LAW *opinion*

Constitutional mandates and court directives must be complied with

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ACCORDING to newspaper reports, the Government of Bangladesh once again applied for and obtained yet another extension perhaps for the 22nd or 23rd time of the time limit for the implementation of the Directives unanimously given by the Supreme Court 12 years ago in *Kudrat-E-Elahi Panir Vs. Bangladesh*. This is unfortunate because it manifests persistent failures of successive governments to flagrantly and wilfully ignore these directives for a dozen years, impeding the process of justice. As the old adage goes, justice delayed is justice denied.

The directives

In 1992, the Full Court Bench of the Appellate Division of the Bangladesh Supreme Court, while upholding the government decision to cancel the upazila system, issued two very important directives. They were:

".....With the re-appearance of Articles 59 and 60 with effect from 18 September 1991, on which date the Twelfth Amendment of the Constitution was made, these local bodies shall have to be updated in conformity with Articles 59 and 60, read with Article 152(1) for the lawful functioning of the said local bodies... as soon as possible in any case within a period not exceeding four months from date."

"...The existing local bodies are...required to be brought in line with Article 59 by replacing the non-elected persons by election keeping in view the provision for special representation under Article 9. Necessary action in this respect should be taken as soon as possible in any case within a period not exceeding six months from date." (*Kudrat-E-Elahi Panir Vs. Bangladesh*)

These two directives relate to very vital constitutional and governance issues.

Constitutional and governance issues

Our Constitution has four Articles Articles 9, 11, 59 and 60 on local governance. The last two articles are more important in that the Parliament cannot ignore them in enacting laws and the Court can also legally enforce them. Article 59(1) states: "Local government in every administrative unit of the Republic shall be entrusted to bodies, composed of persons elected in accordance with law."

That is, there must be elected local government bodies at each designated administrative unit. The purpose of such bodies is "the management of local affairs by locally elected persons" (*Kudrat-E-Elahi Panir Vs. Bangladesh*).

It is clear that having elected local bodies at the District, Upazila and Union levels, which are already designated as administrative units, is a mandatory requirement of the Constitution. The government is bound to abide by this requirement, if there is rule of law in the country the Constitution being the highest law of the land rather than the rule of expediency, convenience or personal whims. The Court, through its directive to hold elections of local bodies within six months, rightly reminded the government of its constitutional obligations.

This constitutional mandate also specifies a dual structure of governance in our unitary system. It provides for a national government with clear and distinct executive authorities. At the same time, it requires a local government system with an elected body at each administrative unit. These local bodies not national authorities are to be entrusted with the task of governance at the local level. In that they are to be responsible for administration and the work of the government officers, maintenance of law and order, delivery of all public services, and also planning and implementation of all local economic development activities (Article 59 (2)). Thus, the local bodies are to form a system of self-government, responsible for the decision making as well as the implementation of various schemes and programs. In other words, like the national government, local government is also a distinct government.

The constitutional mandate clearly requires that the local bodies not be subservient to national authorities. As the Appellate Division of the Supreme Court stated, "If government's officers or their henchmen are to be brought in to run these local government bodies, there is no sense in retaining them as local government bodies" (*Kudrat-E-Elahi Panir Vs. Bangladesh*). This unanimous pronouncement of the apex Court thus leaves no doubt that the Constitution requires the local bodies to form an autonomous system of government at the doorsteps of the people, rather than being extensions of the national government. That is, according to our Constitution, the task of governance at local levels at all designated administrative units are to be carried out by elected local representatives elected for that purpose rather than by non-elected government officials or anyone else, for that matter. Unfortunately the opposite has become the case in our country, in total defiance of the Constitution. The Supreme Court directive for holding local body elections at all administrative units was intended essentially to remedy this void.

It should be noted that the constitutional provision for a system of self-governing local bodies serves two very important purposes. First, it explicitly provides for a structure of grassroots democracy by ensuring "effective participation by the people through their elected representatives in administration at all levels" (Article 11). In

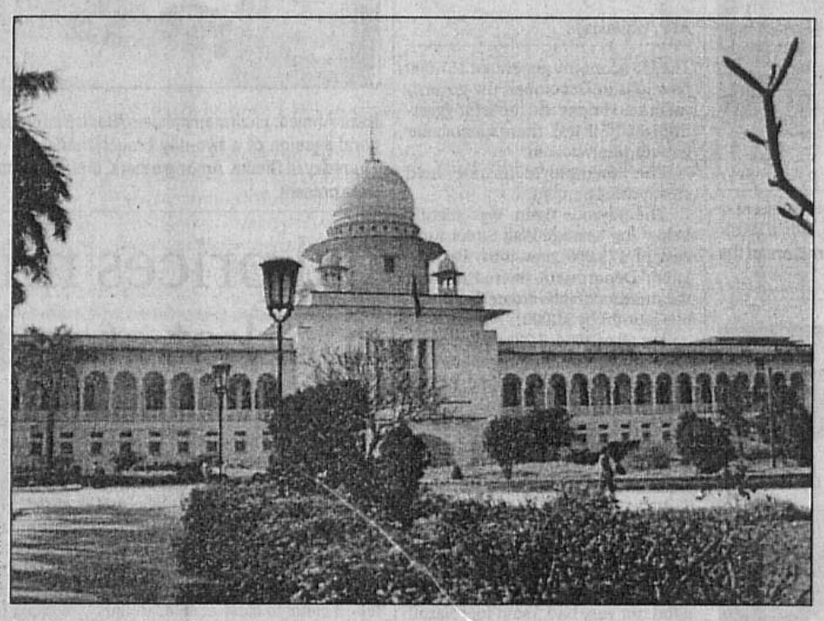
PHOTO: STAR

fact, it is intended to widen and deepen our democratic system by giving power to the people, which is the very essence of democracy. By requiring a system of autonomous local governance, the framers of our Constitution also implicitly provided for an additional form of checks and balances addition to the three interdependent branches, namely the executive, legislature and the judiciary in our constitutional scheme.

Nevertheless, for the last 12 years the successive governments continued to deliberately and blatantly ignore the Supreme Court directives to enforce the constitutional mandate.

By not holding both the Upazila Parishad and Zila Parishad elections, the leaders of government have not only been brazenly violating the Constitution and openly flouting the Supreme Court, they have also been defying their own oath of office to "preserve, protect and defend the Constitution." They have even been ignoring their own election pledges. In its election manifesto published prior to the Parliament elections of 2001, the ruling BNP announced that:

It must be pointed out that the violation of the Constitution and the defiance of the Court directives have discouraged the development of local government institutions (which itself is a violation of Article 9). They have also prevented the emergence of a new cadre of leadership from the grassroots. More seriously, the persistent violations and defiance have altered the structure of our governance. This allowed government functionaries to undesirably exercise powers and authorities that rightfully belong to elected local representatives. Governance at the Upazila and Zila levels are now carried out by non-elected officials with no opportunities for the people to participate (a violation of Article 11) rather than by elected representatives, as envisaged by the Constitution. The government's defiance thus led to the disempowerment of people instead of empowering them, which is the essential prerequisite of a democratic polity. It must be remembered that true democratic governance, of which local governance is a core element, is designed to bring government within the reach of the people in order to prevent the tyrannical behaviour of a few people.

In this context, it should be noted that upazila system represented an important step toward democratic decentralisation. The Supreme Court's affirmation of the cancellation of the system on a purely technical ground that the upazila was not designated as an administrative unit has had severe adverse impacts. Many now feel that if the upazila system remained in place, the quality of our governance would gradually improve rather than progressively deteriorate, as has been the case in the past decade with opportunities for greater public participation and scrutiny. The elected Members of the Parliament would also have to behave more responsibly and concentrate on exercising their constitutionally mandated "legislative powers" (Article 65) rather than indulge in extra-constitutional task of directing local development.

It may be noted that our traditional field-level administration is now in the brink of total collapse and our already feeble local government system is about to become totally irrelevant because of the institution of an informal mechanism of "MP government," consisting of local MPs and their party colleagues. This phenomenon, created during the past decade of our democratic rule, is now causing havoc in the administration across the country.

Correcting technical flaws

The Supreme Court's second directive to update the local government bodies is also important in that it would help correct some serious technical flaws in the existing statutes on local government. The technical flaws arose due to the passage of the Twelfth Amendment of the Constitution in 1991. It may be recalled that Articles 59, 60 and the last part of 11 were deleted in 1975 by the Fourth Amendment of the Constitution, creating a total constitutional vacuum with respect to local government. The Paurashava Ordinance, 1977 and The Union Parishad Ordinance, 1983 were enacted in the backdrop of such a vacuum. In the absence of constitutional mandates, these two laws made Paurashavas and Union Parishads as bodies totally subservient to national authorities. For example, the Paurashava and Union Parishad laws allowed the government officials to directly supervise, direct and control the local bodies. They were even given the authorities to cancel these bodies and suspend the elected representatives. More seriously, the laws designated elected representatives as "public servants," allowing the higher level public servants, i.e., government officials to impose unnecessary, unreasonable and unjust control over the latter's activities. The Twelfth Amendment of the Constitution which restored Articles 59 and 60, requiring an autonomous system of local government clearly made the above laws unconstitutional. This obviously required the laws to be amended and updated, and the Supreme Court rightly directed the government to do so.

It must be pointed out that The Upazila Parishad Act, 1998 and The Zila Parishad Act 2000 followed the other two statutes in making the elected bodies subservient to government officials, and similarly violated the Constitution. The Upazila Parishad Act, however, has an additional serious flaw. Section 25 of the said Act requires the Upazila Parishad to accept the advice of the local MP. This turns legislators into executives, which is a violation of the principles of separation powers and a clear assault on the Constitution.

Can the government justifiably ignore the Supreme Court directives? An Indian Supreme Court judgement may be pertinent in this regard. In *PUCL and another Vs Union of India*, the Court directed the Election Commission to collect from candidates in national and state elections sensitive information about their criminal antecedents, assets and liabilities and their educational qualifications, and help disseminate them among the public. The NDA government, with support from all other political parties, rejected the Supreme Court decision and decided to undo it through legislation. In response, the Court unequivocally stated that the "Legislature in this country has no power to ask the instrumentality of the State to disobey or disregard the decisions given by the Courts." It thus appears that the government has no alternative but to hold the Upazila and Zila Parishad elections without any further delays and also amend the laws, as directed by the Court.

It may be pointed that even though the government has been showing its total disregard for the Constitution and flagrantly and wilfully ignoring the Supreme Court directives, no one seemed to be bothered about it although, as already noted, very serious constitutional and governance issues are involved.

By contrast, one can help but notice the keen interest and activism of both the legal community and even the donors for the implementation of the Supreme Court's landmark judgement in the *Secretary, Ministry of Finance Vs Md Masdar Hossain*, requiring the separation of judiciary from the administration. Such activism should obviously be appreciated and must be extended to other important judicial decisions.

The next hearing date for the government's prayer for yet another extension is exported to be set. We sincerely hope that the Supreme Court, as the guardian of our Constitution, will ensure that the government meets it constitutional obligations by the speediest implementation of the Court's directives. With regard to holding elections, the Court may even consider directing the Election Commission to set dates within a specific time limit. We strongly feel that there is no more room for allowing the government to continue playing the same old game of routinely asking for extensions and in the process ignoring the Constitution and flouting the Court directives. Clearly, what is now at stake is the rule of law that is, maintaining the supremacy of the Constitution. The absence of the rule of law, we must not forget, is the prescription for anarchy.

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LAW *in-depth*

Triple talaq, women's rights and Indian judicial responses

SAUMYA UMA

UNLIKE in Bangladesh, unilateral arbitrary divorce in one sitting, popularly known as "triple talaq", continues to be a valid form of divorce among Muslims in India. This has been the focus of media attention and intense discussion in the past few months in India. The backdrop for the discussion was an announcement by the self-appointed All India Muslim Personal Law Board that it would seek to abolish the practice, and its retraction within a week due to pressure from conservative and fundamentalist forces within the country.

A general agreement exists that a divorce should not be pronounced in private, callously or in an arbitrary manner. This Quranic mandate has now been upheld and elaborated upon by several courts, including the Supreme Court. Most of the cases have arisen in a situation of the woman trying to obtain a maintenance order or to enforce such an order, and the husband claiming in his written statement that he had divorced her, in order to be exonerated of the liability to pay maintenance.

Responses of High Courts

The Bombay High Court's responses to this issue are an example of the contradictory and confusing stands taken by courts of law in the 1990s. Two single judges of Bombay High Court held in two separate cases in the early 1990s that the fact of talaq must be proved and that the Court cannot accept that a valid talaq has taken place merely on the basis of pleadings in the written statement. (Mehtabbi vs Shaikh Sikandar, 1995; Shaikh Mobin vs State of Maharashtra,1996). Subsequently, a Division Bench of this Court took a contrary view. A few months later, without referring to the previous Division Bench judgement, another Division Bench at Nagpur held that the factum of divorce as stated in the written statement was required to be proved (Saira Bano vs Mohamed Aslam, 1999). The controversy was finally settled by a Full Bench judgement of Bombay High Court in May 2002, in Dagdu Pathan vs Rahimbi. Here, the court held that a merely declaring his intentions or his acts of having pronounced the talaq, or a mere pronouncement of talaq by the husband are not sufficient and do not meet the requirements of law; in every such exercise of right to talaq the husband is required to satisfy the preconditions of arbitration for reconciliation and reasons for talaq.

The standpoints of other High Court has not been uniform either. In 1993, a Division Bench of Gauhati High Court held that a Muslim husband cannot divorce his wife at his whim or caprice and divorce must be for a reasonable cause and that it must be preceded by a pre-divorce conference to arrive at a settlement (Zeenat Fatema Rashid vs Md. Iqbal Anwar). In the subsequent years, Calcutta High Court (Moti-ur-Rahaman vs Sabina Khatun, 1994) and Madras High Court (Saleem Basha vs Mumtaz Begam, 1998) have held similarly. However, the High Court of Orissa had held to the contrary. (Rashida Khanum & another vs S.K.Salim, 1995)

Responses of the Supreme Court

The Supreme Court, through a judgement dated 1 October 2002 in Shamim Ara vs State of U.P, has laid the issue to rest by stating that talaq must be for a reasonable cause, and that it must be proved. A summary of the principles laid down by the judiciary with regard to husband's right to unilateral arbitrary divorce are as follows:

- Plea taken in a reply to the maintenance claim filed by the wife does not constitute divorce;
- A mere statement in writing or in oral disposition before the court regarding the talaq having been effected in the past is not sufficient to prove the fact of divorce;
- An oral talaq, to be effective, has to be pronounced;
- It is mandatory to have a pre-divorce conference to arrive at a settlement. This mediation should be in the presence of two mediators, one chosen by the wife & the other by the husband;
- If wife disputes the fact of talaq before a court of law, all the stages of conveying the reasons for divorce, appointment of arbitrators, conciliation proceedings for reconciliation between the parties by the arbitrators and failure of such proceedings are required to be proved;
- A Muslim husband cannot divorce his wife at his whims and caprice; and
- The husband must also prove that there was a valid ground for divorcing the wife.

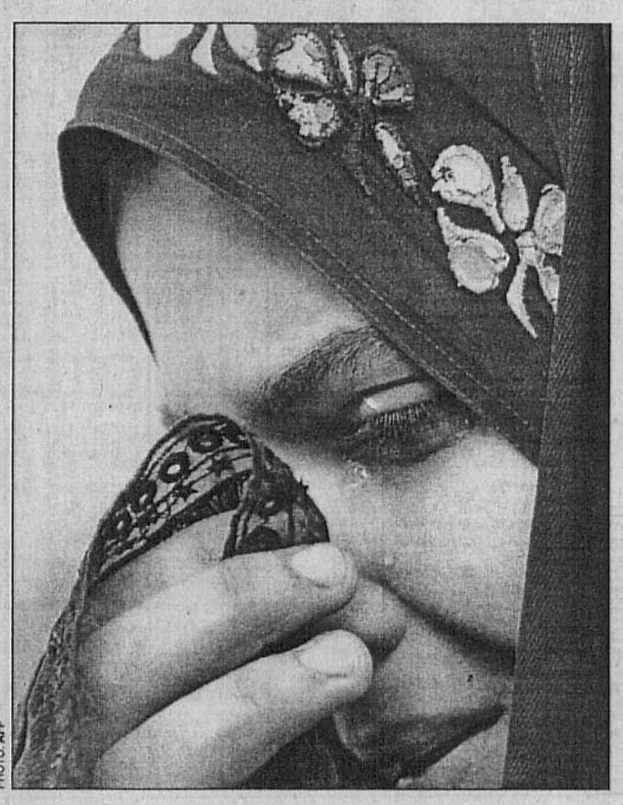
PHOTO: AFP

Some recent efforts at the community level

It can thus be seen that the judiciary has taken efforts to curb the practice of arbitrary, unilateral pronouncement of divorce by Muslim husbands, and affirmed the right of the woman to challenge such a divorce. There is no doubt that Muslim women have recourse to the courts to challenge arbitrary unilateral talaq, and hence arbitrary talaq becomes a non-issue if recourse to law is taken. However, many women are unable to take recourse to law due to lack of awareness, poverty, illiteracy, financial implications of litigation and community opposition against such a move. How can the judgements impact women's lives, when women themselves, and the communities they live in, believe that they have been legally divorced? The challenge then is to educate women living in communities about the legal position and enable their access to law, as well as to promote community awareness and acceptance of the law as stated through judgements.

Some recent efforts undertaken at the grassroots level by organisations such as ours in this regard include:

- Creating awareness about and encourage registration of Muslim marriages under Special Marriage Act, 1954; (this would mean that the parties are governed by SMA a secular law under which divorce will have to be obtained in a court of law)
- Awareness-raising about progressive judgements by courts of law;
- Advocating and using a progressive nikahnama this includes clauses such as a delegated right of divorce to women (talaq-e-tafwiz), arbitration, maintenance, adequate mehr, prevention of polygamy and penalty for triple talaq in one sitting.

In conclusion, while the judgements of Supreme Court and other courts have provided some reprieve to Muslim women, much more needs to be done to move towards a gender-just Muslim matrimonial law. Muslim women in communities, and women's organisations in India have been demanding reform of discriminatory aspects of Muslim personal law for several decades now. In particular, abolition of the practices of triple talaq and polygamy have remained a consistent demand. With the Hindutva forces projecting Muslim law to be backward and barbaric, leaders of the Muslim community have gone into a defensive mode and resisted changes in Muslim personal law as a threat to their identity. Muslim women's voices and articulation of their rights have been subsumed by identity politics.

An ideal Muslim matrimonial law should take into account the experiences and demands of women from the Muslim community, and be an integration of the most liberal interpretations of Quranic verses, the most beneficial provisions of Muslim as well as all other personal laws, and progressive judgements by courts of law, situated within a larger framework of women's human rights and fundamental rights guaranteed by the Indian Constitution.

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FACT *file*

SUDAN CRISIS

Justice in a state of emergency

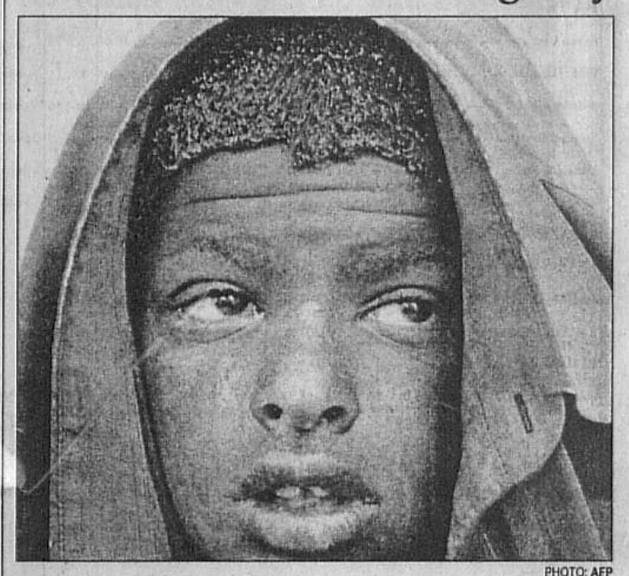
PHOTO: AFP

Over the past 21 months Darfur has been the scene of horrific human rights violations by government forces and allied militia. A million and a half people have been displaced in Darfur; they have been attacked, women raped, people abducted, their relatives killed, villages burnt and looted. Despite the peoples' cries for help, they still remain unprotected. They are still being denied justice.

Victims who speak out face harassment and intimidation at the hands of the government security forces whilst suspected perpetrators of extrajudicial executions, killings, rapes and large-scale attacks remain at large. Darfuris, including internally displaced persons and town-dwellers, human rights defenders and lawyers are routine victims of arbitrary powers of arrest and detention. These powers conferred upon the security forces, apparently designed to protect the country, are instead used to torture the population with impunity.

The legal system is in need of extensive reform. It is weak and biased, unable or unwilling to hold government forces and allied militias accountable for massive violations of international law. Investigations into human rights violations committed in Darfur are either deeply flawed or simply non-existent. Unfair trials are the norm and special courts handing down summary justice leave little confidence in the ability of the judiciary to address the devastation of Darfur.

Governments must not accept the endless routine of human rights violations in Sudan. Mediators of the Sudan and Darfur peace talks must discuss amendments to the emergency laws and ensure that the millions of victims of grave abuses obtain justice.

Source: Amnesty International.