LAW VISION

Subordinate judiciary's power of interpreting laws: Critiquing *Terab Ali v Syed Ullah*

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In 2022, while dealing with the case of *Terab Ali and others v Syed Ullah and others* (civil petition for leave to appeal no. 3135 of 2014), the Appellant Division of the Supreme Court of Bangladesh (AD) made an interesting observation regarding the nature of judicial power exercised by the Subordinate Judiciary of Bangladesh. The main controversy that the AD dealt with in the above-mentioned case was regarding the Subordinate Court applying a precedent set by the Peshawar High Court of Pakistan in 1998. The AD rightly observed that the post-1971 precedents set by the judiciary of Pakistan (like other foreign courts) are not binding on Bangladeshi courts. As the AD remarked, the case laws of Dhaka High Court and Federal Court of Pakistan (from 14 August 1947 to 1956), Supreme Court of Pakistan (from 1956 to 25 March 1971), Calcutta High Court and Federal Court of India (from 1935 to 13 August 1947), and the Privy Council (till 13 August 1947) are binding on Bangladeshi Courts, unless decided otherwise by the Parliament or Supreme Court of Bangladesh. However, while concluding against the holding of the Subordinate Court, the AD held,

"[A]s the Judges of Sub-ordinate Judiciary, as a whole, are not empowered to interpret laws or making a precedent, rather, are bound to apply "existing laws" as it is, it is better for them only to cite or rely on the existing laws and case laws applicable in our jurisdiction and at the same time refrain from rely on foreign case law, not covered under the constitutional scheme framed through Article 111 and Article 149 of the Constitution of Bangladesh as discussed above."

The issue of the use of foreign judgements by the Subordinate Courts demands a separate discussion. This article argues that the AD's claim regarding the Subordinate Court's lack of power to interpret laws begs multiple questions. By saying that the Judges of the Subordinate Judiciary are not empowered to interpret laws and are bound to apply pre-existing laws, the AD has taken a formalist position regarding adjudication in the Subordinate Courts. Legal formalists argue that the law is (or at least ought to be) presented as clear and exhaustive prescriptions. They argue that all judicial decisions are (or can be) clearly determined by pre-existing legal rules. Formalists are, by and large, not in favour of the use of judicial discretion and the creation of laws through adjudication.

Formalism has widely been criticised by legal positivists and natural law theorists alike. HLA Hart criticised formalists for failing to understand the open texture of language. A similar line of criticism may be applicable to the Court's view in *Terab Ali*. Although the law may often be clear, quite often, even the simplest words require interpretive reflection. For instance, even while trying to comply with the AD's direction not to "interpret" laws, the Subordinate Courts must use their judicial minds to interpret the AD's use of the term "interpretation." Since laws are expressed through language, the intrinsic vagueness of language also plagues the law. Human beings have not yet been able to develop a language that can exhaustively express what the speaker truly wants to express, regardless of the speaker's linguistic skills. Thus, it is only natural that Judges, from time to time, would have to interpret laws. The Subordinate Courts deal with more cases than the two branches of the Supreme Court of Bangladesh. Other than the issues falling within the original jurisdiction of the High Court Division of the Supreme Court of Bangladesh, cases are initially dealt with by the subordinate judiciary. Since the Subordinate Court Judges are duty-bound to determine cases within their jurisdiction, it may be argued that they are also duty-bound to deal with difficult cases that require interpreting laws.

Those who subscribe to the above-discussed line of criticism may also argue that Judges of the Subordinate Courts have to deal with certain applications of laws that the legislature or the Apex Court have not yet considered. In those cases, the pre-existing laws would not be able to provide clear prescriptions. This claim can be backed by hundreds of cases in which the Apex Court has affirmed legal interpretation given by Subordinate Court Judges.

Another line of criticism against formalism that may also apply to the AD's observation in *Terab Ali* can be found in the works of Ronald Dworkin and his supporters. Dworkinians argue that every time a law is used or understood, its reader must interpret the law. He argued that the demands of the law must be understood by interpreting it. Although Hart and Dworkin disagree about how often judges have to use their discretion while interpreting the law, both sides of this jurisprudential divide agree that laws do require interpretation from judges.

The Higher Judiciary seldom takes a formalist approach while adjudicating— as evident from its adoption of "implied" principles like the doctrine of basic structure, Wednesbury unreasonableness, the doctrine of reasonable classification, the doctrine of necessity, and so on. These principles were not provided directly in the text of any so-called "pre-existing" laws. Nonetheless, the Courts were not reluctant in adopting them and using foreign judgements to justify such adoption.

The author is not trying to argue that the Higher and Subordinate Judiciaries enjoy (or ought to enjoy) the same level of discretionary powers to interpret laws. It is also not the author's intention to argue that the Subordinate Courts should have free reign to use any foreign judgements they want. The curiosity of the author lies with the AD's observation that the Subordinate Courts do not possess the power to interpret laws. Perhaps a clarification from the AD regarding the use of the term "interpretation" would be helpful since the very concept of interpretation requires interpretation.

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RIGHTS ADVOCACY

Intersectionality and the Protection of Persons with Disabilities

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Rights and Protection of Persons with Disabilities Act, 2013 was enacted in line with the United Nations Convention on the Rights of the Persons with Disabilities (CRPD) to ensure, as axiomatically suggested, the rights and protection of persons with disabilities. The Act speaks of equal treatment, education, and employment of persons with disabilities. Unfortunately, however, it considers disability as a monolithic identity and does not dive into intersectional identities of persons with disabilities.

Distinct identarian characteristics (such as sex, ethnicity, age) in combination with disability exacerbate the impediments faced by persons with disabilities. For instance, disabled people belonging to ethnic groups are discriminated against for their disability as well as their ethnicity. At the intersection of these two identities, a unique form of discrimination emerges which cannot be explained either through ethnicity or disability alone.

The Act speaks of equal treatment, education, and employment of persons with disabilities. Unfortunately, however, the Act considers disability as a monolithic identity and does not dive into intersectional identities of persons with disabilities.

The most prevalent forms of violence against women with disabilities in Bangladesh are perhaps rape and sexual harassment. According to data from the Women with Disabilities and Development Foundation, around 96% of women and girls with disabilities face physical, psychological, sexual, and emotional violence. The Act does not have adequately address protection of women with disabilities from sexual exploitation, psycho-social violence and/or abuse.

Similarly, the vulnerability of children gets worsened when compounded by disability. In 2021, the National Survey on Persons with Disabilities (NSPD) unravels that 1.7% of children in Bangladesh live with one of the twelve types of disabilities defined in the Act of 2013. 60% of children with disabilities aged 5-17 years are not enrolled in schools. Section 16 (1) (h) of the Act mentions access to inclusive education. Although the provision envisages inclusion, it does not address the root-level challenges. The school buildings remain inaccessible for children with disabilities. Lack of wheelchair accessibility, toilet facilities, lack of sensitised teaching staff, and many more hindrances make mainstreaming disabled children's rights into formal education facilities a far cry. The needs of disabled children also vary depending on their respective spectrum of disability. Inclusive education cannot be made a reality in case such dimensions are overlooked.

In sum, the Act of 2013 fails to view disability through the lens of intersectionality. Consequently, the discrimination arising from each layer of identity in combination with disability remains unaddressed. To make the rights and protection of persons with disabilities a reality, it is high time we weaved intersectionality into the policy-legal approaches to disability in general.

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LAW LETTER

Smoking in public

In order to regulate smoking in public, the relevant law in place is the Smoking and Tobacco Products Usage (Control) Act of 2005 (the Act). Section 4 of the Act prohibits smoking in public places. Any person who commits this offence shall be punished with a fine that may extend to Taka 300. If any person commits the same offence for the second time or thereafter, he/she shall incur twice as much fine.

According to Section 2(f) of this Act, public places include educational institutions, government offices, hospitals and clinics, curt buildings, railway stations, public toilets, children's parks, fairs or passenger shelters, any other place declared smoking-free by the government or local government, and many others. As per Section 2(g), public transport means any vehicle used for the carriage of passengers for hire, whether on a regular or occasional basis. This includes ships, launches, trains, buses, motor vehicles, and other forms of public transportation. Additionally, the Smoking and Tobacco Products Usage (Control) Rules, 2015 seek to regulate the sale and distribution of tobacco products.

Despite existing laws to prevent smoking in public, public smoking does not seem to be regulated as such. The reasons behind this lack of implementation are multifarious. First, many people are either unaware of the laws or do not consider them to be applicable on them. Low fines and lack of enforcement are also two major obstacles to enable realisation of smoke-free public environs and spaces. Pertinent to note, according to Section 7 of the Act, the owners of public places and public transport in Bangladesh can designate areas where people can smoke. This also militates against stricter measures in regulating smoking in public places.

The law on smoking in public places needs to be amended to increase fine for smoking in public places. Measures banning smoking in certain categories of public places, increasing taxes on tobacco products, and providing smoking cessation services can also be key. In the end, the government needs to play a pivotal role in raising mass awareness as well.

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