District Jail. On that same day, due to the fact that his condition had worsened considerably he was taken to the Dhaka Medical College Hospital, where he died at 9:00

Inspector of the DB, Fazlul Kabir and Investigating Officer, Sub Inspector Azharul Islam denied having tortured Badal. They told Odhikar that he was a drug addict and that he was begging for Heroine in the police lock-up. Unable to get a 'fix', he fell ill and died. The police Superintendent of Narayangani said the same thing.

Odhikar also talked to the Head of the Dhaka Medical College Forensic Department. He told the investigators that Badal had died almost as soon as he had been admitted to the Emergency Department. He said that Metropolitan Magistrate Taslima Nahid prepared the inquest report and had only mentioned the fact that there were 3 marks of injury on the body and Badal had suffered from high temperatures and had a headache. The Doctor expressed dissatisfaction with the inquest report and commented that it had failed to mention that Badal's nails were blue. Odhikar asked him whether Badal had been an addict or an alcoholic. He replied that he was awaiting the test results.

On 19 May 2002, Badal's mother, Sanowara Begum, filed a case in the First Class Magistrates Court in Narayangani, against Inspector Fazlu Kabir, Sub Inspector Azharul Islam, Sub Inspector Morshed, Constable Alamgir and Constable Shamsu Mia. The court ordered a Judicial Inquiry into the matter. The 22 of May was the day the Judicial Inquiry was to have examined witnesses. That day, Sanowara Begum appeared before the court and placed an application to withdraw the case. The Magistrate Mohammad Ali, fixed the 26 of May as the date for the hearing of this application before a Cognisance Court. The lawyer representing Badal's family told Odhikar that he had no prior knowledge of this application and learnt of it at the court. He alleged that he had heard that this application had been done in exchange for Taka 2 Lakhs (Taka 200,000) from the DB police.

The investigators returned to Badal's home in Boroipara. His parents were away, but his wife was in. Initially, she refused to speak to them, but finally said that the family were scared of the police and could not afford to continue the court case. On coming out of the house, neighbours of the family expressed their rage to Odhikar and stated that Sanowara had come

to an agreement with the DB police after receiving a lot of money. They also said that on the 22 of May, all the witnesses were ready to go to court, but she left without telling them

Because the 26th of May was a government holiday, the 27 was set for

the hearing in the cognisance court. However, since the said court had not received any information from the magistrate, the hearing could not be held At the court premises, Badal's father, Akkas Ali told Odhikar that the family could not afford to continue the case. The investigators suggested free legal aid, but he said that they feared for his and his family's life. His wife refused to speak to Odhikar. That day, the lawyer for the family asked for time in the court. He told Odhikar investigators that he did this because even though he had seen Badal's mother in the court premises, when he searched for her, he was told that she had gone somewhere with some plain-clothes police. On talking to the Public Prosecutor of the Dhaka Metropolitan Magistrate llah Mahmud Hassan, he said that there sions allowing for the withdrawal of a murder case. The Code of Criminal Procedure states that such cases cannot be withdrawn. He also explained that under law, the complainant/informant is only a witness in a murder case and that such an offence was looked upon as an offence against the State He said that it is the State's responsibility to deal with the case.

Death in, or as a result of, police torture is not an unfamiliar scenario in Bangladesh and the term "remand' is one feared by every arrested person. Autopsy and inquest reports remain unclear and unprofessionally written and post mortem examinations and reports hazy. Human rights organisations have, time and again, demanded proper, non-bias inquiries, transparent police administration and criminal action against police proven to commit such acts. All seem to fall on deaf ears.

Asia makes some healthy gains

SALEEMUL HUQ

Asia has the world's largest number of poor, and many of its worst environmental problems. It is also where the main actors in global terrorism have originated in the recent past. A major factor in the rise of the fundamentalism that breeds terrorism is the lack of hope for the continent's young people. And yet the picture is not as bleak as it may seem. The blueprint for the way out of poverty in harmony with the environment is sustainable development. All that is needed is political will and resources. The basis for this was laid at the Earth Summit in Rio de Janeiro, Brazil in 1992 with the concept of sustainable development. The blueprint for achieving this was laid down in Agenda 21, which was agreed to at the Summit. In the 10 years since the adoption of Agenda 21 by all the countries of the world, it may seem that things have changed little for the better. However, that impression would be quite wrong in the context of Asia. Over the last decade, there have been many successful initiatives by governments, nongovernmental organisations, communities, businesses and civil society in general to put into practice the principles of Agenda 21.

A notable feature of most of these initiatives has been their participatory nature involving all the key stakeholders, including civil society. Many countries have even set up new institutional structures at the highest evels. These include national councils for sustainable development with the involvement of government, NGO and private sector participants.

A key feature has been the willingness of the different stakeholder groups to work together for a common purpose to solve problems. Another key feature has been the realisation that economic, social and environmental problems cannot be solved in isolation from one another, but need synergistic approaches that tackle all the problems in a holistic manner. Thus, what had been seen initially as a predominantly environmental agenda has rapidly been recognised all over Asia as an integrated agenda for sustainable development in which not only the environmental ministries and agencies need to participate but all sectors of government.

This is not to say that all the problems in the countries of Asia have been solved. This is clearly not the case. The region still is home to the largest concentration of the world's poor and tackling poverty still remains the number one priority in most countries of the region. Nevertheless, the acceptance that tackling poverty is not best done by concentrating on economic growth alone, but needs to take social and environmental issues into account, is growing and taking hold among policy makers as well as other groups in the region.

As the World Summit on Sustainable Development, to be held in Johannesburg, South Africa in September, approaches, it is perhaps a good time to remember the words of Indira Gandhi, the late Indian prime minister: Poverty is the biggest polluter in the world." The difference is that now we know where the solution lies and how to get there - we just need to reinvigorate and multiply the process. Thus, the most basic cause of breeding terrorism, which is the lack of hope for their future of the region's young people, needs to be transformed into providing hope for a better future through sustainable development.

Saleemul Huq is a researcher and practitioner on sustainable development in Asia. Courtesy: Bangkok Post