LAW OPINION

A matter of unconvincing Judicial opinions

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The law schools one sees in Hollywood movies and law schools in Bangladesh have tons of dissimilarities. One thing that both have in common is the strategy to shape the legal minds of the students through the study and analyse of the case laws. A proper legal education in a country that follows the common law tradition would entail reading hundreds, if not thousands, of judicial opinions authored by the appellate court judges while deciding cases. While discussing case laws with students, law teachers do not simply focus on the conclusions of the cases but on the reasons behind those conclusions articulated by the judges. However, at times, the reasons provided in a judicial opinion fail to convince the readers. Being exposed to the practice of reading judgments, lawyers, judges, and academics get accustomed to reading unconvincing judgments. However, law students who are taught about the binding nature of apex court judgments in the first week of their law school have a harder time digesting the fallibility of the courts. Often, I find intelligent law students struggling to understand how to deal with binding judgments that fail to convince the readers. It does not help that legal academics who author critical scholarship regarding judicial opinions rarely mention the consequences of the unconvincing nature of the judgments they peruse. This short essay tries to address the consequences of unconvincing judicial opinions superficially.

The previous paragraph begs the question—why do judicial opinions need to be convincing? Common law courts delivered judgments orally in their early years and did not pen down judicial opinions. The practice of formally authoring judicial opinions is only a few centuries old. In a modern democracy, the courts occupy an interesting role. In a democratic system, the lawmakers are elected by the people they govern. Their decisions obtain legitimacy directly from people's votes. The decisions of those who execute these laws (at least the final decision-makers) are also legitimised through the people's votes. Both are accountable to the people, as people have the right to protest against their decisions and not elect them for another term. However, judges, who have the power to overturn decisions of the legislature and executive, are not appointed by the people. People cannot protest against judicial decisions without being exposed to the risk of being punished for contempt. Thus, courts, while delivering judgments, owe the people an explanation. Paul W. Kahn writes, "We are convinced that a legislature should have authority when its members are selected through regular, free, and fair elections. We are convinced that judges should have authority when they have persuaded us that they are applying the law, not exercising arbitrary power." (Making the Case: The Art of the Judicial Opinion, 2016)

The use of judicial power is considered legitimate because of the judiciary's obligation to decide cases in a principled, reasoned, and intellectually sound manner. The courts make their reasonings publicly available by authoring judicial opinions to maintain their legitimacy. As Kahn rightly points out, a judgment is different from an opinion. A judgment is the declaration of the outcome of a dispute. A judicial opinion is a judgment's companion. A judicial opinion assures the people that the case was not decided arbitrarily. A judicial opinion plays at least two significant roles. Firstly, it can be thought to be addressed to the losing litigant, trying to explain to her the reasons why the case was decided against her interest. Secondly, it is thought to be addressed to future judges and litigants, telling them why the judgment was delivered in favour of a particular argument for its rhetorical use in the future. This, of course, presupposes that the opinion would be convincing.

Thus, when a judicial decision fails to convince its readers, it directly affects the legitimacy of judicial powers. It goes without saying that one or two unpersuasive judicial opinions would hardly harm the judiciary's legitimacy. However, if the apex court regularly writes unpersuasive opinions, it would affect the people's confidence in the court. Kahn writes, "The courts as an institution must earn our confidence." When a court fails to convince the people that it has decided a dispute judiciously, it fails to satisfy the very standard that gives it legitimacy.

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An unconvincing judicial opinion may also fail to become precedents. As Frederick Schauer rightly points out, judicial precedents can be of two types: vertical and horizontal. (Thinking Like a Lawyer, 2009) The precedents set by higher courts for subordinate courts are called vertical precedents. Vertical precedents are binding on the subordinate courts. When a precedent is presented to a court of the same jurisdiction, it is a horizontal precedent. Although the *stare decisis* principle creates an obligation for courts to follow horizontal precedents, they also have the power to contradict horizontal precedents if they have good reasons to do so. Thus, if a judicial opinion fails to convince future judges, it may fail to become precedents, as a future court may contradict its reasonings. For instance, in the famous (or infamous, depending on where the reader is from) case of *Dr. Bonham* v *College of Physicians,* Edward Coke held that the common law courts had the power to judge the validity of the Acts of Parliament. However, it failed to convince English judges, and eventually the case failed to solidify itself as common law in England.

To celebrate the Supreme Court of India's 50th anniversary, the prominent jurists of that time published a book titled "Supreme but Not Infallible". The book's title could be very aptly used to describe all apex courts. We must remember that courts do not operate beyond making mistakes. Invoking examples like the infamous cases of *Plessy* v *Ferguson, Dred Scott* v *Sanford,* or *Halima Khatun* v *Bangladesh* may suffice to establish this claim. Thus, we must closely examine the persuasiveness of judicial opinions. If they fail to convince their readers, they may not establish the test of time and fail to foster public's confidence in the judiciary.

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RIGHTS AND RESTRICTIONS

Revisiting the case of SHAMIMA BEGUM

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In 2015, a 15-year-old British citizen Shamima Begum travelled to Syria to join the ISIS. In 2019, the Home Secretary of the United Kingdom (UK) decided to revoke Shamima Begum's British citizenship on the presumption of her Bangladeshi citizenship, a claim which the government of Bangladesh contradicts. After a series of legal disputes, the Court of Appeal upheld the decision of the Special Immigration Appeals Commission (SIAC) in February 2024 to the effect that the revocation of Begum's citizenship was lawful.

Both under the UK citizenship law (section 40 of the British Nationality Act, 1981) and international law (article 8(1) of the 1961 Convention on the Reduction of Statelessness), the UK government cannot revoke one's citizenship if such deprivation would leave them stateless. Hence, the revocation of Begum's citizenship is supposed to be dismissed if she is proven *not to be* a citizen of Bangladesh.

The government of Bangladesh denies the assertion of her being a Bangladeshi citizen. A foreign ministry official statement states that Begum is a British citizen by birth and has never applied for dual nationality with Bangladesh; neither has she ever visited Bangladesh in the past despite her parental lineage. Whether Begum is a Bangladeshi citizen, is certainly a contentious legal issue, and requires elaborate exploration, which we hold out for some other time.

Against the backdrop of the official position of Bangladesh, the only viable solution to prevent Begum from becoming stateless was to retain her British citizenship through appeal. However, the SIAC gave the verdict against Begum, leading her case to the Court of Appeals. And the recent ruling by the Court has further complicated the issue for Begum.

The UK Supreme Court, in the case of State of the *Home Department* v *Al Jedda* (2013) affirmed that the act of revoking British citizenship is deemed illegal if it renders an individual stateless. However, after the incident of 9/11, citizenship has been stripped due to national security concerns on several occasions.

Five arguments were presented in her appeal against the decision of the SIAC, covering various aspects, including the claim that the Secretary of State has failed to recognise a plausible suspicion of trafficking (which would be a violation of article 4 of the European Convention on Human Rights), the potential occurrence of *de facto* statelessness, and procedural unfairness. The Court rejected all the claims and noted that these obligations, as outlined in article 4, encompass legislative, operational, and investigative responsibilities. The court clarified that there were no violations of the operational duties, and the UK government was not obliged to repatriate Shamima Begum to the UK due to the lack of a causal connection between the alleged breaches in 2015 and the decision to deprive her of citizenship in 2019.

Shifting the focus to investigative requirements, the court ruled that the Secretary of State was not required to investigate suspected violations of a protective duty aimed at safeguarding potential victims of trafficking from harms. The court justified its position by stating that it would require her presence in the UK for an investigation, which would ultimately contradict previous decisions.

Regarding the contention on *de facto* statelessness, the court, acting similarly to SIAC, rejected the claim made. *De facto* statelessness refers to the situation where an individual may technically hold citizenship in another country but has no practical place to reside. The court outlined its decision, claiming that the government had considered her circumstances but decided to revoke her British citizenship owing to national security concerns.

Furthermore, while acknowledging the importance of ensuring fair representation in legal matters, the Court concluded that there is no mandatory requirement for representation before depriving an individual of citizenship on national security grounds. Additionally, the court acknowledged that even with legal representation, the outcome would likely have remained unchanged.

The UK Supreme Court, in the case of State of the *Home Department* v *Al Jedda* (2013) affirmed that the act of revoking British citizenship is deemed illegal if it renders an individual stateless. However, after 9/11, citizenship has been stripped due to national security concerns on several occasions. Hence, it can be said that this case emphasises the conflict between national security considerations and the right to citizenship, which has been debated in international law for a long time. The broad discretionary power granted to the Secretary of State poses challenges to the concept of citizenship as a paradigmatic right.

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