IN THE SUPREME COURT OF BANGLADESH
APPELLATE DIVISION

PRESENT:

Mr. Justice A. B. M. Khairul Haque.
-Chief Justice.
Mr. Justice Md. Muzammel Hossain.
Mr. Justice Surendra Kumar Sinha.
Mr. Justice Md. Abdul Wahhab Miah.
Mr. Justice Syed Mahmud Hossain.
Mr. Justice Muhammad Imman Ali.

CIVIL APPEAL N0s.593-594 of 2001.

(From the judgment and order dated 1st Januray,2001 passed by the High Court Division in Writ Petition No.5897 of 2000).

Mohammad Tayeeb.	:	**Appellant.** (In C.A. No.593/2001)
Moulana Abul Kalam Azad.		**Appellant.** (In C.A. No.594/2001)

-Versus-

Government of the People's Republic of Bangladesh, represented by the Secretary, Ministry of Religious Affairs and others.	:	**Respondents** (In both the appeals)

For the Appellant. (In C. A. No.593/2001)	:	Mr. Muhammad Nazrul Islam, Senior Advocate (with Mr. Md. Ahsanullah Chowdhury, Advocate), instructed by Mr. Md. Nawab Ali, Advocate-on-Record.
For the Appellant. (In C. A. No.594/2001)	:	Mr. Abdur Razzaq, Senior Advocate, instructed by Mr. Md. Aftab Hossain, Advocate-on-Record.
For Respondent Nos.1-3. (In C. A. No.593/2001)	:	Mr. Mahbubey Alam, Attorney General (with Mr. M.K. Rahman, Additional Attorney General), instructed by Mrs. Sufia Khatun, Advocate-on-Record.
For Respondent No.1. (In C. A. No.594/2001)	:	Mr. Mahbubey Alam, Attorney General (with Mr. M.K. Rahman, Additional Attorney General), instructed by Mrs. Sufia Khatun, Advocate-on-Record.

For Respondent No.6. (In C. A. No.593/2001)	:	Dr. Kamal Hossain, Senior Advocate (with Ms. Sara Hossain, Advocate), instructed by Mr. A.K.M. Shahidul Huq, Advocate-on-Record.
For Respondent No.2. (In C. A. No.594/2001)	:	Dr. Kamal Hossain, Senior Advocate (with Ms. Sara Hossain, Advocate), instructed by Mr. A.K.M. Shahidul Huq, Advocate-on-Record.
For Respondent Nos.4 &5. (In C.A. No.593/2001)	:	Not represented.
For Respondents Nos.1, 3-4. (In C. A. No.594/2001)	:	Not represented.
As Interveners.	:	Mr. M. Amirul Islam, Senior Advocate Ms. Tania Amir, Advocate.
As amici curiae.	:	Mr. T. H. Khan, Senior Advocate. Mr. Rafique-ul-Huq, Senior Advocate. Mr. Dr. Zahir, Senior Advocate. Mr. A.B.M. Nurul Islam,Senior Advocate. Mr. Mahmudul Islam, Senior Advocate. Mr. Rokanuddin Mahmud, Senior Advocate. Dr. Rabia Bhuiyan, Senior Advocate. Mr. M.I. Farooqui, Senior Advocate. Mr. A.F. Hassan Arif, Senior Advocate.
As amici curiae 5 (five) Olayma Kerams. (As referred by the Islamic Foundation)	:	
Dates of hearing.	:	The 1st, 2nd, 9th March,2011, 25th, 26th, 27th, 28th April,2011 and 4th May,2011.
Date of Judgment	:	**The 12th May,2011.**

JUDGMENT

A. B. M. Khairul Haque, C.J. : I have had the advantage of reading the draft of the judgments proposed to be delivered by my learned brothers Md. Abdul Wahhab Miah and Syed Mahmud Hossain, J J. While

agreeing with Syed Mahmud Hossain, J., I would like to share and advert my thoughts by way of supplementing his opinion, but in brief.

In this appeal, a preliminary objection has been raised with regard to issuing of a suo moto Rule by the High Court Division.

Generally, the High Court Division under Article 102 (2) of the Constitution of Bangladesh, is empowered to make an order, firstly, on an application, and secondly, the said application is to be made by an aggrieved person. The objection is, since in the instant case, there was no application, as envisaged under Article 102(2) of the Constitution, the issuance of the suo moto Rule by the High Court Division, was misconceived.

If we confine our attention only on Article 102, then no doubt the above objection is apparently correct, i.e. the High Court Division, may in its discretion, pass an order, but only on 'an application', filed by 'an aggrieved person.'

But we should not be that myopic. There are other provisions also in the Constitution, highlighting the rights of the people. Part II of the Constitution spells out the Fundamental Principles of State Policy, while, Part-III stipulates the Fundamental Rights of the people of Bangladesh.

Article 11 within Part II of the Constitution stipulates that the Republic of Bangladesh shall be a democracy in which fundamental human rights and freedoms and respect for the dignity and worth of the human person, shall be guaranteed. These are not mere empty flowery

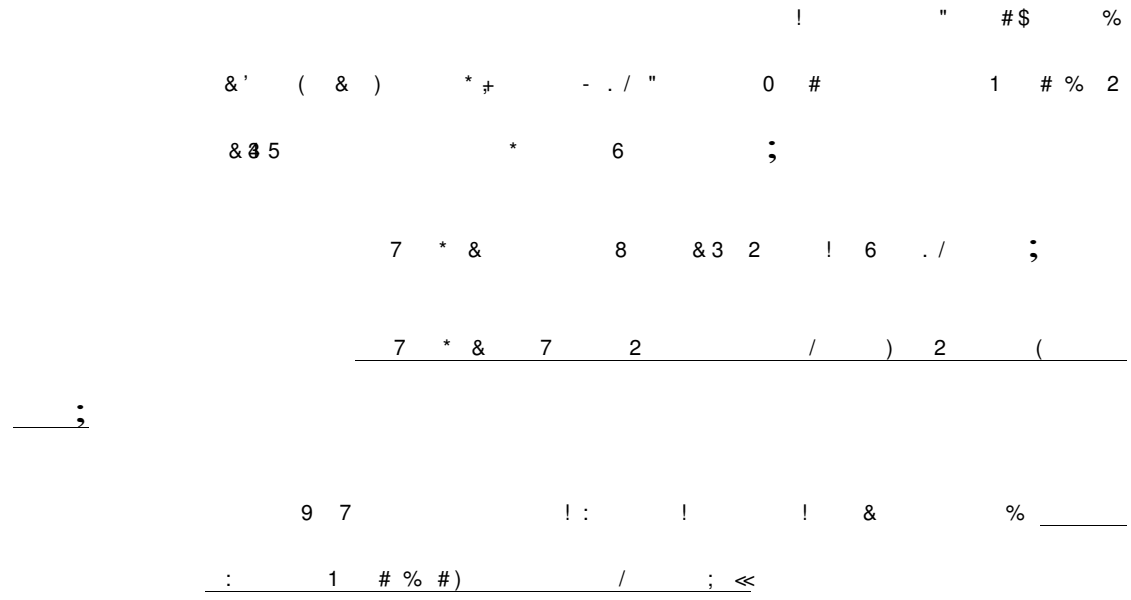
words. These are the dictates of the Constitution. This Article glorifies the State Policy, emburdening the Republic with the obligations, among others to protect the dignity of its citizens. The dignity of a citizen is no less important than his life or limb. This Article casts a duty upon the State to protect the dignity of its citizens.

Similarly, Article 14 enjoins upon the State to emancipate the backward section of the people from all forms of exploitation.

Part III of our Constitution guarantees Fundamental Rights of the people of Bangladesh, such as, among others, equality before law (Art. 27), equal rights of women with men [Art. 28(2)], right to protection of law (Art.31), protection of right to life and personal liberty (Art.32) etc.

Besides, Article 148 provides for taking oath or affirmation by the Judges of the Supreme Court, among others, as mentioned in the Third Schedule of the Constitution, before entering upon the office.

The oath (or affirmation) of the Judges is administered in the following form:



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The English version of the oath (or affirmation) is as follows:

"I, ..., having been appointed Chief Justice of Bangladesh (or Judge of the Appellate/High Court Division of the Supreme Court) do solemnly swear (or affirm) that I will faithfully discharge the duties of my office according to law:

That I will bear true faith and allegiance to Bangladesh:

That I will preserve, protect and defend the Constitution and the laws of Bangladesh:

And that I will do right to all manner of people according to law, without fear or favour, affection or ill-will."

(The underlinings are mine)

The above mentioned portion of the oath (or affirmation) which are underlined requires special attention:

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The English version is:

"That I will preserve, protect and defend the Constitution and the laws of Bangladesh:"

And

> "…… do right to all manner of people according to law……"

Any person, if he is aggrieved, has a constitutional right of redress under Article 102 of the Constitution.

The High Court Division, if satisfied that no other equally efficacious remedy is available or provided for by law, may under Article 102, make an Order in the nature of the writs of prohibition, certiorari, habeas corpus and quo warranto.

The question is whether a person who is aggrieved but unable to file a formal application as envisaged under Art. 102, should remain without any remedy, specially when Art. 21 pronounces:

> (1) It is the duty of every citizen to observe the Constitution and the laws, to maintain discipline, to perform public duties and to protect public property.
>
> (2) Every person in the service of the Republic has a duty to strive at all times to serve the people.

The Constitution not only imposes obligation upon the citizens but also protects them from the excesses as well as laches of the authorities. As such, the persons who are unable to file a formal application, cannot be without remedy in vindication of their rights guaranteed under the Constitution and the laws of the land. If so, it would be in total negation of the spirits enshrined in our sacred Constitution.

In the back-drop of the oath of office of the Judges and the above noted provisions of the Constitution we are to read Article 101 and Article 102 of the Constitution.

We must appreciate that the fundamental rights guaranteed under the Constitution would be meaningless to the inhabitants of this country, if their remedy is impeded for want of a formal application.

In the instant case, there was no formal application, not even a telegram or a letter, but the learned Judges of the High Court Division, on noticing the news item on Shahida, issued a suo moto Rule upon the concerned officials with a direction to produce Haji Azizul Huq, who pronounced the impugned so called fatwa that her marriage was dissolved, just because her husband, in a momentary fit of anger, had uttered the word 'talaq', almost a year back, but thereafter without further disharmony, continued to live together.

The question is whether the learned Judges of the High Court Division on noticing the news-item in a news-paper on 2.12.2000, with the caption ' 2 ! A ! : B C % B * & ! 6 / ! + * < was justified in issuing a Rule in the absence of a formal 'application' of an 'aggrieved person', apparently without strictly following the procedure, set out in Article 102.

Long ago in 1831, Professor Amos said in his lecture at the University College, London :

> "A law student in the present day should be like the ancient God Janus. He should have two faces, looking forwards and

> backwards on his profession; or he may perchance find the choicest stores of his industry suddenly converted into useless and cumbersome rubbish." (Prof. J.H. Baker: An Introduction to English Legal History).

Let me hark-back to legal history as suggested by Prof. Amos but very briefly, in order to trace the development of jurisprudence, specially when there was dearth of a specific provision in a particular field to meet the demand of the day.

Thousand years ago, the writs or the royal commands were the prerogatives of the King alone who was the acclaimed fountain of justice. Those are called prerogatives, because, commands were issued either by the King himself or on his behalf by the Royal Court Judges in order to protect the temporal interest of the King. This was allowed by the common law of the Realm. Those ancient processes of extraordinary nature were available only to the King to protect his interest but were not available to any of his subjects. Even by the writ of habeas corpus, the Court commanded to 'have the body' of a person before it but not for setting him free, rather, to put him in prison. Similarly, the writs of mandamus, prohibition, certiorari and quo warranto were used to be issued by way of royal command to secure his own interest or for his information. Nobody in that ancient times could imagine that those writs can be used for the benefit of the subjects of the Realm. But by and by, the Royal Courts started to issue such prerogative writs in the name of the King but for the benefit of the subjects also, allowing them redress. This was made possible by the ingenuity of the Royal Court Judges, in expounding and expanding the horizon of the common law, to bring

justice to the oppressed, which took couple of centuries but long before those were statutorily recognised in Great Britain and elsewhere in its colonies.

To- day orders or writs in the nature of prerogative writs are frequently issued by the superior Courts almost all over the globe including the Republics having written Constitutions, in order to establish and enforce the fundamental rights of its citizens and also to prevent illegalities.

Next, I shall consider how the doctrine of judicial review came into being.

In the United States of America, Article III of its Constitution conferred the judicial powers upon the Supreme Court. It generally contained the appellate but not the original powers and did not contain any specific provision for power of judicial review.

Let me examine again very briefly, how the Supreme Court in the United states inaugurated the power of the judicial review without any specific provision in the Constitution.

Article III of the Constitution vested the judicial powers upon the Supreme Court. Surprisingly, it is very short. The relevant portion of section I reads as follows:

> "Section 1. The judicial power of the United states shall be vested in one Supreme Court , and in such inferior courts as the congress may from time to time ordain and establish....."

The words conferring the powers of the Supreme Court are 'the judicial power' appearing above. It meant, however, in the language of

John Marshall, C.J., in Marbury V. Madison, 1803, that "The Constitution vests the whole judicial power of the United States in one Supreme Court". The Supreme Court, in construing the words 'The judicial power', held it to be the whole judicial power of the Republic.

Although the power of judicial review was nowhere mentioned either in Article III or anywhere in the Constitution, the Supreme Court in Marbury V. Madison, -(1803), while considering a prayer for mandamus, in an original action, made under the provisions of the Judiciary Act of 1789, found the said law in opposition to the Constitution. Marshall , C.J., emphatically held :

> ".....the Court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty".

This 'judicial duty' contains in effect the power of 'judicial review'.

With this pronouncement in Marbury V. Madison, the doctrine of 'judicial review' was born, although it was nowhere mentioned in the Constitution of the United States or any law made thereunder, but propounded from the words 'judicial power' appearing in Section 1, Article III of the Constitution.

But Marbury never intended or even thought about challenging the vires of the concerned provision of the Judiciary Act, he only made a prayer for mandamus but Marshall, C.J., on his own motion considered the vires of the said provision. In the process, he unknowingly made another history. He suo moto declared the concerned provision of the Judiciary Act ultra vires the Constitution. This is possibly the first suo

moto decision made by a superior Court more than two hundred years ago.

These could be made possible by the boldness of the Judges of the then Supreme Court who could not be daunted by the dearth of a proper provision in the Constitution but acted sua sponte in propounding the said Charter from their notion of doing justice in its proper spirit.

This judicial power of review is now exercised all over the globe and expressly accepted by all including in Bangladesh.

Next, I shall consider how the principle of legitimate expectation came into being.

Generally speaking, without any legal right, no remedy can be allowed. An expectation remains a mere anticipation and nothing more. This was the legal position, necessarily rigid and prevalent in England and elsewhere.

But Lord Denning, M .R., in 1968, made a departure from this rigid legal position in the case of Schmidt V. Secretary of State for Home Affairs and baptised the principle of legitimate expectation although initially it was based on some right, such as a right to hearing in the said case. But in due course, this principle was allowed to travel beyond any legal right in its strict sense. This principle was lucidly explained by the House of Lords in Council of Civil Service Union V. Minister of the Civil Service (1985) AC 374.

The Supreme Court of India also accepted this principle in many of its decisions, no elaborate discussion is called for in this context.

In Bangladesh, the High Court Division, in 2001 made an elaborate discussion and propounded this principle of legitimate expectation in the case of Soya-Protein Project Ltd. V. Secretary, Ministry of Disaster Management 22 BLD(2002)378. The Appellate Division also accepted this principle in the case of the Chairman, Bangladesh Textile Mills Corporation V. Nasir Ahemd Chowdhury 22 BLD(AD)(2002)199. The said principle was again considered and explained by this Division in Government of Bangladesh V. Md. Jahangir Alam (C.A. Nos. 45 to 47 of 2010).

This is how, even without any legal right, in its strict conventional sense, an expectation may be bloomed into a legitimate one, capable of enforcement, although, there is no specific provision for it, still, the will and initiative of the Judges, made it possible from their sense of jurisprudence and justice for the people for whom the bell of justice always tolls.

Now the question of locus standi. It is very important in every suit, even in a writ petition. It is a vexed question, specially in respect of a public interest litigation (PIL). Generally, if the party fails to establish his locus standi, his suit or petition, as the case may be, is bound to fail, simply for the reason that an action of a busybody or meddlesome interloper is not maintainable. That is the general principle, the traditional view, at least in respect of adjudication of disputes between the two parties who are aggrieved.

Earlier English law has not allowed the action popularis of Roman law, rather, the question of standing was always narrowly construed and tended to take a restrictive view.

One of the first departures from this conservative view was taken by Lord Denning in 1957, in the case of R V. Thames Magistrate's Court, ex p. Greenbaum, where as a Law Lord he indicated that certiorari may be granted even to a stranger.

Since 1968, Lord Denning M.R., in the Court of Appeal, allowed standing to one Raymond Blackburn in a number of cases and made the prerogative remedies available to any responsible citizen (The Discipline of Law).

In India, after initial hesitation, the Supreme Court made a bold assertion in the case of S.P. Gupta V. Union of India AIR 1982 SC 149 and held that 'any member of the public acting bona fide can move the Court'. This decision was followed in People's Union for Democratic Rights V. Union of India AIR 1982 SC 1473 where the principle of Rule of Law was invoked in allowing locus standi in the PIL.

In Bangladesh, the Supreme Court, no doubt made an early start in Kazi Mukhlesur Rahman V. Bangladesh 26 DLR (SC) (1974) 44 where standi was allowed to the appellant although in a particular constitutional context but in the process obliquely opened a new vista. But after such an initial glimpse, lost its way and remained barren for the next 23 years. The principle was again reincarnated in Dr. Mohiuddin Farooque V. Bangladesh 49 DLR (AD)(1997)1 where the appellant had no personal interest or grievance in the matter, as such, not an 'aggrieved person'

within the language of Article 102, still his appeal was entertained, in the discretion of the Court, because, the paramount interest of the people was involved.

This is how the traditional conservative view on standi melted into a liberal one in respect of PIL cases.

The above discussions are made not to give an exposition to legal history but are made in order to highlight how strict legal formalities from ancient times, gave way to procedural fairness based on the notion of dispensation of justice to the people for whom the judiciary exists.

The 'due process of law' as appearing in clause iv of the Petition of Right, 1354, and in Fifth and Fourteenth Amendments in the Constitution of the United States or the 'Rule of Law', propounded by Professor William E. Hearne and Professor A.V. Dicey, envisaged that the law is not what it appears to be in the strict lexicographical sense but what it ought to be in the dispensation of justice. According to Professor Stanley de Smith, 'the law should conform to certain minimum standards of justice, both substantive and procedural'.

Let me raise a basic question : why is there a need for a Constitution in the first place? Since the ancient times the people lived in countries ruled by a Monarch or a Ruler, why the people of 13 colonies of America felt the necessity of a Constitution in the first place, and that is also a written one.

In a Monarchy, with or without a democracy, the Monarch is sovereign. In a Republic, the people are sovereign and the character of its government is essentially a democratic one. In order to run the Republic, a

charter is required, which would recognize the existing sovereignty of the people with their rights and obligations. It also delineates the functions of the Republic. This charter creates the institutions and functionaries of the Republic, so that they can serve the people. This charter is the Constitution and the people themselves are the centre-piece of the Republic and its Constitution. Everything belongs to them, the four-corners of the State, the political rights and powers and so also their pre-existing fundamental civic rights, recognised and guaranteed under the Constitution.

In this manner, with this end in view, the Constitution of the United States of America was framed which was rather a short one. The Constitution of India is quite a long one while the Constitution of Bangladesh is in between. The purpose and focus is the same in all the Constitutions, it is the people around which the Constitutions wound around. The Constitutions project, protect and uphold the rights of the people. For them alone the Republic and its Constitution exist, their interest is the highest law. Not only the nation but the Constitution is also 'of the people, by the people, for the people'. For them the notion of justice also rise high.

The Constitution of Bangladesh is no exception. Part III of the Constitution guarantees the fundamental rights of the people and Part II narrates the fundamental principles of State Policy which are also pro-people.

Similarly, Article 101 narrates the general jurisdiction of the High Court Division while certain extraordinary powers of the High Court

Division are exercised under Article 102. Those are substantial as well as procedural.

The general purpose of any procedural law is to streamline the meaningful implementation of a substantial law in its real spirit which is the law above the law.

The High Court Division, under Article 102 of the Constitution, may issue orders and directions in the nature of prerogative writs, stated therein, in order to establish and to enforce the fundamental rights of the people, to ameliorate their sufferings, to provide redress from the high handedness of the people in authority and others and to establish the rule of law. The right to enforce a fundamental right is also a fundamental right.

These are extraordinary original jurisdiction of the High Court Division. Of necessity, access to this jurisdiction is some what restricted. In the absence of an equally efficacious remedy, which is a precondition, an aggrieved person is entitled to file an application before this High Tribunal, praying for appropriate relief.

The purpose of procedural law is for proper exercise and implementation of substantive law so as to avoid busybodies or meddlesome interlopers, otherwise, its real beneficiaries would be lost in their crowd. The procedural law in this case is to promote the substantive right of the people. It cannot hinder or frustrate its real purpose, the interest of the people. After all, the Constitution along with its Article 102 has been enacted, as an expression of the will of the people. The rights of the people cannot be overlooked or sacrificed in the rigour of procedure.

The procedure is needed in order to streamline enforcement of the fundamental rights of the people but not to create impediment to its fulfillment.

The purpose of law is not to hinge on the web of procedure against the interest of the people, rather, the other way around. That is why the ancient rigour of the prerogative writs were modified and used for the benefit of the people. Two hundred years ago, Marshall, C.J., acted sua sponte, may be even without thinking about it but it was done, and a history was made. In the case of Dr. Mohiuddin Farooque V. Bangladesh, the procedural requirement of filing an application by an actual 'aggrieved person' took a back-seat and the rights of the people were glorified.

The learned Advocates, do not apparently have any doubts about the grievance of Shahida or her rights under the Constitution, their only objection is in respect of the lack of an application.

What is the necessity and purpose of an application?

Generally, the application contains the information of the concerned person, his grievance and his prayers. The learned Judges on consideration of the facts revealed in the application, exercise their discretion.

A formal application, however, must be supported by an affidavit. The letters, post-cards, telegrams were all treated as applications by the Supreme Court of India and Pakistan. None of those are supported by any affidavit as required by the concerned Rules. As such, certainly those cannot be applications within the meaning of the Rules.

Why then did those apex Courts become so charitable in accepting those apology of applications for consideration? Because, the learned Judges of those Courts know and appreciate the true spirit of law. They know the background and purpose of the Fundamental Principles of State Policy and the Fundamental Rights of the people enshrined in the respective Constitutions. They know that the said rights are not restricted only to those fortunate few who can avail the services of the learned Advocates and come before the Court with 'perfect' applications but the sacred provisions of the Constitution are not that much discriminatory, those rights are equally open to the poor, to the down-trodden illiterate mass, many of whom are unfortunate sufferers of oppression, direly requiring the protection of the Constitution but they have no means.

It is not their fault that they have no means to come before the Court. Is Bangladesh not their country? Is it not their Constitution also? Have the framers of the Constitution kept them outside its ambit because of their misfortune? Far from it, it is very much their Constitution endowed them, entitled them, blessed them with all the rights spelt out therein.

Generally, no doubt the Judges of the High Court Division should follow the High Court Rules. But can an oppressed person be bolted out of the High Court Division because of non-fulfillment of certain provisions of the High Court Rules? Hardly.

In this connection, the observations of Prof. Dr. Werner Menski in his article 'Introduction : The Democratisation of Justice in India', may profitably be quoted :

> ..... If a judge, reading his paper over breakfast, discovers that a poor individual has wilfully been deprived of a basic right, how can he go to court a little while later and pretend that he can be in charge of processes designed to achieve justice? It is a matter of individual conscience, and a matter of respecting the suffering of others, less fortunate than oneself, that one cares and takes action.

In this connection, one should appreciate that an aggrieved person may or may not be an oppressed but an oppressed person is inevitably and invariably an aggrieved person. Should the Judges refuse to uphold the rights guaranteed under the Constitution to an oppressed person in such a situation? Can the purpose of the fundamental rights guaranteed under Part III of the Constitution be defeated by some provisions of the Rules, made under the Constitution?

Certainly not. The jurisdiction of the Judges of the superior Courts, guaranteed under the sacred words of the Constitution, cannot be thwarted by the Rules. The spirit of the substantive law takes precedence. This kind of exceptional situation brings the discretion of the learned Judges of the superior Courts into play as glorified by the learned Judges of the Supreme Courts of India and Pakistan, to exercise their jurisdiction.

If the oppressed persons specially the helpless womenfolk, are unable to come before the Court, the Court would not stand idly by but the spirit of the Constitution would bring the Judges to them, in order to remove the discrimination created because of their inability to come before the alter of justice where their in humane miseries may, at least be properly addressed. There comes the question of issuing a suo moto Rule

by the learned Judges to rescue those persons who have none around them with helping reassuring hands of law and justice.

Admittedly, there was no application in the instant case. There was a news-paper report about the sad plight of Shahida, an unfortunate helpless woman.

I would not however, make a pretence that the letters, post-cards, telegrams and even news-paper reports are 'applications' within the meaning of the Rules. Those are exactly what they are. But those contain information. Information about violations of human rights, injustice and oppression.

What is the purpose of publishing this kind of news items in the print and electronic media? It is to bring, among others, to the knowledge of the people in general and the concerned authorities in particular, about the incident. The news-item mentioned in the instant suo moto Rule, at least attracted the notice of the learned Judges of a bench of the High Court Division.

The learned Judges on reading the news-item were, however, apparently satisfied about the fundamental rights of Shahida, its breach and also her grievance, but there was no application, which is a procedural requirement under Article 102, as argued by the learned concerned Advocates.

The learned Judges must have weighed in one hand the grievance of a helpless woman, for whose redress this Constitution exists, just like a pole-star to a lost sailor, on the other hand, the lack of an application, although its purpose had been somewhat satisfied since the facts and

violations of law are brought to the knowledge of the learned Judges through news-paper reports. So the filing of the application, although a procedural requirement, but since this is not an absolute pre-condition for exercise of the powers of the learned Judges under Article 102 of our Constitution, may in their discretion be dispensed with to act on their own motion, on the basis of the information contained in letters, telegrams and even on a news-paper report, to dispense justice accordingly to law to the oppressed.

The last but not the least, the consideration of grievance and the discretion of Judges must not be lost in the haze of the procedure, they should not sport away the rights of the people, guaranteed under the Constitution, specially, the down-trodden ones, who are unable to come before the Court. A Judge must keep his eyes on the ultimate dispensation of justice, in his discretion, to the needy, the poor, the oppressed, to all who suffered injustice, on consideration of law in its proper perspective, highlighting :

> '.... those canons of decency and fairness which express the notions of justice of English-speaking peoples....' (Justice Frankfurter in Adamson V. California, 1947).

We are not English-speaking people but the ideals of justice is same and similar all over the globe which inescapably impose upon the High Court Division, an exercise of judgment, based on the principles of Rule of Law.

Another illustration may be recalled from our own memory and experience.

Earlier, nearly 30 (thirty) years back, presumably on the strict interpretation of the singular words 'the application' and 'any person' appearing in clause (2) of Article 102 of the Constitution, an application at that time could contain the grievance of a single person only but over the years, similar kinds of grievance of a number of aggrieved persons are now allowed to be raised and canvassed in one single application before the Court.

This is how the rigours of strict legal formalities give way to simpler procedure to meet the needs and exigencies of time so that instead of filing dozens, sometimes hundreds of similar applications, all those aggrieved persons can now file one single application, with the permission of the Court, containing all their names and the nature of their similar grievances which were not entertained earlier.

This is how the law moves on to further refinements.

This is how the procedure contained even in the Constitution has been developed to meet the exigencies of time for ends of justice.

Law does not stand still. Law is not the stagnant water in a water-hole. It moves on with the advent of civilization.

Besides, there is no reason to disagree with Lord Denning M.R., when he speaks about the functions of a Judge:

> He must not be a mere mechanic, a mere working mason, laying brick on brick without thought to the overall design. He must be an architect thinking of the structure as a whole-building for society a system of law which is strong, durable and just. It is on his work that civilised society itself depends. (Denning, M.R., Forward to the Supreme Court of India : A

socio-legal crititique of its justice techniques by Rajeev Dhavan, quoted by Krishna Iyer, J. in Union of India V. Sankalchand, AIR 1977 SC 2328).

This very sense of justice requires us to hold that one should not make much ado about lack of an application when the question of dispensation of justice to a helpless oppressed woman arises. It may at best inhibit the discretion of the learned Judges but not their jurisdiction. As such, the lack of the procedural requirement of an application of an aggrieved person, would not necessarily impede the jurisdiction of the Court.

Under the circumstances, the vindication of the rights of an oppressed outweigh the procedural requirement of filing of an application.

In the instant case, because of the uncalled for fatwa, Shahida suffered extreme humiliation and outrageous indignity. As such, her inalienable rights guaranteed under Articles 27, 28 (2), 31 and 32 of the Constitution, have been violated. Besides, the provisions of the Muslim Family Law Ordinance were also flouted.

Shahida, above all is a human being. Her right to life is not that of a chattel but that of a citizen of sovereign Bangladesh. As such, she enjoys her inalienable rights guaranteed under the Constitution and the laws adopted or made there-under. Her rights under those provisions of laws had been violated. No doubt, she is an aggrieved person. She has rights as well as great expectations from the Constitution as any other citizen of this country.

Should she continue to suffer the humiliation, the indignity and injustice since she was unable to come before the Court with an application in her hand. If so, what value our valued and sacred Constitution holds for her with all its guarantees, superbly phrased and gloriously spelt out therein ? It would become stale and meaningless flowery hollow words to Shahida and the thousands of faceless unfortunate women like her in the far away hamlets. To her, to them, the Constitution with all its guarantees to the fundamental rights, would become mere worthless sheafs of paper although the Constitution stringently ensured that no body would trifle with her, with them.

The sad and inhuman plights of Shahida was reported in a newspaper and two of the learned Judges of a Bench of the High Court Division, noticed the said newsitem. Should they keep their eyes shut, close their conscience and leisurely wait for an application, as stated in Article 102, when the whole world was collapsing around Shahida, if so, how are they going to mince and digest the sacred words of Part-III of the Constitution and their own oath of office ?

The words "…. I will do right to all manner of people according to law." in this respect mean, among others, the implementation of the rights guarenteed under Part III of the Constitution.

The Judges are bound by their oath to uphold the provisions of the Constitution including the fundamental rights of the people guaranteed therein. The mere procedural veil cannot smog and delude their

conscience. They ought to rise to the occassion when the Constitution is violated or fundamental rights are endangered or even threatened. In the instant case, they indeed did, they rose to the occassion, they issued the Rule suo moto.

What else could they do?

Let us visualize what would have had happened if this kind of social ills is ignored and not promptly addressed. This would have subjected not only Shahida but the whole community to utmost disgrace. This would also be an insult to humanity. Besides, the failure to halt the receding human values would have encouraged and emboldened others to commit such and other violations of law and human rights, specially in the far-flung areas. This would inevitably lead to further violations of decency, human values, violations of the Rule of Law and also the Constitution. This cannot be allowed in any ordered society.

Let it be known that the society which does not honour its womenfolk cannot be called civilised.

In this back-ground, the learned Judges of the High Court Division, instead of waiting for an application, presumably dispensing with such a requirement, issued the Rule on their own motion, in vindication of their oath of office, as dictated by their conscience.

I am of the opinion that they took the right decision, as any other Judge, any other right thinking person, would have done.

Under the circumstances, the learned Judges of the High Court Division were fully justified in issuing the Rule suo moto and hearing the matter in this case.

In this connection, one other matter requires serious consideration and attention. Our Constitution stipulates separation of powers. The Parliament or the House of the Nation enacts laws for the State, the executive government implements those laws and the Judiciary ensures that the Parliament enacts laws within the bounds of the Constitution and the government implements those according to law.

The works and functions of the executive government is most extensive. Anything and everything, leaving aside the functions of the Parliament and the Judiciary, falls within the domain of the Executive. This is the view of the Supreme Court of India and we also hold the similar view.

Naturally, the executive government is emburdened with the functions of maintaining the law and order and implementation of development projects in various fields up and down the country. The executive arm of the government is duty bound and obliged under the Constitution and the laws adopted or made there under, to look into issues, such as, the alleviation of poverty, saving the oppressed from the high-handedness of the influential people, maintenance of law and order, encroachments in the river, environmental pollution or excesses or laches and negligence or recklessness on the part of the concerned indifferent

officials of the government, ensure good governance and provide necessary redress in accordance with law at the earliest opportunity.

It is the failure of the governments to ensure good governance, that obliged the learned Judges of the superior Courts in this part of the world to become more pro-active. There is hardly any PIL case in the superior Courts in the developed countries, because, accountability of the governments to the people are ensured, as such, the concerned officials, under the political leadership, readily address the problems themselves before those can even reach the Courts. This is unfortunately not the case in the third world countries like India and Bangladesh. Poor governance is prevalent everywhere, forcing the conscientious persons to file PIL cases.

It is only when the executive branch fails to uphold the law, address the problems and provide the necessary redress or to come to rescue the sufferers, the Judges of the High Court Division of the Supreme Court, are constrained to look into the matter, but only as a last resort, either on an application filed by an aggrieved person or by the oppressed or by any conscientious person or an institution, on his/her behalf, praying for appropriate relief or in an extreme situation even in the absence of any application, by being aware of the violations of any law or violations of human rights, from the electronic or print media, by issuing a Rule upon the perpetrators of illegality and also upon the concerned officials, because ultimately those officials of the government would do the needful, not the Court. But, by and large, the Judges should normally

remain aloof from the policy decisions of the government of the day which generally represents the will of the people.

However, activism can be allowed in the interest of justice but a learned Judge must not be an adventurist, some times the line is very thin, one should be careful.

The Court may only over-see that law has been obeyed and the rights of the people, guaranteed under the Constitution, are upheld. This is in vindication of the Constitutional obligations of the learned Judges, not for any personal or even institutional aggrandisement .

The learned Judges should also be very careful when they issue any Rule, either on any application or even suo moto, that they are so acting not for any personal exaltation or enhancement but solely in vindication of their obligations under the Constitution and their oath of office and no earthly or even heavenly consideration should influence them in any manner. If so, they would violate their oath of office.

The learned Judges must appreciate that they are also subject to the same Constitution and the laws of the land which they are obliged to exercise in order to uphold justice for all, but they must not even imagine that they are above the law.

However, the learned judges should not be over anxious or over-react to issue a Rule merely on an unsubstantiated news-item, rather, it is sometimes wise to proceed slowly and not in hot haste. It may happen that the concerned authority may take necessary steps, so that interference by

the Court would not even be called for. Only in case of imminent danger to life, liberty and dignity of a human being, the Court may act with due promptitude, but as a last resort, otherwise not.

Besides, it is the paramount obligation of the Judges to uphold the dignity and the independence of the judiciary as a whole and the Supreme Court in particular, which is one of the basic structures of the Constitution. If it is threatened by any body, the learned Judges of the Court may act sua sponte but again with judicious restraint, keeping in view the ultimate interest of the people of the Republic and certainly not for any personal vanity or egotism but only for the people for whom not only this great Institution but all the Institutions of the Republic exist.

It should also be remembered that while the Supreme Court does not claim any superiority over any body, it would not allow any body to claim any superiority over it. This Institution belongs to the sovereign people.

In short:

firstly, the Court may issue a suo moto Rule, in the circumstances as mentioned above; but

secondly, the Court should be slow in assuming such jurisdiction unless there is compelling reason to do so, and

thirdly, the Court should not assume the role of the executive government, keeping in view the principle of seperation of powers, while issuing a Rule either suo moto or even on an application.

So far the merit of the appeal is concerned, my learned brother Syed Mahmud Hossain, J., has so very aptly and ably examined the concept of 'fatwa' and the tenets of Islam that I have hardly anything to add. Still in order to complement his opinion, I would like to add a few words.

Allah Sobhana-Tala, the most Beneficent, the most Merciful and the Eternal Owner of Sovereignty, is the greatest of all teachers. Our languaze is ill equipped, awfully poor and most inadequate to express His alround greatness. The Holy Quran was revealed upon our Holy Prophet, Hazrat Muhammad Rasulullah Salla'llahu Alaihi Wa Sallam, with the following opening words (Al-Alaq) :

> "Read, in the name of your Lord, who created.
> He created man from an embryo.
> Read, and your Lord, Most Exalted.
> Teaches by means of the pen.
> He teaches man what he never know."

The translations of the Holy Quran referred to herein in this opinion, are made by Dr. Rashad Khalifa Ph. D.

The Lord taught the human-being even how to worship Him by saying among others (Al-Fatehah) :

> In the name of God, Most Gracious, Most Merciful.
> Praise be to God, Lord of the universe.
> Most Gracious, Most Merciful.
> Master of the Day of Judgment.
> You alone we worship; You alone we ask for help.
> Guide us in the right path;
> the path of those whom you blessed; not of those who have deserved wrath, nor of the strayers.

Our Holy Prophet Hazrat Muhammad Rasulullah Salla'llahu Alaihi Wa Sallam is the greatest law-giver of the world as revealed to him,

although he never had any institutionalised education. He was the greatest and the final messenger of the Almighty Lord, and He Himself was his instructor. From the early childhood he never spoke any thing but truth, as such, he was named 'As-Sadiq Al-Amin'. He was the first, the best and the superior most of all the creations of Allah, the greatest Exalter. He is God's mercy to mankind, to all.

At the age of 40, first revelation was made to him and after some time he was directed to proclaim the grace of the Lord of the Universe. But the people of Makkah fell upon him as tyrants and started to treat him with extreme cruelty. At one stage, one idolater asked the Holy Prophet to describe his Lord. The Lord himself revealed His Absoluteness (Al-Ikhlas) :

> "Proclaim, He is the One and only God
> The Absolute God
> Never did He beget. Nor was He begotten
> None equals Him."

The new muslims used to ask the Holy Prophet very many questions in order to run their life in Islamic way. Not only the muslims, even the non-believers used to ask him questions some times in jest, some times in real earnest. The Holy Prophet answered them as revealed to him.

God Himself commanded (Al-Baqarah):

> "----------There shall be no compulsion in religion: the way is now distinct from the wrong way……"

In sura Al-Nesa, God indicated that people would come to the Prophet for consultation and He Himself advised him accordingly through Jibrail Alaihissalam, the great angel.

Even the great angel Jibrail Alaihissalam sometimes visited him and asked him questions in order to educate his companions. One such occasion was narrated by Hajrat Umar Farooq (R.A) as stated by Prof. Masud-ul-Hasan in his book : Hadrat Umar Farooq (page-79-80):

> "Hadrat Umar stated that one day when he and some other companions were with God's Messenger, a man with very white clothing and very black hair came up. Sitting down beside the Holy Prophet, leaning his knees against his, and placing his hands on his thighs he said, "Tell me Muhammad about Islam."
>
> The Holy Prophet said, "Islam means that you should testify that there is no god but Allah; that Muhammad is God's Messenger; that you should observe the prayer, pay the Zakat, fast during Ramadan, and make the pilgrimage to the House of God, if you have the means".
>
> The visitor said "You have spoken the truth. Now tell me about faith."
>
> The Holy Prophet said, "It means that you should believe in Allah, His angels, His books; His Apostles, and the last day, and that you should believe in the decreeing both of good and evil."
>
> The man said that that was true. He then asked, "Now tell me about doing good."
>
> The Holy Prophet said, "It means that you should worship Allah as if you are seeing Him, and if you are not seeing him (perceive) that He is in fact seeing you.
>
> The man accepted the statement as correct. He next asked, "Now tell me about the Hour".

The Holy Prophet said, “The one who is asked about is no better informed than the one who is asking.”

Thereupon the man said, “Then tell me about its signs.”

The Holy Prophet replied, “The signs are that a maid servant should beget her mistress, and that you should see barefooted, naked poor men and shepherds exulting themselves in buildings.”

The visitor felt satisfied. Then he sought leave to depart and as soon as leave was given he disappeared. Hadrat Umar who was present wondered who was the visitor.

Turning to Hadrat Umar, the Holy Prophet said, “Do you know who was the visitor?”

Hadrat Umar replied that he did not know.

Thereupon the Holy Prophet said, “He was Gabriel, who came to you to teach your religion”.

On another occasion the non-believers asked three questions and the Prophet got his answers from the angel Jibrail. In most occasions when he replied to any query, it was brought by the angel. In this way, his commands, his conducts in his daily life, his answers or his comments and even observations were all made but obviously with the approval of God. All these directions and instructions were his fatwas, though were not revelations but were made obviously with heavenly touch. These were Sunnah and as muslims we are fully and wholly bound by the revelations (Holy Quran Majid) and the Holy Prophet’s Sunnah.

No wonder when some one asked Hazrat Ma Ayasha Siddiqua Radia Allhu Taala Anha about our Holy Prophet, she replied, have you not read the Holy Quran.

A notable example of fatwa is the address of the Holy Prophet in the Farewell Pilgrimage at Arafat.

With the sad demise of the Holy Prophet, the scope of further revelations had ended forever.

Hazrat Abu Bakr Siddique, Radia Allahu Taala Anhu, on assuming the office of Caliph and Amirul Momenin, gave a most eloquent sermon to the people of Medina, outlining the priorities of his government. Hazrat Omar Farooq, Radia Allahu Taala Anhu and Hazrat Ali, Radia Allahu Taala Anhu, as Caliphs, similarly sent instructions to the Kazis and the provincial Governors as to how they should administer justice and run their administration. Delivered in the first half of the 7^{th} century, the sermon of Hazrat Abu Bakr Siddique (R.A) and the instructions of Hazrat Omar Farooq (R.A) and Hajrat Ali (R.A) were spectacular instances of statesmanship unparalled not only at the then world but also of the modern world. But those were in effect fatwas.

The gradual development of the schools of Islam, propounded by the great Imams and other school of thoughts have been aptly narrated and analysed by my learned brother Sayed Mahmud Hossain, J., as such. I would not dwell on those all over again.

But one thing I would like to emphasis that unlike other religions, the history of Islam shows that there is as such, no place for the office of Priesthood in Islam.

The 10 (ten) Ashab including 4 (four) Caliphs of Islam were recipient of the great heavenly news (Ashara Mobashshara). That itself was enough to show their purity and greatness even to God. The place of Ashab were also in the highest position in the Islamic world. No other human being can ever attain their status. But most of them were mere idolators before they embraced Islam. In Islam all men are equal before God. The companionship of the Holy Prophet and their new religion transformed them into great men. Hazrat Bilal (R.A) was a negro slave of Abyssinian origin . He was the first muazzin of Islam. His birth and calling in life made no difference.

The Holy scripture, the Hadith and Sunnah, the opinions of great Imams and works of other great scholars and saints are handed down to us from generation to generation. Anybody may read those great works and enlighten themselves, and attain the position of a Haqqani Ulema. But like any other discipline, they may require instructions from the persons, learned in Holy Quran Majid and Hadith, to attain knowledge and appreciate the correct spirit of Islam and its way of life.

From this background history we have to understand and appreciate fatwa in this 21st century in the true spirit of Holy Quran Majid and Hadith and not struck in the 7th century in its abstract sense.

We must appreciate that in the early years of Islam, the muslims, notably Hazrat Umar Farooq (R.A) used to ask questions all the time to the Holy Prophet and his replies may be termed as ‘fatwas’. Besides, there were other great scholars who were the constant companions of the Holy Prophet. But only 6 (six) persons were entitled to pronounce fatwa and among them, Hazrat Umar Farooq (R.A) and Hazrat Ali (R.A) were the most prominent. The others were Hazrat Abdullah Ibne Mashud (R.A), Hazrat Ubai Ibne Qaab (R.A), Hazrat Jaed Ibne Sabeth (R.A) and Hazrat Musa Ashari (R.A). This strict restriction in allowing only a handful of Ashab to pronounce fatwas was observed in order to keep and maintain the correctness of the fatwa even at that time inspite of the acknowledged superiority of the Ashab.

People like Haji Azizul Haq and others like him should take note of it and beware about giving fatwas.

During the reign of Hazrat Umar Farooq (R.A), no body was allowed to preach ‘waj’ and pronounce ‘fatwa’ without his permission. He himself made more than one thousand pronouncements on Fiqh or Islamic jurisprudence. All the great schools of thought on Islamic jurisprudence followed the laws laid down by Hazrat Umar Farooq (R.A). He held the Prophetic acts of the Holy Prophet as binding while his day to day performances as a human being were held as a model guide to suit the changing situations. He also developed the doctrine of Qiyas or logical deduction.

After the demise of Hazrat Umar Farooq (R.A), the division among the muslim leaders became apparent. Fatwas were being issued more for

political reasons than for religion and justice. As a result, wars, strifes, and murders for political gains amongst the different leaders and their tribes became prevalent instead of brotherly spirit of Islam, so very earnestly preached and upheld by our most honoured, most revered and most beloved Holy Prophet.

In this sub-continent, under the auspices of Emperor Aurangazab, all the available Fikhs were compiled in one volume, known as 'Fatwa-e-Alamgiri'. It was more like a Code than fatwa as it is understood.

In this historical background, we ought to appreciate that the great men of Islam are no longer there. They however, left their great works, legacies, precedents and examples on the tenets of Islam as propounded by our Holy Prophet and glorified by his great body of Ashab, Tabeins, Tabe Tabeins, great Imams, Haqqani Ulemas who were no doubt Naibe Rasul and as such, definitely call for utmost respect and reverence. But at the same time, it is reiterated that Islam does not provide for Priest-hood and any body who ardently follows the Holy Quran Majid, Hadis and Sunnah, left by our Holy Prophet, God in His unbounded Mercy, may allow him His forgiveness and hedayet.

However, one may always seek guidance on religious matters from others who are learned in Fiqh or Islamic Jurisprudence. But then again they must appreciate that they are not Ashab or Tabeins or Tabe Tabeins or great Imams. As such, they have inherent limitations. They may become learned by reading the Holy Quran and Hadis and other works of the great scholars of Islam but their prouncements are not sacrosanct and one may differ with respect from their point of view with logic. Islam

allows it, because God in his unbounded mercy bestowed His creation with excellent reason and wisdom. One has to cultivate it.

That is why a ‘fatwa’ is only an opinion, may be by a very learned Mufti but it is still an opinion only and being an opinion, it is not binding or coercive on the recipient or any body else. In this connection, one has to remember that for all our conducts we are accountable to God and only to God, who in His unbounded Mercy, for His pleasure created us all and we shall definitely return to Him and to Him alone. The Lord remains in our heart and with every heart throb we feel His Supreme Existence always in our lowly and very humble beings. To Allah we belong and to Him we return.

We must also appreciate that all the directions given in the Holy Quran and Hadis which we follow or try to follow and all our prayers, are all for our Eternal and Sovereign Lord alone, certainly not for any mortal, no matter whether he is a great King-Emperor or a great Mufti. They themselves are also accountable to God for all their acts just like the humblest creation of God, because only He knows whose prayers and conducts would be acceptable to Him. No body else knows. Let it be understood that the person who pronounces fatwa and its recipients are all creations of Almighty Allah and nobody knows who is the real muttaqee. Only He, the Sovereign Lord of the day of Judgment, knows best.

As such, instead of claiming any superiority or even having pride in our ‘knowledge’, all of us should always be utmost submissive in our prayers, very humbly begging for His mercy. We all should beware that

God had revealed what would happen on the day of Judgment (Al-Zalzalah) :

> "--------- Whoever does an atom's weight of good will see it.
> And whoever does an atom's weight of evil will see it."

However, with the advent of civilisation, the rights of the people, the best creation of God, in contradistinction to the powers of the Kings and other autocratic Rulers, are now acknowledged throughout the world. Now, no body rules, the Head of the State, the Head of the Government and other authorities serve the people.

In this connection, we should remember that, our government is the government of laws and not of men. We all are bound by the Constitution of the People's Republic of Bangladesh and the laws of the land. The laws rule.

The Constitution of Bangladesh guarantees` and allows freedom of expression but the said freedom is not unfettered, rather, accompanies and enjoins responsibilities also. One is entitled to express his opinion or fatwa but at the same time, he must be careful not to violate any law or hurt the feelings of anybody, specially the women. One must remember with great respect and reverence that Hazrat Khadeejah, Radia-Allahu Taala Anha, was the first person to embrace Islam and Hazrat Sumayyah, Radia-Allahu Taala Anha, was the first person to become shahid (martyred) in the path of God from amongst the companions of our Holy Prophet. Our beloved Prophet himself was respectful towards womenfolk and we all should follow his noble example.

Under the circumstances, nobody is allowed to function independent of or in derogation of the laws of the land. As such, although a Mufti, Maulana, or Imam may pronounce a fatwa, if requested, but cannot violate the laws of the land, rather, are bound by it. He should also be respectful of the fatwa or opinion of others.

Besides, let it be known if it is not already understood that in respect of a fatwa, no coercion or undue influence, can be exercised upon any body, far less any punishment or torture, physical or mental, can be imposed or inflicted upon any person, for not adhering to any fatwa. If so, beware, he may be visited by the laws of the land.

Under the circumstance, I agree with the Orders proposed to be passed by my learned brother, Syed Mahmud Hossain, J.

A.B.M. Khairul Haque, C.J.

Md. Muzammel Hossain, J: I have had the advantage of going through the judgments to be delivered by my brothers, **Md. Abdul Wahhab Miah,J. and Syed Mahmd Hossain,J.** I concur with the judgment to be delivered by my brother, **Syed Mahmud Hossain,J.**

J.

Surendra Kumar Sinha, J: I have had the advantage of going through the judgments to be delivered by my brothers, **Md. Abdul Wahhab Miah,J. and Syed Mahmd Hossain,J.** I concur with the judgment to be delivered by my brother, **Syed Mahmud Hossain,J.**

J.

Md. Abdul Wahhab Miah, J: I have had the privilege of going through the judgment proposed to be delivered by my learned brother, Syed Mahmud Hossain, J. pronouncing the majority view. I regret that I could not agree with the majority decision that the High Court Division could issue *suo motu* Rule in exercising its power under article 102 of the Constitution of the People's Republic of Bangladesh (the Constitution) and that the High Court Division could make the Rule absolute holding the fatwa in question unauthorized and illegal and make other observations and recommendations as made in the judgment giving rise to these appeals in view of the terms of the Rule issuing order, the facts involved in the case and the finding of the High Court Division that "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."

In view of the above, I find no other alternative but to give my own views as to the power of the High Court Division to issue *suo motu* Rule in exercising jurisdiction under article 102 of the Constitution and also as

to whether the High Court Division was justified in making the Rule absolute in the terms as indicated hereinbefore.

In the judgment proposed to be delivered by Syed Mahmud Hossain, J., detailed facts have been stated. Therefore, I do not consider it necessary to state the facts in detail except that a *suo motu* Rule was issued by a Division Bench of the High Court Division on a news item captioned " ˚ ! " ! # " ! !$ % & ' (!#) #' ". The Rule was issued in the following terms:

> "Let a suo motu Rule Nisi be issued upon the District Magistrate and Deputy Commissioner of Naogaon to show cause as to why he should not be directed to do that which he is required by law to do concerning the said incident and/or pass such other or further order or orders as this Court may deem fit and proper."

At the time of issuance of the Rule, the High Court Division also directed the District Magistrate and Deputy Commissioner, Naogaon to appear in person and also to produce Haji Azizul Hoque before it on 14th December, 2000 at 10:30 a.m.

As already noted in the judgment of the majority that as many as 9(nine) Senior Advocates were requested to appear in the case as amici curiae as the matter involved interpretation of the Constitution and other important points of law of public interest, and 5(five) Olayma Kerams were invited to appear before this Court to express their considered view through the Director General of Islamic Foundation on the points: (i) what is fatwa? (ii) status of fatwa, (iii) the application of fatwa in Bangladesh

and its legality and (iv) the position of fatwa vis′-a-vis′ our law and accordingly, they appeared and made their submissions.

Of the amici curiae, Mr. T. H. Khan, Mr. Mahmudul Islam and Mr. A.F.Hassan Ariff candidly submitted that in view of the language of article 102 of the Constitution, the High Court Division had no jurisdiction to issue *suo motu* Rule. Of course, the other amici curiae including Dr. Kamal Hossain appearing for respondent No.6 and respondent No.2 respectively in Civil Appeal No.593 of 2001 and Civil Appeal No.594 of 2001, Mr. Abdur Razzaq appearing for the appellant in Appeal No.594 of 2001, Mr. Mahbubey Alam, learned Attorney General appearing for respondent Nos.1-3 and respondent No.1 respectively in Civil Appeal Nos.593 of 2001 and 594 of 2001 and Mr. M. Amirul Islam, appearing as intervener, submitted that the High Court Division had/has jurisdiction to issue *suo motu* Rule.

To see whether the High Court Division had jurisdiction to issue *suo motu* Rule, we are to see the words used in article 102 of the Constitution. In the judgment of the majority, though the most part of article 102 has been quoted, I feel it necessary to quote the article as a whole, for ready reference. The article (as it stood on the date of issuance of the *suo motu* Rule on 03.12.2000 and also on the date of judgment on 01.01.2001) reads as follows:

> "102. (1) The High Court Division on the application of any person aggrieved, may give such directions or orders to any person or authority, including any person performing any function in connection with the affairs of the Republic, as may be appropriate for the enforcement of any of the fundamental rights conferred by Part III of this Constitution.

(2) The High Court Division may, if satisfied that no other equally efficacious remedy is provided by law—

(a) on the application of any person aggrieved, make an order—

(i) directing a person performing any functions in connection with the affairs of the Republic or of a local authority to refrain from doing that which he is not permitted by law to do or to do that which he is required by law to do; or

(ii) declaring that any act done or proceeding taken by a person performing functions in connection with the affairs of the Republic or of a local authority has been done or taken without lawful authority and is of no legal effect; or

(b) on the application of any person, make an order—

(i) directing that a person in custody be brought before it so that it may satisfy itself that he is not being held in custody without lawful authority or in an unlawful manner; or

(ii) requiring a person holding or purporting to hold a public office to show under what authority he claims to hold that office.

(3) Notwithstanding anything contained in the foregoing clauses, the High Court Division shall have no power under this article to pass any interim or other order in relation to any law to which article 47 applies.

(4) Whereon an application made under clause (1) or sub-clause (a) of clause (2), an interim order is prayed for and such interim order is likely to have the effect of—

(a) prejudicing or interfering with any measure designed to implement any development programme, or any development work; or

(b) being otherwise harmful to the public interest, the High Court Division shall not make an interim order unless the Attorney-General has been given reasonable notice of the application and he (or an advocate authorised by him in that behalf) has been given an opportunity of being heard, and the High Court Division is satisfied that the interim order would not have the effect referred to in sub-clause (a) or sub-clause (b).

(5) In this article, unless the context otherwise requires, "person" includes a statutory public authority and any court or tribunal, other than a court or tribunal established under a law relating to the defence services of Bangladesh or any discipline force or a tribunal to which article 117 applies."

Sub-article (1) of article 102 has dealt with the powers of the High Court Division to give such directions or orders to any person or authority, including any person performing any function in connection with the affairs of the Republic, as may be appropriate for the enforcement of any of the fundamental rights conferred by Part III of the Constitution "on the application of any person aggrieved." Again in clause (a) of sub-article (2) of the article, power has been conferred on the High Court Division to make order (i) directing a person performing any functions in connection with the affairs of the Republic or of a local authority to refrain from doing that which he is not permitted by law to do or to do that which he is required by law to do; or (ii) declaring that any act done or proceeding taken by a person performing functions in connection with the affairs of the Republic or of a local authority has been done or taken without lawful authority and is of no legal effect "on the application of any person aggrieved" on its satisfaction that there is no other equally efficacious remedy provided by law. In clause (b) of sub-article (2), the High Court Division has been empowered to make an order (i) directing that a person in custody be brought before it so that it may satisfy itself that he is not being held in custody without lawful authority or in an unlawful manner; or (ii) requiring a person holding or purporting to hold a public office to show under what authority he claims to hold that office "on the application of any person." Thus it is clear that in the case of enforcement of any of the fundamental rights conferred by Part III of the Constitution, there is no need for the satisfaction of the High Court Division that there is no other equally efficacious remedy provided by

law, but the condition precedent is "on the application of any person aggrieved." In the case of sub-clauses (i) and (ii) of clause (a) of sub-article (2), the High Court Division is required to be satisfied that there is no other equally efficacious remedy provided by law before making any order as contemplated therein but that again "on the application of any person aggrieved." So far as the cases contemplated in sub-clauses (i) and (ii) of clause (b) of sub-article (2) are concerned, the High Court Division may make an order "on the application of any person." In these two cases, the word "aggrieved" has been omitted, but like the cases as contemplated in clause (a), the High Court Division has to be satisfied that there is no other equally efficacious remedy provided by law. The framers of the Constitution have used the words "on the application of any person" in every contemplated areas/field of jurisdiction of the High Court Division under article 102. In the context, "aggrieved" is not the *lis;* however, we shall consider the word "aggrieved" later on.

A close reading of article 102 as a whole shows that in conferring jurisdiction on the High Court Division to issue orders and directions etc, for the enforcement of any of the fundamental rights conferred by Part III of the Constitution and for other remedies as contemplated in clauses (a) and (b) of sub-article (2), the framers of the Constitution have specifically used the words/language "on the application of any person." It is also significant to note that the legislature instead of "on an application" used the words "on the application", that is, instead of an indefinite article, has used a definite article, namely: 'the'. And it appears to me the object of using the definite article 'the' is to give stress of the necessity to file

application to invoke the jurisdiction of the High Court Division under article 102. So, in order to decide the question whether the High Court Division could issue the *suo motu* Rule in question, we need to see the proper meaning of the core word "application" used in article 102.

Before we do that it would be beneficial if we keep in mind, some established principles of interpretation of statute and these are: (a) the rules for interpretation of all written documents are the same in the sense that the object is the ascertainment of the intention sought to be expressed in words. Hence it is generally said that the principles relating to interpretation of statutes, are applicable in interpreting the provisions of a Constitution, (b) the golden rule of interpretation is that the words should be read in their ordinary, natural and grammatical meaning. But the rule cannot be applied when a word used is ambiguous or obscure. And even the plainest word may have different meaning. For example, the word, 'residence' may mean the place where a person has his abode for some period or his permanent home, whether or not he is residing there for the time being. Hence a word used cannot be construed in isolation and must be understood in the context in which it is used. It was thought that it would be wrong for a Court to look beyond the words with which it was immediately concerned if their meaning was clear, when they were considered in isolation. But this isolationist approach did not find favour with Courts. The words used in a provision must be read in its context to find out if its meaning is clear and unambiguous, (c) while interpreting the provisions of a Constitution, the statutory rule relating to *casus omissus* applies, which simply means that the Court cannot generally supply words

to the statute or Constitution as this would amount to judicial legislation *(see reference by president (1957) 9DLR(SC) 178; Commissioner of I.T.-Vs-Gulistan Cinema (1976) 28 DLR(AD)14; Osman Gani-Vs-Moinuddin, (1975) 27DLR(AD)61; British Coal Corp-Vs-R(1935) AC 500; Gopalan-Vs-Mdras, AIR1950 SC 27; Wali Ahmed-Vs-Mahfuzul Huq (1956) 8 DLR 429; Sir Rupart Cross-statutory Interpretation, 2nd ed, P-48-49; Hansraj Gupta-Vs-DDME Tramway Co., AIR 1933 PC 63; Kamal Ranjan-Vs-Secy of State, AIR1938 PC 181; Abdus Sattar-Vs-Arag Ltd. 17DLR(SC)147; Manzoor Hossain-Vs-State, (1964) 16DLR 90; Chittagong Jute Manufacturing Co.-Vs-East Pakistan, PLD, 1966 Dac 117; Tarulate -Vs-CIT, AIR 1977 SC 1802).*

Keeping in view the above principles of interpretation of statute, let us see the meaning of the word "application." As per BLACK'S LAW DICTIONARY, NINTH EDITION, the word application means: "1.A request or petition. see COPY RIGHT APPLICATION; PATENT APPLICATION; TRADE MARK APPLICATION. 2.MOTION." As per the same dictionary of the same edition 'Motion' means "1. A written or oral application requesting a court to make a specific ruling or order." In the dictionary of the same edition, the word request has been meant as follows:

> "request, n. *Parliamentary law*. A motion by which a member invokes a right, seeks permission for the exercise of a privilege, or asks a question."
>
> Thus request also implies some action, some overt act by a person (a member) of Parliament.

It is true that as per Black's Law Dictionary, application means a request as well, but in view of the expressions made in article 102 "on the application of any person", I am of the view that the meaning of the word "application" must connote "petition" or "Motion." Because, there cannot be a request to a Court and it is always a prayer, which is made to a Court. Further a request cannot be synonymous to a prayer. And as per the said dictionary, petition means "1. A formal written request presented to a court or other official body"

Now, the next question is whether a news published in a daily vernacular, as in the instant case, can be construed or can be categorized or grouped within the meaning of "request", "petition" and "motion", as indicated hereinbefore. My humble answer is a big "No".

When in article 102 in all situations including the enforcement of fundamental rights as conferred in Part III of the Constitution, the framers of the Constitution have used the word "application", it has to be adhered to its plain meaning without imputing anything of our own. From a plain reading of the words used in sub-articles (1) and (2) of article 102, it also appears to me that the words "on the application" cannot be read in isolation, but have to be read along with the words "of any person." Person may be artificial or natural, but it can never be a news item published in a newspaper.

To appreciate the proper meaning and implication of the words "on the application of any person" used in article 102 of the Constitution together with the meaning of the word "application" as given in Black's Law Dictionary discussed above, we must also see the Supreme Court

(High Court Division) Rules, 1973. In this regard, it is very pertinent to state that, in fact, no new Rules were made/framed by the Supreme Court of Bangladesh (hereinafter referred to as the Supreme Court). The Rules made by the erstwhile High Court of Judicature for East Pakistan at Dhaka as contained in volume-1 was adopted by a Gazette notification dated the 31st day of January, 1973 pursuant to the provisions of article 107 of the Constitution, being the Supreme Court (High Court Division) Rules, 1973 (hereinafter referred to as the High Court Division Rules, 1973). It will be clear if we have a glance at the Gazette notification dated the 31st day of January, 1973 which reads as under:

Bangladesh Gazette
Extraordinary
Published by Authority

Wednesday, January 31, 1973

PART I-Orders and Notification by the Government of the People's Republic of Bangladesh, the High Court, Government Treasury, etc.

THE SUPREME COURT OF BANGLADESH
(HIGH COURT DIVISION)
NOTIFICATION

No.740.G-30th January, 1973-In pursuance of clause (I) of Article 107 of the Constitution of the People's Republic of Bangladesh, the Supreme Court of Bangladesh, with the approval of the President, makes the following rules of regulating the practice and procedure of the High Court Division of the Supreme Court(emphasis supplied).

1. (I) These rules may be called the Supreme Court (High Court Division) Rules, 1973.

(2) They shall come into force at once and shall be deemed to have taken effect on the 16th day of December, 1972.

2. All rules made by the erstwhile High Court at Dhaka and continued in force before the commencement of these rules, shall, until repealed, continue in force, with necessary modifications, and shall apply in all cases of hearing and determination of the appeals and petitions before the High Court Division of the Supreme Court.

By order of the Supreme Court,
M.A. Khaliq
Registrar.

Appendix IV to the High Court Division Rules, 1973 relate to matters of Special Jurisdiction and of this appendix serial '(A)' has dealt with Rules to govern the procedure in the Application for Directions, Orders and Writs under article 102 of the Constitution (in serial (A), it is still written Article 98, but it has to be read as article 102 of our Constitution in view of the Gazette notification dated the 31st day of January, 1973 as quoted hereinbefore). In this regard, it is also very pertinent to state that the Rules contained at serial '(A)' of Appendix IV was framed in connection with article 170 of the Constitution of the Islamic Republic of Pakistan in exercise of the powers under the High Courts (Bengal) Order, 1947 and in 1962, the Constitution enacted by the then President of Pakistan, article 98 was the corresponding article to article 170, but no new Rules were framed to regulate the practice and procedure of the writ jurisdiction under the new article of the new Constitution. By gazette notification No.4259 dated 29.07.1968, article 170 was substituted by article 98. And by virtue of the Gazette

notification dated the 31st day of January, 1973 read with section 24 of the General Clauses Act, the same became the Rules in respect of the applications filed for Directions, Orders and Writs under article 102 of our Constitution and are being followed accordingly. In the context, I consider it relevant to quote the entire Rules from appendix IV as contained in Part I and II of serial (A).

"

PART I

1. Every application for a direction, order or writ excluding writ in the nature of *Habeas Corpus* but including writs in the nature of *Mandamus, Quo Warranto*, Prohibition and *Certiorari*, under Article 170 of the Constitution shall be in the form of the petition neatly typed on cartridge paper with a margin of two inches, containing about twenty lines on each full page and typed only on one side of the paper.
2. Every such petition shall be filed together with two (unstamped) plain copies thereof typed on stout paper of foolscap size, shall be numbered as Writ Petition No..... of 19..... and shall be instituted in the matter of [Article 98] of the Constitution of Pakistan and of the parties of the said petition.
3. Every such petition shall set out concisely, in numbered paragraph the facts upon which the petitioner relies, the grounds upon which the court is asked to issue the direction, order or writ, his right in the matter in question, his demand of justice and the denial thereof and shall conclude with a prayer stating, as clearly as the circumstances permit, the exact nature of the relief sought.
4. Every such petition shall be verified by an affidavit of the petitioner himself and/or the person injured or by any person who is competent to represent the injured person with the prior leave of the court on its being satisfied that the said injured person is unable to swear such an affidavit personally and shall be

accompanied by -

(a) where objection is taken to an order of any person, authority or Government or an officer or department of Government, or a Tribunal, Board, Commission or other body, appointed by Government, an authenticated copy of the order or notification complained against,

(b) where an objection is taken to any judgment or order of a Court or an officer thereof a certified copy of such judgment or order and where there has been an appeal or revision from such judgment or order also a certified copy of the judgment or order of the higher court.

5. Every such petition before presentation to the Court, shall be produced before the Commissioner of Affidavits appointed to take such Affidavits for use in matters pending or coming before this Court, either on its Appellate or Original Side, and the Commissioner before whom such petition is presented shall, before the affidavit is sworn or affirmed, satisfy himself that the application is sufficiently stamped, in form and accompanied by the prescribed documents and shall certify accordingly.

6. Every petition shall, after it is numbered and dealt with under Rule 5 above be returned to the petitioner or his Advocate, who shall present it to the Division Bench appointed by the Chief Justice from time to time to hear such petitions.

7. Subject to the directions of the Court, notice of every petition shall be served on all parties directly affected and for this purpose the petitioner shall bring in as many authenticated copies of the application and affidavits and other documents required to be filed under rule 4 above, as there are parties to be served and the serving fee prescribed by rule 14 below-

Provided that at the hearing of the petition any person, who desires to be heard in opposition to the petition and appears to the Court to be a proper person to be heard, shall be heard

notwithstanding that he has not been served with a notice and subject to such conditions as to costs as the Court may deem fit to impose.

8. Where the application relates to any proceeding in or before a Court and the object is either to compel the Court or an officer thereof to do any act in relation to such proceeding or to quash it or any order made therein, notice thereof shall also be served on such Court or officer as well as the other parties to such proceeding and where any objection is taken with respect to the conduct of a Judge, also on the Judge.

9. If at the hearing of the application the Court is of opinion that any person who ought to have been served with notice of the application has not been so served, the Court may order that notice may also be served on such person and adjourn the hearing upon such terms as the Court may consider proper.

10. Where the Court has been pleased to issue a Rule on the Opposite Party to show cause why the direction, order or writ applied for should not be granted, the Rule shall on the date fixed for its return, be placed for hearing before a Division Bench appointed by the Chief Justice of the purpose.

11. All questions arising for determination of such petitions shall be decided ordinarily upon affidavits but the Court may direct that such questions as it may consider necessary be decided on such other evidence and in such manner as it may deem fit and in that case it may follow such procedure and make such orders as may appear to it to be just.

12. When there is a difference of opinion between the Judges composing the Division Bench, the point of difference shall be decided on such other evidence and in such manner as it may deem fit and in that case it may follow such procedure and make such orders as may appear to it to be just.

13. Where the Court is pleased to issue a direction, order or writ in the

nature of *Mandamus, a Certiorari*, Prohibition or *Quo Warranto*, the same shall be issued in Form Nos.2 to 7 contained in the Appendix to these Rules respective and shall be served personally, if possible, upon the parties to whom the direction, order or writ has been directed and in such manner as the Court may direct.

14. Costs shall be in the discretion of the Court, but subject to any special orders of the Court.

(a) Every petition for a direction, order or writ, other than a writ in the nature of *Habeas Corpus*, shall be chargeable with a Court Fee of Tk.50 and each annexure made to such a petition shall be chargeable with a Court Fee of Tk.4.

(b) Every affidavit sworn or affirmed before a Commissioner of this Court shall bear a Court Fee of Rs.4.

(c) For every notice, direction, order or writ to be served within five miles of the Court's Office, before such service, Rs.2 for each person to be served, provided that where a number of persons are to be served at the same address the fee shall not exceed Rs.5 in all; plus actual conveyance hire for the cheapest conveyance available in keeping with the grade of the employee effecting service.

(d) The fees chargeable for certified copies of documents shall be those laid down in Chapter XIII of the Appellate Side Rules.

(e) All other documents shall be chargeable with the same Court fee as would be charged thereon if they were presented or filed on the Appellate Side of the Court.

15. Where costs are awarded to a party, such costs, unless otherwise directed, shall include the court fees paid on the petition and other documents under these rules, the costs of making copies of petition, affidavit etc., which are furnished to the Court and which by these rules are required to be served on the Opposite Party or Parties, the cost of service of notices, directions, orders or writs as prescribed by Rule 14 above and the Advocate's fee.

16. The forms set out in the Appendix hereto shall be used, with suitable modifications where necessary.

PART II.

1. Applications for the issue of Writs in the nature of *Habeas Corpus* shall be governed by the Rules relating to applications under Section 491 of the Criminal Procedure Code in Chapter XI of the Appellate Side Rules with suitable modifications where necessary. ”

A reading of the Rules quoted above *prima facie* shows that every application under article 102 of the Constitution shall be in the form of a petition and every such petition shall be verified by an affidavit of the petitioner himself and/or the person injured or by any person who is competent to represent the injured person with the prior leave of the Court on its being satisfied that the said injured person is unable to swear such an affidavit personally. Not only that in the Rules, it has also been provided on what paper, the petition shall be typed and how the petition shall be typed? what shall contain in the application? how the paragraphs shall be numbered, how and before whom, the application shall be produced for swearing affidavit and how that shall be numbered and be presented before the Court, how the notices shall be served upon the other side, in case Rule is issued and how the application shall be heard and disposed of. In the context, I also consider it necessary to refer to article 101 of the Constitution (as it stood on 3.12.2000 and 01.01.2001) which has clearly provided that *“The High Court Division shall have such original, appellate and other jurisdictions, powers and functions as are*

conferred on it by this Constitution or any other law." The present article 101 is as under:

> "101.The High Court Division shall have such original, appellate and other jurisdictions and powers as are conferred on it by this Constitution or any other law."

So the High Court Division could not and cannot exercise any power either original, appellate and other jurisdiction and powers unless such powers are vested on it either by any provision of the Constitution or law. In other words, the High Court Division cannot exercise a jurisdiction unless it is clothed with such power either by any provision of the Constitution or by any other law.

Reading together articles 101 and 102 of the Constitution and the High Court Division Rules, 1973 as mentioned in serial (A) of Part I and Part II of appendix IV, I failed to understand, in the absence of an application duly supported by affidavit and being registered and numbered as a writ petition, how the High Court Division could assume jurisdiction under article 102 and issue the *suo motu* Rule on a news item published in a daily vernacular and then dispose of the same beyond the Rule issuing order. In exercising jurisdiction, Judges must see first whether they have the jurisdiction to exercise the power. In the absence of conferment of power either by a provision of the Constitution or by any other law, if the Judges of the High Court Division assume any jurisdiction that will be nothing but usurpation of power and such usurpation will be without jurisdiction.

It is true that the Supreme Court as the Guardian of the Constitution is the protector of the rights, freedom and liberty of the People as enshrined in Part III of the Constitution, but when the framers of the Constitution, namely, the Constituent Assembly, in plain and unambiguous language/wordings stated that the High Court Division "on the application of any person" may give such directions or orders to any person or authority, including any person performing any function in connection with the affairs of the Republic, as may be appropriate for the enforcement of any of the fundamental rights conferred by Part III of the Constitution, so also in respect of the other remedies as mentioned in clauses (a) and (b) of sub-article (2) thereto how then it can be read that such power would include a power of issuance of a *suo motu* Rule in the absence of any application. Can it be said that the framers of the Constitution were oblivious or unmindful of the fact that Bangladesh's formal justice system remains relatively inaccessible to the vast majority people and that vulnerable and disadvantaged groups of people viz. children, women. ethnic minorities, ultra poor, disabled people face difficulty in having excess to the justice and that the vast majority people of Bangladesh cannot afford to come to the High Court Division to seek redress against their grievance and that the fundamental rights as guaranteed in Part III of the Constitution and their other rights as contemplated in clauses (a), (b) of sub-article (2) could be or would be violated or infringed, while specifically using the words "on the application of any person."? If we say in the positive, then we shall be questioning the wisdom of the Constituent Assembly, wisdom of the

framers of the Constitution and we shall be putting something which they omitted. 'Yes', there is scope of interpreting the word or expression "aggrieved" appeared/used in article 102 of the Constitution, i.e. as to the standing of a person in filing an application under the article. And that has been interpreted in the case of Dr. Mohiuddin Farooq-Vs-Bangladesh, represented by the Secretary, Ministry of Irrigation, Water Resources and Flood as Control and others 49 DLR(AD) 1.

In that case A.T.M.Afzal, C.J. agreeing with Mustafa Kamal, J. said:

"The Court in considering the question of standing in a particular case, if the affected party is not before it, will enquire as to why the affected party is not coming before it and if it finds no satisfactory reason for non-appearance of the affected party, it may refuse to entertain the application. "

Mustafa Kamal, J. (who wrote the judgment for the Court) said:

"any person aggrieved" meaning only and exclusively individuals and excluding the consideration of people as a collective and consolidated personality will be a stand taken against the Constitution. . . .The High Court Division cannot under the circumstances adhere to the traditional concept that to invoke its jurisdiction under article 102 only a person who has suffered a legal grievance or injury or an adverse decision or a wrongful deprivation or wrongful refusal of his title to something is a person aggrieved. . . . Insofar as it concerns public wrong or public injury or invasion of fundamental rights of an indeterminate number of people, any member of the public, being a citizen, suffering the common injury or common invasion in common with others or any citizen or an indigenous association, as distinguished from a local component of a foreign organisation, espousing that

particular cause is a person aggrieved and has the right to invoke the jurisdiction under Article 102."

B.B.Roy Chowdhury, J. said:

"*The inescapable conclusion, therefore, is that the expression "person aggrieved" means not only any person who is personally aggrieved but also one whose heart bleeds for his less fortunate fellow beings for a wrong done by the Government or a local authority in not fulfilling its constitutional or statutory obligations. It does not, however, extend to a person who is an interloper and interferes with things who do not concern him. The approach is in keeping with the constitutional principles that are being evolved in the recent times in different countries."*

Thus, the standing to file an application under article 102 of the Constitution has been given an extended dimension in the case of Dr. Mohiuddin Farooq and now various Non-Governmental Organizations are coming forward to help the affected people to redress their grievances. But the standing of a person does not mean that one shall be able to approach the High Court Division without filing any application in accordance with the relevant rules as detailed in the High Court Division Rules, 1973 or that a news item published in a daily vernacular can be treated as an application. In this regard, it needs be mentioned that the case of Dr. Mohiuddin Farooq arose out of an application filed under article 102.

Of the amici-curiae, Dr. M. Zahir submitted that the High Court Division had/has power to issue *suo motu* Rule. For this submission, he tried to rely on the customs, tradition, practice and usage and referred to

articles 44, 101, 102 and 108 of the Constitution and the oath of office of a Judge under the Constitution.

Mr. Abdur Razzaq, who appeared in Civil Appeal No.594 of 2001 submitted that the High Court Division had/has power to issue *suo motu* Rule in exercise of its power under article 102, but did not detail how and on what authority, the High Court Division could exercise that power.

Dr. Kamal Hossain, who appeared for respondent Nos.6 and 2 respectively in Civil Appeal No.593 of 2001 and Civil Appeal No.594 of 2001 and Mr. M. Amir-Ul Islam, who appeared as intervener, submitted that the High Court Division had power to issue *suo motu* Rule in exercise of its power under article 102, but they also failed to detail on what authority and how the High Court Division could exercise such power. No doubt, these two learned Counsel were involved in the process of framing the Constitution, but the language of article 102 is so unambiguous that I find it difficult to accept their submissions that article 102 also compasses the idea of issuance of *suo motu* Rule by the High Court Division. In this regard, I am constrained to say that one may be associated with the drafting of the Constitution, but because of such association, one cannot be accepted as an authority to interpret a provision of the Constitution, more so, when one appears for an interested party. 'Yes', in order to clear up ambiguity, obscurity or other difficulties, resort may be had to the constituent Assembly debates as external aid to interpretation. (see the case of Raja Ram Pal-V-Hon'ble Speaker, (2007) 3 SCC 184). But not the opinion or interpretation of a person associated with the framing of the

Constitution. A provision of the Constitution has to be interpreted in view of the language/words used therein.

Mr. Mahbubey Alam, learned Attorney General, though, submitted that the High Court Division could issue *suo motu* Rule in exercise of its power under article 102, he could not explain how?

Let us see how far Dr. M. Zahir was correct in making his submission that the High Court Division could issue the *suo motu* Rule. Dr. Zahir failed to show recurrence of issuance of *suo motu* Rule in exercise of the powers vested in the then High Court at Dhaka or any other High Court of then West Pakistan under article 170 of 1956 Constitution of Pakistan and then 1962 Constitution, so the question of tradition, customs and usage does not arise at all. More so, ours is an "autochthonous" Constitution. "Autochthony" in its most common acceptance is the characteristic of a Constitution which has been freed from any trace of subordination to and any link with the original authority of the Parliament of the foreign power that made it. The aim is to give to a constitutional instrument, the force of law through its own native authority. A factual "autochthony" is generally achieved after a revolution (on autochthony: K.C. wheare, the constitutional structure of the Common wealth 1960). Therefore, customs, tradition, practice and usage, if there were any in issuing *suo motu* Rule, cannot undo or nugate the written provisions of the Constitution as contained in article 102 discussed hereinbefore.

So far as article 44 of the Constitution is concerned, it has simply guaranteed the right of a person to move the High Court Division for

enforcement of the rights conferred by Part III, but that too in accordance with clause (1) of article 102, i.e. the vehicle to enforce the fundamental rights is article 102, which speaks about availing the vehicle by filing the application. Article 108 has said that the Supreme Court shall be a Court of record and shall have all the powers of such a Court including the power subject to law to make an order for the investigation of or punishment for any contempt of itself. And there cannot be any dispute that the power of issuing a contempt Rule is inherent in a Court's power, but that power is not comparable with the power under article 102. It may be mentioned that article 108 of the Constitution has not said anything about filing of any application.

In this regard, it will not be out of place to say that the Indian situation is altogether different because of the language used in articles 226 and 32 of the Indian Constitution. The framers of the Indian Constitution have not used the words "on the application of any person." So, it would be of no use to travel to the Indian writ jurisdiction for the jurisprudential idea or support that suo motu rule can be issued even on letters, post card and telegram. In the context, I am constrained to say that I could not lay my hands in Pakistan jurisdiction where suo motu rule was issued in exercising writ jurisdiction like the case of Indian High Court and the Supreme Court.

So, I do not find any substance in the submission of Dr. M. Zahir as noted hereinbefore.

The power of judicial review of the High Court Division under article 102 of the Constitution not being a lis or issue in the appeals, I consider it simply wastage of time and energy to write even a single sentence on that. I shall not also do that for two reason (i) power of judicial review of the High Court Division under article 102 of the Constitution is by now well settled and has very well been discussed and decided in the case of Anwar Hossain Chowdhury-Vs-Government of Bangladesh and others commonly know as 8th amendment case, 41DLR(AD) 165 and (ii) that would make the judgment unnecessarily lengthy.

I do not see any reason to dispute the observations made by Charles Evans Huges, the tenth Chief Justice of USA, in 1908 as quoted in the judgment of my learned brother, Syed Mahmud Hossain, J. that:

> "We are under a Constitution, but the Constitution is what the Judges say it is and the judiciary is the safeguard of our liberty and our property under the Constitution."

But at the same breath, I am of the view that the Judges cannot say or interpret any provision of the Constitution, in a way, which would negate the meaning of the words or the expressions or the language used in the Constitution and thus to legislate something which the framers of the Constitution did not intend and also make the other law, here the High Court Division, Rules, 1973 totally nugatory and *nonest*.

I am not also oblivious and unmindful of the oath, which is administered to a Judge of the Supreme Court (both the Divisions). A learned Judge of the High Court Division takes oath of office as under:

> "I, ... having been appointed Judge of the High Court Division of the Supreme Court do solemnly swear (or affirm) that I will faithfully discharge the duties of my office according to law:
> That I will bear true faith and allegiance to Bangladesh:
>
> That I will preserve, protect and defend the Constitution and the laws of Bangladesh:
> And that I will do right to all manner of people according to law, without fear or favour, affection or ill-will."

From a reading of the oath, I am of the view that the Judges are oath bound to preserve, protect and defend the Constitution and the laws of Bangladesh and do right to all manner of people according to law, without fear or favour, affection or ill-will, only when a matter is brought before them as per the provisions of the Constitution and the other laws. The High Court Division Rules, 1973 published in Bangladesh Gazette (Extraordinary) on the 31st day of January, 1973 is definitely a law within the meaning of article 152 of the Constitution and the learned Judges of the High Court Division cannot ignore or sideline the same, while exercising power under article 102 of the Constitution and if they do so, I am afraid that will amount to violation of their oath.

Mustafa Kamal, J. in his book under the head Bangladesh Constitution: Trends and Issues on Kamini Dutta Memorial Law Lectures, 1994, though mentioned about a few interesting cases on procedure as narrated by Mr. Justice Nasir Aslam Zahid, the Chief Justice of the High Court of Sindh, while he attended a conference in 1993 on "Law as an Instrument of Social Justice", all of which were not *"from writ jurisdiction proper, but emanated from other proceedings"* and also the fact that during the conference, he found the Chief Justice sorting out numerous telegrams and letters seeking the court's interference, treating some as regular constitutional petitions and sending others to authorities for redress and also mentioned about a case of issuance of a *suo motu* Rule by a Division Bench of our High Court Division comprising Md. Mozammel Haque and Mahfuzur Rahman J.J. in 1993, but then he wrote:

> "From the procedural point of view the Supreme Court of Bangladesh has not yet developed these informal practices, except for some stray cases. . . . Article 107 of our Constitution empowers the Supreme Court to make Rules for regulating the practice and procedure of each division of the Supreme Court and of any court subordinate to it. No doubt the old Rules framed under the Constitution of Pakistan, 1956 are being followed, but some thoughts may now be given as to whether the procedural Rules, of which the Judges are their own masters, can be relaxed and enlarged so that the deprived, backward, illiterate, ignorant and terrorised section of our teeming millions may obtain fair and meaningful opportunity to approach the Supreme Court for redress of legal and constitutional wrong done to them. If the procedure stands between them and the Court then the Constitution loses its validity to this vast multitude.

> I realise the complexity of this problem. Lawyers, especially constitutional lawyers, legal aid societies, Court administration and Judges have all to play a concerned role in this respect and I leave the details advisedly for their consideration."

And these writings of Mustafa Kamal, J. also show that he himself found the difficulties on the part of the High Court Division in issuing the *suo motu* Rule in exercising jurisdiction under article 102 of the Constitution in view of the existing High Court Division Rules, 1973. In this regard, Mustafa Kamal, J. reserved his opinion, but he mentioned some of his experiences, which he gathered from the Chief Justice of the High Court of Sindh and a stray case of issuance of *suo motu* Rule by our High Court Division and those, in no way, can be accepted as a guideline to interpret the meaning of the words "on the application of any person" in deciding the question of power of the High Court Division in issuing *suo motu* Rule in exercising power under article 102. However, I hope that thoughts will be given soon as to how the procedural Rules, of which the Judges are their own master, can be relaxed and enlarged in exercising jurisdiction under article 102 so that the deprived, backward, illiterate, ignorant and terrorised section of our teeming millions may obtain a fair and meaningful opportunity to approach the Supreme Court for redress of legal and constitutional wrong done to them as observed by Mustafa Kamal, J. The question as to whether the High Court Division had/has power to issue *suo motu* Rule in exercising power under article 102 was not so long raised as raised in these appeals, so that was not addressed in the light of the provisions of article 102 read with the High Court Division Rules, 1973. Be that as it may, mere issuance of *suo motu* Rule, in some

stray cases, cannot be regarded or accepted as the pointer to answer the question. And since the question has been raised with precision in these appeals that has to be answered with reference to the words/expressions/ language used in article 102 and the High Court Division Rules, 1973.

In conclusion, I find no other alternative, but to hold that in the absence of any application duly sworn as per the provisions of the High Court Division Rules, 1973 as discussed above, the High Court Division had no power to assume jurisdiction under article 102 of the Constitution on the basis of a news item published in a daily vernacular under the caption " ! " ! # " ! !$ % & ' (!#) #' ". Therefore, the High Court Division acted illegally and without jurisdiction in issuing the *suo motu* Rule in question giving rise to these appeals on the said news item.

The other question to be decided is: whether the High Court Division exceeded its jurisdiction in making the Rule absolute holding *"any fatwa including the instant one are all unauthorized and illegal"* and in making the other observations and recommendations in the impugned judgment.

The Rule was issued in the following terms:

> "Let a Suo Motu Rule Nisi be issued upon the District Magistrate and Deputy Commissioner, Naogaon to show cause as to why they should not be directed to do that which is required by law to do concerning the said incident and/or pass such other or further order or orders as this Court may deem fit and proper."

At the time of issuance of the Rule, the High Court Division gave an interim direction upon the District Magistrate and Deputy Commissioner, Naogaon, to appear in person and also to produce Haji

Azizul Haque before it on the 14th day of December, 2000 at 10:30 a.m. The District Magistrate and Deputy Commissioner, Naogaon contested the Rule by filing an affidavit-in-opposition stating, amongst others, that he on coming to know from the news items in "The Daily Korotua" published from Bogra about the fatwa on the 1st day of December, 2000 directed the officer-in-Charge of Sadar Police Station to take steps in the matter. In compliance with his direction, a Sub-Inspector of the Sadar Police Station visited the village on the 2nd and the 3rd day of December, 2000 and upon talking to Shahida found the news item published in "The Daily Korotua" correct. Shahida lodged a First Information Report (FIR) against Haji Azizul Huq, person who pronounced the fatwa. On the basis of the FIR, Naogaon Police Station Case No.01 dated the 3rd day of December, 2000 was registered under the relevant provisions of the Nari-0-Shishu Nirjatan Daman Ain, 2000. On the 4th day of December, 2000, the police arrested one of the accused, namely, Md. Masoddunnabi, who was produced before the Court and the Magistrate sent him to jail hajat. Sub-Inspector, Md. Nazrul Islam, attached to Naogaon Police Station *suo motu* lodged an FIR and thereupon Naogaon Police Station Case No.2 dated 03.12.2000 was registered under sections 494/509 and 508 of the Penal Code read with section 7 of the Muslim Family Laws Ordinance, 1961. Out of six accused, three were arrested and two of them were enlarged on bail on the ground of their old age. At the intervention of the local Union Parishad and the elite of the village, Shahida returned to her husband's house and started living with him again. As Shahida's marriage

was not registered earlier, at the initiative of local Union Parishad, it was registered in the meantime.

Thus, it is clear that the District Magistrate and Deputy Commissioner, Naogaon complied with the interim direction given by the High Court Division at the time of issuance of the Rule and, in fact, the District Magistrate and Deputy Commissioner did what he was required by law to do concerning the incident, which was reported in the newspaper under the caption " ! " ! # " ! !$ % & ' (!#) #' ". on which the *suo motu* Rule was issued; the learned Judges themselves found that *"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."* After the quoted observations, the High Court Division should have stopped there and dispose of the Rule accordingly, because in view of the action taken by the District Magistrate and Deputy Commissioner as detailed in the affidavit-in-opposition, the cause of action to proceed with the Rule, no more subsisted, instead the High Court Division out of their enthusiasm made the Rule absolute holding *"any fatwa including the instant one are all unauthorized and illegal"* and made the other observations and the recommendations as well. In view of the Rule issuing order as quoted hereinbefore, I find no scope on the part of the High Court Division to embark upon such exercise.

At the risk of repetition, I say that in the Rule issuing order, the District Magistrate and Deputy Commissioner was not, at all, asked to

show cause as to why fatwas including the instant one should not be declared unauthorized and illegal and thus he was not given any chance of hearing on the subject or the point or the issue. It may be stated that the Rule was issued only upon the District Magistrate and Deputy Commissioner, Naogaon. I failed to understand how the High Court Division could merrily exercise its jurisdiction under article 102 and hold all the fatwas including the instant one as unauthorized and illegal without giving the sole respondent any chance of hearing. It was clearly a violation of the principles of natural justice. I could not lay my hands on any decision either under writ jurisdiction or under the civil jurisdiction by this Court or any other superior Court approving such kind of exercise of power by the High Court Division. I am afraid that if this kind of exercise of power by the High Court Division is approved or sanctioned, then the High Court Division shall be on the spree of disposing of the Rule, in exercising jurisdiction under article 102, giving relief to a party at its own whims and sweet will beyond the pleadings and the prayer and without caring the right of hearing of the other side. And in the process, it will give rise to judicial anarchy. It also needs to be mentioned that the language used in the Rule issuing order *"and/or pass such other or further order or orders as this Court may deem fit and proper"*, in no way, gives a Court jurisdiction to give relief to a party or to hold something or to make any declaration or to make observations and recommendations beyond the Rule issuing order; such a language gives jurisdiction to a Court or authorises a Court to give only the ancillary or consequential relief that may follow from the Rule issuing order.

Therefore, I am constrained to hold that the High Court Division exceeded its jurisdiction as well in making the Rule absolute in the terms as indicated hereinbefore.

Since I have held that the very issuance of the *suo motu* Rule was without jurisdiction, I am not required to say anything about the legality/validity of the fatwa in question.

For the discussion made above, I find merits in the appeals. Accordingly, the appeals are allowed. The impugned judgment and order of the High Court Division is set aside.

There will be no order as to costs.

J.

Syed Mahmud Hossain,J: These two appeals, by leave, at the instance of 3rd party-appellants, are directed against the judgment and order dated 1st January,2001 passed by a Division Bench of the High Court Division in Writ Petition No.5897 of 2000 making the suo motu Rule absolute.

The factual matrix involved in these appeals, in short, is that a news item was published in "The Daily Banglabazar Patrika" on 2nd December,2000 to the effect that one Shahida, wife of Saiful (son of Golam Mostafa) of village Atitha within Kirtipur Union Parishad under Sadar Police Station of Naogaon was forced to marry her paternal cousin Samsul under a

so-called Fatwa pronounced by Haji Azizul Huq on the ground that her marriage was dissolved consequent upon an incident of about one year ago while her husband, out of anger, uttered the word 'talak', but in spite of that Shahida and Saiful continued their marital tie. The High Court Division on taking notice of the aforesaid news item captioned " ˚ ! " ! # " ! !$ % & '(!#)#' " and observing that the so called Fatwa was illegal and unauthorized in view of section 7 of the Muslim Family Laws Ordinance,1961 and thereby offences punishable under sections 494/498/508 and 509 of the Penal Code had been committed by Haji Azizul Huq and his accomplices and that the District Magistrate and Deputy Commissioner, Naogaon, had failed to do that which he was required by law to do concerning the incident issued the suo motu Rule in the following terms :

> "Let a suo motu Rule Nisi be issued upon the District Magistrate and Deputy Commissioner of Naogaon to show cause as to why he should not be directed to do that which he is required by law to do concerning the said incident and/or pass such other or further order of orders as this Court may deem fit and proper."

The High Court Division at the time of issuance of the Rule directed the District Magistrate and Deputy Commissioner, Naogaon to appear before the said Division Bench in person and to produce Haji Azizul Huq before the said Bench on 14th December,2000 at 10.30 a.m.

The writ-respondent, the District Magistrate and Deputy Commissioner, Naogaon, contested the Rule by filing an affidavit-in-opposition stating, amongst others, that the said respondent came to know from the news items in "The Daily Korotua" published from Bogra about the Fatwa on 1st December,2000 and directed the Officer-in-Charge of Sadar Police Station to take steps in the matter. In compliance with his direction, a Sub-Inspector of the Sadar Police Station visited the village on 2nd and 3rd December,2000 and upon talking to Shahida found the news item published in "The Daily Korotua" correct. Shahida lodged a F.I.R. against Haji Azizul Huq, the person who pronounced Fatwa. On the basis of the F.I.R., Naogaon Police Station Case No.01 dated 3rd December,2000 under the relevant provisions of the Nari-O-Shishu Nirjatan Daman Ain,2000 was registered. On December 4, 2000, police arrested one of the accused, namely, Md. Masoddunnabi who was produced before the Court and , the learned Magistrate sent him

to hajat. Sub-Inspector Md. Nazrul Islam attached to Naogaon Police Station suo motu lodged a First Information Report and thereupon Naogaon Police Station Case No.2 dated 03.12.2000 was registered under sections 494/509 and 508 of the Penal Code read with section 7 of the Muslim Family Laws Ordinance,1961. Out of the total six accused, three accused were arrested. Two of them were enlarged on bail on the ground of old age. At the intervention of the local Union Parishad and elite of the village, Shahida returned to her husband's house and started living with him again. As Shahida's marriage was not registered earlier, at the initiative of local Union Parishad, it was registered in the meantime.

In the suo motu Rule there were applications for addition of parties and Ain-O-Shalish Kendra (ASK) filed an application to appear as intervener.

The learned Judges of the High Court Division by its judgment and order dated 1st January,2001 made the Rule absolute.

Being aggrieved by and dissatisfied with the judgment and order dated 1st January,2001 passed by the High Court Division in Writ Petition No.5897 of 2000, Mufti Mohammad Tayeeb and Moulana Abul Kalam Azad as leave-petitioners preferred Civil Petition

for Leave to Appeal Nos.269 and 621 of 2001 respectively before this Division and leave was granted on 13th November,2001 resulting in Civil Appeal Nos.593 and 594 of 2001.

Mr. Muhammad Nazrul Islam, learned senior Advocate, appearing on behalf of the appellant in Civil Appeal No.593 of 2001, submits as under :

I. Fatwa is a legal opinion which can be only executed through Court and not by anybody else. Verse Nos.189, 215 of Surah Bakara of the holy Qur'an approved of issuance of Fatwa when asked for.

II. Giving opinion is a fundamental right as enshrined in the Constitution which can not be stopped by the Court.

Mr. Abdur Razzaq, learned Senior Advocate, appearing on behalf of the appellant in Civil Appeal No.594 of 2001, submits as under :

I. While pronouncing the judgment, the High Court Division travelled beyond the terms of the Rule declaring that all Fatwas illegal and as such, the impugned judgment should be set aside.

II. By the impugned judgment, the fundamental rights of the appellant guaranteed under articles 29, 40 and 41 of the Constitution have been taken away. The High Court Division directed another organ of the State to frame law and thereby violated the principle of separation of power and as such, the impugned judgment should be set aside. In support of his contention, he has relied upon the cases of ***Government of Bangladesh and another Vs. Sheikh***

Hasina and another, (2006) 60 DLR (AD)90 and ***Hefzur Rahman (Md) Vs. Shamsun Nahar Begum and another, (1999) 51 DLR (AD)172.*** Though the Fatwa in question is wrong the High Court Division can not examine its propriety under article 102 of the Constitution.

III. The principle expounded in the case of ***Bangladesh Legal Aid Services Trust and others Vs. Bangladesh and others, (2011) 63 DLR (HCD)01,*** that extra judicial punishments including in the name of execution of Fatwa are *ultra vires* the Constitution is correct exposition of law.

IV. In exercise of its suo motu power, the High Court Division can issue suo motu Rule and such power can not be curtailed in the interest of protection of fundamental rights of the citizens as well as for establishment of rule of law.

Mr. Mahbubey Alam, learned Attorney General, appearing on behalf of respondent Nos.1-3 in Civil Appeal No.593 of 2001 and respondent No.1 in Civil Appeal No.594 of 2001, submits as under:

I. By way of giving Fatwa a class of people has created havoc in the rural area and as a result, the poor and illiterate women are the worst sufferers. Unless the poor women-folk of the rural area are protected from the curse of Fatwa, the socio-economic development of the country is next to impossible.

II. Fatwa violates the fundamental rights of the freedom.

III. The High Court Division has power to issue suo motu Rule in exercise of its power under article 102 read with article 101 and oath of the Judges.

IV. Fatwa should not be given against prevailing laws and judgments of the Court and should not be pronounced affecting fundamental rights of the citizens.

V. Fatwa should not be given against State policy or any uncalled-for issue or matter.

Dr. Kamal Hossain, learned Senior Advocate, appearing on be half of respondent No.6 in Civil Appeal No.593 of 2001 and respondent No.2 in Civil Appeal No.594 of 2001, submits as under :

I. No one can assert or exercise any power to make a binding pronouncement on any legal issue or inflict any punishment since such power is expressly conferred only upon the Judiciary.

II. It has been conceded by the learned Senior Advocates of the appellants that opinions even by persons who are qualified and have knowledge with regard to religious issues are not authorized by the Constitution to make any pronouncement which are legally binding or which can authorize imposition of punishments.

III. The awarding of extra-judicial punishment is totally unconstitutional and violates not only the basic structure of the Constitution but also is repugnant to the fundamental rights of the persons to equality, equal treatment under the law, non-discrimination, life, liberty, freedom from cruel and degrading treatment and punishment and to freedom of religion as

guaranteed under articles 27, 28, 31, 32, 35 and 41 of the Constitution.

IV. In the case of **Bangladesh Legal Aid and Services Trust and others Vs. Bangladesh** (ibid) and others, the High Court Division has lucidly held that no extra-judicial punishment is permitted under the Constitution of Bangladesh.

V. The impugned judgment, if read as a whole, has clearly stated that pronouncement of opinion and enforcement thereof by any person not authorized by law or imposition of punishment by any person not authorized by law is unconstitutional.

Mr. T. H. Khan, learned amicus curiae, submits as under :

I. The Court should be confined to the facts of the case and then to decide other things.

II. The instant Fatwa was wrong but that does not mean that all Fatwas are wrong and execution pursuant to the Fatwa in question was also wrong. The impugned judgment is not a judgment at all, though the disputed Fatwa was wrong.

III. The High Court Division does not have the power to issue suo motu Rule under article 102 of the Constitution.

Dr. Zahir, another learned amicus curiae, submits as under :

I. The tradition, customs and usage have given power to this Court to issue suo motu Rule.

II. Suo motu Rule can be issued under articles 44, 101, 102, 108 and oath of a Judge under the Constitution.

III. The word 'Fatwa' does not appear in the holy Qur'an or in the Hadith. Surah Nessa Verse 26 or 176 does not speak of the word 'Fatwa' but of 'Ifta' or 'Istefta'. Those two verses do not authorize mankind to give Fatwa but only say that Allah has prescribed the rules.

Mr. M. I. Farooqi, learned amicus curiae, submits as under :

I. Laws which are covered by our legislations can not be the subject matter of Fatwa.

II. Abuse in the name of Fatwa even if an opinion should not be allowed to be carried out.

Mr. Mahmudul Islam, learned amicus curiae, submits as under :

I. There is no existence of Mufti today and as such no question arises of giving Fatwa.

II. Fatwa is violative of personal as well as fundamental rights of a citizen.

III. Even if it is an opinion, it has got damaging impact and it is destructive of one's family life in the context of village.

IV. It is an interference with the right to life, right to liberty and uncalled for Fatwa creates havoc in the society.

V. There is no scope for issuing a suo motu Rule under article 102 of the Constitution.

Mr. Hassan Ariff, learned amicus curiae, submits as under :

I. Fatwa is not a statutorily recognized power and it is detrimental to the life of a person.

II. Fatwa does not have the force of law and it is a private opinion.

III. The Maker of Fatwa is not holding any office of the State or affairs of the Republic and as such victimization in pursuance of Fatwa is a punishable offence.

IV. A Fatwa is not amenable to the writ jurisdiction of the High Court Division.

V. In order to prevent recurrence of Fatwa, the High Court Division can make directions in an appropriate public interest litigation case. The High Court Division does not have the power to issue suo motu Rule.

VI. If there is any specific law on the subject then no opinion can be given in the name of Fatwa because it will have an adverse impact on the society.

Mr. A. B. M. Nurul Islam, learned amicus curiae, submits as under :

I. Constitution is not the supreme law but it is only a guideline and the holy Qur'an is the supreme law of Bangladesh.

II. All religious books should be made part of curriculum of schools and colleges so that no body can abuse the religion.

III. Fatwa is an opinion and it is a fundamental right of every citizen to express his opinion.

IV. If any person gives wrong Fatwa, he may be punished under the prevailing law.

Dr. Rabeya Bhuiyan, learned amicus curiae, submits as under :

I. Fatwas are issued by half-educated village leaders particularly Imams of the Mosques, Teachers of Madrashas or self-proclaimed Pirs (saints) or the so-called religious expert having no authority or proper knowledge of religious law.

II. Fatwas creating disorder are not meant for public good or for the benefit of the people at large but are highly injurious to women. They are merely opinions and cannot be enforced under the law. The High Court Division has power to issue directions in order to stop such violation.

Dr. Rabeya Bhuiyan has also submitted a written argument exhaustively describing the sources of Fatwa and the Sariah law.

Mufti Md. Tufiatullah, learned amicus curiae, submits as under:

I. There can not be any contest between Fatwa and law.

II. The Mufti has no power to implement Fatwa as it is only an opinion.

III. If Fatwa is prohibited, Islam will be prohibited. Fatwa is applicable in all respects but the law is limited.

IV. If Fatwa is prohibited, it will be difficult for the Muslims to lead normal life in the country.

V. Anything said by the village arbitrators is not Fatwa and such Fatwa should not be prohibited.

VI. Mufti gives opinion and it is only the 'Kazi' who can execute it. Fatwa is not judicial pronouncement of dispute and as such it can not be stopped.

Mufti Md. Ruhul Amin, learned amicus curiae, submits as under :

I. Fatwa has to be given on the basis of the Qur'an, Hadith, Ijma and Kias and Fatwa can only be given in answer to a question.

II. A Mufti does not have the authority to adjudicate a dispute.

III. For a Muslim, Fatwa is necessary from his cradle to the grave and as such, Fatwa can not be declared unconstitutional.

Moulana Kafiluddin Sarker, learned amicus curiae, submits as under :

I. The origin of Fatwa is the holly Qur'an, Hadith etc.

II. Fatwa is a solution to a problem. If fatwa is prohibited, it will be a challenge to the holy Qur'an.

Mufti Mizanur Rahman Sayeed, learned amicus curiae, submits as under :

I. If Fatwa is prohibited, the provisions of the Qur'an will come to a standstill.

II. Fatwabazi should be stopped but not Fatwa.

III. No Trustee Board should be constituted as suggested by the other Muftis.

Dr. Mufti Abdullah Al-Maruf, learned amicus curiae, submits as under :

I. First Mufti is the 'Allah and Prophet Hajrat Mohammad' (peace be upon him) is the second Mufti. He also suggested that qualification should be settled as to who would be able to give Fatwas and 'Fatwa Board' be constituted for determining competent persons for giving Fatwa.

Mr. M. Amirul Islam, learned Senior Advocate, appearing as Intervener, submits as under :

I. The religious leaders cannot encroach upon the judicial system of the country and this has also been admitted by the Ulayma Kerams who appeared before this Division at its invitation.

II. The Ulayma Kerams also condemned the incidents of punishment imposed on relying on Fatwa at village salish.

III. By the so-called Fatwas, freedom of movement and choice was taken away.

IV. The High Court Division has the power to issue suo motu Rule. In support of his contention he relies upon "Trends and Issues of Bangladesh Constitution" at pages 167-171 by Justice Mustafa Kamal and Anwar Hossain's case popularly known as 8th amendment case.

Mrs. Tania Amir, learned Advocate, appearing as Intervener, supports the impugned judgment and submits that the appellant could not make out any

case for interference with the well-reasoned judgment delivered by the High Court Division.

Considering the importance of the matter, this Division was of the view that the opinion of five renowned Olayma Kerams of the country should be obtained on the following points:

(1) What is Fatwa?
(2) Status of Fatwa.
(3) The application of Fatwa in Bangladesh and its legality.
(4) The position of Fatwa vis-à-vis our law.

This Division was also of the view that Olayma Kerams would be able to express their considered opinion personally if they want to do so as is evident from the order dated 10.03.2011. Accordingly, the Director General, Islamic Foundation was directed to send the names of five renowned Olayma Kerams. The Director General Islamic Foundation sent the names of five renowned Olayma Kerams and also the names of twenty Alims who wanted to remain present at the hearing of the appeal.

We have already considered the submissions of the Olayma Kerams made in the foregoing pages.

We have considered the submissions of the learned Senior Advocates for the appellants of both

the appeals, the amici curiae, the interveners, the Olayma Kerams, the impugned judgment and the materials on record.

To begin with, it is pertinent to mention that both the appeals were allowed in part on 12.05.2011 by a short order quoted below :

(i) Both the appeals are allowed in part by majority without any order as to costs.

(ii) Fatwa on religious matters only may be given by the properly educated persons which may be accepted only voluntarily but any coercion or undue influence in any form is forbidden.

(iii) But no person can pronounce fatwa which violates or affects the right or reputation or dignity of any person which is covered by the law of the land.

(iv) No punishment, including physical violence and/or mental torture in any form, can be imposed or inflicted on anybody in pursuance of fatwa.

(v) The declaration of the High Court Division that the impugned fatwa is void and authorized, is maintained.

The Judgment in detail would follow.

While granting leave, their Lordships summarized the submissions of the learned Counsel of both the leave petitioners from which both the appeals have arisen as under :

> "In the aforesaid submissions good many substantial points of law, both Constitutional as well as Sub-constitutional, have been raised. The learned Counsel in their submissions pointedly have raised the question as to whether there is scope for issuing suo moto Rule by the High Court Division in its writ jurisdiction. The learned Counsel have also vigorously submitted that some of the decisions of the High Court Division adverted to in the judgment sought to be appealed against are in conflict with the guaranteed right of freedom of thought and freedom of religion. It has also been submitted by the learned Counsel that the learned Judges of the High Court Division have exceeded their jurisdiction in making recommendation in respect of matters, which are contrary to the basic principle of separation of power as enshrines in the Constitution."

The dispute arose when a news item was published in "The Daily Banglabazar Patrika" on December 2, 2000 that Shahida, wife of Saiful, was forcibly given in marriage to her paternal cousin Samsul based on a so-called Fatwa by Haji Azizul Huq. According to Haji Azizul Huq, the marriage of Shahida was dissolved pursuant to an incident of about one year back while her husband, out of anger, uttered the word '*talaq*' but in spite of that, Shahida and Saiful continued their marriage. Pursuant to that Fatwa, Shahida had to marry her paternal cousin Samsul in order to remarry Saiful.

Let us now examine the propriety of the disputed Fatwa.

In this connection, it is pertinent to quote section 7 of the Muslim Family Laws Ordinance,1961 as under :

"7. 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 purposes of bringing about 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 re-marrying the same husband, without an intervening marriage with a third

person, unless such termination is for the third time so effective.

Facts of the case reveal that after pronouncement of the so-called talaq, no notice in writing was issued either to the Chairman of the Union Parishad or to Shahida, which is a requirement of sub-section (1) of section 7. Sub-section (3) of section 7 provides that a *talaq* shall not be effective until expiration of 90 days from the day on which notice under sub-section (1) is delivered to the Chairman. Sub-section (6) of section 7 provides that a wife whose marriage has been terminated by *talaq* effective under the section will not be debarred from re-marrying the same husband without an intervening marriage with a third person unless such termination is for the third time so effective.

Therefore, it appears that the *talaq* pronounced by Saiful was not valid since it contravened sub-sections (1) and (3) of section 7 of the Muslim Family Laws Ordinance,1961.

Even if the *talaq* was valid, Shahida was not required to marry her paternal cousin Samsul pursuant to the Fatwa given by Haji Azizul Huq. Therefore, it appears that the disputed Fatwa also contravenes sub-

section (6) of section 7 of the Muslim Family Laws Ordinance,1961.

The learned Senior Advocates, appearing on behalf of the appellants of both the appeals, the amici curiae, the interveners and the Olayma Kerams, have admitted that the disputed Fatwa was wrong since it is in direct conflict with section 7 of the Muslim Family Laws Ordinance,1961.

A Fatwa in the Islamic faith is a religious opinion concerning Islamic Law issued by an Islamic scholar interpreting particular legal aspect in a given situation. The word itself is derived from the root *fata*, or *fatah*, which means clarification, explanation, youth or newness. In Islamic jurisprudence, a Fatwa is a religious opinion usually on an important point of law given when an individual fails to get any solution to his problem from the available *shari'a* law, based on the *Qur'an, Hadith, Ijma* and *Qiyas*. The person who can give fatwa is called *Mufti* (a highly qualified jurist or expert in religious law). Fatwas in past were most frequently issued in response to questions about living every day life in accordance with religious law, such as

proper diet, gender relations, or the use of new technologies.

Let us now consider the development of Shari'ah Law.

The *Qur'an* is the first among the two primary sources of Shari'a. The *Qur'an* (the revealed Words of Allah) and the *Sunnah*, or *Hadith*, meaning the practices and sayings of the Prophet, are considered as the core of Islam. In verse 176 of Sura Nisa, Muhammad *(Sm)* receives the following instruction: "When they ask you for a pronouncement (*wa-yastafunaka*). Say: 'God pronounces to you *(yuftikum)* concerning al-*kalala*.....

After the *Qur'an* it was the *Sunnah* which evolved a pattern of question and response between the Prophet (SM) and the Companions. It is reported that the Prophet (SM) was once standing in the pulpit of the mosque in Medina when a man asked him, "What is your opinion regarding the night prayer?" He replied, "Two (*rak'as*, or inclinations) at a time; and when one of you knows that the dawn (is near), he should add one (inclination), thereby causing his prayer to have an odd number of inclinations" (al-Bukhari 1862-1898). Thee is also a *Hadith* that the

Prophet (SM) sent Abu Musa *al Ashari* to Yemen during his life-time, and he told him to judge on the basis of the *Qur'an,* and that if he did not find solution in the *Qur'an,* he should make use of the traditions of the Prophet, and that if he did not find the solution in the tradition of the Prophet, he should use his own judgment. Therefore, in a sense, the Prophet (SM) was the first and prime Mufti for the Muslims.

However, the ofat (death) of the Prophet (SM) never stopped the legal consultation and that later evolved through the reasoning by the Companions and their followers. As a result of that, *Ijma* and *Qiyas* started developing which were also in the form of opinion based on the *Qur'an* and *sunnah*. *Shari'at* means the path to be followed and, as a technical term, means the canon law of Islam. So it is not law in the technical sense; it is a doctrine of obligations and duties. The evolution of Islamic law is not through a process of continuous revelations but through a rational method of interpretation.

To meet the exigencies of life, the Islamic legal scholars applied the principles contained in the *Qur'an* and the Sunnah through two main methods:

Ijma, and *Qiyas* (juristic interpretation), the third and fourth sources of Islamic law. Four Schools in Sunni law, founded by four great Imams are important: the Hanafi, the Maliki, the Shafei and the Hambali. Although there was similarity among them in broad precepts, each of these schools, compiled its own legal doctrine and interpretations. The Hanafi School of Thought was founded by Imam Abu Hanifa and has the largest group of followers. The doctrine is followed in Bangladesh, India and Pakistan.

Ijma means a consensus of opinion or agreement among highly qualified legal scholars of any generation on any matter (not contrary to the *Qur'an* or the *Hadith).* Since Islam does not permit the possibility of any further revelation, *Ijma* was a feature of all schools of Sunni law for legislation. *Qiyas* means reasoning by analogy and is basically a rule of interpretation. *Qiyas* means analogy or parity of reasoning.

The use of individual reasoning, one's own effort or exertion to find the right path in general is called *Ijtehad* or *Ijtehad al-ray*. *Ijtehad* denotes the exercise of one's reason to deduce a rule of Sharia law. Where a principle was silent on an

individual case, an independent opinion or reasoning had to be made and this is Ijtehad. Ijma was a feature of all schools of Sunni law. The differences among them were the results of the legitimate exercise of *Ijtehad* (independent reasoning) by the jurists in the absence of any clear guidance from the Shari'a. In developing Islamic law by consensus, the doctrine of *Ijtehad* also was applied.

Though *Ijtehad* has been described as a most important source after the *Qur'an* and the *Sunnah*, it cannot be strictly said to be a source of law. Rather, it is a continuous process of development of law. As the divine revelation and the Prophet's (SM) tradition ended with the demise of the Prophet (SM), *Ijtehad* is a method by which the *Mujtahid* (the juristic person who exercises *Ijtehad*) exerts himself to find the right meaning of the *Qur'an* and the *Sunnah*. In fact, *Ijtehad* also supports the view that the basis of Islamic law is found in human reasoning.

The differences among the different schools of Islamic thought were due to the approaches and interpretations by the different Islamic scholars on any particular issue, in the absence of any clear guidance from the Qur'an and the Sunnah. The two

other subsidiary *sources of Islamic law, Istihasan and Istislah, are examples of particular forms of ray or individual opinion*. When the early jurists exercised independent reasoning because of the appropriateness of the decision, a concept of equity (Istihasan) was followed. The term *Istislah* means pubic interest, related to the word salish meaning the general interest, used basically in the realm of contract and commercial matters.

Ijtehad played an important role in shaping and developing Muslim law until the end of the 10th century. Legal scholars could examine the *Qur'an* and make reasonable interpretations. It is said that from that period, the doctrine of independent reasoning was precluded. *Shari'a* law became limited to the early interpretation by the great scholars of the classical period, the first few centuries of Islam. People could only follow what had been laid down earlier by *Ijma* and this led to the development of the doctrine of *Taqlid* (following). Traditional jurists/muftis believe that the principles of law interpreted and developed through *Ijtehad* by the classical schools of thought were sacred and immutable, requiring no need for new or further

interpretation. Such a decision virtually closed the door on *Ijtehad*, as well as further progress, and made Islamic law stagnant and oppressive. However, there are a number of great scholars who opined that the doors of *Ijtehad* cannot be closed. Great scholars of the modern period are in favour of exercising *Ijtehad*.

Islamic law has taken different forms at different times, and the particular version of *Shari'a* espoused an Islamic State which is typically subject to the strategic political and economic considerations of that State's leaders. Many States found that Muslim personal law is not by its nature static. It can develop, in case of undue hardship, genuine necessity, or pressing need, through reasonable interpretation known as *Ijtehad*.

To meet the modern challengers of life and for the welfare of the society, modern scholars agree that the application of Ijtehad (reasoning/opinion) cannot and should not be closed. Ijtehad was the most important element in the development of Islamic law during the classical period, and the major portion of Fiqh (Islamic law) consists of the concurrent opinion of the classical scholars, or jurists on legal

issues. The laws regarding Ijtehad and Ijma contemplate the possibility of there being jurists in every age. The *Qur'anic text* is the authority for juristic deductions.

Muslim personal laws *(Shari'a)* have gone through beneficial reforms from time to time through *Ijtehad* (reasonable interpretation) or by state actions. During the British period, the offence of adultery was made punishable with imprisonment of either description for a term which may extend to 5 years or with fine or with both (Indian Penal Code,1860) which has been adopted in Bangladesh.

Public interest/social welfare is also regarded in *Shari'a* as a basis of law. The jurists of different schools have used different Arabic terms to describe it. The Hanafis call it *Istihsan* meaning equitable preference to find a just solution. Imam Malik calls it *Al-Masalih Al Mursalah* that is the public benefit or public welfare. Imam Ahmad bin Hanbal calls it *Istislah* seeking the best solution for the general interest.

The supporters of Istihasan/public interest concept quote in their support the *Qur'anic* verse (al-Hashr,59:2) which provides: "Consider O you who

have vision." It is argued that this verse makes *Ijthad* the obligation of everyone who is competent for it and it makes no distinction whether the *Mujtahid* is a Companion of the Prophet (SM) or anyone else. What is obligatory is *Ijtihad* itself, not adhering to the *Ijtihad* of anyone in particular. This verse also indicates that the *Mujtahid* must rely directly on the sources and not imitate anyone, including the Companion. *Istihsan* in Islamic law and equity in Western Law are both inspired by fairness and conscience and both authorize departure from a rule of positive law when its enforcement leads to unfair/oppressive results. The main difference between them is, however, to be sought in the overall reliance of the equity on the concept of natural law, and of *Istihsan* on the values and principles of the *Shariah.*

Fatwa as opinion on Islamic tenets has never been treated as a source of Islamic law and therefore cannot be treated as part of Shariat. 'Fatwa' is a collection or digest of judicial decisions. Best known is the *Fatwa Alamgiri*, compiled by the order of *Aurangazeb*. Speaking about the sources of Islamic Law, Syed Ameer Ali stated, "The legal works which

have for the last eight centuries been regarded as binding authorities among the Hanafis are divided into two groups, viz, (a) Text-books, and (b)Digests of Decisions which pass under the name of Fatwa." Fatwas are essentially the decisions rendered by the *Quazis*. It also includes the opinion of muftis given to the Quazis in the process of adjudication. Thus there were two types of fatwas, one in the form of adjudication of the Quazis which can be assimilated with precedents and another in the form of opinions of the muftis (who were the officers of the courts) rendered to help Quazis adjudicate disputes.

With the passage of time, the role of the Quazis was taken over by the civil judges and assistance of muftis fell into disuse. Later, the Code of Civil Procedure and Code of Criminal Procedure had done away with the institution of muftis. During the British regime, Islamic criminal jurisprudence became inapplicable and was replaced by the Penal Code and the Code of Criminal Procedure. Later, an Act was passed for validation of Muslim Waqfs and the Muslim Personal Law (Shariat) Application Act,1937 made Muslim Personal Law in respect of specified matters

applicable in case of Muslims. Fatwa not being a source of Muslim law was no part of shariat.

Let us consider whether the laws of Bangladesh recognize any authority or person to give Fatwa.

There is no authority established under law for the issuance of fatwas by any person in Bangladesh

Unlike some other countries, where there are state recognized advisory boards comprising 'Muftis' to issue fatwas regarding various legal issues relating to Muslim Law, in Bangladesh the Government does not delegate any of its legislative, executive or judicial power to any such bodies.

In Bangladesh, we do not have any State regulated religious institution or authority which is the case in certain Islamic States to determine the eligibility of a Mufti or any such council for issuing Fatwas in either its legal or theological aspects.

For example, the Islamic Foundation established by an Act namely, the Islamic Foundation Act,1975 by integrating Baitul Mukarram Society and Islamic Academy is an autonomous body under the Ministry of Religious Affairs of Bangladesh, working to "disseminate values and ideals of Islam". Its

principal functions are limited to establishing, managing and “assisting mosques and Islamic centres, academies and institutes, undertaking research on the contributions of Islam to culture, science and civilization, propagating the basic Islamic ideals of universal brotherhood, tolerance and justice and promoting studies and research in Islamic history, philosophy, law and jurisprudence as contained in section 11 of the Islamic Foundation Act, 1975. Only the Government has the power to make rules under section 18 and the Board of the Islamic Foundation can make regulations only with the prior approval of the Government.

There is no such post as ‘Mufti’ or ‘Grand Mufti’ in the Islamic Foundation and the only posts are of Chairman, Secretary, Director General.

In a number of states where Islamic/Sharia law is applicable, various academic institutions are set up to provide education to qualify persons for posts such as ‘Mufti’ ‘Grand Imam’ etc. with a view to applying Islamic Sharia Law.

The Madrasha Education Board is headed by the Chairman as the executive head who is appointed by the President of Bangladesh under section 4 (a) of

the Madrasha Education Ordinance,1978. It is to be noted that under section 29(1)(a)of the Ordinance, there is an express restriction imposed upon an employee of an affiliated Madrasha where 'he shall not take part in, or subscribe in aid of, or assist in any way, any political movement, or any activities tending directly or indirectly to excite disaffection against the Government as by law established, or to promote feelings of hatred or enmity between different classes of citizens of Bangladesh, or to disturb the public peace.'

Under section 2 (o) of the Madrasha Education Ordinance,1978 "madrasha education" means education pertaining to Ibtedayee standard, Dakhil standard, Alim standard which includes general academic subjects along with the 'reading of the holy Qur'an' and 'Ialamiat, that is, Tafsir, Hadith, Fiqh, (Notably Jurisprudence' started with a small letter alphabet whereas the other words started with Capital letter alphabet) Kamal, Usul, M'aqulat, Faraid and relevant subjects.' There are no such Government regulated specific guidelines as how to acquire knowledge regarding Islamic Jurisprudence and its application under the Ordinance. Under section 18 of

the Ordinance, the Board is empowered to appoint various Committees. However, there is neither any such Committee to scrutinize who can be a Mufti to pronounce a Fatwa nor a monitoring body to examine persons who are giving Fatwas.

Section 38(1) of the Ordinance provides that subject to prior approval from the Government the Board may make regulations 'for the purpose of carrying into effect the provisions of this Ordinance.'

The issuance of Fatwa involving a finding of an 'offence against shari'at' and resulting in imposition and execution of extra-judicial penalties by person is not in accordance with law.

The kind of offences for which women have been subjected to lashing and beating are 'talking to a man', 'pre-marital relations,' 'having a child outside the wedlock.' None of these is an offence under the prevailing Bangladesh laws.

While in some cases, women have been found 'guilty' of adultery and punished, under Bangladesh law, adultery is an offence under section 497 of the Penal Code, but it does not envisage that a woman may be an accused or subject to any penalty.

The trial of any offence and the imposition of penalties may only be given by established courts and tribunal. To the extent that traditional dispute resolution or alternative dispute resolution takes place, it is required to be carried out in accordance with law, and thus cannot involve the imposition of penalties that are not recognized by Bangladesh laws.

Under Bangladesh law, only the Supreme Court, courts established under the Code of Criminal Procedure and those constituted under special laws can adjudicate on offences.

Further, various courts and persons are empowered to undertake alternative dispute resolution, rather than adjudication, for example through arbitration or conciliation. Under the Civil Procedure Code the parties may in a mediation proceeding select as mediator a person who is not a judge and under the Family Courts Ordinance,1985 the Court may arrange a pre-trial hearing. The Muslim Family Laws Ordinance,1961 allows setting up of an Arbitration Council, the Chairman of the Council being the Chairman of the respective local government body. Further, under the Local Government (Union Parishad) Act,2009 the Parishad is empowered to deal with resolution of family disputes. In addition, traditional dispute resolutions through salish for

resolution, *inter alia,* of family disputes take place, but imposition of penalties, such as caning, whipping etc. or fine at such salish by a person bereft of any legal authority is illegal.

Section 5 of the Code of Criminal Procedure,1998 provides that all offences under the Penal Code,1860 shall be investigated, inquired into, tried and otherwise dealt with under the provisions laid down in the Code and the offences under other laws shall be dealt with in the same manner, but subject to any enactment regulating the same.

Section 6 of the Code of Criminal Procedure lays down that except for the Supreme Court and those established under the special laws, there shall be two classes of criminal Courts in Bangladesh, namely, the Courts of Sessions and the Courts of Magistrates.

Section 28 specifies that the offences under the Penal Code will be tried by the

i) the High Court Division
ii) The Court of Sessions
iii) By any other Court as specified in Second Schedule.

Section 29 of the Code provides that any offence under any other law shall be tried by a Court

mentioned in such law and where no Court is mentioned, it may be tried by any Court empowered under Schedule 8 of the Code.

The Code of Civil Procedure,1908, sections 89A and 89B (inserted in 2003): Section 89A(2) provides that if all the contesting parties agree, they shall appoint a mediator, who need not be a judge, to mediate their dispute. Mediation is defined in this section as “flexible, informal, non-binding, confidential, non-adversarial and consensual dispute resolution process in which the mediator shall facilitate compromise of disputes in the suit between the parties without directing or dictating the terms of such compromise.”

The Family Courts Ordinance,1985 provides for the settlement of disputes through conciliation or compromise after filing of a written statement in a pre-trial hearing as envisaged in section 10. The Court may initiate a pre-trial hearing to seek to settle the disputes relating to dissolution of marriage, maintenance and dower, restitution of conjugal rights as well as guardianship and custody of children.

The Muslim Family Laws Ordinance,1961 empowers local government bodies, e.g. the Paurashava, City Corporation or Union Parishad, as appropriate to form an Arbitration Council for reconciliation between the parties wishing to dissolve their marital tie through Talaq and to deal with polygamy as in sections 6 and 7.

The Local Government (Union Parishad) Act,2009, Act No.61 of 2009 provides for establishment of one Permanent Committee relating to matters enumerated in section 45, including resolution of family disputes (sub-clause 'ttha' of clause 1). The Union Parishad is further empowered to impose fines relating to crimes as listed in the Fifth Schedule to the Act, but the 'acts' for which violence is instigated in the name of 'Fatwa' are not mentioned in the list as in section 89(2)of the Act

There is no scope for the application of any version of 'shariat' to the incident in question, as there is specific statutory provision in this regard.

In Bangladesh, the Muslim Personal Law (Shariat) Application Act,1937 provides that 'shariat' law may only be applied to certain specified issues as

envisaged in section 2, which do not include criminal law.

Further, under the Muslim Family Laws Ordinance,1961, only the Government has the power to make rules to carry into effect the purposes of the Ordinance as contained in section 4 read with section 11.

Similarly, the Muslim Marriages and Divorces (Registration) Act,1974 also empowers only the Government to make such rules as enumerated in section 14.

Further, under section 3 of the Act,1974 “Notwithstanding anything contained in any law, custom or usage, every marriage solemnized under Muslim law shall be registered in accordance with the provisions of this Act.” According to section 4 of the Act,1974, a Nikah Registrar shall register the marriages. If a marriage is solemnized by a person other than the Nikah Registrar, in such a case the bridegroom of such marriage shall report it to the concerned Nikah Registrar within thirty days from the date of such solemnization under section 5(2) of the Act,1974. Under section 5 (4) of the Act,1974, “A person who contravenes any provision of this section

commits an offence and he shall be liable to be punished with simple imprisonment for a term which may extend to two years or with fine which may extend to three thousand taka, or with both."

Section 6 of the Act,1974 describes the procedure for registration of divorce in the same manner as in case of registration of marriage between Muslim couples. A Nikah Registrar may register a divorce under Muslim law. An application for registration of a divorce shall be made orally by the individual. In case of a parda-nashin woman the application may be made by her duly authorized lawyer.

Thus, the procedures relating to Muslim marriages and divorces are specifically prescribed in the aforesaid Act,1974. There is no such provision in the Act,1974 where a private person such as Mufti, Moulana or Imam is given power to administer/execute marriages or divorces on behalf of the concerned authority as per the rules prescribed.

Section 11A of the Muslim Family Laws Ordinance provides that offences under this Ordinance shall be tried by a Court within whose local jurisdiction the offence was committed; or where the complainant or

the accused resides. There is also an "Arbitration Council" as defined under section 2 of the Muslim Family Laws Ordinance consisting of the Chairman of the Union Parishad and a representative of each of the parties to a matter dealt with under this Ordinance. Thus, both the Act and the Muslim Family Laws Ordinance unambiguously confirm that only the Government has the rule-making power and that the places of trial are the ordinary courts regarding matrimonial and all other issues pertaining to Muslim Personal Law.

Provisions for prior consultation with Muftis, seeking Fatwas in case of any queries regarding Muslim Personal Law or setting up any quasi-judicial bodies for such issues are not in existence anywhere in the Act or the Ordinance.

Execution of Fatwa is bereft of any legal sanction. Article 31 of the Constitution states as under :

> "31. To enjoy the protection of the law, and to be treated in accordance with law, and only in accordance with law, is the inalienable right of every citizen, whether he may be, and of every other person for the time being within Bangladesh, and in particular no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law."

This article makes it clear that no action detrimental to life, liberty, body, reputation or property of any person shall be taken except in accordance with law. The Fatwa impugned in the Rule amply proved that Shahida was not treated in accordance with law and that she was compelled to marry Shamsul in violation of article 31 of the Constitution and also section 7(6) of the Muslim Family Laws Ordinance,1961.

Article 27 of the Constitution provides that all citizens are equal before the law and are entitled to equal protection of law. Sub-articles (1) and (2) of Article 28 of the Constitution state that the State shall not discriminate against any citizen on grounds only of religion, race, caste, sex or place of birth and that woman shall have equal rights with man in all spheres of the State and or public life. According to sub-article (3) of Article 28 of the Constitution, no citizen shall, on grounds only of religion, race, caste, sex or place of birth be subjected to any disability, liability, restriction or condition with regard to access to any place of public entertainment or resort or admission to any

educational institution. According to article 35(1) of the Constitution, no person shall be convicted of any offence except for violation of a law in force at the time of commission of the act, charged as an offence, nor shall he be subjected to any penalty greater than, or different from, that which might have been inflicted under law in force at the time of commission of the offence. Sub-article (5) of article 35 of the Constitution provides that no person shall be subjected to torture or cruelty, inhuman or degrading punishment or treatment.

The Fatwa impugned in the suo motu Rule violates articles 27, 28 and 35 of the Constitution as it is discriminatory against Shahida and she was denied recourse to law or legal protection from degrading treatment inflicted on her.

What is important to note here is that according to the law of the land, a man is liable to punishment for committing adultery but for committing adultery the woman involved cannot be prosecuted as an abettor.

We have been observing that over a period of years women and men are subjected to lashing and beating across the country in execution of the so-

called Fatwa. These acts attract sections 323 to 326 of the Penal Code according to the nature of injuries. When a woman like Shahida is compelled to perform 'Hillah' marriage; it is an offence as it is contrary to the existing law of the country. The High Court Division has rightly directed the concerned authority to initiate proceeding against the offender under sections 494/508 and 509 of the Penal Code read with section 7 of the Muslim Family Laws Ordinance,1961. The persons handing down such verdicts/punishments are liable to be punished under the relevant provision of the Penal Code and other laws of the land and those who instigated or supported to give Fatwa at the place of occurrence are also liable for abetment of the offence.

Failure of the State to take action to prevent the incidents in the name of Fatwa involves a breach of its obligation under the Constitution and existing law of the land.

Professor Md. Khalid Mashud, Editor of Legal Islamic Interpretation, Muftis and their Fatwas (edited by Md. Khalid Mashud, Brinkly Messick and David S. Powers, Cambridge, Mass: Harvard University Press, 1961) states as under :

> "A Fatwa is an opinion; only an expert can give it. A Fatwa even if by an expert is not a decree; it is not binding on the Court or the State. A Mufti had no authority to punish or impose punishment can not be imposed privately without lawful authority. The State can ban Fatwa that leads to violence and 'fitna'."

Mr. Abdur Razzaq, learned Senior Advocate, cited a book, namely, Fatwas of European Council for Fatwa and Research, in which at page-60, it has been stated as under :

Resolutions on Auto Transplant

The Council of the Islamic Fiqh Academy of the Muslim World League, Makkah, at its eighth working session (1405 AH/1985) resolved that it is permissible within the Sharia'ah to take a part of the human body and transplant it into the same body like removing the skin or bone in order to graft it to some other part of that same body.

The Council of the Islamic Fiqh Academy of the Organization of Islamic Conference, Jeddah, Saudi Arabia, at its fourth working session (1408 AH/1988) resolved that from the Shari'ah point of view an organ may be transplanted from one part of the body to another part of that some body, provided it could be ascertained that the benefits accruing from this procedure would outweigh the harmful effects of it. Furthermore, it resolved that it is also permissible for such a procedure to be undertaken for the purpose of replacing a lost organ, or reshaping it, or restoring its function, or correcting a defect, or removing a malformation which was the source of mental anguish or physical pain.

The Islamic Fiqh academy of India, at its first Islamic Jurisprudence Seminar (Delhi, March 1989), resolved that it is valid to replace a part of a person's body with another part from the same person on the ground of necessity.

Resolutions on Homotransplant/Allotransplant

The Council of the Islamic Fiqh Academy of the Muslim World League, Makkah, at its eighth working session (1405 AH/1985) resolved that it is permissible within the Shari'ah to remove the organ from one person and transplant it into another person's body in order to save the life of that person or to assist in stabilizing the normal functioning of the basic organs of that person. Likewise, the Academy pointed out that such a procedure does in no way violate the dignity of the person from whose body the organ had been removed. Hence, the act of donating one's organ is to be viewed as a permissible and praiseworthy act as long as the following conditions are met :

ii. That the donor's life is not harmed in any way;

iii. That the donor voluntarily donates his/her organ without any form of coercion.

iv. That the procedure is the only medical means available to alleviate the plight of the patient;

v. That the success rate of the procedures for removing and transplanting the organ is relatively high.

The Islamic Fiqh Academy of India, at its first Fiqh (Islamic Jurisprudence) Seminar (Delhi, March 1989), resolved that transplantation of a human organ is permissible in a desperate and unavoidable situation wherein the patient's organ has stopped functioning and there is present danger that he/she would lose

his/her life if the organ is not replaced. Likewise, it is also permissible for a healthy person, in the light of the opinion of medical experts, to donate one of his/her kidneys to an ailing relative. Insofar as corneal transplant is concerned, the Council of the Islamic Fiqh Academy of the Organization of Islamic Conference, Jeddah, Saudi Arabia, at its fourth working session (1408 AH/1988) resolved that from the Shari'ah point of view, such a procedure is permissible.

Resolution on Heterotransplant

The Council of the Islamic Fiqh Academy of the Muslim World League, Makkah, Saudi Arabia, at its working session (1405 AH/1985) resolved that it is permissible within the Shari'ah to transplant the organ of an animal which has been slaughtered according to Islamic rites and/or that of other animals out of necessity. This resolution on heterotransplants was also ratified by the Islamic Fiqh Academy of India, at its first Islamic Jurisprudence Seminar (Delhi, March 1989).

From the above resolutions, it appears that there is consensus among the different Islamic judicial bodies that a Muslim, while living, may donate one of his organs, but not a vital one such as the heart. Equally, a Muslim may become the recipient of human or animal organs. This brings us to the question as to whether it would be permissible for a Muslim to make a will, while still alive, stipulating his/her consent to donate his/her organ after death; or alternatively who would have the jurisdiction to assent to the donation of the dead person's organ in the event that no such clause has been stipulated in the deceased's will.

Mr. Abdur Razzaq has also referred to a Fatwa of the Council on American-Islamic Relations (CAIR) in which it has been held as under :

> In the light of the teachings of the Qur'an and Sunnah we clearly and strongly state :
>
> 1. All acts of terrorism targeting civilians are haram (forbidden) in Islam.
> 2. It is haram for a Muslim to cooperate with any individual or group that is involved in any act of terrorism or violence.
> 3. It is the civic and religious duty of Muslims to cooperate with law enforcement authorities to protect the lives of all civilians.
>
> We issue this Fatwa following the guidance of our scripture, the Qur'an, and the teachings of our Prophet Muhammad-peace be upon him. We urge all people to resolve all conflicts in just and peaceful manners.

In order to perform religious rituals, a Muslim has to consult with a religious leader well-versed in Shari'ah law. In this connection, it is pertinent to give such an example where Fatwa is necessary. Muslims are expected to pray five times everyday at specific time during the day. A person who is going to be on a 12-hour-flight may not be able to perform his prayer on time. So he might ask a Muslim Scholar for a Fatwa on what is the appropriate thing to do or he might look up the answer in a book. The Scholar

might advise him to perform his prayers to the best of his ability on the plane or to delay his prayers till landing of the plane.

From the examples cited above, it appears that in order to perform rituals and other things, Fatwa may be necessary apart from legal matters. Fatwa as opinion on Islamic tenets has never been treated as a source of Islamic law and therefore, cannot be treated as part of Shariat, but Fatwa may be given with reference to Shariat. The newspapers have frequently reported about violation of human rights and perpetration of criminal offences in the name of Fatwa which invariably infringe on the rights of the citizens enshrined in Articles 31 and 32 of the Constitution and law enforcing agencies have been unable to check the evil effects of Fatwa. Even when a Fatwa does not impose a punishment, the person against whom Fatwa is directed suffers ignominy and is looked down upon in the society.

There are some people who in the name of Fatwa impose obligations and tyrannize poor people. It has been argued that if the blanket ban of Fatwa is upheld as given in the impugned judgment, the right of freedom of expression and giving opinion will be

taken away, but such right has been enshrined in the Constitution. Freedom of expression is subject to some responsibilities which include not to infringe the right of another individual. There cannot be any freedom of expression with complete absence of restraint.

All the learned Senior Advocates of the appellants, the Olayma Kerams and the amici curiae, have submitted in unequivocal terms that there is no scope for giving Fatwa contradicting the existing laws of the country and imposing punishment and carrying out that punishment is not at all permissible.

Mr. Abdur Razzaq, learned Senior Advocate, appearing on behalf of the appellant in Civil Appeal No.594 of 2001, in his written argument as well has admitted that there is no scope for imposition of extra-judicial punishment in the name of Fatwa. In this connection, he supported the decision in the case of ***Bangladesh Legal Aid and Services Trust and others vs. Bangladesh and others, (2011)63 DLR 01*** where it has been held that imposition of extra-judicial punishment including those in the name of execution of Fatwa is declared to be without lawful

authority having no legal effect with a few directions of which direction No.I is as under :

> "The person responsible for imposition of extra-judicial punishment and the abettors' shall be held responsible under the relevant sections of the Penal Code and other laws applicable in this regard."

Therefore, we are of the opinion that Fatwa can not be given contradicting or against the existing laws of our country; Fatwa on religious matters only may be given by the properly educated persons which may be accepted only voluntarily but any coercion or undue influence in any form is forbidden; but no person can pronounce Fatwa which violates or affects the rights or reputation or dignity of any person which is covered by the law of the land; no punishment, including physical violence and/or mental torture in any form, can be imposed or inflicted on anybody in pursuance of fatwa; the declaration of the High Court Division that the impugned Fatwa is void and unauthorized, is maintained.

We do not like to create any special class to give Fatwa which may be given by any person versed in Shariat. It has been stated before that educational curriculum of Bangladesh does not recognize Mufti, though the word 'Mufti' is familiar in the sub-continent from time immemorial. In addition, by

creating a class such as Mufti, it would be difficult to restrict issuance of Fatwa by the Muftis only in the rural area. Fatwa may be given strictly keeping in mind the restrictions imposed by this judgment. If any Fatwa is given violating the restrictions, it would amount to contempt of Court and if any person is found indulging in such violation will be punished accordingly.

Mr. Abdur Razzaq, learned Senior Advocate, appearing on behalf of the appellant in Civil Appeal No.594 of 2001, submits that the High Court Division travelled beyond the scope of the Rule and declared that issuance of all Fatwas to be without lawful authority. In support of his contention, he relies upon the case of ***Hefzur Rahman (Md) Vs. Shamsun Nahar Begum and another (1999)51 DLR (AD)172.***

In the cited case, this Division held that a party cannot be granted relief which is not claimed and when the other party had no opportunity to meet such claim and as such resolved that to that extent the impugned decision of the High Court Division must have been held to have been made without jurisdiction.

In the instant case, it appears that the suo motu Rule was issued upon the Deputy Commissioner to show cause as to why he should not be directed to do which he is required by law to do concerning the said incident. In the Rule issuing order, the High Court Division also took notice of the news item published in "The Daily Bangla Bazar Patrika" " ˚ ! "

! #"! !$ % & '(!#)#' ".

Though the word Fatwa, was not specifically mentioned in the Rule issuing order, the bone of contention was that of Fatwa. While delivering the judgment, the High Court Division declared issuance of all Fatwas to be without lawful authority. The High Court Division should have confined itself to the issuance of instant Fatwa and such Fatwas which contradict the existing law of the country or infringe the fundamental right of somebody should be without lawful authority. The High Court Division was not, however, justified in imposing a blanket ban on all sorts of Fatwa. Therefore, it could be said that the High Court Division has exceeded its jurisdiction to some extent.

Leave was also granted to consider the submission of the learned Counsel for the appellants

that the learned Judges of the High Court Division exceeded their jurisdiction in making the recommendations in respect of the matter which are contrary to the basic principle of separation of power as enshrined in the Constitution.

The learned Judges of the High Court Division made recommendations about introduction of study of Muslim Family Laws Ordinance in all schools and Madrashas and the 'Khutba' in all Mosques must be directed to discuss the Ordinance in their Friday sermons. As a long measure, the High Court Division recommended a 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 Court also observed that the State must define and enforce public morality and that it must educate society.

The recommendation is a pious wish of the learned Judges of the High Court Division; it is up to the Legislature to bring about necessary enactment in this regard. This pious wish cannot be regarded as an encroachment upon the domain of the Legislature. The Legislature is always at liberty to do what it thinks fit according to its wisdom. The Supreme Court

on many occasions has made recommendations for amendment of certain laws. In the case of **Khandoker Delwar Hossain, Secretary, B.N.P. and others vs. Bangladesh Italian Marble Works Ltd., Dhaka and others, (popularly known as the 5th Amendment Judgment) reported in (2010) BLD, Special Edition-2,** this Division observed "It is our earnest hope that Articles 115 and 116 of the Constitution will be restored to their original position by the parliament as soon as possible."

Leave was granted to consider whether the High Court Division can issue a suo motu Rule. In order to address the issue, it is pertinent to quote article 102 of the Constitution as under :

> "102.(1) The High Court Division on the application of any person aggrieved, may give such directions or orders to any person or authority, including any person performing any function in connection with the affairs of the Republic, as may be appropriate for the enforcement of any of the fundamental rights conferred by Part III of this Constitution.
>
> (2)The High Court Division may, if satisfied that no other equally efficacious remedy is provided by law-
>
> **(a)** on the application of any person aggrieved, make an order-
>
> (i) directing a person performing any functions in connection with the affairs

of the Republic or of a local authority to refrain from doing that which he is not permitted by law to do or to do that which he is required by law to do; or

(ii) directing that any act done or proceeding taken by a person performing functions in connection with the affairs of the Republic or of a local authority has been done or taken without lawful authority and is of no legal effect; or

(b) on the application of any person, make an order–

(i) directing that a person in custody be brought before it so that it may satisfy itself that he is not being held in custody without lawful authority or in an unlawful manner; or

(ii) requiring a person holding or purporting to hold a public office to show under what authority he claims to hold that office.

.....

.....”

The main objection against issuance of suo motu Rule is that ‘an application’ is the condition precedent for issuance of a Rule under article 102 of the Constitution. In the absence of any application, the High Court Division is precluded from exercising jurisdiction under article 102 of the Constitution.

At the very outset, it is necessary to know what ‘an application’ means. According to **Black’s**

Dictionary, Eighth Edition, 'application' means a request or petition.

In order to resolve the issue, it is necessary to go through the oath of office administered to a Judge as under:

> "I, ...having been appointed Judge of the High Court Division of the Supreme Court do solemnly swear (or affirm) that I will faithfully discharge the duties of my office according to law :
>
> That I will bear true faith and allegiance to Bangladesh :
>
> That I will preserve, protect and defend the Constitution and the laws of Bangladesh:
>
> And that I will do right to all manner of people according to law, without fear or favour, affection or ill-will."

According to his oath of office, the learned Judge is under the obligation to preserve, protect and defend the Constitution and laws of Bangladesh. The learned Judge is also under the obligation to do right to all without fear or favour or ill-will.

The Supreme Court of Bangladesh as the guardian of the Constitution is the protector of rights, freedoms and liberties of the people. Using tools of innovative and creative interpretation of the constitutional provisions, the Supreme Court of Bangladesh has consistently endeavored to further

extend the horizon of rights and liberties and administered quality justice to the justice-seekers. Bangladesh's formal justice system remains relatively inaccessible to the vast majority of the people. Vulnerable and disadvantaged groups including women, children, ethnic minorities, ultra poor and disabled people face particular difficulty in having axcess to justice.

There is no gainsaying the fact that the majority of the people of Bangladesh cannot afford to come to the High Court Division to seek redressal of their grievances. If the fundamental rights of an indigent citizen is violated and if he does not have the means, should he be allowed to suffer only because of his inability to come before the High Court Division with an application. If a glaring injustice amenable to the writ jurisdiction is done to that person, what would be the fate of the oath of office administered to a Judge who is under the obligation to preserve, protect and defend the Constitution. The words, preserve, protect and defend the Constitution shall mean and include implementation of the provisions of the Constitution in their letter and spirit. Mere non-filing of an

application can not be a ground for not exercising power under article 102 of the Constitution. This Division in the recent judgments has enlarged the meaning of aggrieved person, a shining example of which is in the case of ***Dr. Mohiuddin Farooq vs. Bangladesh, represented by the Secretary, Ministry of Irrigation, Water Resources and Flood Control and others, (1997) 49 DLR (AD)01***. As a result, various Non-Governmental Organizations are coming forward to help the indigent people for redressal of their grievances; but it is not always expected that such Organizations will come forward to assist such people in each and every case. In such a situation, the Court can not sit idle.

Charles Evans Hughes, the tenth Chief Justice of USA, in 1908 stated:

> "We are under a Constitution, but the Constitution is what the judges say it is and the judiciary is the safeguard of our liberty and our property under the Constitution."

Reading the language of Article 102 of the Constitution, there is no doubt that a wide power has been conferred on the High Court Division to reach injustice wherever it is found. The founding fathers designedly used a wide language in describing the

nature of the power, the purpose for which and the person or authority against whom it can be exercised. It can issue writs in the nature of prerogative writs as understood in England; but the scope of those writs is widened by the use of the expression 'directions' or 'orders' in clause (1), for the said expression does not equate the writs that can be issued in Bangladesh with those in England, but only draws an analogy from them. This clause enables the High Court Division to mould the relief(s) to meet the peculiar and complicated requirements of the citizens of the country. However, there are some limitations, which are implicit in this article and the original side Rules relating to governing the 'Procedure in Applications for Directions'. Similar views are taken in ***Irani V. State of Madras, AIR 1961 SC 1731.***

The limitations are that (a) there should be an application; (b) the application shall be verified by an affidavit by the petitioner or by any person who is competent to represent the aggrieved person with the prior leave of the court; (c) the affidavit filed in support of the writ petition must be satisfactory and

(d) the relief asked for must be one to enforce a legal right-the right of the petitioner himself. The Supreme Court of India has, of late, admitted exceptions from the limitations relating to affidavit, locus-standi and the like in the case of a class of litigations which are being entertained in the nature of 'public interest litigation' that is to say, the public in general are interested in the vindication of some rights or the enforcement of some public duty and the action can be brought by anyone. This Division has accepted the principle and widened the jurisdiction of the High Court Division by way of giving the meaning of 'aggrieved person' in ***Dr. Mohiuddin Farooq(ibid).***

The Supreme Court of India has further expanded its jurisdiction by entertaining petitions under Article 32 of the Constitution not only from associations or organizations or individuals interested in a common cause or an advocate, even journalists but also on the basis of letters written by such persons containing a complaint of maltreatment of under-trial prisoners or women in police custody ***(Sheela Bose V. State of Maharashtra, AIR 1983 SC 378, Mukesh Kumar V.***

State of M.P., AIR 1985 SC 1363). The court cautioned that the process of the court should not be abused or misused. Where the court is so satisfied, prima facie, it may not insist on the filing of an affidavit and may proceed to investigate into allegations with a view to meting out justice to the persons on whose behalf the communication is addressed particularly where to insist upon an affidavit at the initial stage may lead to perpetration of injustice or may give rise to a situation where from a practical point of view the doors of justice would be closed to the poor and the disadvantaged. It was further observed that the court should not object to the procedural technicalities being relaxed, that is to say, it should provide easy access to justice to the weaker sections of humanity and to combat exploitation and injustice and to secure for the under-privileged segments of society their social and economic entitlements, to redress public injury, enforce public duty, protect social rights, vindicate public interest and rule of law. References in this connection are the cases of ***State of W.B. V. Sampal Lal, AIR 1985 SC 195, State of H.P. V. Parent of***

Student Medical College, AIR 1985 SC 910 and Malik Brothers V. Narendra Dadich, AIR 1999 SC 3211.

In an unreported case, namely, ***Syeda Rizwana Hasan Vs. Bangladesh, C.A. No.200 of 2004,*** this Division held that if there is violation of fundamental rights causing common injury or common invasion affecting the people of a particular area, any public spirited person or organization of that locality can maintain a petition in the High Court Division. It was further held that when there is invasion of human rights which shocks the judicial conscience, the court should extend its jurisdiction. In the case in hand, Shahida, wife of Saiful was forced to marry her paternal cousin Samsul, under a 'Fatwa' pronounced by one Haji Azizul Huq on the ground that her marriage was dissolved on an incident of altercations between the husband and wife. The husband, out of anger uttered the word 'talak' despite that they continued their marital tie. The incidents of this nature are common in the rural areas and sometimes, in the name of such 'Fatwa' victims are being subjected to whipping. These incidents are social crimes which are spreading in the society tremendously

day-by-day. These social crimes should be eliminated and the courts should not remain a silent spectator, particularly the Supreme Court of Bangladesh, which is the guardian of the Constitution. It has a duty to protect these social rights. Though we do not encourage in the manner the High Court Division suo motu has exercised its writ jurisdiction in view of the language used in Article 102 of the Constitution, we treat the news item published in 'The Daily Banglabazar Patrika' on the issue of 2nd December, 2000 as an application under Article 102 of the Constitution and wave the procedural formalities to protect social rights and vindicate public interest and rule of law treating it as an exceptional case with a view to preventing social injustice in the society.

It was never the intention of the framers of the Constitution to imprison the enforcement of fundamental rights guaranteed by Part-III of the Constitution to a word, 'application', occurring in sub-articles (1) and (2) of Article 102 of the Constitution. Given the provisions of the fundamental rights guaranteed by Part-III of the Constitution, in general, and sub-articles (1) and (2) of Article 102 in particular, the

framers of the Constitution never intended to deprive the vast majority of the people of the country of getting their fundamental rights enforced. Denying the fundamental rights of the majority of the people amounts to denying our independence earned through the blood of the freedom-fighters and the sacrifices of the women who were ravished by the occupation force and they never thought of an independence limited to a small section of affluent people.

Two of the framers of the Constitution, namely, Dr, Kamal Hossain and Mr. M. Amirul Islam submitted in no uncertain terms that the High Court Division has the power of issuance of suo motu rule. When there is scope for issuance of suo motu Rule, vulnerable and disadvantaged groups including women of whom Shahida is a beneficiary can be immensely benefited.

Unless life and liberty of citizens are protected, independence becomes meaningless. Article 28 of the Constitution provides that no person shall be deprived of life or personal liberty save in accordance with law. Article 31, amongst others, provides that to be treated in accordance with law is the inalienable right of every citizen. Taking recourse to law requires expense which majority of the citizens cannot afford. The legal aid provided by the Government and NGOs is

meagre in comparison with the need of the huge number of indigent citizens. In the case of **Dr. Mohiuddin Farooq (ibid)** Mustafa Kamal,J. stated ".....the people will always remain the focal point of concern of the Supreme Court while dispensing justice or propounding any judicial theory or interpreting any provision of the Constitution."

Therefore, a proper case where the fundamental right of a citizen is infringed, the High Court Division can issue suo motu rule provided the infringement of right is amenable to the writ jurisdiciton and is of great public importance. In this context, a news paper report, post-card, written material may be treated as an application in order to overcome the obstacle of application. But before issuance of suo motu rule, the High Court Division must record its satisfaction in clear terms about exercise of such power. The High Court Division shall exercise such power sparingly.

Mustafa Kamal,J. in his 'Bangladesh Constitution: Trends and Issues' at page 170 had referred to a suo motu Rule issued by Md. Mozammel Haque. and Mahfuzur Rahman, JJ. on the basis of a report in a vernacular daily (Daily Ittefaq) concerning a person Nazrul Islam who had been languishing in jail for long 12 years ever

since he was 12 years old. As a 5-year old boy he was implicated in a few gang and dacoity cases from which he was acquitted and yet he was kept in wrongful imprisonment. He was put under bar-fetters (*danda-beri*) ever since he was taken into custody and was put under that condition althroughout. The Court was shocked to see him in bar-fetters when he was brought before it. The Court found that the proceedings of the criminal cases were void *ab initio* as he was tried in contravention of the Children Act,1974. The Court found that the fundamental rights of the boy were violated for many years in the past. He was literally in shackles wrongfully and illegally without any cause or case. He was set free and the Court issued various directions to the Ministry of Home Affairs in respect of other accused or persons like Nazrul Islam who may be in any other jail in Bangladesh.

Mustafa Kamal, J. has further stated that he had the occasion to meet Nasir Aslam Zahid, the Chief Justice of the High Court of Sindh and found him sorting out numerous telegrams and letters seeking the Court's interference, treating some as regular constitutional petitions and sending others to authorities for redress. He said he received 50 telegrams a day complaining of human rights violations.

He planned to institutionalize the handling of such letters and telegrams.

Mustafa Kamal,J., however, observed that from the procedural point of view, the Supreme Court of Bangladesh has not yet developed these formal practices except for some stray cases.

In the light of the findings made hereinbefore, both the appeals are allowed in part with observations and directions made in the body of the judgment with the following orders:

(i) Fatwa on religious matters only may be given by the properly educated persons which may be accepted only voluntarily but any coercion or undue influence in any form is forbidden.

(ii) But no person can pronounce fatwa which violates or affects the rights or reputation or dignity of any person which is covered by the laws of the land.

(iii) No punishment, including physical violence and/or mental torture in any form, can be imposed or inflicted on anybody in pursuance of fatwa.

(iv) The declaration of the High Court Division that the impugned fatwa is void and unauthorized, is maintained.

No order as to costs.

J.

Muhammad Imman Ali, J: I have had the advantage of going through the judgments to be delivered by my brothers, **Md. Abdul Wahhab Miah,J. and Syed Mahmd Hossain,J.** I concur with the judgment to be delivered by my brother, **Syed Mahmud Hossain,J.**

J.

Order of the Court

By majority judgment, both the appeals are allowed in part with the following orders:

(v) Fatwa on religious matters only may be given by the properly educated persons which may be accepted only voluntarily but any coercion or undue influence in any form is forbidden.

(vi) But no person can pronounce fatwa which violates or affects the rights or reputation or dignity of any person which is covered by the laws of the land.

(vii) No punishment, including physical violence and/or mental torture in any form, can be imposed or inflicted on anybody in pursuance of fatwa.

(viii) The declaration of the High Court Division that the impugned fatwa is void and unauthorized, is maintained.

No order as to costs.

CJ.

J.

J.

J.

J.

J.

The 12th May,2011.
/Rezaul,B.R/.
Approved for reporting