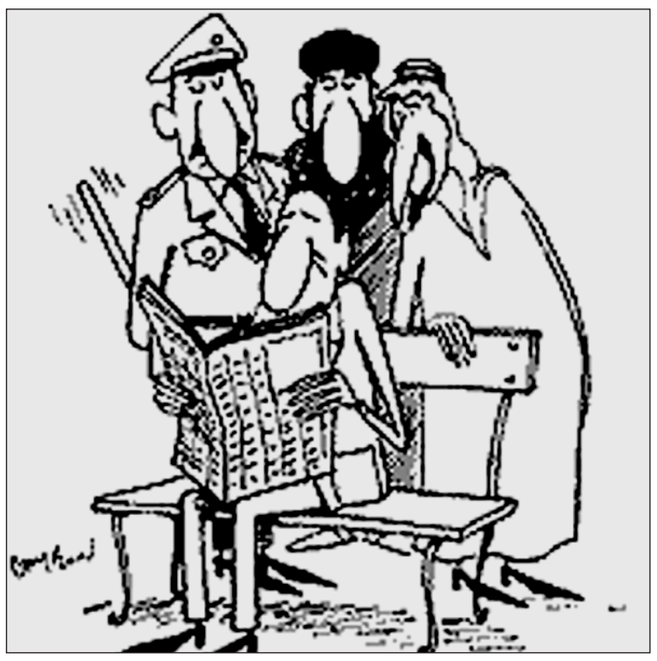
LAW opinion



Freedom of Information and the Media

JUSTICE MOHAMMAD GHOLAM RABBANI

A free press is a check to government power. There is no doubt about it. But without freedom of information the press depends on leaks, which may either be official or unofficial. Official leaks are press hand-outs which are dressed up to suit the government's interest while unofficial leaks are risky in view of the laws of libel, contempt and official secrets.

Canada was legislated 'Access to Information Act' in 1982 while USA has had such legislation since 1966. Its Freedom of Information Act applies to all parts of the federal government unless an exemption applies and the exempted categories include information concerning defence, law enforcement and foreign policy. Many other countries have freedom of information legislation wherein the usefulness of the information is determined by the person who seeks it rather than by ministers or civil servants, that is usefulness is not an objective quality, but depends on the purposes of the person who seeks the information.

Sub-article 2 of article 39 in Part III (Fundamental Rights) of our Constitution runs as follows: "(2) Subject to any reasonable restrictions imposed by law in the interests of the security of the State, friendly relations with foreign states, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence (a) the right of every citizen to freedom of speech and expression; and (b) freedom of the press, are guaranteed".

In those countries the exemptions can be challenged in court and the onus of proof is on he agency withholding the information to prove that the disclosure can bring that harm the exemption in the Act was intended to prevent. Our Supreme Court is yet to give decision on the issue of freedom of information and the press guaranteed in our constitution.

Justice Mohammad Gholam Rabbani, Retired Judge, Appellate Division, Supreme Court.

CRIME & Punishment

Criminal Misappropriation of Property

LAW DESK

The essence of the offence of criminal misappropriation of property is that when any property of another person comes into the possession of the accused in some neutral manner and is misappropriated and converted to his own use by that accused. No entrustment is required for the offence to be constituted. Section 403 and 404 of the Penal code describes the offence.

Criminal misappropriation takes place when the possession has been innocently come out but where a subsequent change of intention, or from the knowledge of some new fact with which the party was not previously acquainted, the retaining becomes wrongful and fraudulent. The offence consists in the dishonest misappropriation or conversion, either permanently or for a time being with the intention for causing wrongful gain or wrongful loss. All that is required, that there should be an intention of causing such gain or loss which would amount to dishonesty *(35 Cr. LJ 982 FB)*. There must be something to prove dishonesty. Intention has got to be proved. For example if any person finds a purse with money not knowing to whom it belongs but afterwards he discovers that it belongs to another specific person and intentionally appropriates the money for his own use then that person is guilty for criminal misappropriation of property.

Ingredients: For committing the offence of criminal misappropriation of property there must be:

1.Dishonest misappropriation or conversion of property for a person's own use.

2.Such property must be movable.

When a person retains or misappropriates the property in assertion of a bona-fide claim of right, though unfounded, in law and fact, he is not guilty of criminal misappropriation because there is no dishonest intention. Retention of money for a sufficiently long period by a person, who is bound under law to return it to another legally entitled the money, raises an inference of a temporary misappropriation within the meaning of the said section of Penal Code. A false denial of a loan is not in itself a misappropriation at all, and no more than an attempt to evade civil liability for the money lent.

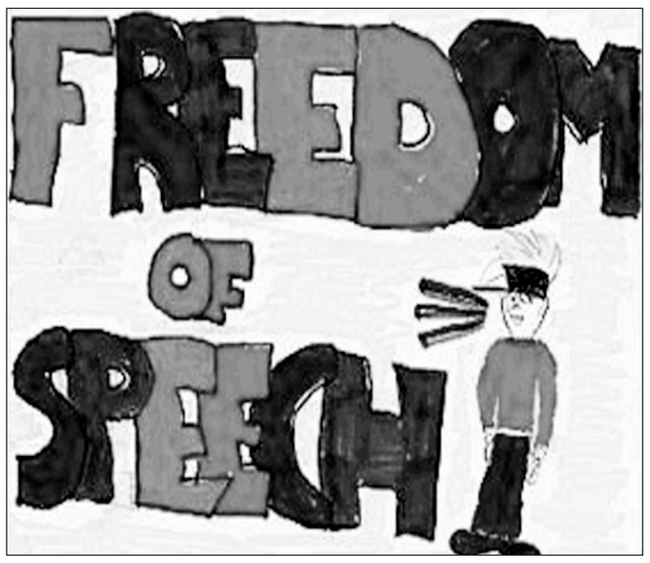
There cannot be any criminal misappropriation with regard to immovable property. It is sufficient for the prosecution to establish that some of the money mentioned in the charge has been misappropriated by the accused even though it may be uncertain what is the exact amount so misappropriated.

On the other side when a person who finds any property and takes such property for the purpose of protecting it or of restoring it to the actual owner and does not convert or misappropriate it dishonestly, in that case he is not guilty for the offence of criminal misappropriation of property. But when he misappropriates it for his own use and when he knows or has the means of discovering the real owner or he does not take reasonable time to discover and give notice to the owner for enable him to claiming the property then he is guilty for the offence above mentioned.

Punishment: Section 403 and 404 of Penal Code fixed punishments for criminal misappropriation of property. When any person dishonestly misappropriates or converts any movable property to his own use, that person shall be punished with imprisonment for a term, which may extend to two years or with fine or with both. Moreover when any person misappropriates or coverts to his own use of any property, knowing that such property was in the possession of a deceased or dead person at the time of that person's decease and has not been since now in the possession of any person legally entitled to such possession, shall be punished with imprisonment for a term up to three years and shall also be liable to fine. Accordingly if the offender at the time of such person's decease employed by him as a clerk or servant the imprisonment may extend up to seven years.

LAW letter

Freedom of Expression in Jeopardy



The uninterrupted flow of information is a must for the good governance. The concept of "Open Government" means where citizens have access to the government policy which uphold the participation of the democracy. The people's rights to know, have to be enshrined so that they can serve as a watchdog in flourishing the democracy.

Article 39 of our constitution guaranteed the freedom of speech with some reasonable restrictions. These restrictions have been proclaimed to stop the abuse of exercising this power by unscrupulous vested quarter. Unless the flow of information appears detrimental to the interest of the state, gagging the freedom of thought is a flagrant infringement of human rights. International human rights campaigner define freedom of expression in three ways, as an aspect of human dignity, as the best means of ascertaining the truth and as a fundamental underpinning of democracy.

Recently the IGP of police issued an order that the police personnel below the rank of police super will not be allowed to divulge any information to the press or media. This decision is tantamount to violation of human rights and this will pave the way for mal-administration especially in a country like Bangladesh where democracy is at embryonic stage. Putting a rein on the journalists will blur the democratic process as they are acting like a mirror of the nation. If citizens can not see what is going on within the government, mismanagement and corruption will go unabated. This is not the first time government is in a bid to embark on stamping the natural efflux of information. Couple of month back the National Security Intelligence Agency proposed to the government to allow them to tap telephone calls and read the e-mails. Government reportedly agreed and they attributed the skyrocketing trend in the rise of crime to implementing this policy. There are thousand of alternative ways to safeguard the security of the state and hampering the privacy of the individuals is by no means acceptable.

Imran Ahmed
Mohammadpur, Dhaka.

FACT file

Muslim women fight instant divorce

For more than a decade Muslim women activists in India have been demanding a ban on what is known as "triple talaq" or instant divorce.

It is a system wherein a Muslim man can divorce his wife in a matter of minutes.

The issue has been highlighted recently after several Indian Muslims have taken to divorcing their wives by mail, over the phone and even through mobile phone text messages.

The practice of instant divorce is banned in several Islamic countries including Pakistan, Bangladesh, Malaysia and Indonesia.

But it continues in India. Islamic scholars say the holy Quran clearly spells out how to issue a divorce.

It has to be spread over three months, which allows a couple times for reconciliation.

But today, many men use the post, the telephone or even the short messaging service (sms) to divorce their wives.

Muslim women's rights activists are outraged by such incidents. They said, there's nothing in the holy Quran that allows triple, verbal, instantaneous talaq (divorce). There's no greater anathema than the kind of talaq (divorce)that has now become the greatest black mark against gender in Islam.

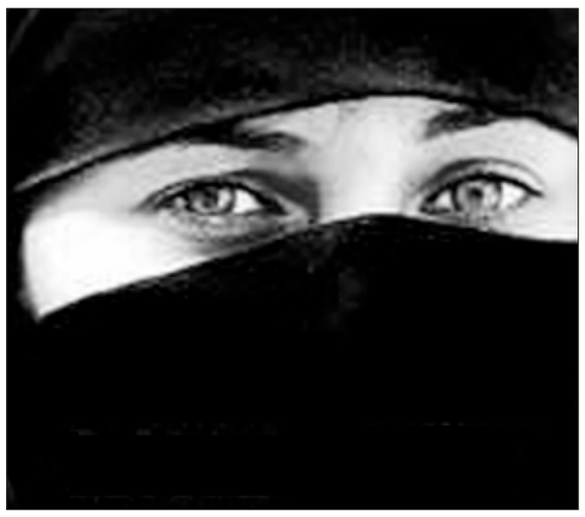
There have been attempts in the past to focus on the ills of instant divorce.

The clamour to ban the practice has forced the All India Muslim Personal Law Board to take up the matter at a recent meeting.

The majority of the *ulema* [clergy] thinks that it's legal, it's binding. They say it's according to the *Sharia* [Islamic code].

"Now how can the Muslim Personal Law Board take a unilateral decision? The board cannot go against the *Shariat*."

Source: BBC NEWS.



Star LAW report

RESERVED SEAT

Local government circular discriminatory & unconstitutional

Shamima Sultana Sheema and Others v Bangladesh and others
WP No.3304/2003

Background

In every City Corporation, in addition to the general seats, to which both men and women may be elected, one third of the commissioners' posts are 'reserved' by law for women.

In elections to the Khulna City Corporation held on 25.4.2002, 31 commissioners (all male) were elected, and another 10 commissioners (all women) were elected from the reserved seats. These ten women include affiliates of the two main political parties, BNP and Awami League, as well as independents.

The LGRD Ministry passed a circular on 23.9.2002 purporting to provide women *Pourshava* Commissioners elected from reserved seats with reduced powers and functions as compared to the Commissioners elected from General Seats. So for example, Commissioners elected from reserved seats were not permitted to take part in the census or to issue nationality certificates. In addition, commissioners elected from reserved seats in Khulna City Corporation have also been receiving a lesser amount as honorarium for their attendance of meetings etc than general seat commissioners.

Court Challenge

The petitioners filed a writ petition before the High Court and challenged the circular.

The High Court (Mr. Justice Md. Hamidul Haque and Ms. Justice Zinat Ara) passed an order on 3 May 2003 directing the Government to 'show cause' on that issue.

However, despite this interim order, these ten commissioners continued to receive discriminatory treatment, including receiving a lesser honorarium for carrying out official duties than the general seat commissioners.

Two non-governmental organisations, Ain o Salish Kendra, and the Bangladesh Mahila Parishad intervened in the case. In addition, Dr. Kamal Hossain, Senior Advocate, was requested by the Court to make submissions on certain constitutional questions.

Arguments in support of challenge

The petitioners and the intervenors argued that:

1. Under the Khulna City Corporation, the Corporation is a body corporate and entitled to take its own decisions, and exercise its powers and functions independently of Government, and the Government cannot interfere in its powers and functions except as provided by law.

2. The Khulna City Corporation Ordinance does not discriminate in any way between Commissioners elected from general seats and reserved seats.

3. Any such discrimination would be in violation of constitutional guarantees of equality before the law and equal protection of law.

4. Further, such discrimination, which amounts to discrimination against women, would be in violation of the state's legal obligations to ensure women's fundamental rights to equality and non-discrimination under national and international law (in particular the provisions of the Convention on the Elimination of All Forms of Discrimination against Women), as well as its policy commitments as contained in the National Women's Development Policy and the Beijing Declaration and Platform for Action.

In sum, they argued that the Circular by discriminating between Commissioners depending on the manner of their election negates the very purpose of providing for such reservations, that is to ensure women's effective political participation in local government. In order to discharge the government's obligation to guarantee equality between women and men, and women's right to participate fully and equally in government, it is essential that all commissioners, once elected (whether from general or reserved seats) be treated at par in respect of their powers and functions.

ASK argued that the provision for direct elections to reserved seats had been made as a 'temporary special measure' to ensure women's effective political participation, in conformity with Art. 28(4) of the Constitution and of Bangladesh's obligations under CEDAW. It further argued that the Circular effectively negated the intent and purpose of these provisions.

Government Response

The Attorney General argued that the circular is not discriminatory as commissioners elected from general seats and reserved seats represent "two separate classes" and therefore there can be no question of different treatment between them constituting discrimination.

The Government's affidavit stated

'the Commissioners of the reserve seats have been elected in a privileged manner' (para 5) and that 'if the commissioners of reserve seats are given equal power then that will not eradicate discrimination rather create a peculiar type of discrimination by multiplying their capacity four times higher than that of the commissioners of general seats though the petitioners have been elected in a privileged manner' (para 8). [emphasis added]

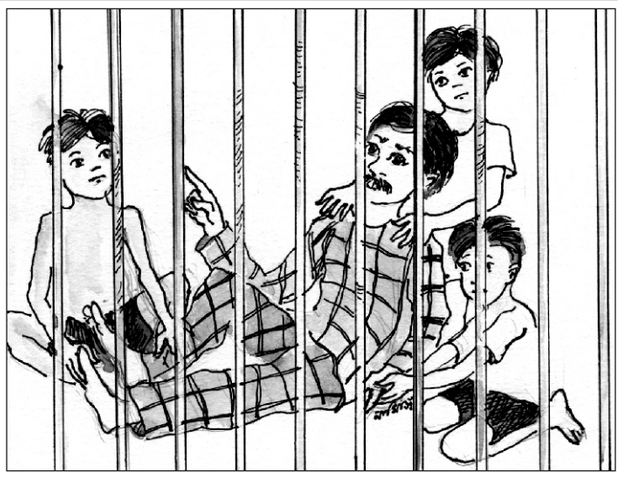
Judgement

After hearing all the parties, a Division Bench of the High Court, comprising Mr. Justice ABM Khairul Haque and Mr. Justice Miftahuddin Chowdhury, delivered judgement in favour of the petitioners.

The Court traced the historical development of the principle of equality, and its foundation in both landmark religious and constitutional texts. It emphasised the supremacy of the Constitution, and elaborated on the constitutional entrenchment of equality in Articles 27 (equality before law) and 28 (prohibition of gender discrimination) of the Constitution and considered these in the context of Articles 10 (regarding women's participation in national life) and Article 59 (local government).

It stated that the Khulna City Corporation did not envisage any discrimination between Commissioners depending on the manner of their election.

The Court noted that the Corporation being a body corporate, the Government could not interfere with its powers and functions except to the extent permitted by law. Further it observed that any directions given by the Government or the Corporation regarding the powers and functions of Commissioners must be in conformity with the letter and spirit of both the KCC Ordinance and the Constitution.



'Children in detention should be separated from adults; they must not be tortured or suffer cruel and degrading treatment.' *Convention on the rights of the child.*

Corresponding with the Law Desk

Please send your mails, queries, and opinions to: **Law Desk,** The Daily Star, 19 Karwan Bazar, Dhaka-1215; telephone 8124944, 8124955, 8124966; fax 8125155, 8126154; email <dslawdesk@yahoo.co.uk

LAW week

Mannan appeals to HC to vacate stay order

Bikalpa Dhara Bangladesh (BDB) leader major (retd) Abdul Mannan appealed to the High Court to vacate the stay order on his petition filed with the EC challenging the validity of the Dhaka-10 by-polls. They filed the appeal to a division bench comprising Justice Abdul Wahab Mia and Zenat Ara.-Daily Star, August 16.

Death from custodial torture alleged

Death of poor rickshawpuller due to alleged torture in custody has created resentment among people in the town. But authorities of Jessore Central Jail, Jessore Hospital and a Court Inspector have suppressed the matter. The torture came to light when people attending the Namaj-e-Janaja of victim Anisur Rahman found marks of injury on the body and the body was buried without autopsy. He was arrested on May 31 by Jhikargacha police under Section 54 while he was going to his father-in-law's house at Chapatala village in the upazila and on June 1, he was produced before a Magistrate court, which sent him to Jessore Central Jail (Hajati No. 2596/04).- Daily Star, August 16.

Cabinet okays women's JS seats election bill

The cabinet yesterday approved a bill on the Jatiya Sangsad reserved seats for women that proposes an election mechanism and empowers the EC to proportionately distribute 45 seats among political parties.

The bill says the EC will seek lawmakers' lists from the political parties or alliances and will distribute the women's seats among them on a pro rata basis.- Daily Star,August 17.

Discrimination against women commissioners illegal: HC

The High Court ruled on August 16 that women city-corporation ward commissioners, elected to reserved seats, were equal to their colleagues of the general seats in terms of power and functions and should not be discriminated against in any manner. The court passed the judgement on a writ petition, filed by 10 Khulna City Corporation ward commissioners, elected to reserved seats, against the government circular.- New Age, August 17.

Dhaka may ask Delhi to ratify 1974 treaty

Bangladesh is planning to ask India to ratify the Indo-Bangladesh Land Agreement of 1974 for establishing a legal basis for a quick resolution to demarcate the still disputed six and a half km of borders between the neighbours.

"The agreement should be ratified and Bangladesh has done it. If it is not ratified there is no legal basis to solve outstanding land disputes," Foreign Secretary Shamsher Mobin Chowdhury told reporters after an inter-ministerial meeting at the foreign ministry on August 18.- Daily Star, August 19 .

Separation of Judiciary

The Supreme Court took the government to task after it failed to specify the time it needs to fully comply with the court directives to separate the judiciary from the executive despite having the deadline extended for 18 times. The full bench of the Appellate Division was ready to give the government another four-month extension on condition that it would seek no further extension. The government, however, could not make such a commitment, prompting the court to adjourn hearing on the government's appeal till November 9 without extending time. The government told the court it needs some more time to take steps to finalise two judicial service rules needed for separation of the judiciary.

The court said it feels ashamed of the government's coming to it over and again with the same matter. If it believes court is its guardian, its action should show it. It should maintain dignity and supremacy of the court, the bench observed.

The seven-member Appellate Division led by Chief Justice Syed JR Modassir Hosain also laughed at the excuses the government makes to repeatedly seek additional time to implement the court orders. After the 18th extension of the SC deadline, Law, Justice and Parliamentary Affairs Minister Moudud Ahmed said the government would comply with the court orders by the fresh deadline and would seek no more extension. He added that the government alone cannot complete the work and needs co-operation from the court.-Law Desk.

READER'S queries

Your Advocate

Q: We often hear about human rights. I have attended a number of seminars on human rights and listened to many speakers talking on human rights. I must confess I could not gather a clear conception about what human rights exactly is. I do not understand which right enjoyed by human is not human right. I think any and every right of a human is human right. Then again there are concepts of 'fundamental human rights' and ''fundamental rights'. I need your comments by way of clarifications.
-Choudhury Areff Rahman, *Sylhet.*

Your Advocate: The intelligent among men are those who know that they do not know. The legal phraseologies you have referred to be really technical in nature and it is natural that their technical import may not be clear by mere attending seminars or symposiums unless you have had a close study on the subject. I do not claim I have extensive study on the subject beyond the little I needed for my profession. Well, I can share my professional experiences with you.

Human rights as a discipline is relatively of recent origin. It is theoretically a complex question to be explored in an interdisciplinary inquiry. Human rights are seen by many academic writers as 'those moral rights, which are owed to each man or woman by every man and woman solely by reason of being human'. Maurice Craston described human rights as 'being the rights of all people at all times at all situations'. This bears a sense, which comes closer to your idea. Human rights as a modern concept has found its origin in the wake of Second World War. Horror of war and boundless sufferings of mankind in the two world wars gave rise to the desire to protect human rights with a realisation that denial of human rights was a potent cause of injustice and strife. Tension of strife-situation and unrest of diverse nature which was making inroads into the different societies and shared concern for protection of citizens against gross violation of fundamental freedoms by the states in the god-like justifications of 'state security', 'public safety', 'national economy', 'law and order' and so on led the international community to take measures for protection against violation of basic human rights and fundamental freedoms. The contemporary search for general international norms and insistence on a universal common standard of human rights particularly of fundamental human freedoms and their legal protection brought about a profound change in the underlying jurisprudence of international law which may fairly be called a revolution. The formal outcome of this revolution is a detailed code of international law which spells out the rights of individual that protect their rights and fundamental freedom as against their own states and the world at large. The code calls these rights "human rights".

The UN General Assembly laid down the foundation of this task by adoption of the Universal Declaration of Human Rights on 10th December 1948. The underlying premises of the declaration was that all human beings are born free and equal in dignity and endowed with reason and conscience and should act towards one another in an spirit of brotherhood. A number of substantive rights are set out ranging over political rights, civil and economic rights, social and cultural rights. They include right to life and liberty, protection against arbitrary arrest, detention or exile, freedom of religion and conscience, freedom of _expression and association, freedom of movement and protection of legal systems, including right to fair trial. Also protected are the political rights of free and equal franchise and an elected government and an equal access to public services. The declaration was a resolution of the UN, not in itself binding on the member states. Later two covenants: The International Covenant of civil and Political Rights (ICCPR) and The International Covenant on Economic, Social and Cultural Rights (ICESCR) were brought into being to give effect to the declaration. It is the two Covenants that one normally turns to find obligations as regards human rights binding on the member states particularly because of their precise language and special machinery each Covenant established for the supervision and enforcement of their provisions. The Universal Declaration and the Covenants are referred to as 'International Bill of Rights".

The precise and compelling words of international instrument of human rights have inspired many state constitutions together with regional human rights treatise and examples of legislation quoting or reproducing provisions of the Declaration. Bangladesh constitution has enumerated a series of those rights and freedoms under its fundamental rights chapter enforceable under Article 102 of the Constitution. Development of human rights jurisprudence has, therefore, taken place in a restricted sense. Technically human rights conform the basic rights enumerated in the human rights instruments negotiated under the auspices of the UN. 'Fundamental rights' are also human rights enumerated as such in our Constitution and are enforceable under law. This does not mean human rights are confined to the rights enumerated by the UDHR or fundamental rights laid down by our Constitution. In its generic sense, human rights as Craston maintained, are all rights that every man and woman owes to every man and woman as human.

Your advocate M. Moazzam Husain is a lawyer of the Supreme Court of Bangladesh. His professional interests include civil law, criminal law and constitutional law.