Law and Our Rights

Protection of Human Rights

Some Points to Ponder

by Barrister Khaled Hamid Chowdhury

These decisions recognise the importance given to the right of a fair trial in both civil and criminal cases and it does not matter that the applicant is a member of the armed forces. The protection of human rights, therefore, should be afforded to everyone, irrespective of their background. Not infrequently, our courts have also been invited in the past to intervene in the decisions taken in the court martial proceedings and given the fact that our Constitution guarantees fundamental rights the scope for rethinking into the matter in the light of the decisions of the European Courts and other Courts dealing with similar issues is getting progressively wider.

burning issue which has enjoyed considerable Approminence in our part of the globe has been the preservation of human rights. There is no dearth of literature. seminars and workshops in this field promoting awareness amongst the people of all classes. Europe is no exception from all this. Indeed one must take account of the fact that it was in Europe where the march for the protection of human rights began. More importantly, the British Government has recently (on 25th October last) introduced proposals for incorporating the European Convention on Human Rights (hereafter ECHR) into British law which will bring about important changes in the relationship between their citizens and the Government. As we shall see, this was long overdue. In this article, I propose to discuss the implications this may have on the way the British constitutional system functions. As we are now back to the era of parliamentary supremacy, there may be lessons for us to learn from this. Reference will also be made to two of the very recent decisions of the European Court of Human Rights, namely Findlay v United Kingdom (Reported in The Times on February 27, 1997) and Coyne v United Kingdom (The Times, October 24, 1997) where it has been held that court martial does not amount to a fair hearing so that Britain was in violation of the European Convention on Human Rights. This latter decision meant that it was for the fiftieth time that Britain lost a case in the European Court and coincidentally this happened on the same day when the Government published the said

proposals. ECHR came into force in 1953 and to date there are 30 states parties to it. The Convention was drawn up after the World War II with the aim of ensuring that no European country would again violate basic human rights as Nazi Germany had done. The first 18 articles of the Convention include a prohibition on torture, a ban on slavery and forced labour; the right to a fair trial; a right to respect for private and family life; freedom of thought, conscience and religion; freedom of expression; freedom of assembly; the right to marry; and a ban on discrimination. For the purposes of enforcement the Convention established the European Commission of Human Rights and European Court of Human Rights, each with one member in respect of each party. Alleged breaches of the Convention may be raised ei-

ther by a state party (art. 24), which rarely happens, or, if the state against which a complaint is made has accepted the right of individual petition, by an individual, (art. 25) Once all effective domestic remedies have been exhausted, an application is made first to the Commission. This must be done within six months from the date when the final decision was taken. (art. 26) The Commission investigates into the matter and seeks to secure a friendly settlement. (art. 28) If no such solution can be reached, the Commission draws up a Report and gives its opinion as to whether a breach of the Convention has been established. The Report is then sent to the Committee of Ministers of the Council of Europe and the states concerned and unless the question is referred to the Court within 3 months, the matter is dealt with by the Committee. A matter may only be referred to the Court if the state against which the complaint is made has accepted the compulsory jurisdiction of the Court pursuant to article 46 (all members except Turkey has done so) or otherwise consents. In most cases a declaratory judgement is given. If the Court finds that a state party is in violation of the ECHR, it may if necessary afford just satisfaction to the injured party. (art. 50) In a number of cases, monetary compensation has been awarded as "just satisfaction" covering costs, expenses and other loss.

The UK had a major role to play in drafting the Convention and was the first to ratify it in 1951 but ironically has been almost alone of the signatories in not incorporating the Convention into its domestic law. This should not lead one to take the view that the decisions of the European Court of Human Rights has had no effect on the English law. In fact on many occasions, either as a consequence or in anticipation of these findings, the English law has been changed in a number of significant respects. The change in the law relating to contempt of court made as a result of the finding of the European Court in the Sunday Times case in 1979 may be cited as an example.

In this context the two recent decisions of similar nature as referred to at the beginning of this article may be briefly discussed. Both the cases concerned the compliance with article 6.1 of the ECHR which reads: "In the determination of....any criminal charge against him, everyone is entitled to fair and public hearing.... by an independent and impartial tribunal..."

In the Findlay v UK case, Mr Findlay, who had joined the British Army in 1980 had suffered physical injuries during the Falklands campaign in 1982 and psychiatric problems thereafter which were only diagnosed in 1990. In July, 1990, he became involved in an incident in which he held members of his unit at gunpoint and threatened to kill himself and some of them. He surrendered afterwards and was arrested. Psychiatric reports indicated that the incident had resulted from post traumatic stress disorder. The convening officer, a major general, took the decision to charge Mr Findlay with six civilian and two military offences and was also responsible for appointing and prosecuting officers and members of the court martial. At the time of Mr Findlay's trial the court martial procedure, especially the role of the convening officer was governed by the Army Act 1955. Accordingly all the prosecuting members and officers were army officers of ranks subordinate to that of the convening officer and serving in units commanded by him. A judge advocate, a barrister, whose role was to provide legal advice was appointed by the Judge Advocate General's Office. After having appeared before the court martial and having pleaded guilty, Mr Findlay was sentenced to two years of imprisonment, demoted to the rank of guardsmen and dismissed from the army. No reasons were provided for that decision. His petitions to the confirming officer, who was the same person as the convening officer, and to the first and second reviewing authorities for a reduction in sentence were rejected. The reviewing authorities were both non-legally qualified army officers advised by the Judge Advocate General's Office. Mr Findlay's application to the High Court Division for leave to challenge by judicial review was refused. It is to be noted that the law in the UK in this regard has since been changed and is now governed by the Armed Forces Act 1996 which came into force on April 1, 1997 which abolished the role of the convening officer. Mr Findlay's application to the European Commission of Human Rights was declared admissible and having attempted unsuccessfully to secure a friendly settlement the Com-

stages of the proceedings. This gave rise to the question as to whether the members of the court martial were sufficiently independent of him (i.e. the convening officer) and whether the organisation of trial offered adequate guarantees of impartiality. The Court answered in the negative. The Court noted that all the members of the court martial were military personnel subordinate in rank to the convening officer and furthermore he also acted as confirming officer. Thus, the decision of the court martial was not effective until ratified by him and he had the power to vary the sentence it had imposed. This was contrary to the well established principle that a tribunal should have the power to make a binding decision, which could not be altered by a non-judicial authority. The court in those circumstances held that Mr Findlay's doubts about the tribunal's independence and impartiality were objectively justified and that there had been a violation of article 6.1. It may, however, be noted that Mr Findlay's claims for lost wages and pension and for compensation failed as the court could not speculate as to what the outcome of the court martial might have been had the violation of the Convention not occurred. Further, it had no jurisdiction to quash convictions pronounced by the national courts. In any case, Mr Findlay was awarded full legal costs as claimed. The latter decision of Coyne v UK is analogous to the Findlay case but here the applicant Mr Coyne was serving at the Royal Air Force and was tried before a court martial pursuant to the procedure laid down by the Air Force Act 1955 for various offences of forgery and deception. The procedure followed is similar to that in the Army Act 1955 and subsequently in this respect the law was also changed and is now governed by the Armed Forces Act 1996. For the same reasons as pronounced in the Findlay case, the Court held that article 6.1 had been violated also in this case.

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These decisions recognise the importance given to the right of a fair trial in both civil and criminal cases and it does not matter that the applicant is a member of the armed forces. The protection of human rights, therefore, should be afforded to everyone, irrespective of their background. Not infrequently, our courts have also been invited in the past to intervene in the decisions taken in the court martial proceedings and given the fact that our Constitution

guarantees fundamental rights the scope for rethinking into the matter in the light of the decisions of the European Courts and other Courts dealing with similar issues is getting pro-

gressively wider. UK's forthcoming accession to the ECHR, the proposals were welcomed by the civil liberties groups which have long campaigned for the Convention to be incorporated into the British law. Ben Emmerson, the Editor of the European Human Rights Law Review comments thus, "For the first time, individuals will have a code of rights that is legally enforceable against the State, covering issues from illtreatment in custody to privacy and freedom of expression." Accordingly, this is for the first time that the British Government is introducing a measure where the civil and political rights of the British citizens are going to be guaranteed by the law. This bill would enable Britons to seek redress under

the Convention in the courts of the UK and thereby obviating the need to go to Strasbourg (this is where the European Court of Human Rights is situated). When it becomes part of the English law the bill will Going back to the issue of the make it unlawful for any public authority to act in a manner inconsistent with Convention rights and will take precedence over existing rules of common law and equity and over delegated legislation. Ministers will be required to show that all new legislation complies with the Convention but in the case of existing laws, the courts will be empowered only to drawing the attention of the Parliament to any incompatibility with the Convention. The Government would then move to change the law. This now already happens once it loses a case at Strasbourg. It is interesting to note that the bill provides a fast track route for amending legislation once the higher courts declare a certain statutory pro-

vision to be incompatible with

the Convention. Under a 90minute order procedure, the minister will be able to rectify the offending provision by statutory instrument, subject to the approval of both Houses of Parliament.

The above procedure imposing restrictions on the courts to strike down an Act of Parliament was necessary to preserve the Parliament's legislative supremacy in Britain. This would also go a long way to allay the fear of those opposing the Bill who argued that the incorporation could erode divisions established for centuries between the Parliament's 'legislative supremacy and the strictly interpretive function of the judiciary. Thus the courts will not be empowered to disapply or strike down primary legislation, i.e. an Act of Parliament. If a violation of the Convention is established, courts and tribunals will be able to grant any remedy within their normal powers. This may mean the overturning of a crim-

inal conviction, the quashing of an executive or administrative decision, the setting aside of delegated legislation, or the award of compensation. There will be a strong interpretive clause under which all courts will be required to construe legislation consistently with the convention, unless the working of an Act makes this impossi-

UK's accession to the European Convention on Human Rights certainly deserves a warm welcome. This will go a long way to warrant that everyone gets the protection that the state should provide. For us, we need to be watchful on the way the new law develops in the UK so that in future our legal system may derive strength to cope with the commonly occurring gross violation of human rights in our country with more determination.

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Charter of Demands for the Proposed Human Rights Commission of Rangladoch nigilia cullilliasiuli ul paligiauesii

ROTECTION and promotion of human rights is one of the main functions of the state. Human rights violation, being a great concern of the international community, effective mechanism for remedying such violations has become a constant search for the modern state. Due to the realisation that only traditional Court system is not enough to cope with the human rights violations, a different approach is needed to protect and promote human rights. Against this backdrop, the establishment of a national institution for the promotion and protection of human rights is seen as a reflection of an increasing demand of such mechanism all over the world. Over the years many states have established national human rights commissions in pursuant to international declarations and constitutional mandates on human rights. Moreover, international community demonstrated their willingness to set out clear norms which should regulate the operation of such national institutions. The Paris Principle of 1991 on national human rights commission is a concrete manifestation of such willingness. In our country, a consensus have developed to establish such national human rights commission. To establish a credible and people-oriented institution, it should conform with the norms and principles set out by the United Nations and well established state practices in this regard. In the light of the above facts, we are presenting the following guidelines as a Charter of Demands which should be taken into consideration in establishing a National Human Rights Commission for Bangladesh:

General principles

1. The Human Rights Commission shall be independent of government control: 2. The Commission shall be established by an Act of the

Parliament: 3. The Commission shall be in a position to assist all persons in safeguarding and enforcing their human rights and up-

holding human dignity: 4. The jurisdiction and function of the Commission shall be defined as broadly as possible and should reflect the concerns and needs of the community in terms of fundamental human

5. Steps shall be taken to enhance public awareness of, and support for, the work of the Human Rights Commission;

Composition

6. Government shall act in aid of the Commission.

7. The composition of the Commission shall ensure the pluralist representation of all social forces involved in the promotion and protection of human rights: 8. The Commission shall be composed of not less than 3 members

Appointment, tenure, terms and conditions and

removal 9. The procedure for appointment of the members of the Commission, their tenure of office, their terms and conditions

of service and other relevant procedures shall be laid down by the proposed Human Rights Commission Bill.

Qualifications 10. The qualifications for appointment of the members of the Commission shall be determined by the proposed Human Rights Commission Bill.

Functions

11. The Commission shall:

a. investigate and inquire into all violations of human b. facilitate judicial proceedings involving violation of hu-

man rights:

c. consult and work with non-governmental organisations; d. publish annual reports;

e. promote human rights, human rights education and cul-

12. The Commission shall a. assist the Government to formulate legislation for the promotion and protection of human rights.

b. recommend to the Government to accede to, or ratify international instruments on human rights. c. recommend to the Government regarding measures to ensure that national laws and administrative practices are in accordance with international human rights norms and stan-

d. shall take up promotional functions through research. human rights campaign, training and seminars and other awareness programmes;

13. The Commission, where appropriate, shall resolve disputes relating to violation of human rights through Conciliation and Mediation.

Powers

14. The Commission shall be vested with necessary powers for performing functions under the law. 15. The Commission shall have the power to accept com-

plaints from any individual, group of individuals, associations,

16. The Commission shall be authorised to undertake investigations on their own initiative; 17. The Commission shall have all powers of initiating in-

vestigations of human rights violations and for that purpose shall exercise the powers of a Civil Court in certain matters. 18. After investigation, the Commission shall have power to recommend necessary steps the appropriate authority to remedy or rectify violations of human right or desist from actions

or measures which violate human rights; 19. The Commission shall be given the rule-making power to regulate its own affairs.

Finance

20. The Commission shall be provided with adequate resources and an independent budget.

Staff

21. Adequate number of qualified and trained staff shall be

22. The appointment of the staffs should be the responsibil ity of the Commission.

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A Tribute to Dr Mohiuddin Farooque (1954-1997)

The Greenery Lost its Soul

T last he lost the battle. And this time the battle was not against any big multinational company or real estate farm or influential and affluent quarter or any statutory body or governmental authority/department for simply showing enmity or harmful disregard to the most precious precondition of life - the Environment of Bangladesh. Dr Mohiuddin Farooque, the lone green lawyer of this country and the pioneer in Public Interest Litigation (PIL) in Bangladesh lost the battle against fungal infection of lungs at 3.51pm on 20 November '97 at the National University Hospital of Singapore. Bangladesh lost its one of the most outstanding green-activists who dedicated his life for the cause of environment

and fought for establishing the

right of the downtrodden people

through the judiciary. A bright, ever-smiling Advocate of the Supreme Court Dr Mohiuddin Farooque's most valued contribution to this country is no doubt, the establishment of BELA. BELA stands for Bangladesh Environmental Lawyers' Association. It is an organisation of lawyers devoted to ensure sound environmental and ecological order in Bangladesh applying legal mechanism as a tool. Through its wide range of activities in promoting the regulatory regime on environment since 1991, BELA has earned the admiration as one of the pioneering public interest environmental advocacy group in the country. It has really developed a track record of proven dedication and success in waging legal battles against creators or contributors of environmental degradation by undertaking research, litigation, awareness creation, legal assistance, advocacy etc. Most importantly under the dynamic leadership of Dr Farooque BELA attained a remarkable success in evolving an environmental jurispru-

dence which was before his ac-

tivism, a barren field of knowl-

edge. The following resume of

by A H Monjurul Kabir

judicial activism initiated by Dr Farooque testifies the above

contention:

1. Dr Mohiuddin Farooque vs Bangladesh & others, CA No. 24 of 1995, judgment on 25 July. 1996: In this case, the petitioner as Secretary General of BELA, filed the petition. The Appellate Division of the Supreme Court, by a consensus judgement (one main judgment and three additional judgments in agreement), resolved the question of locus standi in PIL or PIEL in the affirmative. The court in length discussed the issue and the constitutional phrase within the entire scheme of the Constitution and analysed various issues, notions and principles from many countries. Finally, the scope of "any person aggrieved" has been expanded to. inter alia, having "sufficient interest" with a caution to bar busy bodies, interlopers and those having oblique motives. The judgement also recognised the right to a healthy environment within the existing environmental guarantees.

2. Dr Mohiuddin Farooque us Election Commission & others, WP No. 186 of 1994: This case related to public nuisance. encroachment of public properties, destruction of private properties and noise pollution in the name of election campaign. This case was the first judgment in which the desire of the court to mitigate the environmental pollution was written down in a reported judgment (46 DLR)

3. Dr Mohiuddin Farooque us Bangladesh & others, WP No 92 of 1996 (48 DLR): In this case "right to life" has been expanded by the High Court Division to include everything supportive to an expected normal longevity include right to clean air and water. The petitioner was a potential consumer and attempted to prevent the importation of highly radiated skimmed milk

powder 4. Dr Mohiuddin Farooque us Bangladesh & others, WP No.

1783 of 1994: In this, perhaps for the first time, a wild cat strike by government doctors was asked to be called off

> by the High Court Division. The injunction was complied with and the matter is now pending.

within 24 hours and restore the

public health service facilities

mission drew up a Report and

took the view that there had

been a violation of article 6.1 of

the Convention. In its judgment

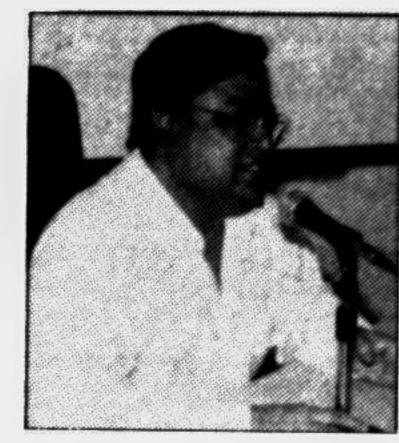
the European Court of Human

Rights observed that the con-

vening officer played a central

role in Mr Findlay's prosecu-

5. Master Issa N Farooque & others vs. Bangladesh & other. WP No 278 of 1996: The petitioners are all minors and have filed the petition to prevent trafficking of children from Bangladesh to UAE for their use



as camel jockeys and to bring those who are there back. The High Court division directed for a report from the Home Ministry. After consideration of the report, the court issued rule nist on five ministries asking them why they should not be directed to do as per allegation and prayer of the petition. The matter is pending for final hearing.

6. Dr Mohiuddin Farooque us Bangladesh & others. WP No 891 of 1994: In this actions against 903 industries have been sought upon direction of relevant statutory authorities. The matter is pending for hearing in the High Court Divi-Dr Mohiuddin Farooque

us Bangladesh & others. WP No

300 of 1995: In this case resort

to High Court Division has been

made to prevent the vehicular

pollution of Dhaka city. Show cause has been issued and the matter is pending for hearing. In addition to those mentioned above, there are many other cases which are pending for final disposal or are under consideration for legal action

The Supreme Court of

Bangladesh also deserves espe-

cial appreciation for its posi-

tive response shown so far by various benches towards the activism of BELA and Dr Mohiuddin Farooque. Dr Farooque was a regular contributor to the 'Law and Our Rights' page of The Daily Star. His contribution came in the form of articles. news items, pictures, suggestions and so on. Often he sent letters of appreciation to the Incharge of this page to encourage the maiden venture of The Daily Star to publish a weekly page on legal and human rights issues. On several occasion he offered unconditional help to cover various technical and intricate issues of law. Infact he became an active insider of Law and Our Rights page. This page did as much as it was possible for a weekly page to support him in his noble struggle directed towards the establishment of a balanced and equitable environmental order where access to justice to be ensured for all deprived or endangered be that human being or not. The death of Dr Farooque at the age of only 43 caused an immeasurable loss to Bangladesh as well as to The Daily Star. We are greatly indebted to him for his inspiration and pragmatic contribution for last two years. We pay our deepest regard to this gal-

We sincerely pray and expect that BELA would survive against all odds with previous missionary zeal despite facing the most acute crisis since its inception. Is there any alternative way to show true regard to this ever green bright young ac-

lant freedom fighter who con-

sumes his every moment to save

the environment from degrada-

Remembering A Valiant Fighter HILE the nation pays homage to the martyred V sons of the soil, I join into pay a special tribute to one

introduction.

of our motherland's illustrious sons who not only fought at the tender age of sixteen for freedom in 1971 but also continued the battle for establishing a healthy and prosperous nation till his untimely and premature departure from this mortal world. Dr Mohiuddin Farooque left us for the eternal world last Tuesday on the 2nd of December, 1997 after a painful battle with a fungal infection in his lungs (Innalillahi... rajeun). To the regular readers of this page and proponents of human rights activism. Dr. Farooque needs no

What was Dr. Farooque's mission? In one of his writings. he himself invented a very interesting simile. He wrote, "the law and the people of Bangladesh have many similarities: they exist in abundance without achieving the purposes for which they are born or made; they are neglected by the creators or procreators for obvious incapability to nourish or cherish ... both are blamed for social misfortunes without being ensured or provided with the opportunities to develop and hence, both are victims of manipulation and denials." It was this manipulation and denial against which Dr. Farooque had vehemently

and constantly fought. His tool was his own profession, his allies the compassionate compatriots and colleagues. Yet, in many of his battles he was completely alone. Many had ridiculed him, humiliated him for his obsession and was jealous of his achievements. Yet he had smilingly continued, often sharing generously the fruits of his toils with his ene-

My association with Dr. Farooque started before the inception of BELA in 1991. The time has flown incredibly fast, from BELA'S first briefcase office (which he liked to display at the present BELA office) to the

by Naeela K Sattar

guest-room turned meeting room in Dr. Farooque's residence "Digonto" to the beautiful lake-side office at Rd # 5 in Dhanmondi where BELA received its shape and soul and to its present position of highest credibility. Dr. Farooque was its carpenter, artist and the driving force. In his able hands and with his mature vision grew and developed a committed, dedicated and able multidisciplinary team ready to translate all signals from him into immediate and effective action. Looking back, it is amazing to recollect the days when we were all inexperienced, and suddenly with Dr. Farooque at the helm we were winning case after case, laurels after laurels, being followed as a model - all within five magi-

Even Dr. Farooque himself had not contemplated such immediate, visible or tangible results for BELA. Writing about civil societies and organisations like BELA, he had warned, "it should be borne in mind that the groups which are not service delivery type but are working to change the infrastructure of democracy and good governance, the return or impact would be felt after a reasonable period of gestation is over like any other investment in the so cial sector."

But many of the positive results were already felt. One may look at the first case handled by the BELA team: BELA v Election Commission and others (Writ Petition No. 86/94) which had complained of violations of law by election candidates in the name of election campaigning. As the result of the petition, all the contesting parties had to come to Court and satisfy that they would abide by the existing laws for protection of public property and maintaining public tranquillity. This was BE-LA's first attempt to remind the authorities of their statutory duties and to warn contestants that what has been accepted as

"election culture" in the past is not legitimate and need not be tolerated by the people. The consequences of the case was really note-worthy. Subsequent elections such as the June 1996 elections saw authorities being strict about enforcement of election are laws, active and conscious propaganda through the mass media undertaken nationally to introduce new election culture and the enforce-



ment powers of the Election Commission itself has ever

strengthened The first breakthrough for Dr. Farooque, however, came very suddenly in Dr. Mohiuddin Farooque v Bangladesh (Writ Petition No. 1783/94). A prolonged strike of the BCS service cadre doctors had left the health service sector paralysed and resulted in immense suffering of the people. Following the petition, the High Court Division directed the doctors to restore public medical services and care by calling off their strike within 24 hours. The petition drew attention to the "striking laws" pointing out more legitimate ways of resolving issues such as the Court. From then on, Dr. Farooque

are very few areas where Dr. Farooque with his able team had not intervened whenever it was question of manipulation or denial - be it Dhanmondi, Uttara or Gulshan lake, the brick field, vehicular pollution, banning import of radiated milk, fighting for compensation for affected people from government development projects, illegal cutting of hills, filling of Sal forest, illegal constructions, faulty box culverts, statutory warnings, trafficking of children as camel jockeys, tannery wastage, burning gas wells, delinquent industries, deer hunting in the Sundarbans, poisoning animals in the zoos, adulteration in soft drinks, noise pollution or any such issue. Farooque Bhai has left us,

has never looked back. There

but like the true freedom fighter, he has conquered new territories, opened up new frontiers, trained and led a strong army and left behind a rich legacy for his beloved BELA and his two lovely children Isa and Hema to nurture, sustain and to carry on the fight for a beautiful Bangladesh. I, along with the millions of people, helped by his mission and those personally helped by him in so many ways pray to Allah for the salvation of his soul and to give his family the strength to bear this great loss.

Dr. Farooque was only fortythree when he died. The news of his death did not make it the ten o'clock national news on BTV. What makes this country so jealous of her talented sons and so miserly in expressing appreciation for those who serve without greed? What Dr. Farooque has achieved in his all too short life should be accredited by the State and all support should be provided to his family and organisation to carry on with dignity and courage what he had begun with so much love and patriotism.

The writer, is an executive member of Bangladesh Environmental Lawyers' Association (BELA).