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Do Judges Make Law? A Scrutiny in the Context of the Decisions of the Supreme Court of Bangladesh

Tapos Kumar Das*

ABSTRACT *Initially this article considers how the decision of the Supreme Court of Bangladesh becomes law. Then it analyses the doctrinal critique and statutory recognition of the judge made law. The author finds that the Supreme Court of Bangladesh assumes the law making role vide (i) interpretation, (ii) directions and, (iii) judicial review of legislation. Keeping word limit in mind, this article scrutinises few landmark decisions of the Supreme Court to determine the nature, extent and limits of the judge made law in Bangladesh. The author suggests that the trend of judicial law making must continue to fill up the 'legislative vacuum' and to limit 'legislative transgression' without imparting indiscriminate alteration in the settled legal regime.*

KEYWORDS: *Bangladesh Supreme Court, constitutional amendment, judiciary, judicial review, judge made law, judicial precedent, ultra vires*

1. Introduction

Like other states, the government of Bangladesh is composed of three organs namely, executive, legislature and judiciary. The Constitution, the supreme law of Bangladesh, has maintained delicate balancing by utter demarcation of powers and functions of the three state organs. The parliament is bestowed with the law making, the judiciary to interpret the law and the executive to run the government in accordance with the law. The Supreme Court comprising of the Appellate Division (AD) and the High Court Division (HCD) is the highest Court of Bangladesh. Article 111 of the Constitution provides that, 'law declared by the AD shall be binding on the HCD and the law declared by either division of the Supreme Court shall be binding on all courts subordinate to it'. Legal opinions are not unanimous as to the meaning of the term 'law declared'. One view is that the province of legislation exclusively belongs to the parliament and judges sitting in the court can merely 'declare the existing law' which is popularly known as 'Declaratory theory'. However, the contrasting estimation is that judges make law (by way of precedent) as well

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as declare it. The present articulation is intended to analyse the trends and limits of judicial law making with reference to jurisprudential theories and decisions of the Supreme Court of Bangladesh.

2. Do Judges Make Law?

The issue whether judges make law or declare it depends largely on the nature of a particular legal system. A consensus remains that in common law countries the role of the judges has been greatly creative and within certain thin and clearly defined limits new law is created by the judiciary (Dicey 1905a; Frank 1930; Mahajan 2005). Juristic view is that, 'a judgment of the Supreme Court so far as it settles a point of law is a declaration for the nation as to what the law is' (Islam 2006: 650). When the Supreme Court decides cases that decisions make law because they become precedent that binds the subordinate courts under the doctrine of *Stare Decisis* as provided in article 111 of the Constitution (Steinman 2004: 545). What is binding as a law is the *ratio* of a decision and not the finding of facts or private opinion of the judges (Islam 2006: 650).

2.1 Declaratory theory

Declaratory theory has antiquity in comparison with the opponent view of the judge made law and amongst its believers notable are Coke CJ, Sir Mathew Hale, Blackstone and Dworkin. Believers of this theory are of the view that judges merely discover the law on a particular issue and then declare it (Mahajan 2005: 224). This theory is rooted on the Dicey's understanding of the parliamentary sovereignty that the legislature has the right to make or unmake any law and no one including the court of law can question the validity of any law passed by the legislature (Dicey 1982b: 151). It rejects the power of the court to examine the constitutionality of any Act passed by the legislature. Declaratory theory is based mainly on the propositions mentioned below:

- i) Scrutton LJ in the case of *Hernett v Fisher* (1927) 1 KB 402 stated that, 'a court sits to administer the law, not to make new law'. In the case of *Willis v Baddeley* (1892) 2 QB 324, Esher LJ also observed that, 'there is in fact no such thing as judge made law, for the judges do not make the law though they frequently have to apply the existing law to circumstances as to which it has not previously been authoritatively laid down that such law is applicable'.
- ii) A judge is sworn to determine, not according to his private judgment but according to the known laws and legal customs; not delegated to pronounce a new law but to maintain and explain the old one (Mahajan 2005: 225).

- iii) Judges are in no sense legislators as they do not have the authority (like a democratic legislature) to represent the will of the people (Cotterrell 2003: 162).
- iv) If an issue has not arisen before the court previously, a judge cannot act as a 'deputy legislator' to create new law. Riddall (1991: 101) opines that, 'judges give effect to what is already implicit in society within which the legal system operates. Judges do not make law, they find it'.
- v) All the resources for the creative judicial decisions are provided by the existing law. Cotterrell (2003: 165) is of the view that, 'a judge does not decide a case in a legal vacuum but on the basis of existing rules which are expressed, and at the same time, are informed by, underlying legal principles'.

Freeman (2005: 1391) suggests that among the modern legal philosophers Dworkin and Guest oppose the judge's role as 'deputy legislator' at least for three reasons:

Firstly, it offends the democratic ideal that a community should be governed by the elected officials answerable to the electorate. The judge not being elected must not substitute his own will as against the legislature.

Secondly, if a judge makes new law and applies it retrospectively in the case before him, then the losing party will be punished, not because he has violated some duty he had, but rather a new duty created after the event.

Thirdly, judges speak judicially of their being bound by law (Guest 1997: 172).

In establishing the rule of law public acceptance of the legislation is must. A law that reflects the will of the people is usually accepted by them. So it is expected that in a democratic society laws should be enacted by the elected representatives accountable to the people. As the judges are not elected, the judge made law lacks popular support and undermines the idea of separation of powers. Furthermore *ex-post facto* effect of judicial legislation is another concern to negate any judicial interference on to the legislative province.

2.2 Judges as law makers

As in reality judiciary makes law in a variety of ways. Under article 107 of the Constitution the Supreme Court of Bangladesh is entitled to make rules for regulating practice and procedure of its divisions and of all courts subordinate to it. Furthermore s 122 of the Code of Civil Procedure 1908 permits the Supreme Court to make rules regulating the procedure of both divisions of the Supreme Court and subordinate civil courts. Similarly s 554 of the Code of

Criminal Procedure 1898 also empowers the Supreme Court to frame rules for inspection and management of the records of the subordinate criminal courts. These are the instance of delegated legislation and are not addressed here. The present articulation is allied with the law making that occurs when judges make decisions that create binding precedent for future cases. Judicial decisions eventually become law because of the doctrine of *stare decisis*. The English jurist Bentham acknowledged the judge made law in the following words:¹

It is the judges that make the common law, just as a man makes laws for his dog. When your dog does anything you want to break him of, you wait till he does it and then beat him. This is the way you make laws for your dog, and this is the way judges make laws for you and me.

Judges are persistently applying the existing set of rules to new fact situations and thus creating new laws. No doubt the rapid expansion of the statutory law has minimised the span of judicial legislation to a greater extent, but till today the creative role of the judges is welcomed for the reasons that, it i) maintains the logic or the symmetry of the law to a far greater extent than the parliamentary enactment, and ii) aims at amending and overhauling the deficiencies of the existing law to provide justice to the litigants (Dicey 1905a: 361).

3. Scope of Judicial Legislation in Bangladesh

Whether modern creative role of the judiciary is consistent with the existing constitutional scheme has always been a contentious issue in all jurisdictions including Bangladesh (Hunter 2005). In the case of *Abdul Mannan Bhuiyan v State* (2008)² the AD of the Supreme Court of Bangladesh embarked on the doctrine of separation of powers and thwarted the HC's attempt to create cognisable offence.

During the period of 1998-1999, the public peace was jeopardised due to the frequent hartal (strike) and anti-hartal activities of political parties. Being informed of the hartal violence from the newspaper dated 10-12 February 1999, the HCD on 15 February, issued a *suo moto* rule calling upon Abdul Mannan Bhuiyan, the General Secretary of the Bangladesh Nationalist party, and others to show cause as to why the pro-hartal and anti-hartal activities

¹ Sixth Form Law. Available at <http://sixthformlaw.info/01_modules/mod2/2_4_law-reform/22_judges_declaratory_theory.htm>. Accessed 25 July 2012.

² 60 DLR (AD) 49.

should not be declared as cognisable offence. In the judgment of *Abdul Mannan Bhuiyan* (2008) the HCD discussed the 'offences against the public tranquility' as provided in the Penal Code 1860 and then summarised s 141 of the Code by holding that:

- i) according to the 5th clause of s 141, a procession or other activities of five or more persons in support of or to force hartal shall be an unlawful assembly punishable under s 143 of the same Code;
- ii) every assembly of five persons or more to protest or to oppose hartal shall be an unlawful assembly;
- iii) activities of the members of these assemblies shall be cognisable offence according to their behaviour under the relevant sections of the Penal Code and the criminal courts and police are directed to act accordingly.

The decision became the first to move beyond the existing penal law to criminalise any procession in relation to hartal. The decision of the HCD was challenged. In the AD the power of the HCD to legislate and create cognisable offence was addressed by Abdul Matin J in following words:

Ours is a Constitution based on the spirit of the separation of powers ... it is true that there is no such thing as absolute or unqualified separation of power in the sense conceived by Montesquieu but there is however, a well marked and clear-cut functional division in the business of the government and our judiciary is to oversee and protect the overstepping not only of other organs of the government but also of itself. Offence can be created only by a law, by an act of the parliament and not by any legal pronouncement by any court. The HCD acted beyond its authority in entering into the field of making law and to declare the pro-hartal and anti-hartal activities as cognisable offence. The HCD had no constitutional or judicial power to legislate or create, of its own, a cognisable offence.

Thus rigid insistence on the separation of powers entrenched the AD to the declaratory theory and quashed the innovative role of the HCD by setting aside the impugned judgment creating a cognisable offence.

However, the retrogressive approach adopted by the AD in *Abdul Mannan Bhuiyan* (2008) was not the regular trend. Decisions³ taken by the Supreme

³ For example, *Abu Bakar Siddique v S.M.A Bakar* (1986); *Aftabuddin v Bangladesh* (1996); *Bangladesh National Women Lawyers Association v Bangladesh* (2009); *Secretary, Ministry of Finance v Masder Hossain* (2000).

Court prior and subsequent to the *Abdul Mannan Bhuiyan* (2008) case shows that the Supreme Court sidesteps rigid insistence on the separation of powers and retrieves the creative role in different manner to fill up the legislative vacuum. More recently, in the AD in the case of *Riaz Uddin Khan v Mahmudur Rahman* (2011),⁴ Surendra Kumar Sinha J acknowledging the judge made law observed that the term 'law' is to be understood from the definition given in article 152⁵ read with article 111 of the Constitution and that the law declared by the AD shall also be regarded as the law of the land. Thus the scope of the judge made law remain untied.

3. 1 Justification of judicial law making

Law is an instrument to meet the societal needs, to maintain public order, harmony and to eliminate disparity and injustice from the society. Now the issue is to what extent the parliamentary law succeeds in meeting the social challenges. Cases are not few where application of the existing law or restrictive approach of interpretation fails in achieving social justice. Pragmatic approach to the social justice compelling the Supreme Court to re-define the law and to re-interpret the statutes so far as possible to keep pace with the contemporary needs. The cry for social justice encourages the Supreme Court to fill the 'legislative vacuum' by way of judge made law. The idea of judicial law making is based mainly on the propositions that:

- i) law constantly evolves and changes and no set of rules can cover every situation. Sometimes unforeseen situations not covered by any existing law may come up and to fill this 'gap' the judge have to make a decision which is not merely an application of existing law but, a decision creating new law (Simmonds 2002: 121);
- ii) cases involving moral values or considerations of social policy may not be answered by any pre-existing law; such cases must be addressed on the basis of extra-legal considerations and in doing so judges will establish a new legal rule (Simmonds 2002: 130). But what makes the new rule a law is the fact that, it is been promulgated by the judge of the Supreme Court under the authority of article 111 of the Constitution;

⁴ 63 DLR (AD) 29.

⁵ Article 152 states that 'law' means any Act, ordinance, order, rule, regulation, bye law, notification or other legal instrument, and any custom or usage, having the force of law in Bangladesh.

- iii) as has been claimed by Austin that, the judges are delegates of the sovereign and 'the sovereign delegates legislative and administrative functions to many institutions – including, significantly, judiciary'; and 'judges make law in so far as their decisions represent sovereign's tacit commands' (Cotterrell 2003: 70-71).

3.2 Statutory recognition of the 'judge made law'

In many jurisdictions the practice of judge made law has been acknowledged statutorily. Of many instances article 1 of the Swiss Civil Code provides that in the absence of statutory provision the court shall decide a case in accordance with customary law and, in the absence of customary law, in accordance with the rule that it would make as legislator and in doing so, the court shall follow established doctrine and case law. Article 1 of the Soviet Criminal Code 1926 states that the object of this code is to protect the socialist state of workers and peasants and the legal order established by it. Article 2 provides that no judge may let acts included within the terms of article 1 go unpunished simply because such acts are not defined or forbidden by law or because of obscurities or contradictions in the laws. Provisions of both codes allow the judges to act as 'deputy legislator' as a last resort to meet the 'legislative vacuum' and thus achieving justice. Such supplementary role of the judges can be accommodated in any legal system to do justice in any unpredicted situation.

Although article 111 has not expressly recognised the judicial legislation, article 112 has made the Supreme Court's decision binding upon the subordinate courts and all state authorities have been made obliged to act in aid of the Supreme Court. However, the absence of direct statutory recognition regarding the creative role of the judiciary has not placed the Supreme Court in abeyance and the cases discussed below illustrates the Supreme Court's assumption of legislative power to fill the 'legislative vacuum' and to do justice.

4. Modes of Judicial Law Making

The concerns, criticisms and controversy regarding judicial law making has rather encouraged the Supreme Court to exceed the limits demarcated by the idea of separation of powers (Hunter 2005). In spite of the restricted approach of the AD denying the creative role of the judges [as in the case *Abdul Mannan Bhuiyan* (2008)] precedents are not rare where the Supreme Court went beyond the statutory province to ensure gradual development of law

through the judicial law making in changing needs. Recent judicial decisions reveal that to intervene the legislative province the Supreme Court has assumed the creative role in the disguise of i) interpretation, ii) directions and, iii) judicial review of legislation. Case studies made below substantiate this assumption.

4.1 Interpretative justice

No doubt the judicial role is not the vivid one of making law like a legislator but at least it is not purely passive one of finding law. Lord Denning (1993: 111) suggests that, 'the parliament enacts a statute which is necessarily expressed in words only and judges opine what those words mean'. Parliamentary modification of law must response to major social changes and social sensitisation of law can only be accomplished by way of judicial interpretation (Islam 2006: 650). A judge must make the law the best that it can be through the creative interpretation of existing legal resources (Cotterrell 2003: 165). In the words of Justice Cardozo (1928: 14):

It is true that codes and statutes do not render the judge superfluous, nor his work perfunctory and mechanical. There are gaps to be filled. There are doubts and ambiguities to be cleared. There are hardships and wrongs to be mitigated if not avoided. Interpretation is often spoken of as if it were nothing but the search and the discovery of a meaning which, however obscure and latent, had nonetheless a real and ascertainable pre-existence in the legislator's mind.

Traditionally the judiciary is considered to be the best forum to impart clarity and uniformity in legal arena. So far the experience suggests that the Supreme Court of Bangladesh has taken the advantage of available opportunity to simplify the statutory obscurity by way of interpretation and in many cases pragmatic judicial interpretation has resulted in creation of new legal principle. The following illustrations are few examples as manifestation of those:

Best interest of the child should be protected

In the case of *Abu Bakar Siddique v S.M.A Baka* (1986),⁶ husband divorced his wife and then lodged a petition demanding the custody of his son of eight years who was residing with his mother. The husband contended that as the son was above the age of seven the mother no longer entitled to his custody on

⁶ 38 DLR (AD) 106.

account of Islamic law.⁷ Contrarily the mother claimed that the boy was suffering from severe ailment and she took him to UK for treatment spending huge money; and, as she herself was a doctor she alone was the best person to render medical assistance and affection to the boy. In reaching decision the AD referred to the case of *Zohra v Latif Ahmed Munawar* (1965),⁸ where being concerned with the welfare of the minor the court permitted deviation from the rule of Hizanat (custody) on the ground that there was no Quranic text on this point.

In the case of *Abu Bakar Siddique* (1986), the AD observes that the court should appoint guardian consistently with the law to which the minor is a subject but the decision of appointment must focus on the welfare of the minor as provided in s 17(1) of the Guardian and Wards Act 1890. Munim CJ finally concludes that in appointing guardian the principle of Islamic law should be taken into account, but deviation from the Islamic principle is permissible for the welfare of the child.

Thus in defiance of traditional Islamic law the custody of the boy was granted to the mother for his best interest. Since then the courts of Bangladesh follow this principle and it has been affirmed by the AD in a series of cases including *Abdul Jalil v Sharon Laily Begum* (1998).⁹

Right to life: all encompassing right

In the case of *Dr. Mohiuddin Farooque v Bangladesh* (1996),¹⁰ the HCD applied interpretative technique to give a wider meaning of the constitutional right of 'right to life'. Here Farooque through a writ petition sought redress against the failure of the authorities in taking effective measures against an import of 125 metric tons of high concentration radioactive 'skimmed milk powder'. Farooque petitioned that, 'consumers must be protected against all unscrupulous activities aiming to release the said consignment of radiated milk to give meaning to the constitutional right to life'. To then, the colossal nexus

⁷ In Islamic law the mother is entitled to the custody of her male child till (its) completion of seven years and, of her female child until (its) attainment of puberty. The right continues even though she is divorced by the father of the child unless she gets remarriage in which case the custody returns to the father.

⁸ 17 DLR (WP) 134.

⁹ 50 DLR (AD) 55.

¹⁰ 48 DLR 438.

between right to life and environment remained undocumented by the judiciary in Bangladesh. In the HCD Kazi Ebadul Hoque J held:

Right to life is not limited to the protection of life and limbs but extends to the protection of health and strength of workers, their means of livelihood, enjoyment of pollution free water and air, bare necessities of life, facilities for education, development of children, maternity benefit, free movement, maintenance and improvement of public health by creating and sustaining conditions congenial to good health and ensuring quality of life consistent with human dignity.

Here the Court merges the right to life with environmental right and observes that if normal longevity of human being is endangered by the use or possibility of use of any contaminated foods then it also violates the right to life guaranteed by articles 31 and 32 of the Constitution. Right to life being a fundamental right can be enforced by the HCD to remove any unjustified threat to the human health and longevity. In this case while the authorities concern were directed to undertake required measures to ensure proper testing of milk, the scope of constitutional right to life was amplified to include economic, social and environmental justice. Since then in interpreting environmental issue the HCD relates it with right to life to underscore the magnitude of environmental order.

Opinions of the Supreme Court shall have primacy

Article 116 of the Constitution has invested the President with the power of posting, promotion and grant of leave of judges and magistrates which can be exercised in consultation with the Supreme Court. Previously, little heed was paid to the requirement of consultation and views of the Supreme Court expressed at consultation were never considered to be binding. Two decisions of the Supreme Court amplified the requirement of 'consultation' beyond the literal ambit of article 116 of the Constitution. *Firstly*, in *Aftabuddin v Bangladesh* (1996)¹¹ case the HCD held:

Whenever the question of posting or promotion of a person employed in the judicial service and magistrate exercising judicial functions come up ... consultation with the Supreme Court by the President is mandatory. ... [A]lso when such person is promoted and/or posted to a post outside the judicial service, there is no scope from complying with the requirements of article 116.

¹¹ 48 DLR 1.

Secondly, in *Secretary, Ministry of Finance v Masder Hossain* (2000)¹² case Mostafa Kamal CJ held:

In exercising control and discipline of persons employed in the judicial service and magistrates exercising judicial functions under article 116 the views and opinions of the Supreme Court shall have primacy over those of the executive.

Since *Masder Hossain* (2000) case, in posting or promotion of judicial officers the executive is legally obliged to consult and follow the opinion of the Supreme Court (Akkas 2004: 167).

4.2 Directions of the Supreme Court

The nature and structure of the society we live in has changed. Society today is exceedingly complex and burdened with multiple injustices (Hunter 2005). In the case of *Rootes v Shelton* (1966),¹³ it was suggested that judicial activism must respond to the 'changing social needs' and 'social expediency' to eradicate injustices. Judges sometimes decide cases involving social and moral values which may not be covered by the existing law; and, to fill this 'legislative vacuum' the Supreme Court issues directions or guidelines having the binding force of law. It is acknowledged that parliamentary legislation is to undergo a prolonged legislative process. Moreover the party bringing any law Bill if does not hold majority in the parliament the Bill never becomes law. Therefore in absence of appropriate legislation, laws made by the Supreme Court in the form of directions or guidelines may be a timely response.

Tears of the divorced women

Mohammedan law provides maintenance of a divorced woman only for the Iddat period.¹⁴ Though in some Muslim countries like Malaysia, Egypt, Morocco, Iraq, Turkey, Libya, Tunisia, Syria and Algeria, through rational interpretation of Islamic principles prolonged maintenance has been ensured for the poor divorced women, in Bangladesh many divorced women suffer untold miseries having no economic and educational background to earn livelihood. To eradicate the sufferings of those ill-fated women in the case of

¹² 52 DLR (AD) 82.

¹³ 86 WN (Pt 1) (NSW) 94, 101.

¹⁴ Iddat is the period for which a woman must wait before remarrying whether in the event of divorce or death of husband. In case of divorce, the period of Iddat will be three menstrual courses, or, if pregnant, till delivery. In case of death of husband Iddat extends to four months and ten days or, if pregnant, till delivery whichever period is longer.

Hefzur Rahman v Shamsun Nahar Begum (1995),¹⁵ Golam Rabbani J supplemented the relevant commandment of Hanafi law holding that a Muslim husband after divorcing his wife should maintain her on a reasonable scale beyond the period of Iddat for life or, till she gets remarriage.

However, the decision of Rabbani J was reversed by Latifur Rahman J in the AD. The AD observed that as the Holy Quran was silent as to the payment of maintenance during the period of Iddat one must follow the other sources of Islamic law in granting maintenance to a divorced woman. The AD held that a divorced woman could lawfully realise maintenance for Iddat period only and any different practice would be contrary to Ijman and would not be accepted in accordance with Muslim law and Shariat. Therefore the creative decision of Rabbani J could not see the light of the day due to the restricted attitude of the AD.

Dilemma of fatwa: creating criminal offence

In 2000, Sahida, the wife of Saiful, was forced to a hilla¹⁶ marriage on a so-called 'fatwa'¹⁷ by Azizul Huq, a local religious leader, who alleged that Sahida's marriage to her husband had been annulled as out of a family feud her husband had uttered the word 'talaq' to his wife. Even after the incident the couple continued living together, which Azizul claimed illegitimate and he issued the fatwa that to continue the conjugal relation, Sahida must remarry Saiful, but before that she must have a hilla marriage with another person. In execution of this fatwa, Sahida was compelled to marry a third person (Sarkar 2011a).

¹⁵ 47 DLR (HCD) 54.

¹⁶ Hilla marriage is a device through which a legal bar to remarry the earlier divorcing husband is removed. In hilla marriage, the divorced wife has to marry a third person and consummate the marriage; then if the new husband divorces her willingly, she can remarry her ex-husband. But a hilla marriage becomes necessary only in the case of triple talaq. If the divorce is given in any other form like one or two revocable talaq, hilla marriage is not necessary.

¹⁷ A fatwa (Arabic: فتوى) (in the Islamic faith is the technical term for the legal judgment or learned interpretation that a qualified jurist or mufti can give on issues pertaining to the Islamic law. In Sunni Islam any fatwa is non-binding, whereas in Shia Islam it could be considered by an individual as binding, depending on his or her relation to the scholar. Available at <<http://en.wikipedia.org/wiki/Fatw%C4%81>>. Accessed 28 July 2013.

Being imbibed of the incident from newspaper, the HCD issued a *suo moto* rule challenging the legality of fatwa. Upon hearing in January 2001, the HCD declared all kinds of fatwa illegal. Challenging the verdict, two interveners appealed in the AD which remained unsettled till May 2011 (Sarkar 2011a).

In spite of the HCD's banning, issuance of and forced execution of fatwa continued. In such backdrop, in response to a number of writ petitions (no. 5863 of 2009; nos. 754 and 4275 of 2010) the HCD on 8 July 2010, ruled punishments like caning or beating to any woman or man in the name of fatwa as criminal offence. A division bench comprising Syed Mahmud Hossain J and Gobinda Chandra Tagore J ruled that infliction of punishment including caning, whipping and beating through local salish devoid of judicial authority and violates constitutional rights of the citizens and that, 'any person who issues or executes such extra-judicial penalty must be punished for committing crime'. So the execution of fatwa by physical force turns to be an annexure to the existing penal scheme.

Banning of the fatwa was not appreciated by Islamic groups and they pressed the above mentioned pending appeal against such banning. On 12 May 2011, the AD modified the HC's verdict and held the fatwa lawful subject to limitations imposed by it. As all six presiding judges could not agree on the verdict, ABM Khairul Haque CJ announced the majority judgment declaring the fatwa lawful 'only' in 'religious matters' and constrained its ambit by directing that (Sarkar 2011a):

- i) only 'properly educated persons' may issue fatwa;
- ii) it cannot be imposed forcibly;
- iii) it cannot be used to punish anyone; and
- iv) fatwa must not interfere with the statutorily protected rights, reputation or dignity of any person.

Thus the dilemma of fatwa is overhaul and further controversy (if any) regarding fatwa should be dealt in accordance with the directions issued by the AD.

Court not only can recommend amendments, it can even issue directions

Another notable case is *BLAST v Bangladesh* (2003),¹⁸ where it was alleged that by abusing the authority of ss 54 and 167 of the Code of Criminal

¹⁸ 23 BLD (HCD) 115.

Procedure 1898 (CrPC) the police had been violating the constitutional rights of articles 27, 31, 32, 33 and 35. On perusal of instances of abusive exercise of powers in legal disguise, the court recommended (i) amendment of ss 54, 167, 176, 202 of the CrPC and ss 302, 330 and 348 of the Penal Code; (ii) insertion of a new section in the Evidence Act 1872 in relation to the proof of custodial death, and; (iii) insertion of a new section in the Police Act 1861 for maintaining special diary for recording reasons for exercise of power under s 54 of the CrPC.

In this case the limit of judicial intervention on to the legislative province was addressed by Hamidul Haque J. Acknowledging the challenges triggered to the authority of the court to recommend amendment of any law His Lordship asserted that, the constitutional court has such power under article 102. As ss 54 and 167 of the CrPC were inconsistent with the fundamental rights of the citizens, the court considered itself competent not only to recommend amendment but also to issue directions. Haque J authenticated the assertion of judicial creativity with the example of *Mazdar Hossain* (2000) case, where the AD directed separation of judiciary from the executive organ of the state and, to ensure the separation modified the draft laws submitted by the government and made those drafts as part of its order.

To prevent the abusive exercise of powers by the police, the HCD then issued not less than fifteen directions calling upon the government to implement these directions immediately. Challenging the HC's decision the government preferred civil appeal no. 53/2004, which awaits disposal in the AD. As no stay was granted the directions of the HCD are in force and observed by the police.

Filling up of legislative vacuum: unnoticed sexual harassment

Till 2008, in Bangladesh there was no legislation to address the sexual harassment of women and girl children at work place, educational institutions and other places. The issue was first addressed in the case of *Bangladesh National Women Lawyers Association v Bangladesh* (2009) 14 BLC.

The fundamental rights guaranteed in articles 10, 19, 26, 28, 29, 31 and 32 of the Constitution embrace all elements of gender equality including the prevention of sexual harassment. But till the case, there was no appropriate legislation to tackle the sexual harassment. So the HCD, to enforce the constitutional commitment for gender equality and to prevent sexual harassment issued 'Directives in the form of Guidelines'. In the Guidelines the

court defined the 'sexual harassment' in a wide context and ordered the authority of the work places and educational institutions to observe the directions until appropriate legislation come in. Subsequently at the proposal of the Ministry of Law, Justice and Parliamentary Affairs, the Law Commission on August 2010 prepared a draft Bill for 'Prevention of Sexual Harassment in Educational Institutions and Work Places'. The draft encompassing the directives of the HCD awaits parliamentary approval.

Constitutionally the parliament was obliged to enact law to protect the women against sexual abuse. In absence of Parliament's initiative, the Supreme Court was competent to give directives under article 111 till a law is being enacted in this regard.

Thus in disguise of directions the Supreme Court has well assumed the role of 'deputy legislator' to meet changing social needs and to supplement the 'legislative gaps'. However, the Supreme Court should not exercise this power at will to replace the legislature. The edge of judicial intervention and correct province of the parliament has been portrayed by Lord Lowry in the case *R v Kearley* (1992)¹⁹ where His Lordship suggested that:

- i) if the solution is doubtful, the judge should beware of imposing their own remedy;
- ii) caution should prevail if parliament has rejected opportunities of cleaning up a known difficulty or has legislated, while leaving the difficulty untouched;
- iii) disputed matters of social policy are less suitable areas for judicial intervention than purely legal problems;
- iv) fundamental legal doctrines should not be lightly set-aside;
- v) judges should not make a change unless they can achieve finality and certainty.

To avoid power struggle with the Parliament, the Supreme Court of Bangladesh may follow the strategy prescribed in *R v Kearle* (1992).

4.3. Judicial review of legislation

Even in the regime of parliamentary sovereignty in *Dr. Bonham's* (1610)²⁰ case, Edward Coke LCJ suggested that, 'when an Act of the parliament is against common right and reason, the common law will control it and adjudge

¹⁹ 2 AC 228.

²⁰ 8 Coke Rep. 107, 116-121 (C.P. 1610).

such Act to be void'. Since *Marbury v Madison* (1803)²¹ it is settled that a court which is empowered to apply and enforce the Constitution would be bound to strike down any legislation which violates any constitutional right or obligation (Basu 1994: 135). In Bangladesh the legislative power of the parliament is subject to the constitutional limitations. As per article 7(2) if any law contradicts the Constitution or as per article 26(2) if any law infringes the fundamental rights, then article 102 empowers the Supreme Court to invalidate that law. By virtue of articles 7(2), 26(2) & 102, the Supreme Court has become the ultimate forum to decide *vires* of any law and thus indirectly participating in law making by declaring a legislation unconstitutional (Ngandwe 2006).

Deviation from constitutional mandate is illegal

The Supreme Court of Bangladesh has been established by article 94 and subordinate courts have their existence under article 114. Article 115 mandated the President to make rules for appointment of judges and magistrates but no such rules were enacted by the President till 2007.

Before 2007, judges and magistrates of the subordinate courts were known as members of Bangladesh Civil Service (BCS) judicial cadre and were appointed in accordance with the Bangladesh Civil Service (Judicial) Composition and Cadre Rules 1980 and the Civil Service Recruitment Rules 1981 enacted under the authority of article 133 (Akkas 2004: 157). In the *Masder Hossain* (2000) case the creation of BCS judicial cadre along with other BCS cadres was challenged to be *ultra vires* of the Constitution. The AD observed that members of the judicial service and the magistrates exercising judicial functions were functionally distinct from other services of the Republic and inclusion of the judicial service in the BCS was *ultra-vires* of the Constitution.

Apart from declaration of *ultra-vires*, the AD directed the government, (i) to make rules under article 115 for appointments of persons to offices in the judicial service or as magistrates exercising judicial functions; (ii) to establish Judicial Service Commission; (iii) to frame rules for posting, promotion, grant of leave, discipline, pay, allowances, pension and other terms and conditions of service of the judges and magistrates; and, (iv) to establish a separate Judicial Pay Commission.

²¹ 5 US (1 Cranch) 137; 2 L. Ed. 60.

The President by notifications in the official gazette promulgated four different rules²² and implemented these directions. The AD also actively participated in drafting of these rules and, Hamidul Haque J in the *BLAST v Bangladesh* (2003) case had acknowledged it as an instance of indirect legislation.

Violation of constitutional scheme is illegal

In 2003, the parliament enacted the Gram Sarkar Act 2003 to form Gram Sarkar (non-elected body) as a supporting organisation for the Union Parishad. Though the government termed the Gram Sarkar as the 'lowest tier' of local government in reality there was a four-tier local government structure in Bangladesh - the lowest was the Union Parishad followed by Pourashava, Upazila Parishad and Zilla Parishad and Gram Sarker was none of the four.²³ By 2005, approximately 39,786 Gram Sarkar units were constituted which neither served as part of the administration nor as the local government.

On 6 July 2003, BLAST filed a writ petition (no. 4502 of 2003) challenging the Gram Sarker Act. The petitioner contended that the creation of a nominated body i.e., the Gram Sarkar was an insult to the concept of democracy and local government as enshrined in the Constitution.

In the HCD ABM Khairul Haque J observed that creation of the Gram Sarker by the nominated members was not of representative character because, they were neither the representative of the village people nor they were accountable to them, they were accountable to the bureaucracy. And as such Gram Sarker was contradictory to the scheme of democracy as portrayed in articles 7, 9, 11, 59 and 60 of the Constitution. On 2 August 2005, the HCD declared the Gram Sarkar Act *ultra vires*. The decision of the HCD was upheld by the AD and the President repealed the Act by promulgating the Gram Sarkar (Repeal) Ordinance 2008.

²² On 16 January 2007 the President promulgated four Rules namely, the Bangladesh Judicial Service Commission Rules 2007 (S.R.O. No-7); the Bangladesh Judicial Service (Pay Commission) Rules 2007 (S.R.O. No-8); the Bangladesh Judicial Service (Constitution, Recruitment, Suspension, Dismissal and Removal) Rules 2007 (S.R.O. No-9); the Bangladesh Judicial Service (Posting, Promotion, Leave, Control, Discipline and other Service Conditions) Rules 2007(S.R.O. No-10).

²³ Gram Sarkar illegal: Non-elected body imposed on UP, says HC verdict. *The Daily Star* [Online] Dhaka, 3 August 2005. Available at <<http://www.thedailystar.net/2005/08/03/d5080301011.htm>>. Accessed 18 March 2011.

Unauthorised legislation is illegal

From October 2006 to 11 January 2009, Bangladesh was governed by the unelected caretaker government. As per article 58(D) (2), the caretaker government is obliged to discharge routine functions for the preparation of general election and cannot make any policy decision except urgent necessity. But this caretaker government exceeding its constitutional limits attempted to enact new laws by way of Presidential Ordinance which failed to survive judicial scrutiny.

In 2008, the President by promulgating an Ordinance amended the Muslim Marriage and Divorce Registration Act 1974. The Ordinance was challenged as out of the caretaker regime's business. On 13 July 2008, referring article 58D, the HCD held that the purported Ordinance being a policy decision was out of the business of the caretaker government and illegitimate.²⁴

Once more, the then President promulgated the Contempt of Court Ordinance 2008 repealing the existing Contempt of Courts Act 1926. On 6 July 2008, a HC Bench comprising ABM Khairul Haque J and Abu Tariq J issued *suo moto* rule challenging this Ordinance. The HCD observed that when a new parliament was expected to take over in short promulgation of new ordinance was unnecessary. The Court added, 'enacting a new law repealing an existing one was a policy decision and since it had nothing to do with the election it was done without lawful authority'. Further, s 10(1) of the Ordinance exempted the public servants accused of contempt from personal appearance before courts. The court considered this privilege as against article 27 which treated all citizens as equal before the law and that in contempt cases it was the Court to decide whether the contemner to appear before the Court.²⁵

On 24 July 2008, the HC declared the Contempt of Court Ordinance *ultra vires* as it diminished the spirit of the Constitution and independence of the judiciary. Decision of the HC was upheld by the AD on 28 July 2008.

²⁴ 'President can promulgate poll related laws only during CG period: HC observes' *The Daily Star* [Online]. Dhaka, 14 July 2008. Available at <<http://www.thedailystar.net/newDesign/news-details.php?nid=45693>>. Accessed 18 July 2011.

²⁵ 'Contempt of Court: HC declares new ordinance invalid: Says it undermines spirit of constitution, free judiciary' *The Daily Star*. [Online] Dhaka, 25 July 2008. Available at <<http://www.thedailystar.net/newDesign/archive.php?date=2008-07-25>>. Accessed 27 February 2011.

5. Scope of Constitutional Amendment

The parliament of Bangladesh is empowered to amend the Constitution by virtue of article 142, but the amending power is not absolute; the amendment must conform to the basic features of the Constitution and should not be inconsistent with the existing constitutional scheme (Kamal 1994:24). If any amending Act is inconsistent with the Constitution or violates the basic features, article 102 authorises the Supreme Court to declare such Act *ultra vires*. The Dicey's understanding of parliamentary sovereignty has no place in the constitutional scheme of Bangladesh rather it has been replaced by constitutional supremacy of the court i.e., the power of the court to review parliamentary Acts against the Constitution (Oliver 1998).

In a multi party parliamentary system the power to amend the Constitution is reserved for the parliament which is anticipated to be exercised in national need irrespective of partisan interest. But the intrinsic human trait of self-interest projecting through the parliament 'inevitably results in the ruling party favouring the partisan interests of its own supporters through its policies and actions while denying even the reasonable claims of others'(Oliver 1998). The constitutional history of Bangladesh shows that most of the amendments so far have been made are for partisan interest and to give legitimacy to the unlawful acts. Such amendments fail to gain public confidence or to guarantee justice. In the backdrop of this reality the Supreme Court's intervention to uphold the Constitution is much needed and well acclaimed. In this trend to now, the Supreme Court has declared four constitutional amendments *ultra vires* for failing to meet the criteria of constitutionality and in this part of the article cases relating the constitutional amendments have been discussed to understand the limitation of constitutional amendment and, the role of the Supreme Court in the face of legislative transgression.

5.1 Eighth amendment case- *Anwar Hossain Chowdhury v Bangladesh* (1989)²⁶

Un-amended article 100 of the Constitution of Bangladesh 1972 provided that permanent seat of the Supreme Court (comprising AD and HCD) shall be in Dhaka but, sessions of the HCD may be held at such other place or places as the Chief Justice may, with the approval of the President, from time to time appoint. On 8 May 1982, by the Martial Law Proclamation, six permanent

²⁶ 41 DLR (AD) 165.

benches of the HCD were established in six divisions of Bangladesh. By an amendment to the Proclamation in 1986, these permanent benches were designated as 'Circuit Benches' and it was provided that when the Martial law will be over and the Constitution will revive these circuit benches will be deemed to be the sessions of the HCD (Kamal 1994: 93). The Constitution revived in 1986 and the Chief Justice by a notification converted those permanent benches as sessions of the HCD. Then the lawyers' community demonstrated contending this as unconstitutional (Halim 2006: 398).

On 9 August 1988, by introducing the Constitution (Eighth Amendment) Act 1988, the parliament amended article 100 to set up six permanent HC benches outside Dhaka and empowered the President to fix the territorial jurisdiction of new HC benches and thereby to curtail the territorial jurisdiction of the HC in Dhaka. Then in the case of *Anwar Hossain Chowdhury v Bangladesh* (1989), amended article 100 was challenged for altering the basic features of the Constitution by curbing the plenary jurisdiction of the HC over the Republic. The HCD summarily rejected the petition granting a leave to appeal (Islam 2006: 650).

The AD declared the amended article 100 *ultra vires* as it destroyed the unitary form of the Supreme Court by setting up rival courts to the HCD in the name of 'Permanent Benches' conferring full jurisdictions, powers and functions of the HCD. The AD found that the amended article 100, (i) was inconsistent with articles 44, 94, 101 and 102; (ii) rendered articles 108, 109, 110, 111 and 112 nugatory and, (iii) directly violated article 114 of the Constitution.

The AD by three-fourths majority held that the setting up of six permanent benches of the HCD by the Eighth Amendment Act was violation of indivisibility of the HC's plenary jurisdiction over the Republic and as such was null and void.

5.2 Fifth amendment case- *Bangladesh Italian Marble Works Ltd v Bangladesh* (2010)²⁷

After the killing of Bagabandhu Sheikh Mujibur Rahman, the then President, Moshtaque Ahmed by a Proclamation dated 20 August 1975 assumed the governmental powers. He suspended the Constitution with effect from 15 August and made it subservient to the Proclamation. After 82 days in power

²⁷ 2010 BLD (Special).

Moshtaque handed over the Presidency to Chief Justice Sayem. On 6 November Sayem assumed the power of the Chief Martial Law Administrator and by a Proclamation dated 29 November 1975, handed over the office of the Chief Martial Law Administrator to Ziaur Rahman, the then Army Chief.

By promulgating Proclamations (Amendment) Order 1977, Ziaur Rahman inserted paragraph 3A in the Fourth Schedule to the Constitution purporting to validate Martial Law Proclamations and instruments, all other laws made and all actions taken under such proclamations/laws.

Ziaur Rahman arranged parliamentary election in 1979 in which his party secured two-thirds majority. On 6 April 1979, the parliament passed the Constitution (Fifth Amendment) Act 1979 ratifying and confirming the Proclamations and other laws made and all actions taken under such laws during the period of 15 August 1975 to 9 April 1979 by insertion of paragraph 18 in the Fourth Schedule of the Constitution.

The Fifth Amendment Act was challenged in the HCD in the case of *Bangladesh Italian Marble Works Limited v Bangladesh* (2010) where ABM Khairul Haque J in his leading judgment declared the purported amendment void for the reasons that:

- i) the Constitution was amended in defiance of the manner provided in article 142;
- ii) it destroyed the basic features of the Constitution;
- iii) it curtailed the supremacy of the Constitution by making it subservient to the Martial Law Proclamations;
- iv) martial law or martial law authority was not recognised in the Constitution, so assumption of state powers by martial law authority was unconstitutional. The Fifth Amendment legalised the illegal and unconstitutional martial law and martial law authority and as such the amendment itself was *ultra vires*;
- v) all Martial Law Proclamations and instruments were *ultra vires* because those were 'made by the persons without lawful authority'.

The decision of the HCD was challenged and a full bench of the AD headed by Md. Tafazzul Islam CJ upheld the HC's verdict.

5.3 Seventh amendment case - *Siddique Ahmed v Bangladesh (2010)*²⁸

On 24 March 1982, Hussain Muhammad Ershad, the then Chief of Army, declared himself the Chief Martial Law Administrator and assumed the state power by a Proclamation of martial law. He suspended the Constitution and by a later amendment of the Proclamation inserted a Schedule to the Proclamation (Manik and Sarkar 2010). The Schedule contained, 'a mini-constitution of his own device which he amended from time to time with wanton abandon providing that, subject to his Proclamation and the Martial Law Regulations etc., the country will be governed in accordance with the said Schedule' (Kamal 1994: 83). The Constitution as well as the Schedule of the Proclamation was made subordinate to the martial law dispensation. Ershad withdrew martial law on 11 November 1986 and on the same date the third parliament passed the Constitution (Seventh Amendment) Act 1986 ratifying and confirming the Martial Law Proclamation and legalising all orders and actions carried under the Proclamation, Regulations and Orders by inserting paragraph 19 to the Fourth Schedule of the Constitution.

In January 2010, Siddique Ahmed challenged the legality of the Seventh Amendment Act to contest his murder conviction in 1986 by a martial law court. On 26 August 2010, in the case of *Siddique Ahmed v Bangladesh (2010)* the HCD declared the Seventh Amendment Act illegal. Shamsuddin Chowdhury Manik J observed that Proclamation of martial law and all martial law instruments which were legalised by the 7th Amendment were *ultra vires* as they were issued by a person who illegally assumed the state power in derogation of the Constitution.

His Lordship mentioned that, 'the phrase amendment has its own meaning and peculiarity and it is incapable of importing any new theme, unknown to it, not associated with it'. 'Amendment' means change or alteration subject to retention of the basic features of the Constitution. An 'amendment' is permitted only in accordance with article 142 of the Constitution and the phrase 'amendment' as has been used in article 142 does not include ratification, validation or confirmation of martial law Proclamation or Regulations. Thus the Seventh Amendment Act could not be ranked as an amending Act, as it was not in conformity with article 142, missed the mandatory 'long title' and undermined the constitutional supremacy as enshrined in article 7 and thus *ultra vires*. The HC's verdict was challenged

²⁸ Writ petition no. 696 of 2010.

and on 15 May 2011, a six-member AD headed by ABM Khairul Haque CJ upheld the HC's verdict (Sarkar 2011b).

5.4 Thirteenth amendment case - *Abdul Mannan Khan v State* (2012)²⁹

The Constitution (Thirteenth Amendment) Act 1996 introduced a non-party caretaker government system in which Bangladesh was ruled by a selected government for an interim period during the transition from one elected government to another, at the expiration of tenure of the former. The members (eleven in total) of the caretaker government were nonpartisan and were meant to assist the election commission in holding a fair national election free from any political influence.³⁰

In the case of *M Saleem Ullah v Bangladesh* (2005)³¹ the provision of the caretaker government was challenged mainly on the ground that, (i) it was non-representative in character, (ii) violating the basic concept of democracy, the fundamental structure of the Constitution and procedural requirements of constitutional amendment. As a division bench of the HC failed to reach in unanimous decision and the case was referred to a full bench which declared the thirteenth amendment valid and constitutional.

Then the decision of the HC was challenged in the case of *Abdul Mannan Khan v State* (2012) and a seven members AD bench on 10 May 2011 reversed the HC's decision. Because of its undemocratic nature the AD declared the thirteenth amendment of the Constitution *ultra vires* and unconstitutional.³²

The declaration of *ultra vires* annuls the operation of any constitutional amendment. As the declaration finally determines the fate of an amending Act it is assumed that to declare the *vires* of any constitutional amendment is a kind of indirect participation in the making of an Amendment Act. In 5th, 7th, 8th and 13th amendment cases the Supreme Court appeared as the final arbiter

²⁹ 60 DLR (AD) 49.

³⁰ Available at <http://en.wikipedia.org/wiki/Caretaker_government_of_Bangladesh>. Accessed 4 September 2013.

³¹ 57 DLR (2005) HC.

³² A.B.M. Khairul Haque CJ, Md. Muzammel Hossain J, S.K. Sinha J and Syed Mahmud Hossain J declared the thirteenth amendment void; Md. Abdul Wahhab Miah J and Nazmun Ara Sultana J differed while Muhammad Imman Ali J left the matter for the Parliament to decide.

and foiled the parliamentary transgression to maintain the supremacy and basic features of the Constitution.

The foregoing study reveals that the judicial review of legislation (including constitutional amendments) have confirmed the Supreme Court's role as a 'deputy legislator' to maintain the harmonious legal and constitutional development. It also shows that judges in Bangladesh do not usurp the legislative power but the peculiar socio-political circumstances (Hoque 2011: 81), legislature's passivity (Cunningham 1987: 513) or legislature's transgression necessitate the judicial interventions onto the legislative province and such interventions are both necessary and desirable (Baxi 1987: 173).

6. Limitations in Judge's Law Making

It is true that constitutional courts necessarily make law but its acceptance is not unconditional. Apart from its *ex post facto* effect, judge made law is prey to the following criticism:

- i) it exists nowhere in fixed or determinate expressions, it tends to be vague and inconsistent and rules are rarely comprehensive (Cotterrell 2003: 72);
- ii) the legislative power of the judge is restricted to the facts of the case placed before him. Any ruling which he may lay down will be law only in so far as it is necessary for the decision of the case. The judge cannot make 'ruling' to introduce large-scale reforms or new codes (Mahajan 2005: 168, 228);
- iii) like legislators, judges are not representatives of the citizens; judge made law lacks popular sanctions of the mass people (Sackville 2001). It is also not less likely that individual opinions of a judge which is not acceptable to the others may be reflected and may turn out to become law;
- iv) judicial creativity is restricted by the rules of statutory interpretation, precedent and the supremacy of the Constitution;
- v) as per article 111 law declared by either division of the Supreme Court only binds the subordinate courts, not courts of superior or equal in status. Yet, due to 'review power' provided by article 105 even the law declared by the AD may not be binding upon itself. So the 'judge made law' is not a law equally applicable to all courts.

7. Conclusions

The tension between 'declaratory theory' and 'judicial law making' is a doctrinal view and not a matter of substance, because no legal system is based solely on 'declaratory theory' or on 'judicial law making'. The tension between the two contentious doctrines has been reconciled by Mahajan (2005: 230-231) in the following fashion:

There is not much difference between declaring and making. Declaring does not mean something mechanical. It also involves a creative and intelligent process by which the rules are applied to particular cases. Likewise, making does not mean that judge make law in the sense in which legislators make law. A judge merely works upon the materials given to him by the legislature. His function is interpretation only and while doing so, he plays a creative role. He gives life to the skeleton of law. He adapts it to the changed conditions and causes its dynamic growth.

In absence of direct constitutional recognition, the creative role of the Supreme Court of Bangladesh has always been a matter of concern for the idea of separation of powers. However the pragmatic approach to the social justice compelling the Supreme Court to review and remodel rigid insistence on the separation of powers. In recent constitutional cases the creative role of the Supreme Court has much more been affirmed due to its increasing response to the social needs and safeguard against unjust legislations.

In Bangladesh the creative discretion of the Supreme Court as 'deputy legislator' has been proved to be a crucial technique of filling up legislative vacuum, to ensure gradual development of law and to limit legislative transgression. Since legislators in Bangladesh have no means of anticipating all possible fact situations likely to arise in future, legislation may never be completely free from ambiguity or uncertainty and surely a scope for judicial law making will remain invariable. But the law-creating power vested upon the Supreme Court by article 111 must be exercised tacitly. Any transformation imparted by judicial creativity must be compatible with the existing laws and principles and, in no way the Supreme Court should usurp the legislative role to replace the parliament or to bring any indiscriminate change in settled legal regime.

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