The Daily Star

May 17, 2016

Law Analysis

Restraints on the judge-made law

Md. Rizwanul Islam

The role of the judges in the course of interpretation of law has at times been controversial, not just in Bangladesh but also in many other countries. At one extreme, some jurists subscribe to the view that the 'law is what the judges say it is', on the other end, some others would say that judges are nothing but interpreters of law and they can only apply it (may reluctantly concede that they can interpret), but cannot make it. While the theory of separation of powers as enshrined in the Constitution of Bangladesh would lend support to the latter view, on some occasions the Judges of the Supreme Court may have leaned somewhat in the direction of making law, the Appellate Division (AD) of the Supreme Court's decision in *Abdul Mannan Bhuiyan and another v State* (2008) 60 DLR (AD) 49, has very lucidly charted some territories where Judges should refrain from treading, in the course of interpretation of the Constitution and other laws.

In this case, the High Court Division of the Supreme Court (HCD), on the basis of a newspaper report, appearing in the Daily Ittefaq, issued a rule under Section 561A of the Code of Criminal Procedure, 1898 (CrPC) upon, inter alia, the political leaders and Secretary, Ministry of Home Affairs to explain why pro-hartal and anti-hartal activities would not be declared as cognizable offences. The HCD held that every assembly of five or more persons either to support or desist a hartal would be an unlawful assembly under the fifth clause of Section 141 of the Penal Code, 1860 (if the common object is “by means of criminal force, or show of criminal force, to compel any person to do what he is not legally bound to do, or to omit to do what he is legally entitled to do.”). It also held that the activities of the members of such an unlawful assembly would be cognizable offences under various Sections of part VIII of the Penal Code, depending on their actual action/s.

In the course of the hearing of the appeal against the judgment rendered by the HCD, the Attorney General made a fundamental point that since there was no pending judicial proceedings which would trigger the exercise of the inherent powers of the HCD, there was no scope for the HCD to apply it; and the AD accepted this argument. The AD arrived at this conclusion on the basis of the finding that the word 'or' in Section 561A of the CrPC is conjunctive. The AD referred to the judgement in *Khondaker Modarresh Elahi*v *Government of the People's Republic*

of Bangladesh, (2002) 54 DLR (HCD) 47 and observed that the legality of hartal *per se* is firmly established and was not at all an issue in the case before it.

Referring to the decision of the US Supreme Court in *Myers* v *United States* (1926) 272 U.S. 52, the AD observed that the raison d'être of the separation of powers among the organs of the government is not efficiency, but the curtailment of arbitrary power by ensuring checks and balances. The AD concluded that "[i]t 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." (Para 40)

If the ratio of this case is followed in its letter and spirit, some needless friction between the judiciary and the two other organs of the state would be avoided, avoidable politicisation of the judiciary would be averted, and democratic culture in this country would be strengthened. The power of judicial review is an indispensable element of the constitutional supremacy and more often than not resorting to interpretative tools is an inseparable part of it. However, the power to legislate is not necessarily a part of the exercise of judicial review. Judicial activism is lauded by many commentators and surely such activism has played a laudable role in the progressive development of the society but there is a fine line between activism and traversing in areas reserved for the Parliament. It is quite clear that the AD in this case was acutely aware of that delicate line and the pitfalls of crossing that line. Such self-restraint has not only helped the AD to avoid being dragged into politically sensitive areas but also has helped it to preserve its image as an impartial arbiter for settling legal disputes as opposed to political ones.

The writer is an Associate Professor at School of Law, BRAC University.