LAW OPINION

OATHS OF THE MPs
A Constitutional Conundrum

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M JASHIM ALI CHOWDHURY

The oaths of the newly elected MPs have given rise to a constitutional conundrum. These oaths may be constitutional in both textual as well as literal senses. However, there are honest questions to be answered.

Article 123(3)(a) of our Constitution requires the election to be held within three months before the end of the five-year tenure of the previous Parliament. The 7 January election was held within that three-month corridor. Article 148(2A), inserted by the BNP government in 2004 through the Fourteenth Amendment Act, requires the oath to be administered within three days of Gazetting the election results. Article 39(4) of the Representation of Peoples' Order 1972 does not mention any minimum or maximum time limit for the Election Commission to publish the Gazette. Once the EC publishes it, the Speaker is bound to administer the oaths within three days.

The proviso of Article 123(b) clearly says that the newly elected MPs enter the office at the expiry of the previous Parliament (ie until 29 January this year). However, Article 148(3) says that they enter office "immediately after" they take their oath. Some may argue that this general rule applies to all other oath-taking office bearers but not the MPs because Article 123(b) has a specifically different rule for them – specific rules must prevail over general rules. An additional twist is found in the Third Schedule, which mentions that while taking the oath, the MPs are "about to enter" their office. "About to enter" may indicate an immediate future – the MPs entering the office "immediately after" they take their oaths. This interpretation goes along well with the article 148(3). However, "about to enter" may also indicate a nearer, but not distant, future as such. If we say that it means entering office in the near future, it goes well with article 123(b), which required them to wait until 29 January 2024. Here, again, we need to prefer an interpretation that goes with a specific rule over one that goes with a general rule.

Still, there is a significant question. Do the newly elected MPs' salaries and allowances start from 11 January 2024? I tried to look at the Members of Parliament (Remuneration and Allowances) Order 1973. Section 2(d) says that the MPs' tenure of office starts on the day they enter their job and ends on the day their tenure ends. If the above-mentioned literal interpretation holds, the newly elected MPs do not enter office until the end of the Eleventh Parliament's tenure. So, they must not start drawing remunerations until the start of their tenure. But was this followed at the beginning of the Tenth and Eleventh Parliaments? This question indeed deserves an answer.

Next, there is a constitutional conundrum. My understanding of articles 56(3) and (4) suggests that the President does not need the MPs to take the oath and the new Parliament to come into sessions before he appoints a new Prime Minister. It may sound a bit strange, but it is true. Article 56(3) allows the President to appoint a Prime Minister who "appears to him" to have the support of the majority of MPs. The Indian Presidents have historically appointed their Prime Ministers immediately after the results of the elections were clear, before the new parliaments were officially convened, and before the MPs were given their oaths. It is known as negative parliamentary investiture, where the leader of the majority party or coalition is presumed to have the confidence of the Parliament unless and until it delivers a vote of no confidence. The Indian Presidents do this despite finding no expressly worded discretionary power in their Constitution. Ours gives a clear discretion to the President. Moreover, articles 56(3) and 57(3), taken together, suggest the Prime Minister's entry into and exit from the office do not depend on the tenure of the Parliament.

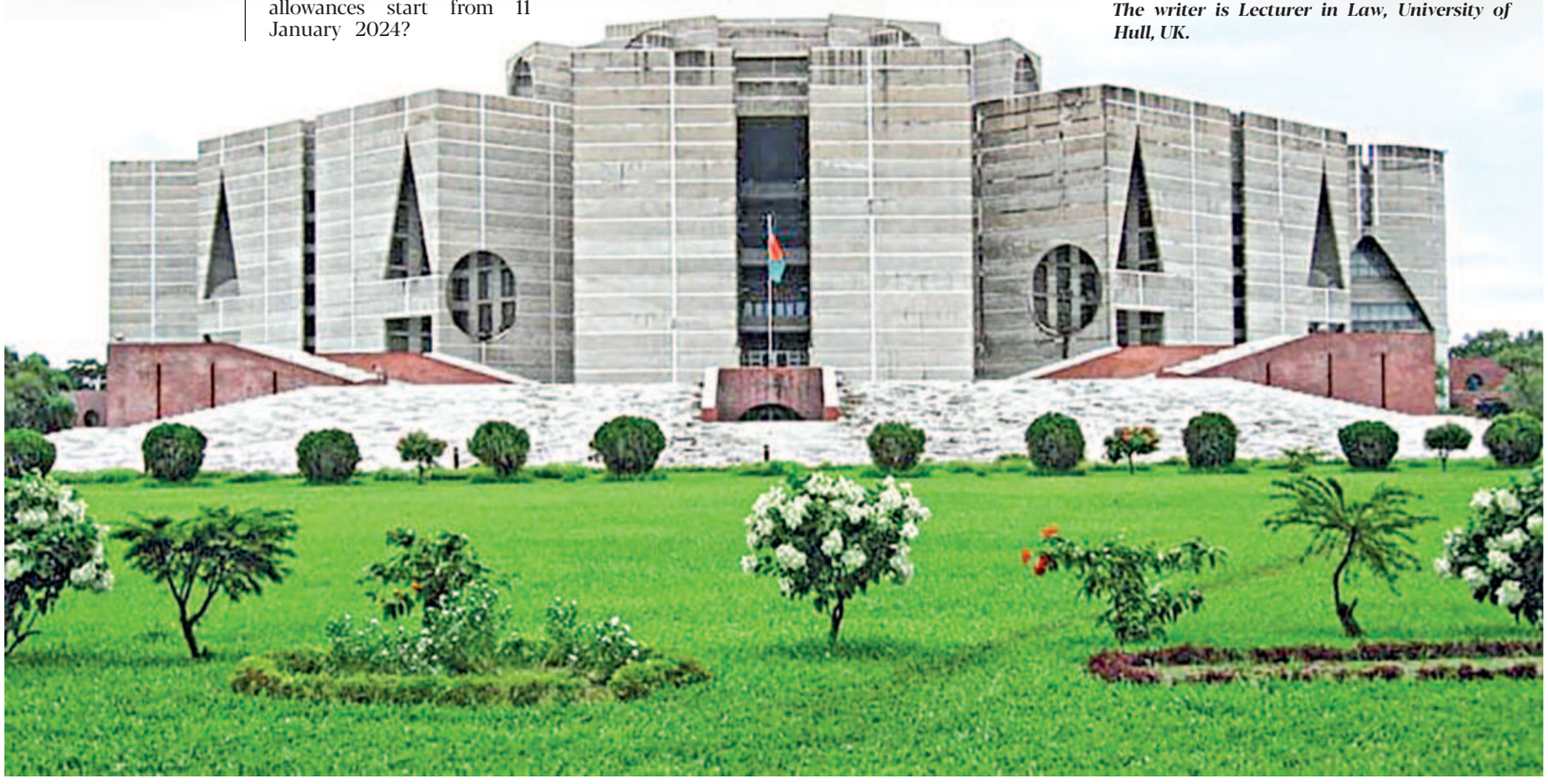
Then, why did the MPs need to take their oaths so hastily? It is for a procedural convention that we developed in the past and a controversial constitutional amendment that does not suit our present-day realities.

We have a practice of the MPs taking oaths, parties convening their parliamentary group meetings, electing their leader and then the President appointing the Prime Minister. There must be caution if we want to call this a Procedural Constitutional Convention. This practice fitted more with the presidential or caretaker government like situations where the previous parliaments got dissolved before the elections. There was no problem with the President allowing the new MPs to take their oaths and the majority party to elect its leader. Does it fit within our current system of elections three months before the end of the previous Parliament? Perhaps not.

Next, the Fourteenth Amendment of 2004 made it constitutionally binding for the Speaker to administer the oaths within three days of the Gazette. It is yet to be clarified what constitutional urgency prompted the BNP government to make this change. They had some immediate concerns surrounding the then next parliamentary election, and they wanted to avoid delay in forming government once the controversial caretaker government somehow managed to hold that election on 22 January 2007.

Two potential solutions can be offered in this regard. First, the 2004 amendment is no longer suitable for the current system and it needs to go. Second, could the President dissolve the Eleventh Parliament from the moment the new MPs took their oaths? It might have been an option. There is nothing in articles 57(2), 72(3) or 123(3) that prevents a Prime Minister from advising the President to dissolve the Parliament at any time. Of course, there is a risk that a partisan Prime Minister and President may coalesce to dissolve the Parliament immediately before a scheduled election and thereby defer the election by three months under Article 123(3)(b). It is a risk similar to that of a Prime Minister losing the confidence of the Parliament and advising the President to dissolve it. Fortunately, article 57(2) protects against such abusive advice. It gives the President the scope to disregard it. By analogy, we can say that the President may ignore this pre-election advice as well. For better protection, we may amend the Constitution to proscribe it in the same way as Article 57(2) does. That said, about the risk mitigation, I see no problem in dissolving a Parliament once an election is over and a new majority is known.

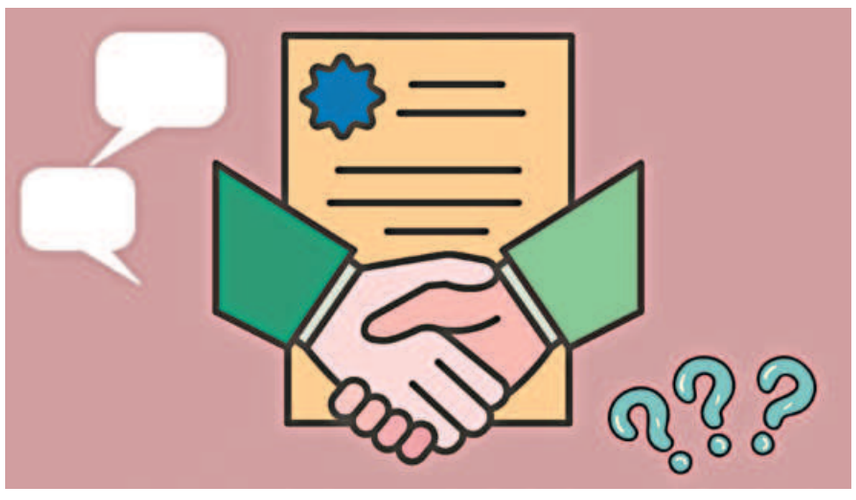
The writer is Lecturer in Law, University of Hull, UK.



YOUR ADVOCATE

Partnership Business and Breach of Trust

This week Your Advocate is Barrister Omar Khan Joy, Advocate, Supreme Court of Bangladesh. He is the head of the chambers of a renowned law firm, namely, 'Legal Counsel', which has expertise mainly in commercial law, family law, labor law, land law, constitutional law, criminal law, and IPR.



Query

I have a partnership firm with five of my childhood friends and we have been selling clothes on an online platform for the past two years, which has been going well. My friend, Jamil, handles the accounts and most of the monetary transactions. Recently, I found out that he has been making secret profits by selling t-shirts (bought with the partnerships funds) privately. Can we legally hold him accountable to reimburse the money he used up to purchase the t-shirts?

Response

Thank you for your query.

A partnership is a business formed by two or more people who have agreed to share the profits made. Habitually, one of the partners manages the business operations on behalf of the others while different partners may mange different portfolio of the business. The work distributions are generally incorporated within the partnership agreement itself.

It is understood that you run a partnership business with five of your friends and sell clothes online. One of the partners, Mr. Jamil, is responsible for handling the accounts and majority of the financial transactions. Unfortunately, you have recently discovered that Mr. Jamil has been secretly making profits by selling t-shirts which were bought using funds from the partnership capital.

Unless there is an embargo in the partnership agreement on the partners in relation to engaging into competing businesses, the very fact of selling clothes online by one of the partners, Mr. Jamil, cannot be legally objected. However, the fact that he has used up the partnership funds for his own business is certainly an illegal move by him. By doing so, he has already committed several criminal offences like, criminal breach of trust, theft, misappropriation etc. and following a successful litigation, he may be imprisoned for the same.

On one hand, you can bring a claim against your friend, Mr. Jamil, to the Civil Court due to a breach of contract resulting from a breach of the Partnership Agreement that you formed at the inception of the business. Consequently, your friend, Mr Jamil, may be held liable to pay damages for the secret profits that he had made using the partnership capital. While on the other hand, you could institute a strong criminal case under the Penal Code 1860.

Nevertheless, it is imperative to understand that pursuing legal actions at the initial stage may not be the wisest of decisions and may not be practically viable. Accordingly, I would advise you to raise the concern formally with him and other partners with a view to determining the next course of action including recovery of money and Mr. Jamil's continuity in the partnership business. If you cannot reach an amicable solution, you may choose to serve him a legal notice for recovery of the money while litigation always remains as an option.

I hope my answer provides you a solution to the issue in your query.

The writer may be contacted at omar@legalcounselbd.com

LAW LETTER

Media exposure and presumption of innocence

The practice of publicly displaying the faces of accused individuals in the presence of media has been longstanding. While the idea is to enhance transparency, deterrence, and public safety, it remains of utmost significance to ponder the potential repercussions of such public exposure on the rights and welfare of the concerned accused individuals. Within a legal system that embraces and entrenches the principle of presumption of innocence until proven guilty, it becomes particularly significant to scrutinise this practice from a standpoint that prioritises the protection of the accused.

The principle 'innocent until proven guilty' emphasises the importance of not pre-judging an individual's guilt based on accusations alone. Nevertheless, when the faces of accused individuals are publicly revealed during the media coverage, this fundamental principle gets negatively tweaked. By exposing the accused to public scrutiny before presenting them in the court, the risk of prejudicing public opinion against them, and potentially influencing the trial itself, increases manifold.

Disclosing the identities of accused individuals can give rise to unforeseen outcomes that impede the accused individual's right to obtain a just and fair trial, paving way for, what is referred to as 'trial by media', wherein public sentiment overrides legal processes. This jeopardises the trial's credibility because indeed, the portrayals by the media cast a shadow over all those associated with the criminal justice system.

The emotional and psychological well-being of the accused constitutes another pivotal facet demanding thoughtful scrutiny. The act of publicising someone as an accused individual prior to establishing guilt can carry far-reaching implications. This exposure places the accused in a position susceptible to stigma, societal detachment, and emotional strains. Negative societal reactions, harm to interpersonal connections, and obstacles in securing employment, even in the event of eventual proof of innocence, can ensue. These outcomes have the capacity to significantly impact the mental health and overall life satisfaction of the accused, magnifying the difficulties encountered by them as they maneuver through complicated legal processes.

The practice of revealing faces of the accused can disproportionately impact vulnerable populations, such as the adolescents. Juvenile offender laws exist to protect the identities of young accused individuals precisely because their rehabilitation and future prospects should not be hindered by premature exposure to the media. Long-term consequences of early stigmatisation can have lasting impacts on a young individual, leading to a cycle of social exclusion and missed opportunities for growth.

Efforts to find the delicate equilibrium between the objectives of law enforcement and safeguarding rights of the accused have resulted in the development of legal schemes that limit the media's capacity to reveal the identities of individuals under accusation. Indeed, laws related to juvenile offenders also acknowledge that the lasting welfare of young individuals should not be jeopardised by untimely exposure to media reporting.

In sum, the act of publicising accused individuals introduces multifaceted ethical and legal predicaments. While the aspiration for openness and communal security is reasonable, it remains crucial to uphold the tenets of fairness and impartiality. The potential repercussions of manipulating public sentiment, undermining fair trials, and affecting the emotional welfare of the accused necessitate thorough contemplation. Striking a balance between the necessity of sharing information and safeguarding the rights of the accused should stand as a crucial priority for any legal framework dedicated to ensuring justice and upholding respect for the dignity of all parties implicated.

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