Thoughts of International Women's Day 2001

Safe custody in Bangladesh: Law and practice

AFE Custody is a much talked-about issue and a widely practiced judicial phenomenon in Bangladesh. Surprisingly the concept, in the present form, was alien to the law of the land till the passage of the Prevention of the Suppression of the Women and Children Act 2000 (hereinafter referred to as the Act). It is the judges of the lower judiciary and the magistrates exercising judicial functions and not the lawmakers of the country who have given currency to the concept of "safe" or for that matter "judicial" custody. Over the past few years it has become a common practice in the lower courts to send the victim of offence to jail against their will in order to ensure their protection and safety (!). In most cases the victim of safe custody is a woman and usually of tender years and she is neither a convict nor an under trail accused. Thus in the name of safety and protection, the state and its institutions routinely victimize the victim of crimes by sending them to the safe custody against their will violating thereby the fundamental rights guaranteed by the constitu-

With the Act coming into force, the controversy centering safe custody has taken a new dimension. The moot question now is under what circumstances the new legislation authorises safe custody.

The concept of safe custody

The safe custody is a place where the women and children who fall victim to some crimes or have no place to go under some unavoidable circumstances are given temporary shelter and protection. They are invariably sent to jail in Bangladesh when produced before the court.

The victims of such crimes should be kept in custody of the court for a reasonable period of time in a neutral home or any other place with a view to ascertain what the free will of the person concerned is. Such course should be taken in order to enable such a person to be free from any coercion or influence that might have been exercised over her or him. It is thought that such person in such situation is not capable of exercising an independent mind unless kept for a reasonable

The victims of safe cus-

of women and children are sent to the safe custody in Bangladesh:

Young women who marry someone of other religion against the will of their parents. Victims of Rape

Female children and women rescued from brothel

Women ousted from the family after torture

Women rescued from the traf-

Children lost or lunatic children.

Law on safe custody

As has been mentioned earlier. before the passage of the Act sending an innocent person to the safe custody was absolutely illegal. There is no such provision of safe custody in the Code of Criminal Procedure (Cr. P.C.), Jail Code or in other relevant laws. The Cr. P.C., however, permitted safe custody for any accused or convict who are of unsound mind under certain circum-

Section 466 (1) of the Code reads as follows: Whenever an accused person is found to be of unsound mind and incapable of making his defence, the Magistrate or Court, as the case may be, whether the case is one in which bail may be taken or not, may release him on sufficient security being given that he shall be properly taken care of and shall be prevented from doing injury to himself or to any other person, and for his appearance when required before Magistrate or Court or such officer as the Magistrate or Court appoints in his behalf."

Section 466(2) of the Code says: "If the case is one in which, in the opinion of the Magistrate or Court, bail should not be taken, or if sufficient security is not given, the Magistrate or Court, as the case may be, shall order the accused to be detained in safe custody in such place and manner as he or it may think fit, and shall report the action taken to the Government."

From the above paragraphs of the Code it is clear that the provisions of this particular law are not applicable to persons bearing a sound mental health

Section 31 of the new Act pro-

of sound mind. The section reads thus: "During the trial of any offence under Act. if the Tribunal deems it fit Generally the following categories that a woman or child requires to be sent to safe custody, the Tribunal can order that woman or child to be sent to safe custody to be placed outside the iail, identified and run by

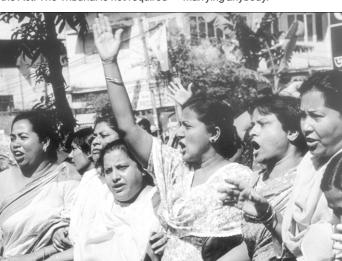
> if the Tribunal deems it fit." This is a big leap from the earlier position of the law regarding safe custody. The new law has made it crystal clear that the Tribunal has the power to send any woman or child to the safe custody if it thinks fit during the trial of any offence under the Act. The Tribunal is not required

the government authority or under

the care of any individual or agency

tion or kidnapping case against the boy. The law-enforcers arrest the couple and produce them before the court. The boy is sent to iail or enlarged on bail. But the wretched girl who is not a criminal and opts to live with her husband in her husband's residence is sent to the socalled safe custody.

For whose interest and safety the girl is sent to the custody is best known to the judges themselves. The girl is being deprived of her liberty and robbed of her fundamental right she is entitled to under the constitution just because she has chosen someone as her life partner. The law of the land does not preclude a citizen of the country from marrying anybody.



Women protesting custodial injustice

to take consent of the person for whose welfare the order is made

Though there was no provisions for safe custody in the law, in practice the judges and magistrates exercising judicial functions were and are used to send the victims of different crimes particularly women and children to safe custody for their protection and welfare without taking their consent.

In most cases of safe custody of young women, the particular case begins with a love story. The girl deserts her father's house with her love and subsequently marries him to form her own family. Conversion from one religion to another is also

The father then files an abduc-

A case study

Sudhir Chandra Chowdhury of Satbaria under Police Station Potiva complained to the SP, Chittagong that the accused Ahmed Kabir and four others had kidnapped his daughter from his lawful custody during his absence from home.

SP directed that a case under section 366 of PPC should be started. On the same day the accused persons were brought before Sub Divisional Magistrate under arrest. Bulbuli (the alleged abducted girl) also appeared before the court and made a statement on oath saying that she had left the paternal house of her own accord and embraced Islam and that she being adult was entitled to move freely. Thereafter the petitioner's

prayer that the girl should be sent the neutral home at Dhaka. The learned magistrate passed an order to the following effect: "Send this girl to the Neutral

Home and send previous information to the Relief Commissioner for accommodating her in the Neutral Home. Its 5:30 p.m. now and necessary arrangement for sending her to Dacca can not be made now. So she should be sent to the local jail for her interim custody till arrangement for sending her to Dacca can be made." (7 DLR)

Had the order been passed under section 466 and 471 of the Cr.P.C., the magistrate passing the order was required to assign reasons for his decision. But in the above case the magistrate did not bother to give any reason or did not pay heed to the appeal of the girl to free her and sent her to safe custody without assigning any reason what-

The basis of the new law relating to safe custody

The provision for safe custody in the new law violates fundamental rights quaranteed under the constitution and other international human rights documents.

First of all, the way the concept of safe custody has been incorporated in the Act violates a settled principle of natural justice. The principle of natural justice requires that nobody should be condemned unheard. It means that even if the concerned person is a criminal, s/he must be heard before s/he is punished. This is a right universally accepted by all civilized nations. The constitution of Bangladesh and the general penal laws of the country have also incorporated this principle of natural

But under the new legislation the tribunal has been empowered to send any child or woman to safe custody without giving the victim a chance to decide about his/her fate. This is absolutely against the principle of natural justice, inherent fundamental right of human persons and all norms of civilized society. Article 3 of the Universal Declaration of Human Rights ensures the right to liberty of every citizen of the globe.

The provision incorporated in section 31 of the Act is violative of

article 31, 32 and 36 of the Constitution of Bangladesh.

Views of the higher court

The highest court of the country, the decisions of which have binding force on the judges and magistrates exercising judicial functions in the lower courts, also does not support this arbitrary deprivation of human

In a case reported in the 7 DLR, the High Court Division of the Supreme Court held: "The petitioner being major her movement can't be restricted. The girl being major the magistrate is not competent to interfere with her personal liberty." There are a number of other instances of judicial pronouncements against the indiscriminate use of safe custody provision by lower courts.

In a most recent case, a rape victim dumb girl was released on June 25, 2000 by the order of a High Court Bench comprising Justice Golam Rabbani and Justice Nazmum Ara Sulatana after being confined in jail for two years in Chittagong jail. The girl was gangraped by his brother in law and his accomplices. She was branded as prostitute, arrested and sent to jail to stay there for two years. But the rapists were not even arrested. She was finally released following a writ petition jointly instituted by the Human Rights and Legal Aid Cell of Bangladesh Bar Council and Law and Society Trust. (The Daily Janakantha, 26 June, 2000)

Situations may occur under which a girl or a woman may voluntarily seek state protection. The underlying philosophy of that custody must be to rehabilitate or to allow her a stepping stone before she can reinstate herself or find a place in society for herself. But that place must be safe in the real sense of the term and the victims of such crime should be sent to safe custody with their free consent. The new law, however, provides that the safe custody must be a place outside the jail. The law came into force on 14 February, 2000. But still there is no such place outside the jail, which can be used for safe custody.

M. M. Aminul Islam is an Assistant Program Officer, Program for Research on Poverty Alleviation Grameen Trust

LAWSCAPE

Combating castism

ADILUR RAHMAN KHAN

Global Conference against Racism and Caste-based Discrimination, initiated by the groups campaigning for the Dalit Human Rights, was held in New Delhi on 1-4 March 2001. The conference brought about a renewed pledge and declaration to fight against all kinds of injustices perpetrated due to 'castism' and caste based discrimination in many parts of the world, particularly in South Asia.

The conference was organised in preparation for the UN World Conference Against Racism, Racial

Discrimination, Xenophobia and Related Intolerance, which is scheduled o be held in September 2001 in South Africa.

The participants of this Conference strongly condemned caste discrimination and the practice of 'untouchability', which is the source of immense human rights suffering and the cause of gross human rights violations and dehumanising and degrading treatment of at least 240 million people in South Asia and millions of others in East Asia and West Africa. They further asserted untouchability as a crime against humanity

Resource persons in the conference spoke about the historical perspective of castism and caste-based discrimination, which has a 3 thousandyear-old history based on discrimination and injustice. A few of them also recalled the genocide perpetrated against the Buddhists by the Brahmanical revivalists in the post Asoka period in this Sub-Continent and compared it with the recent rise of communalism by different fanatic and fascist groups who are perpetrating a similar kind of atrocity against the minorities and the Dalit people. The Dalit representatives also seriously condemned the fact that they were being labelled as 'Harijans' instead of 'Dalits'. Almost all the resource persons and particularly, the Indian delegates urged everyone to call them 'Dalits', which is a name for their political empowerment and which s, to many of them, synonymous to the 'Black Movement' in America.

Representatives from Nepal, Bangladesh, Pakistan, Sri Lanka, South Africa, Japan, The Netherlands, Denmark, Germany, Hong Kong, the United Kingdom and the United States were present, along with a huge contingent of Indian delegates and many of them took active part in the 4 day long conference. Several victims from India, Nepal, Sri Lanka and Bangladesh gave their testimonies about the various acts of oppression committed against them. Women victims narrated horrendous stories from their lives. Representatives from Japan described the injustices perpetrated against the Buraku people in Japan. Bangladesh was represented by the Telegu Community Development Association of Bangladesh (an associa tion for sweepers belonging to that community) and Odhikar, a coalition for human rights.

In the presentation from Bangladesh, it was discussed that although Bangladesh is a predominantly Muslim country, castism is practised - as part of the religion - largely within the 13% of the population who are of Hindu faith. The Joldash, Bede, Dom, Methor, Muchi, Rishi etc. are the people who belong to the lowest castes of the Hindu community in Bangladesh. Although untouchability is not practised, occupational discrimination is very much evident in Bangladeshi society.

Our 'Bangalee Bhodrolok' (Bengali gentleman) based civil society is not very sensitive to the issues of the downtrodden people of the marginalized communities here. Occasionally, they take up the job of whitewashing here and there but remain silent in respect of addressing the basic question of iniustices. Even the mainstream women organisations are silent about these women belonging to lowest castes. Our states are repressive states; evident from all the so-called National Security laws they contain. These marginalized people have repeatedly faced torture by the police or by criminals and vested interest groups with the collaboration of the police. In Bangladesh, the most common 'repressive laws', used by the police to carry out the above-mentioned objective, are Section 54 of the Code of Criminal Procedure, Special Powers Act and Public Safety Act.

Finally, the conference concluded with a final Declaration, urging the United Nations to declare untouchability a crime against humanity, United Nations Development Agencies to pay particular attention to caste violence and caste based discrimination and to assess the impact of their existing progress with regard to caste and to appoint a Special Rapporteur against all kinds of caste based discrimination and castism.

Adilur Rahman Khan an advocate of Bangladesh Supreme Court, is vice president of Odhikar.

The race dimensions of trafficking in persons

n a slowing global economy, one sector is bucking the trend. Each year, millions of individuals, the majority women and children, are tricked, sold, coerced or otherwise forced into situations of exploitation from which they cannot escape. They are the commodities in a multi-billion dollar global industry dominated by highly organized criminal groups operating with impunity. The "new slave trade", as Nigerian President Olusegun Obasanio called it at a conference in Lagos last February, has grown recently in severity and in magnitude. Reliable figures are hard to come by, but it is estimated that 45,000 to 50,000 women and children are trafficked annually to the United States alone. Increasing economic hardship, particularly in developing and transitional countries, onerous obstacles to legal migration and serious armed conflict have coincided with a rise in the number of trafficking cases as well as a spreading of the problem to areas which were previously

Trafficking is a phenomenon that affects and implicates all regions and most countries of the world. While trafficking routes are constantly changing, one constant factor is the economic distinction between countries of origin and countries of destination. As with all other forms of irregular migration, trafficking invariably involves movement from a poorer country to a wealthier one. Southeast Asian women are trafficked to North America and other Southeast Asian countries. African women are trafficked to Western Europe. The breakup of the former Soviet Union and the resulting economic and political dislocation has led to dramatic increase in the number of women trafficked from Central and Eastern Europe. Trafficking will also flourish during and after protracted social conflict

How trafficking happens

Traffickers use a variety of recruitment methods including outright abduction and purchase from family members. However, in most cases, the potential trafficking victim is already seeking a chance to migrate when she is approached by an acquaintance or lured through an advertisement.

Some are tricked into believing they are being recruited for legitimate employment or marriage abroad. Other know they are being recruited into the sex industry and even that they will be obliged to work in order to pay back large recruitment and transportation fees but are deceived about their conditions of work. The web of dependence is a complex one. Traffickers generally seek to exercise control over a victim's legal identity by confiscating her passport of official papers. Her entry or stay in the destination country is usually illegal serving to increase her reliance on the traffickers. Debt bond-

READERS QUERIES

In response to your requests 'Law Desk' plans to introduce a new section 'Readers' Queries' in 'Law and Our Rights Page'. This section will provide you with advice from eminent legal practitioners on different legal and human rights issues. If you have legal queries or experienced human rights violations and need an initial legal advice, do

> Law Desk The Hally Star 19 Karwan Bazar. Dhaka -1215. Fax: 8125155.

send your queries to:

E-mail:lawdesk20@hotmail.com

age is widely used to control trafficked persons and to ensure their continued profitability. Physical restraint, violence, and intimidation are frequently

Traffickers are rarely apprehended and even more rarely prosecuted. Penalties for trafficking are relatively light when compared to the smuggling of drugs or weapons. Once reason for the poor law enforcement response to trafficking is the low incidence of reporting. This is not difficult to understand. Victims of trafficking are rarely treated as anything other than criminals by the authorities of the receiving state and are often detained, prosecuted, and deported. This reality, combined with a fear of reprisals from traffickers, means that trafficked persons have little incentive to cooperate with law enforcement authorities in the destination countries. A lack of knowledge of legal rights and entitlements, cultural and linguistic obstacles and the absence of support mechanisms combine to further isolate trafficked women and to prevent them from seeking or receiving justice.

Critical link between trafficking and racial discrimination

Although the links between trafficking and racial bias are not immediately clear they are nonetheless undeniable. As UN High Commissioner for Human Rights Mary Robinson put it, "Trafficking is ... inherently discriminatory. In the case of trafficking into the global sex industry, we are talking about men from relatively prosperous countries paying for the sexual services of women and girls and sometimes men and boys from less wealthy countries. This is more than a labour rights issue or an issue of unequal development. It is a basic human rights issue because it involves such a massive and harmful form of discrimination.

Because the overwhelming majority of trafficked persons are women, trafficking is usually considered to be a gender issue and the result of discrimination on the basis of sex. It is rarely analyzed from the perspective of race discrimination. There has been little discussion of whether race, or other forms of discrimination, contribute to the likelihood of women and girls becoming victims of trafficking. However, when attention is paid to which women are most at risk of being trafficked, the link of this risk to their racial and social marginalization becomes clear.

Moreover, race and racial discrimination may not only constitute a risk factor for trafficking; it may also determine the treatment that women experience in counties of destination. In addition, racist ideology and racial, ethnic and gender discrimination may create a demand in the region or country of destination which could contribute to trafficking in women and girls.

The connections between trafficking and racial discrimination has been the focus of much of the preparation for the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, to take place in Durban, South Africa, in the autumn. During last September's Asia-Pacific Seminar of Experts in Preparation for the World Conference, Thailand, emphasized the interaction of gender and racial discrimination. According to the country's delegation, some women of certain racial or ethnic groups were subjected to abuses in larger measure than other women, while particular forms of violations, such as trafficking in women and girls frequently involved racist attitudes and perceptions, and were often directed at certain racial and ethnic groups, indigenous women and migrants.

Participants at the Bangkok meeting also agreed that racist ideology fuels trafficking and that the "commodification" of women's sexuality results in abuse of women and girls. The experts called for widespread awareness raising regarding the reality and scope of trafficking, including the use of deceit and force to imprison and coerce victims. Governments were urged to combat racism and trafficking and political leaders called on to refrain from utterances that could encourage racism. An expert group meeting on gender and racial discrimination (Zagreb, Croatia, 21-24 November, 2000) recommended that the World Conference pay specific attention to the issue of gender in considering its themes and to take into account the intersection between gender discrimination and racial discrimination.

There are no easy solutions to the plague of trafficking, but its magnitude requires quick action. As High Commissioner Mary Robinson has stated combating the phenomenon will require holistic, interdisciplinary and longterm approaches which address each aspect of the trafficking cycle and which recognize explicitly the connections between trafficking, migration, racism and racial discrimination. This job has only recently begun, and taking it forward will be one of the challenges before the delegates at the Durban conference. They will have little room for failure the fate of millions of women and children around the world is the balance.

Courtesy: United Nations Information Centre. Dhaka

A great loss for the muslim world

FARISH A. NOOR

T times one cannot help but wonder if the Islamist regimes in the world are capable of implementing policies that make any sense or have any relevance for Muslims who live in the immediate present. The latest news from Afghanistan has once again put Islam and Muslims in the dock and the outlandish fatwas issued by the leaders of the Taliban government have only served to stain the image of Islam even more.

After the fatwa issued by the Taliban's leader, Mullah Mohammad Omar, Afghanistan has witnessed the destruction of hundreds of pre-Islamic statues and monuments- all in the name of 'purifying' Islam of pre-Islamic influences. We are now faced with the very real prospect of witnessing the destruction of the monumental sandstone Buddhas of Bamiyanwhich surely must rank as among the greatest artistic wonders of the world- at the hands of religious zealots and fundamentalist militants who think that the Muslim community is in need of being 'protected' from such un-Islamic influences.

Two important considerations have been left out of the discussion altogether by the Taliban and their supporters.

Firstly, it is painfully clear that the Taliban's actions are motivated by their own parochial, sectarian and selfish motives, and that they are entirely indifferent to the sensitivities of other religious communities in the world. While the Taliban and other Islamist movements continue to bemoan the destruction of Muslim heritage sites and places of worship (such as the Babri mosque in India), they are perfectly happy when it comes to obliterating the sacred sites of other religious communities for their own political ends. This blatant hypocrisy on the part of the Taliban is one of the reasons that they have been portrayed as a force for intolerance and

bigotry in their part of the world. But Muslims cannot continue to lament the injustices meted out to them as long as they do not recognise that they too are capable of the same intolerance and prejudice. (What is more the Taliban situation is not unique- from Egypt to Iran, from Malaysia to Indonesia we are now witnessing the rise of Islamist groupings that are bent on destroying all traces of the pre-Islamic past

in their effort to create a 'pure' Islam after their own image.)

Secondly, it has to be pointed out that the discourse of authenticity and purity upon which the politics of the Taliban has been built is fundamentally bogus and hollow. Islam may be a unique thought and belief system, but Muslim civilisation-like all civilisations- is essentially a composite, fluid, evolving and dynamic system. There has never been, and will never be, a wholly unique or pure civilisation in the world, and Islamic civilisation which is one of the most complex the world has ever seen also happens to be one of the most heterogenous.

It is this essential heterogeneity of Islamic civilisation that has given it its complexity, beauty and internal dynamics of its own. Islam has evolved in tandem and in dialogue with other civilisational systems, and in the process of its evolution it has also taken on board the elements, ideas and norms of other belief and value systems as well. To try and eliminate all traces of alterity and otherness from Islam would therefore be the elimination of Islam itself- as there can never be an Islamic culture or way of life that is entirely self-referential

The idiocy that is at the heart of the Taliban's project therefore reflects the folly of all forms of authentic or puritan politics, and in this respect the Taliban regime is no different from any other exclusivist fundamentalist movement in other parts of the world- be they Christian, Hindu, Jewish or whatever. But the saddest aspect of this entire sordid and pitiful episode is that none of these arguments are likely to persuade the fundamentalist Mullahs and their followers in Afghanistan, and the likelihood is that the destruction of the Buddhist monuments there will probably go on unheeded

Once again, Islam has been abused by a minority of fanatics to the detriment of the rest of the Muslim world. The destruction of the Buddhas of Bamiyan will not only impoverish the world at large, but it will impoverish the Muslims who need to be reminded of the internal diversity of their own cultures more than ever. The loss of the Buddhas of Bamiyan is, in the final analysis, a loss for the Muslim

Dr. Farish A. Noor is a Malaysian academic and human rights activist

Remembering Justice Munim

SHAHABUDDIN AHMAD

ORMER Chief Justice FKMA Munim has passed away on February 16. He lived for about years after retirement on November 30, 1989. His was a quiet life all along. In fact, he personified quietness, immeasurable quietness. He was elevated to the Bench in 1970, about a year before I joined the then High Court of East Pakistan. This is to say that I did not have the opportunity to see him as a member of the Bar. Whatever I have seen and I have come to know of him was that of one belonging to the Bench. This means seeing and knowing a man, rather a judge from some distance.



This visualisation is possible notwithstanding the fact that Justice Munim vas by nature a man who used to talk less and only when it was necessary, and one way of knowing a man is to study the way of his talks. He was constantly in complete possession of an aura of calmness, decency and self control that added uniqueness to his character and personality to mark him out easily as a Judge of great distinction and this uniqueness was noticeable in him always whether while dispensing justice sitting as one belonging to the Bench or in personal life outside of it. He gave always a patient hearing to the submission of lawvers, a patient hearing always without ever beatraying any mark of tiredness or irritation and when at times of absolute necessity, he used to make utterances. If the sacred duty of a Judge is to fully understand the case of the litigant parties before him and to visualise the pangs that draw them to the ordeals of litigation, Justice Munim can be said to have excelled n this. He had always the anxiety not to finish up the hearing of a case unless he was satisfied that the concerned lawyer, while making submission on it, was fully prepared on all the facts and law involved in the case. Justice Munim had an abiding interest in scholarly pursuits and to my

nowledge he had in this no detraction whatsoever. He was a student of the University of Calcutta (Honours) and also of the University of Dhaka from which he obtained his Masters Degree in 1947. He did his Masters in Law from the University of London in 1958 and thereafter in 1960 he obtained PhD degree from the same University, his field of study being Constitutional Law, Earlier in 1959 he became a Barrister-at-Law of the Lincoln's Inn. His scholarly pursuits are borne out by creative works of the books (i) Rights of the Citizen under the Constitution and Law and (ii) Legal Aspects of Martial Law published in 1989. He was the founder-member of Bangladesh Institute of Law and International Affairs of which he was for a long time the Chairman and President. He was largely responsible to build this national organisation as a highly prestigious and useful institution. While a judge of the High Court Division he was, on deputation, the Secretary, Ministry of Law and Parliamentary Affairs in 1972-73 and closely associated with the drafting of the Constitution of Bangladesh, 1972. He was lastly the Chairman of Bangladesh Law Commission

He served our superior Judiciary for about 20 years and delivered innumerable judgements of great and lasting importance. The fact that he had no detraction from scholarly pursuits has itself given invaluable dividends, all derived by this society in its hours of great necessity. His understanding and interpretation of the laws constitute a happy reading and serve to lay bare the sound and deeper meanings of the problems at issue and the same can serve very well as models for our budding Judges. While disposing of a case concerning rejection of plaint he said: if the Court does not even peruse the plaint and rejects it outright the door for arbitrariness is opened and whatever little right a citizen is left with is reduced to a shadowy substance". On the principle of "doing complete justice" as provided in our Constitution he would ay: "The expressions 'doing complete justice' as occur in Article 104 are of great significance. Their importance cannot be whittled down. Nor can the Court give up even a fraction of this power" and he would stretch the court's power of review "Since the power of review has been conferred by the Constitution, they cannot I think, negate this power if the Court wants to exercise it on its own". We are passing through crises and convulsions in every segment of the society, the judiciary not being excepted. We need judges of the calm composure, depth, intellect and honesty of which Justice

Shahabuddin Ahmad is an advocate of Bangladesh Supreme Court and former Deputy Attorney-General of