

LAW AND SOCIETY

On quota reform movement and judicial decision-making



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Whether pressure of any social movement can influence judicial decision-making is a complex question and touches on fundamental aspects of

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constitutional law, judicial independence, and separation of power. The question becomes all the more complicated when the decision-making lies with the highest judicial authority of the

state (i.e., the Supreme Court).

While the Constitution does not provide a direct mechanism for public protests to overturn court verdicts, it does recognise fundamental rights such as freedom of assembly and freedom of expression. These rights allow citizens to voice their opinions and potentially influence the broader legal, judicial, and political landscape.

In the landmark case of *Brown v Board of Education* (1954), the US Supreme Court declared racial segregation in public schools unconstitutional. While the decision was based on constitutional interpretation, it was influenced by the broader civil rights movement and changing social attitudes towards racial equality. Even conservative courts can be influenced by advocacy and public conscience. During Nixon's Presidency, despite conservative

appointments, the court made several progressive decisions. This included ruling against sex discrimination and deciding *Roe v Wade* (1973), which legalised abortion. These decisions were influenced by growing public support for gender equality and reproductive rights.

The South African Constitutional Court's decision in *Minister of Health v Treatment Action Campaign* (2002) demonstrates how a combination of litigation and public mobilisation can influence judicial outcomes. The court's ruling, while based on constitutional interpretation, was undoubtedly informed by the broader social movement advocating for HIV/AIDS treatment access. In India, the Indian Supreme Court's decision in the *Vishaka and others v State of Rajasthan* (1997),

was influenced by women's rights movements and led to guidelines on sexual harassment in the workplace. This judgment was an outcome of both street protests outraged by the decision of the previous *Bhanwari Devi* case and sustained public advocacy.

The concept of 'popular constitutionalism' argues that the people, and not just the courts, play a role in constitutional interpretation. While this does not suggest that court decisions can be overturned by public opinion, it acknowledges that sustained public engagement with constitutional issues can shape the context in which future cases are decided.

The current debate in Bangladesh over the reformation of quota system brings these issues into sharp focus. The staying of the 2018 government circular and lack of adequate initiatives by government to reform the quota system has sparked widespread protests from general students. It has brought into focus the tension among judicial independence and public sentiment and freedom of expression.

While public protests do not have the constitutional authority to directly overturn judicial decisions, they reflect a shift in public opinion that the court cannot entirely ignore. The Supreme Court, while not directly accountable to public opinion, does not operate in a vacuum but within a broader societal context. The effectiveness of the judiciary in a democratic system is partially derived from public trust and acceptance of its decisions. While Supreme Court judgments are designed to be final and independent of public pressure, among others, the ongoing quota debate in Bangladesh illustrates the complex interplay between judicial decisions, constitutional interpretation, and evolving societal values, highlighting the need for a delicate balance to be struck between upholding legal principles and responding to legitimate public concerns within a dynamic democracy.

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RIGHTS WATCH

Right to information and Bangladesh

TAWSIF MOTTAKI CHOWDHURY

Bangladesh experienced a wave of enthusiasm in the wake of the enactment of the Right to Information Act in 2009. Initially, public perceived the law to be a potent instrument that would enable them to keep an eye on government activities, reveal wrongdoings, and hold public officials accountable. However, as time went on, the initial zeal faded, and the Act came to use for only a handful of people.

In theory, the 2009 Act empowers citizens to scrutinise government work, question decisions, and demand transparency. The preamble to the Act holds the right to information to be an inalienable part of Freedom of Thought, Conscience and Speech under Article 39 of the Constitution of Bangladesh. Section 4 of the Act states that every citizen has a right to information from the authority, and the authority must provide so upon demand. Section 8 allows citizens to request information from responsible officers in writing, electronically, or via email. As per section 9, the responsible officer must provide the requested information within 20 working days and if multiple information-provider units or authorities are involved, within 30 working days. Section 9(3) further provides that if the officer is unable to provide the information, they



must inform the requester of the reason of such inability within 10 working days of receiving the application.

Ideally, informed citizens should utilise this opportunity to its maximum potential. However, the reality is far from ideal in Bangladesh. Fear of retaliation, lack of awareness about the law's intricacies, and lack of trust hinder citizens from exercising their rights under the Act. This underutilisation reflects a broader trend of information apathy, where the power to challenge corruption and promote good governance through the RTI is acknowledged in theory but overlooked in practice.

Neighboring countries are experiencing a rise in the enforcement of this right in favor of the mass people. The Indian Supreme Court unanimously ruled on 15 February 2024 to overturn the now-infamous Electoral Bonds Scheme of 2018 and ordered the disclosure of a vast amount of sensitive information that had been withheld from the citizens. Bangladesh can gain valuable insights from India's experience with the RTI Act on its immense potential.

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Sri Lanka has also witnessed how successful the law can be in holding the government accountable and battling corruption. Sri Lanka's efforts to combat corruption have benefited immensely from their RTI legislation. The International Monetary Fund's Governance Diagnostic Assessment (GDA) recognised the RTI as having a significant impact on improving governance. Special attention was given to the RTI Commission of Sri Lanka for their uncompromising compliance with the law.

However, the same success has not been mirrored in Bangladesh due to several factors. Firstly, the nature of RTI requests in Bangladesh is predominantly personal, lacking the public interest driven inquiries. Secondly, there is a notable absence of collective civil society action to challenge and safeguard the RTI law's implementation. And lastly, there is an immense lack of cooperation on part of the officials in providing information in our country.

The way forward is evident as Bangladesh grapples with the underutilisation of the RTI. NGOs and our civil society must lead the change in advancing RTI into the forefront of governance. Bangladesh stands at a pivotal moment, where RTI's potential as a weapon against corruption and good governance must be fully realised through collective effort and commitment.

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GENDER AND LAW

Obstetric violence and women's human rights in Bangladesh

ARIFUR RAHMAN

Safe motherhood entails a serious consideration of ensuring safe maternal and reproductive healthcare services. Yet, women in our country often face the challenge of trading off their health safety for childbirth. Last year a case was filed against a private hospital and its concerned doctor on the grounds of alleged botched Cesarean sections (C-sections) and fraud following the death of 25-year-old Mahbuba Akter Akhi. C-sections which practitioners are advised to follow in exceptional childbirth scenarios have become a common phenomenon in Bangladesh. Such procedures have become so pervasive over the years that normal delivery procedures are nowadays almost an exception—practitioners follow C-sections even when such procedures are not required. The rate of unnecessary C-sections in Bangladesh rose to 51% between 2016 and 2018 as reported by Save the Children. When we perceive these unnecessary C-sections simply as a medical procedure, we ignore the abuse, coercion, and trauma women experience during childbirth. In fact, women often lose any sense of control over their body and reproductive health when seeking healthcare support during childbirth. Although any birthing body including trans and non-binary persons could be subject to obstetric violence, this essay focuses only on (cis) women. Obstetric violence is an ever-evolving concept but generally refers to the mistreatment of women including but not limited to negligence, abuse, or coercion in obstetric and gynecological care. An example of obstetric violence includes the performance of C-sections without the voluntary and informed consent of the patient. However,

obstetric violence is not merely another case of medical negligence and abuse, rather an example of gender-based violence, exemplifying its dynamic nature and the various forms it takes. It is part of the broader structural violence that women face in everyday life.

The World Health Organisation (WHO) in its statement 'The prevention and elimination of disrespect and abuse during facility-based childbirth' provides an array of examples of obstetric violence such as 'outright physical abuse, profound humiliation and verbal abuse, coercive or unconsented medical procedures (including sterilisation),



lack of confidentiality, failure to get fully informed consent, refusal to give pain medication, gross violations of privacy, refusal of admission to health facilities', among others. While women in Bangladesh often go through various forms of obstetric violence, it has yet to be recognised as a form of human rights concern. In fact, Bangladesh has not even recognised obstetric violence as a legal issue.

In *N.A.E v Spain* (2022), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) Committee, while

dealing with obstetric violence experienced by a Spanish woman (the author) found that subjecting the author to unnecessary vaginal examinations, use of oxytocin without adequate justification, and performing episiotomy without consent resulted in the violation of human rights of the author under the CEDAW such as equality and non-discrimination in healthcare under Article 12, and right not to be subject to gender stereotypes under Article 5, among others. The committee further highlighted how gender stereotypes and prejudices lead to gender-based violence if medical

treatment of women supported by harmful gender stereotypes and cultural norms about their reproductive choices and health. Such stereotypes typically include regarding women's primary role in the society as a mother or a caregiver and, hence, the expectation that 'women should continue their pregnancies regardless of the circumstances, their needs and wishes' (*Mellet v Ireland*). To undermine the opinion of a patient in obstetric care and avoid the need to help her make an informed decision also reflects the long-held discriminatory notion that women lack any agency when it comes to making any decision about their reproductive health and choices. It only reproduces stereotypes and prejudices by reinforcing the traditional gendered notion that women should be submissive and obedient and that they are without any capacity of forming opinion. While gender stereotypes and prejudices contribute to the normalisation and validation of gender-based violence during childbirth, such stereotypes about women's sexual and reproductive health eventually allow healthcare providers to take full control of women's bodies.

Obstetric violence has serious consequences for women's human rights. Therefore, instead of sweeping it under the carpet, Bangladesh needs to take obstetric violence seriously because doing so supports its commitment to international human rights treaties and its Constitutional goal of securing (gender) equality and non-discrimination.

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