

The Yep Forum Public Dialogue on Public Interest and the Judiciary

Organized by the young Entrepreneurs and Professionals Forum in collaboration with The Daily Star and the British Council.

Mahfuz Anam : We, from The Daily Star, are glad to be attached with the Young Entrepreneurs and Professional Forum (YEP). We believe that we cannot reach the desired goal of brightening the future of Bangladesh if we cannot involve the young entrepreneurs and professionals goal.

Today's topic "Public interest and the Judiciary", we think is a very timely discussion we have come here to discuss and we have invited honourable discussants who include respected citizens, lawyers and judges of the country. Along with them we have brought the youths who are the main participants of this programme. We have brought them close and we would like that you put forward your questions, your emotions, your ambitions and anything you have within your heart as to why we are not being able to take forward our country to the desired goal.

Another important reason for today's discussion is that we are really worried. Due to the economic situation and politics that we are seeing in this country, we want justice from the judiciary. We are not getting the leadership role we need from the judiciary for proper law and order situation. You can say that there is a widespread impression that judiciary is no longer as it used to be and the trust towards law and judiciary is diminishing day by day and this is not at all desirable.

In fact, it is one of the most disappointing aspects of our society today that where is the judiciary going? And there the image of the judiciary, public expectation of the judiciary, in fact public demand of the judiciary is far higher than what we are getting today. And due to that concern we have gathered here today. We will hope that through this discussion we will be able to find out a constructive way in front of us.

We have heard that the judiciary in the past had played the role necessary for a democratic and independent country and in many cases we have also seen it but that is slowly decreasing.

And how to restore the image of the judiciary, how to bring judiciary back into the moral centre issue life of a society. That is the real challenge.

Professor Sirajul Islam Chowdhury : Today discussant and participants, Thank you. It is already been said that in what capacity I am standing here. Tree felling is going on in Usmani Uddayan and incidentally I have got involved with the movement to resist it, not as a professional but as a common citizen. And my presence here is as a citizen. As because "aspiration of the people" is the topic of discussion therefore my presence here is as a common man.

What are we seeing and what are our aspirations? Through the movement against the cutting of trees we faced several things which you are aware of. It is not only to preserve the trees, it is to preserve the park, the open space.

Let us think about this Dhaka city. We live in this city and are looking towards the environment and expansion of this city, and the problem which are coming up. If you think of the open space, it is a very important matter for this city that once was a city of 52 bazaars and 53 lanes. And it was called so, the city of 52 bazaars and 53 lanes. But at that time there was many open space, many fields and you know there was the Buriganga river. On the bank of Buriganga there was Coronation Park, Bahadur Shah Park is there. Dhopkipata field has vanished. You will not find the Dhopkipata Park, you will feel like crying seeing the Sirajudin Park. Lalbag is a memory now. There are only tanneries at Hazaribag which will make it impossible for you to go there. Shahbag is not there. These are all named after gardens. You will not find Kalabagan, you will not find Segun Bagicha, you will not find any garden here.

The intervention in the Usmani Uddayan is spoiling it. This is a big thing and a big demand for the citizens. The river is going away, the jheels, beels and canals here are being filled up.

Now if we look at the rights of the citizens, then as a common citizen I feel a number of things. As citizens, we have some basic rights which are recognised everywhere in the world food, clothing, shelter, health, education.

We feel that the effect on health due to the cutting of the trees and destroying the park will be a very big blow. Our city is one of the most polluted city in the world now. There is arsenic under its ground and lead above. If the trees are cut off and the open space destroyed then this will increase the pollution. The traffic jam created in the Usmani Uddayan area will be severe.

Two questions come along with this the interference on our basic rights and the rights of movement as ensured in article 36 of the constitution will be hampered due to the traffic jam. The people will not have the right to go to the park. We will lose the right to move around in this park. And this is said in article 38 of the constitution that the state will ensure equal rights for all citizens. We are not going to big things. We are not going to the social, economic and class difference. We only take that the right which people had to enter this park will not be there anymore. This will be an illegal thing which the state will be depriving the people of. Another thing is that we have heard that this area has been designated as a green area in the city's masterplan.

We as citizens know that you cannot go for any construction without the permission from RAJUK. Then has the government taken the permission for the place. Our question will remain as to when did the government take the RAJUK's permission.

When the government itself violates the law, when the government itself creates instances of breaking the law then what can we expect from the citizens.

Another thing is about what is the responsibility of the citizens as stated in article 20? The responsibility of the citizens is to abide by the constitution and the law and safeguard national property. Safeguarding the national property has now become a very big responsibility because we are seeing that state property, national assets are now turning into personal property. It is happening all over the country and in Dhaka it has taken a serious turn.

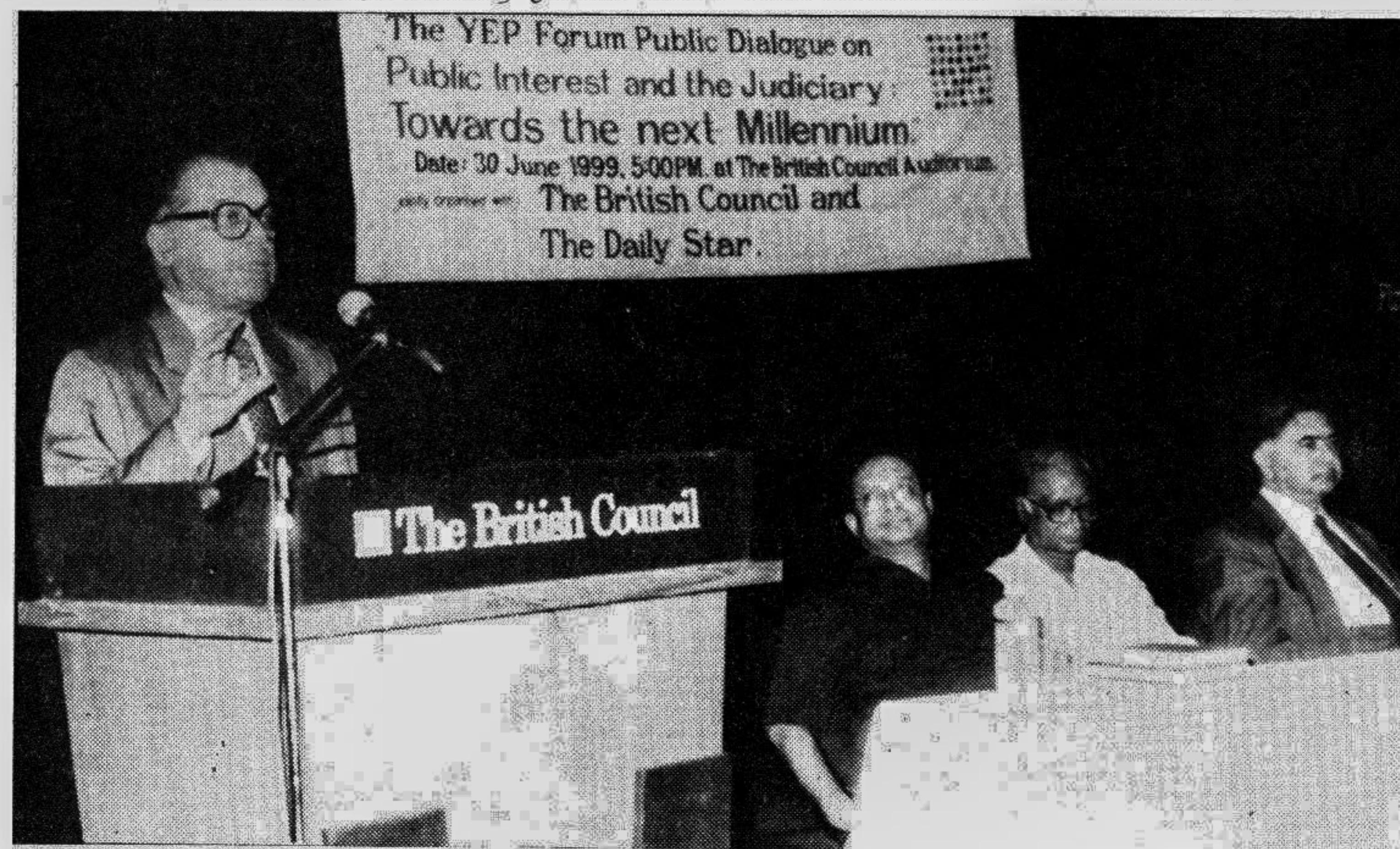
The Prime Minister herself said that the government is constructing an international conference centre in this park because it is getting out of hand. This public property will go into somebody else's hand. Then what is the responsibility of the citizens? It is the responsibility and duty of the citizens to safeguard state property. Then how do we do it?

We are seeing that we in the process of safeguarding are creating awareness. We cannot go for an agitation or create violence. We cannot stage a gherao (siege) and that is why we are increasing awareness and I think building up this awareness is our job as citizens. State properties are going out of hand. River, canals are being encroached, forests are being plundered, state's properties all over the country are turning into private properties. The Dhaka's Buriganga river is turning into a drain and the canals are being filled up to construct different types of houses and structures. Markets are being set up on the sides of the old railway lines. The 52 bazaar and 53 lanes are being set up in Dhaka but the state property cannot be safeguarded.

So the question arises what can be done now? What can be get from the judiciary in this regard? The Bengalis are fond of fighting cases. William Hunter had jokingly said that a Californian will search for a knife to do a crime, an Englishman will search for a whip but the Bengali will go to the court for it. But the court is never giving the Bengalis a fair trial. There is no access to the court, the trust on the court is not there.

Then the question remains what can we do? The government is not responding to the public opinion that has been created. What can judiciary do here? The lawyers present here should see how they can put up this thing and how much confident they are that the matter can be settled in the court. Will we expect to get decision from the court or remain frustrated? Our opinion is building up. The government is not going to respond to the public opinion. We will try to intensify the public opinion and take up more programmes, but the question remains as to how the law can help us, how the court can help us? I am raising this point as a common citizen. This is only an example. Our success or failure will have its influence all over the country. It will influence our future. We will hope that we succeed. Our failure will result into bigger failures and all the state properties will turn into private properties. Pollution will increase and then traffic jam will increase. We will lose the right to move around. We will lose our right and our health will further deteriorate. Therefore I raise the question as to what we can hope to get from the court and what assistance can the lawyers provide. Thank you.

M. Ahsanul Habib : I want to start from what Sirajul Islam Chowdhury sir just said about the condition of the government property, state property and public property. If we look at the constitution, we will find that the state creates some agencies to look after and manage the public properties on behalf of the public. But what is the practical situation? In practice all the public property have become government property and various government organisations think that these are their properties and they manage them accordingly. There is a history behind all these government properties. Once there was Zamindari system here. One zamindar used to take care of the forest, another the rivers and so on. In 1950 when the Zamindari system was abolished the responsibility of collecting taxes came upon the state and the state became a rent receiving body. But the process somewhat continued because the maintenance of the forest went to the forest department and they believe that it is their property and manage it in their way. And in the management process they do not or cannot follow the law. The law is violated and work is done



Among those who participated
Dr. Sirajul Islam Chowdhury, Convenor, The Committee for the Protection of the Trees of the Osmany Udyan-
Mr. Ehsanul Habib, Senior Staff Lawyer, Bangladesh Environmental Lawyers Association (BELA)
Mr. Adilur Rahman Khan, Advocate, Bangladesh Supreme Court
Ms. Tania Amir, Advocate, Bangladesh Supreme Court
Dr. M. Ershadul Bari, Professor and Dean, Faculty of Law, University of Dhaka.
Justice Naimuddin Ahmed, Member, Law Commission.
Mr. Mahfuz Anam, Editor, The Daily Star

against the interest of the people. And in the little time we had been working in the cases from the Bangladesh Environmental Lawyers Association we have realised that this ownership pattern is totally different. It is found that instead of the state, the government is owning the properties and the government agencies are using them violating the law. In these public interest litigations we have tried to bring them back to the legal procedures and make their activities legal.

Another thing we have seen that the environmental resources are being held by multi-sectoral agencies. If we take for instance a river, we will see that the land of the river is owned by the Land Ministry. In the port areas it is the Water Transport Authority. And again those who control the floods, the Water Development Board or the Water Resource Ministry possess the flow of the water. These multisectoral agencies run according to their respective wishes. When an embankment is needed, it is constructed and they don't think of what will happen to the fishes. They also do not think of other things like the people living beside it, whether they will drown or not, they don't bother. In the public interest litigation matters we see that a coordinated working factor is there. When we frame the cases we say that every ministry had their respective responsibilities and you have failed to do so. And all of them are brought in one platform through these cases. Most of the public interest litigation cases we have done so far have been through the High Court's Special Original Jurisdictions which we call Writ Jurisdictions. And we do the cases mostly in the writ of mandamus nature. For doing this writ a particular condition is necessary and that it has to be shown that there has been violation of fundamental right. There are basic rights which are ensured by the constitution which the people will enjoy. If these rights are ever obstructed then one can go for this writ. We do the cases according to the law of Right to life as ensured in article 31 and 32.

In 1996 it was established through a case that 'Right to healthy environment' is a basic human right. It was established through judicial interpretation under which cases of public interest and litigation are done.

In some cases the laws by which government departments and the ministries are run have the provision of indemnity clause. This clause says that no legal proceedings can be drawn against a government employee. But we avoid this with the help of writs and so far we have filed about 18 cases. Some of these cases have ended and some are pending trial.

I want to mention here that the press plays a very big role in public interest litigations. The press is the main source of highlighting the issues. We first know about a issue from the press and then find out other necessary information and then file the case. Then again it is the responsibility of the press to give publicity on the matter which they do which accelerates the implementation process. An example in this regard is the strike by the BMA, an association of doctors, who went on an indefinite strike in 1994. We filed case against this strike and an intense awareness was buildup through the press. The case was filed just when the people were annoyed of how long this strike would continue. An order was soon passed that the doctors should join their duties immediately. They were asked to resume their duties and they did that immediately. Here we see that the press played a big role on this issue. They kept the people aware. Many things could have happened if the doctors refused to obey the order of the court but as the press had kept the people informed we got a good result at that time.

Although we are not able to see immediate results of public interest litigations but these are in a process and an empowerment of the people is slowly building up. The example of Feni can be cited where poor people were provided khas land to settle down but after a few days the DC though knew these poor cannot be given this land and leased it out for shrimp cultivation. These poor people with our help filed a case against what they thought this to be a wrong. A injunction was obtained and the poor people are still in their place. Although such instances are not seen everywhere in the country and all people are not coming forward but the process has started which will strengthen the hands of the people to come to the court.

Adilur Rahman Khan : Bangladesh has got its independence 27 years ago but the judiciary is yet to be independent. One party rule through the fourth amendment of the constitution in 1975 and all the subsequent martial laws have been blows on the judiciary. The 1972 constitution ensured the independence of the judiciary but the 1972 Constitution did not run for long or was not allowed to. The one-party rule had politically obstructed and later on the martial law regimes. Expecting justice from the judiciary in many cases had been difficult and in some cases a matter of laughter. For example a chief justice, may be for the first time in the world, had become the chief martial law administrator. Another chief justice had said that the judiciary should not conflict with martial law. He had said that martial law is the super law.

Many politicians in power question why the judges grant so many bail. The bail are given because nearly 50,000 people have been imprisoned in the name of combating operation. Are all these 50,000 criminals? If 50,000 people are imprisoned to catch a few hundred terrorists, as it has been reported in the press, then what other way is there other than granting bail? Doesn't this also need to be seen politically? What does the police in our country do? After catching somebody for a serious offence they take service charge, or whatever you can say, in different way and put a minor offence against him so that he can easily get bail from the court? The cases do not end properly. Those who are responsible to process the cases are appointed politically and not according to merit. As a result processing of the cases become diffi-

cult. The follow-up of the cases are printed on the back pages of a few newspapers. It is seen that those responsible are not following up the cases properly. Police is filing the final report or delaying in submitting the chargesheet. If it takes years to submit the chargesheet then what remains of the case?

Another thing we see is that leaders of the top class of our society are corrupted. Our seniors here have said that bank defaulters or those who have looted the money of the people obtain bail from the court but what do we see in cases of certificate cases? There are thousands of certificate cases against the peasants. How many get bail? This is the condition of the judiciary in our country.

Justice Krishnahan in this regard has said that judicial activation is necessary. If we cannot use judicial activation for the people of the country, if we cannot use the judiciary to establish the rule of law, justice and social justice then for whom is that judiciary?

It is written in the 1972 constitution of Bangladesh that the people are the founder fathers of the country. If we cannot use the judiciary for the people then should we not go to Justice Krishnahan's statement that 'define (defend) law to defend justice'. Thank you.

Barrister Tania Amir

I would like to share some information with you all. It is for you to judge just how far the judiciary can ensure the relationship between the common man and the judiciary.

Public interest litigation is now recognised in Bangladesh. Officially it is recognised, but how far is this recognised in terms of practical experience? The door may have opened, but they have opened a crack. If we file ten public interest litigations, maybe one will be allowed. This is reality. So while officially public interest litigation is recognised, I will give you an example or two of just how far the people are actually benefiting from this in Bangladesh.

Recently there was a safe custody case. You all will know that there is no safe custody law in Bangladesh where the court can forcefully send a person to jail or keep a person in detention against his or her will.

In such a case we submitted an application for habeas corpus. The girl was in jail regarding a Hindu/Muslim marriage. The boy and girl had got married on their own accord. The parents did not accept this Romeo-Juliet situation. The father filed a kidnapping and rape case against the boy. In many cases the boy shows him kabin or marriage certificate and is granted bail. In this case, however, the boy was absconding. When the girl went to court, her father-in-law and her sister-in-law accompanied her. They were taken to jail too. Her father-in-law was 70 years old. The police had been pressuring the girl. They had been telling her if she came and issued a statement, they wouldn't bring a chargesheet against her. She wanted to issue a statement to free her father-in-law from jail. The police did not accept the statement. On the contrary, they detained her for 26 hours. They began to pressure her to issue a false statement. Her father was even brought in. But the girl refused to give any false statement against her husband or father-in-law.

The next day she was taken before a magistrate. She openly stated that she had left her home on her own free will and had neither been kidnapped nor raped. This statement is on record. Then the state's special prosecutor said that she was not an adult and therefore should be sent to jail. When we came to know that she was in jail, we wanted official documents. The lawyers who went to collect the documents were told that no documents could be given. She was in safe custody and there were no provisions regarding safe custody. There are no regulations regarding safe custody, keeping someone against their will in jail.

We then submitted a habeas corpus application, asking for the girl to be released. Under Article 102 of the Constitution we asked for a declaration that there was no such law as 'safe custody' and that no girl could be kept in jail or anywhere else against her will. We got a very good rule. When we asked the girl to be produced in court, she came from the jail with chains around her ankles and waist. We said that it was impossible, that she would not stay in jail anymore. Our petitioners who said that they had their own organisation and they could take her there. We who were the lawyers said that it was not uncommon for the lawyers to take the person too. Even a judge can take the person into the custody of his own home. Why should she be taken to jail. If her welfare was a matter of concern, her rights could not be violated. The court then looked into whether there was any government institution for the purpose. We informed them of a shelter home in Mirpur and the court sent her there.

Our argument continued. The bench, for one reason or the other, was dissolved. It took another year for the bench to be reconstituted. The father came and said that daughter was not and adult and should be given back to him. Our argument was that this was not a matter of custody, it was an issue of liberty. She had rights. A person who had not broken any law, had no criminal charges, was an innocent person, whatever her age may be. Whether she was a minor or a major, how could she be deprived of her rights? Finally we got the judgement that the case was not maintainable. This is the first time in Bangladesh perhaps that in a habeas corpus case it was said that the case was not maintainable. It was said that when she had blood relations, how can anyone else be a habeas corpus petitioner. Perhaps this is the first time such a statement was uttered in this day and age of public interest litigation.

When the father's lawyer had been arguing court we had not apprehended that such a thing would take place. The girl had openly said in court in presence of the judge that she accepts the application made on her behalf. So we didn't think this could be an issue. But since the argument had arisen, I had executed a document in this regard and had it attested by the magistrate and the Mirpur Shelter Home. We had asked the court to file these, but the court did not give us the time. They just went ahead with the judgement, so we filed another habeas corpus for the girl. The court dismissed the application and did not issue a rule. We issued a third application to review what had been rejected. We said two things may have been possible. The court may have overlooked that fact that the girl had given power of attorney to the petitioner.

We went to our senior Dr. Kamal Hossain. He was very kind. He moved the application himself in court. The court rejected the review too. So where is the remedy? So we was not in jail, she was in the shelter home in Mirpur. But our argument was that even if she was in Sonargaon Hotel, it amounts to be an illegal detention venue. It could be anywhere and it still be illegal as there was no basis for safe custody.

I found a clause in Section 146 which says that if there is disputed property and it is non-perishable property and two parties are quarreling over it, then the court may give a neutral verdict. Now I don't know if there is any law in Bangladesh which has

produced women as being non-perishable property. This is the only clause I found which says that the court can take anything to neutral custody. Here it is like the father and the husband are fighting over ownership of the property and the court is saying that it will keep it. The significant matter is that the girl was released to go back to her father. She refused to go back and she was back to safe custody. So what is the difference between her and a political detainee?

As for the sentiment of her father, where will it end? In Pakistan we hear of a father killing his daughter if she leaves her minority community to convert and marry outside. It is a loss of face to them, a prestige issue. We don't have martial here and our judiciary is somewhat independent. So we can't say our judiciary doesn't have the power.

The judiciary could be somewhat pro-activist, pro-people, pro-rules of law. No one is completely neutral. So the judiciary should approach the right of the people. When one places one hand on the Constitution and takes an oath, where the rule of law is being violated, will I remain neutral? I ask you all. The question of remaining neutral does not arise.

I can give another example, some facts. It is for you to judge how much assurance the judiciary can give the people. This is the case we brought against RAJUK in the Gulshan area. The case was stayed. The one who had been allocated land came and said that stay order did not apply to him. The order was given by the court to RAJUK. So he began construction. The court did not stop him because he said that he was constructing at his own risk. The Prime Minister's Office even issued a letter saying that no construction could be done on the low land, but the man had already completed his construction. We approach the court in such cases for damages occurred, but perhaps it is not always possible to be compensated. It is as much as possible. Recently in habeas corpus the court granted damages.

Finally about the role of the media. The cases we have in court, where does contempt of court begin and where does it end and how much can we discuss, I am confused.

The Appeal Division gave a judgement in my case 4 or 5 years ago, saying that the government's move had been illegal and the land should be returned. We gave two applications and they asked for it. I still cannot implement the verdict of the highest court. But with freedom of press in mind, if I write about this or if the press writes about this, would this be contempt? And I think it is necessary for a couple of such contempt cases to be filed. These haven't been filed before. Criticism can certainly be made. I USA, how does the media deal with the court? It takes note of every full stop, comma and semi-colon.

The judiciary has no troops, no weapons, but it is a co-equal organ of the state. And its power comes from the people. There has to be justice. If people do not have faith in the judiciary, it cannot be effective.