



READER'S queries



Your Advocate

Q. Dear Sir, I have been reading with great interest the Readers queries in your Law & Our Rights Page. My question to you is as follows:

1. I came to know from many Banks that if any cheque is dishonored it is criminal offence under Negotiable Instrument Act 138 punishable with RI Imprisonment & penalty three times of the cheque amount. I find that by this act medium class people issuing such cheques are taken to custody on orders of the court, but the influential people issuing bigger amount on cheques, are not taken into custody & get bail. I also find that the court send such matter for inquiry to the police station and for FIR. The police keep the matter pending for months together without doing anything. Is the law bailable or non-bailable. How long can the police keep the case with them without submitting the report to the court?

2. I would like to know what is the use of the law if it is not being implemented. The influential people issue cheques knowing well that they have no money in the account and also knowing that the law will not be able to touch them. Please suggest me what is the remedial to the above, and why such law is introduced if it cannot be implemented.

Thanking you in advance for your advice.

Yours faithfully,  
A.R. Merchant  
Dhaka.

Your Advocate: I have read through your query very attentively. Your grievances that transpired seem to be more against non-application and misapplication of law and alleged undercurrent of rich-poor discrimination in the exercise of law than against law itself. These are things, which are, no doubt, amenable to law. But unfortunately law cannot take its own course, as it is commonly believed to be, without the persons and agencies entrusted to carry it into effect. If there is any inherent infirmities in the system itself the subject exceeds the narrow confines of the area of a professional lawyer and turns out as one to be addressed through interdisciplinary inquiry. I, as a lawyer, can at best offer my thanks for your regards to say what you mean to say but cannot find out a redress for your grievances.

In the general run of frustrations expressed in your query only two sentences have touched upon law points that admit of comments from a lawyer. The sentences relate to the question of bail and to the length of time police may take in submitting inquiry-report. I am trying to address the same.

Section 138 of the Negotiable Instrument Act is a penal clause providing for imprisonment but nowhere in the Act anything is said about bail. That is, the law is silent as to whether the offence is bailable or non-bailable. Therefore, it can neither be called bailable or non-bailable. But where under any special law offences punishable with imprisonment are created without saying anything about their position in terms of bail court can grant bail in exercise of its power conferred by the Code of Criminal Procedure.

As for police, there is time frame provided by the Code of Criminal Procedure for submitting report of investigation. But this is merely directory. No consequence follows if police fails to submit report within the time specified by law except that the failure in submitting the report furnishes a good ground for bail of the accused, if in custody. In your case, that is, in a case under Section 138 of the Negotiable Instrument Act I do not find any reason of inquiry to be made by any police officer, or any other person. Because the nature of the case does not call for such inquiry. In such cases court of magistrate is competent to take cognizance directly and enter upon trial.

Coming back to your basic grievances, I feel like adding that inspite of all, you can consult a good lawyer on your particular issue. The records of your case, if any, will speak for themselves and give the lawyer the true scenario of your sufferings. Who knows, there may still be elements suggesting means for the redress of your grievances, which may otherwise look impossible or misleading from outside.

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.

LAW investigation

The agitations at the Bar and its ethics: what next?

NASER ALAM

FOR about two years the cloisters of the Supreme Court has mostly been known for the battle of the political quarters. Judges have been threatened first by a leading political party activists who were waging sticks against the chairs of their lordships with provocative comments, some writers blamed a former chief justice of 'betrayal', one other former chief justice was questioned about his integrity on election issues. During that time most of the active agitations were outside the vicinity of the courts gradually the agitating forces moved towards and into the highest judiciary. The members of the bar joined the political elements, promoted unprofessional conduct of agitation into the court cloisters, and now it finally entered into the courtrooms. It raises some grave concerns about what is coming next? What would be the agenda of the new-generation political lawyers? What kind of movement the bar would allow its members to demonstrate? What would be the bar's ethical limits?

Bar's ethical limits have not been an issue to those activists, surprisingly! What the Bar should indulge in doing and not doing has not been much talked about. These issues, which would have significant positive impact on the role of the members of the profession seems to have been put to the galleys. It appears that the underlying role of the bar has been pushed aside and the institution has been pushed towards adopting different agendas than it should practice, and recently been at the frontline of provocative and may be unconstitutional bustles.

The bar's role is to promote and improve the services and functions of the Bar, and to represent the interests of the Bar on all matters relating to the profession, public interest or in any way affecting the administration of justice. It should be the ambassador to attain a modern and forward looking profession which seeks to maintain and improve the quality and standard of service to all clients and towards ensuring dispensation of justice to the society. It should also maintain and enhance professional standards by regulating education and training for the profession. A modern and efficient bar should conduct research and promote the Bar views on matters affecting the administration of justice, including substantive law reform.

A member of the bar must not conduct himself or herself in a way, which is prejudicial to the administration of justice; or is likely to diminish public confidence in the legal profession or the administration of justice or otherwise bring the legal profession into disrepute.

These are the underlying canons of the legal profession as well as the body who manages the profession. We have seen in recent years that the bar has been involved in mostly agitations against the government for judicial appointments. There have been demonstrations in the court and outside the court, in front of the Chief Justice's office, including insulting kicking on his office doors, passing resolutions for not attending the court, threatening any member of the profession with disbarment from the profession if they do not join the agitation and so on. Concerns have been raised that the newly appointed justices do not have proper legal experience and they would not be able to comprehend the legal issues properly and cannot deliver judgments in a professional way. There has been underlying allegation of political favours regarding some of the appointments.

If it is well founded that quality has been seriously compromised, then who is to blame for the poor benchmark? The bar is an autonomous institution; the bar and not the government should first ensure the quality benchmarking. One of the constitutional requirements for the appointment of a High court judge is ten years of practice. It is time to think why after ten years of legal practice a lawyer should not be competent enough to deal with legal issues at a higher court in the capacity of a judge?

As indicated above, one of the core role of the Bar is to enhance the quality of its members in dispensing legal services, thus the bar is responsible in ensuring that it is happening. Otherwise, the bar is in violation of its ethical duties to the professional clients and to the society. Any failure and its consequences should result in self-criticism. We are not thinking more about producing a brigade of competent legal professionals. The bar seems to be very focused on the blaming-game after something goes wrong, instead of resorting to active exercise of ethical control from the outset.

The bar also regulates the entry and it is well-known that entry to the bar is one of the easiest among other professions. It is surprisingly easier to get a law degree from a law college and in most instances by adopting unfair-means during exams and memorizing only a few very straightforward 'answers'. The



bar exam itself is riddle with unethical practice. When I took my bar exam, I witnessed many would-be lawyers copying answers from books and other carefully carved notes, and I was stunned at the lack of supervision. Favouritism during the oral examination is an open secret, producing false case diaries as a 'normal' activity and this unethical list can go large.

Now, if those members snick into the profession not by way of intelligent demonstration, but by dint of unethical conducts, how can they not 'bring the legal profession to disrepute'? They would always look for more favouritism, commit unprofessional conduct and then finally kick at the door of justice.

Also caution should be exercised by the senior bar members not to dilute the ethical practice with agitation in the name of constitutional rights and professional duties. As a lawyer, we have a duty to the clients and to the court, and not to any political godfathers. We should shy away from the agitation style of the political godfathers and adopt a more resolute way of voicing our unity, rather than engaging in threatening behaviour. If the current style of agitation continues, then public confidence on the bar and the bar office bearers would degrade. It would then become an issue to the society as to whom they can trust.

I have not heard of any attempt by the bar to produce significant research on subtle legal issues these days. Members are increasing becoming political and the line of political influence on dispensing justice by them has merged and become indistinguishable. Why not think this way if the senior members are known political activists, then those who follow them are also political activists. Now, when it comes to the appointment of judges, why should the junior members of the bar be blamed more for having political affiliations? If this problem were to be addressed properly, should the senior members not declassify them from politics altogether? Should they not set the ethical limits first and descend it upon the other members? Should they not become more resolute than confrontation? If we really mean to see a positive change, then the bar should practice fairness, ethics and constitutionalism first. Otherwise, time is not probably far away when it would be hard to attract able legal professionals to the bench; may be the time has reached already!

The writer is a Barrister at Law.

LAW week



Children under nine cannot be punished

The Jatiya Sangsad passed the Penal Code (Amendment) Bill 2004 raising the minimum official age of criminal responsibility of a child from seven to nine years. Piloting the bill, Law Minister Moudud Ahmed said under the new provision a child of nine years could be exempted from criminal responsibility while a child in the age group 9-12 could be given limited exemption if he or she is found insufficiently matured. "The government did not propose to raise the age limit from 12 to 14 since it was found that two main accused of the murder of Govt Laboratory School teacher, both aged 14, had staged the cold-blooded murder," the minister told the lawmakers. Awami League (AL) lawmakers AKM Jahangir Hossain and Rahmat Ali moved motion for eliciting public opinion before passage of the bill. AKM Jahangir said there should be uniformity in age limit of children for exemption from criminal responsibility. The law minister said it is not possible to make a uniform age limit, because each law is made for a particular subject and it is not possible for making a uniform age of children for immunity from criminal responsibility. However, the bill was passed by voice vote without much discussion. UNB, November 2.

DIG (prison) in sexual abuse

The Women and Children Repression (Prevention) Court, Jessore issued a warrant of arrest against a deputy inspector general of prison on charge of sexual harassment of a woman police for two times. A woman working with the police at the Jessore Central Jail filed the case on October 17 against Sardar Abdus Salam, in-charge of the Khulna and Barisal divisions, the police said. The woman complained that Abdus Salam tried to rape her in May and August in his Jessore Central Jail residence. Daily Ittefaq, November 3.

Faizee to face Bar Council scrutiny

Additional judge Faisal Mahmud Faizee, who was withdrawn from the High Court bench for alleged tampering with law graduation result, faces scrutiny by the Bar Council. Faizee is likely to explain his position before Attorney General AF Hassan Arif, ex-officio chairman of the council. Sources said the Bar Council, lawyers' regulatory body that issues enrolment certificate for legal practice, will also discuss similar allegations against some other lawyers. Chief Justice Syed JR Mudassar Husain withdrew Faizee from the bench in the wake of the allegation and lawyers' threat to boycott his court. He also thrust full responsibility of the bench upon Justice Ali Asgar Khan, Faizee's senior judge in the bench, as Asgar declined to sit with him in the court. Two major dailies reported that Justice Faizee, one of the 19 additional judges whose appointment on August 23 drew sharp criticism, had tampered with his marks-sheet of LLB degree obtained from Chittagong Law College in 1989. An enquiry committee of Chittagong University has unearthed the fraud. The Daily Star, November 4.

LAW news



30 Justices of peace caught for criminal activities

They are supposed to be highly reputable community leaders but more than 30 Justices of the Peace (JP) in Malaysia have been detained in the past year for alleged involvement in criminal activities. The number prompted the Attorney-General's Chambers, which has the final say on who can be a JP to consider stopping the appointment of these people as second-class magistrates.

Sources said the JPs who were arrested included at least nine detained to assist police investigations into their alleged involvement in loan-shark activities. JPs are supposed to be highly reputable community leaders, 'one source said. Their appointment is not an award but a trust that carries with it certain legal powers and responsibilities. How are they supposed to be appointed second-class magistrates if they are criminals themselves?

The Attorney-General's Chambers and relevant authorities should look into this matter and find a solution. JPs who are second-class magistrates can hear cases referred to the traffic tribunal and those involving minor criminal offences. They can impose penalties for offences punishable by fines. Currently, there are about 3,000 JPs in Malaysia given the title by the Attorney-General's Chambers, based on the recommendations made by national leaders.

The Penang president of the Council of the Justices of Peace, Datuk Sonny Soon Ewe Yin, was said that more JPs were involved in 'unhealthy' activities. But he did not blame the Attorney-General's Chambers for considering the move to stop the appointments of JPs as magistrates. The JPs have themselves to blame, he said, adding that he was glad no JP in Penang was involved in any 'unhealthy' activity.

The move being considered by the Attorney-General's Chambers was opposed by a member of Justices of the Peace Council. He said the Attorney-General could scrutinise the background of potential JPs to make sure they did not have criminal records before they were appointed as magistrates. "Just because of a few rotten apples, it is not fair that other JPs in Malaysia cannot be appointed as magistrates," he said. He also stressed that only the names of qualified individuals were submitted to the Attorney-General's Chambers for consideration.

Source: Asia News Network.

LAW opinion

Misconception about woman's right in Islamic law

THERE is a common notion among the women of Bangladesh that the Islamic law has not treated them equally and it gives priority and prerogative to the male Muslims. The main logic behind their view are - a son double share in the parental property, one man being equitable to two woman in legal testimony, males right to marry up to four wives, males right to guardianship and custody etc. All these instances deny the absolute equality of man and woman apparently. But if we study the Holy Quran, Hadith and their explanation, it will be manifest that Islamic law not only secure the right of a woman rather in

O mankind! We created you from a single (pair) of a male and a female and made you into nations and tribes that you may know each other. Verily the most honored of you in the sight of Allah is (one who is) the most righteous of you. And Allah has full knowledge and is well acquainted (with all things). (Qur'an 49:13)

It can be understood from this verse that there is actually no discrimination between man and woman in the eye of Allah but still then some misconception arises due to some Islamic rules and regulation. These misconceptions will be removed if we can find out the logic behind such rules and regulation.

At first, let's discuss the reason behind the double share of a son in his parental property. Basically, according to explanation of sharia responsibility attributed on the man to maintain not only his wife but also his children even if the woman is wealthier than his husband is. The letter is under an obligation for her maintenance. The sharia recognizes the full property rights of women before and after marriage. Greater financial security is assured for women. They are entitled to receive marital gifts, to keep present and future properties and income for their own security. No married woman is required to spend a penny from her property and income on the household. She is entitled to full financial support during marriage and during the waiting period (iddah) in case of divorce. She is also entitled to child support. Generally, a Muslim woman is guaranteed support in all stages of her life, as a daughter, wife, mother, or sister. These additional advantages of women over men are somewhat balanced by the provisions of the inheritance which allow the male, in most cases, to inherit twice as much as the female. This means that the male inherits more but is responsible financially for other females; daughters, wives, mother, and sister, while the female (i.e., a wife) inherits less but can keep it all for investment and financial security without any legal obligation to spend any part of it even for her own sustenance (food, clothing, housing, medication, etc.). Therefore double share of the parental property is given to the male due to aid them to perform their obligation. Again if we speak about the Quranic heir (who are the class 1 heir), they are 12 in number and 7 of them are women. So the number of male heir is less than the female heir. It is a burning example that in case of succession Islamic law gives women special priority.

Another argument arises about polygamy that if a Muslim man is permitted to marry up to four wives why not a Muslim woman is not allowed doing so. The main reason behind this is that if polygamy were allowed for women it would be impossible to identify the paternity of children, which would destroy the fabric of the society. Moreover, only Islamic law allows limited polygamy and a Muslim male can marry more than one wife only if he can deal the wives justly. The Quran states if you fear that you shall not be able to deal justly with the orphans marry women of your choice two or three or four; but if you fear that you shall not be able to deal justly (with them) then only one... (Qur'an 4:3) The only passage in the Qur'an(4:3) which explicitly mentioned polygamy and restricted its practice in terms of the number of wives permitted and the requirement of justice between them was revealed after the Battle of Uhud in which dozens of Muslims were martyred leaving behind widows and orphans. This seems to indicate that the intent of its continued permissibility is to deal with individual and collective contingencies that may arise from time to time (i.e., imbalances between the number of males and females created by wars). This provides a moral, practical, and humane solution to the problems of widows and orphans who are likely

to be more vulnerable in the absence of a husband/father figure to look after their needs: financial, companions, proper rearing, and other needs.

Again in case of custody and guardianship father is entitled to the custody of the son over seven years of age and the right of guardianship of children is always vested in father. The main logic behind such rule is the socio economic conditions of the women have the effect of not favoring them in this case and the preconceived idea remains that women are unable to maintain the child due to their lack of economic solvency. Therefore legal responsibility of maintaining the child and also the custody as well as guardianship remain with the father ultimately.

Again in case of legal testimony no reference was made to the inferiority or superiority of one gender's witness or the other's. The only reason given is to corroborate the female's witness and prevent unintended errors in the perception of the business deal. The Arabic term used in a relevant passage (tadhilla) means literally "loses the way," "gets confused or errs." But are females the only gender that may err and need corroboration of their testimony. Definitely not, and this is why the general rule of testimony in Islamic law is to have two witnesses even if they are both males. This leaves us with only one reasonable interpretation that in an ideal Islamic society as envisioned by Islamic teachings the female members will give priority to their feminine functions as wives, mothers, and pioneers of charitable works. This emphasis, while making them more experienced in the inner function of the family and social life, may not give them enough exposure and experience to business transactions and terminology, as such a typical Muslim woman in a truly Islamic society will not normally be presented when business dealings are negotiated and if may present may not fully understand the dealings. In such a case, corroboration by two women witnesses helps them remind one another and as such give an accurate account of what happened.

So it is quite evident from the above discussion that Islamic law contains a comprehensive message concerning equality of the sexes. This is implied by several verses of Quran. The Quran states: And it becomes not a believing man or a believing woman, when Allah and His Messenger (Muhammad) have decided on an affair (for them), that they should (after that) claim any say in their affair; and who so is rebellious to Allah and His Messenger, he verily goes astray in error manifest. (33:36)

Basically, the Muslim woman was given a role, duties and rights 1400 years ago that most women do not enjoy today, even in the West. These are from God and are designed to keep balance in society; what may seem unjust or missing in one place is compensated for or explained in another place. Islam is a complete way of life. Hence, there should not be any scope of misconception regarding women right in Islamic law.

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PHOTO: AFP

some cases it offers them more privilege than a Muslim male. Today people think that women are liberated in the West and that the women's liberation movement began in the 20th century. Actually, the women's liberation movement was not begun by women but was revealed by Allah to a man in the seventh century by the name of Muhammad (peace be upon him), who is known as the last Prophet of Islam. The Quran and the Traditions of the Prophet (Hadith or Sunnah) are the sources from which every Muslim woman derives her rights and duties. Actually, nowhere does the Qur'an state that one gender is superior to the other. Some mistakenly translate 'qiwamah' or responsibility for the family as superiority. The Qur'an makes it clear that the sole basis for superiority of any person over another is piety and righteousness not gender, color, or nationality: The Quran states:

LAW network



ODHIKAR: Ten Years of a Human Rights Organisation

Bangladesh returns to democracy following the fall of autocratic regime through a popular upsurge in 1990. Since then, we have been successful in holding three credible elections. However the growth of constitutional liberties still faces severe challenges. Democracy or free and fair election alone is not enough to protect the rights of the disadvantaged and vulnerable groups including women. Unfortunately continued occurrences of election violence, arbitrary arrests, custodial death, and torture by state and non-state actors hamper the enjoyment of civil and political rights, often with ominous consequences. The need for an independent and objective human rights organisation in safeguarding basic human rights, particularly civil and political rights of the people of Bangladesh was strongly felt.

In 1994, a group of human rights activists initiated discussions and underscored the need to uphold the civil and political rights of the people of Bangladesh along with social, cultural and economic rights. Eventually, a decision was arrived at to form an organisation in order to advance such rights. In October 1994, Odhikar came into being at a meeting held at the Bangladesh Environmental Lawyers Association. Among its founder members were Dr. Mohiuddin Farooque, founder of BBA, Barrister Lutfur Rahman Shujahan, convener of the National Committee for the Protection of Fundamental Rights in the CHT and Advocate A. F. Hassan Arif. Mr. Fazlul Huq, Executive Director of BAST was the founding President. Advocate A. F. Hasan Arif succeeded him. Professor Tasneem Siddiqui of the University of Dhaka took over as President once her predecessor became the Attorney General for Bangladesh in 2001. Currently, Mr. Masood Alam Raghib Ahsan is the Director of Odhikar.

On 10 October 2004, Odhikar celebrated ten years of defending human rights. During these years, the organisation established itself as one of the leading human rights bodies of the country. It developed a strong network of partners and human rights defenders not only all over Bangladesh, but also in the region.

Initially the meetings used to take place at the premises of the Bangladesh Legal Aid and Services Trust. In 1995, Odhikar was registered with the NGO Affairs Bureau of the Government of Bangladesh and established its first office in Shegun Bagicha, with a tiny staff and some volunteers. Its early work involved investigation and reporting on police abuse and field investigations of selected incidents of violence all over Bangladesh. As it is difficult to access donor funds for working on civil and political rights, Odhikar had to face major difficulties in mobilising resources for its activities. Nonetheless, due to deep conviction of its members to the cause, it overcame such obstacles often with members contributing to activities from their own pockets. As its activities expanded, in September 2001, Odhikar moved to a larger premise in Gulshan. The hard work was finally paying off as Odhikar's credibility as a human rights organisation was steadily being appreciated. It's reporting on human rights abuses under successive governments never faltered. It has also expanded its activities to monitor police stations, election monitoring, training of young professionals and students in defending human rights. Odhikar continues to press for the establishment of an independent national human rights commission to strengthen the national human rights protection system in Bangladesh.

To date the organisation has trained 240 young people from all over Bangladesh as human rights defenders and monitors 24 police stations, including some outside Dhaka. Odhikar prepared research reports on the Misuse of Section 54 of CrP and sections 86 and 100 of DMP Ordinance, and on the Condition of Women and Children in Prisons and on the juvenile justice system. It has 11 publications to its credit. Odhikar also organised a number of advocacy activities such as consultations, dialogues and symposia to disseminate findings of its research. Members of the government, the opposition and civil society participate in such activities. Reports and data generated by Odhikar are widely used by media and academia. Odhikar is a member of several international networks such as ANFREL, SAFHR, Forum-Asia, IMADR, FIDH and the Coalition for the International Criminal Court and the South Asian Network against Torture and Impunity.

It has not been an easy struggle and the Odhikar team understands that working on civil and political rights is no easy task. Despite the odds, the whole team remains firmly committed to the organisation's principle of upholding such rights of common people. Indeed, it is the close relationship and team spirit of this relatively small organisation that helps it move forward.