Law and Our Rights

"All citizens are equal before law and are entitled to equal protection of law"Article 27 of the Constitution of the People's Republic of Bangladesh

Outlawing Unauthorised Fatwa through Judicial Activism

By A. H. Monjurul Kabir

THE year 2001 starts with a commendable judicial intervention outlawing the continuing malpractice of fatwa. In a landmark judgement (Writ Petition No.5897 of 2000), a Division Bench of the High Court Division of the Supreme Court of Bangladesh, comprising Justice Md. Gholam Rabbani and Justice Najmun Ara Sultana, the first woman judge in the country, declared any fatwa issued from an unauthorised source is illegal and also ruled that giving a fatwa by unauthorised persons(s) must be made a punishable offence by Parliament immediately. The verdict was delivered against the backdrop of an increasing number of fatwas, mostly issued by mullahs, half-educated or educated with inadequate maddrasah education targeting the vulnerable segments of the society.

The High Court judgement on the first day of January 2001 will, no doubt, have significant impacts on the societal context of Bangladesh. Many NGOs, human rights activists and groups welcomed the decision while a section of religious personalities, groups and political parties including Islami Oikkya Jote (IJO) considered the judgment audacious and have already declared the two judges Murtads.

Setting the Ground

In the present case, the judges of said Division Bench issued a suo motu rule (on its own initiative, without being approached by any party) on 2 December 2000, upon a news item published in the Daily Bangla Bazar Patrika on the same day. The rule nisi was on the Deputy Commissioner of Naogaon, to show cause as to why action shall not be taken against him, for his failure to take action against an incident of illegal fatwa in Naogaon and to show cause as to why his inaction would not be violative of Section 7 of the Muslim Family Laws Ordinance, 1961 and Sections 498, 508 and 509 of the Penal Code.

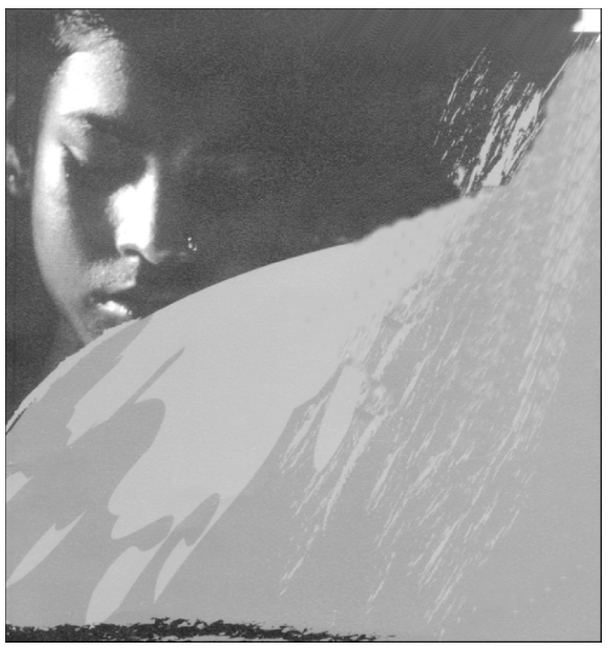
According to the report a woman named Shahida, wife of Saiful of Naogaon district was forced to marry her husband's paternal cousin Samshul on a fatwa by Hazi Azizul Huq that her marriage had been dissolved consequent to an incident of about one year ago. Her husband allegedly uttered the word 'talaq' out of anger, but thereafter continued their married life. On 16 November 2000, while Saiful was visiting his sister in another village, Hazi Azizul Huq, a neighbour who claimed to have heard the pronouncement of talaq, himself issued a fatwa that Shahida must contract a hilla (interim marriage with a third person for reunion of the couple in a broken marriage) for enabling her to resume relations with her 'divorced' husband. Accordingly Shahida was forced to consummate the marriage with Samshul. Later, Saiful refused to accept Shahida as his wife and sent her back to her father's house.

On request, the Division Bench allowed Ain-o-Salish Kendra (ASK) to appear in this case as an intervenor. Considering the importance of the case, several other lawyers and experts applied before the court to be included as Added Parties. The court also accepted their applications. On 31 December 2000, the court heard their submissions on the illegality of unauthorised fatwa in Bangladesh. Citing a number of instances of fatawabazi (issuing and enforcing fatwa) Dr. Kamal Hossain, on behalf of the intervenor, submitted that those of fatwas were the open challenge to the fundamental rights guaranteed under Articles 27 (Equality before law), 28 (Discrimination on grounds of religion etc.), 31(Right to protection of law), and 35 (Protection in respect of trial and punishment) of the Constitution of Bangladesh. Ms. Tania Amir contended that the instant fatwa is a punishable offence under section 508 of the Penal Code and there are also other sections in the Code to punish the person involved in the execution of the fatwa. Mr. Amir-ul Islam also endorsed the views expressed by Dr. Kamal Hossain and Ms. Tania Amir.

Judging the Judgment

Unfortunately in some newspapers the judgement has been given undue credit of reforming Muslim law of talaq; some dubbed the judgement as progressive as it purportedly "has overturned a provision of the Islamic law." Such misinterpretations of the judgement are bound to create confusions in public. It is important to analyse the judgement on the basis of its content. The judgement has a number of critical aspects to be considered:

Reaffirming and Reinforcing Existing Law: In Bangladesh section 7 of the Muslim Family Laws Ordinance (MFLO) governs the method relating to the dissolution of a Muslim marriage at the instance of the husband and the remarriage after the dissolution. Section 3 of the MFLO asserts that the provisions of this Ordinance shall prevail over any other law, custom, and usage. The MFLO in section 7(6) clearly discourages hilla marriage. Dissolution of marriage simply by uttering the word 'talaq' once or thrice at the same time is against the dictates of the Quran and the Hadith as well as invalid in law under section 7 of the MFLO.



Defining and Distinguishing Fatwas: Fatwa is defined as a legal opinion of a lawful person or authority; therefore, the judges do not find any authority except the courts of law to decide all questions relating to legal opinion on the Muslim and other laws as in force. The judgment makes it clear that frequent religious sermons as issued in many parts of Bangladesh specially in rural areas in the name of fatwa do not reflect the fatwas as understood under shariah.

Enacting Legislation: The judges strongly recommend for enacting a legislation that will penalise the unauthorised practice of issuing and enforcing illegal fatwa. It will be interesting to note how the House of the Nation (Parliament) responds to this request specially when a group of MPs and politicians propagating the so called myth of parliamentary sovereignty and ostensibly demanding for establishing parliamentary control over judiciary.

Promoting Proper Religious Education: The judges observe that the existing maddrasah education is defective and as a short term measure, they recommend that study of Muslim Family Laws Ordinance must be introduced not only in maddrasahs but also in schools.

Utilising Formal Religious Assemblage: The Friday Jumma prayer is of extremely importance as Imams/Khatibs deliver weekly khutba (religious sermon) on different aspects of life and living. The judges recommend the concerned authority to direct the Khatibs of all the mosques to discuss the MFLO in their Friday sermons.

Unifying Different Systems of Education: They rightly point out the need to address the wider social causes contributing to the practice of fatwas and as a long -term measure, the judges propose for introducing a unified education system.

Controlling Freedom of Religion: An enactment to control the freedom of religion subject to law, public order and morality within the scope of Article 41(1) (Freedom of religion) of the Constitution should be promulgated. The judges strongly underscore the need to define and enforce public morality. They remind the state of its duty to educate society.

In fact, the judgement fervently calls for concerted action to combat religious extremism both on the part of the state and the non-state actors including numerous mosques across the country.

Engendering Judicial Activism

Like some of the progressive courts of the world, the judiciary of Bangladesh is also trying to adopt an activist, goal oriented approach in the matter of interpretation of fundamental rights. It has expanded the interpretation of fundamental rights and in the process rewritten some parts of the Constitution through a variety of techniques of judicial activism. The present judgement on fatwa is a glaring example of such activism. The transition from traditional captive agency with a low social visibility into a liberated agency with a huge socio-political feasibility is an interesting development. The Supreme Court of India has already undergone a radical change in the last few years and it is now increasingly being identified by justices as well as people as 'the last resort for the purpose of the bewildered.' It has, through judicial activism, found a new historical basis for the legitimization of judicial power and acquired a new credibility with the people.

Judges should be afforded full protection against any threat or coercion they might have to face for being activist in their approaches. At the same time, the judiciary has to take into consideration indigenous reality and the spirit of the constitution and the laws of the land as well. In this regard what Justice J.S. Verma of the Supreme Court of India in the Jain Hawala case opined is worth remembering "judicial activism is like a sharp-edged tool, which has to be used as a scalpel by a skillful surgeon to cure the malady not as a Rampuri knife, which can kill."

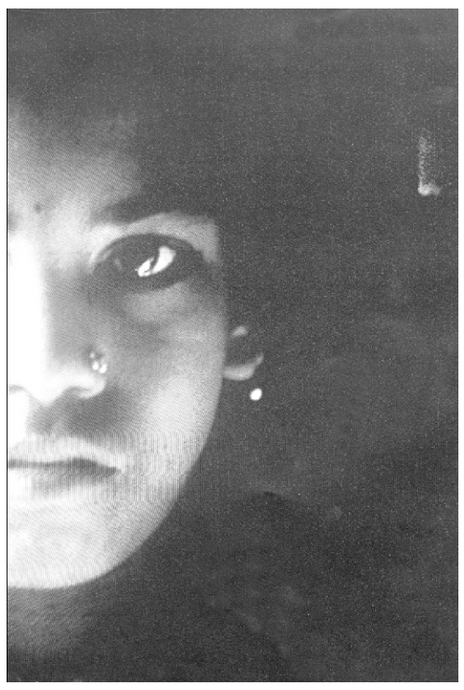
Urgency for a Knowledge-Based Dialogue on Religion

Undoubtedly the judgment, still subject to appeal, is a landmark one. It reinforces the trend of interpreting Quran on the basis of human rights and human dignity for which Islam is regarded not as a mere religion but as a complete code of life, a progressive philosophy of life. It also reminds us the daunting task of interpreting Quran should be left with the most learned segment of the society, not with self-proclaimed, semi-educated experts. Islam is a religion of peace and considered as the most progressive one among all other religions even by its vehement critics. The language of threat, fear, awe and hatred as often uttered and pronounced by so-called religious leaders of the country is not of Islam. Unfortunately a section of orthodox people with improper or inadequate religious education has been discharging the crucial responsibility of preaching and interpreting Quran, Hadith and other Islamic aspects of life for quite a long time taking full advantage of the apathy of the concerned and liberal segments of our society. This trend has to be reversed. We have to be very cautious also about the common western propaganda that Islam is anti-human rights and therefore, any stand against it is synonymous with progressiveness. There is, in fact, no alternative of engaging into knowledge based dialogues on religion and civilisation. The High Court Judgement is a crystal-clear reminder of that.

Defining Fatwa: An Oriental Perspective

By Dr. Saira Rahman

THE term fatwa requires explanation in both its actual meaning and in what it means in Bangladesh today.Fatwa, in true Islamic context has been explained by Dr. Syed Anwar Husain as 'the opinion of a mufti who is a versatile person having sufficiently strong grounding in Islamic principles. A mufti is a religious person appointed by the state for the purpose of issuing fatwa.' And no one else can do so. Therefore, in other words, a fatwa is a religious decree or edict according to Quranic doctrines or Shari'a . The term itself is derived from the Arabic 'to give decision'. During the time when Islam was still young, and through the Ummayyid and Abbassinid dynasties, religious courts were held, where fatwa were passed. Due to outside influence and changes in society, the responsibility of judging people was given to the state, but every-day, domestic disputes were resolved by special fatwa institutions, which were, however, not allowed to pass decisions over serious criminal offences. Nor could they decide on severe punishments like the death sentence.In Bangladesh today considered from a strict Islamic point of view, the practice of fatwa is an anathema. It is an instrument of exploitation disguised in religious garb. It is targeted against the most vulnerable members of society to achieve social, political and economic advantage and has its roots in policies and practices of political elite who seek to gain through the patronising of anti-social, anti-development, fanatic elements.At this point of the discussion, I would like to point out the difference between the fanatic and the fundamentalist and would like to stress that 'fatwa-mongers' in rural Bangladesh are not fundamentalists. Call them 'fanatics', 'religious fascists', 'obscurantists' or 'extremists' but not 'fundamentalists'. Webster defines a 'fanatic' as 'an extremist, often applied to followers of a religious or political party' and 'fanaticism' as 'excessive zeal or unreasoning fervour especially religious or political'. 'Fundamentalism', on the other hand, denotes 'a belief that the Bible is to be accepted literally as an inerrant and infallible spiritual and historical document'. The term itself is from the word 'fundamental' meaning 'pertaining to or being the basis, root or foundation of something; essential; elementary; primary'. The word 'Bible' can be substituted by 'Quran' in the above definition of 'fundamentalism'. Therefore these two terms are completely opposite in meaning.Unfortunately, in modern terminology, fanatics and fundamentalists have been thrown together to mean the same extreme personality which makes a fanatic. The western media has also played a role in giving the term 'fundamentalist' a negative meaning. Fatima Mernissi comments '.....the media does not help Westerners to understand what goes on in the Muslim world, reducing, as it does, political figures to Tarzan's Chita. And even Chita had some humane quality about her, denied to Muslims as they are described in the Western media. This dehumanisation of Muslims in America and European television has, by mirror effect a dehumanising impact on the American and European viewers. They become so frightened that their national capacities are paralysed and only their defensive, aggressive energies are brought to bear on their relations with this important part of the world civilisation.' The fact that the term 'fundamentalist' and 'fundamentalism' do not quite apply to Islam in the same way as it applies to Christianity or Judaism is, of course, also recognised in some non-Muslim quarters. Bernard Lewis, a Jewish scholar of Islam states "it is now common usage to apply the term 'fundamentalist' to a number of Islamic radical and militant groups. The use of this term is established and must be accepted, but it remains unfortunate and misleading. 'Fundamentalist' is a Christian term. It seems to have come into use in the early years of this century, and denoted certain Protestant churches and organisations, more particularly those which maintain the literal divine origin and inerrancy of the Bible. In this they oppose the liberal and modernist approach to the Quran, and are, in principle at least fundamentalists." However, even though Lewis agrees that the term is misleading, he says that the term 'fundamentalist' is established and must therefore be accepted-even while denoting extremists and Muslim fanatics. If this statement is accepted, then how can we argue for the abolishment of such terms as 'chairman', 'manpower', 'red Indian' and other sexist and racist language which have been part of the English vocabulary for a very long time and are, due to non-acceptance in present times, now seen as 'politically incorrect'?I emphasise that the fatwa-mongers and the political powers behind them are not fundamentalists because they act on blind impulses and emotions with little regard to the basic doctrines of respect, humanity and peace and tolerance enshrined in the Quran. Kazi Alauddin Ahmed places it exceedingly well when he comments ' In my opinion he (the fanatic) is practically blindfolded and yet he enjoys a sort of mirthful sojourn in the dark alleys of ignorance, superstition, intolerance, vengeance and other such ignominious overtures.' The fatwa passed by the village imams, as will be seen, have little to do with Quranic teachings and philosophy. The decisions are almost invariably self-interested and biased: fabrications, misinterpretations or extremist interpretations of the Holy Book.A fundamentalist, in the Islamic context, is a believer in the fundamentals of the Quran, its underlying philosophy and spirit. By virtue of his understanding, he is an educated, enlightened, unbiased person having through exposure to the Quran and who, therefore, has no scope of perverting it or distorting the basic principles of peace, humanity and tolerance enshrined in it. A rational Muslim who interprets the term 'fundamentalist' literally, will have no qualms in calling himself one, since a majority of Muslims do believe in the basic principles of Islam contained in Sur'ah Al-Baqarah 17:7 'it is not righteous that yea turn your face towards east or west; but it is righteous to believe in God and the Last Day and the Angels and the Book and the Messengers; to spend your subsistence, out of love for Him, for your kin, for orphans, for the needy, for the wayfarer; for those who ask, and for the ransom of slaves; to be steadfast in prayer, and practice regular charity; and fulfil the contracts which yea have made; and to be firm and patient, in pain and adversity, and throughout all period of panic, such are the people of truth, the God-fearing.' Thus in relation to Muslims, 'Islamic Fundamentalism' should mean the 'fundamentals of Islam.Thus, the Muslim fundamentalist, in my opinion, is in danger of being overwhelmed by fanatics who are misusing the identity and dignity of the former, with the help of the (purposely?) confused West. In Bangladesh, fatwa are passed not by the enlightened fundamentalist, but by the dark political powers of the fanatics and their cronies.Fatwa, in itself, poses no danger to Muslim society. It is the misinterpretation and misuse of the term and its practice, which is violative to society. Furthermore, since the term "Fundamentalist" has been given a negative attitude and an adverse labelling by the West and certain vested interest groups, in relation to Muslims, we need to ensure that the real meaning of the term and practice of 'Fatwa' is not similarly given



The writer is a free-lance legal researcher.

Bangladesh: Landmark High Court Ruling against Fatwa

AMNESTY International welcomed last week's landmark Bangladesh High Court ruling that fatwas religious edicts issued by the Muslim clergy are illegal. The court also ruled that such edicts, most of which are issued against women, must be made punishable by an act of parliament. "This is a significant and most welcome development which sends a clear message that discriminatory practices against women, particularly in rural areas, are unacceptable and must stop," Amnesty International said. "The division bench of the High Court which made the ruling, and the Bangladeshi women's rights activists who presented the court with evidence against the practice of fatwa, are to be congratulated." Dozens of fatwas are issued each year by the rural clergy at village gatherings after receipt of complaints, usually against women who assert themselves in village family life. They impose flogging and stoning, and other humiliating punishments such as shaving of heads, insults and beatings. They are also often involved in their execution. In many cases, there appears to be a financial motive involved. Fatwas can be a source of income for the local clergy, known as Fatwabaz (in fatwa business), who justify their deeds in the name of religion. In October 2000, the UN Special Rapporteur on Religious Intolerance reported that 26 fatwas issued in the previous year were an attempt "to stifle any efforts to emancipate women."

In 1993 a fatwa was issued against 21-year-old Noorjahan Begum and her second husband on grounds that their marriage was un-Islamic. Noorjahan had married for a second time after she had taken action, which she thought was in line with accepted practice, to end her first traumatic marriage. She was buried in the ground up to her chest, and stoned to death by villagers. Her husband survived the stoning.

Last July, Rashida, a housewife from Sylhet District, was reportedly flogged 20 times in public. A local clergyman issued a fatwa on her for allowing a man who had called to see her husband to wait in her house until the husband arrived. With her husband chronically ill, Rashida had assumed the position of the head of the family.

The landmark judgement was delivered by two renowned justices of the High Court, Mohammad Gholam Rabbani and Nazmun Ara Sultanathe first woman judge in the country. Amnesty International is concerned they may be targetted by Islamist groups and is calling on the government to ensure their safety.

"This judgement highlights the failure of the government to provide protection to women against the practice of fatwa. It must now follow the example of the judges and take action to bring to justice any person who issues a fatwa and to ensure that such unlawful edicts are punishable by law."

Law Report

"The Fatwa in Question is Wrong"

In the Supreme Court of Bangladesh High Court Division
(Special Original Jurisdiction)
Writ Petition No 5897 of 2000.
In the matter of:
An application under Article 102 of the Constitution of the People's Republic of Bangladesh and
In the matter of:
Editor, The Daily Banglabazar Patrika and two others .....
Petitioners -Versus-
District Magistrate and Deputy Commissioner, Naogaon ...
Respondent.
Heard on 14.12.00 and 31.12.2000.
Judgment on 1.1.2001
Present:
Mr Justice Mohammad Gholam Rabbani and
Ms Justice Nazmun Ara Sultana

Mohammad Gholam Rabbani, J:

The instant suo motu Rule has arisen upon a news published in The Daily Banglabazar Patrika on 2.12.00 which briefly is this. Sahida, wife of Saiful (son of Golam Mostafa), of village Atitha within Kirtipur Union Parishad under Sadar Upazila of the district of Naogaon, was forced to marry her husband's paternal cousin Samshul on a so-called fatwa by Hazi Azizul Huq that her marriage had been dissolved consequent to an incident of about one year ago when her husband out of anger uttered the word 'talak', but thereafter continued their married life.

In Bangladesh laws relating to the dissolution of a muslim marriage at the instance of the husband and the remarriage after the dissolution becomes effective are codified in section 7 of the Muslim Family Laws Ordinance and its section 3 states that the provisions of this Ordinance shall have effect notwithstanding any law, custom and usage. Now we quote section 7 as hereunder:

"Talaq (1) Any man who wishes to divorce his wife shall, as soon as may be after the pronouncement of talaq in any form whatsoever, give the Chairman notice in writing of his having done so, and shall supply a copy thereof to the wife.

"(2) Whoever contravenes the provisions of sub-section (1) shall be punishable with simple imprisonment for a term which may extend to one year or with fine which may extend to ten thousand taka or with both.

"(3) Save as provided in sub-section (5), a talaq unless revoked earlier, expressly or otherwise, shall not be effective until the expiration of ninety days from the day on which notice under sub-section (1) is delivered to the Chairman.

"(4) Within thirty days of the receipt of notice under sub-section (1), the Chairman shall constitute an Arbitration Council for the purpose of bringing about a reconciliation between the parties, and the Arbitration council shall take all steps necessary to bring about such reconciliation.

"(5) If the wife be pregnant at the time talaq is pronounced, talaq shall not be effective until the period mentioned in sub-section (3) or the pregnancy, whichever be later, ends.

"(6) Nothing shall debar a wife whose marriage has been terminated by talaq effective under this section from remarrying the same husband, without an intervening marriage with a third person, unless such termination is for the third time so effective."

Under this Ordinance Chairman means the Chairman of the Union Parishad or Paurasava or Mayor or Administrator of the Municipal Corporation and the Arbitration Council means the Council consisting of the Chairman and a representative of each of the parties.

"Anyone who wants to rule persons first tries to humiliate them, to trick them out of their rights and their capacity for resistance, until they are powerless before him as animals." Wrote Eliar Caneth, winner of the Nobel Prize in 1981, in his book, 'Crowds and Power'. In pre-Islamic times the basic concept of marriage under the customary law was that of a sale of the woman by her father or other near male relative, who received the purchase price paid by the husband who could discard his wife at a moment's notice, a right stemming from his position as a purchaser of her.

The Qur-an altered the position of the wife from that of a sale-object to that of a contracting party by a simple rule that the wife herself alone shall receive the dower money payable by the husband. "And give the women dowries as a gift, free" (The Qur-an, 4:4). The Qur-an suspends the effect of the repudiation of marriage until the expiry of the waiting period (iddat) which is to last until the wife completes three menstrual cycles or if pregnant, until delivery of the child, to provide an opportunity for reconciliation, and during the period of iddat the wife is entitled to get lodging and maintenance from the husband. The Qur-an says: "When Ye divorce women, and they fulfil the term of their '(Iddat), either take them back on equitable terms or set them free on equitable term; but do not take them back to injure them, (or) to take undue advantage; if any one does that, he wrongs his own soul.' (2:231). (Quoted from the Holy Qur-an, Text Translation and Commentary, by Abdullah Yusuf Ali, 3rd Edition).

Dissolution of marriage by uttering the word 'Talaq' once or thrice at the same time is against the injunction of the Qur-an and the Hadith as well as invalid in law under section 7 of the Muslim Family Laws Ordinance. This type of talaq is rightly called talaq-ul-bidat or heretical divorce. "The talak-ul-bidaat, as its name signifies, is the heretical or irregular mode of divorce, which was introduced in the second century of the Muhammadan era. It was then that the Omeyyad monarchs finding the checks imposed by the Prophet on the facility of repudiation interfered with the indulgence of their caprice, endevoured to find an escape from the strictness of the law and found in the pliability of the jurists a loophole to effect their purpose. As a matter of fact the capricious and irregular exercise of the power of divorce which was in the beginning left to the husbands was strongly disapproved by the Prophet. It is reported that when once news was brought to him that one of his disciples had divorced his wife, pronouncing the three talaqs at one and the same time, the Prophet stood up in anger on his carpet and declared that the man was making a plaything of the words of God and made him take back his wife". (Quoted from 'Muhammedan Law, by Syed Ameer Ali, Vol II, 5th Edn, page-474)

In view of the aforesaid factual and legal position, we hold that the marriage between Saiful and Sahida was not dissolved and that for the sake of argument if it is taken that the marriage was dissolved, even then there was no legal bar for Sahida to remarry Saiful without an intervening marriage with a third person. The fatwa in question is wrong.

After placing the affidavit and annexures thereto on behalf of the intervener Ain-O-Salish Kendra, Dr Kamal Hossain submits that the tragedy of Sahida is not an isolated event, it is happening often and everywhere in the Country. From the said annexures containing the lists of fatwas during the period from 1993 to 2000 not only we get their alarming number, but also their astonishing range and variety. Dr Hossain submits that those fatwas were the open challenges to the fundamental rights guaranteed under Articles 27, 28, 31, and 35 of the Constitution, yet the State failed to enforce those fundamental rights.

The court held that Shahida's marriage with her husband Saiful was not dissolved

Fatwa means legal opinion which, therefore, further means legal opinion of a lawful person or authority. Legal system of Bangladesh empowers only the Courts to decide all questions relating to legal opinion on the Muslim and other Laws as in force. We, therefore, hold that any fatwa including the instant one are all unauthorised and illegal.Ms Tania Amir submits that the instant fatwa is a punishable offence under section 508 of the Penal Code and there are also other sections in the Code to punish the persons involved in the execution of the fatwa and that the nature of the execution will determine the penal section under which he or they can be punished. We further recommend that giving a fatwa by unauthorised person or persons must be made a punishable offence by the Parliament immediately, even if it is not executed. We further recommend that the punishment under S 508 of BPC be enhanced from 1 year to 5 years.Mr M Amir-ul Islam, learned advocate for the petitioners, adopts the arguments of Dr Kamal Hossain and Ms Tania Amir.We further hold that the respondent District Magistrate should have immediately taken cognizance of the said offence under Section 190 of the Code of Criminal Procedure. We are, however, satisfied with the steps taken by the respondent as stated in his affidavit-in-opposition. Let it, we hope, be the once for all warning to the other District Magistrates, the Magistrates and the Police Officers.Before parting with this matter, we find it necessary to answer a question as to why a particular group of men, upon either getting education from maddrasah or forming a religious group, are becoming fanatics with wrong views. There must be defect in their education and their attitude. As a short measure, we recommend that study of Muslim Family Laws Ordinance must be introduced in all school and maddrasah and that the Khatibs in all the mosques must be directed to discuss the Ordinance in their Friday sermons. As a long term measure, we recommend an unified education system and an enactment to control the freedom of religion subject to law, public order and morality within the scope of Article 41 (1) of the Constitution. The State must define and enforce public morality. It must educate society.

With the observations as above, we make this Rule absolute without any order as to costs. Office is directed to send the copies of this judgement to the Ministries of Home, Law, Education and Religious Affairs immediately.

Nazmun Ara Sultana, J:
I agree