

CASE MANAGEMENT IN REDUCING CASEBACKLOGS:
POTENTIAL ADAPTATION FROM THE NEW SOUTH WALES DISTRICT COURT TO
BANGLADESH CIVIL TRIAL COURTS

UMMEY SHARABAN TAHURA

LL.M. University of Dhaka, Bangladesh

LL.B (honours) University of Dhaka, Bangladesh

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Macquarie Law School

Macquarie University

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Dedicated with love to my son (Wasi Ibrahim Raiid)and
My Husband (Md. Musa Ibrahim)

ABSTRACT

Case management systems are now commonplace in courts throughout the world. Bangladesh, however, has not introduced a case management system despite its being an almost overwhelming necessity due to backlogs and delays. The success of case management has already been proved in many countries. The District Court of NSW was chosen as an example of successful use of case management in reducing backlogs and disposal time in civil cases; therefore the court system of Bangladesh has been compared with that of New South Wales (Australia) concerning the courts' structure, procedures to appoint judges, jurisdiction of the specific court, the separation of the judiciary from the executive, and other institutions relating to the court system. The study aims to show how case management can reduce case backlogs from the civil trial courts of Bangladesh by finding the practical causes through empirical research following grounded theory. Semi-structured, open-ended interviews with lawyers, litigants, judges, and court staff were conducted in seven districts of Bangladesh between September 2013 and January 2014. This empirical research found that time limits imposed by law were not maintained in the courts. Moreover, excessive workload upon judges and lawyers, low rates of disposal through mediation, uncertain intention of lawyers and clients, insufficient logistic and technical support, frequent involvement of the higher courts in interlocutory matters, and also complex procedural law and its applications placed immense pressure on the courts creating huge backlogs. Adopting a suitable case management system in Bangladesh, based on that used in NSW, could reduce the backlogs. Recommendations based upon the empirical research are advanced.

THESIS DECLARATION

I certify that the work in this thesis entitled ‘Case Management in Reducing Case Backlogs: Potential adaptation from the New South Wales District Court to Bangladesh Civil Trial Courts’ has not previously been submitted for a degree nor has it been submitted as part of requirements for a degree to any other university or institution other than Macquarie University.

I also certify that the thesis is an original piece of research and it has been written by me. Any help and assistance that I have received in my research work and preparation of the thesis itself have been appropriately acknowledged. Also, I have obtained Macquarie University Human Research Ethics Committee Approval (Ref: 5201300485).

This thesis, to the best of my knowledge and belief, contains no copy or paraphrase of work by another person, except where duly acknowledged in the text.

Ummey Sharaban Tahura (43220452)

24 February 2015

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LIST OF PUBLICATIONS AND CONFERENCE PRESENTATIONS RELATED TO THIS THESIS

Journal Article:

1. Ummey Sharaban Tahura, 'Case Management: A Magic Lamp in Reducing Case Backlogs' (2013) 13 (1&2) *Bangladesh Journal of Law* 1-32
<http://www.biliabd.org/article%20law/Vol-13/Ummey%20Sharaban%20Tahura.pdf>.
2. Ummey Sharaban Tahura and M R LL Kelly, 'Procedural experiences from the civil courts of Bangladesh: Case management as a potential means of reducing backlogs' – Submitted to the *Australian Journal of Asian Law* (Acceptance upon minor corrections).

Conference Presentation:

Ummey Sharaban Tahura, Case Management in the Civil Trial Courts of Bangladesh: Scope for Thinking' (Paper Presented at the Asian Conference on Politics, Economics and Law, Osaka, 21-24 November 2013).

Conference Proceedings:

Ummey Sharaban Tahura, Case Management in the Civil Trial Courts of Bangladesh: Scope for Thinking' (Paper Presented at the Asian Conference on Politics, Economics and Law, Osaka, 21-24 November 2013) <http://iafor.org/iafor/conference-proceedings-the-asian-conference-on-politics-economics-and-law-2013/>.

Newspaper Articles:

1. Ummey Sharaban Tahura, 'Reducing case backlogs: Time to change the classification of cases' *The Daily Star* (Dhaka) 9 September 2014, <http://www.thedailystar.net/law-and-our-rights/time-to-change-the-classification-of-cases-40766>.
2. Ummey Sharaban Tahura, 'Case Management System to reduce Case Backlog' *The Daily Star* (Dhaka) 6 January 2015, <http://www.thedailystar.net/law-and-our-rights/case-management-system-to-reduce-case-backlog-58616>.

LIST OF ABBREVIATIONS

ADR	Alternative Dispute Resolution
AIJA	Australian Institute of Judicial Administration
ALRC	Australian Law Reform Commission
ApDR	Appropriate Dispute Resolution
AUD	Australian Dollar (Local Currency name)
BDT	Bangladeshi Taka (Local Currency name)
BJSC	Bangladesh Judicial Service Commission
CJM	Chief Judicial Magistrate
CMM	Chief Metropolitan Magistrate
CMS	Case Management System
CPC	Code of Civil Procedure
CPD	Continuing Professional Development
CRO	Civil Rules and Order
CrPC	Code of Criminal Procedure
DFID	Department for International Development
DLAC	District Legal Aid and Services Committee
GIO	Government Insurance Office
JATI	Judicial Administration and Training Institute
LASA	Legal Aid and Services Act
MCLE	Mandatory Continuing Legal Education
NLASO	National Legal Aid and Services Organization
NSW	New South Wales
UNDP	United Nation Development Program
USAID	United States Agency for International Development
VLRC	Victorian Law Reform Commission

LIST OF NATIONAL LAWS

Administrative Tribunal Act 1980 (Bangladesh)
Admiralty Court Act 2000 (Bangladesh)
Arms Act 1878 (Bangladesh)
Bangladesh (Adaptation of Existing Laws) Order 1972 (Bangladesh)
Bangladesh Civil Service (reorganization) Order 1980 (Bangladesh)
Bangladesh Judicial Service Commission Rules 2007 (Bangladesh)
Bangladesh Judicial Service Rules 2007 (Bangladesh)
Bangladesh Labour Act 2006 (Bangladesh)
Bangladesh Legal Practitioners and Bar Council Order, 1972 (Bangladesh)
Bank-Company Act 1991 (Bangladesh)
Civil Courts Act 1887 (Bangladesh)
Civil Rules and Order (Bangladesh)
Code of Civil Procedure (Amendment) Act 2012 (Bangladesh)
Code of Civil Procedure 1908 (Bangladesh)
Code of Criminal Procedure Code 1898 (Bangladesh)
Companies Act 1994 (Bangladesh)
Environment Court Act 2000 (Bangladesh)
Evidence Act 1872 (Bangladesh)
Explosive Substances Act 1908 (Bangladesh)
Family Courts Ordinance 1985 (Bangladesh)
Money Loan Court Act 2003 (Bangladesh)
High Court Rules 1973 (Bangladesh)
Hindu Disposition of Property Act 1916 (Bangladesh)
Hindu Law of Inheritance (Amendment) Act 1929 (Bangladesh)
Hindu Widow's Re-marriage Act 1856 (Bangladesh)
Hindu Women's Right to property Act 1937 (Bangladesh)
Judicial Administration Training Institute Act 1995 (Bangladesh)
Legal Aid Services Act 2000 (Bangladesh)
Legal Practitioners and Bar Council Act 1965 (Bangladesh)
Lunacy Act 1912 (Bangladesh)

The Constitution of the People's Republic of Bangladesh 1972
Mobile Courts Ordinance 2007 (Bangladesh)
Muslim Personal Law (Shariat) Application Act 1937 (Bangladesh)
Penal Code 1860 (Bangladesh)
Small Causes Court Act 1887 (Bangladesh)
Special Power Act 1974 (Bangladesh)
State Acquisition and Tenancy Act 1950 (East Bengal Act)
Succession Act 1925 (Bangladesh)
Supreme Court of Bangladesh (Appellate Division) Rules 1988 (Bangladesh)
Transfer of Property Act 1882 (Bangladesh)
Village Court Act 2006 (Bangladesh)
Village Court Ordinance 1976 (Bangladesh)

LIST OF NEW SOUTH WALES AND OTHER INTERNATIONAL LAWS

Administrative Appeals Tribunal Act 1975 (NSW)
Administrative Decisions Tribunal Act 1997 (NSW)
Administrative Decisions Tribunal Rule 1998 (NSW)
Administrative Tribunal Regulation 2009 (NSW)
Children and Young People Act 1999 (NSW)
Children and Young Persons (Care and Protection) Act 1998 (NSW)
Children's Court Act 1987 (NSW)
Civil Procedure Act 2005 (NSW)
Civil Procedure Rules 1998 (UK)
District Court Act 1858 (NSW)
District Court Act 1973 (NSW)
Family Law Act 1975 (Cth)
Family Law Rules 2004 (Cth)
Federal Circuit Court of Australia Act 1999 (Cth)
Federal Court Australia Act 1976 (Cth)
High Court of Australia Act 1979 (Cth)
Industrial Relations Act 1996 (NSW)
Judicial Officers Act 1986 (NSW)
Judiciary Act 1903 (Cth)
Land and Environment Court Act 1979 (NSW)
Local Court Act 2007 (NSW)
Motor Accident Compensation Act 1999 (NSW)
NSW Civil and Administrative Tribunal Act 2013 (NSW)
Practice Note DC (civil) No. 1 (NSW)
Supreme Court Act 1858 (NSW)
Supreme Court Act 1970 (NSW)
The Commonwealth of Australia Constitution Act 1901 (UK)
The Australian Constitution
Uniform Civil Procedure Rules 2005 (NSW)

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The list of seven cases cited from data collection:

(For Ethical purposes full name and addresses is not provided)

CR-1 Case (Dhaka District)

CR-2 Case (Rajshahi District)

CR-3 Case (Khulan District)

CR-4 Case (Barishal District)

CR-5 Case (Chittagong District)

CR-6 Case (Sylhet District)

CR-7 Case (Rangpur District)

Other Reported Cases

Aon Risk Services Australia Ltd V Australian National University (2009) 239 CLR 175

Hans Pet Constructions Pty Ltd v Cassar(2009) NSWCA 23

Harley V McDonald (2002) 2 WLR 1749

Jacobson v Ross (1995) 1 VR 337

Kable v Director of Public Prosecutions NSW (1996) 198 CLR 59

Kirk v Industrial Court of NSW (2010) 239 CLR 531

Md. Masdar Hossain and other v Secretary, Ministry of Finance (1997) 18 BLD 558

New South Wales v Commonwealth (1915) 20 CLR 54

R v Kirby; Ex Parte Boilermakers' Association of Australia(1956) 94 CLR 254 (*Boilermakers' case*)

Secretary, Ministry of Finance v Md. Masdar Hossain and other (2000) 29 CLC (AD)

Viro v R (1978) 141 CLR 88

LIST OF INTERVIEWEES

(For Ethical purposes full name and addresses is not provided)

1. J1, Senior Assistant Judge, Dhaka Court, Dhaka
2. J2, Senior Assistant Judge, Senior Assistant Judge Court, Rajshahi.
3. J3, Senior Assistant Judge, Court, Khulna
4. J4, Senior Assistant Judge, Court, Barishal, Bangladesh
5. J5, Senior Assistant Judge, Chittagong Court, Chittagong.
6. J6, Senior Assistant Judge, Senior Assistant Judge Court, Sylhet
7. J7, Senior Assistant Judge, Senior Assistant Judge Court, Rangpur
8. C1, Client, Dhaka
9. C2, Client, Rajshahi
10. C3, Client, Khulna
11. C4, Client, Barishal
12. C5, Client, Chittagong
13. C6, Client, Sylhet
14. C7, Client, Rangpur
15. L1, Dhaka Bar, Dhaka
16. L2, Rajshahi Bar, Rajshahi
17. L3, Khulna Bar, Khulna
18. L4, Barishal Bar, Barishal
19. L5, Chittagong Bar, Chittagong
20. L6, Sylhet Bar, Sylhet
21. L7, Rangpur Bar, Rangpur
22. S1, Court staff, Dhaka Court
23. S2, Court staff, Rajshahi Court
24. S3, Court staff, Khulna Court
25. S4, Court staff, Barishal Court
26. S5, Court staff, Chittagong Court
27. S6, Court staff, Sylhet Court
28. S7, Court staff, Rangpur Court

GLOSSARY

ADR: Alternative Dispute Resolution is the procedure of settling disputes by means other than litigation. It can be Arbitration, mediation or conciliation.

Arbitration: Arbitration involves a voluntary submission of a dispute to a neutral third party who must determine it by making an award if it cannot be otherwise settled. The arbitrator's award is normally binding upon the parties.

Axial Coding: The process of relating categories to their sub-categories is termed axial, because coding occurs around the axis of category linking categories at the level of properties and dimensions.

Cause List: Cause list is the official registrar's book maintaining the suit number and its date of hearing. A Daily Cause List in the prescribed form shall be posted in some conspicuous part of every court-house for the information of the parties, their advocates and the public. Cases and appeals shall be shown in the order in which they appear in the Diary according to rule 13 of *Civil Rules and Order* (Bangladesh).

Code Notes: Memos containing the actual products of the three types of coding: open, axial and selective.

Conciliation: Conciliation is similar to mediation except the conciliator is expected to contribute his or her ideas during the process.

Court Diary: A Diary in the prescribed form to be called the Diary of the Court shall be maintained by each Civil Court in the manner prescribed by *Civil Rules and Order* (Bangladesh) r 12. It contains the list of the cases of that court.

Daag: *Daag* is used to identify a particular piece of land, whether it is public or private. Each and every plot of all settled or unsettled land is given a number called daag no. The daag no is written according to the serial number of the fields.

Division: Bangladesh is divided into seven major administrative regions called Divisions. In Bangla they are called *bidhag*. Each division is named after the major city within its jurisdiction that serves as the administrative capital of that Division. The name of the divisions are Dhaka,

Rajshahi, Khulna, Chittagong, Barishal, Rangpur and Sylhet. Each division is further spilt into districts which are then further sub-divided into Upazila, and Upazilas are divided into unions.

Logistic Support: Logistic support in the court includes; pen, paper, staplers, printers, cartridge, and all other things which are necessary for office work.

Mediation: A process of alternative dispute resolution where disputants are assisted by a neutral person seek to isolate disputed issues with the aim of developing options and alternatives to reach a consensual agreement to accommodate the needs of the parties.

Memos: Memos are written records of analysis that may vary in type and form. These are important tools to both refine and keep track of ideas that develop while comparing incidents to incidents and then concepts to concepts in the evolving theory. In memos ideas are developed about naming concepts and relating them to each other. *Muslim Personal Law (Shariat) Application Act (1937):* An Act to make provision for the application of the Muslim Personal Law (Shariat) to Muslims where it is expedient to make provision for the application of the Muslim Personal Law (Shariat) to Muslims.

Open Coding: The analytic process through which concepts are identified and their properties and dimensions are discovered in data.

Peshkar: *Peshkar* is a court officer who assists the judge in handling the case records and scheduling and allocating a time for each case.

Practice Note: Practice Notes are not legislation. They are directives of the court authorised usually by court rules. They may be delegated legislation.

Praecipe: *Praecipe* means permission to order for production of documents at the time of trial.

Pre-Trial Conference: In all cases in the case-managed list, (except defamation cases, child care appeals and Family Provision cases in Newcastle) the District Court of NSW will allocate a pre-trial conference date when the statement of claim is filed. The pre-trial conference will be held two months after commencement of proceedings.

Sheristadar: A court officer in Bangladesh; a register-keeper who receives complaints, checks that they are in proper form and duly stamped, records depositions, etc., and generally attends to

routine business. For each and every court there shall be a *Sheristadar* who is also responsible for the administrative work of the Court. They are also appointed by the Government but not necessarily from a law background.

Status Conference: All cases, except for those which for good reason cannot be heard within 12 months of commencement, will be required to take a hearing date within a period between 8 and 11 months from commencement in the District Court of NSW.

Subpoena: Requires the production of documents pre-requisite to support a case as soon as possible before trial.

Wakf: An endowment made by a Muslim to a religious, educational, or charitable cause.

CHAPTER ONE: A PROLOGUE TO THE THESIS

INTRODUCTION

Most developed countries have shifted to a 'second generation' of Case Management System (CMS).¹ Bangladesh, despite its being an almost overwhelming necessity due to backlogs and delays, has not introduced any CMS. It should be noted that the court system of Bangladesh is adversarial, and that the judges play largely a silent role. It could be argued that the introduction of case management would require judges to play a more active role to control the court. The question thus arises, whether there is a conflict remains between the adversarial system and active role for judges. The researcher argues that Australian courts also have an adversarial system and that they have successfully introduced case management- empowering judges to control court procedure and thus providing a good example for Bangladesh courts. In a lawyer-dominated court system like Bangladesh, case management moves the control of the cases from lawyer/clients to the court. M Shah Alam argued that the common law legal system has both merits and demerits, and that Bangladesh demonstrates its demerits outweigh its merits, as manifested in crippling backlogs and delays.² He noted that when justice is delayed, even the winning party is not compensated equally for its huge costs in terms of time, money and energy. Against this background, this research investigated the reasons for these huge backlogs to examine whether case management could reduce the backlog, and attempts to devise an appropriate case management method to reduce case backlogs from the civil trial courts of Bangladesh drawing upon the experiences of the District Court of NSW for its high volume of cases and one of the best performing courts (see page 77 for justification of choosing NSW District Court).

¹ Victorian Law Reform Commission, *Civil Justice Review*, Report No 14 (2008) <<http://www.lawreform.vic.gov.au/inquiries/civil-justice>>291; see also, Rosemary Kennedy, Judy Harvey and Di Gursansky, 'The Response by Australian Universities to Case Management' (2001) 54(4) *Australian Social Work* 29.

² M Shah Alam, 'A Possible Way out of Backlog in Our Judiciary', *The Daily Star* (Dhaka), 16 April 2000 http://ruchichowdhury.tripod.com/a_possible_way_out_of_backlog_in_our_judiciary.htm.

AIM AND OBJECTIVES OF THE RESEARCH

Bangladesh is a low-income country and has a very large population of 160 million, while being relatively small geographically, covering an area of only 143,998 sq km, located in South Asia.³ Bangladesh is the eighth most populous country in the world.⁴ Of the total territory only 52% of the land is arable.⁵ Therefore, each plot is priceless. For its population and the number of pending cases, Bangladesh has a relatively modest number of Judges. At present there are fewer than 1500 judges serving the Subordinate Judiciary.⁶ Measured against its population, this gives a ratio of judges to population of 1 judge per 106,666 inhabitants and 1 judge per 1,664 pending cases.⁷ Moreover, because of the non-existence of any proper case management, the trial courts experience a low rate of disposal. Therefore, the research intended:

- To study the impact of case management in reducing the number of pending cases;
- To find out how case management has successfully reduced backlogs from the District Court of New South Wales;
- To find out the causes of gaps between the law and its practice in the civil trial courts of Bangladesh;
- To find a suitable case management method to reduce the burden of pending cases in Bangladesh based on experience from the District Court of New South Wales.

RESEARCH QUESTION AND HYPOTHESIS

This research needed to address the two key questions: *what* is the purpose of case management; and *how* it could be successful in reducing backlogs from the civil trial courts of Bangladesh after analysing and finding the gaps between law and its practice through empirical data, which lies at

³Central Intelligent Agency, *The World Factbook*, Bangladesh <https://www.cia.gov/library/publications/the-world-factbook/geos/bg.html>.

⁴Ibid.

⁵Ibid.

⁶ Staff Correspondence, 'CJ stresses more transparency', *The Daily Star* (Dhaka), 19 January 2015 <<http://www.thedailystar.net/cj-stresses-more-transparency-60600>>; Ashutosh Sarkar, 'Backlog of cases', *The Daily Star* (Dhaka), March 18, 2013 <<http://archive.thedailystar.net/beta2/news/backlog-of-cases/>>. Recently (end of 2014) another 60 judges have been appointed to the lower court of Bangladesh- said Assistant Secretary, Law and Justice Division, Ministry of Law, Justice and Parliamentary Affairs.

⁷ See page 3 below.

the heart of the research. To address these questions the following issues will be dealt with in this thesis:

1. Success or impact of case management in reducing case backlogs;
2. Comparison between the New South Wales Court system and the Bangladesh Court system to find how the case management system applying in the District Court of New South Wales could be a good example for Bangladesh Civil Trial Courts;
3. How the District Court of New South Wales has applied this case management system and how they have succeeded in reducing backlogs;
4. To devise a suitable case management system for Bangladesh Civil Trial Courts after finding the causes of delays through empirical research.

The study's hypothesis is that proper case management can reduce case backlogs from the civil trial courts of Bangladesh.

BACKGROUND TO THE RESEARCH

Experiences from the Bangladesh Civil Trial Courts

During the decade of the 1990s, Bangladesh experienced immense growth in the number of cases filed.⁸ The result was an enormous number of pending cases and delayed trials. Procedural laws are complex and cause case jams, backlogs of cases, more delays, more expenses, more frustrations and an increasingly bitter perception of the justice delivery system by the common people.⁹ *The recorded backlog in the Subordinate Courts of Bangladesh was 24,95,944 at the end of 2014,¹⁰ putting great pressure on the legal system, and also on clients.* The number of pending cases was 2.1 million in May 2012 (including Subordinate Courts and the Supreme Court of

⁸Zahidull Islam Biswas, 'Judiciary must take bold step to get rid of backlog of case', *The Daily Star* (Dhaka), 28 June 2008.

⁹Chief Justice Mustafa Kamal, 'ADR in Bangladesh' (Paper presented at the International Judicial Conference 2006, Supreme Court of Pakistan, 16 May 2013 2006) <<http://www.supremecourt.gov.pk/ijc/Articles/7/4.pdf>>.

¹⁰ Staff Correspondence, above n 6; Mahiuddin Faruque, '2.4 millions cases are pending to resolve', *The Daily Prothom Alo* (Dhaka), 11 June 2013, 24 <http://www.prothomalo.com/bangladesh/article/8953/%E0%A6%A8%E0%A6%BF%E0%A6%B7%E0%A7%8D%E0%A6%AA%E0%A6%A4%E0%A7%8D%E0%A6%A4%E0%A6%BF%E0%A6%B0_%E0%A6%85%E0%A6%AA%E0%A7%87%E0%A6%95%E0%A7%8D%E0%A6%B7%E0%A6%BE%E0%A6%AF%E0%A6%BC_%E0%A6%B8%E0%A6%BE%E0%A6%A1%E0%A6%BC%E0%A7%87_%E0%A7%A8%E0%A7%AA_%E0%A6%B2%E0%A6%BE%E0%A6%96_%E0%A6%AE%E0%A6%BE%E0%A6%AE%E0%A6%B2%E0%A6%BE>.

Bangladesh),¹¹ and it increased to 2.7 million by March 2013 (including Subordinate Courts and the Supreme Court of Bangladesh) and 2.8 million by the end of 2014.¹² In respect of the total pending cases, 77% is land litigation¹³, and the number is increasing day by day. Therefore, it is high time to work on this area to ensure the justice system itself is not contributing to the principle ‘justice delayed is justice denied.’¹⁴

Islam and Solaiman pointed out that a former Chief Justice of Bangladesh noted that the judiciary in Bangladesh once enjoyed the confidence of the common people, but the scenario is changing.¹⁵ According to them, many cases had then been pending for over a decade. They also mentioned some specific causes for those delays. For example, the judiciary was running short of judges because of inadequate salaries and government witnesses were slow to appear. They strongly argued that the lower courts are especially overburdened. They equated delay with injustice and viewed it as a major systemic flaw in the justice system, because it violated the fundamental right of people to a prompt trial, as guaranteed in Article 35(3) of the Bangladesh Constitution.¹⁶

Professor Zuckerman argued that the role of the civil court is much wider than merely to mediate disputes; it also ensures rights through law enforcement, and he defines ‘law enforcement’ as ‘deciding cases by establishing the true facts and correctly applying the law to them.’¹⁷ He further argued that to maintain the deadline of the cases, there is no alternative to case management which ultimately ensures enforcement of the law.¹⁸

Adaptation of case management in the Civil Court: Experience from the New South Wales District Court

¹¹Staff Correspondent, 'Judiciary beset with 21 lakh pending cases: CJ', *The Daily Star* (Dhaka), 19 May 2012, Metropolitan <<http://archive.thedailystar.net/newDesign/news-details.php?nid=234786>>.

¹²FE Report, 'CJ for meditation to clear backlog of pending cases', *The Financial Express* (Dhaka), 16 March 2013 <<http://www.thefinancialexpress-bd.com/index.php?ref=MjBfMDNfMTZfMTNfMV8xXzE2MzM1NQ==>>; see also, Uttom Kumar Das, 'Alternative Dispute Resolution', *The Probe News* (Dhaka), 19 May 2009 <<http://www.probenews.com>>; Sarkar, above n 6; Staff Correspondence, above n 6.

¹³Abul Barkat and Prosanta K Roy, *Political Economy of Land Litigation in Bangladesh A Case of Colossal National Wastage* (Association for Land Reform and Development (ALRD) and Nijera Kori, 2004) 291.

¹⁴M Rafiqul Islam and S M Solaiman, 'Public confidence crisis in the judiciary and judicial accountability in Bangladesh' (2003) 13(1) *Journal of Judicial Administration* 31-32.

¹⁵Ibid, M Rafiqul Islam and S M Solaiman, 'Judiciary and Judicial Accountability in Bangladesh' (2003) 13 *Journal of Judicial Administration* MRafiqul Islam and S M Solaiman, 'Judiciary and Judicial Accountability in Bangladesh' (2003) 13 *Journal of Judicial Administration* M Rafiqul Islam and S M Solaiman, 'Judiciary and Judicial Accountability in Bangladesh' (2003) 13 *Journal of Judicial Administration* 30.

¹⁶Ibid 32; See, *Constitution of the People's Republic of Bangladesh 1972* (Bangladesh) art 27, 35.

¹⁷Adrian Zuckerman, 'The Challenge of Civil Justice Reform: Effective Court Management of Litigation' (2009) 1:1 *City University of Hong Kong Law Review* 49, 53.

¹⁸Ibid 50, 63.

In Australia, the 'Access to Justice Movement' was started in the 1990s, when the Australian Law Reform Commission was requested by the Commonwealth Attorney-General to prepare a report on the civil justice system.¹⁹ The report was submitted in 2000,²⁰ and in the meantime the Case Management and the Alternative Dispute Resolution (ADR) systems were introduced into the civil litigation system.²¹

The procedure of case management was formally introduced in the District Court's civil jurisdiction of New South Wales in December, 1995.²² From 1996, the Court took control of all contested civil actions. This introduction of case management was contained in the Practice Note No. 33 of the District Court (NSW) which was reissued in January 2002. The revised Practice Note implemented a timetable set by the parties at a pre-trial conference to which parties must comply, and actions were not to commence until they were ready to meet those requirements.²³ The revised Practice Note No. 33 emphasised the need to finalise as many matters as possible through ADR systems.²⁴ Most matters are referred to [arbitration](#)²⁵ or court-managed [mediation](#)²⁶, and this may be done at any time.²⁷

In describing how the case management system has been developed in New South Wales, former Chief Justice Spigleman noted that case management is done by judges with an interest in and an aptitude for organization.²⁸ He also described how case management had been gradually incorporated into the statutes of NSW. Regarding integration into statutes, he stated the *Civil Procedure Act 2005* (NSW) and the *Uniform Civil Procedure Rules 2005* (NSW) confirm and re-enact the powers of courts to confine a case to issues genuinely in dispute and to ensure

¹⁹Laurence Boulle, 'Alternative Dispute Resolution, Case Management and the Rule of Law' (2002) 8(2) *The National Legal Eagle* 1.

²⁰Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, Report No 89 (2000) 18.

²¹Boulle, above n 19, 1.

²²The District Court of New South Wales, *Annual Review* (1996) 22.

²³The District Court of New South Wales, *Annual Review* (2004) 17
<<http://www.districtcourt.justice.nsw.gov.au/Documents/2004anrevweb.pdf>>.

²⁴The District Court of New South Wales, *Annual Review* (2003) 15<<http://www.districtcourt.justice.nsw.gov.au/Documents/2003annrevdc.pdf>>.

²⁵ See Glossary at page no xiii for 'arbitration' definition.

²⁶ See Glossary at page no xiii for 'mediation' definition.

²⁷Ibid 16.

²⁸ Chief Justice Spigelman, 'Case Management in New South Wales' (Paper presented at the 'the Judicial Delegation from India' Sydney, 21 September 2009) 103-104<http://www.supremecourt.lawlink.nsw.gov.au/agdbasev7wr/supremecourt/documents/pdf/spigelman_speeches_2009.pdf>.

compliance with court orders, directions, rules and practices.²⁹ The District Court of New South Wales adopted 'judicial management' where the judges take control of the case through various directions and timetables.³⁰ To ensure proper functioning of case management, the power of the Court has been ensured and now the District Court of NSW has turned its focus from 'delay reduction' to 'reducing cost'.³¹ He clarified that reducing cost would reduce costs to both the court and the parties.

THEORETICAL FRAMEWORK

Galligan defined 'law' as state law, in whose making, interpretation, and implementation state officials play a prominent part.³² Hart's assumption about the theories of law was that people share the view of officials as to what is law.³³ Yet we learn from studies of Californian Ranchers and Wisconsin Businessman and many others that communities, associations and professions tend to reject laws which do not serve their purposes.³⁴ Empirical research, therefore, can be a way of examining whether the purposes of laws are fulfilled or not. The aim of such research is to establish how the law works in practice, by collecting and analysing relevant data.³⁵ Galligan further argued that Hart's philosophical legal theory is of marginal use to empirical researchers because the ideas and concepts are too narrow, too elementary and too general to be useful in investigating law empirically; rather empirical research can stimulate theoretical reflection and perhaps contribute to better legal theory.³⁶ Empirical research has broader aims through enquiries, which may of themselves develop a different kind of legal theory; *grounded theory* is one of them. This research applies a 'grounded theory' view of empirical research within a doctrinal-comparative approach.

²⁹Ibid 105-106.

³⁰Ibid 126; see also, Michael Legg, *Case Management and Complex Civil Litigation* (the Federation Press, 2011) 5; Justice Ronald Sackville, 'Case Management: A Consideration of the Australian Experience' (Paper presented at the Case Management Conference, Dublin, Ireland, 1997) 166<[http://www.courts.ie/courts.ie/library3.nsf/%28WebFiles%29/0170EA45B0ED069380256DA60039EEBC/\\$FILE/working1.pdf](http://www.courts.ie/courts.ie/library3.nsf/%28WebFiles%29/0170EA45B0ED069380256DA60039EEBC/$FILE/working1.pdf)>.

³¹Spigelman, above n 28, 126.

³²D.J. Galligan, 'Legal Theory and Empirical Research' in Peter Cane and Herbert M. Kritzer (ed), *The Oxford Handbook of Empirical Legal Research* (Oxford University Press, 2010) 978.

³³Ibid998, H.L.A Hart, *The Concept of Law* (Oxford University Press, 1961) 26.

³⁴Galligan, above n 32, 998.

³⁵Ibid978.

³⁶Ibid990.

Grounded theory is a general method of comparative analysis.³⁷ It interplays between systematic data collection and analysis to produce a theory during the research process.³⁸ Thus data collection, analysis and theory stand in a symbiotic relationship with one other. Sociologists **Glaser and Strauss** discovered grounded theory in the 1960s.³⁹ They clarify that generating grounded theory is a way of arriving at theory suited to its supposed uses unlike the theory generated by logical deduction from a priori assumptions.⁴⁰ **Strauss and Corbin** have refined the approach. Corbin explains how his approach to analysis has been affected by recent directions in qualitative research while still retaining most of Strauss's basic approach to doing analysis.⁴¹ There were mainly two approaches to constructing a theory: inductive theory construction and deductive theory construction.⁴² Later on, abduction, originated by Charles S Peirce, was also treated as a process, structured through the execution of the core elements of the grounded theory method.⁴³ Inductive analysis is the principal technique used in the grounded theory method. Patton defines inductive analysis as 'that the patterns, themes, and categories of analysis come from the data; they emerge out of the data rather than being imposed on them prior to data collection and analysis.'⁴⁴ It will form the ideological and theoretical approach used to justify the argument in the thesis. Patton identifies the 'grounded theory' methodology as the most influential paradigm for qualitative research in the social sciences.⁴⁵ This inductive methodology develops theory progressively from data.⁴⁶ Thus, methods and issues of collecting data and analysis will inform the thesis.

On the other hand, the deductive analysis is less common in qualitative research but is increasingly being used.⁴⁷ Deduction, according to Corbin and Strauss, is 'hypothesizing about

³⁷Barney G. Glaser and Anselm L Strauss, *The Discovery of Grounded Theory* (Aldine Publishing Company, 1967)1.

³⁸Glenn A. Bowen, 'Grounded Theory and Sensitizing Concepts' (2006) 5(3) *International Journal of Qualitative Method*2.

³⁹ See, Ralph LaRossa, 'Grounded Theory Methods and Qualitative Family Research' (2005) 67(4) *Journal of Marriage and Family*839; see also, Bowen, above n 38, 2.

⁴⁰ Glaser and Strauss, *The Discovery of Grounded Theory*, above n 37, 3.

⁴¹Juliet Corbin and Anselm Strauss, *Basics of Qualitative Research* (Sage Publications, 2008) 9.

⁴² Glaser and Strauss, *The Discovery of Grounded Theory*, above n 37, 5.

⁴³Antony Bryant and Kathy Charmaz, *The Sage Handbook of Grounded Theory* (Sage Publication, 2007) 215; Jo Reichertz, 'Abduction: The Logic of Discovery of Grounded Theory' (2010) 1(1) *Forum: Qualitative Social Research*2.

⁴⁴Michael Quinn Patton, *Qualitative Evaluation Methods*.(CA: Sage, 1980) 306.

⁴⁵Michael Quinn Patton, *Qualitative Research and Evaluation Methods* (Thousand Oaks: Sage, 3rd ed, 2002) 125.

⁴⁶ Inductive analysis involves discovering themes in data; Patton, *Qualitative Research and Evaluation Methods*,above n 45,453-4.

⁴⁷Catherine Pope, Sue Ziebland and Nicholas Mays, 'Qualitative research in health care : Analysing qualitative data' (2000) 320 *British Medical Journal* 114.

the relationships between concepts' and those relationships would also be derived from data and the researcher will shape the data into concepts.⁴⁸ Abduction, which relates to both induction and deduction in terms of suddenly understanding the fit between a particular event and its context, was one of the processes used during continual comparative analysis.⁴⁹ The researcher moves between generating categories from data (induction) and the consideration of how these categories fit with other data (deduction). The importance of induction and deduction to the development of a grounded theory is explicated by Glaser and Strauss (1967), Strauss (1987), Strauss and Corbin (1998), and Charmaz (2006); however the role of abduction is rarely explained by these authors in any detail. Ezzy explains abduction as 'the philosophical background to the processes that are involved in grounded theory.'⁵⁰ The qualitative researcher might choose to use a directed approach to content analysis, which might be categorized as a deductive use of theory.⁵¹ Glaser and Corbin, both separately and as co-authors, describe the core elements of grounded theory as: coding, memo writing, constant comparative method of analysis, theoretical sampling and theoretical sensitivity.⁵²

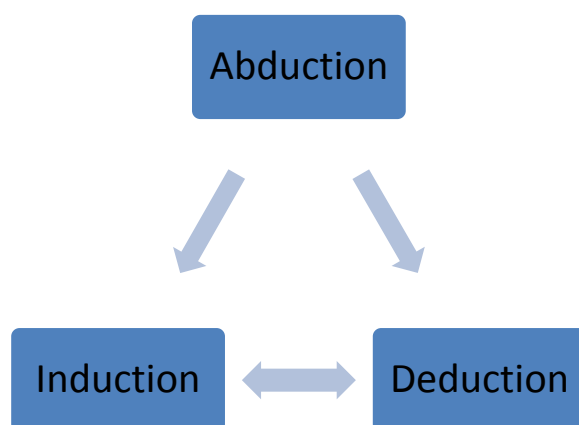


Figure 1.1: Relationship between abduction, induction and deduction in grounded theory.⁵³

⁴⁸Corbin and Strauss, *Basics of Qualitative Research*, above n 41, 56.

⁴⁹Anselm Strauss, *Qualitative analysis for social scientists* (Cambridge University Press, 1987) 12; Sengstock Brian, *A grounded theory study of nursing students' experiences in the off campus clinical setting* (Doctor of Philosophy Thesis, Central Queensland University, 2008) 80 <<http://eprints.qut.edu.au/30282/1/c30282.pdf>>.

⁵⁰Douglas Ezzy, *Qualitative analysis: Practice and innovation* (Allen & Unwin, 2002) 13.

⁵¹Hsiu-Fang Hsieh and Sarah E. Shannon, 'Three Approaches to Qualitative Content Analysis' (2005) 15(9) *Qualitative Health Research* 1281.

⁵²Juliet Corbin and Anselm Strauss, 'Grounded Theory Research: Procedures, Canons, and Evaluative Criteria' (1990) 13(1) (Spring90) *Qualitative Sociology* 6; Corbin and Strauss, *Basics of Qualitative Research*, above n 41, 89-93.

⁵³ This figure has been created by Sengstock Brian; see, Brian, above n 49, 28.

In the present research, all these processes (induction, deduction and abduction) have been used in analysis to find the practical causes of delay in the Bangladesh civil court proceedings and how backlog could be reduced through incorporating case management.

ETHICAL CONSIDERATIONS

Ethical clearance to conduct this research study was sought and obtained from the Macquarie University Human Research Ethics Committee ([Appendix A](#)). Recruitment and data collection activities commenced following the receipt of approval.

The Judges of Bangladesh are not allowed to take part in any interview without proper permission. Permission from the Ministry of Law, Justice and Parliamentary Affairs for interviewing the judges and going through the clients' case records from the seven district of the country was duly obtained, which was a condition for ethics approval ([Appendix B](#)).

The study was explained to participants in Bengali via an information sheet and the researcher's contact details were provided to enable participants to access further information if they required it. Informed written consent ([Appendix C](#)) was obtained from participants prior to the commencement of data collection activities. Verbal as well written consent was obtained from each participant who agreed to be audio recorded. Participants were fully informed that they could withdraw at any time without prejudice.

The issues of anonymity and confidentiality have been addressed in a variety of ways throughout the course of study. As the recording of the individual interviews was undertaken by face-to-face interview process the requirement for confidentiality and anonymity was reiterated. To ensure the confidentiality the audio recorded interviews were transcribed by the researcher. The transcripts referred to individual participants by the use of a code to maintain anonymity.

Throughout the course of the study all data were stored securely in the locked office of the researcher. Computer files were stored on password protected hard drive to ensure that the integrity and security of the data were maintained. Upon the completion of the research the data will be stored in a secure area at the university as per policy.

RESEARCH METHODOLOGY

Qualitative research⁵⁴ is empirical research of non-numeric data. This is a disciplined investigation which explores the uniqueness of individual cases or classes of behaviour to promote understanding of how and why certain phenomena occurred, not just of what occurred.⁵⁵ Qualitative analysis is a process of examining and interpreting data in order to elicit meaning, gain understanding, and develop empirical knowledge.⁵⁶ It involves a radically different way of thinking about data.⁵⁷ Semi-structured, open-ended interviews with lawyers, litigants, judges and court staffs were conducted in seven courts from seven districts⁵⁸ of Bangladesh in September 2013-January 2014. A different set of questionnaires was prepared for each group; some of the questions were common to all the groups and some common to one to two groups. As part of grounded theory, this researcher's initial observations were included at the time of data collection.⁵⁹ (These questionnaires were examined and approved by the Human Research Ethics Committee). Such interviews assisted in collecting information that reflects the present condition of the court proceedings, interviewees' insider experiences, opinions and evaluation of their court proceedings experiences. They were also asked for their opinions, expectations, and suggestions regarding court procedure.

At the same time, the case records of the litigants were examined after obtaining permission from the Bangladesh Government through the Ministry of Law, Justice and Parliamentary Affairs to compare individuals' practical experiences with the records of the courts ([Appendix B](#)). The experiences of the interviewees were compared to the case records to determine any gaps between laws and their application in practice, and the reasons behind such gaps. This grounded theory method assisted in capturing ideas of how the application of the law can be more fruitful in ensuring justice, and also helped in suggesting a suitable case management.

⁵⁴For more detail on this research method, see Gina Wisker, *The Postgraduate Research Handbook* (Palgrave Macmillan, 2nd ed, 2008).

⁵⁵Armytage Livingston, *Reforming Justice A Journey to Fairness in Asia* (Cambridge University Press, 1st ed, 2012) 306.

⁵⁶Corbin and Strauss, *Basics of Qualitative Research*, above n 41, 66.

⁵⁷Anselm Strauss and Juliet Corbin, *Basics of Qualitative Research* (SAGE Publications, 1998) 59.

⁵⁸Districts are the administrative unit of Bangladesh.

⁵⁹Strauss and Corbin, *Basics of Qualitative Research*, above n 57, 49-52.

Quantitative analysis⁶⁰ can be defined as the technique associated with the gathering, analysis, interpretation and presentation of numerical information.⁶¹ Glaser and Strauss mentioned that quantitative researchers made great strides both in producing accurate evidence and in forming theoretical concepts.⁶²

In this research, the role of case management in reducing case backlogs has been prioritised. The judiciary of New South Wales has widely accepted the role of case management with respect to reducing caseload, and they have achieved extraordinarily positive results in reducing backlogs⁶³ through a thorough analysis of 24 years of Annual Reviews (1990-2013). This data reflects how changes have occurred in terms of disposal rate, disposal time, reducing pending load and mode of disposal after incorporating case management in NSW in 1995.

In terms of the **Doctrinal-Comparative** approach, this research described how the present legal system of Bangladesh and the civil courts of Bangladesh operate; and also the effectiveness of the procedural laws as applied in the civil courts of Bangladesh compared to the court system of New South Wales. The *Constitution of the People's Republic of Bangladesh 1972* (Bangladesh) gives an outline of the judiciary of Bangladesh; the procedure of the civil courts is governed by the *Code of Civil Procedure 1908* (Bangladesh), the *Civil Courts Act 1887* (Bangladesh) and the *Civil Rules and Order* (Bangladesh), and the Civil Suits Instruction Manual along with some other laws relevant to the subject matters of a particular suit. To administer and ensure justice in Bangladesh, the whole process of civil litigation is separated into stages and the *Code of Civil Procedure 1908* (Bangladesh) specifies the time limit for each stage, and according to the law a civil suit should be completed in less than one year. But reality differs. So it can be perceived that whatever the law says or however good it is, the law becomes inefficacious if the proper application is not secured.

Data collection assisted in determining how laws are applied and interpreted differently in practice than in theory, and in identifying any procedural and/or substantive changes needed to incorporate case management in the court proceedings. In this research, trustworthiness techniques were included at the time of data collection. Critical analysis with description of

⁶⁰ For more detail on this research method, see Charles Teddlie, *Foundations of Mixed Methods Research* (Sage Publication, 2009).

⁶¹ Ibid 5.

⁶² Glaser and Strauss, *The Discovery of Grounded Theory*, above n 37, 15.

⁶³ See, Spigelman, above n 28, 122.

phenomena was applied so that the process of theory development would be both visible and verifiable. The research project examines the extent to which case management can be able to reduce case backlogs from the civil trial courts of Bangladesh.

Thus, both the qualitative and quantitative research refers to ‘the real world of reform practice’ as a means to adduce truth, develop theory and appraise the literature.⁶⁴ This document-based, analytic approach provides a ‘rich vein’ of material as a data source.⁶⁵ Glaser and Strauss point out that each form of data is useful for both verification and generation of theory, whatever the primacy of emphasis.⁶⁶

Limitations of the Study

This study covered only the civil trial courts of Bangladesh. It has not discussed the appeal or revision jurisdiction of the higher courts, and how they operate. It has considered seven case records from the seven civil courts in order to obtain basic data. While these cases served as a manageable data base within the time constraints of the research, further work needs to be done.

LITERATURE REVIEW

The main theory applied in this research was *grounded theory*. The issue of literature review in grounded theory remains a contentious one with the classic grounded theorist arguing that a literature review should not be conducted until the analysis is completed.⁶⁷ The theory can be developed using data rather than the formulation of pre-assumptions.⁶⁸ Strauss and Corbin encourage the use of non-technical literature during the research which consists of letters, biographies, diaries, reports, newspaper, catalogue and a variety of materials.⁶⁹ As argued above, turning to the literature could mean the theory may be forced. This therefore contributed to the decision to stay away from the bulk of the literature until the latter stages of the data analysis, thus also ensuring that the theory was grounded in the actual data.⁷⁰ Towards the latter stages of data collection and analysis a review of the literature was conducted to contextualise the findings

⁶⁴ Armytage, above n 55,305.

⁶⁵ Ibid 305.

⁶⁶ Glaser and Strauss, *The Discovery of Grounded Theory*, above n 37, 31.

⁶⁷ Strauss and Corbin, *Basics of Qualitative Research*, above n 57, 49.

⁶⁸ Ibid 49; Kathy Charmaz, *Constructing Grounded Theory* (Sage Publications, 2006) 5.

⁶⁹ Strauss and Corbin, *Basics of Qualitative Research*, above n 57, 49-51.

⁷⁰ Ibid 49.

of the study in relation to existing knowledge.⁷¹ The research findings were compared with the literature using the constant comparative method of analysis, an approach which did not constrain the analytic conceptualisation of the original data.

A principal constraint in this research on case management in the civil courts is the absence of relevant literature especially in the context of Bangladesh. In 1988, Dr. Zahir tried to identify the causes of delay in civil proceedings.⁷² He said on the basis of American experience, court managers may have a vital role to play. He also revealed some issues relating to courts and their application of procedure in causing delay.⁷³ He emphasised social and economic circumstances where lawyers played a vital part in delaying the disposal of cases.⁷⁴ The Law Commission of Bangladesh has conducted a limited research to identify the causes of delay in disposal of civil and criminal cases, and as a research officer of the Commission, this researcher participated in the study. The Law Commission submitted its report in December 2010 on the *Code of Civil Procedure 1908* (Bangladesh).⁷⁵ The report made some recommendations; for example: emphasising time limits for each stage of the civil cases, making Alternative Dispute Resolution compulsory, and imposing restrictions on amending pleadings.

On the basis of this report in 2012 the *Code of Civil Procedure 1908* (Bangladesh) was amended and the ADR system was made compulsory. However in Bangladesh, the existing ADR system has failed to achieve its goals because of its rigid and one-size-fits-all application. It is used in the same way for each and every case and does not consider that not all cases are appropriate for ADR. Proper case management can identify which cases are suitable for ADR at a very early stage. This research analysed whether use of Appropriate Dispute Resolution (ApDR) in simple and flexible ways at the very early stages when the suit is first filed would be more effective. Moreover the literature related to case management is presented in Chapter Two with citation of the relevant works as appropriate. Both empirical and analytical methods were employed to generate ideas on the research theme. The study consulted both primary and secondary sources, including data, public and government documents from the District Court of NSW and

⁷¹Ibid 49-51.

⁷²Dr. M Zahir, *Delay in Court and Court Management* (Bangladesh Institute of Law and International Affairs, 1988) 9.

⁷³Ibid 12.

⁷⁴Ibid 14.

⁷⁵ Law Commission Bangladesh, *Report on Recommendations for Expediting Civil Proceedings*, Report No 106, (2010) <<http://www.lawcommissionbangladesh.org/reports.htm>>.

Bangladesh civil trial courts, books, articles and monographs which are related to case management in civil courts.

SIGNIFICANCE OF THE STUDY

In mid 2008, this researcher joined the Judiciary as an Assistant Judge with a big dream to serve the common people. Just a few days after joining, one day, when she was writing the deposition of an old man, aged about 90, suddenly he loudly moaned. He stopped her and begged: ‘I do not want to win the suit; put an end of this process and let me out of this. I am tired of giving *hazira* (attendance) from the last 30 years’. His plea shattered all the dreams she had at the time of joining. Then she thoroughly reviewed the records of that old man with heavy eyes and found it was a partition suit, and this was the third time the record had been sent back to the Assistant Judge’s Court on remand from the Appellate Court to take more evidence. At that time, a lot of questions arose in her mind. Why did it take such a long time? Who/What were responsible for the sufferings of this litigant? The law? The procedure? The application of the law? This incident affected her deeply, and she was determined to change the situation by finding out the reasons behind the delays and possible remedies.

To dispose a case within the scheduled time is one of the core components to ensure justice. The research outlined in this thesis suggests a number of reform initiatives: adapting case management and delay reduction, promotion of access to justice ensuring the rule of law, and turning a complex procedure to a simple one; all these findings make this research significant.

Adapting Case Management and Delay Reduction

Many countries have adopted different methods of case management techniques suitable for their countries, and they have successfully reduced case backlogs. Elepano added that delay in the disposition of cases could be reduced, but only if the courts were genuinely committed to ensuring that all case events happen at their designated times.⁷⁶ She emphasised that sustained leadership was essential in managing the human dimensions of the change process. Without sustained leadership, the desired change would have been resisted by older judges, court personnel and litigants who found adjusting to the new time frames difficult. Elepano explained

⁷⁶ Z. Elepano, ‘Case Management Reform- The Phillippine Experience’ in Armytage Livingston and Metzner Lorenz, *Searching for Success in Judicial Reform: Voices from the Asia Pacific Experiences*, (Oxford University Press, 2009) 81-109.

Indonesian courts' experience in her study of reducing chronic backlog. This was due to improvement in case management which was given high institutional priority, to the importance of judicial leadership and stakeholder participation in the reform process, and to a dual strategy for backlog reduction and case management of new cases.⁷⁷ From the Bangladesh perspective, it would be assumed that the introduction of case management with proper monitoring system would reduce backlogs from the civil trial courts.

Promotion of Access to Justice Ensuring the Rule of Law

The judiciary is as an institution accountable to society to administer justice that is not only fair and in accordance with the law, but also efficient, cost effective and with a high degree of professionalism and skill.⁷⁸ If case management could reduce case backlogs and delay in resolving cases then it will be easier to ensure prompt and efficient justice which is an indicator of rule of law. 'Justice delayed is justice denied' is an equitable principle designed to uphold a speedy and fair trial. When access to justice within a reasonable time is ensured then the rule of law is maintained. Case management concentrates on speedy disposal with a fair trial. The court structure and operation of courts play vital roles in timely disposal. This research will focus on the present operations of the civil courts of Bangladesh and how to make them more effective and speedy through case management.

Turning a Complex Procedure to a Simple and Flexible

The success of case management depends upon the flexibility and simplicity of its application and procedure. The experiences of case management in the countries who have achieved reduction in backlogs indicate that case management must be simple and flexible. Using a case management tool in the procedural law to attain substantive justice outcomes will enhance public confidence in court processes as being seen as fair and timely. The introduction of an information management system also provided the judges with reliable data on the logistics of service delivery and enabled delay to be identified at the time of its occurrence.⁷⁹ The present Bangladesh

⁷⁷ Ibid 81-109; see also, Armytage, above n 55, 255.

⁷⁸ Judge Colin Doherty, Judge Jan-Marie Doogue and Jeff Simpson, 'Accountability for the Administration and Organisation of the Judiciary; How should the Judiciary be accountable for their work beyond the Courtroom?' (Paper presented at the Asia Pacific Courts Conference 2013 'the Pursuit of excellence and innovation in courts and tribunals', Auckland, Newzealand, 2013) 1
<<http://www.aija.org.au/Asia%20Pacific%202013/Presentations/Doogue%20Doherty.pdf>>.

⁷⁹ The World Bank, *Malaysia Court Backlog and Delay Reduction Program* (2011) 21 <<http://www->

court procedure is too complicated for a lay person to navigate easily. Therefore, implementing case management will make the court procedure more simple and flexible.

ORGANISATION OF THE THESIS

The whole thesis is divided into six chapters which are organised as follows:

Chapter One serves as an Introduction to the research, methodology, research aims, theoretical framework, background research, literature review, significance, limitations of the study and ethical consideration.

Chapter Two describes what case management is and how it works. It also highlights the common components of case management and what could be the role of the judge.

Chapter Three presents the Bangladesh court system in comparison to New South Wales. The justification behind this is that this study uses the experience of the New South Wales District Court as a comparison. Therefore, through analysing the similarities and dissimilarities it would be feasible to adapt the District Court's successful experience into the civil trial courts of Bangladesh.

Chapter Four examines the District Court of NSW and how the case management method has been incorporated and how they succeeded in reducing backlogs through increasing the disposal rate and decreasing case duration.

Analysis of the data collection to find out the real causes for delay in the civil proceedings of Bangladesh using the grounded *theory* method and the subsequent analysis has been integrated in **Chapter Five**.

Based on the analysis and findings on the causes for the delay, the reasons for adapting case management, recommended ways to reduce backlogs through incorporating case management, followed by the conclusion, have been discussed in **Chapter Six**.

CONCLUSION

This thesis investigated the practical causes for the gaps between law and its practice. It explains how the court system is operating in Bangladesh compared with the courts of NSW. This study also evaluates how the District Court of NSW has successfully reduced case backlogs using case management tools. The research examines why and how delay occurs analysing the empirical data using grounded theory and how case management could be a solution in reducing the backlog taking the example from the NSW District Court. It also considers whether any reform is needed to achieve this end.

CHAPTER TWO: CASE MANAGEMENT AS A TOOL IN REDUCING CASE BACKLOGS

INTRODUCTION

This chapter investigates the definition of case management, its history and how it developed in USA, UK and in Australia. It also focuses on the common elements of case management and what could be the role of the case manager. Finally, this Chapter discusses how the case management system used in reducing case backlogs; this in turn relates to *Chapter Four* and *Chapter Six* which will describe how case management works in the District Court of New South Wales (Chapter Four) and what its role would be in the Bangladesh Civil trial courts (Chapter Six).

WHAT IS CASE MANAGEMENT?

According to Steelman, the terms ‘backlog’ and ‘congestion’ were often used interchangeably with ‘delay’ to describe a court experiencing difficulty with its caseload.⁸⁰ The general consensus about the definition of delay was eventually expressed by the American Bar Association’s National Conference of State Trial Judges in 1984 where ‘Delay is declared to be any elapsed time beyond that necessary to prepare and conclude a particular case.’⁸¹ However the Annual Review (1990) of the District Court of NSW measured ‘backlog with the number of pending cases’ and ‘delay with pending time’ that exceeds the tolerable waiting period.⁸² ‘Delay’, ‘backlog’ or ‘case congestion’, whatever the term is, can be reduced through proper case management.

Steelman defines caseload management as ‘the process by which courts convert their inputs (cases) into outputs (dispositions). The quality of this process determined how well courts achieve their most fundamental and substantive objectives and purposes. Properly caseload management is the absolute heart of court administration.’⁸³

⁸⁰David C. Steelman, 'The History of Delay Reduction and Delay Prevention Efforts in American Courts' (Paper presented at the Case Management Conference, Dublin, Ireland, 1997) 78
<[http://www.courts.ie/courts.ie/library3.nsf/%28WebFiles%29/0170EA45B0ED069380256DA60039EEBC/\\$FILE/working1.pdf](http://www.courts.ie/courts.ie/library3.nsf/%28WebFiles%29/0170EA45B0ED069380256DA60039EEBC/$FILE/working1.pdf)>.

⁸¹Ibid 78.

⁸²The District Court of NSW, *Annual Review* (1990) 6.

⁸³David C. Steelman, John A. Goerdt and James E McMillan, *Caseload Management The Heart of Court*

M Shah Alam defines case management as the detailed scheduling of the life and history of a case after submission of the written statement, determined by an early judicial intervention i.e. a sitting judge's order, enforcing active participation of the parties and strict observance of the schedule under the court's supervision.⁸⁴ In other words, it is a procedural calendar of a particular civil suit where the parties have to follow procedural stream-lining worked out by the court, and which also includes initiation and coordination of consensual processes aimed at the resolution of the case other than through a court trial.

Legg considers case management in terms of both macro and micro levels. In macro terms it focuses on the structural design of a court system to manage cases, while in micro terms it focuses on the role of the judges (or managerial judging).⁸⁵

Structural Case Management

The structural form of case management mainly focuses on the nature of the particular court system but it may also include the way in which judges are allocated to cases. The two competing models are the 'master calendar' and 'individual case management' models.⁸⁶ In the master calendar approach a case is not allocated to a particular judge but rather case preparation takes place under the supervision of registrar or other court official.⁸⁷ The individual case management system works on the basis that a case is randomly allocated to an individual judge from filing till disposal.⁸⁸ This latter approach is adopted in the Federal Court of Australia.⁸⁹ These two systems may also be combined into some form of hybrid. For example a single judge may supervise the pre-trial hearing that is then allocated to an available judge.⁹⁰

Management in the New Millennium (National Center for State Courts, 2004) xvii; Caseflow Management Curriculum Guidelines 'Core Competency Curriculum Guidelines: What Court Leaders Need to Know and Be Able to Do,' *Court Manager* 18, no 2 (2003) 16-20

⁸⁴ Alam, above n 2.

⁸⁵ Michael Legg, Case Management and Complex Civil Litigation, above n 30, 3.

⁸⁶ Justice David Ipp, 'Reforms to the Adversarial Process in Civil Litigation-part II' (1995) 69 *Australian Law Journal* 790.

⁸⁷ Spigelman, above n 28, 117-118.

⁸⁸ Michael Legg, Case Management and Complex Civil Litigation, above n 30, 5.

⁸⁹ Federal Court of Australia, Practice Note CM 1, *Case Management and the Individual Docket System*, 1 August 2011; see also, The Hon Steven Rares, 'What is a quality Judiciary?' (2011) 20 *Journal of Judicial Administration* 140.

⁹⁰ Supreme Court of New South Wales, Supreme Court Equity Division, Practice Note SC Eq 3, *Commercial List and Technology and Construction List*, 10 December 2008 at [21]; Spigelman, above n 28, 120.

Managerial Judging

Managerial judging means management of an individual case, or management within a case. Legg differentiates managerial judging from structural case management in the way that a judge tailors the procedures to be employed to the individual case.⁹¹ Managerial judging requires the judge to take an active part in directing the proceeding through its interlocutory stages, especially in dealing with pleadings, discovery and witnesses. As a result the judge takes control of the case and through various directions and timetables specifies the steps to be taken and the time by which those steps must occur.⁹² The use of timetables with clear deadlines allows for the planning and achievement of the steps to ready the case for resolution and ensures that the case is unable to lie dormant. It further includes the use of costs orders or other sanctions to address non-compliance with directions and timetables.⁹³

Legg has modified the characteristics of managerial judging for Australian civil procedure from the United States *Manual for Complex Litigation*, which states as follows:⁹⁴

- It is active. The judge anticipates problems before they arise rather than waiting passively for counsel to present them. The lawyers may become immersed in the details of the case, so that innovation and creativity in formulating a litigation plan will frequently depend on the judge.
- It is substantive. The judge becomes familiar at an early stage with the substantive issues in order to make an informed ruling on issue definition and narrowing, and on related matters, such as timetabling and discovery.
- It is timely. The judge decides disputes promptly, particularly those that may substantially affect the course or scope of further proceedings. Delayed ruling may be costly and burdensome for litigants and will often delay other litigation events. The parties may prefer that a ruling be timely rather than perfect.
- It is continuing. The judge periodically monitors the progress of the litigation to see that the timetable is being followed and to consider necessary modifications of directions.

⁹¹Michael Legg, Case Management and Complex Civil Litigation, above n 30, 5.

⁹²Adrian Zuckerman, *Civil Justice in Crisis: Comparative Perspectives of Civil Procedure* (Oxford University Press, 1999) 47.

⁹³Michael Legg, Case Management and Complex Civil Litigation, above n 30, 6.

⁹⁴Ibid 8, see also, Federal Judicial Center, *Manual for Complex Litigation* (4th Ed, 2004) 13.11-13.13.

- It is firm but fair. Time limits and other controls and requirements are not imposed arbitrarily or without considering the views of counsel, and they are revised when warranted. However, once established, timetables are met, and when necessary, appropriate sanctions are imposed for derelictions and dilatory tactics.
- It is careful. An early display of careful preparation sets the proper tone and enhances the court credibility and effectiveness with counsel.

Justice David Ipp of the Supreme Court of Western Australia has undertaken some interesting research on managerial judging. He identified two models for pre-trial case management which can be referred to as individual lists or a master list.⁹⁵ Justice Ipp describes the individual lists as management involving continuous control by a judge, who personally monitors each case on an ad hoc basis; and a master list as management where control is exercised by requiring the parties to report to the registrar at fixed milestones and where the court exercises routine and structured control. The master list is the common method in Australia.

Therefore, case management, in a broad sense, refers to the schedule of proceedings involved in a matter. There are various stages in litigation, such as the filing of a claims, answers, the discovery process, (interrogatories, subpoena, depositions), and motions that occur before a trial is held or a decision is rendered. Each stage of the process has a scheduled timeframe in which it should be completed. When a complaint is filed, and a case is assigned to a court, the judge will often set forth a schedule according to the relevant Act (e.g. the *Civil Procedure Act 2005* (NSW) parts 3, 4, 5 and 6) of for the submission or completion of the pleadings, court appearances, and other matters, which can be in generally termed as case management.

BACKGROUND HISTORY OF CASE MANAGEMENT

To dispose a case within the scheduled time is one of the core components to ensure justice. Judge Roderick, Joyce QC and Dr Berry Zondag speak of justice as when the efficient court reliably resolves disputes between the parties upholding the legal principles in the light of relevant and well tested evidence followed by a safety loop, known as appeal opportunities.⁹⁶

⁹⁵Ipp, Reforms to the adversarial process in civil litigation-part II, above n 86, 790.

⁹⁶Judge Roderick, Joyce QC and Dr. Berry Zondag, 'The Case for Enhanced Case Management and Greater Judicial Clarity' (Paper presented at the New Zealand Bar Association Annual Conference, New Zealand, 2010) <<http://www.scribd.com/doc/36566675/The-Case-for-Enhanced-Case-Management-and-Greater-Judicial->

Delay hinders justice. Delay in court proceedings has been perceived as a common problem for a long time. But there are ways to reduce the delay. Successful programs can be institutionalized so that further delays can be prevented or managed. Chief Justice Spigleman clarified that not all lapses of time can be called ‘delay’.⁹⁷ The principal driving force for case management was the acceptance of the existence of delays in the court system.⁹⁸ To identify the causes of delay, Steelman argues that the pace of civil and criminal litigation is not similar and may not correlate with the population size, the court’s jurisdiction or the composition of the caseload.⁹⁹ He then explained that on the civil side, implementation by the court of key concepts of case management is strongly correlated with speedy case processing times and reducing delay.

Case-flow management or case management is the conceptual heart of court management in general.¹⁰⁰ Over the last two decades, the judiciaries of developed countries have widely accepted the role of case management in reducing the caseload. The evolution of case management is described below.

USA: The Root of Case Management

Case management first appeared from a brief review of American court reform efforts in the twentieth century.¹⁰¹ In the first half of the twentieth century, the court reform movement was introduced by Roscoe Pound, William Howard Taft and Arthur Vanderbilt.¹⁰² Among them, the father of court reform in America was Roscoe Pound, who delivered a speech ‘The causes of popular dissatisfaction with the administration of justice’ to a convention of the American Bar Association in 1906.¹⁰³ He identified the causes of dissatisfaction under four main heads: (1) Causes for dissatisfaction with *any* legal system, (2) causes lying in the peculiarities of Anglo-American legal system, (3) causes lying in American judicial organization and procedure, and (4) causes lying in the environment of judicial administration (though his inquiry was limited to civil

Clarity> 1.

⁹⁷Spigelman, above n 28, 103.

⁹⁸Ibid 103.

⁹⁹Stelman, *The History of Delay Reduction* above n 80,90.

¹⁰⁰Stelman, Goerdt, and Mcmillan, above n 83, xi.

¹⁰¹Ibid xi.

¹⁰²Ibid xi.

¹⁰³Roscoe Pound, ‘The Causes of Popular Dissatisfaction with the Administration of Justice’ (Speech delivered at the annual convention of the American Bar Association, 1906) <http://law.unl.edu/splash/Roscoe_Pound-Causes_of_Popular.pdf>; see also, Steelman, Goerdt, and Mcmillan, above n 83, xi; see, Steven W. Hays and Cole Blease Graham Jr. (ed), *Handbook of Court Administration and Management* (United States of America, 1993) 8-11.

justice).¹⁰⁴ In 1913, Pound first proposed to reform courts through the American Judicature Society.¹⁰⁵ The primary focus of this organization was on judicial selection, tenure, compensation and retirement; later on it included court operation and procedures.¹⁰⁶ William Howard Taft, after becoming the Chief Justice of the Supreme Court of America in 1921, took some affirmative steps to reduce the case backlog in the Court which can be termed 'court management'.¹⁰⁷ For instance, he recommended some legislative changes giving the Court wider discretion in acceptance of cases.¹⁰⁸ A third great leader of court reform in USA was Arthur T. Vanderbilt, who was the president of the American Bar Association in 1938 and who created a division dedicated to reform of judicial administration.¹⁰⁹

In 1937, three scholars, Luther Gulick, Lyndall Urwick, and Carl Pforzheimer raised questions concerning better administrative management of government resources and operations in America.¹¹⁰ In 1948, the USA's first court administrator was appointed: a state court administrator in New Jersey.¹¹¹ Later, court management as a profession apart from judges and court staffs, was further developed in America; many important organizations were established to assist courts. In 1952, the Institute for judicial Administration (IJA) was formed. In 1963, the National College of State Trial Judges was created. In 1967, the Federal Judicial Centre was created as the research arm of the federal judiciary.¹¹² These developments came from the judicial reform movement during the period, advocating that policy effectiveness in court operations depends on successful interaction between judges, lawmakers, court administrators, policy analysts and all other actors in the judicial branch. From the beginning of the twentieth century until the 1970s, the court

¹⁰⁴Ibid.

¹⁰⁵Robert Tobin, *An Overview of Court Administration in the United States* (National Center for State Courts, 1997) 15.

¹⁰⁶Ibid 15; see also, The American Judicature Society, *Home*<<https://www.ajs.org/>>.

¹⁰⁷Steelman, Goerdts, and Mcmillan, above n 83, xii.

¹⁰⁸Robert C. Post, 'Judicial Management: The Achievements of Chief Justice William Howard Taft' (1998) Fall *OAH Magazine of History* 24; Robert C. Post, 'Chief Justice William Howard Taft and the Invention of Federal Judicial Management: A Study in Judicial Leadership', *State-Federal Judicial Observer* March 1998 <[http://www.fjc.gov/public/pdf.nsf/lookup/observ16.pdf/\\$file/observ16.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/observ16.pdf/$file/observ16.pdf)>; Steelman, Goerdts, and Mcmillan, above n 83, xii.

¹⁰⁹Ibid, xii.

¹¹⁰Luther Halsey Gulick, Lyndall F Urwick and Carl H Pforzheimer, *Papers on the science of administration* (Institute of Public Administration, Columbia University, 1937) ; see also, Hays and Graham Jr., above n 103, 19.

¹¹¹Steelman, Goerdts, and Mcmillan, above n 83, xii-iii.

¹¹²Ibid xiii.

reform movement made efforts to reduce delay focused on court structure, court resources and rules of procedure.¹¹³

UK: Turning Judges' Roles from Passive to Active

Though case management as part of court management was introduced first in the USA, it spread to other countries. The English Common Law system generally does not accept the principle that courts should control the progress of civil litigation; therefore it does not encourage active case management by individual judges, rather it supports the lawyer's active role in court proceedings.¹¹⁴ However, Plotnikoff argued, in recent times this view has changed as it is assumed that when lawyers delay in determining the timing of trial, at that time the passive role of the English court would no longer be acceptable.¹¹⁵

In 1988, a report of the Review Body on Civil Justice was published in England (this was the final publication in the government's three-year Civil Justice Review). Examining the Report, Plotnikoff's analysis focused on case management in England, and examined the review body's recommendations in the context of pre-trial judicial conference in the course of describing the history of the Civil Justice Review.¹¹⁶ Plotnikoff noted that the review body accepted the idea that procedural measures could reduce delay as well as cost. The review body identified the following public policy objectives to be met either by court rules or by court intervention:¹¹⁷

- Cases should be disposed of within a reasonable period of time, whether by settlement, trial or otherwise.
- Each side should have full information about other's case in order to assist settlement or preparation for trial.
- There should be adequate preparation for trial, identification of the relevant issues, and of evidence required to resolve those issues.
- Cases which are ready for trial should come on without delay.

¹¹³David C. Steelman, 'What Have We Learned About Court Delay, Local Legal Culture, and Caseflow Management Since Late 1970's?' (1997) 19(2) *Justice System Journal* 149-154.

¹¹⁴Joyce Plotnikoff, 'The Quiet Revolution: English Civil Court Reform and the Introduction of Case Management' (1988-89) 13(2) *The Justice System Journal* 202<http://www.jstor.org/stable/27976687?seq=1#page_scan_tab_contents>.

¹¹⁵See, *Ibid* 203.

¹¹⁶*Ibid* 202.

¹¹⁷*Ibid* 209.

- The conduct of trials should be expeditious, with issues, evidence, and argument presented as an economical a manner as justice permits.

In 1994, a comprehensive and far-reaching reform of civil justice began. The Lord Chancellor appointed Lord Woolf, one of the United Kingdom's most senior judges, to review existing rules and procedures, gather evidence and opinion from civil justice professionals and commentators, and to identify effective ways to cuts costs, reduce the complexity of the rules, and remove unnecessary distinctions of practice and procedure between the courts. Woolf's interim report was published in 1995, and after consultation, the final report was published in June 1996.¹¹⁸ Under Woolf's case management scheme, judges are responsible for controlling litigation at all stages so that parties cannot indulge 'their worst excesses'.¹¹⁹ Woolf in his 'Access to Justice' report strongly recommended adopting case management to reduce delay and backlogs, and based on his report, case management was incorporated in the court proceedings of United Kingdom and this together with a new code of rules, formed a comprehensive and coherent package for the reform of civil justice.¹²⁰

Australia: A Way Out of Excessive Cost and Delay

Like other common law countries, Australia is also concerned about the fairness, cost efficiency and of course delay of the judicial system.¹²¹ According to Justice Geoff Venning, case management was introduced in the Australia in the late 1980s when Maureen Soloman and Douglas Somerlot published their seminal text, 'Case Flow Management in the Trial Court: Now and in the Future' in 1987.¹²² The objectives and the principles of case management remain as valid now as it was when first introduced.¹²³ Case management has evolved over the past decades

¹¹⁸ See, Lord Woolf, 'Access to Justice : Final Report' (Her Majesty's Stationery Office (HMSO), 1996) <<http://webarchive.nationalarchives.gov.uk/+/http://www.dca.gov.uk/civil/final/contents.htm>>; Zuckerman, *Civil Justice in Crisis*, above n 92, 152.

¹¹⁹ Ibid 153.

¹²⁰ Lord Woolf, *Access to Justice: Overview* <<http://webarchive.nationalarchives.gov.uk/+/http://www.dca.gov.uk/civil/final/contents.htm>>.

¹²¹ Sackville, *Case Management: A Consideration of the Australian Experience*, above n 30, 165.

¹²² Justice Geoff Venning, 'Innovation in Case Management' (Paper presented at the Asia Pacific Courts Conference 2013 'the Pursuit of excellence and innovation in courts and tribunals', Auckland, New Zealand, 2013) <<http://www.aija.org.au/Asia%20Pacific%202013/Presentations/Venning.pdf>> 1 ; see, Maureen M. Solomon and Douglas K. Somerlot, *Caseflow Management in the Trial Court: Now and for the Future* (American Bar Association press, 1987) 1-2.

¹²³ Venning, above n 122, 1.

in Australia in response to concerns about excessive costs and delay.¹²⁴ Since 2000, the Victorian Civil Justice Review Project, the Australian Law Reform Commission and the Western Australian Law Reform Commission have all commented and explored the developments in case management in Australia.¹²⁵ Like most developed countries, Australia now recognizes that court-developed case management systems have produced cost effective and timely resolution of cases through judicial supervision of cases.¹²⁶ In Australia, the different types of courts deal with different types of cases, and the result is that, in Australia, case management has taken different forms and has not proceeded at a uniform pace.¹²⁷ The Australian Institute of Judicial Administration (AIJA) has played an important part in disseminating information about new approaches to case management within the purview of judicial administration.¹²⁸

Since its establishment in 1976, the Federal Court of Australia has adopted a system of individual case management.¹²⁹ The system was designed to allow judges to supervise the management of a case by means of direction hearings from its commencement until the trial or other disposition. The Federal Court has extensive power to give directions for the conduct of the proceedings.¹³⁰ The Supreme Court of NSW faced the question of case management and delay-reduction in late 1988.¹³¹ Justice Wood described the background situation at that time: there was no appreciation within the Court or the profession of any need for time standards, and there was no judge or group of judges responsible for the monitoring of the lists, or for the avoidance of delays. He said there was no management plan, and there was little by way of information. To overcome the situation the Court took the initiative by establishing a Delay Reduction Committee which included representatives from government and the profession to put forward a design to

¹²⁴Victorian Law Reform Commission, Civil Justice Review, above n 1, 290.

¹²⁵Ibid290; Australian Law Reform Commission, Managing Justice, above n 20, Chap 6; Law Reform Commission of Western Australia, Review of the Criminal and Civil Justice System of Western Australia Final Report, Report No 92 (1999) 97-102.

¹²⁶Victorian Law Reform Commission, Civil Justice Review, above n 1, 291.

¹²⁷Sackville, Case Management: A Consideration of the Australian Experience, above n 30,166.

¹²⁸ The AIJA is an incorporated association affiliated with the University of Melbourne. Its functions include conducting professional skill courses and undertaking research and collecting information on judicial administration. The AIJA's membership includes judges, magistrates, judicial administrators, legal practitioners and academics. It publishes the *Journal of Judicial Administration* <http://www.aija.org.au/>.

¹²⁹Sackville, Case Management: A Consideration of the Australian Experience, above n 30,181.

¹³⁰*Federal Court Rules 2011* (Cth) div 1.3.

¹³¹Justice JRT Wood, 'Case Management in the Common Law Division of the Supreme Court of New South Wales' (1991) 1 *Journal of Judicial Administration*71.

implement a more efficient system of case management.¹³² In this strategy, the Court adopted the following:

- Appointing a list judge to give directions, deal with adjournment applications and monitor cases;
- Establishing a system for the collection of monthly statistics;
- Creating specialist lists to monitor particular categories of cases such as motor accident claims;
- Implementing a policy of giving certain dates for hearing and generating a firm expectation that the dates would be kept; and
- Introducing pre-trial supervision of cases by registrars, with a view to ensuring that prospect for settlement was explored.

A limited form of case management was introduced in the District Court of NSW in 1992¹³³ and officially it was introduced in January, 1996.¹³⁴ Sackville noted that while the District Court has not adopted any sophisticated form of case management for civil litigation generally, nevertheless it appears that the court has largely eliminated its backlog.¹³⁵ (The detail of reducing backlogs using case management tool in the District Court is explained in *Chapter Four*).

Bangladesh: Where Case Management is an Urgent Need

Most developed countries have already turned towards a ‘second generation’ of case management development.¹³⁶ But Bangladesh, a still developing country, has not introduced the case management at all, despite the urgent need to overcome backlogs.¹³⁷ In a lawyer-dominated adversarial legal system, judges play basically a passive role. But to introduce case management, the judge must play an active role in controlling the court procedure (the detail of this issue is discussed in Chapter Six). Notably, the Honourable former Chief Justice of New South Wales, J J

¹³²Sackville, Case Management: A Consideration of the Australian Experience, above n 30, 175.

¹³³Ibid 180.

¹³⁴The District Court of New South Wales, *Annual Review*, (2003) 15.

¹³⁵Sackville, Case Management: A Consideration of the Australian Experience, above n 30, 180.

¹³⁶Victorian Law Reform Commission, Civil Justice Review, above n 1, 291.

¹³⁷Umme Sharaban Tahura, 'Reducing case backlogs: Time to change the classification of cases', *The Daily Star* (Dhaka), 9 September 2014 <<http://www.thedailystar.net/law-and-our-rights/time-to-change-the-classification-of-cases-40766>>.

Spigelman states, 'there is no inconsistency' between an expanded managerial role of the judges and the essential requirements of an adversarial system.¹³⁸

WHY IS CASE MANAGEMENT ESSENTIAL?

Case management arose as a response to the traditional adversarial system. Under the traditional system it was for the parties to define the issues for determination and to take the steps they deemed necessary to prepare for trial. The judge was largely a passive umpire who only became involved in the proceedings when called upon to decide a particular issue, as in the case of an interlocutory dispute, or to hear the case once it was ready for trial. This demarcation of roles between the parties and the judges was thought to give rise to unnecessary costs and increase delay in the resolution of the proceedings.¹³⁹ Case management moves the control of cases from the parties/lawyers to the court. In *Aon Risk Services Australia Ltd v Australian National University* (2009), the Australian High Court stated:

In the past it has been left largely to the parties to prepare for trial and to seek the court's assistance as required. Those times are long gone.¹⁴⁰

The United States Federal Judicial Center has summarized the importance of case management and states its aim is:¹⁴¹

To improve the quality of civil justice; to help parties to civil disputes obtain a fair resolution (often by other than adversary procedures) at a cost commensurate with what is at stake. Seeking perfect justice at a cost litigants and the judicial system cannot afford is self-defeating. Case management must be directed at tailoring dispute resolution procedures and techniques to the available resources and the needs of the case.

Case management ensures timeliness in resolving a case and by shifting the control from the lawyers or client to the court, and the client gets a complete picture of his case regarding the lifespan at the very beginning and accordingly he can prepare himself. The Honourable Sir Anthony Mason (former Chief Justice of the High Court of Australia) noted some advantages of

¹³⁸Spigelman, above n 28, 100.

¹³⁹The Hon CW Pincus, 'Court Involvement in Pre-Trial Procedures' (1987) 61 *Australian Law Journal* 471

¹⁴⁰*Aon Risk Services Australia Ltd V Australian National University* (2009) 239 CLR 175 (French CJ Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ) para 113 <<https://jade.barnet.com.au/Jade.html#!article=97589>>.

¹⁴¹Federal Judicial Center, *Manual for Litigation and Cost and Delay Reduction* (1992) 1.

case management: for example it reduces time of disposition, it also ensures the date of hearing and the future course of the case; it also helps to identify issues at the very early stage.¹⁴²

The goals of case management also reflect the importance of case management. Solomon and Somerlot identify those goals as: Court management of case progress as part of an organized predictable system should assure:¹⁴³

- equal treatment of all litigants by the court;
- timely disposition consistent with the circumstances of the individual case;
- enhancement of the quality of the litigation process; and
- public confidence in court as an institution.

Case management also identifies the appropriate cases for ADR. Professor Boulle argues, based on four cases studied, that not all cases need ADR nor does ADR succeed in all cases.¹⁴⁴ Proper case management can identify the cases where ADR can succeed, and the judge can identify appropriate processes for each case. Boulle gave two examples of cases where the judges bound the parties to go for mediation rather than leaving it to their choice and mediation was successful. He concluded that a referral order for mediation is not a denial of access to justice; it is merely ‘a deferment of your day in Court’. Boulle encapsulates the future debate in these terms: ‘how should the paternal institution of the Rule of Law be reconciled with the modern twins of Case Management and ADR?’¹⁴⁵

BASIC METHODS OF CASE MANAGEMENT

The goals of prompt and affordable justice cannot be easily achieved because of delay and cost. Although courts may differ in their specific approaches to caseload management, those approaches can generally be considered on the basis of certain techniques that all successful courts have in common.¹⁴⁶ At the same time, it is also true that there is no single model of a successful delay-reduction or delay-prevention program. Different courts use different

¹⁴²The Honourable Sir Anthony Mason, 'Case Management: The Judiciary and Change' (Paper presented at the Conference on Case Management, Dublin, Ireland, 1997)
195<[http://www.courts.ie/courts.ie/library3.nsf/\(WebFiles\)/0170EA45B0ED069380256DA60039EEBC/\\$FILE/working1.pdf](http://www.courts.ie/courts.ie/library3.nsf/(WebFiles)/0170EA45B0ED069380256DA60039EEBC/$FILE/working1.pdf)>.

¹⁴³Solomon and Somerlot, above n 122, 5.

¹⁴⁴Boulle, above n 19,3.

¹⁴⁵Ibid4.

¹⁴⁶Steelman, The History of Delay Reduction, above n 80, 90; see also, Solomon and Somerlot, above n 122, 7-31; Australian Law Reform Commission, Managing Justice, above n 20, para 6.11.

approaches and adapt program details suitable to local circumstances and have not sought a single miracle cure.¹⁴⁷ Steelman identified some common methods of caseflow management; most of them are supported and adopted in the case management systems in many countries. These methods are outlined under the following headings:¹⁴⁸

Early Court Intervention and Continuous Court Control of Case Progress

The last twenty years' research on case management has established that only the court will be the controller of the progress of cases.¹⁴⁹ National research of the USA found that early court control is clearly correlated with shorter times in disposition of civil cases.¹⁵⁰ Steelman differentiates what early control means in practice and what it should be. In practice, early control refers only to the commencement of a case, focusing on a monitoring process, and in this process the clerk records the initial filing of a case and enters the case into a system under which it will be reviewed at a fixed time to determine whether the next anticipated event has occurred in keeping with time standards for interim stages in the case's progress.¹⁵¹ This process should be part of the court's automated case-management information system. The court controls case movement by setting it into the clerical and automated case-management routine.¹⁵² The objectives of early intervention are to resolve cases as early in the process as is reasonable and to reduce the costs for parties and the court by doing so. It is found from Steelman's research that most cases are resolved by negotiated settlement or plea, and that only small percentage of cases are actually resolved by the binding decision of a judge or jury after a trial.¹⁵³ Friesen stresses that court control should be a continuous process; so that progress to each scheduled control point or event triggers application of the next scheduled control point.¹⁵⁴

The Victorian Law Reform Commission also supports early court intervention through the mode of early dispute resolution.¹⁵⁵ In 2008, the Victorian Law Reform Commission submitted a report

¹⁴⁷ Steelman, *The History of Delay Reduction*, above n 80, 90.

¹⁴⁸ Steelman, Goerdt, and Mcmillan, above n 83, 3; Steelman, *The History of Delay Reduction*, above n 80, 107; James S. Kakalik et al, 'An Evaluation of Judicial Case Management under the Civil Justice Reform Act' (RAND Institute, 1996) <http://www.rand.org/content/dam/rand/pubs/monograph_reports/2007/MR802.pdf> xviii.

¹⁴⁹ Thomas W Church, *Justice Delayed: the Pace of Litigation in Urban Trial Courts* (National Center for State Courts, 1978) 66-67

¹⁵⁰ John Goerdt, Chris Lomvardias and Geoff Gallas, *Reexamining the Pace of Litigating in 39 Urban Trial Courts* (National Center for State Courts, 1991) 55

¹⁵¹ Steelman, Goerdt, and Mcmillan, above n 83, 3.

¹⁵² *Ibid* 3.

¹⁵³ *Ibid* 3.

¹⁵⁴ Ernest Friesen, 'Cures for Court Congestion' (1984) 23(1) *Judges Journal* 7.

¹⁵⁵ Victorian Law Reform Commission, *Civil Justice Review*, above n 1, 61.

on 'Civil Justice Review'. Based on that report the *Civil Procedure Act 2010* (Vic) was enacted where case management was given importance. In that report, the Victorian Law Reform Commission revealed that Magistrates' Courts offered two main forms of ADR: pre-hearing conferences and mediation. The former are largely conducted by registrars and deputy registrars of the court, who combine mediation and conciliation skills in an attempt to resolve the issues in dispute.¹⁵⁶ If the dispute cannot be resolved, the pre-hearing conference may nonetheless be useful in clarifying the issues in dispute for trial and allowing parties to apply for interlocutory orders to assist them in preparing for trial. The Victorian Law Commission simplified the procedure by removing complexities and interlocutory matters.¹⁵⁷

The American Bar Association's Section of Litigation found in its survey that early intervention not only helps to narrow the issues and control discovery, but also increases clients' satisfaction when they find that the judges are actively involved in managing the case.¹⁵⁸

Differentiated Case Management through Case Tracking

The purpose of case tracking is to save money and time.¹⁵⁹ Different cases have different needs. Rather than leaving it up to the judge to tailor the procedure to the needs of the case, tracks are created with different sets of procedures. A Differentiated Case Management (DCM) method is accepted by most of the countries who have adopted case management. It means a court will distinguish among individual cases in terms of the amount of attention they need from judges and lawyers and the pace at which they can reasonably proceed to conclusion.¹⁶⁰ According to Steelman, DCM is a more refined approach than allocation of jurisdiction between a general and a limited or specialist jurisdiction trial court.¹⁶¹ Steelman also justifies why DCM is necessary by stating that in the absence of case differentiation, courts customarily apply the same procedures and timetables to all cases of a given type. Generally courts give attention to cases according to their filing time. Steelman argues that treatment of all cases in the same way may mean that some cases are rushed, and others are unnecessarily delayed. Courts have long recognized that certain

¹⁵⁶Ibid 61.

¹⁵⁷Ibid 61.

¹⁵⁸American Bar Association, 'ABA section of litigation Member Survey on Civil Practice' (Detailed Report, American Bar Association, 11 December 2009) 124-6<<http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Duke%20Materials/Library/ABA%20Section%20of%20Litigation,%20Survey%20on%20Civil%20Practice.pdf>>

¹⁵⁹Steelman, Goerd, and Mcmillan, above n 83, 102-3.

¹⁶⁰Ibid 4.

¹⁶¹Ibid 4.

cases may be so complex that they need special attention and call for a departure from procedures typically applied to all cases. Steelman used the example of American Federal Courts that have applied special procedures for the management of complex litigation since 1960.¹⁶²

According to the DCM plan, cases might fall into one of three categories:

- Cases that proceed quickly with only a modest need for court oversight;
- Cases that have contested issues calling for conferences with a judge or court hearing, but that otherwise do not present great difficulties;
- Cases that call for ongoing and extensive involvement of a judge, whether because of the size and complexity of the estate involved, the number of attorneys and other participants involved, or the difficulty or novelty of the legal issues presented.

Holly Bakke and Maureen Solomon argue that this Differentiated Case Management is not restrictive; rather it is more flexible and each court can devise its own method according to the categories of cases.¹⁶³ Steelman also develops how the DCM method would operate, stating that the operation of a differentiated case management program depends on early court cognizance of each case at the moment of filing. DCM for pre-trial matters has a particular effect on the time allowed for completion of discovery. Steelman further said that under a DCM system, court monitoring of case progress would be continuous.¹⁶⁴

The cases will be differentiated according to the legal and factual complexities of the cases. The number and complexity of the factual and legal matters required to be determined in any individual matter will have an important bearing on the time, cost and resources required for its resolution. The Victorian Law Reform Commission termed those complex cases as ‘mega litigation.’¹⁶⁵ To manage that mega litigation, judges need additional powers, although Justice Sackville has identified some constraints on imposing additional power upon judges — for example, identifying issues or time limits for the hearing is more dependent on the parties than judges.¹⁶⁶ So empowering judges would not be a total solution. As part of DCM, rule-makers can

¹⁶²Ibid 4.

¹⁶³Holly Bakke and Maureen Solomon, 'Case Differentiation: An Approach to Individualized Case Management' (1989) 73(1) *Judicature* 17.

¹⁶⁴Steeleman, Goerd, and Mcmillan, above n 83, 5.

¹⁶⁵Victorian Law Reform Commission, Civil Justice Review, above n 1, 73.

¹⁶⁶Justice Ronald Sackville, 'Mega Litigation: Towards a New Approach' (Paper presented at the The Annual Conference of the Supreme court of NSW, Central Coast, NSW, 2007) 24

create different sets of rules for different types of cases because it is doubtful that a single set of rules could service all cases across all subject areas.

A similar approach exists in the United Kingdom through the adoption of procedural tracks as a result of the reforms introduced in response to Lord Woolf's Access to Justice Report. The United Kingdom system allocates cases to one of three tracks: small claims track, fast track and multi-track.¹⁶⁷ In all three procedural tracks there are standard directions so that, where possible, case management will involve the allocation of the case to a track and then to court supervision of compliance with the applicable standard directions. However the multi-track, which deals with a broad range of cases, also makes provision for hands-on judicial case management throughout the progress of the litigation where that is required, by use of special lists and tracks which are usually designated as 'expedited', standard' and 'complex' or focus on particular case types such as asbestos or bankruptcy litigation.¹⁶⁸

Realistic Schedules for Completion of Court Events

To make the case management effective the court must ensure the parties' as well as the lawyers' preparation. Professor Ernest Friesen observed that it is lawyers, not judges, who control the court through settling cases. Lawyers settle cases when they are prepared, and lawyers prepare for significant and meaningful court events.¹⁶⁹ Making the court event meaningful and to occur as scheduled is an important way to ensure that both lawyers and parties are prepared. However this may increase the emotional and financial costs of litigation because of the need to prepare for additional court appearances.¹⁷⁰ The court must undertake continuous communication with the litigators, and Friesen identifies that such continuous communication would include:¹⁷¹

- Reasonable advance notice to lawyers of deadlines and procedural requirements;
- Notification to lawyers that all requests for adjournments and other schedule revisions must be made in advance of the deadline date, and will only be granted on a showing of good cause;

<<http://www.austlii.edu.au/au/journals/FedJSchol/2007/13.html>>.

¹⁶⁷Civil Procedure Rule (UK) r 26.1(2).

¹⁶⁸Lord Woolf, *Access to Justice: Interim Report* (1995)Chapter 5

<<http://webarchive.nationalarchives.gov.uk/+http://www.dca.gov.uk/civil/final/contents.htm>>.

¹⁶⁹Friesen, above n 154,4.

¹⁷⁰Steelman, Goerdts, and Mcmillan, above n 83, 6; Spigelman, above n 28, 126.

¹⁷¹Friesen, above n 154,7.

- Action in response to lawyers' noncompliance with deadlines or other requirements;
- Consistent action on lawyers' requests for extensions or schedule revisions;
- Contemplation of the reasonableness of management procedures in terms of burden on the lawyers' cost for the parties.

Firm and Credible Trial Dates

It is commonly thought that trials should commence on the first date scheduled. If case participants doubt that trials or hearings will be held at or near the scheduled time and date, they will not be prepared.¹⁷² US national research shows that a court's ability to provide firm trial dates is associated with shorter times to disposition in civil and felony cases in urban trial courts.¹⁷³ Steelman identifies four steps to ensure firm and credible trial dates, as follows:

Maximizing Dispositions before Setting Specific Trial Dates

If a case is not disposed before trial, it is scheduled for trial. Generally, the court cannot have firm and predictable trial dates. By necessity the trial list will be many times longer than the number of actual trials, and listing a case for trial will not signal to lawyers and litigants that the case will actually be tried.¹⁷⁴ There is a powerful reciprocal relationship between firm trial dates and meaningful pre-trial court events that promote early non-trial dispositions. Anticipation of a certain and unavoidable trial date leads lawyers and litigants to prepare their cases and to be prepared to resolve them. This in turn will reduce the size and age of the court's pending inventory and provide even greater certainty that a trial will commence when scheduled.¹⁷⁵

Realistic calendar-setting Levels

This relates to how many cases a court has scheduled for trial on any given date. To simplify scheduling, a court might rely on the assertions of lawyer that case/s will go to trial on a scheduled date, and only one case will be listed for trial at a time.¹⁷⁶ Steelman suggests achieving a balance between overbooking and downtime,¹⁷⁷ that the most effective way to avoid excessive

¹⁷²Ibid 8.

¹⁷³Goerd, Lomvardias, and Gallas, above n 150,38.

¹⁷⁴Steelman, Goerd, and Mcmillan, above n 83, 7.

¹⁷⁵Ibid 7.

¹⁷⁶Ibid 8.

¹⁷⁷Overbooking means listing more cases than it should be according to law and downtime is listing fewer cases than it should be according to law.

overbooking or downtime is to develop a reasonable settling factor and to apply reasonable but firm policy limits on the granting of continuances.

Continuance policy

The third part of the formula for ensuring credible trial dates is firm and consistent application of a policy for minimizing trial date continuances. If the court grants too many continuances, the docket will collapse, and the judge's time will be underutilized.¹⁷⁸

Backup Judge Capacity

Trial scheduling is unavoidably uncertain because it involves future events that may be affected by changes and developments that occur after matters are set for trial. To avoid this problem it is better to do a calendar system and to pool judges assigned to do nothing but hearing trials.¹⁷⁹

Trial Management

By managing trials effectively, judges can continue to do justice in individual cases while expanding the availability of the scarce resources in the courts, judge time and courtroom space, for other matters.¹⁸⁰ Steelman argues that as part of the overall case management, trial management involves a set of steps, which include:

- Preparation for trial;
- Scheduling to start trials on time and provision of adequate time for them;
- Management of jury selection;
- Maintenance of trial momentum; and
- Establishment and enforcement of time limits.¹⁸¹

¹⁷⁸Steelman, Goerd, and Mcmillan, above n 83, 10.

¹⁷⁹ See, Steelman, Goerd, and Mcmillan, above n 83, 10-11.

¹⁸⁰Edward B McConnell, 'Court Management: The Judge's Role and Responsibility' (1991) 15(2) *Justice System Journal* 715

¹⁸¹Steelman, Goerd, and Mcmillan, above n 83, 12; see, Harry J Zeff, 'Hurry up and wait: A Nuts and Bolts Approach to Avoiding Wasted Time in Trial' (1989) 28(3) *Judge's Journal* 18.

HOW TO MAKE THE CASE MANAGEMENT SYSTEM EFFECTIVE

If the case management system is not effective it will fail in reducing backlogs. The Victorian Law Commission has identified some ways to make the case management system more effective.¹⁸²

Active Case management

Making case management ‘active’ can reduce the case backlog. One objective of active case management is to encourage and require the parties, their lawyers and those funding the litigation to limit the issues in dispute. Professor Zuckerman also argues for active case management.¹⁸³ The Victorian Court of Appeal has stated: ‘Courts are now expected to take an active role in the management of long and complex litigation. There is a need for a degree of innovation and flexibility if courts are to meet the legitimate expectations of litigants that come before it, particularly those in long cases.’¹⁸⁴

However, the Australian Law Reform Commission argued against active case management for the following reasons:¹⁸⁵

- It increases the power of judges and expands the opportunities to use or abuse their powers, particularly in a context where standards and rules are still being devised.
- It threatens the impartiality of judges. Judicial intervention is said to increase the opportunities for judges to be unduly influenced for or against a party through frequent close contact between judges and lawyers and the extensive information provided to judges during pre-trial hearings.
- There can be a lack of accountability for decisions made during the pre-trial case management.
- It may result in the existing system of justice being replaced with a lower quality system of justice, albeit one that is cheaper and quicker. The concern is that case processing may

¹⁸²Victorian Law Reform Commission, Civil Justice Review, above n 1, 297.

¹⁸³Zuckerman, Civil Justice in Crisis, above n 92, 47.

¹⁸⁴*Jacobson v Ross* (1995) 1 VR 337, 351-352 (Brooking J)

¹⁸⁵Australian Law Reform Commission, *Review of the Adversarial system of litigation: Rethinking Family Law Proceedings*, Issues paper 22(1997) 241-266 <<http://search.library.wisc.edu/catalog/ocm40487104>>.

become an end in itself, rather than the means of achieving justice, with the managerial focus on speeding up the process rather than on improving the quality of decisions.

Nevertheless, the advantages of active case management have been summarised by Justice Gordon of the Federal Court:¹⁸⁶

- It permits parties to assess better and earlier the risks of the litigation which is central to an informed settlement;
- It limits discovery;
- It limits the number of interlocutory disputes concerning issue identification and discovery;
- It provides certainty of trial date or period of hearing earlier;
- It shortens the time needed for, and the cost of preparation;
- It shortens the length of the trial and usually the length of the judgment; and
- It reduces the cost of litigation.

In the same way, Victorian Law Reform Commission strongly argues for active judicial case management.¹⁸⁷ A number of submissions suggested that more active ‘management’ is needed to reduce delay and unnecessary costs. It was also contended that the emphasis should be more on planning for the most effective way to resolve the dispute, rather than simply managing proceedings ‘where it is largely left to the parties to determine the process’. The Victorian Law Reform Commission is, however, mindful that proactive case management is a difficult task, both for parties and for the court.¹⁸⁸ There is a risk that cases may be ‘over’ managed, leading to unnecessary interlocutory hearings and additional costs. As with many areas of civil procedural reform, there is a need to achieve an appropriate balance between competing considerations.

Introducing Summary Judgement

The Victorian legislature introduced the summary judgement as form of case management. Justice Croft said summary judgement is one aspect of the case management¹⁸⁹ (The District

¹⁸⁶The Hon Michelle Gordon, 'Evaluation of the Docket System with Particular Emphasis on Case Preparation and Early Identification of Issues' (Paper presented at the Federal court- Law Council of Australia Workshop, Adelaide, 14 March 2008).

¹⁸⁷Victorian Law Reform Commission, Civil Justice Review, above n 1, 303.

¹⁸⁸Ibid 301-303.

¹⁸⁹Justice Clyde Croft, *The Civil Procedure Act and Case Management* (A presentation delivered at the Geelong Law

Court of NSW has not formally introduced summary judgement; however Western Australia has recently adopted summary judgements). Section 47(3)(c) of the *Civil Procedure Act 2010* (Vic) states:¹⁹⁰

Deciding the order in which issues in dispute in the civil proceeding are to be resolved including-

- (i) Deciding promptly which issues need a full investigation and a hearing; and
- (ii) Disposing summarily of other issues.

Justice Croft cautioned however, that summary judgment is not always appropriate for every case.¹⁹¹ It will vary from circumstance to circumstance.

Flexibility and Proportionality of Procedures

This is another key for successful case management. From the New Zealand perspective, it was found that earlier case management attempts had failed because the system was too rigid and too formulaic.¹⁹² Case management needs to be flexible, and to recognise that not all cases require a standard approach, even when they may fit within readily identified categories. The responsibility for intensive case management should be restricted to those Judges who have the necessary attributes and interest in case management.¹⁹³

Limiting Discovery and Controlling Interlocutory Disputes

This is another method for making case management successful. There are some areas where the court will order discovery within a certain time. Discovery and the cost associated with it were identified as a major handicap to the goal of prompt and economic disposal. Limiting discovery would allow the Court to apply either a less expensive or more restricted test for discovery as may be appropriate.

Association, 18 January 2011) 20.

¹⁹⁰Ibid 20.

¹⁹¹Ibid 20.

¹⁹²Venning, above n 122, 5.

¹⁹³Ibid 5.

Interlocutory applications add to the duration and cost of litigation. There are a number of measures which can be utilised to limit interlocutory applications.¹⁹⁴ They fall into two broad categories:

1. measures restricting interlocutory steps in a proceeding; and
2. measures to reduce unnecessary interlocutory applications.

Interlocutory proceedings may also add to cost and delay when procedural decisions are the subject of appeals or applications for leave to appeal.

Limiting Trial Procedures

In addition to limits on pre-trial procedures, the Victorian Law Reform Commission (VLRC) has considered whether there should be more clearly delineated and specific powers to impose limits in respect of the conduct of the trial.¹⁹⁵ The Victorian Law Reform Commission states that the need for judicial intervention in the conduct of court proceedings including trial is increasing day by day.¹⁹⁶

Case Conferences as an Alternative to Directions Hearing

A number of the recommendations were made by that Commission in its *Civil Justice Review* report to facilitate the early resolution of disputes.¹⁹⁷ At present many interlocutory steps, including directions hearings, focus primarily on procedural steps directed towards the ultimate trial of the action. Although parties participating in directions hearings may discuss settlement, such hearings are usually formal and adversarial. ‘Case conferences’ are an alternative method by which the parties may endeavour to reach agreement on the steps required for the conduct of the action. They can provide an early opportunity for the parties to reach a settlement agreement or narrow the issues in dispute.

Many of the arguments for and against court-conducted mediation are relevant to judicially managed case conferences. In some instances the parties or their legal representatives may agree to meet and confer in relation to the conduct of the case and possible settlement. However, this

¹⁹⁴Victorian Law Reform Commission, *Civil Justice Review*, above n 1, 358.

¹⁹⁵*Ibid* 311.

¹⁹⁶*Ibid* 314.

¹⁹⁷*Ibid* 336.

process is likely to be more effective if an independent third party is present. Moreover, judicial officers, with their added authority, may be more influential in such processes than other dispute resolution practitioners such as mediators.

Introducing an Individual Docket System

A recent example of an individual docket system is the Federal Court docket system in Australia, which was introduced in 1997.¹⁹⁸ The essence of the system is that each case commenced in court is allocated to a judge, who is then responsible for managing the case until final disposition. Commentators suggest that a docket system aims to encourage the just, orderly and expeditious resolution of disputes. The Federal Court of Australia states that it seeks to enhance the transparency of the processes of the Court.

The key elements of the docket system are described by the Federal Court of Australia as follows:¹⁹⁹

- Cases are randomly allocated to judges. A case ordinarily stays with the same judge from commencement until disposition.
- Cases in some areas of law requiring particular expertise (including intellectual property, taxation and admiralty) are allocated to a judge who is a member of a specialist panel. Such cases are randomly allocated to members of the particular panel. This system replaces the former specialist lists.
- The docket judge makes orders about the way in which the case should be managed or prepared for the hearing. The court may direct that special procedures be used, including case management conferences and referrals to mediation.
- The docket judge monitors compliance with directions, deals with interlocutory issues and ensures that hearing dates are maintained.

Judges are expected to manage the cases in their lists or divisions from first directions hearing until trial, and, they will hear interlocutory disputes concerning those cases when they are available.

Proactive Judicial Case Management for Complex Cases

¹⁹⁸Federal Court, *Individual Docket System* <www.fedcourt.gov.au/how/ids.html>.

¹⁹⁹*Ibid.*

The number and complexity of the factual and legal matters required to be determined in any individual matter will have an important bearing on the time, cost and resources required for its resolution. One of the factors having an impact on the operation of the civil justice system is the apparent increase in the legal and factual complexity of many civil cases and the disproportionate impact on judicial resources of what has been described as ‘mega litigation’. The Victorian Law Reform Commission has also recommended proactive judicial management for complex litigation.²⁰⁰ In light of these difficulties Justice Sackville raised the question of what can be done to achieve more effective judicial control of mega-litigation. Many of his observations are equally relevant to judicial management of civil litigation generally. As Justice Sackville noted:²⁰¹

- There is ‘no easy solution’.
- The aspiration of ‘just, quick and cheap resolution of the real issues’ in dispute is easier to express than to achieve.
- Modern technology may help, but it is ‘wishful thinking’ to assume that modern information technology will solve the problem.
- ‘Vigorous’ judicial management and control will help restrict the ambit of the litigation but will not prevent mega-litigation ‘imposing an unreasonable burden on the judicial system’.
- The role of the judiciary needs to change further to adopt even ‘more rigorous and interventionist pre-trial case management strategies’ and greater control over the parties ‘in the conduct of the trial itself’.

Digitalizing the Court System

Before addressing this point we need to focus on addressing the challenges that the manual court system faced. For example, in Bangladesh it became difficult to follow the case progress and maintain the *court diary* according to the law manually: very often the date of the cases overlapped. Most developed countries have introduced the digitalized court system. It saves time while avoiding easy access to corruption (for example by favouring a particular case, taking bribes or so on). Judge Harvey explained how the New Zealand judicial system was eventually

²⁰⁰Victorian Law Reform Commission, Civil Justice Review, above n 1,359.

²⁰¹Sackville, Mega Litigation, above n 166, 13.

turned into computerized court system to achieve the advantages of case management.²⁰² As a first step New Zealand Department for Courts developed a 'Computers for Judges' program in the early 1990s to supply of computers to the judiciary and for the development of information and research systems, enabling the utilization of information systems and developing computer networking technology. In 1995, the Department of Justice undertook a significant and continuing program to modernize court administration under which the computerized Case Management System (CMS) was developed.²⁰³

RESPONSIBILITIES OF THE CASE MANAGER

Who should be the case manager? Some think judges should play the role of the case manager. In recent times, the 'case manager' as a different profession has been created within the court systems. Steven W Hays mentioned there is a group who strongly believes that neither judges nor the court clerk was up to task of effectively administering the judicial bureaucracy.²⁰⁴ Hays suggested that by freeing judges from administrative work, and by replacing clerks as the primary judicial housekeeper, court administrators were expected to enhance efficiency and promote modernization within the tradition-bound judicial bureaucracy. He strongly argued that despite the impressive successes of the court management profession over the past four decades, the managerial responsibilities of judges and court clerks have not been significantly diminished.²⁰⁵ It is to be borne in mind that the case managers were never intended to replace judges as administrative decision makers. Hays argued that judges are and will always be the most influential court managers. For the foreseeable future, judges would share some of their managerial responsibility with court clerks or others who can be known as a 'case manager'.²⁰⁶

The success of case management also depends on the case managers who will apply the case management technique. Most scholars argue that judges should be the case managers, but others argue that this would overburden the judges in exercising their judicial activities. Professor Resnick raised this very crucial point in her thoughtful article on '*managerial judges*'.²⁰⁷ She

²⁰² Judge David Harvey, 'The New Zealand Courts Case Management System: A Judicial Perspective' (Paper presented at the Technology for Justice Conference, Sydney, 20-22 October 2002) 3 <<http://www.aija.org.au/Tech2002/presentations/Harvey.pdf>>.

²⁰³ Ibid 4.

²⁰⁴ Hays and Graham Jr., above n 103, 221.

²⁰⁵ Hays and Graham Jr., above n 103, 221-2.

²⁰⁶ Ibid 222.

²⁰⁷ Judith Resnick, 'Managerial Judges' (1982) 96 *Harvard Law Review* 432.

wrote that their involvement in efforts at calendar control might bias their objectivity in the determination of cases.²⁰⁸ To guard against this risk, she urged the adoption of appropriate safeguards to assure due process protections where judges are more focused on case management, such as (a) controlling discretion; and (b) preserving impartiality.²⁰⁹ The case flow management must ultimately be an activity that judges actually undertake on a day to day basis.²¹⁰ The RAND Institute's research paper also reveals the same argument through interviewing judges and lawyers.²¹¹ Their research concludes judges desire to tailor case management to the needs of the case and to their style of management.

Case management also will vary depending on the personality, experience, and of expertise, willingness to innovate and experiment, likes and dislikes of a particular judge.²¹²

Whether the judge or someone else will take the role of case manager, Steelman identifies that a case manager should have the following attributes.²¹³

Leadership

Experts on caseflow management have found in their assessment of courts that leadership is fundamental to the success of a caseflow management program. Steelman strongly argues that it is the leader who will give effect to improving caseflow management and in doing so, he or she might (1) articulate a vision of how changes will improve the system, (2) show how individual persons will benefit from them, and (3) show ongoing commitment to the effective operation of the proposed program through dissemination of information on program progress and rewards to those who help the program achieve its goals.²¹⁴ Steelman further states that this leadership level should be from the Chief Justice to general judge at the state level.

Commitment to a Shared Vision

Steelman mentioned that one of the contributions of a leader to the development, implementation, and continued success of a caseflow management program is an ability to articulate a vision of

²⁰⁸ See also page at 37.

²⁰⁹ Resnick, above n 207, 432.

²¹⁰ Steelman, Goerdts, and Mcmillan, above n 83, 85.

²¹¹ Kakalik et al, above n 148,xxiii.

²¹² Legg interviewed Sackville JA, NSW Court of Appeal, Sydney, 30 March 2011 mentioned in Michael Legg, Case Management and Complex Civil Litigation, above n 30, 8.

²¹³ Steelman, Goerdts, and Mcmillan, above n 83, 61.

²¹⁴ Ibid 62-63.

how the program will improve the system and benefit those affected by it. He argued that the involvement and commitment should be made by the bench, and also from the court staff, and investment by others outside the court can also be essential to the program's ongoing success.²¹⁵

Communications

Steelman strongly believe that the success of caseflow management would be greatly enhanced if the court provided good communication between judges and court staff, as well as broad consultation among court leaders, members of the practicing bar, and the key representatives of other institutional participants in the court process.²¹⁶ Through a process of active communication, court improvement can be undertaken to modify attitudes and expectations of the people by providing information about the need for change, building motivation to carry it out, and establishing broad organizational support for it.²¹⁷ The level and scope of communication that may be needed to establish and maintain support for implementation of a successful caseflow management improvement program are broad. Communication in several dimensions is required.

A Learning Environment

Courts that are successful with caseflow management put a high value on education generally and provide specific training in their caseflow management improvement programs continuously. So education and training in caseflow management and emphasis on learning in the court should be a continuous process.

Luther Gulick and Lyndall Urwick stated that a court manager will also undertake planning, organizing, staffing, directing, coordinating, and reporting.²¹⁸ Plotnikoff added other things to be considered by the case manager:

- Creating accountability;
- Setting time standards;
- Other goals setting;
- Monitoring and measuring performance.

²¹⁵Steelman, Goerd, and Mcmillan, above n 83, 64.

²¹⁶Ibid 67.

²¹⁷Ibid 67.

²¹⁸Gulick, Urwick, and Pforzheimer, above n 110; Hays and Graham Jr., above n 103, 19.

The UK review body on civil justice also set out the type of effective case monitoring system which courts would require. Its first recommendation was fairly basic, namely that the court record should show the date by which the case is due to be finalised, and the court file should record the finalisation within the prescribed period.²¹⁹

It can be said that a successful caseload manager requires a number of qualities: general leadership; involvement and commitment to a vision; good communication; and a learning environment. Case management's success depends on how it would be managed and implemented. David Steelman described it through the example of Australian courts. He said case management was successful in Australia because the court leaders have shown a long-term commitment to expeditious case procedure, have communicated well with the litigants and other institutional participants, and have actively involved non-judicial court staff members in the case management effort.²²⁰ Case management emphasizes that effective implementation will involve judges at all levels together with the whole of the administration of court service.²²¹ For the system to work, judges must be involved not only in the operation of the system, but in its design. The issue of bench-bar cooperation, a fundamental part of any case management system, must also be addressed.²²² Effective caseload management is part of what is considered optimal performance for a court in terms of service to the public and the ability to render just decisions in keeping with procedural fairness and in a timely manner; it has also become the way that effectiveness as an individual trial judge is typically measured.²²³

FUTURE APPROACH TO CASE MANAGEMENT

The Honourable Sir Anthony Mason was cautious in relation to the application of case management. Though he was confident that case management has undoubted potential to deliver an improved justice system, if not carefully handled it could also cause dissatisfaction and criticism on the part of lawyers and on the part of the community.²²⁴ He further said that case management does not reduce the cost of the cases, though he was optimistic about Lord Woolf's

²¹⁹Plotnikoff, above n 114,212; also see at page no 26.

²²⁰Steelman, *The History of Delay Reduction*, above n 80, 102.

²²¹Plotnikoff, above n 114,217.

²²²Ibid 218.

²²³Steelman, *The History of Delay Reduction*, above n 80, 116.

²²⁴Mason, above n 142, 195.

proposed 'fast-track' proposal regarding reducing cost of litigation.²²⁵ Jay Tidmarsh contended that case management in fact increases the cost of the litigation.²²⁶ The RAND Institute issued a report evaluating the effect of case management effectiveness and its study suggested that early case management might actually increase costs unless it is accompanied by long term planning and management.²²⁷ However, in 2006 William W Schwarzer and Hirsch Alan argued that case management saves time and expense in that if a small amount of a judge's time is devoted to an early case management, it will save vast amounts of time later and saving time also means saving costs, both for the court and for the litigants.²²⁸ Sir Anthony Mason further referred to the need to ensure that case management of cases that are not complex is structured in such a way that preliminary conference and similar activities are kept to a minimum so as to not impose too much of a burden on a small practice.²²⁹ He concluded that while he supported case management, at the same time it must be handled with care.

American state court leaders preparing for the commencement of the twenty-first century came to view delay reduction and delay prevention in the broader context of increasing attention to customer service.²³⁰

Judge Roderick Joyce QC and Dr Berry Zondag placed emphasis on structural efficiency for the success of the case management. They proposed future attention to the following:²³¹

- The possibility of filing all document online including fee payment;
- Online storage and management of all documents related to a case including the evidential matters;
- Online access to the case management and case planning system;
- Online case management dispute resolution;
- Greater use of online communication technology; and

²²⁵ See also, Lord Woolf, Access to Justice: Final Report, above n 118, Chapter 2.

²²⁶ Jay Tidmarsh, 'Pound's Century and Ours' (2006) 81 *Notre Dame Law Review* 559.

²²⁷ Kakalik et al, above n 148, 54-57.

²²⁸ William W Schwarzer and Hirsch Alan, *The Element of Case Management: A Pocket Guide for Judges* (Federal Judicial Center, 2nd ed, 2006) 1.

²²⁹ Mason, above n 142, 199.

²³⁰ Steelman, The History of Delay Reduction, above n 80, 115.

²³¹ Judge Roderick Joyce QC and Dr Berry Zondag, 'The Case for Enhanced Case Management and Greater Judicial Clarity' (Paper presented at the New Zealand Bar Association Annual Conference, New Zealand, 2010) 7 <<http://www.scribd.com/doc/36566675/The-Case-for-Enhanced-Case-Management-and-Greater-Judicial-Clarity>>.

- Use of electronic documents in hearing as a matter of course.

This proposed approach to case management would reduce the cost of the litigation and at the same time maximise utilization of the court resources, whilst also promoting good customer service through increasing satisfaction.

CONCLUSION

Case flow management programs are now commonplace in trial courts throughout the world. Case management varies from court to court; however, there are some common methods of case management, for example: early judicial intervention, Differentiated Case Management, using referral to alternative dispute resolution, and proper monitoring. At the same time, it is also to be recalled that all features may not be applicable for all courts. In addition, it should also be kept in mind that the success of case management depends on the terms of reference of a case manager which varies from court to court and from person to person. Judges and court managers must be realistic about the implications of case management in escalating the speed of court proceedings. Case management in its various forms requires skills and imposes burdens that historically formed no part of the judicial role. The transformation of the judicial role has now proceeded substantially further than in the early days of case management. Whatever the system is, the responsibilities to achieve the just, quick and cheap resolution of the real issue in dispute in civil proceedings using case management lie on the case managers.

CHAPTER THREE: THE COURT SYSTEM OF BANGLADESH COMPARED WITH THAT OF NEW SOUTH WALES (AUSTRALIA)

INTRODUCTION

The comparison of different court systems is an enterprise that has developed explicit conceptual frameworks for such comparison between different States' court systems. This chapter describes the court system of Bangladesh compared with that of New South Wales (Australia) concerning the courts' structure, procedure to appoint judges, jurisdiction of the specific court, the separation of the judiciary from the executive, and other institutions related to the court.

HISTORICAL BACKGROUND

As formerly a British colony, the Australian NSW legal system is based, historically and conceptually, on the Common Law.²³² Gradually it was partially modified by a distinct body of common law, called equity.²³³ Bangladesh, as part of the Indian Subcontinent, had also been a British colony; therefore the judicial system of Bangladesh is a mixed system which has structure, legal principles and concepts modelled mostly on English Common Law but also on Islamic Law or Hindu Law, because, before Bangladesh was ruled by the British Government, it was governed by Muslims and Hindus. During the Muslim period in Bengal, the administration of justice was based on mainly on the Islamic concept imported from Arabia.²³⁴

Bangladesh is a twice-born nation. In 1947, it achieved its independence from the United Kingdom as part of Pakistan, and in 1971, it finally became independent from Pakistan through a war of liberation.²³⁵ The judicial system of Bangladesh has gradually developed over many centuries. In each period, Bangladesh had different types of judicial system.²³⁶ A major portion of the laws of Bangladesh was enacted during the British colonial period. After the independence (26 March 1971) of Bangladesh, in 1972 an order named the *Bangladesh (Adaptation of Existing Laws) Order 1972* (Bangladesh) was passed and through this order, all the Acts, Ordinances,

²³² See, James Crawford *Australian Courts of Law* (Oxford University Press, 1982) 6.

²³³ Ibid 6.

²³⁴ B.S Jain, *Administration of Justice in Seventeenth Century India* (Metropolitan Book Co Private Ltd, 1970) 1.

²³⁵ Pranab Kumar Panday and Md. Awal Hossain Mollah, 'The Judicial System of Bangladesh: An Overview From Historical Point Viewpoint' (2011) 53(1) *International Journal of Law and Management* 7.

²³⁶ Sarkar Ali Akkas, *Judicial Independence and accountability: a comparative study of contemporary Bangladesh experience* (Doctor of Philosophy Thesis Thesis, University of Wollongong, 2002) 52-53.

Regulations, Rules and Orders or bye-laws which were enforced immediately before the 26th day of March, 1971 comprised the laws of the People's Republic of Bangladesh.²³⁷

In the case of Australia, James Crawford described that all the non-statutory law applied in Australian courts is derived from the common law, and statutory laws are those that are enacted by the Parliament or some official body under Parliamentary authority.²³⁸ In Bangladesh, the *Constitution* is supreme over the parliament²³⁹ and in NSW the State *Constitution* is subject to the Australian *Constitution*.²⁴⁰ Comparing the existing laws, in Bangladesh most of the laws enacted at the time of British colony are still in operation with very nominal amendment; but in Australia, the laws that are in operation have been enacted newly within last two to three decades to meet the present need. Australians are subject to both the Commonwealth as well as State laws because the Australian

Constitution creates a federal system. So there are two hierarchies within one integrated court system.²⁴¹ This integration has been ensured in various ways: by the establishment of the High Court of Australia as the ultimate court of appeal in Australia under the *Constitution* (section 71, section 73), by the use of State courts as repositories of federal jurisdiction, by complementary State and Commonwealth legislation, and by constitutional and legislative provisions dealing with the execution of the court processes and judgments.²⁴² The court systems of each state and territory²⁴³ in Australia are very similar in nature, but different from Bangladesh Court system.

COURT STRUCTURE

The Judiciary of the Bangladesh is divided into two parts: one, the higher judiciary known as the Supreme Court of Bangladesh and two, the lower judiciary known as the Subordinate Courts.

The judiciary of the New South Wales can be divided into three parts:

²³⁷ *Bangladesh (Adaptation of Existing Laws) Order 1972* (Bangladesh)s 2.

²³⁸ Crawford, above n 232, 15.

²³⁹ *The Constitution of the People's of Republic of Bangladesh 1972* (Bangladesh) preamble.

²⁴⁰ *Australian Constitution* s 106.

²⁴¹ See, *Kable v Director of Public Prosecutions NSW* (1996) 198 CLR 59 and *Kirk v Industrial Court of NSW* (2010) 239 CLR 531.

²⁴² Enid Campbell and H.P. Lee, *The Australian Judiciary* (Cambridge University Press, 2001) 14.

²⁴³ There are six states in Australia: New South Wales (NSW), Queensland (Qld), South Australia (SA), Tasmania (Tas), Victoria (Vic) and Western Australia (WA). Each State has its own state *Constitution*, which divide the state's government into the same divisions of legislature, executive and judiciary as the Australian Government. In addition, there are ten territories outside the borders of the states. See also, Australian Government, *State and Territory Government* <<http://australia.gov.au/about-australia/our-government/state-and-territory-government>>

- One, the higher judiciary, which includes most of the Commonwealth Courts and the Supreme Court of the State;
- two, the intermediate State courts, known as the District Courts; and
- three, the inferior State courts, known as the Local Courts.

Each court has a different method of appointment, and also has certain jurisdiction or power to deal with a matter, as determined by statute.

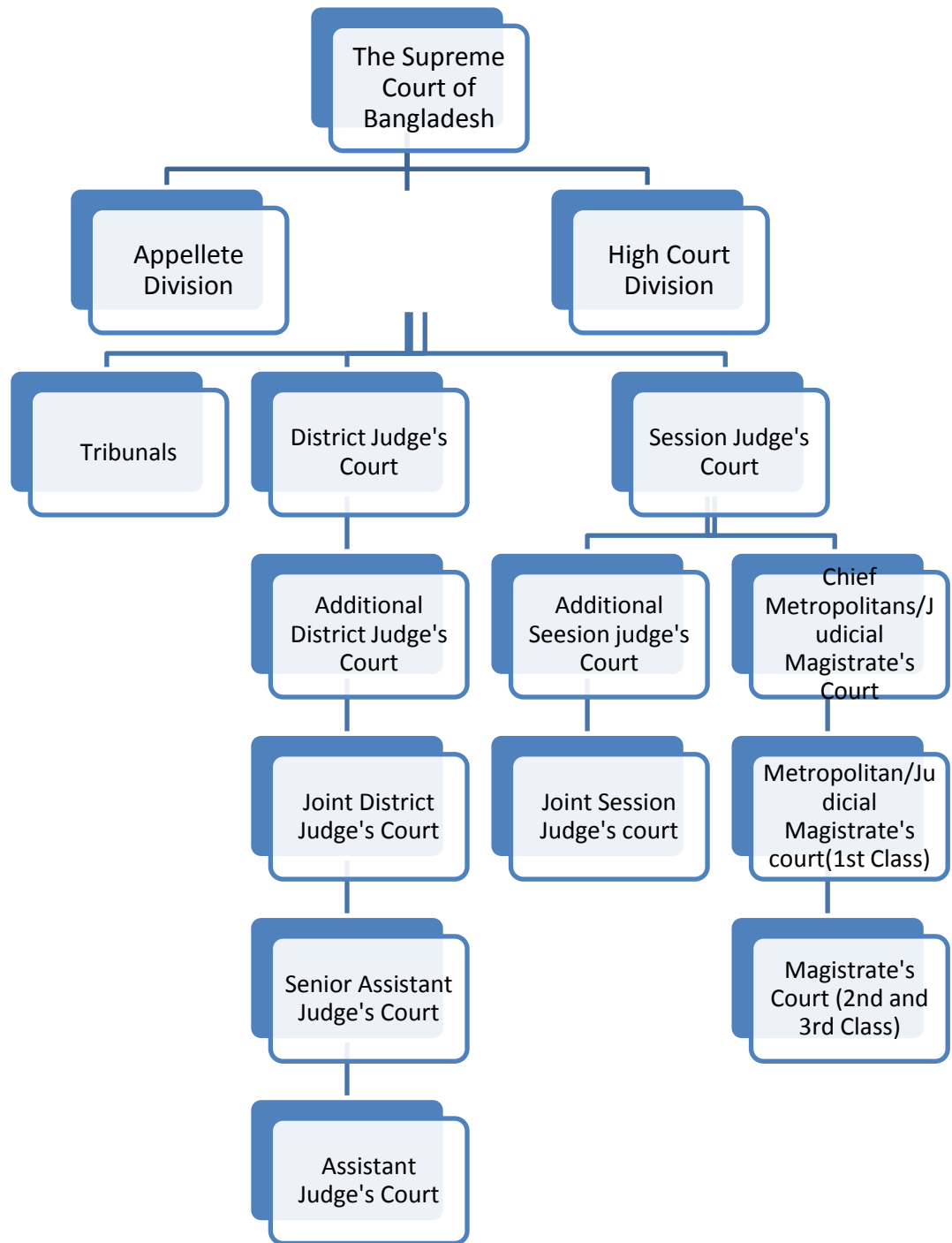


Figure III.1: The Court Structure in Bangladesh²⁴⁴

²⁴⁴ This chart has been formed based on the *Constitution of the People's Republic of Bangladesh* chap VI; *Code of Criminal Procedure 1898* (Bangladesh), *Civil Courts Act 1887* (Bangladesh).

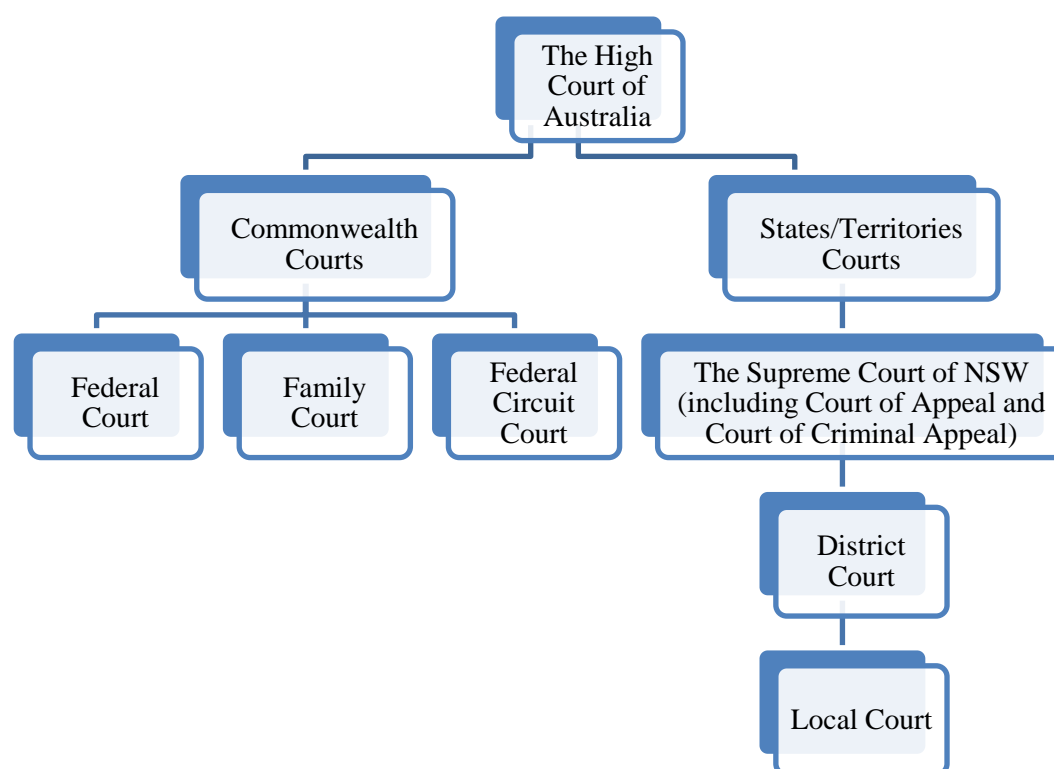


Figure III.2: The Court Structure of NSW (Australia)

Higher Courts of Bangladesh and New South Wales

The Supreme Court, the highest court of Bangladesh, is headed by the Chief Justice, and stands at the apex, having both civil and criminal jurisdiction.²⁴⁵ The Supreme Court of Bangladesh comprises of the Appellate Division and the High Court Division and all together it is known as the Supreme Court of Bangladesh.²⁴⁶ The Appellate Division is higher in rank and therefore decisions of this Court are final.²⁴⁷ In Australia, the highest court is the High Court and decisions of the High Court are final and conclusive especially by virtue of the section 73 of the *Australian Constitution*. (Section 74 of the *Constitution* provided for appeal from the High Court to Queen in Council (Privy Council), however in 1978 the High Court held in *Viro v R*²⁴⁸ that, it (High

²⁴⁵*The Constitution of the People's Republic of Bangladesh 1972* (Bangladesh) part VI.

²⁴⁶*Ibid* Art 94(1), 103(1).

²⁴⁷*Ibid* Art 111.

²⁴⁸*Viro v R* (1978) 141 CLR 88 mentioned in Tony Blackshield and George Williams, *Australian Constitutional Law and Theory Commentary and Materials* (The Federation Press, 2006) 600.

Court) is no longer bound by any Privy Council decision in accordance with laws passed by the Commonwealth parliament.²⁴⁹ Therefore section 74 of the Australian *Constitution* has become ineffective and the decision of the High Court is now final in Australia.)

Within the States, the Supreme Court of NSW, the highest court in the State of NSW, deals with both appellate and trial matters.²⁵⁰ The appellate courts are:

- Court of Appeal
- Court of Criminal Appeal

Trial work of the criminal and civil jurisdiction is divided between two divisions:

- Common Law Division
- Equity Division

Appeal from the Supreme Court of NSW lies to the High Court of Australia.

Appointment, Tenure and Removal of the Judges of the Higher Courts

The higher courts' Judges' appointment, tenure and removal procedure is different in Bangladesh from NSW (Australia). In Bangladesh, the authority to appoint the Chief Justice of the Supreme Court is vested upon the President of People's Republic of Bangladesh, who also appoints other judges of the Supreme Court in consultation with the Chief Justice.²⁵¹ In Australia, the Justices of the High Court and other Commonwealth Courts created by the Commonwealth Parliament pursuant to *Constitution*, are appointed by the Governor-General in Council.²⁵² Regarding State (NSW)'s Courts, the Chief Justice and other judges of the Supreme Court are appointed by the State Governor by Commission under the public seal of the State.²⁵³ Associate Judges of the Supreme Court of NSW are appointed by the Governor under section 111 of the *Supreme Court Act 1970* (NSW).

²⁴⁹Ibid 600.

²⁵⁰The New South Wales Bar Association, *Court Structure, Judges' Titles and Order of Seniority* <<http://www.nswbar.asn.au/index.php>> *Court Structure, Judges' Titles and Order of Seniority* The New South Wales Bar Association <<http://www.nswbar.asn.au/index.php>> *Court Structure, Judges' Titles and Order of Seniority* The New South Wales Bar Association <<http://www.nswbar.asn.au/index.php>> *Court Structure, Judges' Titles and Order of Seniority* The New South Wales Bar Association <<http://www.nswbar.asn.au/index.php>>.

²⁵¹The *Constitution of the Peoples of Republic of Bangladesh 1972* (Bangladesh) 95(1).

²⁵²Australian *Constitution*, s 72.

²⁵³*Supreme Court Act 1970* (NSW) s 26.

A citizen, having ten years' experience as an advocate²⁵⁴ of the Supreme Court or as a judicial officer in the territory of Bangladesh or such other qualification prescribed by law can be appointed as a judge of the High Court Division²⁵⁵ and traditionally the most senior judges from the High Court Division, are appointed as the judges of the Appellate Division. In Australia, the justices of the High Court and other Commonwealth courts are appointed from the enrolled practicing barristers or solicitors or legal practitioners or from judges of any Commonwealth Court or State Courts having at least 5 years' experience.²⁵⁶ In case of Supreme Court of NSW, any person holding judicial office²⁵⁷ in any state or territory or any Australian lawyer having 7 years' experience can be appointed as judges of the Supreme Court (NSW)²⁵⁸ generally on the recommendation of the Attorney General.²⁵⁹ Honourable former Chief Justice Spigelman mentioned that there are precedents for academics to be appointed as judges in NSW²⁶⁰ which is totally absent in Bangladesh.

The age limit for the Judges of the Supreme Court (both the Appellate Division and the High Court Division) in Bangladesh is up to sixty-seven years unless they become physically or mentally ill and thus unable to perform their judicial functions or they are guilty of misbehaviour.²⁶¹

Article 96 of the Bangladesh *Constitution* certifies that a judge shall not be removed from his office except by an order of the President passed pursuant to a resolution of Parliament supported by a majority of not less than two-thirds of the total number of members, only on the ground of

²⁵⁴ Advocates include lawyers, barristers and solicitors in Bangladesh who are officially enrolled in the Bar Council through bar council examination.

²⁵⁵ The *Constitution of the Peoples of Republic of Bangladesh 1972*(Bangladesh) Art 95(2); through this article, the *Constitution* makes the scope to enact new laws for the appointment of the judges of the Supreme Court if necessary. But at present only the judges of the Subordinate Court or the Lawyers from the Supreme Court can be appointed as the Judge of the Apex Court.

²⁵⁶ *High Court of Australia Act 1979* (Cth) s7.

²⁵⁷ For the Supreme Court of the NSW, judicial officers including the registrar can be appointed instead of judge only.

²⁵⁸ *Supreme Court Act 1970* (NSW) s 26.

²⁵⁹ Judicial Commission of New South Wales, *Appointment and Removal of Judges* Judicial Commission of New South Wales <<http://www.judcom.nsw.gov.au/publications/education-monographs-1/monograph1/fbmason.htm>; ibid *Appointment and Removal of Judges* Judicial Commission of New South Wales <<http://www.judcom.nsw.gov.au/publications/education-monographs-1/monograph1/fbmason.htm>; ibid *Appointment and Removal of Judges* Judicial Commission of New South Wales <<http://www.judcom.nsw.gov.au/publications/education-monographs-1/monograph1/fbmason.htm>; ibid *Appointment and Removal of Judges* Judicial Commission of New South Wales <<http://www.judcom.nsw.gov.au/publications/education-monographs-1/monograph1/fbmason.htm>>.

²⁶⁰ Spigelman, above n 28,99.

²⁶¹ The *Constitution of the Peoples of Republic of Bangladesh 1972*(Bangladesh)Art 96.

proved misbehaviour and incapacity.²⁶² And the parliament may by law regulate the procedure of resolution and investigation and proof of the misbehaviour or incapacity of judges.²⁶³ In Australia, judges of the Commonwealth Courts cannot be removed except by the Governor-General on an address by both the Houses of Parliament in the same session on the grounds of proved misbehaviour or incapacity,²⁶⁴ while the judges of the State court can be removed by the State Governor only on the ground of misbehaviour or incapacity and the *Judicial Officers Act 1986* (NSW) ensures protection by determining misbehaviour.²⁶⁵ The age limit for Justices of the High Court is seventy.²⁶⁶ Regarding the State (NSW), judges can serve until the age of 72 and may be appointed as acting judge until the age of 75, or in some cases until 77.²⁶⁷

The appointment and removal procedure for the judges of the Higher Courts is similar in Australia and Bangladesh though the age limit is different.

Jurisdiction of the Higher Courts

Jurisdiction of the Supreme Court of Bangladesh

In Bangladesh, the jurisdiction of the Appellate Division and High Court Division of the Supreme Court of Bangladesh is determined separately in the *Bangladesh Constitution*. The Appellate Division has only the appellate jurisdiction and accordingly it can hear and determine appeals against judgments, decrees, orders or sentences passed by the High Court Division.²⁶⁸ In addition, this Appellate Division has also some other jurisdictions, for example, advisory jurisdiction, rulemaking power²⁶⁹ and also review²⁷⁰ jurisdiction. Article 106 of the *Bangladesh Constitution* states on advisory jurisdiction:

²⁶²Ibid Art 96.

²⁶³Ibid Art 96 (3).

²⁶⁴*Australian Constitution*, s 72; *Federal Court of Australia Act 1976* (Cth) s 6; *Federal Circuit Court of Australia Act 1999* (Cth) schedule 1 part 1(1).

²⁶⁵*Judicial Officers Act 1986* (NSW) s 41; see also, Judicial Commission of New South Wales, *Appointment and Removal of Judges*, above n 259.

²⁶⁶*Australian Constitution*, s 72.

²⁶⁷*Supreme Court Act 1970* (NSW) s 37; The Supreme Court of New South Wales, *Judicial Officers* <http://www.supremecourt.lawlink.nsw.gov.au/supremecourt/sco2_judicialofficers.html>; Spigelman, above n 28, 99.

²⁶⁸*The Constitution of the Peoples of Republic of Bangladesh 1972* (Bangladesh) Art 103(1).

²⁶⁹To ensure justice the Appellate Division can issue such directions, orders, decrees or rule nisi as may be necessary under article 104 of the *Constitution of the Peoples of Republic of Bangladesh 1972* (Bangladesh).

²⁷⁰The Appellate Division can review its own judgment or rule nisi subject to the provisions of any Act of Parliament under the *Constitution of the Peoples of Republic of Bangladesh 1972* (Bangladesh) Art 105.

If at any time it appears to the President that a question of law has arisen, or is likely to arise, which is of such a nature and of such public importance that it is expedient to obtain the opinion of the Supreme Court upon it, he may refer the question to the Appellate Division for consideration and the Division may, after such hearing as it thinks fit, report its opinion thereon to the President.²⁷¹

The Bangladesh *Constitution* along with the other laws of the country has conferred original, appellate, revision, reference and supervisory jurisdiction on the High Court Division. Applying original jurisdiction, any suit determined by the ordinary laws of the country can be filed in the High Court Division.²⁷² For example, the *Companies Act 1994* (Bangladesh), has conferred original jurisdiction with respect to any matter relating to the companies²⁷³. The *Constitution* itself conferred the original jurisdiction by way of writ jurisdiction: that is if any fundamental rights, which are guaranteed by part III of the *Constitution*, are violated, the aggrieved person can file a case in the form of a writ petition to the High Court Division under Article 102 of the Bangladesh *Constitution*.²⁷⁴ Appeal from the Subordinate Courts lies to the High Court Division.²⁷⁵ The revision and reference jurisdiction of the High Court Division also depend on the ordinary laws conferring this jurisdiction on the High Court Division.²⁷⁶ The *Constitution* also ensures that the High Court Division shall have superintendence and control over all Courts and Tribunals subordinate to it.²⁷⁷

Jurisdiction of the High Court in Australia

The Australian *Constitution* confers upon the High Court of Australia both appellate jurisdiction and original jurisdiction.²⁷⁸ Since its establishment, the High Court acquired original jurisdiction in the five classes of matters listed in section 75 of the Australian *Constitution*.²⁷⁹ In addition, the

²⁷¹The *Constitution of the Peoples of Republic of Bangladesh 1972* Art 106.

²⁷²Under the *Companies Act 1994* (Bangladesh) any suit relating to the company shall be filed to the High Court Division.

²⁷³*Companies Act 1994* (Bangladesh)s 3.

²⁷⁴The *Constitution of the People's Republic of Bangladesh 1972*, Art 102. For example, discrimination on ground of religion, right to protection of law and so on are guaranteed as the fundamental rights.

²⁷⁵Section 106 of the *Code of Civil Procedure 1908* (Bangladesh) clearly stated that appeal from the District Court shall be lies to the High Court Division.

²⁷⁶For example, section 115 of the *Code of Civil Procedure code 1908* (Bangladesh) confer revision jurisdiction on the High Court Division.

²⁷⁷The *Constitution of the People's Republic of Bangladesh 1972*(Bangladesh) Art 109.

²⁷⁸*Judiciary Act 1903 (Cth)* s 30-35A; see also, *Australian Constitutions* 75, 76 and 73.

²⁷⁹Section 75 of the *Commonwealth Constitution* states that the High Court shall have original jurisdiction on matters- arising under any treaty; affecting consuls or other representatives of other countries; in which the

High Court acquired jurisdiction under section 73 of the Australian *Constitution* to hear and determine appeals against the decisions of the Supreme Courts of the States/ Territories, the Federal Court of Australia and the Family Court of Australia upon leave to appeal if granted and subject to any limitations which were prescribed by the federal Parliament.²⁸⁰ Under the Australian *Constitution*, the Parliament may confer to the High Court the power to interpret the *Constitution*²⁸¹ as determined in the *Judiciary Act 1903* (Cth), and other original jurisdiction.²⁸² The Court's original jurisdiction is usually exercised by a single judge²⁸³ and the appellate jurisdiction by a Full Court, consisting of two or more High Court Justices, which also hear appeals from judgments of this court constituted by a single Judge.²⁸⁴ Constitutional matters are heard by a full bench of seven judges.²⁸⁵

Jurisdiction of the Federal Court

The Federal Court has original and appellate jurisdiction. The Court acquires jurisdiction under 150 separate statutes of the Australian Parliament,²⁸⁶ in a variety of matters arising under Commonwealth laws.²⁸⁷ The Court's jurisdiction now covers almost all civil matters arising from Commonwealth law and some summary and indictable criminal matters.²⁸⁸ It also has jurisdiction to hear and determine any matter arising under the Australian *Constitution* through the operation of section 39B of the *Judiciary Act 1903* (Cth). The Court also has a substantial and diverse appellate jurisdiction. Initially, the Federal Court's jurisdiction included that which had been given to the Federal Industrial Court, established in 1957, but in 1993, this jurisdiction was relocated to the newly created Industrial Relations Court of Australia, which was later disestablished, and its jurisdiction returned to the Federal Court.²⁸⁹

Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party; between States or between residents of different States, or between a State and a resident of another State; in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth.

²⁸⁰ *Judiciary Act 1903*(Cth) s 35A.

²⁸¹ Australian *Constitution* s 76(i).

²⁸² *Judiciary Act 1903* (Cth) s 30.

²⁸³ *Ibid* s 16.

²⁸⁴ *Ibid* s 20.

²⁸⁵ Australian *Constitution* s 76(i); High Court of Australia, *operation of the High Court*<<http://www.hcourt.gov.au/about/operation-of-the-high-court>>.

²⁸⁶ At present the total number of statutes is 150 cited in the Federal Court of Australia, *Jurisdiction*<<http://www.fedcourt.gov.au/about/jurisdiction>>.

²⁸⁷ Campbell and Lee, above n 242, 13.

²⁸⁸ The Federal Court of Australia, *Jurisdiction*<<http://www.fedcourt.gov.au/about/jurisdiction>>.

²⁸⁹ Campbell and Lee, above n 242, 13.

Jurisdiction of the Family Court

As a specialist Family Law Court, it has jurisdiction over matters such as marriage, divorce, the adoption of the child in both original and appellate jurisdictions.²⁹⁰ It sits at the same level as the Federal Court and appeals from the Full Court of the Family Court go directly to the High Court. The Family Court sits as the Full Family Court in order to hear appeals from single judicial decisions of the Family Court.²⁹¹ The Family Court also provides mediation services to help resolve disputes.²⁹²

Jurisdiction of the Federal Circuit Court

In April 2013 the Federal Magistrates Court of Australia was renamed the Federal Circuit Court of Australia under the *Federal Circuit Court of Australia Legislation Amendment Act 2012* (Cth).²⁹³ The Federal Circuit Court of Australia was established by the *Federal Circuit Court of Australia Act 1999* (Cth) formerly the *Federal Magistrates Act 1999* (Cth).²⁹⁴ This Court only has the original jurisdiction which is conferred by the express provision of the laws made by the parliament.²⁹⁵ Section 10 of the *Federal Circuit Court of Australia Act 1999* (Cth) defines that the original jurisdiction includes any jurisdiction in it to hear and determine appeals from decisions of persons, authorities or tribunals other than courts.

Jurisdiction of the Supreme Court of New South Wales

The Supreme Court (NSW) has unlimited civil jurisdiction and handles the most serious criminal matters. It also has the ability to deal with all matters that are not within the exclusive jurisdiction of the federal courts.²⁹⁶ However the general jurisdiction of the Supreme Court includes all jurisdictions which may be necessary for the administration of justice in New South Wales within the purview of the NSW *Constitution*.²⁹⁷ The Supreme Court decides cases both at first instance

²⁹⁰*Family Law Act 1975* (Cth) s 31; see also, The Family Court of Australia <<http://www.familycourt.gov.au/>> .

²⁹¹*Family Law Rules 2004* (Cth) Chap 22; Family court of Australia, *Appeal Procedures ~ Single Judge*, <http://www.familycourt.gov.au/wps/wcm/resources/file/eb28dd443808602/BRApp_SingleJudge_010109V2.htm>.

²⁹²*Family Law Act 1975* (Cth) s 47-50.

²⁹³Federal Circuit Court of Australia, *Introduction to the Federal Circuit Court of Australia* <<http://www.federalcircuitcourt.gov.au/html/introduction.html>>.

²⁹⁴*Ibid.*

²⁹⁵*Federal Circuit Court of Australia Act 1999* (Cth) s 10.

²⁹⁶The New South Wales Bar Association, *Court Structure, Judges' Titles and Order of Seniority*, above n 250, 23.

²⁹⁷*Supreme Court Act 1970* (NSW) s 23.

and on appeal from lower courts. The Supreme Court of NSW has original, appellate and supervisory jurisdiction. The Court exercises its original jurisdiction through Common Law Division and Equity Division. Usually civil, criminal and administrative matters are decided by the Common Law Division and equity, probate, commercial, admiralty and protective matters are heard by Equity Division.²⁹⁸ The appellate jurisdiction is encompassed within the Court of Appeal and Court of Criminal Appeal. The Court of Appeal is responsible for hearing the appeals in civil matters against the decisions of the judicial officers of the Supreme Court, District Courts, Land and Environment Court and some Tribunals within the State as prescribed in the *Supreme Court Act 1970* (NSW).²⁹⁹ The Court of Criminal Appeal hears appeals from criminal proceedings in the Supreme Court, the Industrial Court, the District Court and the Drug Court.³⁰⁰ The Supreme Court has supervisory jurisdiction over the tribunals and other courts in the State. This jurisdiction is generally exercised through its appellate courts, i.e. the Court of Appeal and the Court of Criminal Appeal.³⁰¹

Comparing the jurisdiction of the apex courts of Bangladesh and NSW, it is found that both of the apex courts have original as well as appellate jurisdiction. But the Appellate Division of Bangladesh Supreme Court has no original jurisdiction though it has rule-making power and advisory jurisdiction.

Intermediate Court of NSW

Unlike Bangladesh, in NSW Australia, courts that are not superior or inferior in status are known as the Intermediate Courts. In NSW, this type of court is known as the District Court. The District Court, as a court of record, was established by the *District Court Act 1858* (NSW),³⁰² later on this Act was replaced by the *District Court Act 1973* (NSW).

²⁹⁸ The New South Wales Bar Association, Court Structure, Judges' Titles and Order of Seniority, above n 250, 24.

²⁹⁹ *Supreme Court Act 1970* (NSW) s 48.

³⁰⁰ *Ibid* s 101.

³⁰¹ The New South Wales Bar Association, Court Structure, Judges' Titles and Order of Seniority, above n 250, 24; See also, *Kirk v Industrial Court of New South Wales* (2010)239 CLR 531.

³⁰² To meet the growing needs of the colony, the *Supreme Court Act 1858* (NSW) was enacted. It was a colonial Act. The *District Courts Act 1858* (NSW) was remained in force until 1973; see The District Court of New South Wales, *Annual Review* (2003) 5.

Appointment of Judges in the District Court of NSW

Generally Australians having practiced as lawyers for at least seven years may be appointed as judges in the District Court by the Governor of the State by commission.³⁰³ However, practicing lawyers are not the only persons qualified to be selected as Judge. A judicial officer of the State or of the Commonwealth or of the other territory or a Chief Magistrate of the Local Court with the same tenure can also be appointed as the judge of the District Court.³⁰⁴ Among the judges the Governor may appoint a Chief Judge on commission.³⁰⁵ The District Court is composed of the Chief Judge, and other Judges as the Governor of the State thinks fit.³⁰⁶

Jurisdiction of the District Court of NSW

District Courts have both the original as well as appellate jurisdiction both in civil and criminal matters. This is the largest trial court in the State. In case of criminal matters, the District Court deals with all criminal offences except murder, treason and piracy. In case of civil matters, the Court deals with claims to a maximum amount of AUD 750,000 (BDT 44,821,800).³⁰⁷ The District Court hears appeals arising from the decisions of the Local Court and the Children's Court.³⁰⁸ Appeals against District Courts' decisions go to the Court of Criminal Appeal, the Court of Appeal or the Supreme Court of NSW depending on the type of case in question. The District Court also has residual jurisdiction and summary jurisdiction.³⁰⁹

Bangladesh Subordinate Courts/ Inferior Courts

In Bangladesh, there are courts in a different and clearly subordinate tier, known as subordinate courts. Chapter II of Part VI of the Bangladesh *Constitution* concerns the establishment of Subordinate Courts of Bangladesh and the respective laws determine their powers, functions and jurisdictions. In NSW, the most inferior State Courts are known as the Local Courts and their

³⁰³ *District Court Act 1973* (NSW) s 13.

³⁰⁴ *Ibid* s 13.

³⁰⁵ *Ibid* s 13.

³⁰⁶ *Ibid* s 12.

³⁰⁷ *Ibid* s 44; OANDA, *Currency Converter* <http://www.oanda.com/currency/converter/> Currency rate: 1AUD=59.76 BDT (10 February 2015).

³⁰⁸ *Local Court Act 2007* (NSW) s 70; *The Children Court Act 1987* (NSW) s 22A; see, District Court of New South Wales, *About us* <<http://www.districtcourt.lawlink.nsw.gov.au/districtcourt/index.html>>.

³⁰⁹ *District Court Act 1973* (NSW) s 142.

jurisdiction is prescribed by the *Local Court Act 1982* (NSW) (later replaced by the *Local Court Act 2007*(NSW)).³¹⁰

Appointment of the Judges in the Subordinate Courts/Inferior Courts

In Bangladesh, the judges and the magistrates of the lower courts are appointed from the law graduates having good academic results by way of judicial service examination intake. To undertake the examination, no experience in court practice is required. Graduates can go straight from law school to be a judge or Magistrate.³¹¹ The whole procedure of the examination is conducted by the Bangladesh Judicial Service Commission. There is no scope of lateral entry at any other higher tiers of service. However on completion of a certain period³¹² in each stage and on satisfactory performance at a judicial post, any member of the service may be promoted to the next higher posts subject to availability of vacancies. The highest post of service is the District and Session Judge who sits on the Court of District Judges or Court of Session Judge.³¹³

In NSW, any Australian who has at least five years' experience as a lawyer or as a judicial officer in any court within the territory of Australia can be appointed as a Magistrate of the Local Court by the State Governor by commission.³¹⁴

Jurisdiction of the Subordinate Courts

The civil and criminal jurisdiction of the Bangladesh Subordinate Courts can be described separately (see below) as they are governed by separate Acts. On the other hand, the whole jurisdiction of the Local Court in NSW is governed by the *Local Court Act 2007* (NSW).

Jurisdiction of Bangladesh Subordinate Courts

The jurisdiction of Bangladesh subordinate courts can be separated into civil and criminal matters.

³¹⁰*Local Court Act 2007* (NSW)s 5.

³¹¹Bangladesh Judicial Service Commission, *Bangladesh Judicial Service Examination* <http://www.jscbd.org.bd/pdf/exam_information.pdf>; however, there was an attempt to require the would-be judges to be called to the Bangladeshi Bar.

³¹²These periods is determined by the President for each stage. For example, the entry post for Subordinate Courts is Assistant judge. After four years experiences as Assistant Judge can be promoted to Senior Assistant Judge.

³¹³Bangladesh Judicial Service Commission, *Career Prospect* <http://www.jscbd.org.bd/c_prospect.php>.

³¹⁴*Local Court Act 2007* (NSW) s 13.

i Courts of Civil Jurisdiction

The civil courts are created under the *Civil Courts Act of 1887* (Bangladesh). This Act provides for five tiers of civil courts in a district, which are:³¹⁵

- Court of the Assistant Judge
- Court of the Senior Assistant Judge
- Court of the Joint District Judge
- Court of the Additional District Judge
- Court of the District Judge

The number of the judges for the each post is determined by the President of the People's Republic of Bangladesh.³¹⁶

Court of the District Judge

The Court of the District Judge is the principal court at the district level.³¹⁷ Though it is mainly an appellate court, it also has a very limited original jurisdiction related to probate and letters of administration.³¹⁸ A District Judge hears and determines appeals against the judgments, decrees or orders of the Joint District Judges' Court in which the suit's value does not exceed the limit of BDT³¹⁹ 5,00,000/- (=AUD 8,366.47). However the presiding District Judge is authorized to hear and determine appeals and revision against all judgments or orders of the Court of Senior Assistant Judges and Court of Assistant Judges.³²⁰ A District Judge exercises administrative control over all civil courts within the local limit of his jurisdiction.

Court of Additional District Judge

³¹⁵ *Civil Courts Act 1887* (Bangladesh) s 3.

³¹⁶ *The Constitution of the People's Republic of Bangladesh 1972*, Art 115.

³¹⁷ The whole Bangladesh is divided into seven administrative divisions, and each division is comprised of numbers of districts. Though the highest administrative unit is the division but the highest post of subordinate judiciary is up to District level. Each District is divided into sub-district which is popularly known as upazilla and each upazilla into union, which is the smallest administrative unit. Though the appointment of the judges start from the upazilla level mentioned in Government of the People's Republic of Bangladesh, *Ministry of Public Administration* <http://www.mopa.gov.bd/index.php?option=com_content&task=view&id=365&Itemid=381>.

³¹⁸ This jurisdiction is relates ttowakf, trust.

³¹⁹ Bangladeshi currency. Currency rate BDT 1=AUD 0.01673 on 10 February 2015.

³²⁰ *Civil Courts Act 1887* (Bangladesh) s 21(1)(2); *The Code of Civil Procedure 1908* (Bangladesh) s 115.

The judicial function of Additional District Judges is similar to the District Judges' except that they cannot receive any appeals directly from the inferior courts. An Additional District Judge may discharge any of the functions of a District Judge, as assigned by a District Judge. In discharging those functions the Additional District Judge exercises the same power as the District Judge.³²¹

³²¹ *Civil Courts Act 1887* (Bangladesh) s 8.

Pecuniary limit (valuation of the subject matter)	Filing Court	Appeal Court
BDT 400001- unlimited AUD 5040- unlimited	Court of Joint District Judge	High Court Division(if the valuation of subject matter exceed BDT 500000/-= AUD 6,300) Court of District Judge(if the valuation of subject matter does not exceed BDT 500000/-= AUD 6,3900)
BDT 200001-400000 AUD 2520-5040	Court of Senior Assistant Judge	Court of District Judge
BDT 1-2,00,000 AUD 1- 2520	Court of Assistant Judge	Court of District Judge

Table III.1: Pecuniary jurisdiction of the filing court and Appellate court of the Subordinate Courts in Bangladesh.³²²

Court of Joint District Judge

The Court of Joint District Judge exercises both original and appellate jurisdiction. All original civil cases, which exceed the pecuniary jurisdiction of the Senior Assistant Judge that is BDT 4, 00, 000/- (=AUD 6,693.18),³²³ are filed in the Court of the Joint District Judge. The pecuniary jurisdiction of the Court of Joint District Judge is unlimited.³²⁴ Appeal from the Assistant Judge Court and from the Senior Assistant Judge Court lies to the District Judge Court, and the District Judge has the power to transfer cases to the Court of Additional District Judge or the Court of Joint District Judge but it cannot hear appeal directly from the Assistant Judge court or Senior Assistant Judge Court.³²⁵

Court of Senior Assistant Judge

³²² *Civil Courts Act 1887* (Bangladesh) s 19, 21.

³²³ Currency rate BDT 1=AUD 0.01673 on 10 February 2015.

³²⁴ *Civil Courts Act 1887* (Bangladesh) s 18.

³²⁵ *Civil Courts Act 1887* (Bangladesh)s 21.

This Court has original jurisdiction only and the pecuniary limit of jurisdiction is up to BDT 4,00,000/- (=AUD 6,693.18) and appeal from this Court lies to the Court of the District Judge.³²⁶

Court of Assistant Judge

The Court of Assistant Judge is the base of the hierarchy of the subordinate civil judiciary and only has original jurisdiction. All civil suits begin in the Court of Assistant Judge unless barred by the pecuniary jurisdiction, which is limited to BDT (Bangladeshi Taka) 2,00,000/- (=AUD 3,346.59).³²⁷ Appeal from this Court lies to the Court of District Judge.³²⁸

ii Courts of Criminal Jurisdiction

The legal basis of the ordinary criminal courts is *the Code of Criminal Procedure 1898*. The Subordinate Courts of criminal jurisdiction are classified as the following tier:

Court of Session Judge

Court of Additional Session Judge/ Court of Chief Metropolitan Magistrate (CMM)/Court of Chief Judicial Magistrate (CJM)

Court of Joint Session Judge/ Court of Additional Chief Metropolitan Magistrate (ACMM) / Court of Additional Chief Judicial Magistrate

Court of Judicial Magistrate (ACJM)

The *Code of Criminal Procedure 1898* (Bangladesh) binds the government to appoint a judge in each Session Court. Session Judges and Additional Session judges hold the same jurisdictional power, while the Joint Session judges enjoy lesser. A Session Judge and an Additional Session Judge may impose any penalty including the death penalty prescribed by law however any sentence of death passed by any such Judge shall be subject to confirmation by the High Court Division.³²⁹ A Joint Sessions Judge may pass any sentence authorized by law, except a sentence

³²⁶*Civil Courts Act 1887* (Bangladesh)s 19.

³²⁷*Code of Civil Procedure 1908* (Bangladesh) s 15.

³²⁸*Civil Courts Act 1887* (Bangladesh)s 19.

³²⁹*Code of Criminal Procedure 1898* (Bangladesh) s 31.

of death or of transportation³³⁰ for a term exceeding ten years or of imprisonment for a term exceeding ten years.³³¹

Section 6 of the *Code of Criminal Procedure 1898* (Bangladesh) specifies that the word ‘Chief Metropolitan Magistrate’ and ‘Chief Judicial Magistrate’ shall include Additional Chief Metropolitan Magistrates and Additional Chief Judicial Magistrates respectively. Therefore, the Additional Chief Metropolitan Magistrate and Additional Chief Judicial Magistrate may exercise the same power of sentence as that of the Chief Metropolitan Magistrate and Chief Judicial Magistrate.

Jurisdiction of NSW subordinate courts

The most inferior NSW State Courts, known as the local courts in NSW, have both civil and criminal jurisdiction but the jurisdiction is limited to imposing punishment in criminal cases of imprisonment up to a period of two years, and in the civil jurisdiction the monetary limit is up to AUD 100,000 (=BDT 5,976,230) for General Division and AUD 10,000 (=BDT597,623) for the Small Claims Division.³³² Appeal from this Court lies to the Supreme Court or to the District court according to the subject of the determination.³³³

Pecuniary limit (valuation of the subject matter)	Court of First Instance	Appeal Court
AUD 0-1,00,000 (BDT 0-5,976,230)	Local Court	District Court/ The Supreme Court of NSW
AUD 1,00,001-750,000 (BDT 5,976,290-44,821,800)	District Court	The Supreme Court of NSW/ High Court

Table III.2: Jurisdiction of filing court and Appellate court of the Subordinate Courts in NSW

³³⁰*The Code of Criminal Procedure 1898* (Bangladesh) s 31, 368. Though the term ‘transportation is in existence in many laws concerning the mode of punishment, the *Penal Code 1860* (Bangladesh) s 53A states that ‘transportation’ shall be construed as a reference to ‘imprisonment’.

³³¹*The Code of Criminal Procedure 1898* (Bangladesh) s 31.

³³²*Local Court Act 2007* (NSW) s 29.

³³³*Ibid* s 41; see also Elizabeth Ellis, *Principles and Practice of Law* (Lawbook Co., 2005) 117.

There are too many tiers of the subordinate courts of Bangladesh both in civil and criminal cases that makes it very complex to navigate easily. On the other hand the tier of the NSW District Court is comparatively easily navigable.

Specialized Courts

Both in Bangladesh and in NSW there are some specialized courts whose status and structures are different and should be described differently.

Specialized Courts In Bangladesh

Small Causes Court

In order to try some small causes, the Courts of Small Causes were established under s 5 of *the Small Cause Courts Act 1887* (Bangladesh). The Joint District Judge, Senior Assistant Judge and Assistant Judge sit in the Court of Small Causes by the order of the Government.³³⁴ The pecuniary jurisdiction is limited at BDT 20,000/-(= AUD 334.659) for the Court of Joint District Judge and BDT 10,000/-(= AUD 167.329) for Court of Senior Assistant Judges and Assistant Judge.³³⁵ Appeal lies from the Court of the Small Causes to the Court of District Judge.³³⁶

Family Court

The Family Courts were established under section 4 of *the Family Courts Ordinance 1985* (Bangladesh). A Family Court has jurisdiction to entertain, try and dispose of any suit relating to or arising out of dissolution of marriage, restitution of conjugal rights, dower, maintenance and guardianship and custody of children.³³⁷ This is a Court of a civil nature but governed according to the religion of the plaintiff and defendant. The *Muslim Personal Law (Shariat) Application Act 1937* (Bangladesh) has specified the grounds where the parties of the suit are Muslim.³³⁸ If the parties are Hindu, then the laws of the Hindu religion will be applied.³³⁹ In the same way if the

³³⁴ *Small Causes Court Act 1887* (Bangladesh) s 6; *Civil Courts Act 1887* (Bangladesh) s 25.

³³⁵ *Ibid* s 25.

³³⁶ *Small Causes Court Act 1887* (Bangladesh) s 24.

³³⁷ *Family Courts Ordinance 1985* (Bangladesh) s 5.

³³⁸ *Muslim Personal Law (Shariat) Application Act 1937* (Bangladesh) s 2.

³³⁹ *The Hindu Women's Right to property Act 1937* (Bangladesh); the *Hindu Widow's Re-marriage Act 1856* (Bangladesh); the *Hindu Disposition of Property Act 1916* (Bangladesh); the *Hindu Law of Inheritance (Amendment) Act 1929* (Bangladesh) are some laws applicable where the parties to the suit are Hindu.

parties are Christian, then the *Christian Marriage Act 1972* (Bangladesh) shall be applied. Besides these specific jurisdictions of the Family Courts, all other matters are dealt with equally irrespective of religion of the parties. The Court of Senior Assistant Judge and Assistant Judge act as the Family Court Judge under the *Family Courts Ordinance 1985* (Bangladesh).³⁴⁰ Appeal from any order, judgment shall lie to the Court of District Judge.³⁴¹

Money Loan Court

Money Loan Courts were established under section 4 of the *Money Loan Court Act 2003* (Bangladesh), which was enacted to make special provisions for recovery of loans given by financial institutions. Judges of the Money Loan Court are appointed from among the Joint District Judges. Appeal from this Court lies to the High Court Division.³⁴²

Village Courts

The Village Courts have been established under the *Village Courts Act, 2006* (Bangladesh) section 4(2) with a view to adjudicating petty civil and criminal matters in rural areas.³⁴³ The pecuniary jurisdiction was fixed up to BDT 25,000/- (= AUD 418.324). There is a list of criminal cases and civil matters outlined in the schedule of the Act, which provides the Court's jurisdiction. Under section 5 of the Act, a Village Court shall consist of a Chairman and two members nominated by each party to the dispute totalling five members including its Chairman.³⁴⁴ Appeal from this Court lies to the Court of Assistant Judge or Court of Senior Assistant Judge. At present the Government of Bangladesh decided to establish 500 Village Courts around the whole of Bangladesh.³⁴⁵

³⁴⁰*Family Courts Ordinance 1985* (Bangladesh) s 4.

³⁴¹*Ibid* s 17.

³⁴²*Financial Loan Court Act 1990* (Bangladesh) s 7.

³⁴³ Village Court is established under *Village Court Ordinance 1976* (Bangladesh). Later on in 2006 *Village Court Act 2006* (Bangladesh) was passed. It consists of five member including the Local Chairman and the pecuniary jurisdiction was fixed up to BDT 25,000/-; See, the *Village Court Act 2006* (Bangladesh), Schedule <http://bdlaws.minlaw.gov.bd/pdf/938___Schedule.pdf>

³⁴⁴*Village Court Act, 2006* (Bangladesh).

³⁴⁵ Activating Village Courts in Bangladesh Project, *Justice for poor through village courts* <http://www.villagecourts.org/video_detail.php>.

The Environment Court

The Environment Court is established under the *Environment Court Act 2000* (Bangladesh). The Court consists of one judge from among Joint District Judges of the judicial service.³⁴⁶ Appeal from this court lies to the Environment Appeal Court, which consists of one judge at rank of the District Judge or Session Judges. Decisions of this Court are final.³⁴⁷

Specialized Courts in NSW

In NSW, there are also some specialized Courts whose status and appeal structures are different. Some of the important courts are as follows:

Land and Environment Court of NSW

In NSW, the Land & Environment Court is nominally equal in status to the Supreme Court and, except in relation to enforcement matters, appeals lie to the NSW Supreme Court only on questions of law. This court was established under the *Land and Environment Court Act 1979* (NSW). Any person who is under 70 years of age and has held a judicial office in any state of Australia or any Australian lawyers having 7 years' experience may be a Judge of this Court.³⁴⁸ The Court has appellate as well as review jurisdiction in relation to planning, building, environmental, mining, and ancillary matters

Industrial Court of NSW

In 1991 *The Industrial Relations Act 1991* (NSW) abolished the former Industrial Relations Commission and established a separate Industrial Court of New South Wales.³⁴⁹ In 1996, the *Industrial Relations Act 1996* (NSW) came into force and replaced the earlier Act of 1991. Section 145 of that Act established a new Industrial Relations Commission.³⁵⁰ Unlike the Commonwealth courts, the Commission exercised both the judicial and administrative powers and now the Act of 1996 restored the traditional arrangement by merging these bodies into one Commission to be called as the Industrial Relations Commission of NSW which obtained

³⁴⁶*Environment Court Act 2000* (Bangladesh) s 4.

³⁴⁷*Ibids* 11.

³⁴⁸*Land and Environment Court Act 1979* (NSW) s 8.

³⁴⁹The Industrial Relation Commission, *Our*

History<http://www.lawlink.nsw.gov.au/lawlink/irc/ll_irc.nsf/pages/IRC_about_us_our_history>.

³⁵⁰*Industrial Relations Act 1996* (NSW) s 145.

superior status equivalent to the Supreme Court. In 2005, the *Industrial Relations Amendment Act 2005* (NSW) re-established the Commission as the Industrial Court of NSW.³⁵¹ The Industrial Court has civil jurisdiction and criminal jurisdiction where it hears serious breaches of the State's occupational health and safety laws.³⁵²

Children's Court of NSW

In all States and Territories, there are specialized Children's Courts that have jurisdiction over offences committed by young people.³⁵³ The courts may be constituted by a specialized children's court magistrate or judge, or by a magistrate constituting a children's court exercising the powers under the relevant legislation. The NSW Children's Court has been established by the *Children's Court Act 1987* (NSW).³⁵⁴ Proceedings relating to care and protection are conducted under the *Children's Court Act 1987* (NSW) and the *Children and Young Persons (Care and Protection) Act 1998* (NSW).³⁵⁵ Appeal arising from any judgment or order of this court lies to the District Court.³⁵⁶

Both in Bangladesh and in NSW these Specialized Courts are established according the priority of matters determined by the each relevant legislature. As these are special, so their court procedures and structures are also different from the general courts. From the above discussion it can be said that unlike Bangladesh, in NSW some of the Special Courts have equal rank with the Supreme Court of NSW: for example the Land and Environment Court of NSW. But in Bangladesh such courts are included among the subordinate courts. For example, the assistant judges or senior assistant judges preside on Family Courts and when they deal with the family matters they are called family court judges.

Tribunals

Besides Courts, there are some Tribunals as part of the judiciary both in Bangladesh and in NSW. But the jurisdiction of Tribunals is different in Bangladesh from those in NSW. There are a

³⁵¹ The Industrial Relation Commission, above n 349; see, The New South Wales Bar Association, Court Structure, Judges' Titles and Order of Seniority, above n 250.

³⁵² *Industrial Relations Act 1996* (NSW) s 153.

³⁵³ According to section 18 of *Children and Young People Act 1999* (NSW), young people means persons under 18 years of age.

³⁵⁴ *Children's Court Act 1987* (NSW) s 4.

³⁵⁵ *Ibid* schedule 2.

³⁵⁶ *Ibid* s 22A.

number of Tribunals in Bangladesh. The object in forming these Tribunals was to ensure speedy disposal of some types of cases. No court can entertain any matter or can give any order falling within the jurisdiction of such a Tribunal. Those Tribunals exercise the judicial power only. Descriptions of some tribunals are as follows:

Tribunals in Bangladesh

Special Tribunals

Special Tribunals were established under s 26 of the *Special Powers Act 1974* (Bangladesh). These tribunals are authorized exclusively to try the offences under different statutes including the *Arms Act 1878* (Bangladesh) and the *Explosive Substances Act 1908* (Bangladesh). The offences include unlicensed manufacture, conversion, sale, importation, exportation and possession of any arms, ammunition or military stores and causing an explosion by an explosive substance likely to endanger life person or private property or with intent to commit an offence.³⁵⁷

All Session Judges and Additional Session Judges may act as judges of the special Tribunals for areas within their session's division.³⁵⁸ Judges may impose any sentence authorized by law for the punishment of the offence for which a person is convicted.³⁵⁹ An appeal from this Tribunal may lie to the High Court Division in any matter.³⁶⁰

Administrative Tribunal/ Administrative Appellate Tribunal

Article 117 of the *Constitution of the People's Republic of Bangladesh* empowers the Parliament to set up one or more Administrative Tribunals by law, and accordingly Administrative Tribunals were established under the *Administrative Tribunals Act 1980* (Bangladesh). An Administrative Tribunal consists of one member appointed from among persons who are or have been District Judges.³⁶¹ It has exclusive jurisdiction to hear and determine disputes relating to the service matters of persons employed in the service of the Republic or any statutory public authority.³⁶²

³⁵⁷*Arms Act 1878* (Bangladesh) s 5-6, 13; *Explosive Substances Act 1908* (Bangladesh) s 3-3A.

³⁵⁸*Special Power Act 1974* (Bangladesh) s 26(2).

³⁵⁹*Special Power Act 1974* (Bangladesh)s 28(a).

³⁶⁰*Ibid* s 30.

³⁶¹*Administrative Tribunal Act 1980* (Bangladesh) s 3.

³⁶²*Ibid* s 4(1).

In order to hear and determine appeals from any order or decision of an Administrative Tribunal, Administrative Appellate Tribunals are established comprising one Chairman and two other members.³⁶³ Decisions of the Appellate Tribunal are final.³⁶⁴

Labour Court

Labour Courts were established under section 214 of the *Bangladesh Labour Act 2006* (Bangladesh). A Labour Court consists of one chairman from among persons who are or have been District Judges or Additional District Judges, with two other members. It has exclusive jurisdiction to hear and determine disputes relating to matters of persons employed in the private sector subject to the provisions of the Act. Appeal from this Court lies to the Labour Appellate Tribunal.³⁶⁵ The Labour Appellate Tribunal exercises the power of the High Court Division and decisions of this Tribunal are final.³⁶⁶

Tribunals in NSW

The NSW Civil and Administrative Tribunal (NCAT)

The NSW Civil and Administrative Tribunal (NCAT) commenced operating on 1 January 2014 under the *Civil and Administrative Tribunal Act 2013* (NSW).³⁶⁷ It substituted for the earlier Administrative Decisions Tribunal, established under the *Administrative Decisions Tribunal Act 1997* (NSW) that came into operation in 1998.³⁶⁸ The new Tribunal works like a ‘one-stop-shop’ for specialist tribunal services in NSW.³⁶⁹

It has general, administrative review, appeal and enforcement jurisdiction within the territory of NSW.³⁷⁰ This Tribunal has six divisions and each division deals with different matters.³⁷¹ It has two appellate jurisdictions. One is internal appeal and another is external appeal. Parties can appeal only in some specified cases to NCAT’s Internal Appeal Panel.³⁷² This type of appeal is

³⁶³Ibid s 5-6.

³⁶⁴Ibid s 6.

³⁶⁵*Bangladesh Labour Act 2006* (Bangladesh) s 214.

³⁶⁶Ibid s 218.

³⁶⁷NSW Civil and Administrative Tribunal, *What is NCAT?* <http://www.ncat.nsw.gov.au/ncat/about_us.html>.

³⁶⁸Administrative Decisions Tribunal was established under the *Administrative Decisions Tribunal Act 1997* (NSW) and came into operation in 1998; see, *Administrative Decisions Tribunal Act 1997* (NSW)

³⁶⁹NSW Civil & Administrative Tribunal, above n 367.

³⁷⁰*NSW Civil and Administrative Tribunal Act 2013* (NSW) s 28.

³⁷¹Ibid part 4; NSW Civil & Administrative Tribunal, above n 367.

³⁷²*NSW Civil and Administrative Tribunal Act 2013* (NSW) s 32, 80.

made when it is upon any question of law.³⁷³ An application on the merits of the decision can be made only if the Appeal Panel permits.³⁷⁴ Some Division's decisions are not subject to an internal appeal and may be appealed to the Supreme Court or Court of Appeal upon leave.³⁷⁵

In Bangladesh, the use of the word 'Tribunal' is a misnomer, as the judiciary is separated from the other two organs, and being part of the judiciary, these 'Tribunals' can exercise only the judicial power. Even the Administrative Tribunal can exercise the judicial power and their decisions are executed by the relevant Ministries. But in NSW, the Tribunals have both the administrative power and judicial power. However at the Commonwealth level, Tribunals can exercise only the administrative power.

SEPARATION OF POWER

Three organs of Government are recognized by the political theory: those are the legislature, the executive and the judiciary. In order to understand the court system it is necessary to examine how far the judiciary is separated from the other two organs. The main objective of this separation of power is to establish a proper check and balance in order to prevent oppressive government. Within a Westminster-type parliamentary Government system, complete separation between the legislature and the executive is not possible because the members as well as the head of the executive must also be members of the legislature, but the situation with the judiciary is different. How far the separation of the Judiciary is ensured in these two systems will be discussed in the following.

In Bangladesh

The *Constitution of the People's Republic of Bangladesh 1972* is the Supreme Law of the country³⁷⁶ and it ensured separation of the Judiciary from the executive³⁷⁷, but the reality was different till 2007 as the executive had control over the tenure, appointment and discipline of the

³⁷³Ibid 83(2).

³⁷⁴NSW Civil & Administrative Tribunal, above n 367.

³⁷⁵NSW Civil and Administrative Tribunal Act 2013 (NSW) s 83(1).

³⁷⁶The *Constitution of the Peoples of Republic of Bangladesh 1972* Art 7.

³⁷⁷Ibid Art 22. The independence of Bangladesh was declared on 26 March 1971 and the *Constitution* came into in force in 16 December 1972. In between the time the Proclamation of Independence acted as supreme law of the country < http://bdlaws.minlaw.gov.bd/pdf/367___Schedule.pdf>. By the Bangladesh Order 1972 the large compendium of laws were adopted and made applicable for the Governance of Bangladesh < <http://www.lawyersnjurists.com/resource/articles-and-assignment/the-bangladesh-constitution-declares-equal-rights-for-men-and-women-in-all-spheres-of-public-life/>>.

judges of the subordinate courts. However, the independence of the higher judiciary had been ensured since the *Constitution* came into force in 1972. How far the separation of the Judiciary is ensured can be understood through the appointment procedure of the judges, their tenure and institutional independence along with individual independence.

The Supreme Court

As mentioned earlier, the President of the People's Republic of Bangladesh appoints the Chief Justice and in consultation with the presiding Chief Justice, he will then appoint the other judges of the Supreme Court of Bangladesh (page number 53).³⁷⁸ The tenure of the Judges of the Supreme Court is determined by the Bangladesh *Constitution* itself (Page number 54).³⁷⁹ Institutional and individual independence are also ensured in the higher judiciary of Bangladesh. Article 94(4) of the *Constitution* ensures the individual independence of the judges of the Supreme Court stating 'subject to the provisions of this *Constitution* the Chief Justice and the other Judges shall be independent in the exercise of the judicial functions.' The *Supreme Court of Bangladesh (High Court Division) Rules 1973* (Bangladesh) and the *Supreme Court of Bangladesh (Appellate Division) Rules 1988* (Bangladesh) ensure the institutional independence of the Supreme Court. The control, discipline and other institutional management are governed by these two rules within the Supreme Court of Bangladesh.³⁸⁰

Subordinate Courts

In 1975, the fourth amendment of the Bangladesh *Constitution* confirmed that all persons employed in the judicial service including all magistrates shall be independent while exercising their judicial functions.³⁸¹ This change was made to ensure the 'personal independence' of judges. But in practice the scenario was different.

Therefore, in 8 January 1994, an order regarding pay allowances was passed by the Ministry of Finance, which was discriminatory for the judicial officers because that order barred them from getting pay and allowances,³⁸² and that order treated Judicial Officers as ordinary civil service

³⁷⁸The *Constitution of the Peoples of Republic of Bangladesh 1972* Art 95(1).

³⁷⁹Ibid Art 96(1)(2).

³⁸⁰The Supreme Court of Bangladesh, *Court Rules* <<http://www.supremecourt.gov.bd/scweb/rules.php>> .

³⁸¹The *Constitution of the Peoples of Republic of Bangladesh 1972* Art 116A.

³⁸² Admin officers are responsible for the administrative job of Government. They recruit through the Public Service Commission.

officers. Then, in 1995 Masdar Hossain, a lower court judge, lodged a writ petition³⁸³ no 2424 along with 441 other judicial officers, to the High Court Division (which is popularly known as *Masdar Hossain's case*).³⁸⁴ It was argued on behalf of the petitioner that as the *Constitution* guarantees the separation of the Judiciary (Article 22) and also ensures the independence of the judiciary (Article 94(4) and 116A) and moreover the *Constitution* also recognises that the judicial service is different from the other civil services (Article 152(1)), the order of 8 January 1994 should be declared void and unconstitutional. Thus, the historic judgment was pronounced by the High Court Division with twelve directives on 7th May 1997.³⁸⁵ The High Court Division in its directions reaffirmed the separation of judiciary stating that the judicial service is functionally and structurally distinct and separate from the other civil administrative and executive services. It also directed the Government to establish a separate pay commission, a judicial service commission and also a magistracy exercising judicial functions.³⁸⁶ The Respondent, the Finance Ministry, then filed an appeal and the Appellate Division passed an order in 12 December 1999.³⁸⁷ Though the appeal was partly allowed, the direction of the High Court Division with regard to payment of salary and other benefits was affirmed along with the other directions of establishing infrastructure to ensure the separation and independence of the judiciary.³⁸⁸ In June 2001, the Appellate Division directed the government to implement its twelve directive points³⁸⁹ including for the formation of a separate Judicial Service Commission (JSC) to serve the appointment, promotion and transfer of members of the judiciary in consultation with the Supreme Court. Even with the directives from the Supreme Court, the government showed unwillingness to implement the judgment and sought 26 extensions of time to comply.³⁹⁰

³⁸³ Writ is the original jurisdiction of the High Court Division. In case of violation of any fundamental right, which are guaranteed in the part III of the *Constitution*, any person can file a writ in the form of petition to the High Court Division under Article 102 of the *Constitution*.

³⁸⁴ *Secretary, Ministry of Finance v Md. Masdar Hossain and other* (2000) 29 CLC (AD) <http://www.icsforum.org/library/files/269_2000.pdf> on 12 March 2013; see also Md. Awal Hossain Mollah, 'Separation of Judiciary and Judicial Independence in Bangladesh' <<http://unpan1.un.org/intradoc/groups/public/documents/apcity/unpan020065.pdf>>.

³⁸⁵ *Md. Masdar Hossain and other v Secretary, Ministry of Finance* (1997) 18 BLD 558.

³⁸⁶ *Secretary, Ministry of Finance v Md. Masdar Hossain and other* (2000) 29 CLC (AD) <http://www.icsforum.org/library/files/269_2000.pdf>.

³⁸⁷ *Secretary, Ministry of Finance v Md. Masdar Hossain and other* (2000) 29 CLC (AD), 75.

³⁸⁸ *Ibid.*

³⁸⁹ These twelve directions were part of the judgement and had the binding force upon the Government under Article 102 and 112 of the *Constitution*; *Secretary, Ministry of Finance v Md. Masdar Hossain and other* (2000) 29 CLC (AD); see also, M Rafiqul Islam, Judicial independence amid a powerful Executive in Bangladesh: A Constitutional Paradox? (2008) 18 *Journal of Judicial Administration* 239; Islam and Solaiman, above n 14, 29.

³⁹⁰ Islam, above n 389, 237; Bangladesh Supreme Bar Association, *Masdar Hossain*

In 2006 the Caretaker Government³⁹¹ took the lead and stepped in to accomplish this long-overdue separation in January 2007.³⁹² The President of Bangladesh promulgated four sets of necessary rules under Article 115 of the *Constitution*³⁹³ to effect the separation.³⁹⁴ These Rules³⁹⁵ were implemented by 1 July 2007, and have rendered the Supreme Court independent and brought magistrates exercising judicial functions under the control of the Supreme Court, free of executive influence. This is how the constitutional requirement of an independent judiciary has formally been fulfilled.

The *Masdar Hossain case*³⁹⁶ reaffirmed judicial independence and elaborated the constitutional position and practice regarding separation of the judiciary through promoting the amendment of the *Criminal Procedure Code 1898* (Bangladesh) in November 2007. This amendment classified magistrates into: Executive Magistrates and the Judicial Magistrates³⁹⁷ along with their jurisdictions.³⁹⁸ Accordingly, the appointment, tenure and security of the Executive Magistrates are now governed by the *Bangladesh Civil Service Rules 1981*, and those of the Judicial Magistrates by the *Bangladesh Judicial Service Rules 2007*.³⁹⁹ The *Code* through the *Mobile Courts Ordinance 2007* (Bangladesh) specified the power of the Executive Magistrates.⁴⁰⁰ Before

Case<http://www.bangladeshsupremecourtbar.com/Masdar_Hossain_Case.php>.

³⁹¹ There shall be a non-party Care-taker government during the period from the date on which the Chief Advisor of such government enters upon office after Parliament is dissolved or stands dissolved by reason of expiration of its term till the date on which a new prime minister enters upon his office after the constitution of Parliament. The responsibility of the caretaker government was to ensure the neutral election and to maintain the law and order situation of the country. Usually the last retired Chief Justice would be elected as the Chief Care Taker government along with at least 10 other reputed persons from the civil society to help functioning Government properly. However, this provision has been omitted by fifteenth amendment of the constitution, see, *Constitution of the People's Republic of Bangladesh 1972*<http://bdlaws.minlaw.gov.bd/sections_detail.php?id=367§ions_id=41507>; Dr. Md. Morshedul Islam, 'Assumption of the Office of Chief Advisor of Non-Party Caretaker Government in Bangladesh: A Critical Politico-Legal Analysis' (2012) vol 7 *Journal of Law, Policy and Globalization* <www.iiste.org/Journals/index.php/JLPG/article/download/.../3365>.

³⁹² Islam, above n 389, 239.

³⁹³ The President of Bangladesh has made necessary rules under Article 115 of the *Constitution*.

³⁹⁴ According to Article 152(1) of the *Constitution* 'rules' are treated as law and has the same binding force like Act that are passed by the Parliament. See also,³⁹⁴ Islam, above n 389, 239.

³⁹⁵ The rules are: *Judicial Service Commission Rules; Judicial Service (pay-Commission) Rules; Judicial Service (Formation of Service, Appointment, Promotion in the Service and Temporary Suspension and Removal) Rules and Judicial Service (Determination of Service Place, Controlling of Granting Leave, Maintaining Discipline and other Conditions of Employment) Rules*. Necessary reforms have also been made in the *Code of Criminal Procedure* through and ordinance of 2007. These Rules were published through government gazette notification (additional issue) on 16 January 2007.

³⁹⁶ *Secretary, Ministry of Finance v Md. Masdar Hossain and other* (2000) 29 CLC (AD).

³⁹⁷ *The Code of Criminal Procedure Code 1898* (Bangladesh)s 6(2).

³⁹⁸ *Ibid* s 10, 11.

³⁹⁹ *Ibid* s 10, 11.

⁴⁰⁰ *Ibid* Schedule III; From the 11 January 2007 the President Iajuddin Ahmed issued state emergency, under Article

filing the *Masdar Hossain Case*⁴⁰¹ the appointment procedure for the lower judiciary was operated through the Public Service Commission along with the other public services under the *Bangladesh Civil Service (Reorganization) Order, 1980 Rules*.⁴⁰² According to the directions of the *Masdar Hossain Case*⁴⁰³ the Government established the Bangladesh Judicial Service Commission in 2007 under the *Bangladesh Judicial Service Commission Rules 2007* which is responsible for the appointment procedure of all judges and judicial magistrates in the Subordinate Courts through the judicial examination.⁴⁰⁴ Furthermore, a general Administrative Committee headed by the Chief Justice and not more than three judges was established to control and administer the judges of the Subordinate Courts regarding their appointment, removal, place of posting and salary matters.⁴⁰⁵ Through these rules, the institutional independence of the judiciary has been ensured, and Article 116A of the *Constitution* ensures the individual independence of the judges as it states: ‘*Subject to provisions of the Constitution, all persons employed in the judicial service and all magistrates shall be independent in the exercise of their judicial functions.*’

In NSW

In the NSW (Australian) system there are checks and balances between the Executive and the Legislature,⁴⁰⁶ where the separation of the judiciary operates with a different flavour than Bangladesh.

In Commonwealth Courts

Chapter III of the Australian *Constitution*, specifically section 71,⁴⁰⁷ strictly maintains the separation of powers for those Courts created by Commonwealth legislation from the Legislature

141A of the *Constitution*, which continue till 29 December 2009; See Moinul Hoque Chowdhury, 'A blot called '1/11'', *bdnews24.com* (Online, Dhaka), 2013 <<http://bdnews24.com/bangladesh/2013/01/11/a-blot-called-111>>; According to Article 141A such proclamation must be place in front of the parliament within one hundred and twenty days of the parliament is constituted. Otherwise the proclamation will be treated as invalid.

⁴⁰¹ *Secretary, Ministry of Finance v Md. Masdar Hossain and other* (2000) 29 CLC (AD)

⁴⁰² M. Abdul Wahhab, 'Civil Service Recruitment Policy in Bangladesh: A Critical Analysis' (Paper presented at the NAPSIPAG International Conference, University Utara Malaysia, Kedah, Malaysia, 11-13 December 2009) <http://www.napsipag.org/pdf/ABDUL_WAHAB.pdf>.

⁴⁰³ *Secretary, Ministry of Finance v Md. Masdar Hossain and other* (2000) 29 CLC (AD).

⁴⁰⁴ Bangladesh Judicial Service Commission, *Home*<<http://www.jscbd.org.bd/>>

⁴⁰⁵ The Supreme Court of Bangladesh, *Court Rules: High Court Division*<<http://www.supremecourt.gov.bd/scweb/rules/Rules%20of%20H.Ct.%20Judicature~ChapI.pdf>>

⁴⁰⁶ Graham Spindler, *Separation of Powers: Doctrine and Practice*<<http://www.parliament.nsw.gov.au/Prod/parlment/publications.nsf/key/SeparationofPowers>>

and the Executive. In *New South Wales v Commonwealth*,⁴⁰⁸ the High Court ruled that this part of the *Constitution* embodied the doctrine of separation of judicial powers. This also applies to the Tribunals and the Commissions set up by Federal Parliament which, unlike some of their equivalents in the States, cannot exercise the judicial power but only the executive or administrative power.⁴⁰⁹

In State Courts (NSW)

As mentioned earlier that each State has its own *Constitution*, and though the separation of powers was established very certainly at the Commonwealth level, it does not exist under the States' *Constitutions*. In NSW, the issue of judicial independence was recently raised. For example, the High Court of Australia does have the power of judicial review (section 75) but the States' Supreme Courts also possesses the power of judicial review.⁴¹⁰ However, the appointment and removal of judges lies with the Governor for States' courts. Thus it does not ensure judicial independence of NSW State's courts.⁴¹¹

So it can be concluded that the separation of the judiciary has been ensured in Bangladesh both in the Supreme Court as well as in the Subordinate Courts. But in Australia, strict separation has been ensured only in the Commonwealth Courts, but lack of formal separation of powers still exists under the NSW State Constitution.

ORGANIZATIONS RELATED TO THE JUDICIARY

Judicial administration issues are the responsibility of the policy makers (normally judges through rule-making, and the legislature). Policy choices affect what judges do and how they do it in adjudicating cases, beyond their purview of court administration. There are some organizations both in Bangladesh as well as in NSW that play a vital role in the field of judicial administration.

In Bangladesh

⁴⁰⁷ Australian Constitution, s 71.

⁴⁰⁸ *New South Wales v Commonwealth* (1915) 20 CLR 54; see also *R v Kirby; Ex Parte Boilermakers' Association of Australia* (1956) 94 CLR 254 (*Boilermakers' case*).

⁴⁰⁹ *New South Wales v Commonwealth* (1915) 20 CLR 54

⁴¹⁰ *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531

⁴¹¹ James Crawford, *Australian Courts of Law* (Oxford University Press, 1982) 26-27

Judicial Administration Training Institute (JATI)

To enhance the capacity of Judges, Law Officers of the Government, Advocates and Court support staffs to achieve better access to justice for citizens, the Judicial Administration Training Institute was established by the *Judicial Administration Training Institute Act 1995* (Bangladesh). This is a statutory public authority and the focal point for training members of judicial service and certain other professionals, for example, lawyers, connected with the judicial system.⁴¹²

Bangladesh Judicial Service Commission (BJSC)

The Bangladesh Judicial Service Commission has been established by the *Bangladesh Judicial Service Rules 2007* (Bangladesh). Its primary responsibilities are to arrange the examination for appointments at the entry level of the Bangladesh Judicial Service and to conduct periodical examinations.⁴¹³

National Legal Aid Services Organization (NLASO)

In order to ensure access to justice to the poor and indigent people, the Government of Bangladesh enacted the *Legal Aid Services Act 2000*. Thereafter the National Legal Aid Services Organization (NLASO) was established to implement the government's legal aid program across the country. NLASO provides legal aid to poor litigants who are incapable of seeking justice due to financial insolvency, destitution, helplessness and also for various other socio-economic conditions.⁴¹⁴ There are 64 District Legal Aid Committees (DLAC) through which NLASO implements the government legal aid program at the District level. There are *Upazila* and *Union* committees also working to spread the legal aid program at the grassroots level.⁴¹⁵

In NSW

Judicial Commission of NSW

The Judicial Commission is an independent statutory corporate body established under the *Judicial Officers Act 1986* (NSW). The functions of the Commission are to:

⁴¹² Judicial Administration Training Institute Bangladesh <<http://www.minlaw.gov.bd/jati.htm>>.

⁴¹³ Bangladesh Judicial Service Commission <<http://www.jscbd.org.bd/>>.

⁴¹⁴ *Legal Aid Services Act, 2000* (Bangladesh) s 7.

⁴¹⁵ National Legal and Services Organization of Bangladesh, *NLASO Overview* <<http://www.nlaso.gov.bd/>> .

1. Provide a continuing judicial education and training program;
2. Assist the courts to achieve a consistent approach to sentencing in criminal cases;
3. Examine complaints against judicial officers; and
4. Provide professional development programs for judicial officers.

The Commission works on judicial development. For example, since 2006 the Commission and the Australian Institute of Judicial Administration have worked on taking expert evidence in trial to expedite trials, and also invented a new method of taking expert evidence which has been published in DVD format.⁴¹⁶

As the objects of this organization relate to judicial officers, it needs to be clear who a judicial officer is. The definition of 'judicial officer' is different between the higher courts and the lower courts. In the Supreme Court of the NSW the Judicial Officers include Judges, Associate Judges, and for some purposes, the Registrar.⁴¹⁷ In the case of the lower judiciary, 'judicial officer' includes a Judge, Magistrate or other person who, whether alone or together with others, constitutes a Court, but does not include a lay member of a court.⁴¹⁸ All Judicial Officers in NSW are appointed by the Governor of the NSW.⁴¹⁹ Although legislation sets minimum requirements (for example 5 years' experience after attaining qualification as a lawyer), in practice governments consult existing judges and elected representatives of the legal profession before making an appointment. Judicial appointments are made on the basis of a legal practitioner's integrity, high level of legal skills and the depth of his or her practical experience.⁴²⁰ Apart from a sound knowledge of the law, judicial officers require other skills and attributes to carry out their complex tasks effectively. Moreover, the requisite qualities differ according to the particular judicial office. In practice, most judges are chosen from the senior ranks of the Bar. The NSW Registrars are appointed under section 120 of the *Supreme Court Act 1970* (NSW) pursuant to the provisions of the *Public Sector Management Act 2002* (NSW); it can thus be said that they are part of the Executive rather the Judiciary.

⁴¹⁶ Judicial Commission of New South Wales, *Concurrent Evidence: New methods with experts* (2006) <http://www.judcom.nsw.gov.au/publications/benchbks/civil/concurrent_evidence.html>.

⁴¹⁷ Judicial conference of Australia, *Judges for yourself, A guide to Sentencing In Australia*, 9 <http://www.jca.asn.au/attachments/judge_for_yourself_large.pdf>

⁴¹⁸ *Judicial Officers Act 1986* (NSW) s 43b.

⁴¹⁹ Judicial conference of Australia *Judges for yourself*, above n 417, 9.

⁴²⁰ The Supreme Court of New South Wales, *Annual Report* (2009) 9 <<https://www.opengov.nsw.gov.au/publication/11781>>.

Bar Association of NSW

The specific object of the Bar Association of NSW, according to its constitution, is to promote the administration of justice and to ensure its benefit for the all the members of the community.⁴²¹ The Bar Association sometimes submits submissions on reform of traditional law and procedure. In December 2010 it submitted a Criminal Justice Reform Submission to the Chief Justice of the Supreme Court.⁴²² The submission was prepared by the Criminal Law Committee and reflected the outcomes of the Association's Criminal Justice Conference, held in September 2010.⁴²³ Copies of the submission were provided to the then NSW Government, opposition and cross-bench.

The National Judicial College of Australia

The National Judicial College of Australia was established in 2002 as an independent entity, funded by contributions from the Commonwealth and some State and Territory governments. The College is situated in Canberra and it also has an overseas education program.⁴²⁴ It is controlled by a governing council. The College Constitution states that the College is to assist judicial officers to administer the law in a just, competent and speedy way. The College provides professional development to all judicial officers in Australia.

The establishment and function of each of these institutions are different from each other and cannot be confused by virtue of the similarity in name. For example, the Judicial Commission of NSW was established to train judges and examine the complaint procedure against the judges. But in Bangladesh the training of the Judges is operated by the Judicial Administration Training Institution and examining the complaint procedure is the matter for a different committee (page number77).

CONCLUSION

Though the court systems of both Bangladesh and Australia are based on Common Law, the structure and the way courts have developed are different from each other. In NSW, the court

⁴²¹ The New South Wales Bar Association, Court Structure, Judges' Titles and Order of Seniority, above n 250.

⁴²² Judicial Commission of New South Wales, *Annual Report* (2010-2011) <http://www.judcom.nsw.gov.au/about-the-commission/annual-reports/annual-report-2011-2011/Annual_Report_2010-2011_Full_report.pdf>.

⁴²³ The detail of the submission can be found at <<http://www.nswbar.asn.au/circulars/2010/nov/cjrs.pdf>>

⁴²⁴ National Judicial College of Australia, *About the College* <<http://njca.anu.edu.au/Website%20pages/About/About.htm>>.

system is just one part of an integrated court system whereas in Bangladesh, it is a stand-alone system. There are some similarities in these two systems: for example, both are adversarial systems. But they are different in court structure, appointment procedure of judges, jurisdiction of the courts and regarding separation of powers. For example in Bangladesh, the Subordinate Courts are divided on the basis of civil and criminal jurisdiction and in the NSW, only the appeal jurisdiction of the Supreme Court is divided as to civil and criminal matters. The Judiciary of Bangladesh is separated from the executive organ of the state; in NSW however, there is no separation of the judicial power from the executive power under the State *Constitution*.⁴²⁵

⁴²⁵*Kable v Director of Public Prosecutions (NSW)* [1996] HCA 24; (1996) 189 CLR 51, 65 (Brennan CJ), 79 (Dawson J), 92–94 (Toohey J), 103–104 (Gaudron J), 109–110 (McHugh J); *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531, 573 [69]; [2010] HCA 1; *Public Service Association and Professional Officers' Association Amalgamated (NSW) v Director of Public Employment* [2012] HCA 58; (2012) 87 ALJR 162, 175 [57] (Hayne, Crennan, Kiefel and Bell JJ); [2012] HCA 58; 293 ALR 450, 466.

CHAPTER FOUR: EVALUATION OF CASE MANAGEMENT IN THE DISTRICT COURT OF NEW SOUTH WALES, AUSTRALIA

INTRODUCTION

The general philosophy of supporting case management has already been established, but there are ways in which the judicial paradigm could usefully become more flexible, without sacrificing justice. Proper case management ensures that flexibility and due justice. This Chapter will focus on how the District Court of New South Wales has been successful in reducing case backlogs using the case management tool by analysing the Court's disposal rate, disposal time, number of pending cases and also the manner of disposal from the 1990-2013 Annual Reviews (data arise from the District Court of NSW has been attached to [Appendix F](#)).

METHODOLOGY AND JUSTIFICATION OF CHOOSING DISTRICT COURT OF NEW SOUTH WALES

Australia has a multitude of courts and each of them has a different history, jurisdiction and case load. Therefore, Sackville argues that the process of innovation on a court-by-court basis has tended to produce diverse case management arrangements across the various jurisdictions based on particular challenges they face.⁴²⁶ For example, some courts, such as the common law Division of the Supreme Court of New South Wales, deal with high volume litigation, such as personal injury cases. Others, such as the Federal Court, dispose of a wide range of cases, many of which may not be amenable to a standard approach to management. In some instances, case management has been introduced as a response to a crisis appearing to admit of no solution other than court control over the burgeoning lists.⁴²⁷ In others, it represents a carefully formulated strategy for the long term functioning of the court. The result is that, in Australia, judicial case management has taken different forms and has not proceeded at a uniform pace.⁴²⁸

Among the various courts and various case management systems, the District Court of New South Wales was chosen for this research to observe how the case management method applied

⁴²⁶ Hon Ronald Sackville AO, 'The Future of Case Management in litigation' (2009) 18 *Journal of Judicial Administration*, 213.

⁴²⁷ Sackville, Case Management: A Consideration of the Australian Experience, above n 30, 166.

⁴²⁸ Ibid 166.

here. The justification for choosing the District Court is because this is the largest trial court in NSW. The number of cases in Bangladesh is very high and among the courts of NSW, the District Court has the highest number of registered cases. In addition, over recent years the NSW District Court has been one of the two best performing courts.⁴²⁹ This Court is therefore a good example of showing how case management can function effectively even with a high volume of cases.

In this Chapter, the Annual Reviews of the District Court of NSW (1990-2013) have been analysed along with some articles, to obtain relevant statistics on how case management impacted on the civil caseload. Since 2003 these reports were collected from the District Court of New South Wales' website and prior to that the reports were collected from the District Court (NSW) Sydney with the assistance of Judge Dianne Truss.⁴³⁰ Sackville mentioned that the District Court has not adopted any sophisticated form of case management for civil litigation generally.⁴³¹ However, it appears that the court has largely eliminated its backlog.

DISTRICT COURT OF NEW SOUTH WALES

The Courts below the Supreme Court of New South Wales possess more limited jurisdictions, though they handle the vast majority of cases, both civil and criminal.⁴³² In case of the District Courts of NSW, mostly known as the intermediate court in the hierarchy of the NSW court system, it was established as a Court of record.⁴³³

The NSW country region is comprised of various venues where the District Court sits. In Sydney, Parramatta and in Campbelltown the Court sits permanently and full time.⁴³⁴ In addition, continuous sitting is conducted at Newcastle, Gosford, Wollongong and Lismore. There are also some other places where the court sits: Albury, Armidale, Bathurst, Bega, Bourke, Broken Hill, Coffs Harbour, Coonamble, Dubbo, East Maitland, Goulburn, Grafton, Griffith, Lismore, Moree,

⁴²⁹Craig Smith, *NSW District Court Practice, Procedure and Case Management* (NSW young lawyers, 2011), 2.

⁴³⁰Judge Dianne Truss, District Court Judge, NSW.

⁴³¹Sackville, Case Management: A Consideration of the Australian Experience, above n 30, 180.

⁴³²Enid Campbell and H.P.Lee, *The Australian Judiciary* (Cambridge University Press, 1st ed, 2001) 11.

⁴³³*District Court Act 1858* (NSW); The District Court New South Wales, *Annual Report* (2003) 5

<<http://www.districtcourt.justice.nsw.gov.au/Documents/2003annrevdc.pdf>>.

⁴³⁴The District Court of New South Wales, *Annual Review* (2012)

8<<http://www.districtcourt.justice.nsw.gov.au/Documents/2012%20District%20Court%20Annual%20Review.pdf>>.

Nowra, Orange, Parkes, Port Macquarie, Queanbeyan, Tamworth, Taree, and Wagga Wagga regions.⁴³⁵

CASE MANAGEMENT IN THE DISTRICT COURT OF NEW SOUTH WALES

In the 1980s and early 1990s the District Court of NSW faced what was described as ‘desperate times’.⁴³⁶ Justice Ronald Sackville has characterized the condition by inordinate delays, cases remaining for many years in the list without apparent movement, and a high proportion of cases not being ready on the dates allocated for hearing; in other words, huge backlogs.⁴³⁷

The Annual Review (1990) of the District Court of New South Wales defined ‘backlog’ as ‘the number of pending cases that cannot be completed within an acceptable waiting period’, and delay as ‘the amount of processing time that exceeds the tolerable waiting period.’⁴³⁸ Thus, backlog is measured in the number of cases; delay is measured according to time.⁴³⁹

Before official introduction of the ‘judicial case management’ in January 1996, some elements of case management had already been introduced into the District Court.⁴⁴⁰ For example, during March 1990, ‘pre-trial conferences’ were introduced and five additional Assistant Registrars were appointed to conduct these conferences and assist with the call-overs necessary to refer an increasing number of matters for hearing before arbitrators.⁴⁴¹ Early in 1991, the Chief Judge instituted an ‘Individual List Project’ as part of Delay Reduction Programme to assist in dealing with the matters awaiting hearing in Sydney. Four Judges were allocated to deal with civil cases period and the older matters awaiting hearing were assigned to these individual Judges.⁴⁴² In 1994 the GIO(Government Insurance Office)Tail project was introduced to reduce the backlogs from the District Court.⁴⁴³ Under this project, three experienced judges were appointed to the Court. The aim of the project was to resolve all outstanding actions which had been commenced in the Court resulting from motor vehicle accidents occurring prior to 1 July 1989.⁴⁴⁴ The

⁴³⁵ Ibid 8.

⁴³⁶ Sackville, Case Management: A Consideration of the Australian Experience, above n 30, 179.

⁴³⁷ Ibid 180.

⁴³⁸ The District Court of New South Wales, *Annual Review* (1990) 6.

⁴³⁹ Ibid 6.

⁴⁴⁰ The District Court of New South Wales, *Annual Review* (1996) 22.

⁴⁴¹ The District Court of New South Wales, *Annual Review* (1990) 7.

⁴⁴² The District Court of New South Wales, *Annual Review* (1991) 6.

⁴⁴³ The District Court of New South Wales, *Annual Review* (1994) 13.

⁴⁴⁴ Ibid 13.

strategies involved in the project included identifying the matters concerned, establishing their status and employing judicial case management to ensure their timely disposal.

On 6 December 1995, the Chief Judge introduced a procedure of case management in the Court's civil jurisdiction.⁴⁴⁵ The new procedure was contained in **Practice Note 33**.⁴⁴⁶ Under this procedure, the Court took control of all contested civil actions commenced after 31 December 1995 from the time the action was instigated.⁴⁴⁷ In this new frame of case management, the time for disposal of civil cases was set according to the American Bar Association's standards. This standard was not only generally accepted in the United States of America, but also in Canada and the United Kingdom. That is, the bulk of the Court's civil business should be disposed of within 12 months of the commencement of the case.⁴⁴⁸ In addition, the District Court had also adopted other plans to make the case management successful. Those plans are described shortly below.

Strategic Plan

The Court introduced its Strategic Plan in July 1995 to monitor its performance. This was a statement from an independent judiciary to the community on how the Court would exercise the authority entrusted to it and how it would account for carrying out its functions.⁴⁴⁹

Under this plan, the Court identified its primary goals as:⁴⁵⁰

- *Access*: to ensure that the Court is accessible to the public and those who need to use its services.
- *Case management*: to discharge the Court's responsibilities in an orderly, cost effective and expeditious manner.
- *Equality and Fairness*: to provide to all equal protection of the law.
- *Independence and Accountability*: to promote and protect the independence of the Judges of the Court and account for the performance of the Court and its use of public funds.

⁴⁴⁵The District Court of New South Wales, *Annual Review* (1996) 22.

⁴⁴⁶See Glossary at page no xiii for 'Practice Note' definition.

⁴⁴⁷The District Court of New South Wales, *Annual Review* (2003) 15.

⁴⁴⁸The District Court of New South Wales, *Annual Review* (1998) 22.

⁴⁴⁹The District Court of New South Wales, *Annual Review* (2004) 10.

⁴⁵⁰The District Court of New South Wales, *Annual Review* (2003) 10.

- *Professionalism*: to encourage excellence in the functioning of the Court.

In 2000, the Court issued its second Strategic Plan. Its aim was to improve upon the first plan, assisted by the experience gained over the previous 5 years.⁴⁵¹ Also, this strategic plan established four major working committees — the Criminal Business Committee, the Civil Business Committee, the Professional Standards Committee and the Resources Committee.⁴⁵² Each of these Committees has developed business plans which form part of the overall strategic plan of the Court.⁴⁵³

In 2007, the Court issued the Third Strategic Plan (2007-2012). Here the Court committed to ensuring its easy access to the public and the effective determination of cases in an orderly, cost effective and expeditious manner and at the same time the equal protection for all.⁴⁵⁴

In 2012 the Court introduced its fourth Strategic Plan.⁴⁵⁵ This plan articulates the values of the Court and sets out the goals to be achieved during 2012-2017. The Court is committed to discharging the following responsibilities:

- Ensuring public accessibility to the Court;
- Ensuring effective determination of cases in an orderly, cost effective and expeditious manner;
- Ensuring independence of the judges and the Court;
- Ensuring accountability for the performance of the Court;
- Ensuring the highest standard of excellence in Court functioning.

Practice Notes

Practice Note 33⁴⁵⁶ introduced case management in 1996. It implemented a timetable with which parties must comply and actions were not to commence until they were ready to meet those

⁴⁵¹Ibid 10.

⁴⁵²Ibid 10.

⁴⁵³The District Court of New South Wales, *Annual Review* (2003) 10.

⁴⁵⁴The District Court of New South Wales, *Annual Review* (2012) 10.

⁴⁵⁵The District Court of New South Wales, *Annual Review* (2013) 10.

⁴⁵⁶See Glossary at page no xiii for 'Practice Note' definition.

requirements.⁴⁵⁷

Due to changes in legislation the pending caseload was increased during 2001 and the first half of 2002.⁴⁵⁸ For that reason, the Court reviewed its civil case management strategy and reissued *Practice Note 33*, effective from 1 January 2002.⁴⁵⁹ The revised Practice Note continued the emphasis on early preparation of cases and on case management generally. Further, it was designed to assist the Court in meeting its time standards, and there was considerable consultation with the legal profession and other interested bodies prior to its introduction.

Under the former Practice Note, the parties were given a timetable with which they were required to comply. However cases were often not being prepared within the time prescribed. The revised Practice Note now requires the parties to set their own timetable (within the 12 months' time standard) at a pre-trial conference, to which they must adhere. That timetable will result in cases being allocated a hearing date from the status conference⁴⁶⁰ and as a result, the case being concluded within 12 months of its commencement.⁴⁶¹

The revised Practice Note also abolished the Review Date and made changes in the Pre-Trial Conferences which must occur within 3 months after the commencement of the proceedings, and within seven months after the commencement of the case; each party must file a certificate setting out details of all documents served, the dates they were served and any future matters to be attended to.⁴⁶² Unless orders are made at the Pre-trial Conference, the Court generally will not permit the service of any further documents.⁴⁶³

The revised Practice Note 33 further emphasised that the Court proposed to finalize as many matters as possible through alternative dispute resolution systems.⁴⁶⁴ Most matters are referred to

⁴⁵⁷The District Court of New South Wales, *Annual Review* (2003) 15.

⁴⁵⁸*Ibid* 16; in 1999 the *Motor Accidents Compensation Act 1999* (NSW) commenced which limits the Courts' access to motor accident claims which reduced the number of registrations. In 2001, some other legislative changes in relation to claims arising out of work-related accidents and medical negligence increased the number of registrations. In 2002 another legislative changes aimed to reduce civil litigation (personal injuries claims) also increased the number of registration at the first half of the year and reduced registration at the last half of the year. See also, The District Court of New South Wales, *Annual Review* (2003) 14.

⁴⁵⁹*Ibid* 16.

⁴⁶⁰See Glossary at page no xiii for 'Status Conference' definition.

⁴⁶¹*Ibid* 16.

⁴⁶²*Ibid* 16.

⁴⁶³*Ibid* 16.

⁴⁶⁴*Ibid* 16.

arbitration or Court-managed mediation, and this may be done at any time. To assist in this regard, the Court established arbitration guidelines.⁴⁶⁵

At present the *Practice Note DC (Civil) No 1* is in operation in the District Court of NSW. This Practice Note is issued under sections 56 and 57 of the *Civil Procedure Act 2005* (NSW) and is intended to facilitate just, quick and cheap resolution of the real issues in all proceedings before the Court. This Practice Note supersedes and replaces the previous Practice Note referable to case management in the general list.⁴⁶⁶ This Practice Note also stipulates the time standard for finalization, representation for appearing in the Court, pre-trial conferences, subpoenas, status conference, long trial dates.

Civil Business Committee's Plan

In 2000, the Court established a Civil Business Committee under the second strategic plan to monitor, report, and advise on any matter relating to the Court's objective of providing a system for the earliest, most effective and efficient resolution of civil disputes.⁴⁶⁷ This Committee⁴⁶⁸ is responsible for submitting a report each year on the Court's operational performance with up-to-date statistical information. Under that Committee's plan the Court's business was to be conducted in accordance with the following standards:⁴⁶⁹

- 90% of cases disposed of within 12 months of initiation and 100% within 2 years, apart from exceptional cases where continuing review should occur;
- Deferred cases which cannot comply with the time standard are included in a list by order of a judge and their status reviewed regularly;
- All cases are to be offered a hearing date within 12 months of initiation;

⁴⁶⁵The District Court of New South Wales, *Annual Review* (2003) 16.

⁴⁶⁶*Practice Note DC (Civil) NO:1*(NSW) 1

⁴⁶⁷The District Court of New South Wales, *Annual Review* (2006) 10; The District Court of New South Wales, *Annual Review* (2012) 10.

⁴⁶⁸The committee consists of the judges of the Court, the Judicial Registrar, the Civil List and Case Manager and representatives of the Law Society of NSW, the Bar Association of NSW, the Insurance Council of Australia and the Motor Accidents Authority; This Civil Business Committee will be accountable to the Policy and Planning Committee created under Strategic Plan. see also, the District Court of New South Wales, *Annual Review* (2012) 10.

⁴⁶⁹The District Court of New South Wales, *Annual Review* (2003) 15

- Motions are to be offered a hearing date within 2 months, or if they are filed in the long motions list, a hearing date within 3 months of filing;
- ‘Not reached cases’ are to be offered the next available dates for hearing not more than 3 months after the not reached hearing date and will be given priority on that date;
- Rehearing from arbitrations are to be offered the next available hearing date and must take a date within 6 months of the application being filed.

The 2000 business plan also prescribed that cases were to comply with *Practice Note* 33, and if not would be subject to the orders set out therein. In an addition:⁴⁷⁰

- Any case not allocated a hearing date within 18 months of commencement would be listed before a Judge to show cause why the action or defence should not be dismissed;
- Any case not allocated a hearing date within 2 years of commencement could expect to be dismissed unless a judge had extended the time for allocation of a hearing date within the 2 year period;
- Long motions not fixed for hearing within 6 months of filing to be dismissed unless a Judge extended the time;
- Transferred cases must be listed before a registrar within 3 weeks, and if not listed for hearing after two call-overs’, to be referred to the list judge to show cause;
- Failure to comply with orders of the Courts may result in dismissal on first failure and would result in dismissal on second failure;
- All cases suitable for arbitration would be so filed.⁴⁷¹

This plan also ensured that cases would not be listed for hearing unless they were ready for hearing. It is the responsibility of the legal advisers to ascertain the availability of their clients and witnesses before a hearing date is taken and accordingly:⁴⁷²

- Cases would not be adjourned, except in exceptional circumstances;
- Applications for adjournment would generally not to be heard on the day of the hearing;

⁴⁷⁰The District Court of New South Wales, *Annual Review* (2003) 15.

⁴⁷¹Ibid 15.

⁴⁷²The District Court of New South Wales, *Annual Review* (2003) 15

- Where appropriate, cost orders would be made in sums of money payable within a nominated time, and legal practitioners may be called upon to show cause why they should not personally pay the costs ordered.
- Cases not listed before a Judge on the hearing date would be listed before the List Judge in the reserve hearing list.

The 2013 civil business plan in addition to the Court's operational performance, considered the following matters:⁴⁷³

- Proposed amendments to the rules and practice notes.
- Particular concerns of the various representatives and matters which the court wished to bring to their attention.

Alternative Dispute Resolution

The revised Practice Note 33 (that became effective on 1 January 2002) emphasised alternative dispute resolution systems and the need to finalise as many matters as possible through that method. Most matters were referred to arbitration or Court-managed mediation, and this could be done at any time. In fact during 2001 and 2002, the Court was proactive in promoting alternative dispute resolution as a means of dealing with cases.⁴⁷⁴ Some of the measures it employed were:

- Issuing arbitration⁴⁷⁵ guidelines;
- Generally referring matters to arbitration prior to listing matters for hearing before a Judge; and
- Allocating arbitration sittings at 10 identified regional centres.

This involved a number of the Court's cases being dealt with through a mediation⁴⁷⁶ process.⁴⁷⁷ The recent *Practice Note DC (Civil) No:1* currently in operation authorises the Court to refer a case for ADR under part 4 of the *Civil Procedure Act 2005* (NSW).⁴⁷⁸ Here the Court will instruct the parties regarding the case's suitability for mediation or arbitration, or any other

⁴⁷³The District Court of New South Wales, *Annual Review* (2013) 10.

⁴⁷⁴The District Court of New South Wales, *Annual Review* (2003) 16.

⁴⁷⁵See Glossary at page xiii for 'arbitration' definition.

⁴⁷⁶See Glossary at page no xiii for mediation definition.

⁴⁷⁷The District Court of New South Wales, *Annual Review* (2003) 16.

⁴⁷⁸*Practice Note DC (Civil) NO:1*(NSW)9.

appropriate alternative dispute resolution which does not depend on the consent of the parties.⁴⁷⁹ If the case is not subject to ADR, then the court may order a settlement conference before the hearing date.⁴⁸⁰ On that date the parties with their lawyers and a person having the authority to resolve the case must attend the conference.⁴⁸¹

There are two different civil arbitration schemes in operation in the District Court.⁴⁸² One is the general scheme and the other is the Philadelphia scheme.⁴⁸³ The difference between the two schemes is that under the general scheme, the Arbitrator provides the accommodation and facilities for the arbitration. In the Philadelphia scheme (named after a similar scheme which has operated very successfully in Philadelphia, USA for many years), a number of Arbitrators are rostered to attend court-provided accommodation on a nominated date and support services are provided by Registry staff. The latter scheme enables multiple matters to be listed, and reserve matters are allocated to Arbitrators as a previous matter is concluded.⁴⁸⁴

Thus each year the District Court introduced a new method as part of case management which has influenced the civil caseload since 1991. These influencing factors are as follows at a glance:⁴⁸⁵

- 1990:** Pre-trial Conference was introduced
- 1991:** Individual List Project was introduced. In addition, the Local Court's Jurisdiction was increased to AUD 40,000 with effect from 1 November 1991.⁴⁸⁶ (It reduced the number of case registration).
- 1993:** The District Court's jurisdiction was increased to \$250,000 with effect from 1 July 1993.⁴⁸⁷
- 1994:** GIO (Government Insurance Office) Tail project was introduced to process long standing motor accident claims.⁴⁸⁸

⁴⁷⁹Ibid 9.

⁴⁸⁰Ibid 9.

⁴⁸¹Ibid 9.

⁴⁸²The District Court of New South Wales, *Annual Review* (1995) 24.

⁴⁸³Ibid 24.

⁴⁸⁴Ibid 24.

⁴⁸⁵The District Court of New South Wales, *Annual Review* (2003) 14.

⁴⁸⁶The District Court of New South Wales, *Annual Review* (2000) 27.

⁴⁸⁷Ibid 27.

- 1996:** With the commencement of case management, a concerted effort was made by the Court during the first 18 months to dispose of pre-1996 matters. These efforts quickly eliminated many of the matters that had remained inactive, resulting in a high disposal rate.
- 1997:** Part 12 rule 4C⁴⁸⁹ of the *District Court Rules 1973* (NSW) came into operation and it increased the volume of registrations. This section ensured action commenced before 1 January 1996 would be deemed dismissed if the Praecipe for Trial not filed before 1 January 1998.⁴⁹⁰ Also, the District Court's general jurisdiction was increased to \$750,000 with no limitation on actions arising from motor vehicle accidents, with effect from 18 July 1997.⁴⁹¹
- 1999:** *Motor Accidents Compensation Act 1999* (NSW) commenced, limiting access to the Court in relation to motor accident claims. The impact of these amendments has been a gradual (although substantial) reduction in these types of claims, which formerly represented a significant proportion of the Court's caseload.
- 2001:** Legislative changes in relation to claims arising out of work-related accidents and medical negligence were made during the year which increased the number of registrations.

⁴⁸⁸Honor Figgis, 'Dealing with Court Delay in New South Wales' (Breifing paper no 31/96, Nsw Parliamentary Library Researc Service, November 1996) 23
<[http://www.parliament.nsw.gov.au/prod/parlament/publications.nsf/key/DealingwithCourtDelayinNewSouthWales/\\$File/DealingwithCourtDelayinNewSouthWales.pdf](http://www.parliament.nsw.gov.au/prod/parlament/publications.nsf/key/DealingwithCourtDelayinNewSouthWales/$File/DealingwithCourtDelayinNewSouthWales.pdf)>.

⁴⁸⁹ Thus Part 12 rule 4C stated:

Dismissal of Dormant actions commenced before 1.1.96

4C (1) *This rule applies to actions which were commenced before 1 January 1996:*

(a) *By the lodging of an ordinary statement of claim; or*
(b) *By the lodging of a statement of liquidated claim and in which notice of grounds of defence has been filed, Which have not been disposed of by judgment or final order.*

(2) *If in an action to which this rule applies not praecipe for trial has been filed before 1 January 1998, the action is on that date deemed to be dismissed.*

(3) *If*

(a) *an action to which this rule applies has been adjourned;*
(b) *The adjournment is not to a specified date or a specified sittings for hearing, directions or other purpose, or to any "not ready list" maintained in accordance with Practice Note No 33; and*
(c) *the action remains so adjourned on 1 January 1998,*
The action is on that date deemed to be dismissed.

(4) *the Court may if it thinks fit by order rescind a dismissal which is deemed to have occurred through the operation of this rule if application for the order is made before 1 July 1998, and where such an order is made the Court shall give directions as to the future conduct of the action.*

⁴⁹⁰The District Court of New South Wales, *Annual Review* (2003) 14.

⁴⁹¹The District Court of New South Wales, *Annual Review* (2000) 27.

- 2002:** Further legislative changes aimed at reducing civil litigation (personal injuries claims) prompted another rush of filing in the first half of the year, with a marked drop occurring in the second half after the amendments became effective.
- 2003:** A significant decrease in the number of matters suitable for arbitration (as a result of legislative amendments in 1999, 2001 and 2002⁴⁹²) reduced the Court's capacity to finalize actions through this quick and inexpensive alternative dispute resolution mechanism.⁴⁹³
- 2004:** The position of Judicial Registrar was created. Craig Smith, the former Judicial Registrar of the District court of NSW, explains that the reason for the creation of this post was to ensure that the parties had their cases ready to be heard within 12 months of commencement.⁴⁹⁴
- 2006:** Legislation especially with respect to tort law was changed and the number of registrations was increased.⁴⁹⁵ *Practice Note DC (Civil) NO:1* was issued.⁴⁹⁶
- 2008:** New categories of 'Dismissed' and 'Discontinued' were included into the mode of disposal.⁴⁹⁷
- 2009-2013:** No special procedure was adopted. Some Acts were considered and reviewed by the Civil Business Committee.⁴⁹⁸
- 2012:** Fourth strategic Plan was introduced.⁴⁹⁹

⁴⁹² See at footnote no 458.

⁴⁹³ The District Court of New South Wales, *Annual Review* (2003) 14.

⁴⁹⁴ Smith, above n 429, 1.

⁴⁹⁵ See at footnote no 458.

⁴⁹⁶ The District Court of New South Wales, *Annual Review* (2006) 15 <<http://www.districtcourt.justice.nsw.gov.au/Documents/2006annrevdcbodyreport.pdf>>.

⁴⁹⁷ The District Court of New South Wales, *Annual Review* (2008) 17-18 <<http://www.districtcourt.justice.nsw.gov.au/Documents/2008annrevdc.pdf>>.

⁴⁹⁸ The District Court of New South Wales, *Annual Review* (2009) 15 <<http://www.districtcourt.justice.nsw.gov.au/Documents/2009annrevdc.pdf>>; The District Court of New South Wales, *Annual Review* (2010) 10 <<http://www.districtcourt.justice.nsw.gov.au/Documents/2010%20District%20Court%20Annual%20Review.pdf>>; The District Court of New South Wales, *Annual Review* (2011) 10 <<http://www.districtcourt.justice.nsw.gov.au/Documents/2011%20District%20Court%20Annual%20Review.pdf>>; The District Court of New South Wales, *Annual Review* (2012) 10 <<http://www.districtcourt.justice.nsw.gov.au/Documents/2012%20District%20Court%20Annual%20Review.pdf>>; The District Court of New South Wales, *Annual Review* (2013) 10 <<http://www.districtcourt.justice.nsw.gov.au/Documents/2013%20District%20Court%20Annual%20Review.pdf>>.

ANALYSING THE IMPACT OF CASE MANAGEMENT IN THE DISTRICT COURT (NSW) IN THE LIGHT OF DATA (1990 - 2013)

Increasing Disposal Rate

After introducing case management in 1996, 9978 matters were registered and 10,341 matters were disposed from the District Court (Sydney).⁵⁰⁰ The numbers of case disposals were 9098, 6547, 5567, 7575 in the years of 1992, 1993, 1994 and 1995 respectively.⁵⁰¹ In 1994 of the 4,109 matters settled, discontinued or transferred, settlement was reached in 967 matters after listing for hearing before a Judge, 1071 matters after listing for hearing before an Arbitrator and in 600 matters at Pre-trial conferences.⁵⁰² The remaining 1,471 matters were disposed of by filing terms of settlement, an agreement as to judgement or notice of discontinuance, or orders were made transferring the proceeding to another jurisdiction.⁵⁰³ As the GIO (Government Insurance Office)Tail Project was introduced from the beginning of 1994, the result of that project was by 31 December 1994, 3723 matters had been identified and included in the project and of those 1940 matters had been finalised.⁵⁰⁴ During 1995, 7575 matters were dealt with to finality. No doubt the GIO (Government Insurance Office)Tail project had a major impact on the increase in the disposal rate.⁵⁰⁵ Assistant Registrars at Sydney conducted pre-trial conferences in 3189 matters. A settlement rate of 22% was achieved.⁵⁰⁶ In 1998, 1990 and 2000 the disposal numbers were 6357, 6911 and 7311 respectively.⁵⁰⁷

If we go back to 1990, it is found that at the end of 1989, 26,580 matters remained in the list awaiting hearing.⁵⁰⁸ In 1990 the disposal rate was 8,985 and the situation obtained where the active pending case load would reduce at an annual rate of 2,778. Thus at this rate it would take just under four years to clear the backlogs.⁵⁰⁹ This figure validates the success of pre-trial conferences introduced in March 1990 and the result was 8,693 matters were the subject of such

⁴⁹⁹Ibid 10.

⁵⁰⁰The District Court of New South Wales, *Annual Review* (1996) 22.

⁵⁰¹Ibid 22.

⁵⁰²Ibid 11.

⁵⁰³Ibid 11.

⁵⁰⁴Ibid 13.

⁵⁰⁵The District Court of New South Wales, *Annual Review*(1995) 22.

⁵⁰⁶Ibid 24.

⁵⁰⁷The District Court of New South Wales, *Annual Review* (1998) 26, The District Court of New South Wales, *Annual Review* (1999) 23, The District Court of New South Wales, *Annual Review* (2000) 28.

⁵⁰⁸The District Court of New South Wales, *Annual Review*(1990) 6.

⁵⁰⁹Ibid 6.

pre-trial conference. A disposal through settlement of 23% was achieved in that year.⁵¹⁰ In the following year the disposal number was 11,538.⁵¹¹

From the chart below it is clear that the disposal rate was highest in 1991 as pre-trial conferences had been introduced in 1990 and the individual list project had been introduced in 1991. Then in 1996 the disposal rate was about 10,341 (which is the second highest such rate) as in this year the judicial case management system was introduced.

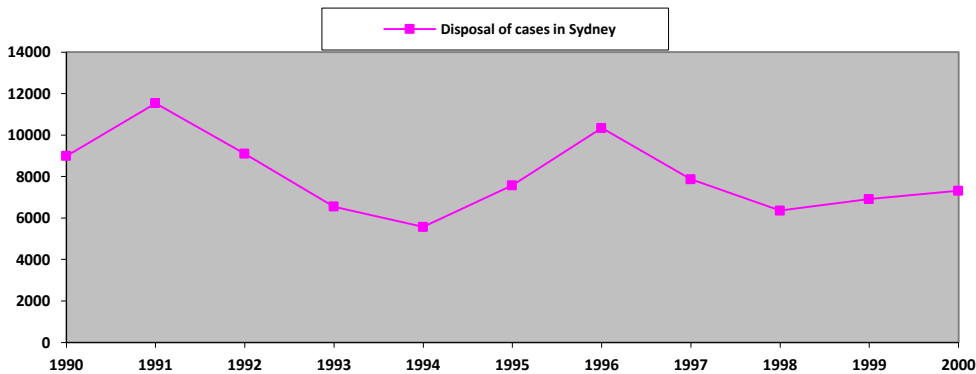


Figure IV.1: Number of Dispositions in the District Court Sydney (1990-2000)⁵¹²

The Court finalized 8505 matters through the case-managed system in 1997, and the total disposal rate was 14,571.⁵¹³

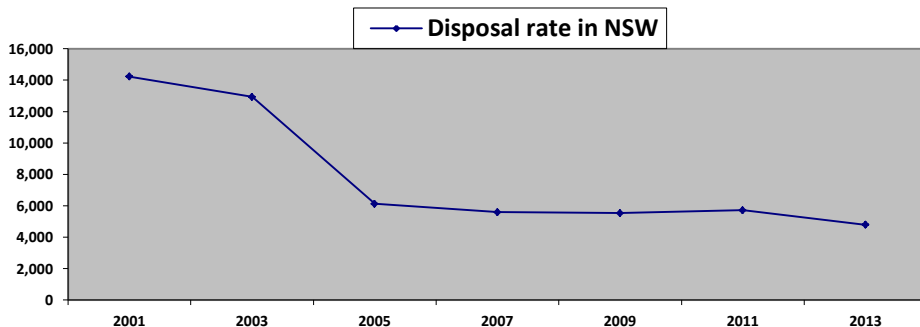


Figure IV.2: Number of Disposition in the District Court of NSW (2001-2013)⁵¹⁴

From the above chart, it is clearly seen that the disposal number in Sydney was gradually decreasing from 2001 till 2013. In 2003, the cause for decreasing disposal number was identified

⁵¹⁰The District Court of New South Wales, *Annual Review* (1991) 7.

⁵¹¹Ibid 5.

⁵¹²This chart was prepared analysing the annual review (1990-2000) of the District Court of New South Wales.

⁵¹³The District Court of New South Wales, *Annual Review* (1997) 21.

⁵¹⁴This chart was prepared analysing the annual review (2001-2013) of the District Court of New South Wales.

as being due to nature of the Court's civil work. There were 4956 matters finalized in 2012 compared to 5531, 5088 and 4822 in 2009, 2010 and 2011 respectively.⁵¹⁵ Thus it could draw a brief from the above data that the disposal rate was high in 1991, 1996 and 2002 due to introducing pre-trial conference and the individual list project (1991), case management (1996), and legislative changes (2001, 2002).⁵¹⁶

Reduction of Pending Cases

As with registrations, the active pending caseload continued to decline during 1992 reaching 8,078 compared with 12,140 in 1991 and 19,695 in 1990.⁵¹⁷ At the end of 1995, the Court revised the manner of calculation of its pending caseload. Previously, matters which had been stood out of the list generally or in which praecipes for trial had not been filed, were not included in the active pending caseload. In order to plan for judicial case management, the Court needed to identify the number of actions it had on hand, which had a potential to take up hearing time.⁵¹⁸ To achieve this, the Court calculated the number of matters it had pending which had not, in some way, been resolved. In Sydney, at the end of 1995, this was calculated to amount to 11,726. By the end of 1996, this figure had been reduced to 3,877.⁵¹⁹ As the pre-1996 caseload had reached a more manageable figure, it was possible to undertake a more accurate assessment. Hence, the Court in Sydney began in 1997 with less than 3000 old system cases on hand, about a 75% reduction on the start of 1996.⁵²⁰ Thus the Court reduced its caseload by almost a one-third during the year.⁵²¹

Just through introducing case management in 1996, by the end of that year the pending case load was reduced to under 2000 from over 23,000.⁵²² In addition 7,850 matters were pending for hearing under the old system prior to 1996.⁵²³ Hence the total number of pending actions of NSW amounted to 15,889. This compares to 23,181 matters pending at the end of 1995, which represents a 31.5% reduction in the caseload.⁵²⁴ This significant reduction was due to the

⁵¹⁵The District Court of New South Wales, *Annual Review* (2011) 16.

⁵¹⁶ See at footnote no 458.

⁵¹⁷The District Court of New South Wales, *Annual Review*(1992) 5.

⁵¹⁸The District Court of New South Wales, *Annual Review* (1996) 25

⁵¹⁹*Ibid* 25.

⁵²⁰*Ibid* 25.

⁵²¹*Ibid* 22.

⁵²²The District Court of New South Wales, *Annual Review*(1997) 21.

⁵²³The District Court of New South Wales, *Annual Review* (1996) 22.

⁵²⁴*Ibid* 22.

concerted efforts of the Court to eliminate as much of its pre-1996 caseload as possible, during the transitional period before case-managed matters would begin to be listed for hearing.⁵²⁵ The total State-wide pending civil caseload was reduced by 25% during 1997.⁵²⁶ By the end of 1997, the total pending caseload in NSW was 12063 matters as compared to about 17,392 at the end of 1996.⁵²⁷ During 1998, the pending civil case load remained around 12,000, but in 1999, this steadily increased to almost 15,000⁵²⁸ because of legislative changes as mentioned before.⁵²⁹ In this year, it was noticed that the Court's concerted efforts during the first 18 months of case management to dispose of pre-1996 matters, quickly eliminated many matters which were inactive.⁵³⁰

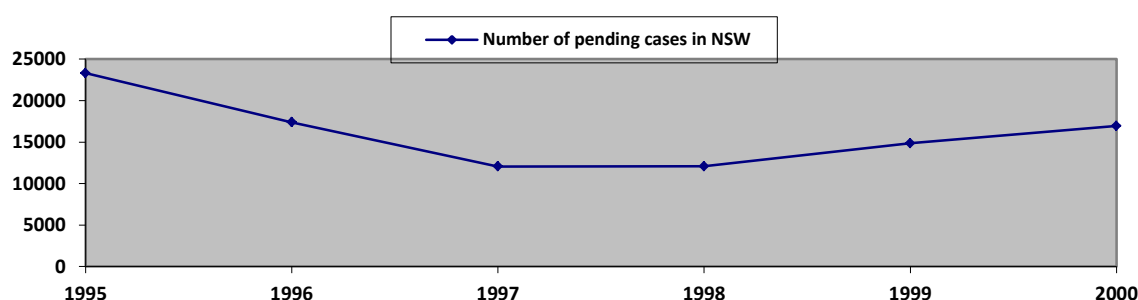


Figure IV.3: Number of pending cases in NSW (1995-2000)⁵³¹

In 1996 and 1997 after case management was first introduced, the caseload was reduced by almost half, and it remained at this level for the next year. Due to some legislative changes⁵³² in 1999 and 2000 it steadily rose to about 17,000 by the year 2000.⁵³³ As the Court's jurisdiction was increased in 1999, that produced a significant rise of new cases. This, in turn, greatly inflated the number of matters awaiting finalization.⁵³⁴ In 2000 there was 23% increase in pending cases compared with 1999 and a 47% increase compared with 1997 and 1998.⁵³⁵

⁵²⁵Ibid 22.

⁵²⁶The District Court of New South Wales, *Annual Review* (1997) 21.

⁵²⁷The District Court of New South Wales, *Annual Review* (1996) 22.

⁵²⁸The District Court of New South Wales, *Annual Review* (1999) 19.

⁵²⁹See at footnote no 458.

⁵³⁰Ibid 21.

⁵³¹This Figure has taken from The District Court of New South Wales, *Annual Review* (2000) 24.

⁵³²See at footnote no 458.

⁵³³The District Court of New South Wales, *Annual Review* (2000)23.

⁵³⁴Ibid 26.

⁵³⁵Ibid 28.

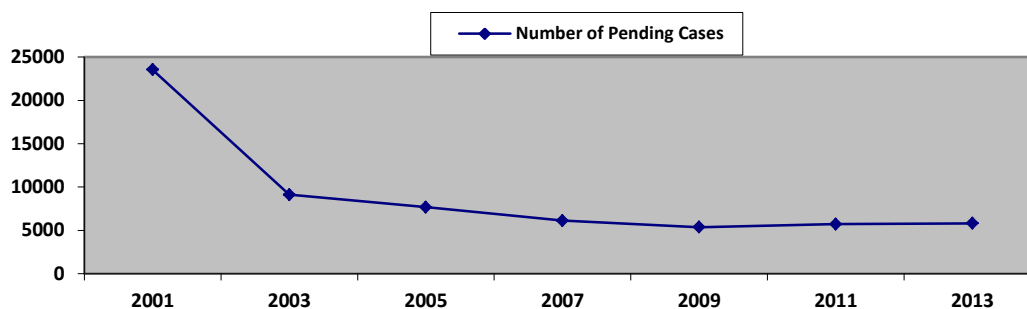


Figure IV.4: Number of pending cases in NSW (2001-2013)⁵³⁶

During 2003 a system error was identified which had had the effect of inflating the pending caseload. To correct the problem a manual stock take of all matters on hand at the end of 2003 was undertaken.⁵³⁷ As a result, the number of pending cases decreased down to 9104 from 19128 in 2002.⁵³⁸ In the above chart, it is found that the rate of pending cases decreased till 2009. In 2009, the rate was the lowest between 2001 and 2013; the disposition rate of cases since 2009 has not seen a notable change: this may be because yearly prior to 2009, improvements to the case management systems were taken but same 2009, in additional improvements to the system have been made. It is to be taken into consideration that the Court's disposal rate also depends upon various factors, for example, judicial resources, demand on Court jurisdiction, increasing the length of the civil hearings, settlement rate and also the courts' resources.⁵³⁹

Median of Disposal

During 1990, the average period of delay between the filing of Praecipe for trial and a hearing date was 45 months (as at 31 December 1990). The comparative period of delay as at 31 December 1989 was 44 months.⁵⁴⁰ The average disposal time in 1994 was 25 months (110 weeks), compared with 30 months (130 weeks) and 34 months (150 weeks) respectively in 1993 and 1992.⁵⁴¹ In 1996, the median disposal time for finalizing matters was 14.9 months from commencement.⁵⁴² With regard to the standard time of disposal of case, 54% of all completed actions were finalized within 12 months, and 80% were finalized within 24 months. In 1998, the median state-wide completion time was 11.4 months. This compares to 15.7 months in 1997 and

⁵³⁶ This figure has been created analysing the Annual Review of the District Court of New South Wales.

⁵³⁷ The District Court of New South Wales, *Annual Review* (2003) 13.

⁵³⁸ The District Court of New South Wales, *Annual Review* (2002) 24.

⁵³⁹ The District Court of New South Wales, *Annual Review* (1990) 6-7.

⁵⁴⁰ Ibid 7.

⁵⁴¹ The District Court of New South Wales, *Annual Review* (1994) 8.

⁵⁴² The District Court of New South Wales, *Annual Review* (1996) 23.

14.9 months in 1996.⁵⁴³ The time was reduced to 11.5 months in 2000 which is almost the same as 1998 and 1999, but far better than 1997.⁵⁴⁴ Again the disposal time increased a little in 2000 (11.8 months) and then decreased again in 2002 (11.3 months)⁵⁴⁵ but in 2003, it increased to 14.2 months.

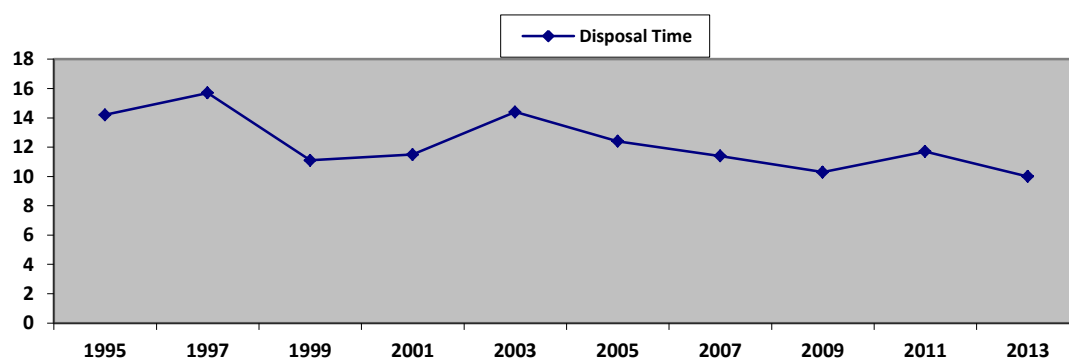


Figure IV.5: Average Disposal Time in the District Court New South Wales by months⁵⁴⁶

The above chart shows that since 1995, the median of finalization of cases was not steady rather it operated in a zig-zag fashion. In 2013, the disposal time was the lowest: 10 months.⁵⁴⁷ In this year (2013), 51% of the cases were completed within 12 months and 87% within 24 months.⁵⁴⁸ In 2009, the time also fell from 10.9 to 10.3 months. In 2012, 50% of all actions finalized were completed within 12 months, with 88% being completed within 24 months.⁵⁴⁹ In 2011, 52% of all actions completed were finalized within 12 months with 86% being completed within 24 months. Of the pending caseload at the end of 2011, 22% exceeded 12 months and 5% exceeded 24 months.⁵⁵⁰

Manner of Disposal

In 1992, Judges of the District Court of NSW disposed of 1,265 (13.9%) cases by way of hearing and 581 (6.4%) cases by way of settlement before judges; Arbitrations dealt with 2,199 (24.2%) matters by way of hearing and settled 1,894 (20.8%) matters. A further 1,108 matters (12.2%) were settled at the pre-trial conference and 2,051 (22.5%) matters settled at other stages prior to

⁵⁴³The District Court of New South Wales, *Annual Review* (1998) 24.

⁵⁴⁴The District Court of New South Wales, *Annual Review* (2000) 26.

⁵⁴⁵The District Court of New South Wales, *Annual Review* (2002) 25.

⁵⁴⁶This figure has been created analysing the Annual Review of the District Court of the New South Wales.

⁵⁴⁷The District Court of New South Wales, *Annual Review* (2013) 15.

⁵⁴⁸*Ibid* 15.

⁵⁴⁹The District Court of New South Wales, *Annual Review* (2012) 16.

⁵⁵⁰The District Court of New South Wales, *Annual Review* (2011) 17.

hearing.⁵⁵¹ During 1993 in Sydney, 6547 matters were disposed. In relation to these matters judgements were given by Judges in 1033 matters (15.8%), awards made by arbitrators became judgements (no application for rehearing having been filed) in 944 matters (14.4%), and 4570 matters (69.8%) were settled, discontinued or transferred to other jurisdictions.⁵⁵² Assistant Registrars at Sydney conducted pre-trial conferences in 4528 matters. A settlement rate of 23% was achieved.⁵⁵³ In 1994, there were 13,463 civil matters finalised in the District Court of NSW, among them 1163 (8.6%) by a verdict after hearing; 1341 (10%) by other means at hearing (eg. settlement at the hearing stage); 3,926 (29.2%) at arbitration; and 7,033 (52.2%) otherwise than at the hearing or arbitration.⁵⁵⁴

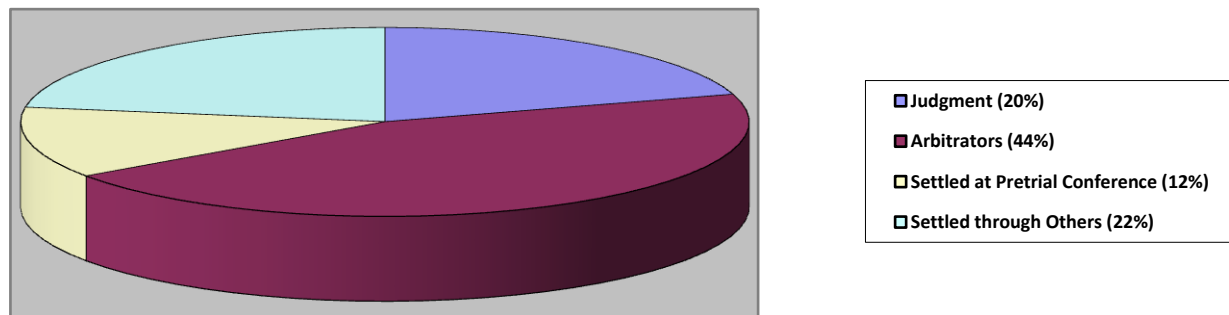


Figure IV.6: Manner of Disposal in 1991 in Sydney⁵⁵⁵

Of the matters disposed of during 1996, 28.1% related to judgments given by the Court, 12.8% were arbitration awards and 59.1% either settled, discontinued or transferred.⁵⁵⁶ Of those matters which were settled, discontinued or transferred, 23% occurred before arbitrators and 27.1% occurred before Judges.⁵⁵⁷

⁵⁵¹The District Court of New South Wales, *Annual Review* (1992) 6.

⁵⁵²The District Court of New South Wales, *Annual Review*(1993) 9.

⁵⁵³*Ibid* 10.

⁵⁵⁴The District Court of New South Wales, *Annual Review* (1994) 8.

⁵⁵⁵The District Court of New South Wales, *Annual Review* (1992) 6; settled through others includes: matters were settles, discontinues or transferred.

⁵⁵⁶The District Court of New South Wales, *Annual Review* (1996) 26.

⁵⁵⁷ *Ibid* 26.

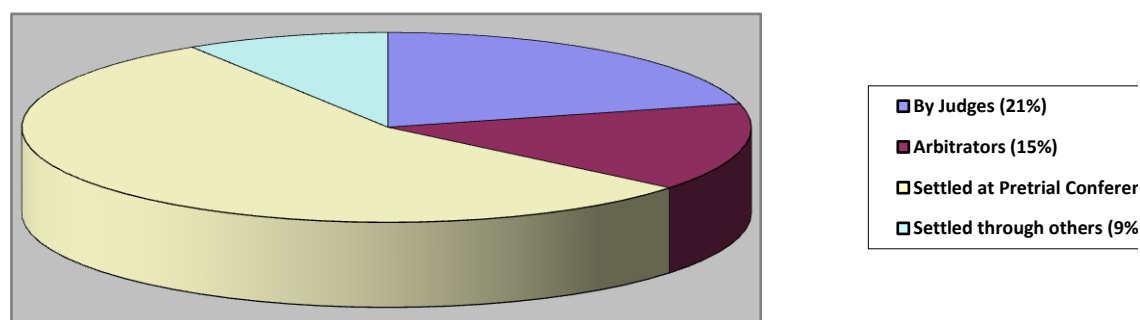


Figure IV.7: Manner of Disposal in 1996 in Sydney⁵⁵⁸

Before the ADR system was emphasised in 2003, 2,900 matters were finalised in 2001 and 4,400 in 2002 after referral to arbitration.⁵⁵⁹ The number disposed through arbitration decreased day by day. As a result, less than 2,500 matters were finalised by arbitration in 2003.⁵⁶⁰ A further 1021 matters were settled through Judgment, 1078 were dismissed, and 436 were settled before the Court. At arbitration, 1024 were awarded, and 999 were settled and through ‘other method’ (includes settled, discontinued and transferred) 2611 matters were settled, 535 were discontinued and 96 matters were transferred.⁵⁶¹

In 2008, the manner of disposal was changed, and it was categorised in a new way. Thus, disposal through default judgement, dismissed, discontinued and transferred were added separately. According to this categorisation, in 2013, 4792 matters were finalised in NSW, among them 3188 matters were settled in Sydney and 208, 15, 2175, 372, 317 and 91 matters were finalised through judgment by trial, default judgment, settlement, dismissed, discontinued and transferred respectively.⁵⁶² In a broad sense among the total disposal, 9% matters were finalised by judgment, and 59% were finalised by settlement.⁵⁶³

⁵⁵⁸The District Court of New South Wales, *Annual Review* (1997) 25.

⁵⁵⁹The District Court of New South Wales, *Annual Review* (2003) 16.

⁵⁶⁰Ibid 15-16.

⁵⁶¹Ibid 18.

⁵⁶²The District Court of New South Wales, *Annual Review* (2013) 16-17.

⁵⁶³Ibid 16-17.

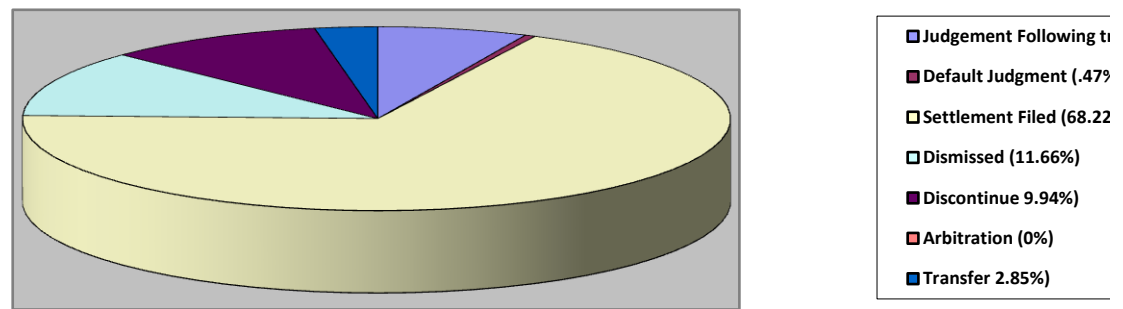


Figure IV.8: Manner of Disposal in 2013 in Sydney⁵⁶⁴

From the above discussion (figures IV.5, IV. 6 and IV.7) it could be said that in 1991, before case management started, the disposal through the arbitration was 44% of the total disposal. Recently in 2013, disposal through arbitration is totally absent. In 1996, most of the cases were disposed through settlement at the pre-trial stage (55%); the percentage had increased in 2013 (68%).⁵⁶⁵ It has been mentioned in the 2003 District Court Annual Review that it would not be wise to compare registrations with finalizations — rather both of them should be compared with pending caseload.⁵⁶⁶ For example, a matter in the course of its life may, for various reasons, be registered more than once. Multiple parties and cross actions can further affect the equation. Cases determined at arbitration can be re-heard. A matter previously dismissed can be restored, or retrial may be ordered. Further, actions may be transferred between registries, which can complicate matters as each registry has its own registration numbering system. Registries also conduct stock-takes of cases on hand during the course of the year, with pending statistics being adjusted as necessary.⁵⁶⁷

Craig Smith, the Judicial Registrar of the District Court, states that approximately 70% of the civil work of the District Court arises in Sydney.⁵⁶⁸ Explaining how case management works in resolving civil cases in the NSW District Court he quoted some statistics: in 2010, there were 3,927 matters requiring case management registered in the Sydney District Court. There were a further 3,892 matters registered that did not require case management.⁵⁶⁹ He also said that in

⁵⁶⁴Ibid 16-17; Here finalised by 'settlement filed' includes matters that settled as a result of ADR.

⁵⁶⁵The District Court of New South Wales, *Annual Review* (2013) 16.

⁵⁶⁶Ibid 13.

⁵⁶⁷Ibid 13.

⁵⁶⁸Smith, above n 429, 1.

⁵⁶⁹Ibid 1.

2009, of the 3,914 case-managed matters finalised, only 478 (12%) were finalised by a judgement following a trial.⁵⁷⁰ He argues that most matters were settled through case management. He further states that the percentage of matters that are finalised following a hearing (12%) has remained fairly constant over the past 5 years (2005-2009).⁵⁷¹

CASE MANAGEMENT IN LEGISLATION

Former NSW Chief Justice Spigelman⁵⁷² placed emphasis on the comprehensive legislation and rules which enable the court to manage its caseload effectively.⁵⁷³ He noted that the rules regarding case management were developed progressively over the last two decades.

In 2005, a new Act and Rules were enacted adopting specific provisions for case management in the civil courts of New South Wales. These relevant statutes and rules, (the *Civil Procedure Act 2005* (NSW) and the *Uniform Civil Procedure Rules 2005* (NSW)), have been consolidated and applied uniformly to all three Courts of New South Wales. Those three courts are the Supreme Court of NSW, the District Court of NSW and the Local Court of NSW (excluding the Small Claims division of the Local Court).⁵⁷⁴ The uniform sets of rules are sufficiently flexible to allow for the differing requirements at the three levels of the hierarchy. The Act and Rules were more integrated with existing practice than earlier provisions. The key reform was uniformity. The Rules are backed up by detailed Practice Notes with respect to the conduct of proceedings, particularly the conduct of proceedings in specialist lists. Although the basic rules are uniform, at the three levels of the court hierarchy practices differ, so that matters are treated with greater expedition in the Local Court than in the District Court and in the District Court than in the Supreme Court.⁵⁷⁵

The *Civil Procedure Act 2005* (NSW) and the *Uniform Civil Procedure Rules 2005* (NSW) commenced on 15 August 2005. The objectives of this Act and the Rules were to streamline and simplify procedure; to remove unnecessary differences between the courts; and, to create time and costs savings for the courts, the legal profession and the public.⁵⁷⁶ Both the Act and the

⁵⁷⁰Ibid 1.

⁵⁷¹Ibid 1.

⁵⁷²Spigelman, above n 28,106-7.

⁵⁷³Ibid 106-7.

⁵⁷⁴*Civil Procedure Act 2005* (NSW) Schedule 1.

⁵⁷⁵Spigelman, above n 28,106.

⁵⁷⁶Smith, above n 429, 2.

Rules have given greater power to the Judge for case management and have made litigation procedure more flexible to ensure quick, just and cheap disposal of civil suits.⁵⁷⁷ In NSW, there are clearly delineated and specific powers to impose limits on the conduct of pre-trial procedures.

Part 6 of the *Civil Procedure Act 2005* (NSW) explicitly deals with case management and interlocutory matters of the court; section 56 of the Act describes how civil litigation is now to be conducted in NSW. Under this section parties have a statutory duty to assist the court to further this overriding purpose and, therefore, to participate in the court's processes and to comply with directions and orders in the following manner.⁵⁷⁸

56(1) The overriding purpose of this Act and of rules of court, in their application to a civil dispute or civil proceedings, is to facilitate the just quick and cheap resolution of the real issues in the dispute or proceedings.

(2) the court must seek to give effect to the overriding purpose when it exercise any power given to it by this Act or by rules of court and when it interprets any provision of this Act or of any such rule.

(3) A party to civil proceedings is under a duty to assist the court to further the overriding purpose and to that effect, to participate in the processes of the court and to comply with directions and orders of the court

(4) Each of the following persons must not, by their conduct, cause a party to a civil dispute or civil proceedings to be put in breach of a duty identified in sub section (3) or (3A):

(a) any solicitor or barrister representing the party in the dispute or proceedings,

(b) any person with a relevant interest in the proceedings commenced by the party.

(5) The court may take into account any failure to comply with sub section (3) or (4) in exercising a discretion with respect to costs.

⁵⁷⁷ *Civil Procedure Act 2005* (NSW); *Uniform Civil Procedure Rules 2005* (NSW) reg. 2.1.

⁵⁷⁸ *Civil Procedure Act 2005* (NSW) s 56; Spigelman, above n 28, 107.

(6) For the purpose of this section, a person has a relevant interest in civil proceedings if the person:

(a) provides financial assistance or other assistance to any party to the proceedings, and

(b) exercise any direct or indirect control, or any influence, over the conduct of the proceedings or the conduct of a party in respect of the proceedings.

However Section 57 of the *Civil Procedure Act 2005* (NSW) is more specific regarding the object of case management. Sub-section (1) states as follows:

‘For the purpose of furthering the overriding purpose referred to in section 56(1), Proceedings in any court are to be managed to have regard to the following objects:

(a) the just determination of the proceedings,

(b) the efficient disposal of the business of the court,

(c) the efficient use of available judicial and administrative resources,

(d) the timely disposal of the proceedings, and all other proceedings in the court, at a cost affordable by the respective parties’⁵⁷⁹

Section 58 of the *Civil Procedure Act 2005* (NSW) also provides guidance as to the considerations relevant to the making of an order or direction through requiring regard to the provisions of sections 56 and 57 and setting out a number of discretionary considerations:

(1) In deciding:

(a) whether to make any order or direction for the management of proceedings, including:

(i) any order for the amendment of a document, and

(ii) any order granting and adjournment or stay of proceedings, and

(iii) any other order of a procedural nature and

⁵⁷⁹ *Civil Procedure Act 2005* (NSW) s 57 ss (1).

- (iv) *any direction under Division 2, and*
- (b) *the terms in which any such order or direction is to be made, the court must seek to act in accordance with the dictates of justice.*

(2) *For the purpose of determining what are the dictates of justice in a particular case, the court:*

- (a) *must have regard to the provisions of sections 56 and 57 and*
- (b) *may have regard to the following matters to the extent to which it considers them relevant:*
 - (i) *The degree of difficulty or complexity to which the issues in the proceedings give rise,*
 - (ii) *The degree of expedition with which the respective parties have approached the proceedings, including the degree to which they have been timely in their interlocutory activities*
 - (iii) *The degree to which any lack of expedition in approaching the proceedings has arisen from circumstances beyond the control of the respective parties*
 - (iv) *The degree to which the respective parties have fulfilled their duties under section 56(3)*
 - (v) *The use that any party has made, or could have made of any opportunity that has been available to the party in the course of proceedings, whether under rules of court the practice of the court or any direction of a procedural nature given in the proceedings*
 - (vi) *The degree of injustice that would be suffered by the respective parties as a consequences of any order or direction,*
 - (vii) *Such other matters as the court considers relevant in the circumstance of the case.*

Allsop ACJ in *Hans Pet Constructions Pty Ltd v Cassar* observed:⁵⁸⁰

⁵⁸⁰ (2009) NSWCA 23 para 38; see also, Michael Legg, Case Management and Complex Civil Litigation, above n 30, 28-9.

The Civil Procedure Act, ss 56-61 of the *Civil Procedure Act 2005* (NSW) bring about a new statutory balance among various factors in litigation including court and party efficiency and the delivery of individual justice.

Allsop further states, ‘Delay and case backlog are not merely factors affecting the public cost of delivering justice, they corrode the ability of the courts to provide individual justice....’⁵⁸¹

Section 61 of the *Civil Procedure Act 2005* (NSW) relevantly provides:

(1) The court may, by order, give such directions as it thinks fit (whether or not inconsistent with rules of court) for the speedy determination of the real issues between the parties to the proceedings.

(2) In particular, the court may, by order, do any one or more of the following:

(a) it may direct any party to proceedings to take specified steps in relation to the proceedings,

(b) it may direct the parties to proceedings as to the time within which specified steps in the proceedings must be completed,

(c) it may give such other directions with respect to the conduct of proceedings as it considers appropriate.’

(3) If the party to whom such a direction has been given fails to comply with the directions, the court may, by order, do any one or more of the following:

(a) it may dismiss the proceedings, whether generally, in relation to a particular cause of action or in relation to the whole or part of a particular claim,

(b) it may strike out or limit any claim made by a plaintiff,

(c) it may strike out any defence filed by a defendant, and give judgment accordingly,

(d) it may strike out or amend any document filed by the party, either in whole or in part,

⁵⁸¹ *Hans Pet Constructions Pty Ltd v Cassar* (2009) NSWCA 23 para 38; Michael Legg, Case Management and Complex Civil Litigation, above n 30, 29.

(e) it may strike out, disallow or reject any evidence that the party has adduced or seeks to adduce,

(f) it may direct the party to pay the whole or part of the costs of another party,

(g) it may make such other order or give such other direction as it considers appropriate.

(4) Subsection (3) does not limit any other power the court may have to take action of the kind referred to in that subsection or to take any other action that the court is empowered to take in relation to a failure to comply with a direction given by the court.⁵⁸²

Apart from these, there are other sections as well as rules which deal with the case management power of the court. According to the *Civil Procedure Act 2005 (NSW)* and the *Uniform Civil Procedure Rules 2005 (NSW)* the Court takes the following actions to ensure case management:⁵⁸³

(e) The court can dispense with a rule (Civil Procedure Act 2005 (NSW) s 14)

(f) The court can give directions in circumstances not covered by the rules (Civil Procedure Act 2005 (NSW) s 16)

(g) The court can give directions for the speedy determination of the real issues between the parties (Civil Procedure Act 2005 (NSW) s 61)

(h) The court can give directions as to the conduct of any hearing (Civil Procedure Act 2005 (NSW) s 62)

(i) The court can make directions re procedural irregularities for example, set aside orders/steps in proceedings and allow amendments (Civil Procedure Act 2005 (NSW) s 63)

(j) The court can order the amendment of documents or process (Civil Procedure Act 2005 (NSW) ss 64, 65)

(k) The court can order costs (Civil Procedure Act 2005 (NSW) s 98)

⁵⁸²*Civil Procedure Act 2005 (NSW) s 56 (3).*

⁵⁸³Smith, above n 429, 5-6.

- (l) *The court can order costs against a practitioner (Civil Procedure Act 2005 (NSW) s 99)*
- (m) *The court can give directions/make orders for the just quick and cheap disposal of the proceedings (Uniform Civil Procedure Rules 2005 (NSW) r 2.1, 2.3)*
- (n) *The court can give directions in relation to expert witnesses (Uniform Civil Procedure Rules 2005 (NSW) r 31.20); and*
- (o) *Rule 12.7 of the Uniform Civil Procedure Rules 2005 (NSW) allows the court to dismiss proceedings or strike out a defence if the proceedings/defence are not prosecuted/conducted with 'due despatch'.*

The object of the incorporation of case management into the legislation is to reduce delay and to minimise the cost of litigation. Chief Justice Spigleman explains it as including:

- The just determination of proceedings;
- The efficient disposal of the business of the court;
- The efficient use of available judicial and administrative resources;
- The timely disposal of the proceedings and all other proceedings in the court, at a cost affordable by the parties.⁵⁸⁴

The powers of case management expressly conferred on the court are very extensive. The legislation includes powers to give directions as to the conduct of any hearing, to limit the number of witnesses that may be called or documents that may be tendered and to specify the time that may be taken by a party in presenting his or her case.⁵⁸⁵ Nonetheless, it also emphasises that the courts must exercise the powers in a manner that does not detract from the principle that each party is entitled to a fair hearing.⁵⁸⁶ The Hon Ronald Sackville adds further that in some jurisdictions, the relevant legislation either makes no reference to case management principles or

⁵⁸⁴Spigelman, above n 28,108.

⁵⁸⁵*Civil Procedure Act 2005 (NSW) s 62(1), (2), (3).*

⁵⁸⁶*Civil Procedure Act 2005 (NSW) s 62(4), (5).*

does so only in the most general terms. Nonetheless, those jurisdictions frequently make detailed provision for case management in the rules of court.⁵⁸⁷

Sackville mentioned that there is a school of thought that thinks specific legislative intervention in case management is unnecessary, since the rules or the inherent powers of the court confer ample authority on the judges to manage litigation in a manner that minimises delays, and ensures that costs are proportionate to the matters in dispute.⁵⁸⁸ The philosophy underlying case management has proved to be attractive not only to courts, but also to legislators.⁵⁸⁹ Sackville notes that such a view underestimates the significance of legislation of the kind enacted in New South Wales. Sackville then supports his contention for two reasons: first, incorporating case management into legislation becomes the legitimate representation of the general people; and second, to make the courts empowered for effective use of case management legislation is a legal framework within which the courts operate.⁵⁹⁰ Sackville argues that not only has case management flourished in the courts, but it is enshrined in the legislation providing the framework for the civil justice system.⁵⁹¹

CONCLUSION

Australia is moving towards judicial control over the litigation. The statistics explained above show that case management has reduced not only the backlogs, but also disposal time in the civil cases of District Court (NSW). Proper planning and legislative changes from time to time has increased the disposal rate and, at the same time, it has made some changes in the mode of disposal. The NSW District Court has emphasised case management as a result of its incorporation into legislation including an overriding purpose. This also creates the space for the courts to exercise their power to ensure justice in managing cases.

⁵⁸⁷Sackville, *The Future of Case Management in litigation*, above n 426, 216.

⁵⁸⁸*Ibid* 217.

⁵⁸⁹*ibid* 215.

⁵⁹⁰*Ibid* 217.

⁵⁹¹*Ibid* 215.

CHAPTER FIVE: PROCEDURAL EXPERIENCES FROM BANGLADESH CIVIL TRIAL COURTS: DATA COLLECTION AND ANALYSIS

INTRODUCTION

In Chapter One the methodological approach was discussed in brief. This Chapter is divided into two parts. In the first part, this study's methodology, how the recruitment process was commenced to identify the potential participants, how the sampling was conducted, and the justification and application of grounded theory is discussed. The second part consists of an analysis of the data following grounded theory. Although the data collection process and data analysis are discussed separately, both were conducted simultaneously as grounded theory advised, and accordingly data analysis commenced with the first interview and continued till writing this chapter.⁵⁹²

SELECTION OF PARTICIPANTS

Different types of selection methods were followed for different types of participants. Having obtained the appropriate ethical approval for the research, clients, lawyers, judges and court staff were selected from the seven divisions⁵⁹³ of Bangladesh as the potential participants. The seven divisions are: Dhaka, Rajshahi, Khulna, Chittagong, Barishal, Sylhet, Rangpur. To make the research representative, seven civil cases were chosen from the seven divisions on a random basis along with the potential participants. In this regard, the following procedure was adopted.

Among seven divisions, the divisional districts were chosen for their wide variety of cases. Each District has a number of civil and criminal courts, and among the lowest grade of civil trial courts, the Senior Assistant Judge Court (senior most Assistant Judge Courts locally known as *Sadar Courts*), accumulates most varieties of civil cases and therefore seven Senior Assistant Judge Courts from seven divisional districts were chosen for data collection purposes. In Bangladesh, each court maintains a list known as the Cause List⁵⁹⁴, which is publicly available. The purpose of the *Cause List* is to declare the purpose for which the case has been listed and the

⁵⁹²Corbin and Strauss, *Grounded Theory Research: Procedures, Canons, and Evaluative Criteria*, above n 52, 6.

⁵⁹³Divisions are the largest administrative unit in Bangladesh.

⁵⁹⁴Cause list is the official registrar book to maintain the suit number and its date of hearing. A Daily Cause List in the prescribed form shall be posted in some conspicuous part of every court-house for the information of the parties, their advocates and the public. Cases and appeals shall be shown in the order in which they appear in the Dairy according to rule 13 of *Civil Rules and Order* (Bangladesh).

stage it has reached, along with a short description of what is to be done on the day for the case on the *Cause List*. The potential participants were identified from the records of the cases as set out in the daily *Cause List* in the relevant District's Court. A case from those listed for hearing on the interviewing date was identified on random selection basis from the court's *Cause List*. It is to be noted that cases are identified according to the filing serial number along with the filing year. Thus the number of cases listed for hearing on the particular day was examined, and then the focus shifted to advanced cases, because they would have gone through more stages, making it possible to analyse how the laws were applied in those stages. As the case number contains the filing year of the case, therefore, from the number of each case it was easy to ascertain whether there was any backlogs in that particular case. The attendance of the clients with their lawyer was checked, and if both were available, they were approached to see if they were willing to participate in the research.

Concerning the court staff, each of the Senior Assistant Judge courts had at least two assistants; one is known as Sheristadar,⁵⁹⁵ and the another one is known as Peshkar.⁵⁹⁶ Court staffs, who play a vital role in facilitating cases, and the judges who are actually responsible for making the decision and ensuring justice to people, are appointed to particular courts; these appointments are on the public records and also on the court records, and thus a judge and court staff were easily identified. The researcher collected all information relevant to the court procedure subject to confidentiality requirements and then conducted the interviews. To match the availability of clients and lawyers according to the advanced case records was more difficult than identifying relevant courts staff and judges,⁵⁹⁷ as court staff and judges had been appointed to the relevant courts for about three years.

After describing the purpose of the research, Judges, lawyers and court staff were given a copy of the information and consent form. Clients were given separate information and the consent form and the contents of the form and the purpose of the study was read out orally in Bangla so that they could understand easily. The information and consent sheets were also translated into

⁵⁹⁵ *Sheristadar* is the Official administrative officer. For each and every court there shall be a *Seristadar* who will be responsible for the administrative work of the Court. They are also appointed by the Government but not necessarily from the Law background.

⁵⁹⁶ *Peshkar* helps the court handling the case record and scheduling and allocating time for each case.

⁵⁹⁷ The judges are appointed in a particular court for near about three years and after that they are transferred to another district by the Ministry of Law Justice and Parliamentary Affairs in consultation with the Supreme Court. But in case of court staff, they are transferred to another court near about three years in the same districts mostly by the District Judge.

Bangla as well for the participants' convenience (Appendix C). Most clients had little literacy, and the aim of the research was described in as simple language as they could understand to obtain his or her written consent. All the participants signed the consent paper. At the time of obtaining written consent, the privacy policy was described and all interviewees were assured that the information is confidential and would be kept securely, and that their identity would not be disclosed without their consent. All the information regarding the research project, its aim and what would be their role in the interview were described several times to obtain their consent to the interview and another copy of the information and consent sheet were provided to them for their preservation. After briefing on the aim of the research, participants were asked for their consent and, in the case of clients (litigants) and the lawyers, were given at least one hour to consider whether they wished to participate, or if they needed more time to think on the matter and take a decision, but for the judges and the court staff the information had been provided one day earlier (This is because the Judges and the court staffs hold their position for three years on average and will always be present at the court, while the lawyers and the clients will be subject to change depending upon which cases are listed for any particular day).

A total of 28 participants were recruited for the study equally from four categories of participants: clients, lawyers, Judges and court staff from the seven divisional districts. In addition, the interviewed seven clients' case records were also considered. The use of a wide range of participants in this study also acted as validity tool. No gender and age limitation was considered to identify the potential participants.

DATA COLLECTION METHOD AND DATA COLLECTION PROCEDURE

Corbin and Strauss point out that there is no hard and fast rule for the grounded theory method, rather it is flexible.⁵⁹⁸ However, there are certain principles and canons that act as boundaries to grounded theory.⁵⁹⁹ It has some specific procedures for data collection and analysis. Strauss and Corbin however also place emphasise on the creativity of the researchers and analysis that interplays between researchers and data.⁶⁰⁰

⁵⁹⁸Corbin and Strauss, *Grounded Theory Research: Procedures, Canons, and Evaluative Criteria*, above n 52, 6.

⁵⁹⁹*Ibid* 6; Strauss and Corbin, *Basics of Qualitative Research*, above n 57, 12-14.

⁶⁰⁰*Ibid* 12-13.

Corbin and Strauss discuss the sources of the data. They ascertain the data for the grounded theory can come from various sources, for example interview and observations, other governments documents, video, tapes, newspapers, letters and books which are related to the research questions after ensuring the credibility of the additional data.⁶⁰¹

Before the interviews, a set of semi-structured open ended questions had been prepared to elicit the participants' experience (sample of questionnaires has been attached to [Appendix D](#)). After obtaining their written consent, interviews were conducted. All interviewees in each group were asked the same questions, to ensure parity of comparison.

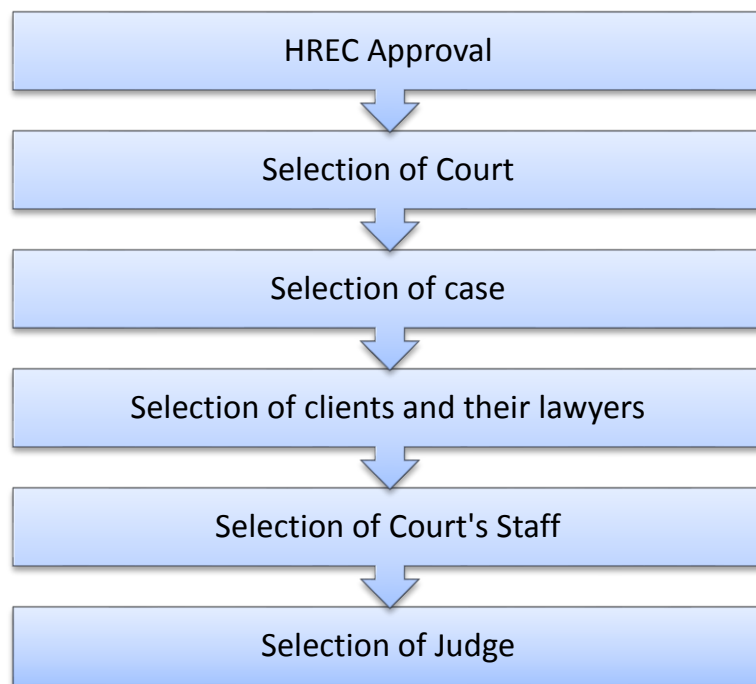


Figure V.1: The Sequences of the Recruitment Process

To choose the potential participants for face to face interview, the selected venue was within the court premises. However, because of the poor economic court infrastructural condition, it was not possible to conduct the interview in any private room. Clients and lawyers were interviewed mostly at the court room at a mutually convenient time whilst ensuring their privacy. This issue was addressed at the time of the Ethics application. The researcher tried to conduct the client's

⁶⁰¹Corbin and Strauss, *Grounded Theory Research: Procedures, Canons, and Evaluative Criteria*, above n 52, 6.

interview before interviewing the lawyers, subject to their availability. Judges' interviews were conducted in their private rooms, and the court staffs were interviewed in the office room. Regarding experiences, the clients suffered most because of huge backlogs, and the other participants are closely related to the court proceedings and had a number of years' experience.

Charmaz indicated that the interview process impacts upon the collection of data, which ultimately affects theory development.⁶⁰² That was the reason to be cautious at the time of data collection. A casual and relaxed atmosphere was deliberately encouraged from the very beginning of the interviews. To make the participants relaxed, the interviewer introduced herself as 'a researcher' and tried to make them at ease and comfortable. For the clients, lawyers and the court staff, it was not possible for them to discover her previous designation (the interviewer had previously been working as a judge in the Subordinate Courts of Bangladesh) as her designation was carefully concealed to keep them free from any kind of undue influence. However in the case of judges, some of them knew her as a judge and as a former colleague and co-trainee. However, it could be strongly argued as they were on the same level (senior assistant judges), there was no chance of influence or undue influence; rather they were open to share additional information beyond the questions provided to them in advance. Face to face interviews lasted for 45 to 60 minutes. All the participants except one agreed on to be recorded. Besides an audio record, handwritten records of the interview were made contemporaneously and transcribed immediately after data collection into the computer on an Excel sheet.

DATA ANALYSIS PROCESS

Strauss and Corbin define grounded theory as derived from data, systematically gathered and analysed through the research process.⁶⁰³ The grounded theory is an instrument of the research process and as such, data analysis depends on the researcher's analytical skills and creativity, and the interconnections between as well comparison among the data that can be interpreted to develop theory.⁶⁰⁴ They also stressed that the researcher must not begin with a preconceived theory in mind unless the purpose is to elaborate or extend that theory.⁶⁰⁵ This study generally

⁶⁰²Charmaz, above n 68, 29-30.

⁶⁰³Strauss and Corbin, *Basics of Qualitative Research*, above n 57, 12.

⁶⁰⁴*Ibid* 12.

⁶⁰⁵*Ibid* 12.

utilized the procedure described by Strauss and Corbin for analysis of the data; however the procedural steps were not rigidly adhered to, rather applied creatively and flexibly.⁶⁰⁶

Observational notes were recorded relating to the participants, including his or her non-verbal communications, as well as the court environment, the work environment and even the court procedure beyond the law: for example, the record keeping procedure, communication among the clients, lawyers, court staff and the judges, management of the logistic support,⁶⁰⁷ influence upon the court staffs by clients or lawyers. Whilst it may appear that the data analysis commenced after the completion of all the interviews, in accordance with the grounded theory method, data collection and analysis were actually simultaneous processes as indicated previously.⁶⁰⁸

To facilitate confidentiality, all identifying information was subsequently removed from the data, with each participant as well as case records being assigned an alphanumeric code. For example, Judges were identified as 'J' with number (J1, J2J7) ; Clients as 'C' with a relevant matching number (C1, C2C7), Court staff added as 'S' (S1, S2S7) and Lawyers as 'L'(L1, L2,.....L7). These codes were assigned at random to participants and do not represent the sequence in which the interviews occurred; however all the interviewees from one district can be identified by a similar numeric number. In addition the case records were numbered as CR-1, CR-2, CR-3....CR-7 and the courts were numbered as D1, D2, D3.....D7Memo writing and comparative analysis were utilized throughout the study and also assisted the process of open, axial and selective coding as suggested by Strauss and Corbin.⁶⁰⁹

Interviews and Case Records→ Coding→ Memos →Concepts→Categories→Analysis→ Theory generate.

To analyse the data the above procedure was followed.

Grounded Theory Method Analysis

⁶⁰⁶Ibid 10-13.

⁶⁰⁷See Glossary at page no xiii for 'logistic support' definition.

⁶⁰⁸Corbin and Strauss, Grounded Theory Research: Procedures, Canons, and Evaluative Criteria, above n 52, 6; Strauss and Corbin, Basics of Qualitative Research, above n 57, 57-58.

⁶⁰⁹Corbin and Strauss, Grounded Theory Research: Procedures, Canons, and Evaluative Criteria, above n 52, 12-16; LaRossa, above n 39,840.

Corbin and Strauss urged caution in choosing samples for data collection, as the data analysis of the samples led to the building of concepts.⁶¹⁰ In turn, the concepts can be compared to each other to achieve a greater precision and consistency. They argued that precision increased when comparison takes place of incident to incident. They also emphasized the need for consistency of the data, otherwise it would not demonstrate any accuracy.

Grounded theory analysis starts from the very beginning of data collection.⁶¹¹ Then it is the skill of the researcher to label her analysis into concepts as theory cannot be built on raw data. These concepts would preferably be more numerous and abstract as they go on.⁶¹² Strauss and Corbin identify comparative analysis as an essential feature of the grounded theory methodology. Throughout the analytic process, the constant comparative method was used to compare incident to incident and to identify the similarities and differences in order to facilitate the development of concepts.⁶¹³ Constant comparative analysis assisted in grouping concepts under higher order categories.⁶¹⁴ Corbin and Strauss saw the developed categories as the cornerstones of developing theory. This technique allowed a comparison of data against itself, against other data and also against conceptualizations.

Coding

Coding in accordance with the framework of grounded theory is an emergent ‘dynamic and fluid’ process.⁶¹⁵ Data is coded in different ways (a sample of these Nodes and Codes is attached to [Appendix G](#)). Corbin and Strauss described the three basic types of coding in grounded theory.⁶¹⁶ Thus these codings are described as below:

Open coding

The first is open coding through which the analysis begins through developing concepts.⁶¹⁷ During this time, broadly speaking, data are broken down into discrete parts, closely examined

⁶¹⁰ Strauss and Corbin, *Basics of Qualitative Research*, above n 57, 43-44; Corbin and Strauss, *Grounded Theory Research: Procedures, Canons, and Evaluative Criteria*, above n 52, 7.

⁶¹¹ *Ibid* 6.

⁶¹² *Ibid* 7.

⁶¹³ Strauss and Corbin, *Basics of Qualitative Research*, above n 57, 78-85.

⁶¹⁴ Corbin and Strauss, *Grounded Theory Research: Procedures, Canons, and Evaluative Criteria*, above n 52, 7.

⁶¹⁵ Strauss and Corbin, *Basics of Qualitative Research*, above n 57, 101.

⁶¹⁶ Corbin and Strauss, *Grounded Theory Research: Procedures, Canons, and Evaluative Criteria*, above n 52, 12; see also, LaRossa, above n 39, 840-8.

⁶¹⁷ Barney G. Glaser, *Theoretical sensitivity* (CA: Sociology Press, 1978) 56.

and compared for similarities and differences.⁶¹⁸ On the other hand Strauss and Corbin described it as the interactive process of analysing data after separating them into concepts.⁶¹⁹ Corbin and Strauss then described how in open coding variables (events/actions/interactions) are compared with others to discover similarities and dissimilarities between them and to label them conceptually. Conceptually similar events are grouped into categories, which are the basis of theoretical grounds. Open coding encourages the researchers to go back to the field to clarify any ambiguity. Therefore in initial coding the labels were generally descriptive, with some being the actual words used by the participants. The example of how the open coding has been used in this study is included at Appendix E.

Initially the codes were written manually and then transferred into Microsoft Excel and Word 2010. But later Nvivo 10 software was used to make the process of coding in the form of *nodes* and subsequent analysis more easy. But mostly the analysis process was done manually. Line by line analysis allowed careful comparison of new data with that already coded. The concepts identified as similar were grouped together to build a category.

How many cases are you taking care of?

This concept led to the category of ‘case load upon the lawyers’.

Axial Coding

Axial coding is the process of reassembling data that was fractured during first coding.⁶²⁰ The difference between open coding and axial coding comes down to the difference between a typology and a theory. In open coding, the researcher for the most part is developing variables. The variables may be elaborate, but how they are interrelated remains largely unexplored. In axial coding, categories are related to their sub-categories (if this occurs) and also to ascertain the indicators of them (Why or how this occurs).⁶²¹ Thus categories are concepts, derived from data.⁶²² It looks at how categories crosscut and link. Corbin and Strauss mention that categories

⁶¹⁸Strauss and Corbin, Basics of Qualitative Research, above n 57, 102.

⁶¹⁹Strauss and Corbin, Basics of Qualitative Research, above n 57, 102; Corbin and Strauss, Grounded Theory Research: Procedures, Canons, and Evaluative Criteria, above n 52,12.

⁶²⁰Strauss and Corbin, Basics of Qualitative Research,above n 57, 124.

⁶²¹LaRossa, above n 39,849; see, Strauss and Corbin, Basics of Qualitative Research, above n 57, 123-5.

⁶²²Ibid 130.

represent a phenomenon that is a problem, an issue, an event or a happening that is defined as being significant.⁶²³

Axial coding provides a framework for the researcher to apply and this framework may extend or limit the researcher's vision. This framework was used in this study to brighten the clarity of the links between the categories and their subcategories. For example:

How many cases have included in your diary in the last calendar year?

How many cases have you completed in the last calendar year?

Who, why, how were segregated of category to find out the 'indicator' of the happening/not happening of a thing. From the above questions the last two questions were asked to understand more elaborately how the caseloads are upon the lawyers (Axial Code).

Selective Coding

The third method is selective coding. Selective coding is the process by which all categories are unified around a 'core category' (central category) which represents the main theme of the research.⁶²⁴ This type of coding is likely to occur in the later phases of a study. The core category represents the central phenomenon of the study.⁶²⁵

It involves the identification of the core category or the major theme of the research from which the theory will emerge and major categories are related to it through explanatory statements of relationships.⁶²⁶ The core category identified in this study was labelled 'causes of delay', constituted by the sub categories 'mediation', 'caseload upon the judges and lawyers', 'relation among clients-judges-lawyer-court staff', 'involvement of the higher court', 'not maintaining the time frame', which were related directly to and integrated with the core category and continued until the completion of this thesis. The 'generalizability' of a grounded theory is partly achieved through a process of abstraction that takes place over the entire course of the research.⁶²⁷ Once the basic theoretical scheme had been identified, the theory was refined through further theoretical sampling and data analysis until accuracy was achieved.⁶²⁸ Selective coding allows the

⁶²³Ibid 124.

⁶²⁴Ibid 146.

⁶²⁵Corbin and Strauss, Grounded Theory Research: Procedures, Canons, and Evaluative Criteria, above n 52, 14.

⁶²⁶Strauss and Corbin, Basics of Qualitative Research, above n 57, 146-8.

⁶²⁷Corbin and Strauss, Grounded Theory Research: Procedures, Canons, and Evaluative Criteria, above n 52, 15.

⁶²⁸Strauss and Corbin, Basics of Qualitative Research, above n 57, 212.

researcher to account for variations both within and between the categories which are identified. The grounded theory that is used in this study is that proposed by Strauss and Corbin.

For example, ‘Do you think the case burden upon the lawyers also has impacts in delaying the court procedure?’ The open code and axial code identified the case load upon the lawyers and this question was related to the core category ‘causes of delay’ to identify whether caseload upon the lawyers could delay the court proceedings (following selective code).

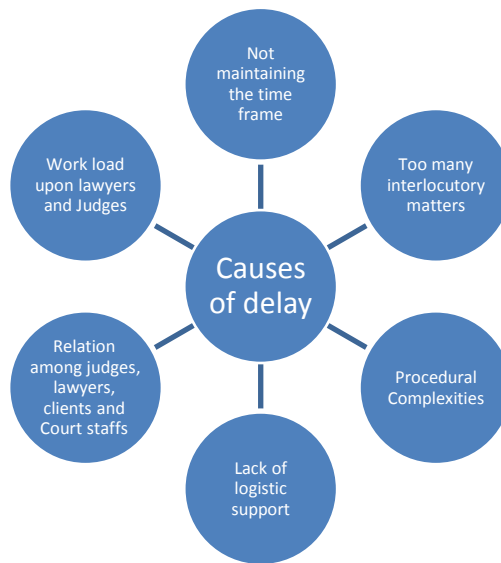


Figure V.2: The Core category and sub categories

Memo Writing

Memo writing is the gap analysis intermediate step between data collection and the drafting of the theory.⁶²⁹ Memo writing in grounded theory is a crucial method as it prompts the researcher to analyse data and codes early in the research process by writing memos at the commencement of the study and continuing until the completion of the research. Memos catch the thoughts, capture the comparisons and connections and crystallise questions and directions to pursue.⁶³⁰ Thus memos can be in several forms: code notes, theoretical notes, operational notes and sub-varieties of these and a single memo may contain any of these different types.⁶³¹ Memos were kept as notes to self and these notes provided a means of documenting thoughts related to the

⁶²⁹Corbin and Strauss, Grounded Theory Research: Procedures, Canons, and Evaluative Criteria, above n 52, 10.

⁶³⁰Charmaz, above n 68, 72.

⁶³¹Strauss and Corbin, Basics of Qualitative Research, above n 57, 218.

codes, the emergent categories, and the interaction of the categories as the study progressed.⁶³² These notes were recorded when they occurred and were hand written. Sorted and resorted during the writing process, theoretical memos developed a firm base for the research and lead to developing theory.⁶³³

Strauss and Corbin expanded the original notion of grounded theory memoing by identifying various types of memos. Code notes, theoretical notes, operational notes and logical and integrative diagrams were all proposed in Strauss and Corbin's expansion with an expectation that these memos would be at the conceptual level, corresponding to the coding stage that they relate to.⁶³⁴ However, Charmaz (2006) indicated that the memos may be free and flowing.⁶³⁵ Though theoretical memo and code note writing procedures are specific to grounded theory, the recording of field notes and interview data is not appreciably different from the techniques used by other qualitative researchers.⁶³⁶ In this study the researcher followed the Strauss and Corbin (1998) procedure in writing memos.

DISCUSSION

What the Law says and how it applies in the Stages of a Civil Trial Court

When a dispute arises, the aggrieved person comes to the Court to release his grief and seek justice with due process. Every Civil Court tries all suits of a civil nature if they are not explicitly barred by law. A suit of a civil nature means any dispute arising out of a right to property or a right to an office.⁶³⁷ It is also stated that every suit shall be instituted in the court of the lowest grade competent to try it.⁶³⁸ For that reason, for this study the competent lowest graded civil courts were chosen; these are the Assistant Judge's Court and the Senior Assistant Judge's Court. Though the *Code of Civil Procedure 1908* (Bangladesh) has not defined the word 'suit,' a suit is considered to be a civil proceeding filed in civil court by the aggrieved person, institution, legal entity or the State, whose civil right has been violated. From the filing till resolution, a case had to cross some stages.

⁶³²Corbin and Strauss, Grounded Theory Research: Procedures, Canons, and Evaluative Criteria, above n 52, 10.

⁶³³Ibid 10.

⁶³⁴Strauss and Corbin, Basics of Qualitative Research, above n 57, 218.

⁶³⁵Charmaz, above n 68, 80.

⁶³⁶Corbin and Strauss, Grounded Theory Research: Procedures, Canons, and Evaluative Criteria, above n 52, 11.

⁶³⁷*Code of Civil Procedure 1908* (Bangladesh) s 9.

⁶³⁸ibid s 15.

Stages of the Civil Suits in law	Time limit in law for each stage (in days)	Time spent in practice in each stages on those seven sample suits (in days)(on average)
Submission of plaint	0	0
Issue of summon	35	68
Appearance of defendant/s and submission of written statement	60	275
ADR/Mediation	107	541
Framing of Issues	15	282
Steps for discovery production and inspection	24	77
Settling date for peremptory hearing	0	435
Peremptory Hearing	120	1680
Argument	0	
Pronouncement of Judgement	7	
	Total = 368	Total = 3357

Figure V.3: The Stages of Civil Suits in Bangladesh including time allocated in law and time spend in practice (though none of the seven suits had even completed the peremptory hearing stage (taking evidence)).⁶³⁹

⁶³⁹ None of the suit was disposed through mediation, nor even properly attempted to mediate.

Submission of Complaint

When a dispute arises regarding any matter of a civil nature, any party can file a suit through application, which is commonly known as the complaint. This is the very first step of a civil suit. The person who submits the complaint is called the plaintiff and the person against whom the plaintiff files the suit is called the defendant. Along with submitting the complaint, the plaintiff must pay court fees and the cost of serving summons, and he must also submit as many copies of the complaint as there are defendants.⁶⁴⁰ The Court officer (known as the *Sheristadar*⁶⁴¹ in Bangladesh) shall examine the complaint to ascertain whether it has been duly presented in accordance with the provisions of the *Code*,⁶⁴² after which he will list the case in the register book, along with the number of the case.

In practice, it is the lawyer who prepares the application, with all necessary documents, and submits them to the court. Most of the clients interviewed were found to be illiterate, and do what their lawyer advises them to do. Moreover, it emerged from the interviews that most clients were completely ignorant about their cases, not even knowing what type of case it was. This applied to five out of the seven clients interviewed: they simply followed their lawyer's instructions.

Preliminary observation found no delay occurred at this stage.

Service of Summons

This is the process by which the court officer, in keeping with the purpose for which he was appointed, is obliged to inform the defendant that a suit has been filed against him. A court notice (summons) is sent to the defendant along with a copy of the complaint, so that the defendant knows what allegation has been made against him, enabling him to prepare accordingly.⁶⁴³ Generally, the time limit for issuing a summons is five working days, and a summons will be served within thirty days, but the serving of the summons depends upon the Judge.⁶⁴⁴ Recent amendments in 2012 to the *Code* have included the use of a courier, fax and electronic mail as modes of serving

⁶⁴⁰See the *Code of Civil Procedure 1908* (Bangladesh) Or. IV rule 1.

⁶⁴¹*Sheristadar* is the Office administrative officer. For each and every court there shall be a *Sheristadar* who will be responsible for the administrative work of the Court. They are also appointed by the Government but not necessarily from the Law background.

⁶⁴²See *Civil Rules and Order* (Bangladesh) Vol 1, Chap2, r 55.

⁶⁴³See, *Code of Civil Procedure 1908* (Bangladesh) s 27.

⁶⁴⁴See, *Code of Civil Procedure (Amendment) Act 2012* (Bangladesh) O. V r 1, 9(5).

a summons in addition to summons through court officer and post office,⁶⁴⁵ as well as the summons being served by the plaintiff himself.⁶⁴⁶ The amendments also require the court to determine the time of appearance of the defendants at the time of issuing the summons, whether it is for the settlement of issues or for final disposal of the suit.⁶⁴⁷ Therefore the defendant has sufficient time to prepare and present his witnesses when he would appear in the court.⁶⁴⁸ But this requirement is seldom applied by the courts.

However, at the time of data collection, hardly any cases had reached the peremptory hearing stage since the 2012 amendments. From the sample of suits (7 cases) it emerged that, on average, in each case it had taken 68 days (2 months) for the summons to be served, the longest time being 170 days (5 months) (in the case of CR-6, D6). In this case the summons had been served on 6 February 2007, while the case had been filed on 20 August 2006. The record revealed no reason for this delay. Research found that the court had first fixed a date for the return of summons on 11 October 2006 but as only the *adalot summons*⁶⁴⁹ was returned and the postal summons was not returned by the scheduled date the court fixed another date for return of the postal summons. According to the 2012 amendment, service of summons in only one mode either by court officer, or by post or courier service or even by the plaintiff himself would have been enough to satisfy the Court.⁶⁵⁰

⁶⁴⁵See Ibid s 9A. Before that only the summons through court officer and post office were in operation. It also ensures that any mode of serving summons would be enough to declare that the summons has been served.

⁶⁴⁶See *Code of Civil Procedure (Amendment) Act 2012* O.V r9A.

⁶⁴⁷*Code of Civil Procedure 1908* (Bangladesh) O .V r 5,6.

⁶⁴⁸Ibid O .V r 8.

⁶⁴⁹*Adalot* summons is sent by the court's officer to the defendant's address/es; postal summons is sent through the government post office to the defendant's address/es.

⁶⁵⁰See the *Code of Civil Procedure 1908* (Bangladesh) O. V r 31.

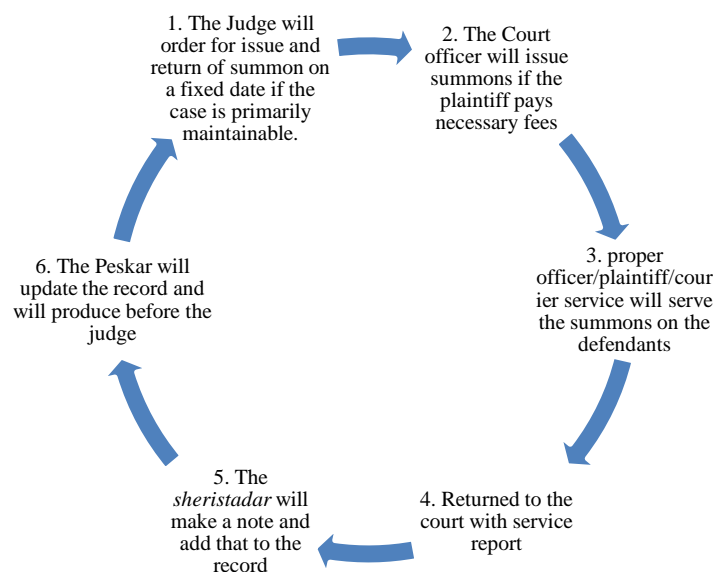


Figure V.4: How Summons are Served in the Civil Courts of Bangladesh

J2 shared his contemporary experiences, as follows:

we the judges do not monitor whether the summons has been returned or not, and if not, why? The receipt is left in the office day after day and the Peshkar⁶⁵¹ assigns dates one after another and the judge hardly can manage time to go through each document as he is already overburdened.

He suggested that strong monitoring and coordination is required to speed up the service of summonses. Because a number of people are involved in this process, it is necessary that there be good co-operation between them. Insufficient time has elapsed since the 2012 amendment to assess its effectiveness, but preliminary observation suggests that it is unlikely to have made or to make any difference (as indicated by the experience of the J2), as no proper system has been put in place to monitor whether summonses are returned after service or not.

Submission of the Written Statement

When the defendant hears what allegation has been made against him, it is his duty to go to the court and submit a statement in writing, popularly known as a submission of written statement.

⁶⁵¹ *Peshker* is the Court's Assistant.

Usually the time limit for the submission of this written statement is 30 working days.⁶⁵² However, the court can extend the time to up to 60 working days⁶⁵³ if it thinks this necessary.

If the defendant does not appear in court within the time specified in the summons, or does not submit a written statement within the required time—say 60 working days—then the court holds the case for an *ex parte* hearing, and after taking documentary and oral evidence, the Court pronounces judgment.⁶⁵⁴

In practice, judging from the seven sample suits, each case needed, on average, 275 days (9 months) for the written statement to be submitted. Among these, the most drawn-out case was that of CR-7, which took 539 days (18 months). During this time the defendant did not initially appear, and the Court held an *ex parte* hearing. While the case was proceedings *ex parte*, the plaintiff appeared for an interlocutory matter (an injunction prayer). At that time the court then again issued a notice upon the defendant, following which the defendant appeared at the court and finally submitted a written statement. The court accepted the written statement at the cost of BDT 300. It was asked, ‘Why was the written statement submitted beyond the specified time, was accepted?’ J7, a Senior Assistant Judge, explained that there is scope for going to a higher court if a written statement is not accepted by the judge because it has not been submitted in time — an opportunity often used by defendants. So usually the judges accept their written statements even if they are not submitted in time to as to avoid the possibility of appeal to a higher court. Nevertheless, there is frequent interference by the higher courts that often delays proceedings. None of the seven cases maintained the time limit (of 60 days) for submitting the written statement.

Alternative Dispute Resolution

In civil procedures, mediation is often referred to as Alternative Dispute Resolution (ADR). An optional ADR provision was inserted in the *Code of Civil Procedure* in 2003, and in 2012 it became compulsory for the judge to suggest mediation to resolve disputes between parties.⁶⁵⁵ There are options to appoint an outside mediator; the cost of mediation will be borne by the

⁶⁵² See *Code of Civil Procedure 1908* (Bangladesh) O. VIII r 1.

⁶⁵³ See *Ibid* O. VIII r 1.

⁶⁵⁴ See *Ibid* O. VIII r 1.

⁶⁵⁵ Mediation has become compulsory by *Code of Civil Procedure (Amendment) Act 2012* (Bangladesh) which came into effect on 24 September 2012.

parties. But if they fail to agree upon a mediator, the court will appoint one. The mediator is required to stipulate the conditions and terms of mediation between the parties in writing, and both parties must sign with thumb impressions; that document will then be submitted to the court if the mediation is successful.⁶⁵⁶ Otherwise, the mediator will refer the matter back to the court if it is unsuccessful. The general rule is that mediation must be concluded within 60 days of referring for mediation which can be extended another 30 days only.⁶⁵⁷ The whole procedure is not to exceed 107 days.⁶⁵⁸

In two of the sample suits it was found that the case did not precede to mediation, nor had the court even recommended mediation, and the parties and their lawyers had overlooked this stage. In the case of CR-4, it was found that the court had skipped this stage, and at the time of the interview, C4, the plaintiff, stated that ‘the defendant met her once personally for mediation’ out of the court without lawyers or courts’ involvement, but the plaintiff expressed no interest because she thought that if she agreed to mediation she would lose the case and the mediation failed. The same happened in CR-5’s case, where the mediation stage was skipped and took the case directly to the next stage. C5, one of the plaintiffs in CR-5’s case, strongly expressed his opposition to mediation at the time of interview: ‘Why should I mediate, I have filed the case not to mediate with the defendants’. The plaintiffs’ views in those two cases were that if they mediated they would lose the case.

Most judges and lawyers appear disappointed at the low number of instances of disposal of cases through mediation. The only exception was in D5, where the judge had been successful in mediating between the parties in 80% of cases. However, the court statistics showed that in 2012, only 11 percentage of the total disposal was through mediation. At the time of interview it was revealed that the interviewee judge had been appointed from a magistrate’s court to that court just the month before the interview had taken place, and the above figure given by the judge was about his previous criminal court. The majority of judges and lawyers believe that the present law is perfect for mediation, although one lawyer from D3 said that the present ADR system should made easier and simpler.

⁶⁵⁶See *Code of Civil Procedure 1908*(Bangladesh)s89(5).

⁶⁵⁷ See *Ibid* s 89(4).

⁶⁵⁸*Ibid* s 89A.

The statistics from D4 showed that the total number of cases disposed of in the year 2012 was 406 and that among them only 27 cases were disposed through mediation. In D5 it was found that only 30 cases were disposed through mediation, out of 263. The disposal rate through mediation is not satisfactory. In the seven sample suits, none was disposed through mediation, nor even any proper initiative was taken to resolve through mediation; however time spent was in this stage even more than the law specified, and was on average 541 days. The average percentage of mediated cases across the seven courts in 2012 can be seen in Figure V.5:

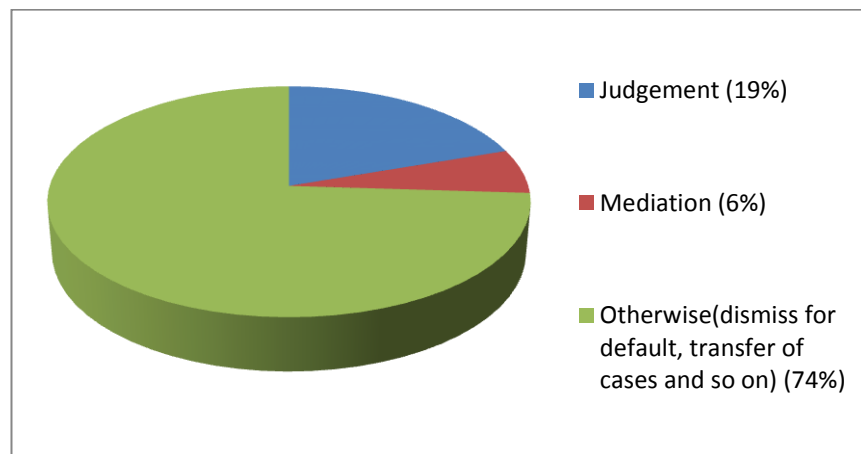


Figure V.5: Manner of Disposal in Seven Senior Assistant Judge Courts of Bangladesh in 2012⁶⁵⁹

Framing of Issues

If mediation is successful, the dispute will end there. However, if ADR fails, the case goes back to the original court or an alternative court if the District Judge thinks it appropriate and the court shall proceed with first hearing of the suit from the stage at which the suit stood before the decision to mediate. At the first hearing the court will ascertain from each party or his pleader whether he admits or denies such allegations of fact as are made in the plaint or written statement. The court will record such admission or denials.⁶⁶⁰ During this stage the court isolates

⁶⁵⁹If a case is disposed through mediation, the case is disposed finally as no appeal/review lies from mediation. If a case is disposed through judgement, an appeal/review can still arise from that judgement; and if a case is disposed through other methods, for example, transfer to another court, that means the case is not finally disposed but rather the listing shifted from one court to another court. If a case is disposed through dismissed for default that case can be restored again, as it does not comply the entire court procedure.

⁶⁶⁰ See *Code of Civil Procedure 1908* (Bangladesh) O.X r1.

the issues, both in law and regarding the facts, over which the parties disagree.⁶⁶¹ The time limit, according to the law, for framing issues is 15 days from the date of first hearing, or the submission of a written statement, whichever is later.⁶⁶²

In the seven sample suits, it was found that on average it took 282 days (9.4 months) for the framing of issues. In CR-4's case it stage took 1490 days (49.6 months). The reason for this delay was that the court had to frame the issues twice following the submission of written statements by the defendants, as there were a number of sets of defendants. At the hearing stage, in CR-4's case, it was revealed that the suit needed to cure non-joinder of parties⁶⁶³ as new defendants were needed be added in the suit and at that time the case was pushed back to the earlier stage of service of summons through amendment of the plaint, and new defendants were added⁶⁶⁴ and then the court reframed the issues. In the cases of CR-1 and CR-3 this stage of framing the issues took 157 and 101 days respectively. None of the seven cases completed this stage within the required time. The fastest was the case of CR-6 that took 26 days.

Steps for Discovery, Production and Inspection

Within 10 days of the framing of the issues, both parties may deliver interrogatories, discovery, inspection, production, impounding and return of documents or other material objects producible as evidence, to the other party in writing, and upon their delivery the court should make a decision within 14 days as to whether it is necessary to answer these interrogatories.⁶⁶⁵ The total time for this stage is limited to 24 days according to the *Code*. This stage is important for preparing the parties for the hearing, and for providing each side and the court with the relevant documents needed for arguing and deciding the case (discovery), although there is limited use of this step in practice. This stage can be compared adversely to the subpoena (Page no xxiv) process of the New South Wales District Court.⁶⁶⁶

⁶⁶¹See Ibid O. XIV r4.

⁶⁶²See Ibid O. XIV r5.

⁶⁶³Non-joinder of parties generally means not to join all the persons who need to be joined in the suit. Order I rule.9 of the *Code of Civil Procedure* 1908(Bangladesh) ensures that no suit shall be defeated only for the non-joinder and misjoinder of parties. However, there are some specific laws which make obligation to cure non-joinder of parties by including all the co-sharer tenants as parties to the suit. For example, section 96(2) of the *State Acquisition and Tenancy Act 1950* (Bangladesh)

⁶⁶⁴See *Code of Civil Procedure* 1908 (Bangladesh)O. I r. 10(4).

⁶⁶⁵See Ibid 30 and O. XI r 1-2.

⁶⁶⁶New South Wales District, *Practice Note Dc (Civil) No. 1*, s 6.

In the seven sample suits this stage took, on average, 77 days (2.5 months). In the case of CR-5 it took 212 days (7 months). After perusing his case records, it was found that both parties had applied for extra time, and that the court had allowed it. In this case the plaintiff and the defendants were at least able to use the time for the delivering of interrogatories. In the rest of the sample suits, however, neither party took any such initiative. In the case of CR-2 the court skipped this stage altogether, and set a date for the next stage. So from these seven sample suits it can be inferred that in most of the cases neither the court nor the parties or their lawyers felt the necessity to utilize this stage proactively, nor to comply with the statutory deadlines.

After this discovery stage, the suit is scheduled for the peremptory hearing; however, by convention, there is a transitional stage.

Settling Date for Peremptory Hearing

This ‘settling date’ (SD) stage is a transitional one between the discovery stage and the peremptory hearing stage. It is a conventionally accepted stage, though not specified in the *Code of Civil Procedure 1908* (Bangladesh). The practice is to defer the suit in this stage, if the Court Diary⁶⁶⁷ is full. According to the *Civil Rules and Order*, there must not be a total of more than 5 cases in the list for peremptory hearings in each working day, and the total number of cases set for hearing (taking evidence) must not exceed 100 cases in total in the *Cause List* of the Court at a time.⁶⁶⁸ The *Code of Civil Procedure 1908* (Bangladesh) is very clear and restrictive about the fixing the number of suits in the daily *Cause List*. If there are more than 120 cases pending for trial, then the new cases being readied for trial must remain pending until the number on the *Cause List* has been reduced.

The empirical evidence provided by the seven sample suits indicates that the settling the date for peremptory hearing (SD) stage takes, on average, 435 days (14.5 months). Among the sample suits, the case of CR-4 was delayed at this point for 1226 days (40.80 months). On perusing the case record it was found that the SD stage for this suit was initially scheduled to begin on 16 March 2010, and at this stage, the plaint was amended, new defendants added, and then the suit was referred back to the service of summons stage. The SD stage was then set to begin on 19

⁶⁶⁷ A Diary in the prescribed form to be called the Diary of the Court shall be maintained by each Civil court in the manner prescribed by *Civil Rules and Order* (Bangladesh) r 12.

⁶⁶⁸ See *Code of Civil Procedure 1908* (Bangladesh) O. XVIII r 20

May 2013. In the rest of the cases it was found that the court's diary was full and thus the court could not insert the new case into the list in accordance with the law. Observations made while selecting the cases for the interviews discovered that, although there is a restriction against scheduling more than five cases for hearing on each day, the usual practice is to list eight to ten cases for hearing, because of the extraordinary pressure from clients for new cases to go to trial, and also because of the backlogs. Once a date has been settled, the case proceeds to hearing.

Peremptory Hearing

A peremptory hearing is the trial stage in the progress of a suit, where the judge takes evidence, both oral and documentary, to consider questions of both law and fact to determine the suit. It is generally accepted that the plaintiff starts to give evidence through an opening speech first. Examination of a defendant's witnesses before the examination of the plaintiff is not regarded as acceptable.⁶⁶⁹ However it really depends upon who bears the burden of proof on the matters in issue in the trial.⁶⁷⁰ As soon as the case is opened by the plaintiff (or defendant depending on the right to begin according to Order XVIII rule 1 of the *Code of Civil Procedure 1908*(Bangladesh), he will call the witnesses on his side one after another and will examine them.⁶⁷¹ The documentary as well as oral evidence is proved at this stage. It is each party's responsibility to ensure their witnesses are prepared to give evidence. The witnesses are then summoned to give evidence; section 32 of the *Civil Procedure Code 1908* (Bangladesh) confers power on the Court to compel the attendance of a witness by issuing a warrant of arrest if they do not appear before the court after service of summons. The Court also has discretion, on showing of sufficient cause, to allow adjournment up to a maximum of six times for each party.⁶⁷² Order XVII rule 1 states that the court shall award costs to the other side in case of adjournment beyond six times.

None of the sample suits had completed its peremptory hearing. In the case of CR-1, the peremptory hearing stage had already comprised 642 days (21.4 months), with only the examination of the plaintiffs' witnesses having been completed, with the examination of the defendant's witnesses still to come. In CR-2's case 3869 days (129 months or 10 years) had passed in this peremptory hearing stage. The case record showed that the case had been fixed for

⁶⁶⁹Mahmudul Islam & Probir Neogi *The law of Civil Procedure* (2006) 772.

⁶⁷⁰*Code of Civil Procedure 1908* (Bangladesh) O. XVIII r1.

⁶⁷¹*Ibid* O.XVIII r2-17.

⁶⁷²See *Ibid* O. XVII r 1.

its peremptory hearing on 26 February 2003. But the case did not proceed to hearing, as further service of summonses was needed for newly inserted defendants because of amending the plaint, and thus the case then reverted to the service of summons stage, and then the settling of the date stage, and finally a date was again fixed for the peremptory hearing on 5 August 2008, which was still in progress at the time of data collection.

It was found that in most of the sample cases, both plaintiff/s and defendant/s petitioned for extra time. In the case of CR-3, 23 dates were fixed at this peremptory hearing stage for examining the plaintiff and his witnesses, and the examination had still not been completed. These dates were all one and a half months apart. Among these 23 dates, the court was otherwise occupied with other cases on four of them, both parties petitioned for extra time on nine of them (which the court allowed), and two of the dates were spent on other purposes—for example, issuing summonses to witnesses. Only the remaining eight dates were used for the examination of witnesses.

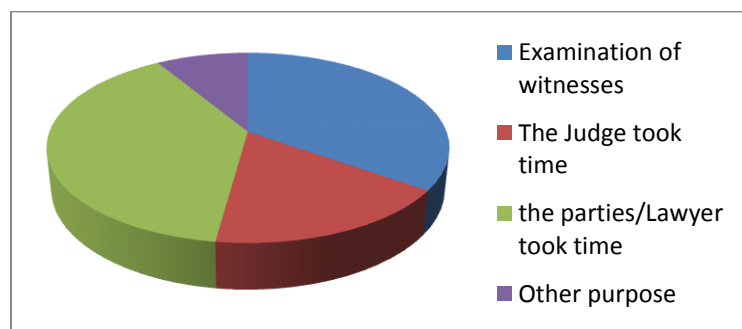


Figure V.6: Time Allocated at the Peremptory Hearing Stage in CR-3's (D3) Case (16 May 2011-29 August 2013)

Argument

This is another stage which exists in practice, but for which there is no specific provision in the *Code of Civil Procedure 1908* (Bangladesh). Order XVIII, Rule 2 (2) & (3) of the *Code of Civil Procedure 1908* (Bangladesh) states that:

The other party shall then state his case and produce his evidence (if any) and may then address the Court generally on the whole case. The other party beginning may then reply generally on the whole case.

After both parties have completed the production of evidence, the court fixes a date for hearing the summary of the case, and the lawyers of the both parties argue on their clients' behalf

according to the evidence as well as according to the law. Generally, delays do not occur in this stage.

None of the sample suits had reached this stage.

Judgment

After the case has been heard the Court pronounces judgment,⁶⁷³ and a decree follows.⁶⁷⁴ A judgment must be based on the evidence on record and should be concise, but must touch on all the important questions raised by the parties with reference to the issues in the suit.⁶⁷⁵ Judgments are enforced according to the direction written in the judgment. If there is no such direction, the plaintiff has to file a separate execution suit according to section 38 of the *Code of Civil Procedure 1908* (Bangladesh).⁶⁷⁶

None of the sample cases had reached this stage.

Appeal, Review, Revision, Reference (In Civil Suits)

There are four avenues available to seek reconsideration of a court's decision. They are different in kind, and also in outcome.

Appeal

Appeal is an undefined term; it means shifting the case from an inferior court to a superior one to test the soundness of the decision of the inferior court. It is the continuation of the original proceeding before a superior court. All the decrees followed by a judgment, made from the court of first instance, are appealable. However, not all orders⁶⁷⁷ are appealable, but only those allowed in Section 104 of the *Code of Civil Procedure 1908* (Bangladesh). An appeal from any order which is allowed by the *Code* shall lie to the Court to which an appeal would lie from the decree

⁶⁷³ Judgment means the statement given by the Judge of the grounds of a Decree or Order, see *Code of Civil Procedure 1908* (Bangladesh)s 2(9).

⁶⁷⁴ See *Code of Civil Procedure 1908*(Bangladesh) s 33.

⁶⁷⁵ Justice Mohammad Hamidul Haque, *Trial of Civil Suits and Criminal Cases* (Bhumika, 2011) 83.

⁶⁷⁶ *Code of Civil Procedure 1908* (Bangladesh) Or. XXI.

⁶⁷⁷ Orders are different from Judgment. According to section 2 of the *Code of Civil Procedure 1908*(Bangladesh), judgment means the statement given by the Judge of the grounds of a decree or order. Decree is defined at the same section as the formal expression of an adjudication, which conclusively determines the rights of the parties. Whereas, order mean the formal expression of any decision of a Civil Court which is not a decree.

in the suit.⁶⁷⁸ The right of appeal is substantive right. Unless otherwise is specified an appellate court can do the following:

- Determine the case finally by way of confirming, verifying or reversing the decision of original court.
- Send back the case on remand.⁶⁷⁹
- Re-frame issues and refer them for trial.
- Take additional evidence or require such evidence to be taken.

Review

Review means consideration, inspection or re-examination of a subject or thing. If a person is aggrieved by a decree or an order from which an appeal is allowed by this Code, or where no appeal is allowed, he may apply for a review of judgment *to the same court* which passed the decree or which made the order, and the Court may make such decision thereon as it thinks fit considering the following matters:⁶⁸⁰

- When new and important matter or evidence is discovered which after the exercise of due diligence was not within his knowledge, or could not be produced by him at the time when the decree or order was passed;
- When there is any mistake or error apparent on the face of the record;
- When there is any other sufficient reason.

Revision

Revision means re-examination of cases which involve the illegal assumption, non-exercise or irregular exercise of jurisdiction, especially on the issue of error of law.⁶⁸¹ Revision applies where no appeal lies.⁶⁸² Unlike appeal, revision is the discretionary power of the court and in revision the court cannot review the evidence unless this is enabled by statute.⁶⁸³ In this fashion it

⁶⁷⁸See *Code of Civil Procedure 1908* (Bangladesh) s 106.

⁶⁷⁹ To send on remand means send back to the original court from which the case was appealed with specific directions.

⁶⁸⁰See *Code of Civil Procedure 1908* (Bangladesh) s114, O. XLVII r 1.

⁶⁸¹See *Ibid* s115.

⁶⁸²See *Ibid* s 115.

⁶⁸³ See *Ibid* s115 (1) (4).

differs from both appeal and review. Only the High Court Division and the District Judge Court have the revision power.⁶⁸⁴

Reference

This is a power of the High Court Division. If the appeal court, the trial court or executing court at any time determines any question of law or usage having the force of law, by its own motion or upon the application of the parties can refer for the decision of the High Court Division.⁶⁸⁵ The High Court Division may make such order as it thinks fit.⁶⁸⁶

The provisions for appeal, review, and revision were taken into consideration during data collection, because sometimes delay of a case occurs because of an appeal, review or revision. However it proved that none of the sample suits was delayed due to an appeal, review or revision. Nevertheless, at the time of the interviews, all the judges agreed that appeal, revision or review are the options to involve a higher court in the case procedure which causes delay as the clients choose to seek a second opinion from the higher court frequently against the order given by the trial court, and that lawyers are always aware of this option. One of the lawyers identified this option as the main cause for delay. L6 commented: ‘the main cause for delaying the court proceedings is the frequent involvement of the higher court with the lower courts.’ He felt that the law should be changed to stop lawyers seeking such review so as not to cause any injustice to clients, since such procedures are often used as the means of delaying a case.

General Observational Findings to ascertain the Causes of Delay

According to the grounded theory methods, the core codes (selective code) were identified as ‘causes of delay’ and ‘way out’. The core code ‘causes of delay’ was segregated to categories and sub categories which were compared with each other to identify the gaps between law and fact and ultimately illustrating the causes of delay. In the next part, observational experiences during data collection are added here according to District followed by a discussion on identifying the categories.

⁶⁸⁴Ibid s 115.

⁶⁸⁵ Ibid S 113, O XLVI r 1

⁶⁸⁶See Ibid s 113.

Observational Experience

Overall observational experience was that most of the litigants selected for the interviews were either illiterate (just could sign their own name) or very little literate. Almost all of them trusted their lawyer blindly. At the same time they agreed that their cases were delayed. All the clients were agreed that they were not asked for mediation properly by the court, or by the lawyers. All the lawyers agreed that there should not be any restriction on the number of cases a lawyer may have at any one time. At the same time it also seemed that the lawyers were too busy running around from one court to another and it was really very difficult to catch them for the interview. All the participants agreed that the number of the courts and the judges should be increased except two judges. Most of them agreed upon changing the procedure. All the clients want to speed up the whole procedure, though the court staffs tended to say that if both parties agreed upon expedition of a case it does resolve quickly, and that a case delays because of the intention of the parties and their lawyers. Among seven districts, I found no regular judge in two districts. Apparently the judges are young and energetic and courageous and want to ensure speedy disposal of cases. The judges and the court staffs point to the lawyers for delaying the cases. Most of the court staffs do not have any clear concept of the law and they do not have any computer skills at all. The court staff and most of the judges agreed that they do not have sufficient logistic support; but at the same time a few of them assert that this could not be a cause of delay, as they (the court staff) manage logistics by themselves. Court staff could not answer satisfactorily questions concerning how they managed a large degree of logistic support by themselves, and why it could not be a cause of delay. It was also found that though the law specifies listing for hearing not more than 5 cases, all the courts frequently exceed the limits due to pressure. It was also found that the Assistant Judge Court and the Senior Assistant Judge Court do not have any stenographer to help them in writing judgments.⁶⁸⁷ Also four of the judges shared their personal opinion regarding job satisfaction. They shared that if they work very hard it is not recognised; poor salary is another matter. The District Judges were very cooperative and helpful, and they instructed any concerned judges and the staffs to help in the research. Some of them shared their own experiences and their thoughts regarding case management in the courts of Bangladesh. One thing I should mention is that the political condition of the Bangladesh at the

⁶⁸⁷From the Joint District Judge and on wards each judge gets stenographer, who take dictation from the judge and help them in writing judgement. But Assistant Judge and Senior Assistant Judge are not entitled to get stenographer. They need to write judgement and order by themselves.

time of interview (September 2013-January 2014) was in a very bad situation and due to continuous strikes I had to finish my data collection procedure as soon as possible for my own safety.

D1⁶⁸⁸

The suit I chose on a random basis was a suit for declaration. The suit was filed against the Government, and I choose the defendant (the Government) in this case and his lawyer, who was the public prosecutor. That was the first day, when C1 appeared (defendant) in that case on behalf of Government. Before him some other person appeared on behalf of Government. He had newly transferred to that area. It seemed that he hardly had any clear idea about the case. It seemed as though he thought: ‘it was a government case, so I will just appear in court and that is enough. It does not matter whether the case is quickly disposed or not because the Government spends money for the case’. On the Lawyer's part, it was found that the Lawyers are appointed by the Government, and they are known as GP (Government's Prosecutor). While sharing his experience, he said that sometimes people forcefully take possession of government property. When the government takes the initiative to eject them, they filed suit and try to delay their eviction. Government prosecutors are also paid less than privately engaged advocates, so they are not disposed to speed up the case. He further shared that even sometimes government employees, for example, in the land acquisition office or the registration office, also help those people by taking a bribe to delay the case as much as possible. Later on he also mentioned another (different) government case: he said that on behalf of government he already has appeared in that court but the case is still pending for service of summons from 2010. He got excited: ‘how this could be happening!’

The researcher was grateful to the Judge because he made time in his packed schedule. The Judge shared his experience: ‘every day on average I have to hear 300 cases. If this is the load, how shall I be able to do all this work with due care?’ He also said that, though there are timeframes in law, judges cannot strictly follow them because the courts are mostly lawyer-dominated and neither lawyers nor the clients would be helpful which would create problems in overall case management. From the court staff's experience, I found that they were too overburdened with work. This interviewer had to go the court on five days to be able to interview

⁶⁸⁸ The interviewees Courts were numbered as D1, D2, D3D7.

the court staff. The *Sheristadar* said that they had to satisfy the clients with their service and they can hardly make time to talk to them properly as the workload is very high.

D2

The case chosen in this District was a correction of deed case. Perusing the case record, it was found that the case was listed for the Peremptory Hearing once, but it had been referred back to an earlier stage again because another suit had been filed regarding the same land at issue between the parties.

The judge of this Court was very proactive, cooperative and also friendly. At that time, there was no regular judge in that Court, and the judge who was interviewed was regular judge of a different court but in charge of that Court. The client (Plaintiff) of the case had little literacy and he (the client) was not confident regarding the information of the case. When the client was asked about his expectation concerning resolution of the case, he counted the years and agreed that it was much delayed. He seemed disappointed at this long delay. He was satisfied with his lawyer's support. The Lawyer was also cooperative; he admitted that the workload upon the lawyers also caused delay. The court staff was transferred on the day of interview, and was busy with the handing over the work. But she was passionate to take part in the interview and tried to be cooperative even in her busy day. She also shared some of her personal opinions regarding her earlier judges. She shared that the judges are too busy to follow the law properly and the staff are also too busy to help the judge properly.

D3

I also found here that the regular judge had been absent for many days, and another judge was in charge of that court in an addition to his regular job. This was a suit for declaration, and the defendants were relatives of the plaintiff. The plaintiff agreed to be interviewed. The plaintiff wanted speedy disposal and claimed the defendants delayed the whole proceedings by submitting a petition for extra time. As there was no regular judge in that court, the in-charged Judge was relaxed about granting the time petition as he had to work for his regular court as well. The lawyer was also very cooperative, and asked many questions regarding the research and how it could be useful for the general people. The Judge was also very cooperative. Though he was overburdened working on two courts at a time he took time to answer the questions. The court staff was also cooperative.

D4

This is the District from where I first started my data collection. The suit chosen was a declaration suit. The plaintiff was a woman and she could just sign her name. She hardly knew anything about her case: for example, the stages of the suit or what she needed to do. While sharing her experience, she became emotional as she had to pay a lot for the case. The researcher felt that she was very influenced by her lawyer, and she did not have any opinions of her own. The lawyer at first showed some hesitation regarding taking part in the interview, but when the objectives were clarified to him he was agreed to take part. The regular Judge of the court was extremely busy, but she helped as much as she could. The court staff appeared to lack of knowledge of the law and the necessary legal proceedings or steps.

D5

The case chosen for the data collection purpose was a suit for declaration. The person who took part in the interview was not the original plaintiff: he was taking care of the suit by the power of attorney. It seemed that he had a very good knowledge about the whole procedure, but he had less knowledge about this particular case. The lawyer was very smart and energetic, and had a very clear concept about the law and its application procedure and also placed emphasis on the need for speedy disposal, and believed in giving clients' satisfaction. The presiding judge was newly appointed from the criminal court to civil court, so he had no clear concept of civil courts though he had in depth knowledge on the law. The court staff's performance was not satisfactory, in that there appeared to be a lack of knowledge about law and its application.

D6

The suit selected from this court was a title suit and the representing plaintiff was plaintiff no 4 of the case. He also had no very clear idea about his case. The lawyer was extremely helpful, sharing some of his personal experience regarding how delay occurs and where. He referred to some of his other cases, noting that some of them had been pending on appeal to the High Court Division for years in respect of some minor interlocutory matters. The presiding judge initially seemed unwilling to co-operate, but after direction from the District Judge tried to be cooperative. The court staff was also helpful, and seemed to have a good understanding of the law.

D7

This was a suit for a permanent injunction and the plaintiff was very old. His story was very touching. He had sold his most of the property to finance this suit and he has nothing left. Because of his age, he could not recall anything about the case. To him laws were complex and hard to understand, so he always followed his lawyer's advice. His lawyer also apparently seemed cooperative, but the researcher doubted how cooperative he was for his clients. The presiding judge was extremely helpful and the court staff had a very long experience and also had a clear concept of the law.

In addition to the observations mentioned above the identified categories are discussed below:

Time Frame in each stage is not maintained

The law specifies the time for each stage of a civil suit. Maintaining the timeframe in most of the cases is mandatory and accordingly a civil case should be disposed of by the trial court within 368 days (12 months or 1 year); but in the seven sample suits an average of 2510 days (84 months or 7 years) had passed from the date of filing and none had reached the argument stage, rather they had just arrived at the peremptory hearing stage.

In CR-1 case, it was found that the court had not followed the timeframe when fixing the date for the case. Though the law is not clear about who is responsible for fixing the dates before starting the peremptory hearing, the *Civil Rules and Order* (Bangladesh) clearly states that that it is the duty of presiding judges to fix the date at the peremptory hearing stage.⁶⁸⁹ It is further stated that, 'on the date finally fixed for the hearing of a suit, the trial shall begin and the evidence of witnesses shall be recorded from day to day until the trial is completed. Under exceptional circumstances, adjournment may be given after recording reasons necessitating such adjournment....' Rule 127 clearly states that if any adjournment takes place without the consent of all parties then the party desiring an adjournment should be punished by imposing costs.⁶⁹⁰ The *Code of Civil Procedure 1908* (Bangladesh) limits such adjournments: up to six times for each of the parties.⁶⁹¹

In case CR-1, the time spent for each stage according to the case records is as below:

⁶⁸⁹ *Civil Rules and Order* (Bangladesh) Chap 7 r 124.

⁶⁹⁰ *Ibid* Chap 7 r 127.

⁶⁹¹ *Code of civil procedure* 1908 (Bangladesh) or XVII, r-1,2.

Stages of the cases	Action taken	Gap between the dates	Explanation
Filing date of the case	24/01/2011		It was suit for declaration
Return of summons	31/03/2011	46	The summons was served on the first date scheduled to serve.
Submission of Written statement	1/02/2012	277	No explanation was made for delaying submission of written statement. But perusing the record it was found that the defendant was the Government and the Government's lawyer attended the case on 1st February 2012 with written statement. The court extended the time without any findings.
ADR 89A	6/02/2012	35	Neither of the parties attempted to mediate the case.
Framing of issues	9/07/2012	157	The court first fixed a date for framing of issues on 10/05/2012 but on that date the issues were not framed and on 09/07/2012 finally the issues were framed. I did not find any written reason as to why the issues were not framed on the first scheduled date.
Steps under section 30	9/09/2012	62	The court fixed the date after 62 days of framing of issues.
Settling date before peremptory hearing	11/11/2012	63	The court fixed the date after 63 days of earlier stage that is 'steps under section 30'.
Peremptory hearing	27/01/2013- 31/10/2013	277	On 3 October 2013 the examination of witnesses on behalf of the plaintiff has been closed and the next date for producing the witnesses on behalf of defendant was fixed on 31/10/13. The examination of witnesses on behalf of defendants was continuing on 31/10/2013.
Argument			As the examination of witness is not complete the date for argument was yet to be fixed.
Pronouncement of judgment			The case is still pending

Figure V.7: Time Spend in Each Stage in CR-1 Case

From the case record it could not found who fixed the date for the case. It could have been either the judge or the court staff. Whoever it is, it is clear that none of them followed the law. The CR-1(Figure-V.7) case is a suit for declaration filed against the Government of Bangladesh. Perusing the case record it was found that the suit was of simple nature. Here the defendant, the Bangladesh Government, submitted the written statement 277 days (9 months) after service of summons; the law limits the time to a maximum of 60 days (2 months) and preferably 30 days (1 month). Why did the court accept that written statement as it breached its time limit? One judge (J1) stated:

With some exceptions, most of the lawyers do not maintain the court's order within time. They want to make it as lengthy as possible. If the judge wants to execute the law strictly following the time frame, the lawyers do not cooperate with the court and it creates problem in court management. So the judge follows a middle way.

Another judge (J2) added that if they do not accept this kind of submission then the lawyers would go to the higher court on revision/appeal which will also be time-consuming so most of the judges avoid this stage and accept the written statement even if it is submitted beyond the time limit.

The peremptory hearing stage took 277 days (9 months) where the examination of plaintiffs' witness had just closed and the defendant's witness were to be heard. Rather than continuing the case on day to day basis, it was found that each adjournment was made for on an average one and half month to two months.

One judge (J3) said:

It became the custom and the clients are used to dealing with this. Now if I make myself busy continuously 5/6 days for one case, then the other lawyers and clients won't be happy. Besides because of the huge workload, cases listed for hearing today, will be actually begun after two years. Neither the clients nor the lawyers would support continuous hearing date.

The close study of the Cause List showed that the circumstances which lead to adjournments include the fact that the number of cases fixed for trial on a particular day are excessive therefore in most of the cases the judges freely grant allowed time petition submitted by the lawyers. Even

where there is no scope to use the discretionary power, judges reluctantly to do so due to workload.

However, the *Code of Civil Procedure 1908* (Bangladesh) explicitly ensures to the judges discretionary power in extending the time fixed by the law as follows:⁶⁹²

Where any period is fixed or granted by the Court for the doing of any act prescribed or allowed by this Code, the Court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.

From preliminary observation and open ended questions this researcher found that usually the court assistant (*peshkar*) fixed the date in each stage until the peremptory hearing is started, as the law is specific about fixing date for peremptory hearing by judges only.⁶⁹³ *Peshkars* usually do not follow the laws strictly because of lawyers' or clients' pressure. Undue influence is another reason. Taking bribes is an open secret for the court staff which judges can hardly control due to overloaded work pressure. As mentioned above (Page number 137), court staffs were asked if there was sufficient logistic support, and at the time of interview they did not answer properly how they managed in the absence of such support. This could be because one way to manage the lack of adequate support is by taking bribes from the clients or the lawyers.⁶⁹⁴

When the preliminary hearing starts, the judges fix the date in consultation with the clients and their lawyers to ensure their availability. The judges try to assure the clients that at least 'I have touched your case' rather proceed further in any one case: thus judges tend to do a little on a lot of cases rather than processing one case to the next relevant stage. Here the question may arise as to whether there is any scope for judges to fix firm dates in consultation with lawyers and clients, because the law requires specifically that one case continue on a day to day basis.⁶⁹⁵ Rule 125 of the *Civil Rules and Orders* (Bangladesh) states:

On the date finally fixed for the hearing of a suit, the trial shall begin and the evidence of witnesses shall be recorded from day to day until the trial is completed. Under

⁶⁹²Ibid s 148.

⁶⁹³*Civil Rules and Order* (Bangladesh) Chap 7 r 124.

⁶⁹⁴My own experience as a judge also shows that the court staff deal with the clients and lawyers regarding the provision of documents and if the court does not have papers or printers the court staff remedy the lack by taking money from the clients or lawyers. Even sometimes the judges do not have paper to write or print their orders or judgments. Then the court staff provide those things.

⁶⁹⁵*Civil Rules and Order* (Bangladesh) Chap 7 r 125.

exceptional circumstances, adjournment may be given after recording reasons necessitating such adjournment. This rule does not prohibit the taking up of other cases for passing such routine orders as will occupy a short time only or the disposal of cases which are expected to take only a short time.

During data collection it was also found that judges cannot exert control over the lawyers and court staff. Excessive workload could be a reason, but at the same time it should be added that the judges' work is not properly evaluated (page number 137). So judges are not inspired to work hard as they are not praised if they do anything extraordinary. Low salary and lack of proper evaluation does not give them job satisfaction.

Inadequate number of Lawyers and Judges

It was found from data that on an average each lawyer (among the seven participants) was taking care of 535 cases at the time of interview. It has become clear that most lawyers are overburdened with their caseloads. They, however, (with two exceptions) do not admit that this causes delays in the progress of cases.

L3 stated:

There should be consistency between acceptance of new cases and disposal of pending cases. But this does not totally depend upon the lawyers. Sometime the clients request us to take his/her case even if we are overburdened.

L4 at the time of interview said he does not think that the case burden could be a cause in delaying the court procedure. However, later on, he admitted that sometimes he has taken time from the court on this ground.

Lawyers argued that they satisfied their clients, and that this is why their clients come to them for legal assistance; if caseloads were be a problem, the clients would not come to them. The exception was L2 who remarked that overloaded lawyers sometimes delay court proceedings. He gave an example from his own experience, saying that he himself sometimes used to submit time petitions to the courts when more than one of his cases was called for hearing in different courts at the same time, and he could attend only one.

Should a lawyer accept more cases if s/he cannot balance the disposal of cases against the acquisition of new ones? Or there should be an obligation of a minimum disposal rate on

lawyers' part? At the time of interview all the lawyers disagreed that there should be any obligation in disposing a number of cases, as they termed their profession as 'independent' and 'free': imposing such an obligation would be a violation of the basics of their profession. They concluded the responsibility lay upon the client. They needed to satisfy their clients otherwise the clients would find a new lawyer. It is found that 3 out of the 7 interviewee clients have changed their lawyers.

On the clients' part, they want the best lawyer for their case as judged by the lawyer's fame. This means that some lawyers have too many cases and others have too few.

Among the seven courts from each division, it was found that on an average each court was handling 1411 cases at the beginning of 2013. All the interviewees except J2 and J6 (26 out of 28), agreed that the number of judges is too small in relation to the number of cases. Those two judges argue that the number of the judges is enough but the number of the courts is not sufficient. Later on, at the time of answering some other question, J2 agreed that it became difficult for a judge to go through each record, as he is already overburdened. Moreover, it is the judge who has to discover whether notices are served, whether defects are cured, and whether parties have taken various steps in various stages, and in so doing judges' energy is considerably sapped even before a case begins.⁶⁹⁶ Judges have to undertake these matters, because the primary responsibility lies on them, and also to avoid corruption.

S2 identifies the shortage of the judges as the main causes for delay. Five other staffs also identify it as one of the causes for delay. From observation, it was found that two out of seven courts have no presiding judges. In those two courts, judges from other courts perform 'in charge of that court' in addition to their own court. And in comparing the caseload upon the judges it can undoubtedly be seen that the number of judges is not enough to reduce the backlogs (page number 2). In addition to an inadequate number of judges, their punctuality is another concern as expressed by S4. He argued that the judges do not sit on the court on time and usually do not hear cases at the afternoon session. On the other hand the judges argue that in many places they had to share their court with other judges and also have to share their room, and that this prevents them working long hours. Moreover most of the lawyers avoid afternoon session.

⁶⁹⁶ See, Justice M. Jagannadha Rao, *Case management and its advantages* Indian Law Commission <http://lawcommissionofindia.nic.in/adr_conf/Mayo%20Rao%20case%20mngt%203.pdf> 10.

The preliminary conclusion from the data collection and interviews is that judges try to go lightly through as many cases as they can manage, rather than going thoroughly through each case. The reason might be that they want to assure the clients that ‘at least I touched your case’, even if they failed to progress far with it. As mentioned earlier, Bangladesh has a relatively modest number of Judges. The clear conclusion from the data collected is that it is not possible for any lawyer or judge no matter how active he is, to allocate sufficient time and concentration to his cases if his workload is too great; he cannot concentrate or allocate proper time for each of his cases which could indeed be one of the major causes for cases being delayed.

Intention of the Clients and Lawyers is to prolong the Case

The overwhelming conclusion from the interviews was that most of the litigants were either illiterate (only able to indicate their own name) or almost illiterate. They knew little about their case or what to do next. Six out of seven could not correctly describe their case, and viewed it as a property case or land case not specifying whether it was suit for declaration of title or suit for rectifying deed. They followed their lawyer’s instructions blindly. They all agreed that their case was delayed but could not say at which stage it was delayed. When asked, most of them said they believed that the standard time for resolving their case should be not more than two years, and expressed the wish that the procedural matters they were involved in—which are indeed complex—were easier to understand.

Most of the court staff who took part in the interview process think that the intention of the clients is the main cause for case delay. On the other hand the judges think it is the lawyers who are responsible case delay.

S3 stated:

The main cause for delaying the court proceedings is the intention of the clients. Some clients go to the higher court for revision against any order, knowing that their petition will be rejected. They actually delayed the court proceedings intentionally.

J3 indicated:

The main cause for delaying the court proceedings is the lawyers. If the lawyers make the case delay, no one can resolve it speedily. Sometimes the judges also avoid the complex case and delay the case.

The data indicates that the clients do not have any clear concepts about their suits or the law. If the clients do not have proper knowledge about their case and the law then how would it be possible for them to delay the case if they are not so advised by their lawyer. Moreover, if the case is delayed then the clients suffer most. It costs their time, money and energy.

C7 shared each time he comes to court he had to spent on an average 2,500/- (BDT); he burst into tears at the time of interview:

for this case, I have sold almost everything and I have left nothing.

C3 also expressed the same:

Each time I come to court it takes cost. I can't bear any more.

He further added that:

From my experience, I perceived that I (the plaintiff) want speedy disposal as I need the property most; on the other hand, the defendants want to make delay. So the court should make a time frame of maximum two years and each party would be bound to resolve the case within that time.

From the observational point of view, it was also found that most of the pleadings are too long and vague; the cause would seem to be that lawyers want to impress their client by writing long pleadings. It is also clear that though it may seem that the clients do not follow court's order and delay the court procedure, the fact is the clients suffer most if a case is delayed. So it would be wiser to say the blame lies with the lawyer whose advice they follow. At the same time it is also to be noted that if any party is a defaulter he may wish to cause delay, as he thinks that it would be in his interests to delay finalising the case for as long as possible. J2 also shared his experience that the lawyers always make their clients believe that he is going to win the case, even though the case is meritless, and delay the case as much as they can.

Low Rate of Disposal through Mediation

Mediation is a method which could help parties to resolve their cases quickly in the best possible way. It not only would resolve the case quickly but also finally as no appeal lies against mediation. But from the interviews it appears that most clients do not want to mediate. It is

possible that this is because they come to court when all possibilities of mediation have been exhausted in an informal way.

C7 was asked, 'Have you ever tried for mediation?' He asked rather than answering: 'Why should I? I have come to the court, not to mediate the case.'

The reasons why mediation has not been a solution to the overburdening of the courts are as follows: (1) clients do not want mediation; (2) lawyers do not encourage their clients to go to mediation; (3) judges do not have enough time to consult with and convince clients of the advantages of mediation.

Furthermore, regarding this last point, when judges do try to encourage mediation, clients do not view this positively as they think judges have self-interested reasons for doing so. This point was made by J2. He added that this is a psychological matter, and that if the judges were trained properly, they could assist clients psychologically in coming to see why ADR should be taken into consideration.

L2 shared his experience:

From my experience I found, if I try to convince the clients more for mediation, they changed their lawyer and appoint a new one. Actually some clients take it as prestigious issue and they want to make the case as lengthy as possible.

L7 added that:

In respect of the present ADR system, I must say there is no correlation between the public demand and the present ADR procedure. To make a case resolved through mediation everybody has to devote much time. The judges can't manage the time, neither the lawyers. Moreover the clients are not interested if they are economically solvent. They take it as their prestige.

J1 stated what happens if a judge insists on mediation for the parties:

There is an opposite reaction in this case. If the judge tries much then the clients do not take it positively, they think the judge has some interest in it. And on the judge's part, it takes time and if a judge gives much time for mediation then he won't be able to do other work.

Analysing data critically, the conclusion is that judges and lawyers agree that clients do not wish to mediate their cases, and that even when the judges encourage mediation, clients misunderstand what they are doing. From the interviews with clients, it was found that clients think that if they go for mediation that means that they are going to lose the case as s/he must waive his/her claim. They take mediation as part of compromising their claims rather than seeing it as a win-win situation. It was also found that when the defendants are the defaulter, they agreed to mediate. On the other hand the lawyers termed the clients as too rigid and egoistic to compromise. Of course, due to the lack of adequate communication between [lawyers and clients](#), and lawyers' perception of their status as interdependent with the number of cases they have before the court, as outlined above, the opposite may well be true. All the lawyers claim that they strongly take the initiative for mediation but that their success rate is not satisfactory. Similar views were also expressed by the judges.

These observations lead to the conclusion that both judges and lawyers must be trained properly in the use of mediation. Convincing clients to opt for mediation appears to be, on the clients' part, both a psychological and practical matter, requiring adequate information about the process. This may well be true also on the lawyers' part; there is clearly a need for adequate training for both lawyers and judges in the utility of mediation in closing cases promptly. One of the best means of saving time, money and energy is to mediate cases at an early stage. But for this to happen, clients and lawyers will have to change their attitudes. Here, the role of lawyers is paramount, because of their close relation with the clients.

From the researcher's observational and professional experience, it is noted that the land area of Bangladesh is so limited and the land available per individual is so limited, that it is not enough to ensure the agricultural need of the individuals. For this reason, perhaps, for clients each and every inch of the land is too precious to compromise in relation to a dispute about land.

Involvement of the Higher Court in Interlocutory Matters

The common tendency for most cases is to go for interlocutory relief: for example, clients frequently submit applications for injunction petition or to appoint a receiver, and whatever the decision made by the trial court, the aggrieved party chooses to seek a second opinion from a higher court as mentioned above. Sometimes the main case is long delayed because of these interlocutory matters—a view expressed by one lawyer (L6). Although in the seven sample suits

no delay occurred due to review by a higher court, all the judges and lawyers agreed at the time of the interviews that in practice frequent involvement of the higher courts causes case proceedings to be delayed, and that it is a common tendency for lawyers to go to a higher court either for revision or to appeal against some interlocutory matter. Sharing his own experience, L6 identifies ‘involvement of the higher court’ as the most significant cause for delay:

The main cause for delaying the court proceedings is the frequent involvement of the higher court in the lower courts. In one of my cases, the litigants went to the High Court Division for revision against an order of the Subordinate Court and the High Court Division without showing any reason kept the matter pending for more than 2 years. In another case, the opposite party went to the High Court Division against a simple order of joinder of parties and the matter was pending for near about 6 years. This should be stopped.

J4 said:

The purpose of interlocutory matters is to give the clients a quick relief, but in our country it is used as a tool to make the proceedings delay. Whatever the trial court decides, they take the advantage of revision and misc. appeal which makes the case delay.

The preliminary conclusion here is that if the lawyers go to higher courts against each and every order of the trial courts that will surely delay the court proceedings. There should be limited options to go to a higher court regarding interlocutory matters, and the law needs to be changed in this regard. Presently, the *Code of Civil Procedure Code 1908* (Bangladesh) ensures the option of involvement of the higher court even against any simple order. So the parties take the opportunity. But the *Code* has not specified the time limit for resolving that revision or misc. appeal, which causes the court proceedings to delay.

Logistic Supports and Technical Assistance

All the interviewee judges and court staff agreed that the courts do not have sufficient logistical support. Sometimes court staffs have to supply paper, pens and other materials at their own cost. Few of them disagreed that this could delay court proceedings. S7 expressed his view that, though there is not sufficient logistic support this should not be held responsible for the delaying the court procedure. J3 said that the responsibility to provide adequate support does not end with

providing a computer; rather, proper and regular maintenance should be ensured. J4 stated that if there were computer facilities, ‘we could have saved time in writing judgments.’

At the time of data collection it was found that five out of the seven courts visited had no working computers; though each court had a computer, a lack of proper maintenance left many computers out of working order. It seems clear, however, that adequate working computer facilities (with appropriate maintenance and training for judges and court staff) would not only expedite the writing of judgments but would also make it easier to keep records up to date and to allocate and manage time arrangements for cases. Some of the interviewees disagreed that poor computer facilities could be a cause of delay to court proceedings, as the court staff manage them at their own cost (page number 137). Here this researcher would strongly argue that if the court staff manages this logistic support at their own cost, they could try by some other means, which might not be legal, to replace those costs. Sometimes they may also give undue advantages to those clients who will help them to replace those costs. So it would cause not only the delay of the case, but also raise questions on the legality of steps taken by the courts themselves.

Procedural Law and its Application

The majority of interviewees agreed that the procedural law in civil courts is too complex and hard to follow properly, so the law itself causes delay. All the court staff and some judges and lawyers identified the procedural law as one of the main causes of delay. They argued, ‘the operating law is almost 200 years old law. Very few amendments have been drawn but the basic is as old as 100 years back. Now it is time to make the law simple and understandable for the general people. If the law is too complex to understand then the defaulter party will take the advantage of it.’

S4, in addition to clients and their lawyer’s intention, also held the judges responsible for delaying court proceedings. He stated:

Earlier the judges had heard court's matter till afternoon, but presently they hear till 2:00 pm. If they would extend the hearing time, more disposals would be possible. The judges even do not have proper training. The fresh law graduates sit as a presiding judge without having any law experience, so sometimes they do not understand the law and how the application of the law should be ensured.

J1 shared his experience:

... due to huge volume of work load and adversarial legal system, the judges can't handle the court actively, rather it is the lawyer who dominates the court.

The procedural law relates to the administrative part of the court. For example, whether summons have been returned within due time, whether the requisites are provided adequately and in due time and all other administrative tasks that the judges need to look after. As the judges are doing both the administrative work as well as judicial work they are overloaded.

In summary, the parties to the suit are almost illiterate and the present procedural law is an old and complex one and hard to navigate easily.

Delay in Providing Documents

Civil cases are document-based and very often the clients cannot manage to produce documents within time. The causes are that most of the documents supporting title and possession are provided by government offices and most government offices work not only manually but also they preserve them manually too. As a result, it takes time to locate the specified documents and supply them according to the clients' demands. The court staff also claimed that the clients cannot provide the court with documents and thus cause delay. One client (C6) suggested that since the civil cases are mostly document-based, it would be better not to waste time examining the witnesses and the plaintiffs/defendants at great length in each case, and to place more emphasis on the documents.

C2 admits he submitted several time petitions as he could not comply with the court's order to produce a document. L1 also expressed the same view, '.... it takes time to produce government's documents.'

L4 saw this as a vital cause of delay:

The civil cases depend on the documents and very often it takes time to manage those documents which is one of the vital causes.

A court staff, S2, makes the client responsible for not obeying court's order,

.....especially, when they are supposed to submit any document. They do not submit it on time.

In summary from the interviews, most of the departments of Bangladesh government operate manually. The civil cases are very much based on documents and the Ministry of Land is responsible for providing those documents. Their manual work systems cause delay in providing documents when they are needed to be produced at the court and causes overall delay in the court proceedings. It is not that clients delay intentionally.

Relations among Litigants, Lawyers, Judges and the Court Staffs

As pointed out above, the clients in these cases tend to rely blindly upon their lawyers (page number 137). Usually they believe they have a very good relationship with their lawyers. They choose their lawyers either on the basis of reputation or acquaintance, (e.g. someone from the same neighbourhood); the clients usually obtain information about their case from their lawyer's assistant.

J2 was particularly concerned that most of the clients are illiterate and cannot read the case list so as to establish the next important date or what their case is about, thus perforce relying on their lawyers, while the lawyers convince them that they can win the case without necessarily going into the details of the case, nor the time involved.

All the clients claimed that the court does not communicate with them directly; on the other hand the judges claimed the opposite. Judges stated that they ask concerning clients' availability through their lawyers. This researcher also asked the clients 'Which mode of communication do you prefer? Through lawyers or the Court?' And all of them (except one) answered, 'through lawyers.' The exception (C7) answered that any mode was fine for him.

The following is a summary of the analysis of the collected data. The relationship between lawyers and clients appears generally sound: but this is to be expected, because if the relationship deteriorated, the clients would change their lawyers, a view expressed by the clients themselves. However, if the relationship between clients and their lawyers were as good as both clients and lawyers believe, clients would have a clear idea about their case and what the next step was. But as noted earlier, clients do not generally have any idea at all about their case. Literacy, furthermore, has nothing to do with this. What this demonstrates is that lawyers commonly let their clients down with regard to a very important part of their relationship: keeping them informed and seeking instructions from the client.

The relation between court staff and judges depends on how well the judges manage their staff, perhaps because here the primary responsibility is upon the judges.

The relation between court staff and lawyers/clients varies. The most crucial relationship is between clients and the judge/court. Clients indicated that they are mostly satisfied with the performance of the courts. This, however, is in contradiction to their expectation that cases should be completed within two years: every client interviewed had experienced extraordinary delay in processing their case. From the data, it can be inferred that the relationship between the judges and the clients is heavily influenced by the performance of the lawyers, and lawyers' relationship both with their clients and with the court itself. As mentioned above, it seems clear that lawyers are failing in their duty to their clients, leading to distance between the client and the court and the judge, the clients being ignorant both the relevant issues and the relevant processes. From this it could be deduced that lawyers' use of the adversarial process may in fact be a consideration contributing to delay. Lawyers frequently see having a large number of cases on hand as essential to their professional standing.

Inadequate Number of Experts

None of these seven sample suits was delayed because of expert opinion. But in some cases to prove documents expert opinion is needed which might be a cause of delay.

J3 clarified how expert opinion can cause delay:

.....the number of experts is very low in our country, if any suit needs expert opinion it is the custom that the expert needs to produce the documents as witnesses. So it takes years to match their schedule.

EVALUATION OF GROUNDED THEORY IN DEVELOPING A THEORY

Charmaz argues that the endpoint of the research makes sense to the researcher as they have been immersed in the process. He further indicates that other scholars are liable to judge the grounded theory process as an integral part of the final product and as such proposes that researchers need to consider their audience whoever it is.⁶⁹⁷ In an effort to ensure that the criteria for grounded

⁶⁹⁷Charmaz, above n 68, 181.

theory have been met, a review of the credibility, originality, resonance and usefulness of the study reported in this thesis is presented as follows:

Credibility

The study's credibility has been demonstrated through immersion in the research data. The source of data was seven civil trial courts of Bangladesh and the people involved with the court proceedings. This thesis provides a link between the data and the grounded theory that evolved through the categories, concepts, memos from interviews and the case records. This allows the reader the opportunity to develop an independent assessment of the study.

Originality

The categories which are presented in this research are original and offer new insights into identifying the gaps between the law and its practice, and how delay occurred in the court proceedings. Judges, clients, lawyers and court staff who are closely related to court proceedings were the interviewees for this research. Originality is further enhanced as there are few studies investigating and analysing empirical data to ascertain the practical causes of delay.

Rationale

The resonance of this study is demonstrated through identifying the causes of delay and analysing the gaps between the law and practice. The law imposes time limits, but in practice time limits are hardly ever maintained. The reasons behind failure to maintain the lawful timeframe which in turn creates huge backlogs have been demonstrated through the study.

Usefulness

The courts of Bangladesh currently face huge backlogs which ultimately impedes the delivery of justice. Delayed justice is no justice at all. The reasons behind why the laws are not applied according to its directions must be identified first to reduce the case backlogs. This study contributes in determining how laws are applied and interpreted differently in practice than in theory and what issues result from this divergence. Recommendations are provided according to the findings of the analysis.

The structure for the research activities reported in this Chapter was provided by the use of the grounded theory approach and methods. The research and analysis of the empirical data enabled the following discoveries:

- Judges are conferred with discretionary power with the hope of prudent use. But they use this power so often that the time limits are not maintained properly even when the law imposes such limits. Judges' work is not properly evaluated (Page number 137), so they are not inspired to develop strong leadership with an active role in controlling the time limits.
- In a lawyer-dominated adversarial legal system, like Bangladesh, lawyers control the courts and their clients.
- Discussion among the parties hardly takes place; this is why any mediation process has failed on the whole.
- The silent role of the judges bars them from involvement in the case in depth and sometimes they are discouraged from doing so.
- In a small country with a large population where every inch of the land is invaluable, this makes litigants reluctant to compromise with others.
- Judges' administrative workload also overburdens them.
- Misinterpretation or misapplication of the law (for example in issuing summons after the 2012 amendment) (Page number 124).
- Inadequate numbers of judges.
- Not enough working computers with proper maintenance.
- Bureaucratic delays in managing supply of government documents.

CONCLUSION

Gaps between law and in practice have made those huge backlogs. The study found the gaps being: not maintaining the timeframe established by law, heavy workload upon judges and lawyers, low rate of disposal through mediation, uncertain intention of the lawyers and clients, insufficient logistic and technical support, inability to produce documents on time, frequent involvement of the higher courts in interlocutory matters, the complexity of the procedural law and its application; and also the relation among lawyers-clients-judges-court staff. If the gaps are not eliminated, the huge backlogs will not be reduced. The following chapter provides a set of ways forward to remove the gaps through a suitable case management system.

CHAPTER SIX: INTRODUCING CASE MANAGEMENT IN BANGLADESH: RECOMMENDATIONS AND WAY FORWARD

INTRODUCTION

In the previous Chapter, gaps between the law and its application have been described while discussing the stages of civil cases in the civil courts of Bangladesh. This research was aimed at finding out the causes of backlogs and delay in disposal of cases, based on the empirical data; grounded theory was followed for the empirical research. In this Chapter, recommendations based on those causes have been posted along with the rationale behind those recommendations. The conclusions emphasize incorporating case management in the civil court procedure of Bangladesh identifying the causes of delay to reduce backlogs. Recommendations are drawn focusing on a suitable case management for the civil trial court of Bangladesh.

RECOMMENDATIONS AND RATIONALES

The principles that Lord Woolf identified⁶⁹⁸ in his ‘Access to Justice’ report regarding the good and effective civil justice system are as follows:

- (a) Be *Just* in the results it delivers;
- (b) Be *fair* in the way it treats litigants;
- (c) Offer appropriate procedures at a reasonable *cost*;
- (d) Deal with cases with reasonable *speed*;
- (e) Be *understandable* to those who use it;
- (f) Be *responsive* to the needs of those who use it;
- (g) Provide as much *certainty* as the nature of particular cases allows; and
- (h) Be *effective*: adequately resourced and organized.

These principles are mostly absent in the civil justice system of Bangladesh. Instead, it is too slow in bringing cases to a conclusion. It is also incomprehensible to many litigants. Thus the Bangladesh civil justice system is in desperate need of reform to reduce backlogs. This study strongly suggests that a new legal landscape is required to enable reform and to redress the problems of huge backlogs. It is a simple fact that if the disposal rate is lower than the number of cases filed, backlogs occur. One of the key constraints facing the justice sector is the slow

⁶⁹⁸Woolf, Access to Justice: Interim Report, above n 168.

disposal rate and corresponding build-up of a large case backlogs. From the seven courts, it was found that in 2012 the disposal rates were 40%, 32%, 4%, 13%, 7%, 49% and 14% of the filing rate, respectively, for D1, D2, D3, D4, D5, D6, and D7. Regarding the present state of Bangladesh civil courts, as a result of the interviews and data collection, two ways to reduce the backlogs seem imperative, namely:

- (a) By decreasing the duration of disposal;
- (b) By increasing the rate of disposal.

To this end, the recommendations are divided into four main parts:

- 1). Incorporating case management into the civil court procedure;
- 2). Legal reforms;
- 3). Expanding use of information and technology; and
- 4). Other reforms: includes; increasing the number of judges and courts; reforming legal learning, increasing training and monitoring.

Suggestions for the civil trial courts of Bangladesh are based on the analysis of the District Court of New South Wales.

Incorporating Case Management into the Court Procedure

It has already been mentioned that no formal case management method has been adopted into the court system of Bangladesh. Identifying the causes of delay, the following important attributes of the case management can be incorporated into the civil court procedure of Bangladesh.

Introducing New Classification of Civil Cases According to Complexity

A very important attribute of case management is ‘classification of cases’ according to their complexity and ensuring treatment accordingly. Accordingly at first we need to know what are complex cases and how they occur.

The USA *Manual of complex and Multidistrict litigation* defines complex litigations in very simple terms, as ‘having unusual problems and which require extraordinary treatment’⁶⁹⁹ Tidmarsh briefly clarifies that complex cases are ‘costly to litigate, when they involve many

⁶⁹⁹ *Manual of complex and Multidistrict litigation* (1970) (USA) 0.11.

issues, when they involve many parties, when they involve parties located in many forums, when they involve legally thorny issues, when they are protracted, when they develop voluminous evidence, or when the outcome of the case might have nationwide consequences.’⁷⁰⁰ In Australia, referring to complex litigation, the expression of ‘mega-litigation’ has also been adopted.⁷⁰¹

To ensure separate treatment it is better to know the indicia of complex cases and how they occur. The identification of a complex case is important because it allows the court, legal practitioners and the parties to determine a plan for such cases, dealing with the complexities through managerial judging.⁷⁰² Legg has summarized that a case can be complex in the following ways:⁷⁰³

- a. Legal complexity: Legg first emphasizes legal complexity which involved uncertainty or the nature of the law applied in each case.⁷⁰⁴ He further suggested that uncertainty may arise because of a lack of precedent, a novel interpretation of pre-existing law or a law that is expressed in open-ended terms.
- b. Factual complexity: Legg also identified complex facts where expert or technical opinions are needed. Expert evidence and discovery can create complexity through increasing the size of the litigation or the difficulty of the underlying concepts that need to be resolved.⁷⁰⁵
- c. Multiple parties: Legg ascertained complexity also arises through a number of claims and party interests being combined into a single proceeding.⁷⁰⁶ This may have efficiency advantages for the court but it can also result in more complex litigation.
- d. Lawyer conduct: Legg described how lawyers’ conduct can result in complex litigation through ‘adversarialism’ by taking of every point within the litigation and lack of

⁷⁰⁰Jay Tidmarsh, 'Unattainable Justice: The Form of Complex Litigation and the Limits of Judicial Power' (1992) 60 *George Washington Law Review* Jay Tidmarsh, 'Unattainable Justice: The Form of Complex Litigation and the Limits of Judicial Power' (1992) 60 *George Washington Law Review* Jay Tidmarsh, 'Unattainable Justice: The Form of Complex Litigation and the Limits of Judicial Power' (1992) 60 *George Washington Law Review* Tidmarsh, above n 226, 1692-93, see Legg, Case Management and Complex Civil Litigation, above n 30, 12.

⁷⁰¹The Hon Sir Gerard Brennan, 'The State of the Judicature' (1998) 72 *Australian Law Journal* 44; Victorian Law Reform Commission, Civil Justice Review, above n 1, 73; The Hon Ronald Sackville, 'Mega-litigation: Towards a New Approach' (2008) 27(2) *Civil Justice Quarterly* 245-46.

⁷⁰²Legg, Case Management and Complex Civil Litigation, above n 30, 20.

⁷⁰³Ibid 18-21.

⁷⁰⁴Michael Legg, 'Regulatory Theory, Litigation and Enforcement' in Michael Legg (ed), *Regulation, Litigation and Enforcement* (Thomson Reuters, 2011) 1.220.

⁷⁰⁵Legg, Case Management and Complex Civil Litigation, above n 30, 19.

⁷⁰⁶Ibid 19.

cooperation between the lawyers can cause the contentiousness of the case to result in the need for greater evidence (every point must be proved rather than non-core issues agreed), a larger range of claims and associated legal issues so that the complexity of the litigation increases.⁷⁰⁷

The Supreme Court of New South Wales adopted ‘Differentiated Case Management (DCM)’ in the 1990s.⁷⁰⁸ DCM was introduced based on the concept that not all cases make the same demands upon the court system and so the cases should be processed according to their needs. Therefore, at the very initial stage, the needs of the individual cases would be identified and the court schedule would be planned according to a case’s characteristics and the degree of appropriate management would be ensured.⁷⁰⁹ Accordingly, some cases would be heavily supervised while others would be less supervised to ensure their timely disposal.⁷¹⁰ In early 1991 the District Court adopted the individual list project; under this project, 1200 civil cases that were taking lengthy period were allocated to four special judges to deal with those cases to ensure delay reduction.⁷¹¹

Like medical cases, legal suits also have to be diagnosed on the very first day of their registration. The Honourable Chief Justice of Western Australia compared this process of diagnosis at the early stage for each case with the medical profession, and termed it a ‘triage’.⁷¹² He explained that just as in the medical case a particular patient is assessed at the very beginning, so too such a procedure can be adopted in court cases. He gave the example that if it is a case about inheritance, then the case should be sent straight for mediation with family members.⁷¹³

Notably, the *Civil Rules and Order* (Bangladesh) ensures the classification of civil cases as below:⁷¹⁴

⁷⁰⁷ Ibid 20.

⁷⁰⁸ The Supreme Court Common Law Division Case Management List of New South Wales, *Practice Note no1*, 20; see, Legg, Case Management and Complex Civil Litigation, above n 30, 3; See also above at page no 33.

⁷⁰⁹ Legg, Case Management and Complex Civil Litigation, above n 30, 3.

⁷¹⁰ Wood, above n 131, 121.

⁷¹¹ District Court of New South Wales, *Annual Review* (1991) 6.

⁷¹² The Honorable Martin Wayne, *The Future of Case Management* The Supreme Court of Western Australia, 4<http://www.supremecourt.wa.gov.au/_files/Australian_Legal_Convention300909.pdf>.

⁷¹³ Ibid 4.

⁷¹⁴ *Civil Rules and Order* (Bangladesh) Chap 16 r 361. Among those classifications some of the suits, which are mentioned in the section 2 of the *Muslim Personal Law (Shariat) Application Act 1937* (Bangladesh) shall be governed by the *Sharia law* if the parties of the suit before the relevant civil court are Muslims. Thus section 2 of the *Muslim Personal Law (Shariat) Application Act 1937* (Bangladesh) states as follow:⁷¹⁴

- Class 1 includes: suits for affecting immovable property other than foreclosure, redemption or sale under Or 34 of the *Code of Civil Procedure 1908* (Bangladesh), suits for succession, suits relating to public trusts, charities, endowments, public or general rights or customs or other matters related to the public interest, suits for dissolution of marriage and for restitution of conjugal rights, and suits for perpetual injunction or declaration of rights;
- Class II includes: suits for a declaration of a right to maintenance with or without a charge on an immovable property to determine the rate thereof, cases under section 96 of the *state Acquisition and Tenancy Act 1950* (East Bengal Act), popularly known as a pre-emption case, contested and uncontested suits and cases for probation and letters of administration and for the revocation of the same, cases under the *Guardian and Wards Act 1890* (Bangladesh), cases under the *Lunacy Act 1912* (Bangladesh), cases for succession certificate under the *Succession Act 1925* (Bangladesh), suits for foreclosure, redemption or sale under Or 34 of the *Code of Civil Procedure 1908* (Bangladesh);
- Class III includes: all suits and cases not already named under class I and II excluding suits tried under the procedure prescribed for Small Cause Courts, suits for specific performance of an agreement to sell immovable property or for cancellation of the deed of sale of immovable property, suits for the recovery of arrears of maintenance, cases for the protection of the property of a deceased person under part VII of the *Succession Act 1925* (Bangladesh), cases for the deposition of mortgage money under section 83 of the *Transfer of Property Act 1882* (Bangladesh);
- Class IV includes: proceedings in execution of decrees in suits belonging to Classes I, II, III; and lastly,
- Class V includes: records of Miscellaneous Non-Judicial Cases which includes records of suits of the Small Cause Court class tried under the Small Cause Court procedure by

Notwithstanding any custom or usage to the contrary, in all questions (save questions relating to agricultural land) regarding intestate succession, special property of females, including personal property inherited or obtained under contract or gift or any other provision of Personal Law, marriage, dissolution of marriage, including talaq, ila, zihar, lian, khula and mubaraat, maintenance, dower, guardianship, gifts, trust properties, and waqfs (other than charities and charitable institutions and charitable and religious endowments) the rule of decision in cases where the parties are Muslims shall be the Muslim Personal Law (Shariat).

judicial officers empowered under section 25, Act XII of the *Civil Courts Act* 1887(Bangladesh).

Despite these classifications, the stages and procedures are mostly identical for each of them (for example: submission of plaint, service of summons, submission of written statement, ADR, Discovery, settling date for peremptory hearing, peremptory hearing, argument and pronouncing judgment). But if different procedures are not followed for different classifications of cases, there is no purpose in their classification.

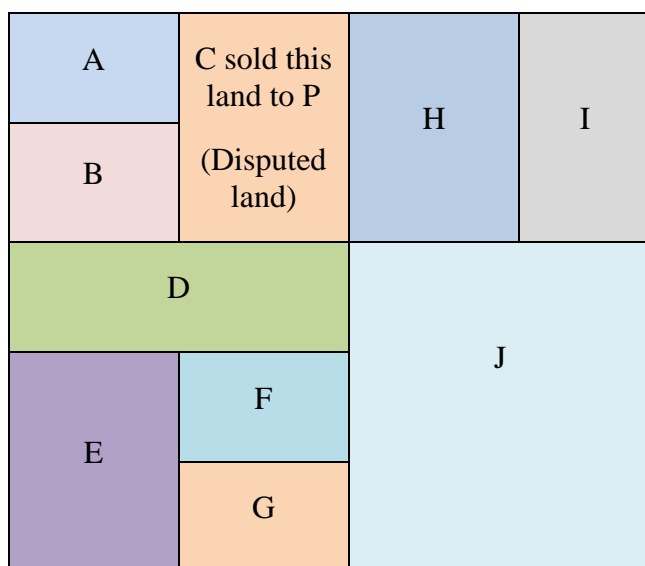


Figure VI.1: Division of a property X

For example, the total land in a particular holding, locally known as a *daag*,⁷¹⁵ is X, where all the above persons have title to a certain amount of land. If A wants to file a suit for pre-emption (with respect to the sale by C of land in the above figure to P), he will have to make parties of all other co-sharer tenants by inheritance of the holding, as well as the purchaser P and seller C (B, D, E, F, G, H, I, J, the purchaser P and the seller C).⁷¹⁶ Or in case of suits for succession, all the interested relatives of the deceased must be made party to the suit. Inclusion of so many parties in a suit makes it complex and causes delay.

All the participants expressed that the cases should be classified according to their complexity at the very early stage and would assist in proceeding with individual care and treatment. All of them agreed that suits which are complex in nature need separate treatment. All the judges and lawyers agreed that most of the suits for declaration of title and partition suits were complex in nature and they need separate treatment.

Recommendation -1:

- The classification of civil cases should be re arranged according to complexity and different treatment should be ensured. Accordingly rule 361 of the *Civil Rules and Order* (Bangladesh) should be changed in relation to classification and to ensure separate

⁷¹⁵ See Glossary at page no xiii for 'daag' definition.

⁷¹⁶ See *State Acquisition and Tenancy Act 1950* (Bangladesh)s 96(2).

treatment for complex and simple cases; the *Code of Civil Procedure 1908* (Bangladesh) also needs amendment along these lines..

- There should be an option for conversion from complex to simple or from simple to complex at any stage of a suit as soon as it is identified that the suit is not a complex one, or not a simple one, and treatment would then be different. The *Code of Civil Procedure 1908* (Bangladesh) needs amendment to ensure this.

It is here that case-management under the control of the relevant judge would appreciably streamline procedures and reduce delay.

Including Pre-trial Activities in Case Preparation

Pre-action protocols or pre-trial activities have been introduced in many countries. These are essentially procedural requirements which apply before the commencement of proceedings. In the UK pre-action protocols operate under the Civil Procedure Rules 1998 (UK) with the aims of 'more pre-action contact between the parties', 'better and earlier exchange of information', 'better pre-action investigation by both sides,' 'to put the parties in a position where they may be able to settle cases fairly and early without litigation', and 'to enable proceedings to run to the court's timetable and efficiently if litigation does become necessary'.⁷¹⁷ Peckham also strongly argued for the judge's active role in the early pre-trial proceedings, to use his status and experience to persuade the parties to eliminate the issues, thereby avoiding unnecessary discovery, hearing and presentation of evidence.⁷¹⁸ Pre-trial protocol or activities also ensure the court's involvement at an early stage and also limits interlocutory matters (see at page number 38).

In March 1990, the District Court of New South Wales introduced pre-trial conferences and five additional Assistant Registrars were appointed to conduct these conferences and the average settlement rate achieved was 21% at the end of 1990 and 23% of settlement achieved at the end of 1991.⁷¹⁹ Though it was admitted that the specific saving by introducing pre-trial conferences

⁷¹⁷ *Civil Procedure Rules 1998* (UK) Practice Direction- Pre-action Conduct, pre-action protocol for Personal Injury Claims, 1.2; Lord Woolf, 'Access to Justice : Final Report' (Her Majesty's Stationery Office (HMSO), 1996) 9

⁷¹⁸ Robert F. Peckham, 'The Federal Judge as a Case Manager: The New Role in Guiding a Case from Filing to Disposition' (1981) 69(3) *California Law Review* 772.

⁷¹⁹ District court of New South Wales, *Annual Review*, (1990) 7; District court of New South Wales, *Annual Review*, (1991) 7.

could not be measured, it helped to identify and define the issues at the early stage.⁷²⁰

However, Peckham says some traditional judges may not be comfortable with the pre-trial management techniques; but it is needed to ensure speedy, smooth and inexpensive disposition of cases while noting that mismanagement or non-management of cases can cause considerable delay leading to uncertainty in business and personal affairs and other, crushing expense to one or more of the parties.⁷²¹

In Bangladesh, trial is viewed as the main event. The consequence of focusing on the trial includes inadequate or late investigation of the facts, last-minute settlements, and the danger of surprise at trial. Court staffs prepare cases by ensuring that the parties had submitted the necessary documentation, lists of witnesses, and arrange for summonses for the latter. But there is no legal scope to engage the parties in pre-trial conferences. Empirical research shows that the rate of disposal through mediation is not satisfactory and a cause may be the parties hardly get time to talk to each other. So pre-trial conference could be a place to talk to each other and could increase the rate of mediation, and while also limiting interlocutory matters, and even sometime controlling the defects of pleadings and identifying issues at the early stage.

Recommendation -2:

- Pre-trial conferences should be added in the *Code of Civil Procedure 1908* (Bangladesh). Here the provisions of ADR (section 89 of the *Code of Civil Procedure 1908* (Bangladesh)) should be changed ensuring the parties' involvement, making scope for them to talk to each other at the early stage of their case. This little time or effort devoted to pre-trial activities will help the parties as well as courts for case preparation.

Alternative Dispute Resolution (ADR) in the Form of Appropriate Dispute Resolution (ApDR)

Alternative Dispute Resolution could be the best solution for comparatively complex litigation which involves cost, delay and energy.⁷²² Not only Australia, but also other countries like USA and UK have taken mediation as the way to resolve more cases other than through judgment.⁷²³ Thus it is wise to bring case management and alternative dispute resolution movements together

⁷²⁰ District court of New South Wales, *Annual Review*, (1991) 7.

⁷²¹ Peckham, above n 718, 772.

⁷²² Victorian Law Reform Commission, *Civil Justice Review*, above n 1, 219.

⁷²³ See, Peckham, above n 718, 771.

to answer the expectation from civil adjudication and dispute resolution. The idea is to offer a variety of dispute resolution processes so as to accommodate the needs of disputants and disputes.⁷²⁴

King et al ascertained the advantages and disadvantages of ADR as follows:⁷²⁵

- Reduce costs
- Reduce delay
- Promote access to justice
- Allows for a win-win or at least a more flexible solution
- The dispute resolution procedure can be tailored to the parties' and the disputes' needs
- Empowers the parties
- May promote communication and preserve relationship
- Confidentiality or privacy

The disadvantages of ADR, or qualifications on its use, have been summarised as:⁷²⁶

- Savings in costs or delay will not eventuate if the ADR process is unsuccessful
- The law may not develop as decided cases giving rise to precedents do not exist.
- Lack of court protections which may permit exploitation of power imbalances
- Inability to access an opponent's documents or information
- Can be used as a delaying tactic or to obtain information as to another participant's position.

Legg argued that mediation can be more effective for cases which are involved multiple parties and factual complexities, and legal complexities.⁷²⁷ However he also cautioned that mediation could be more difficult in complex cases as well, depending on the causes of complexities.⁷²⁸ He further suggested an alternative approach may be suitable for some cases to avoid complexity, or at least simplify the cause of the complexity. The aim is not to try to replicate or approximate the result that a trial would achieve but rather to seek a compromise that is acceptable to the parties.

⁷²⁴Victorian Law Reform Commission, Civil Justice Review, above n 1, 219.

⁷²⁵Michael King et al, *Non-Adversarial Justice* (The Federation Press, 2009) 91-94; Victorian Law Reform Commission, Civil Justice Review, above n 1, 214.

⁷²⁶King et al, above n 725, 94-96; Victorian Law Reform Commission, Civil Justice Review, above n 1, 214-15.

⁷²⁷Legg, Case Management and Complex Civil Litigation, above n 30, 126-130.

⁷²⁸King et al, above n 725, 126.

Compromise without resolving complexity of a case is also desirable or possible because of 'litigation risk'.⁷²⁹ Legg further said that the effectiveness of ADR in dealing with civil disputes should not be interpreted as meaning that courts are ineffective.⁷³⁰

Sander demonstrated that both Alternative Dispute Resolution and the courts can play together in relation to resolving disputes and their combination would achieve the most beneficial and efficient outcome.⁷³¹ Thus in 1976, he suggested the 'multi-door court' house with the option for mediation in the back. In Australia the multi-door court house in the shape of multi-option dispute resolution has been introduced to ensure courts and ADR work hand-in-hand.⁷³² In doing so, Legg suggests ADR relieves court congestion, identifies the issues in dispute, provides the expertise for addressing technical subject matters, and overcomes factual and legal uncertainty.⁷³³ Alternatively, the courts also provide the procedures to identify the issues in dispute, facilitate the provision of needed information through discovery and expert witnesses, actually resolve particular legal questions and discourage and punish lawyer's misconduct within the purview of law.⁷³⁴

Peckham in the early 1990s also felt that due to the increasing number of cases stress is needed on pre-trial conferences as only 6% of the litigation reached the trial level and most others had been resolved through mediation in the Federal District Court of USA.⁷³⁵ ADR could also be a way to avoid the 'adversarialism' of the court system where the involvement of lawyers is said to increase the contentiousness of the case resulting in every point being taken. However, lawyers are often the gatekeepers to dispute resolution mechanisms as they guide and advise their clients as to the most effective and appropriate process.⁷³⁶

The Honourable Wayne Martin, Chief Justice of Western Australia, in his paper, *The Future of Case Management*, termed the Supreme Court of Western Australia as the Supreme Dispute Resolution Centre, as mediation is the main mechanism for the resolution of cases and trial is the

⁷²⁹ Legg, Case Management and Complex Civil Litigation, above n 30, 132.

⁷³⁰ Ibid 134.

⁷³¹ Frank E. A. Sander, 'Varieties of Dispute Processing' (1976) 70 *FDR* 111.

⁷³² Legg, Case Management and Complex Civil Litigation, above n 30, 135.

⁷³³ Ibid 135.

⁷³⁴ Legg, Case Management and Complex Civil Litigation, above n 30, 135.

⁷³⁵ Peckham, above n 718, 771.

⁷³⁶ King et al, above n 725, 118.

alternative.⁷³⁷ He mentioned it is the common law tradition to treat all cases as suitable for trial though he suggested identifying the cases that are likely to go to trial and treat them in a particular way; for example, identification of cases as suitable for case management should be done at the very beginning of a case. The District Court of New South Wales has the power to refer parties to mediation with or without the parties' consent.⁷³⁸ Costs associated with litigation have always been an incentive to settle. Litigation is an expensive exercise even for the successful party as there is a considerable gap between party's real expenses and those which s/he might recover from the unsuccessful party by way of a costs order. The offer of a compromise system has replaced or been used to supplement suchpayments in many countries.⁷³⁹

The Alternative Dispute Resolution (ADR) system in Bangladesh has failed to achieve the goals set for it. Justice Mustafa Kamal (former Chief Justice of Bangladesh) first introduced case management in Bangladesh in 2000.⁷⁴⁰ The rate of mediation in civil courts is not satisfactory in relation to the disposal rate. The empirical evidence suggests that clients are not convinced by mediation, and that this is the main reason for ADR's failing to achieve its object. To change the situation, the parties have to be convinced of its advantages as a way of saving time, money and energy. Alam also argued for institution of ADR in the pre-trial stage just after submitting the plaint and the written statement, and he gave the example of some states in USA which were able to resolve 90% of cases through ADR at the pre-trial stage, with the rest going for trial, which is just the reverse of the approach in Bangladesh.⁷⁴¹

In Bangladesh, litigants do not calculate the cost of the whole case, nor are they given estimates by their lawyers. It would be helpful if lawyers could calculate the approximate cost to clients at the beginning of a case, and inform them. Such a procedure, when coupled with suggestions for mediation, could well result in savings to litigants in time and money, while also seeing much earlier resolution of disputes. This would, however, depend upon lawyers adopting a proactive attitude towards mediation, as well as being prepared to work with court staff and mediators. The whole situation invites courts to put emphasis on case management, where 'Alternative Dispute Resolution' can be redefined as 'Appropriate Dispute Resolution'. Because mediation may not

⁷³⁷Wayne, above n 712, 3.

⁷³⁸*Civil Procedure Act 2005* (NSW) s 26 .

⁷³⁹Bobette Wolski, 'Reform of the Civil Justice System two decades past- implication for the legal profession and for law teachers' (2009) 21(3) *Bond Law Review*214.

⁷⁴⁰Kamal, above n 9,1.

⁷⁴¹Alam, above n 2.

succeed in all cases, and not all cases need the same method of mediation, proper case management would find the appropriate dispute resolution method for each case. Here, contrary to Alam's view, the recommendation arising from this research is to shift the ADR stage to immediately after the appearance of the defendants at the court even before submission of written statement.⁷⁴² If the parties agree to mediate then, it would save the time defendants spend submitting their written statement. If the parties do not agree, the court and the defendant would still be able to identify those issues (both of law and fact) they could not agree over, and save time. It is evident from the data that the clients from Bangladesh are not convinced by the ADR mechanism. However, there is no alternate to increasing mediated settlement because this is a complete solution and no appeal or revision arises from it. To do so judges and lawyers should properly be trained to convince the client into mediation.

Recommendation-3:

- ADR should come in the form of Appropriate Dispute Resolution (ApDR); Section 89 of the *Code of Civil Procedure 1908* (Bangladesh) should be amended. Case management would identify the ApDR for individual cases rather making it compulsory for all cases.⁷⁴³

Legal Reform

In addition to legal reforms incorporating case management in a meaningful way, there are some other legal sectors which need reform.

Incorporating Case Management into the Civil Court Proceedings

Case management is now given greater structure and definition through the legislative adoption of an overriding and overarching purpose throughout the world. Sackville explained in an interview with Legg that there was a need of a legislative requirement for case management because through legislation a judge is bound to take account of cost and delay which in turn strengthens the judge's ability to require cases to run efficiently.⁷⁴⁴

⁷⁴² Ibid.

⁷⁴³ Mediation has been compulsory in Bangladesh for all civil cases. See above at page 135.

⁷⁴⁴ Legg interviewed Sackville JA, NSW Court of Appeal, Sydney, 30 March 2011 mentioned in Legg, Case Management and Complex Civil Litigation, above n 30, 6.

A Practice Note would be a good way to institute reform apart from Acts or Rules to incorporate case management as it is more flexible. Don Mathieson wrote an article on the recent legislative changes made in the civil Procedural Rules of New Zealand.⁷⁴⁵ Mathieson explains there are some disadvantages if Practice Directions overlap with rules in the procedural area, but at the same time the advantages of the Practice Directions cannot be overlooked, as they are more flexible and easier to change if circumstances require quick action.⁷⁴⁶

The Honourable Wayne Martin gives the example of Western Australia in how they manage by splitting case management between judges and registrars.⁷⁴⁷ The judges manage the cases more intensively and those are the cases which are more likely to go for trial; on the other hand the registrars handle those cases which are less intensive. Thus two different management systems have been introduced in the same court.⁷⁴⁸

In the District Court of New South Wales, the *Civil Procedure Act 2005* (NSW)⁷⁴⁹ gives statutory recognition to the overriding purpose of ensuring just, quick and cheap resolution of the issues in the court proceedings (the detail of the legislative incorporation of case management in the District Court of New South Wales has been discussed at page number 104). Section 58 specifically sets out the matters to be considered in making case management decisions according to individual case requirements, while considering also section 56 and 57 of the *Civil Procedure Act 2005* (NSW). That Act entrusts the judges with unlimited discretionary power to guarantee that the application of this power will be to ensure timely delivery of justice through cost effectiveness.⁷⁵⁰ It further allows a court to strike out claims, proceedings or defences, make cost orders, and make orders or give directions as it considers appropriate.⁷⁵¹ The overriding purpose is a guiding light or keystone in the arch of civil justice, but it is also of practical significance.⁷⁵² This overriding purpose requires the adjustment between ensuring justice and minimising cost delay. In addition, District Court of New South Wales also issues *Practice Notes* from time to time.

⁷⁴⁵Don Mathieson, 'Reforming civil procedure' (2012) 43(1) *Victoria University of Wellington Law Review* 127.

⁷⁴⁶*Ibid* 139.

⁷⁴⁷Wayne, above n 712, 7.

⁷⁴⁸*Ibid* 7.

⁷⁴⁹*Civil Procedure Act 2005* (NSW) s 56.

⁷⁵⁰*Ibid* s 56- 57.

⁷⁵¹*Ibid* s 61(3).

⁷⁵²Legg, Case Management and Complex Civil Litigation, above n 30, 30.

In Bangladesh, there is no legislative recognition of case management. However the *Code of Civil Procedure* 1908 (Bangladesh) ensures the inherent power of the Court stating:⁷⁵³

Nothing in this code shall be deemed to limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.

From this research it was found that though there are time-frames specified for each stage, the court hardly ever follows them as there is the lawful option to apply discretionary power in extending the time.⁷⁵⁴ The *Code of Civil Procedure* 1908 (Bangladesh) further ensures that the determination of the cost and incident to all suits shall be at the discretion of the Court and the Court will decide how the costs will be paid and how.⁷⁵⁵ Experience from the District Court of New South Wales shows that it applies time frames more strictly and here the court takes control the Court proceedings rather than leaving it to the parties and their lawyers.⁷⁵⁶

During the data collection, most of the interviewees and all the clients expressed that due to procedural complexities the clients are dependent upon their lawyers. All the court staffs and some judges strongly argued that it is because of the lawyers' attitude that a case takes time to resolve. Legg also finds lawyers responsible for creating complexity.⁷⁵⁷ He explains if the complexity of a dispute arises because of lawyer conduct then those same lawyers may have no interest in advising a client to attempt ADR. An early settlement may adversely affect the lawyer's income.⁷⁵⁸

The adversarial legal system is also causing backlogs. It could rightly be said that the overall court system of Bangladesh is too fragmented in the way it is organized since there is no one with clear overall responsibility for the administration of civil justice, and too it is adversarial as cases are run by the parties, not by the courts, and the rules of court, all too often, are ignored by the parties and not enforced by the court.⁷⁵⁹ However Spigelman rightly said there is no conflict

⁷⁵³ *Code of Civil Procedure* 1908 (Bangladesh) s 151.

⁷⁵⁴ *Ibid* s 148.

⁷⁵⁵ *Ibid* s 35.

⁷⁵⁶ The District court of New South Wales, *Annual Review*, (2003) 15; see, Spigelman, above n 28, 113; see also, Sackville, *Mega-litigation*, above n 701, 180; *Civil Procedure Act* 2005 (NSW) s 98.

⁷⁵⁷ Legg, *Case Management and Complex Civil Litigation*, above n 30, 133.

⁷⁵⁸ *Ibid* 133.

⁷⁵⁹ See also, Woolf, *Access to Justice: Interim Report*, above n 168.

between the adversarial legal system and adopting case management.⁷⁶⁰ Mathieson also doubts concerns that case management undermines the adversary system.⁷⁶¹

Recommendation-4:

- Bring case management formally into the civil litigation system through an amendment of the *Code*, at the same time empowering judges to control cases.⁷⁶²
- The use of the case-management procedures must be in keeping with the requirements of an overriding or overarching purpose, also to be stated in the *Code*.
- To make the changes more flexible and frequent (considering the practical need), the provision of *Practice Notes*, as used in the District Court of New South Wales, could also be incorporated in the Bangladesh system. The Supreme Court of Bangladesh has the power to make rules⁷⁶³ though it hardly uses this rule-making power to reduce the case backlogs.

Reform in writing Pleadings

Generally Pleadings are the formal court documents by which each party to litigation states its case. Legg summarises the function of pleadings as follows:⁷⁶⁴

- To set out all the material facts on which the party relies to establish his claim;
- To define the issues between the parties;
- To inform the party of the case they have to meet at trial so that time and resources are devoted to the issues in dispute and not to extraneous matters;
- To ensure procedural fairness;
- To state all facts which, if not included, may take the other party by surprise, thus preventing trial by ambush;
- To define the findings of fact that can be made at trial;
- To enable the relevance and admissibility of evidence to be determined at trial;

⁷⁶⁰Spigelman, above n 28,4.

⁷⁶¹Mathieson, above n 745,142.

⁷⁶²Example can be taken from the District Court of NSW. See above at page no 112, 113.

⁷⁶³*Code of Civil Procedure 1908* (Bangladesh) s 122.

⁷⁶⁴Legg, Case Management and Complex Civil Litigation, above n 30, 20.

- To determine the scope of pre-trial procedures;
- To determine any questions of res judicata or estoppel.

Problems associated with the pleadings have been identified by various law experts. Zander suggested they conceal rather reveal the facts and issues.⁷⁶⁵ Vague or ambiguous pleading creates problems not only for the courts but also for the opposite party to know what the actual complaint against him is.⁷⁶⁶ Honourable Chief Justice Martin also argued for ignoring the formal pleading as ‘sometimes it is really hard to identify the real issues from the pleading rather they encourage the parties in exchanging a narrative statement of facts and issues and contentions comprising three or four pages’.⁷⁶⁷ However he also admits that there are some cases where pleading would be appropriate but hundreds of pages of pleading is just often a waste of time and money. He then said, Western Australia actively and aggressively discourages interlocutory matters (a course first identified by Lord Woolf). They also encourage the face to face meeting between the parties under authority to resolve interlocutory disputes. Legg suggests it would be better to rely on the principles of case management than vague pleadings.⁷⁶⁸ Pleading with a non-responsive defence also creates complexities. In some forms of litigation where there are numerous issues, or inter-related issues it may be productive to adopt more innovative approaches such as using a list of issues or a case management conference at which the parties and the judge determine the issues to be the subject of discovery.⁷⁶⁹

In the District Court of New South Wales, the Court has the power to strike out any or the whole part of the pleadings if that part does not disclose any reasonable cause of action has a tendency to cause prejudice, to delay the proceedings, or to abuse the process of the court.⁷⁷⁰

The present research also finds that it is the tendency of the Bangladeshi lawyers to submit a vague and in essentially large pleading with the intent to convince their client rather make the case simple and easy (page number 148).

⁷⁶⁵Michael Zander, *Cases and Materials on the English Legal System* (Cambridge University Press, 10 ed, 2007) 70.

⁷⁶⁶Legg, Case Management and Complex Civil Litigation, above n 30, 54.

⁷⁶⁷Wayne, above n 712, 7.

⁷⁶⁸Legg, Case Management and Complex Civil Litigation, above n 30, 57-58.

⁷⁶⁹Ibid 71.

⁷⁷⁰*Uniform Civil Procedure Rules*2005 (NSW) r 14.28.

Recommendation-5:

- The way of writing pleadings should be changed by the *Code*. Unnecessary and vague written statements should be a matter of costs for wasting the court's time; at the same time it should be ensured that the courts are empowered to strike out any part of the pleadings if it seems inessential.⁷⁷¹

Changing the Traditional Way of Examining Witnesses and Introducing Summary Judgements

Chief Justice Martin also argued for written submissions rather than oral evidence as he found oral evidence of very limited utility.⁷⁷² Part 13 of the *Uniform Civil Procedure Rules 2005* (NSW) allows the District Court of New South Wales to dispose a case at an early stage exercising the following power:⁷⁷³

- Power to enter judgment for plaintiff, if the plaintiff or some other person on his behalf produce evidence and the defendant does not have any defence.⁷⁷⁴
- Power to summarily dismiss proceedings if it appears to the court that the proceeding is frivolous or vexatious, or no reasonable cause of action is disclosed or the process of the courts has been abused.⁷⁷⁵
- Power to dismiss proceedings for non-appearance of the plaintiff at any hearing of the Court.⁷⁷⁶

The *Evidence Act 1872* (Bangladesh) mandates the order of the examining a witness would be examination in chief, cross examination and re-examination (if necessary). But the detail is provided in Order XVIII of the *Code of Civil Procedure 1908* (Bangladesh), that deals with hearing of suits and examination of witnesses. The *Code* ensures that party having the right to start the case shall state his case.⁷⁷⁷ In practice, lawyers make the witnesses state line by line as

⁷⁷¹*Code of Civil Procedure 1908* (Bangladesh) empowers the judges to strike out if there is misjoinder of parties (Order I, rule 9), if there are unnecessary issues (Order XIV rule 5)

⁷⁷²Wayne, above n 712, 7.

⁷⁷³*Uniform Civil Procedure Rules 2005* (NSW) part 13.

⁷⁷⁴*Ibid* r 13.1.

⁷⁷⁵*Uniform Civil Procedure Rules 2005* (NSW) r 13.4.

⁷⁷⁶*Ibid* r 13.6.

⁷⁷⁷*Code of Civil Procedure 1908* (Bangladesh) O XVIII r 2.

written in the pleadings at the time of taking evidence and the judge writes it down verbatim,⁷⁷⁸ as the law says, which is very time consuming.

In case of expert evidence, it is given by way of written report. An expert is cross-examined at trial only if the opposite party so requests. Consequently, the circumstances in which an expert attends the trial and gives oral evidence are frequent. As the numbers of experts (see at page no155) are very few, it often takes time to appear in the court.

Introducing summary judgment in appropriate cases may significantly shorten litigation. Empirical research shows that the judges of the Assistant Judge Court and the Senior Assistant Judge court do not have any stenographer who can take dictation and transcribe the judgement so that the judge can have time to manage some other work. The traditional way of writing judgments is the judges write pleadings of both parties by hand and then make a decision discussing the issues in detail, which is time consuming. In addition, the mode of taking evidence should be changed. From the empirical data, C6 also suggested that as civil cases are mostly document-based, delay could be avoided by omitting oral evidence. Even the examination in chief can be shortened by taking affidavits and thus cross examination would be limited on very specific issues where it is needed.

Recommendation-6:

- Summary judgment system should be introduced for appropriate cases. The new provision could be added in Order XX of the *Code of Civil Procedure 1908* (Bangladesh)
- The mode of taking evidence should be changed. Document-based cases can avoid oral evidence; at the same time the examination in chief can be shortened by taking affidavits and new provision can be made in Order XVIII of the *Code of Civil Procedure 1908* (Bangladesh).

Ensuring Lawyers' and Clients' Legal Accountability to Courts by Imposing Cost Orders

Wolski argues that legal practitioners owe their clients a number of duties including a duty of representation, a duty to act on instructions and a duty to continue to act but these duties are, and

⁷⁷⁸ Ibid O XVIII r 4,5.

always have been, subject to overriding duties to the court and to the administration of justice.⁷⁷⁹ Performing these duties, legal practitioners should have an additional obligation: that is they should refuse to represent a client where they believe that the client's case is frivolous or vexatious. Commonly, vexatious proceedings are understood as instituted to harass or annoy another party.

In the United Kingdom, the Privy Council on appeal from the New Zealand High Court recently confirmed in *Harley v McDonald*⁷⁸⁰ that the court has inherent jurisdiction to award costs against legal practitioners (solicitors or barristers) who pursue hopeless cases.

Wolski argues that the adversarial court system restrains courts from controlling the clients.⁷⁸¹ She also believed that the problems were attributable to lawyers who had the capacity and willingness to exploit weaknesses in the system and the incentive to complicate litigation. Zuckerman asserted that it was incentive, rather than the complexity of the procedural system, which caused excessive costs,⁷⁸² although he fell short of accusing lawyers of deliberately complicating litigation. The professional practice rules in many countries now require practitioners to inform clients and potential litigants about alternatives to litigation.⁷⁸³

In a lawyer-dominated adversary legal system, sometimes lawyers' conduct also includes time-based billing so that the economic incentives associated with litigation mean that litigation will be prolonged and expanded in the interests of lawyers receiving a greater fee.⁷⁸⁴ However, the District Court of New South Wales ensures the lawyer's and the client's accountability to the court through legislation (Page no105).⁷⁸⁵

Section 35A and 35B the *Code of Civil Procedure 1908* (Bangladesh) empowers the court to impose cost upon parties for false or vexatious cases and delay in making applications in respect of interlocutory matters, while costs orders are still discretionary. Order XVII of the *Code of Civil Procedure 1908* (Bangladesh) allows the court to impose costs for adjourning the hearing

⁷⁷⁹Wolski, above n 739, 202.

⁷⁸⁰(2002) 2 WLR 1749, 67.

⁷⁸¹Wolski, above n 739, 196.

⁷⁸²A A S Zuckerman, 'Lord Woolf's Access to Justice: Plus ça change ...' (1996) 59 *Modern Law Review* 773.

⁷⁸³Wolski, above n 739, 199.

⁷⁸⁴Legg, Case Management and Complex Civil Litigation, above n 30, 20.

⁷⁸⁵*Civil Procedure Act 2005* (NSW) s 56(3) (4).

made upon the application of the parties if more than six times.⁷⁸⁶ Empirical research showed that the judges frequently do not follow time restrictions, and do not impose heavy costs (page no127). But there is no way to ensure the accountability of the lawyers. Neither the *Code of Civil Procedure* 1908 nor the *Bangladesh Legal Practitioners and Bar Council Order, 1972* impose any cost upon lawyers for wilful delay in court proceedings. Though the *Bangladesh Bar Council Canons of Professional Conduct and Etiquette* (framed under *Legal Practitioners and Bar Council Act 1965* (Bangladesh) by the Bangladesh Bar Council imposes some duties towards the clients and the courts, those are not specifically related to delay in disposal of a case and give next to no legal remedy.⁷⁸⁷

Recommendation-7:

- The *Code* and the *Canons* should impose some legal obligation upon lawyers to cooperate with the court in speedy disposal, and intentional violation of this rule could be subject to costs or other punishment.⁷⁸⁸

Increasing Jurisdiction

Research shows that the pecuniary jurisdiction of the civil court of Bangladesh was changed long ago.⁷⁸⁹ But the value of the property has changed much over the years. Therefore some courts are facing an excessive number of cases while other courts have fewer, which is also a cause for delay in disposal of cases. To ensure an equal pressure upon the courts the pecuniary jurisdiction of the civil courts of Bangladesh needs to be changed.

Recommendation-8:

- Chapter III of the *Civil Courts Act 1887* (Bangladesh) should be rearranged and the pecuniary jurisdiction of the courts should increase.

Computerizing the Court System

⁷⁸⁶ *Code of Civil Procedure 1908* (Bangladesh) O XVII r 1, 2.

⁷⁸⁷ *Bangladesh Bar Council Canons of Professional Conduct and Etiquette* Chap II and Chap III <http://bangladeshbarcouncil.org/cmsadmin/upload_dir/bar_council_rules.pdf> 119-24.

⁷⁸⁸ Example can be taken from the NSW District Court how they have ensured the lawyers responsibility. See at above page no 112.

⁷⁸⁹ The pecuniary jurisdictions of the civil courts has been changed in 2001 by the *Civil Courts (Amendment) Act 2001* (Bangladesh) s 18-21.

Realistically, in order to assist efficiency and reduce delays, there is no alternative but to computerize the whole legal system. This would provide courts instantly with the information needed for effective case management. It would also ensure good record-keeping and systematic e-filing of the cases. With a properly computerized system, it would be possible to monitor and track case-flow in such a way as to know the status of each case and its procedural position, and to locate documents and records more easily and reflect each case and its progress in a transparent manner and to do so, two more things will need to be ensured:

- (a) Computer training on a regular basis for both the judges and court staff;
- (b) Proper technical support and continuous maintenance of the computer system.

Computerization alone, without necessary training and continuous maintenance and technical support, would be futile. The absence of reliable computer facilities burdens the court and adds to delays. A national budget allocation, perhaps assisted by international aid, would help to keep the computers working and keeping records up to date.

Recommendation-9:

- Each Court should be provided with proper and continuing computer facilities and court staff as well as judges should be trained up on computer skills. Court registers and filing should be drawn under e-filing system to ensure easy case tracking.

Other Reforms

Increasing the Number of the Judges

As mentioned earlier that the number of the judges is very low in comparison to the population and the cases pending (page number 2). Therefore there is no alternative but to increase the number of the judges along with proper infrastructure. Without doing so, efficient case management could not be implemented in practice. At the same time it is also found that the hierarchy of the subordinate courts are too many and the inter-relationships too complex (page number 61) to understand easily. Therefore it would be better to institute fewer levels of courts while increasing the number of the judges. For better case flow management, proper distribution of workload among the judges and at the same time review from time to time to ensure a manageable caseload is essential.

Recommendation-10:

- The number of judges should be increased with proper infrastructure.
- The hierarchy (levels) of courts should be decreased by amending section 3 of the *Civil Courts Act 1887* (Bangladesh).

Reforming Judicial Administration and Training Institute (JATI)

Most participants agreed that the judicial officers, lawyers and even the court staffs need training. The training, however, may be varied: for example, judges and lawyers need training on mediation and if they continue to promote it, the numbers of mediations conducted should increase substantially overtime. Both judges and staff need information technology training. The Judicial Administration and Training Institute can play a vital role, but the first requirement would be to improve the Institute and for that reason the budgetary allocation is a prime need. Many international organisations, for example, USAID, UNDP, DFID could be of great assistance in this area.

Recommendation-11:

- The JATI should be reviewed and improved.

Legal Learning

Wolski mentioned the need for shaping the attitudes and skills of lawyers from law schools.⁷⁹⁰ She advised that law teachers must not only teach their students about the reforms to procedural law, but also inform and hopefully instil in students, ‘the spirit, ethos and ethic of the changes. Of course, law schools have to teach a great deal more than procedural law.’⁷⁹¹

There is growing awareness of the importance of teaching skills, values and professional responsibilities in the law school curriculum, in addition to substantive and procedural knowledge. The question to be answered now is what skills, values and professional responsibilities should be taught? Wolski included skills in areas such as problem solving, legal analysis and reasoning, legal research, factual investigation, communication, counselling, negotiation, litigation and ADR, and the ability to recognise and respond appropriately to ethical

⁷⁹⁰Wolski, above n 739, 222.

⁷⁹¹Ibid 222.

dilemmas.⁷⁹² Law schools must take steps to modify the adversarial systems. It is time for law graduates to acquire new skills and ways of approaching problems that will enable them to practice law in a more cooperative way.⁷⁹³

Almost all studies and reports into legal education and the legal profession emphasise the need to teach skills in the context of ethics, values and professional responsibility. Law schools also have an obligation to instil in students a critical understanding of personal and professional values.⁷⁹⁴ If law schools are to respond in an appropriate way to the reforms which have taken place in the civil justice system, more resources must be made available for the funding of skills, ethics and values teaching and learning in law schools and for teaching beyond the parameters of large group lectures.⁷⁹⁵ The reforms and changes needed to increase access to justice must start at the grass roots, in law schools.

At the same time legal learning must be a continuing process. In NSW, the law society of New South Wales has undertaken the Mandatory Continuing Legal Education (MCLE) for the all solicitors who are practicing.⁷⁹⁶ Each year the solicitor has to complete his education which is also known as Continuing Professional Development (CPD). Compared with NSW, Bangladesh has no ongoing professional development or continuing legal education for lawyers in order to ensure lawyers' knowledge is up-to-date, and that they continue to act responsibly and in a committed fashion.

Recommendation-12:

- Legal education should be changed and more focus be ensured on mediation, ethics, and professional responsibilities not only at the law school, but also as part of a continuing education for qualified lawyers.

⁷⁹² Ibid222.

⁷⁹³ Ibid 223.

⁷⁹⁴ Ibid224-5.

⁷⁹⁵ Ibid232.

⁷⁹⁶ The Law Society of New South Wales, *Mandatory Continuing Legal*

Education <<http://www.lawsociety.com.au/ForSolicitors/practisinglawinnsw/mclecpd/index.htm>>

Increasing Monitoring

If there were an adequate monitoring system, the existing gaps in the laws would decrease automatically. Whether the summons are served on time and returned to the court, whether defendants have submitted the written statement on time, whether the examination of witnesses is completed on time — all these things need to be monitored properly. A separate monitoring body consisting of judges and lawyers could be a good approach to monitor lawyers' and judges' accountability.

Recommendation-13:

- A proper monitoring system must be ensured through a body or committee.⁷⁹⁷

ADDRESSING THE AIMS AND OBJECTIVES OF THE RESEARCH

In Chapter One, the aim of this research was stated to be:

- To study the impact of the case management in reducing the number of pending cases.
- To find out how case management has successfully reduced backlogs from the District Court of New South Wales.
- To find out the causes of gaps between the law and its practice in the civil trial courts of Bangladesh.
- To find a 'suitable case management' method to reduce the burden of pending cases in Bangladesh adapting experiencing from the District court of New South Wales.

Chapter Two examined how case management can be used as a tool in reducing case backlogs; in Chapter Three, the comparison between the court systems of Bangladesh and the New South Wales District Court, Australia justifies the reason of choosing the District Court of New South Wales; Chapter Four describes how the District Court has used case management for years as a tool in reducing case backlogs and achieved success. Chapter Five describes the gaps between

⁷⁹⁷ Example can be taken from the Civil Business Committee of the NSW District Court. See at above page no 94.

law and in practice in the civil courts of Bangladesh through analysing the empirical data through grounded theory methods. And all the outcomes of this study demonstrate that case management can be a tool in reducing backlogs from the Bangladesh civil trial courts. But still it needs to be tested through practical application.

CONCLUSION

The Bangladesh civil court proceedings are too fragmented in the way they are organized since there is no-one with clear overall responsibility for the administration of civil justice and it is too adversarial. Cases are run by the parties and their lawyers, not by the courts, and the rules of court are all too often ignored by the parties and not enforced by the judge which in turn causes congestion of cases. In this situation, incorporating case management into the civil court procedure could be a timely solution which of course will need to be supplemented by empowering the judges to control the case in maintaining time limits, changing the traditional pleadings writing procedure, introducing summary judgments, restricting frequent involvement of the higher court in the interlocutory matters, motivating clients to mediate at the pre-trial conference, increasing the number of the judges and courts, and ensuring computer facilities in each court with proper maintenance and skilled persons to run the system. All these require amendments to the *Code of Civil Procedure 1908* (Bangladesh), the *Civil Rules and Orders* (Bangladesh), and also some other relevant laws. It is the high time to proceed with a computerized case management system in court procedure to make the legal system more effective and efficient, and to achieve maximum benefits for litigants. The empirical data set out in this study demonstrates how and why delays occur and establishes a basis upon which to engender change in order to reduce backlogs.

These recommendations have been formed to assist legislators and judges and other legal professionals, but mainly to assist the people of Bangladesh. Lack of proper evaluation of the work, lack of basic logistics like pens and paper, computer facilities and stenographers, even insufficient office space for judges and court staff act as constraints to the courts conducting their business properly and causes sufferings of the clients like the old man (see at page no 14) who is tired of giving court attendance over the last thirty years— this constitutes an intolerable situation.

These recommendations require money and of course political will. International organisations, for example, UN organizations alongside bi-lateral and multilateral organizations and donor agencies functioning in Bangladesh could be of great assistance for funding; but there will also be needed for a proper long term plan. Without a long term plan, it would not be sustainable to achieve the benefits of case management. A dedicated and willing working group from the Supreme Court of Bangladesh including the Honourable Chief Justice and the Ministry of Law, Justice and Parliamentary Affairs could help to devise a plan and oversee its implementation. If all these are not done, the moaning of that old man will have no end.

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APPENDIX A: ETHICS CLEARANCE

From the office of Faculty of Arts Human Research Ethics Committee

Dr Mianna Lotz

Chair, Faculty of Arts Human Research Ethics Committee

Level 7, W6A Building

Macquarie University

Balaclava Rd

NSW 2109 Australia

Mianna.Lotz@mq.edu.au

29 July 2014

Ummey Sharaban Tahura

Macquarie Law School, Faculty of Arts

Room-340, W3A building

Macquarie University, Sydney-2109

Australia

Ethics Application Ref: (5201300485) - Final Approval

Dear Dr Kelly,

Re: 'An investigation of case management as a tool in reducing case backlog: potential adaptation of the case management experience of NSW District Court to the Bangladeshi Civil Trial Courts'

Thank you for your recent correspondence. Your response has addressed the issues raised by the Faculty of Arts Human Research **Ethics** Committee. Approval of the above **application** has been granted, effective 29/07/2013. This email constitutes ethical approval only.

Please note that the Committee requested that you remove all references to 'anonymity' in the Information and Consent sheets (as the researcher will know the participants' names, a more accurate description of the process here is 'de-identification').

This research meets the requirements of the National Statement on Ethical Conduct in Human Research (2007). The National Statement is available at the following web site:

http://www.nhmrc.gov.au/_files_nhmrc/publications/attachments/e72.pdf.

The following personnel are authorised to conduct this research:

Dr Margaret Kelly

Mrs Ummey Sharaban Tahura

NB. STUDENTS: IT IS YOUR RESPONSIBILITY TO KEEP A COPY OF THIS APPROVAL EMAIL TO SUBMIT WITH YOUR THESIS.

Please note the following standard requirements of approval:

1. The approval of this project is conditional upon your continuing compliance with the National Statement on Ethical Conduct in Human Research (2007).
2. Approval will be for a period of five (5) years subject to the provision of annual reports.

Progress Report 1 Due: 29/07/14

Progress Report 2 Due: 29/07/15

Progress Report 3 Due: 29/07/16

Progress Report 4 Due: 29/07/17

Final Report Due: 29/07/18

NB: If you complete the work earlier than you had planned you must submit a Final Report as soon as the work is completed. If the project has been

discontinued or not commenced for any reason, you are also required to submit a Final Report for the project.

Progress reports and Final Reports are available at the following website:

http://www.research.mq.edu.au/for/researchers/how_to_obtain_ethics_approval/human_research_ethics/forms

3. If the project has run for more than five (5) years you cannot renew approval for the project. You will need to complete and submit a Final Report and submit a new **application** for the project. (The five year limit on renewal of approvals allows the Committee to fully re-review research in an environment where legislation, guidelines and requirements are continually changing, for example, new child protection and privacy laws).

4. All amendments to the project must be reviewed and approved by the Committee before implementation. Please complete and submit a Request for Amendment Form available at the following website:

http://www.research.mq.edu.au/for/researchers/how_to_obtain_ethics_approval/human_research_ethics/forms

5. Please notify the Committee immediately in the event of any adverse effects on participants or of any unforeseen events that affect the continued ethical acceptability of the project.

6. At all times you are responsible for the ethical conduct of your research in accordance with the guidelines established by the University. This information is available at the following websites:

<http://www.mq.edu.au/policy/>

http://www.research.mq.edu.au/for/researchers/how_to_obtain_ethics_approval/human_research_ethics/policy

If you will be **applying** for or have applied for internal or external funding for the above project it is your responsibility to provide the Macquarie University's Research Grants Management Assistant with a copy of this email as soon as possible. Internal and External funding agencies will not be informed that you have approval for your project and funds will not be released until the Research Grants Management Assistant has received a copy of this email.

If you need to provide a hard copy letter of approval to an external organisation as evidence that you have approval, please do not hesitate to contact the Faculty of Arts Research Office at ArtsRO@mq.edu.au

Please retain a copy of this email as this is your official notification of **ethics** approval.

Yours sincerely

Dr Mianna Lotz
Chair, Faculty of Arts Human Research **Ethics** Committee
Level 7, W6A Building
Macquarie University
Balaclava Rd
NSW 2109 Australia
Mianna.Lotz@mq.edu.au

**APPENDIX B: APPROVAL FROM MINISTRY OF LAW, JUSTICE AND PARLIAMENTARY
AFFAIR , BANGLADESH**

Government of the People's Republic of Bangladesh

Ministry of Law, Justice and Parliamentary Affairs

Law and Justice Division

Bichar Shakha-1

No- bichar-1/2 L-2/2010-431

Date: 15/09/2013

Subject: Seeking permission to interview Judges and access into relevant records

Directed by the proper authority, it is to inform that, UmmeiSharabanTahura is doing MPhil in Australia under the Australian Government Development Scholarship in the Macquarie Law School, Macquarie University, NSW, Australia. She is thereby given permission to interview Judges of the eight districts of Bangladesh and also access to relevant records for her research study as part of MPhil program.

1. District, Dhaka
2. District, Mymensingh
3. District, Chittagong
4. District Barishal
5. District, Sylhet
6. District, Rajshahi
7. District, Rangpur
8. District, Khulna

1. Accordingly all the relevant District Judges are requested to assist her to access into relevant records and interviewing judges.

(signature)

Mohammad JahirulKabir

Senior Assistant Secretary

Phone: 9545431

Concern:

1. District Judge, Dhaka
2. District Judge, Mymensingh
3. District Judge, Chittagong
4. District Judge, Barishal
5. District Judge, Sylhet
6. District Judge, Rajshahi
7. District Judge, Rangpur
8. District Judge, Khulna
9. UmmeySharabanTahura, Senior Assistant Judge
MPhil Candidate, Macquarie University
Flat no 5A, 147/B/6 Green road, Dhaka

APPENDIX C: INFORMATION LETTER AND CONSENT SHEET



Macquarie Law School

Faculty of Arts

MACQUARIE UNIVERSITY NSW 2109

AUSTRALIA

Phone: +61-2-98507060

Fax: +61-2-98507686

Email: margaret.kelly@mq.edu.au

Chief Investigator's / Supervisor's Name: Dr Margaret R.L.L. Kelly

Chief Investigator's / Supervisor's Title: Senior Lecturer

Co-Investigator's /Interviewer's Name: Mrs UmmeySharabanTahura

Co-Investigator's /Interviewer's Title: Candidate, Master of Philosophy in Law, Macquarie University

CLIENT Participant Information and Consent Sheet

Name of Project: An investigation of case management as a tool in reducing case backlog:
Potential adaptation of the case management experience of NSW District Court to the Bangladeshi Civil Trial Courts.

You are invited to participate in a study of finding out the causes of the case backlogs in the civil trial courts of Bangladesh. The purpose of the study is to find out the causes of backlogs in deciding cases.

The study is being conducted Mrs UmmeySharabanTahura, MPhil Candidate of Macquarie Law School, Macquarie University; *phone:* +61(0)298508806; *email:* ummey.tahura@students.mq.edu.au to meet the requirements of Master of Philosophy in Law under the supervision of Dr.Margaret R.L.L. Kelly of Macquarie Law School, Macquarie University; *Phone:* +61(0)298507060; *Email:* margaret.kelly@mq.edu.au.

Mrs Tahura will conduct research on court procedures to find causes for case backlogs in the courts. She will do this by asking practical questions of clients involved in cases about how their case has progressed and whether any delays have occurred. The purpose of this project is to gather information only and will not affect your individual case in any way; but it will help in finding out the causes of any backlogs in the time taken to settle cases.

She will ask you if you are willing to take part in the study. She will already have spoken to your lawyer as identified in today's court list, and have been given his/her consent to ask you if you are willing to answer her questions. You will then have time to consider whether you want to participate. If you then agree to answer her questions, the interview will take about 50 minutes.

Mrs Tahura will ask everyone who agrees to participate the same questions. These questions are about the time it has taken to consider your case, the numbers of times you have come to court, things that may have delayed the case, and your own thoughts on the progress of your case and the process of handling your case and any suggestions you may have.

Recording of Interview: Because this is a research study acquiring information, Mrs Tahura needs to record your interview and take notes to ensure that there is an accurate record of the

information, and that reliable records are maintained. She will also need to obtain your name as a client and record this for the study; but this information will be kept safely, and no-one else beyond the study will be given your personal details. All records of the interviews will be securely stored at Macquarie University. There will be no secretive use of this recording. Your anonymity will be maintained.

Any information or personal details gathered in the course of the study are confidential, except as required by law. No individual will be identified in any publication of the results.

Please tell me if you agree for me to digitally record this interview?

Yes ☐ No ☐

Dr. Margaret R.L.L. Kelly (Chief Investigator) and Mrs UmmeySharabanTahura (Co-Investigator) will be the persons who have access to the information. The Higher Degree Research Committee and Academic Senate of Macquarie University will have the right to access to the research data. Examiners of Mrs Tahura's MPhil thesis might have access to the research data for the thesis examination purpose only.

Any information or personal details gathered in the course of the study are confidential, except as required by law. No individual will be identified in any publication of the results without your consent. During the thesis writing Mrs Tahura might present the result of the interview data at some relevant conferences and it will also result in the publication of a referred journal article. A summary of the results of the data can be made available to you on request when primary conclusions are being developed, and you will have the opportunity to provide further feedback. Your comments and feedback may be incorporated into the final publication.

Because of the nature of the research, quotations from your responses may be used with your written consent.

Please tell me if you agree to be quoted? Yes ☐ No ☐

Participation in this study is entirely voluntary: you are not obliged to participate and if you decide to participate, you are free to withdraw at any time without having to give a reason and without consequence.

No payment or remuneration is involved: Based on the subject matter of the research, it is not anticipated that the interviews will create discomfort or risks for any participants.

If you agree to be interviewed after Mrs Tahura has explained these details to you, you will need either to sign this form below, or authorise her to fill in the details on your behalf, and you will be asked again at the beginning of the interview to indicate your consent to answer the questions for the study.

I, _____ have read (*or, have had read to me*) and understand the information above and any questions I have asked have been answered to my satisfaction. I agree to participate in this research, knowing that I can withdraw from further participation in the research at any time without consequence. I have been given a copy of this form to keep.

Participant's Name: _____

(Block letters)

Participant's Signature: _____ *Date:* _____

Participant's Contact Details: _____

Investigator's Name: _____

(Block letters)

Investigator's Signature: _____ *Date:* _____

Place of Interview: _____

The ethical aspects of this study have been approved by the Macquarie University Human Research Ethics Committee. If you have any complaints or reservations about any ethical aspect of your participation in this research, you may contact the Committee through the Director,

Research Ethics (telephone +61 (2) 9850 7854; email ethics@mq.edu.au). Any complaint you make will be treated in confidence and investigated, and you will be informed of the outcome.

(INVESTIGATOR'S [OR PARTICIPANT'S] COPY)



Macquarie Law School

Faculty of Arts

MACQUARIE UNIVERSITY NSW 2109

PHONE: +61-2-9850 7060

Fax: +61 (0)29850 7686

Email: margaret.kelly@mq.edu.au

প্রধান তদন্তকারি আফিসার/ তত্ত্বাবধায়ক এর নাম: মারগারেট আর এল এল কেলি

প্রধান তদন্তকারি আফিসার/ তত্ত্বাবধায়ক এর পদবী: জ্যেষ্ঠ প্রভাষক

সহ তদন্তকারি আফিসার/ তত্ত্বাবধায়ক এর নাম: উম্মে সরাবন তহুরা

সহ তদন্তকারি আফিসার/ তত্ত্বাবধায়ক এর পদবী: এম ফিল প্রার্থী, ম্যাকুয়েরি ল স্কুল, ম্যাকুয়েরি ইউনিভার্সিটি

অংশগ্রহণকারীর তথ্য এবং সম্মতির ফর্ম (বিচার প্রার্থী জনগণের জন্য)

প্রোজেক্টের নাম: মামলা জট কমাতে মামলা ববস্থাপনার ভূমিকা বিষয়ে অনুসন্ধান: নিউ সাউথ ওয়েলস এর জেলা আদালতের অভিজ্ঞতাব্যবস্থাপনার দেওয়ানি বিচার আদালতে মামলা ববস্থাপনার সম্ভাব্য অভিযোজন।

আপনাকে বাংলাদেশের দেওয়ানি বিচার আদালতে মামলা জটের কারণের অনুসন্ধানমূলক গবেষণায় অংশগ্রহণের জন্য আমন্ত্রণ করা হল।
গবেষণার উদ্দেশ্য হলো মামলা দীর্ঘায়িত করার পেছনের কারণগুলো খুঁজে বের করা।

তহুরা আদালতের পদ্ধতিগত বিষয়ও গবেষণায় অন্তর্ভুক্ত করবে আদালতে মামলা দীর্ঘ হওয়ার কারণ খুঁজে বের করার জন্য। এটা করার জন্য সে বিচার প্রার্থী জনগণকে তাদের মামলার অগ্রগতি সম্পর্কে কিছু বাস্তব প্রশ্ন করবে। গবেষণার উদ্দেশ্য কেবল মাত্র তথ্য সংগ্রহ এবং এই তথ্য কোনোক্রমেই কারো মামলায় কোনোরকম প্রভাব ফেলবে না। এবং এটি মামলা জটের কারণগুলো খুঁজে বের করবে।

গবেষণাটি পরিচালনা করবেন উম্মে সরাবন তহুরা, যিনি ম্যাকুয়েরি ল স্কুল, ম্যাকুয়েরি ইউনিভার্সিটিতে এম ফিল করছেন। ফোন: +৬১(২)৯৮৫০৮৮০৬; ইমেইল: ummey.tahura@students.mq.edu.au আইন বিষয়ে ড. মারগারেট এম এল এল ক্যালি, ম্যাকুয়েরি ল স্কুল, ম্যাকুয়েরি ইউনিভার্সিটি; ফোন: +৬১৪০২৯৮৫০৭০৬০; ইমেইল: margaret.kelly@mq.edu.au এর তত্ত্বাবধানে এম ফিল এর জন্য।

আপনি যদি অংশগ্রহণে সম্মত হন, তবে আপনাকে জিজ্ঞেস করা হবে। তহুরা এর মধ্যেই আপনার আইনজীবীর সাথে কথা বলেছে আদালতের তালিকা অনুসারে মামলা পছন্দ করার পর। তিনি আপনার সাক্ষাৎকারের বিষয়ে অনুমতি দিয়েছেন যদি আপনি আগ্রহী হন। আপনাকে সিদ্ধান্ত নেয়ার জন্য কিছু সময় দেয়া হবে। আপনি যদি সম্মত হন প্রশ্নের উত্তর দেয়ার জন্য তবেই আপনাকে জিজ্ঞেস করা হবে প্রায় ৫০ মিনিটের সাক্ষাৎকার পর্বটি।

যারা অংশগ্রহণে সম্মত হয়েছেন তাদের প্রত্যেককে একই ধরনের প্রশ্ন জিজ্ঞেস করা হবে। প্রশ্নগুলো আপনার মামলায় কি রকম সময় লাগছে, আপনি কতবার আদালতে এসেছেন মামলা করার পর থেকে, কোন কোন বিষয় মামলার বিলম্বের জন্য দায়ী, আপনার মামলার অগ্রগতির পিছনে কিসের ভূমিকা বা এই বিষয়ে আপনার ভাবনা, আপনার মামলা পরিচালনার ক্ষেত্রে ভূমিকা বা আপনার পরামর্শ ও জিজ্ঞেস করা হতে পারে।

t x3 xÓV xp j l á h xp d yl s , Æ/ যেহেতু এই গবেষণাটি একাডেমী বিষয়ের সাথে যুক্ত কাজেই সঠিক ভাব রক্ষার্থে সাক্ষাৎকার পর্বটি ধারণ করতে হবে এবং নোট নিতে হবে। সাক্ষাৎকারের সকল তথ্য ম্যাকুয়েরি ইউনিভার্সিটিতে নিরাপদে সংরক্ষণ করা হবে। তথ্যগুলোর কোন গোপন ব্যবহার করা হবে না। আপনার ব্যক্তিগত তথ্য গোপন রাখা হবে, তবে আপনার পদ/পদবি/ মামলার সাথে কিভাবে (বিচারক, আইন জীবী, আদালত কর্মচারী বা বিচার প্রার্থী সেটা উল্লেখ করা হবে) আপনি কি ডিজিটালি তথ্য সংগ্রহ বিষয়ে সম্মতি দিবেন?

হ্যাঁ ☐ না ☐

ড. মারগারেট এম এল এল ক্যালি (প্রধান তদন্তকারী ব্যক্তি) এবং উম্মে সরাবন তহুরা (সহতদন্তকারী ব্যক্তি) এই দুজনই তথ্য প্রবেশের অধিকার থাকবে। এছাড়াও হাইয়ার ডিগ্রি রিসার্চ কর্মিটি এবং একাডেমিক সিনেটের তথ্য প্রবেশের অধিকার থাকবে। গবেষণাপত্রের পরীক্ষকদেরও কেবলমাত্র পরীক্ষাপত্র পরীক্ষার জন্য তথ্য প্রবেশের অধিকার থাকবে।

আইনগত প্রয়োজনীয়তা ছাড়া গবেষণার জন্য সংগৃহীত তথ্য বা ব্যক্তিগত বিবরণী গোপনীয় থাকবে। কোন ব্যক্তিই প্রকাশনার ফলাফলে চিহ্নিত হবেন না। তবে, গবেষণাপত্র লেখার সময় তহুরা সংশ্লিষ্ট সেমিনার বা কোন জার্নাল আর্টিকেল এ সাক্ষাৎকারের ফলাফল প্রকাশ করতে পারি।

তথ্যের সংক্ষিপ্ত ফলাফল প্রাথমিকভাবে তথ্য সংগ্রহ সমাপ্ত হলে আপনার অনুরোধে সরবরাহ করা হবে। সে সময়ে আপনাকে আরো তথ্য সরবরাহ করার সুযোগ দেয়া হবে। আপনার মন্তব্য এবং পরবর্তী তথ্য সর্বশেষ প্রকাশনায় যোগ্য কার হবে।

গবেষণার জন্য আপনার উদ্ধৃতি ব্যবহার করা হতে পারে। আপনি উদ্ধৃত হতে লিখিত অনুমতি দিচ্ছেন?

হ্যা ☐ না ☐

স্বৈচ্ছাপ্রণোদিত অংশগ্রহনঃ গবেষণা অংশগ্রহন করা আপনার সম্পূর্ণ স্বৈচ্ছাপ্রণোদিত অভিমত। আপনি অংশগ্রহনের সিদ্ধান্ত নেয়ার পরও অংশগ্রহন করতে বাধ্য নন। আপনি যে কোন সময়েই অংশগ্রহন করা থেকে বিরত হতে পারেন কোন কারণ বা ফলাফল প্রদর্শন ছাড়াই।

সম্মানী বা ভাতা দেয়া হবে নাঃ গবেষণা কাজে অংশগ্রহণের জন্য আপনাকে কোন সম্মানী বা ভাতা দেয়া হবে না। গবেষণার বিষয় থেকে কোন ঝুঁকি বা অসুবিধা অনুমান করা সম্ভব নয়।

আপনি যদি সাক্ষাৎকার প্রদানে সম্মত হন তহুরার সমস্ত ব্যাখ্যা শোনার পর আপনাকে এই ফর্মের সাক্ষর/ টিপসই দিতে হবে এবং সাক্ষাৎকার এর প্রশ্ন জিজ্ঞেস করার পূর্বে আবার আপনার সম্মতি জানতে চাওয়া হবে।

আমি, $j, \%y \setminus (J f l x K n x, V j, \% \otimes x i x i x u, \mathcal{E}, \setminus) R l H N j, p p e f \partial X, q x l \hat{x}^{\wedge} y \setminus R l H K n x p V p x$
 $\frac{1}{2}^{\sharp} \mathfrak{K}, q x p t, \mathfrak{A} x s] i V N \mathfrak{K} p \mathfrak{Q}, \mathcal{E} y \setminus E K y n X, l s d x \mathcal{E} J H \ddot{o} u, i p] i \partial J \frac{1}{4} n y e y g y^{\mathfrak{K}}, R`x \mathfrak{Q}], i \mathfrak{Q}$
 $j p l e \mathfrak{H} X, l s d x J H$ গ্রহণে $K y n l x h \partial i L l x k q x q \frac{1}{2} g r \mathfrak{H} \setminus x \% x L K y n J H \ddot{o} u, d y l p e f x V, e j x p E$
 $K n x V k, n \mathfrak{H} R V y' V y j t p l p x u V x p u, \mathcal{E}, \setminus - t H p \mathfrak{Q}, d p] i \partial E$

অংশগ্রহনকারীর নাম (Participant’s Name): _____

(Block letters)

অংশগ্রহনকারীরসাক্ষর: _____ Date: _____

তদন্তকারীর নাম(Investigator's Name): _____

(Block letters)

Investigator's Signature: _____ Date: _____

গবেষণার নৈতিক অনুমতি দিয়েছে ম্যাকুয়েরি ইউনিভার্সিটির হিউম্যান রিসার্চ এথিক্স কমিটি। আপনার যদি অংশগ্রহন সংক্রান্ত নৈতিক বিষয়ে কোন অভিযোগ বা শর্ত থাকলে আপনি কমিটির সাথে যোগাযোগ করতে পারেন-পরিচালক, রিসার্চ এথিক্স (ফোন +৬১(০২)৯৮৫০৭৮৫৪; ইমেইল; ethics@mq.edu.au).আপনার অভিযোগসমূহ গোপন রেখে তদন্ত করা হবে এবং তদন্তের ফলাফল আপনাকে জানানো হবে।

e g ৳ V x p z [J f l x J H ö u V x p z 8 V y]



Macquarie Law School

Faculty of Arts

MACQUARIE UNIVERSITY NSW 2109

AUSTRALIA

Phone: +61-2-98507060

Fax: +61-2-98507686

Email: margaret.kelly@mq.edu.au

Chief Investigator's / Supervisor's Name: Dr Margaret R.L.L. Kelly

Chief Investigator's / Supervisor's Title: Senior Lecturer

Co-Investigator's /Interviewer's Name: Mrs UmmeySharabanTahura

Co-Investigator's /Interviewer's Title: Candidate, Master of Philosophy in Law, Macquarie University

NON-CLIENT Participant Information and Consent Sheet

*Name of Project: An investigation of case management as a tool in reducing case backlog:
Potential adaptation of the case management experience of NSW District Court to the
Bangladeshi Civil Trial Courts.*

You are invited to participate in a study of finding out the causes of the case backlogs in the civil trial courts of Bangladesh. The purpose of the study is to find out the causes of backlogs in deciding cases.

The study is being conducted Mrs UmmeySharabanTahura, MPhil Candidate of Macquarie Law School, Macquarie University; phone: +61(0)298508806; email: ummey.tahura@students.mq.edu.au to meet the requirements of Master of Philosophy in Law under the supervision of Dr.Margaret R.L.L. Kelly of Macquarie Law School, Macquarie University; Phone: +61(0)298507060; Email: margaret.kelly@mq.edu.au.

Mrs Tahura will conduct research on court procedures to find causes for case backlogs in the courts. She will do this by asking practical questions of clients, lawyers, court staff, and judges involved in cases about how the chosen case has progressed and whether any delays have occurred. The purpose of this project is to gather information only and will not affect any individual case in any way; but it will help in finding out the causes of any backlogs in the time taken to settle cases.

Mrs Tahura will ask you if you are willing to take part in the study and answer a set of questions, and also ask (if you are a lawyer representing a client) your permission to interview your client as identified in today's court list so that she may interview them also.

If you decide to participate, you will be asked to participate in an interview of approximately 50 minutes duration. During this time you will be asked a range of questions relevant to the broad

aims of the research. You may be asked to comment on what are the common concerns and queries potential complainants have and about any procedural complexities you may face. You may also be asked about whether you have any particular views on or experience with court environments, or any suggestions to reduce backlogs.

Recording of Interview: Because this is a research study acquiring information for academic purposes, Mrs Tahura needs to record your interview and take notes to ensure that there is an accurate record of the information, and that reliable records are maintained. But this information will be kept safely. All records of the interviews will be securely stored at Macquarie University. Your anonymity will be maintained; however your position (whether as a Judge, a lawyer, or a court staff member) will be recorded. No individual will be identified in any publication of the results without their consent.

Do you agree for me to digitally record this interview?

Yes

☐

No

☐

Dr. Margaret R.L.L. Kelly (Chief Investigator) and Mrs Ummey Sharaban Tahura (Co-Investigator) will be the persons who have access to the information. The Higher Degree Research Committee and Academic Senate of Macquarie University will have the right to access to the research data. Examiners of Mrs Tahura's MPhil thesis might have access to the research data for the thesis examination purpose only.

Any information or personal details gathered in the course of the study are confidential, except as required by law. No individuals will be identified in any publication of the results without their consent. During the thesis writing Mrs Tahura might present the result of the interview data at

some relevant conferences and it will also result in the publication of a referred journal article. A summary of the results of the data can be made available to you on request when primary conclusions are being developed, and you will have the opportunity to provide further feedback. Any of your comments and feedback may be incorporated into the final publication.

Because of the nature of the research, quotations from your responses may be used with your written consent.

Do you agree to be quoted? Yes ☐ No ☐

Participation in this study is entirely voluntary: you are not obliged to participate and if you decide to participate, you are free to withdraw at any time without having to give a reason and without consequence.

No payment or remuneration is involved: Based on the subject matter of the research, it is not anticipated that the interviews will create discomfort or risks for any participants.

If you agree to be interviewed after Mrs Tahura has explained these details to you, you will need to sign this form below, and you will be asked again at the beginning of the interview to indicate your consent to answer the questions for the study.

I, _____ have read (*or, have had read to me*) and understand the information above and any questions I have asked have been answered to my satisfaction. I agree to participate in this research, knowing that I can withdraw from further participation in the research at any time without consequence. I have been given a copy of this form to keep.

Participant's Name: _____

(Block letters)

Participant's Signature: _____ *Date:* _____

Participant's Contact details: _____

Investigator's Name: _____

(Block letters)

Investigator's Signature: _____ *Date:* _____

Place of Interview: _____

The ethical aspects of this study have been approved by the Macquarie University Human Research Ethics Committee. If you have any complaints or reservations about any ethical aspect of your participation in this research, you may contact the Committee through the Director, Research Ethics (telephone +61 (2) 9850 7854; email ethics@mq.edu.au). Any complaint you make will be treated in confidence and investigated, and you will be informed of the outcome.

(INVESTIGATOR'S [OR PARTICIPANT'S] COPY)



Macquarie Law School

Faculty of Arts

MACQUARIE UNIVERSITY NSW 2109

PHONE: +61-2-9850 7060

Fax: +61 (0)29850 7686

Email: margaret.kelly@mq.edu.au

১২ হি খি এ গ.অ V xyp K yk t xp. e ঙু খি h xCEV R p i x1 : মারগারেট আর এল এল কেলি

১২ হি খি এ গ.অ V xyp K yk t xp. e ঙু খি h xCEV R p j g l z জ্যেষ্ঠ প্রভাষক

সহ তদন্তকারি আফিসার/ তত্ত্বাবধায়ক এর নাম: উম্মে সরাবন তহুরা

সহ তদন্তকারি আফিসার/ তত্ত্বাবধায়ক এর পদবী:এম ফিলপ্রার্থী, ম্যাকুয়েরি ল স্কুল, ম্যাকুয়েরি ইউনিভার্সিটি

অংশগ্রহণকারীর তথ্য এবং সম্মতির ফর্ম (বিচার প্রার্থী জনগণ ছাড়া)

প্রোজেক্টর নাম: মামলা জট কমাতে মামলা ববস্থাপনার ভূমিকা বিষয়ে অনুসন্ধান: নিউ সাউথ ওয়েলস এর জেলা আদালতের
অভিজ্ঞতায় বাংলাদেশের দেওয়ানি বিচার আদালতে মামলা ববস্থাপনার সম্ভাব্য অভিযোজন।

আপনাকে বাংলাদেশের দেওয়ানি বিচার আদালতে মামলা জটের কারণের অনুসন্ধানমূলক গবেষণায় অংশগ্রহণের জন্য আমন্ত্রণ করা হল।
গবেষণার উদ্দেশ্য হলো মামলা দীর্ঘায়িত করার পেছনের কারণগুলো খুঁজে বের করা।

তহুরা আদালতের পদ্ধতিগত বিষয়ও গবেষণায় অন্তর্ভুক্ত করবে আদালতে মামলা দীর্ঘ হওয়ার কারণ খুঁজে বের করার জন্য। এটা করার জন্য সে বিচার প্রার্থী জনগনকে তাদের মামলার অগ্রগতি সম্পর্কে কিছু বাস্তব প্রশ্ন করবে। গবেষণার উদ্দেশ্য কেবল মাত্র তথ্য সংগ্রহ এবং এই তথ্য কোনোক্রমেই কারো মামলায় কোনোরকম প্রভাব ফেলবে না। এবং এটি মামলা জটের কারণগুলো খুঁজে বের করবে।

গবেষণাটি পরিচালনা করবেন উম্মে সরাবন তহুরা, মিনিম্যাকুয়েরি ল স্কুল, ম্যাকুয়েরি ইউনিভার্সিটিতে এম ফিল করছেন। ফোন: +৬১(২)৯৮৫০৮৮০৬; ইমেইল: ummey.tahura@students.mq.edu.au আইন বিষয়ে ড. মারগারেট এম এল এল ক্যালি, ম্যাকুয়েরি ল স্কুল, ম্যাকুয়েরি ইউনিভার্সিটি; ফোন: +৬১৪০২৯৮৫০৭০৬০; ইমেইল: margaret.kelly@mq.edu.au এর তত্ত্বাবধানে এম ফিল এর জন্য।

আপনি যদি গবেষণায় অংশগ্রহণে ইচ্ছুক হন, তবে বেগম তহুরা আপনাকে কিছু প্রশ্ন জিজ্ঞেস করবে এবং সেইসাথে আজকের মামলার তালিকা অনুযায়ী (যদি আপনি আপনার ক্লায়েন্টের প্রতিনিধিত্ব করেন) আপনার অনুমতিক্রমে আপনার ক্লায়েন্টেরও সাক্ষাৎকার নেবে।

আপনাকে প্রায় ৫০ মিনিটের একটি সাক্ষাৎকার পূর্বে অংশগ্রহণের জন্য আমন্ত্রণ জানানো হবে। এই সময়ের মধ্যে আপনাকে গবেষণার উদ্দেশ্যের সাথে সংশ্লিষ্ট আরও বৃহৎ পরিসরে কিছু প্রশ্ন করা হবে। ন্যায্য বিচার পাওয়ার জন্য সাধারণত কোন বিষয়গুলো ভূমিকা রাখে বা কি ধরনের পদ্ধতিগত জটিলতার সম্মুখীন আপনাকে হতে হয়েছে এই বিষয়গুলো জিজ্ঞেস করা হতে পারে। আদালতের পরিবেশগত বিষয়ে আপনার কিছু বলার আছে কিনা সেগুলোও জিজ্ঞেস করা হতে পারে এবং আপনার মামলার জট কমানো বিষয়ে কোন পরামর্শ আছে কিনা তাও জিজ্ঞেস করা হবে।

t xO xÓV xp j l á h xp d y l s , ÆI যেহেতু এই গবেষণাটি একাডেমী বিষয়ের সাথে যুক্ত কাজেই সঠিক ভাবে রক্ষার্থে সাক্ষাৎকার পর্বটি ধারণ করতে হবে এবং নোট নিতে হবে। সাক্ষাৎকারের সকল তথ্য ম্যাকুয়েরি ইউনিভার্সিটিতে নিরাপদে সংরক্ষণ করা হবে। তথ্যগুলোর কোন গোপন ব্যবহার করা হবে না। আপনার ব্যক্তিগত তথ্য গোপন রাখা হবে, তবে আপনার পদ/পদবি/ মামলার সাথে কিভাবে (বিচারক, আইন জীবী, আদালত কর্মচারী বা বিচার প্রার্থী সেটা উল্লেখ করা হবে) আপনি কি ডিজিটাল তথ্য সংগ্রহ বিষয়ে সম্মতি দিবেন?

হ্যাঁ ☐ না ☐

ড. মারগারেট এম এল এল ক্যালি (প্রধান তদন্তকারী ব্যক্তি) এবং উম্মে সরাবন তহুরা (সহ তদন্তকারী ব্যক্তি) এই দুজনই তথ্য প্রবেশের অধিকার থাকবে। এছাড়াও হাইয়ার ডিগ্রি রিসার্চ কর্মিটি এবং একাডেমিক সিনেটের তথ্য প্রবেশের অধিকার থাকবে। গবেষণাপত্রের পরীক্ষকদেরও কেবলমাত্র পরীক্ষাপত্র পরীক্ষার জন্য তথ্য প্রবেশের অধিকার থাকবে।

আইনগত প্রয়োজনীয়তা ছাড়া গবেষণার জন্য সংগৃহীত তথ্য বা ব্যক্তিগত বিবরণী গোপনীয় থাকবে। কোন ব্যক্তিই প্রকাশনার ফলাফলে চিহ্নিত হবেন না। তবে, গবেষণাপত্র লেখার সময় তহুরা সংশ্লিষ্ট সেমিনার বা কোন জার্নাল আর্টিকেল এসাক্ষাৎকারের ফলাফল প্রকাশ করতে পারি।

তথ্যের সংক্ষিপ্ত ফলাফল প্রাথমিকভাবে তথ্য সংগ্রহ সমাপ্ত হলে আপনার অনুরোধে সরবরাহ করা হবে। সে সময়ে আপনাকে আরো তথ্য সরবরাহ করার সুযোগ দেয়া হবে। আপনার মন্তব্য এবং পরবর্তী তথ্য সর্বশেষ প্রকাশনায় যোগ্য কার হবে।

গবেষণার জন্য আপনার উদ্ধৃতি ব্যবহার করা হতে পারে। আপনি উদ্ধৃত হতে লিখিত অনুমতি দিচ্ছেন?

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স্বৈচ্ছাপ্রণোদিত অংশগ্রহনঃ গবেষণা অংশগ্রহনকরা আপনার সম্পূর্ণস্বৈচ্ছাপ্রণোদিত অভিমত। আপনি অংশগ্রহনের সিদ্ধান্ত নেয়ার পরও অংশগ্রহন করতে বাধ্য নন। আপনি যে কোন সময়েই অংশগ্রহন করা থেকে বিরত হতে পারেন কোন কারণ বা ফলাফল প্রদর্শন ছাড়াই।

সম্মানী বা ভাতা দেয়া হবে নাঃ গবেষণা কাজে অংশগ্রহণের জন্য আপনাকে কোন সম্মানী বা ভাতা দেয়া হবে না। গবেষণার বিষয় থেকে কোন ঝুঁকি বা অসুবিধা অনুমান করা সম্ভব নয়।

আপনি যদি সাক্ষাৎকার প্রদানে সম্মত হন তহুরার সমস্ত ব্যাখ্যা শোনার পর আপনাকে এই ফর্মের সাক্ষর/ টিপসই দিতে হবে এবং সাক্ষাৎকার এর প্রশ্ন জিজ্ঞেস করার পূর্বে আবার আপনার সম্মতি জানতে চাওয়া হবে।

আমি, $j, \%y \setminus 'J f l x K n x V j, \%o, r x i x i x u, \mathcal{E}, \setminus (R l H N j, p p e f \grave{o} X, q x l \hat{f}^{\wedge} y \setminus R l H K n x p V p x$
 $\frac{1}{2} \hat{t} \mathcal{C}, q x p t, \mathcal{A} x s] i V N \mathfrak{z} p, j, \mathcal{E} y \setminus E K y n X, l s d x \mathcal{E} J H r \ddot{o} u, i p] i \grave{o} J \frac{1}{4} n y e y g y \mathfrak{C}, R ` x @] , i @$
 $j p l e \hat{a} X, l s d x l H r$ গ্রহণে $K y n l x \grave{o} i L l x k q x k q \frac{1}{2} g r \hat{a} \setminus x \%o x L K y n J H r \ddot{o} u, d y l p e f x V, e j x y p E$
 $K n x V k, n \acute{p} R V y' V y j t p l p x u V x p u, \mathcal{E}, \setminus - t H p \mathfrak{U}, d p] i \grave{o} E$

অংশগ্রহনকারীর নাম (Participant's Name): _____

(Block letters)

অংশগ্রহনকারীর সাক্ষর: _____ Date: _____

তদন্তকারীর নাম (Investigator's Name): _____

(Block letters)

Investigator's Signature: _____ Date: _____

গবেষণার নৈতিক অনুমতি দিয়েছে ম্যাকুয়েরি ইউনিভার্সিটির হিউম্যান রিসার্চ এথিক্স কমিটি। আপনার যদি অংশগ্রহণ সংক্রান্ত নৈতিক বিষয়ে কোন অভিযোগ বা শর্ত থাকলে আপনি কমিটির সাথে যোগাযোগ করতে পারেন—পরিচালক, রিসার্চ এথিক্স (ফোন +৬১(০২)৯৮৫০৭৮৫৪; ইমেইল; ethics@mq.edu.au). আপনার অভিযোগসমূহ গোপন রেখে তদন্ত করা হবে এবং তদন্তের ফলাফল আপনাকে জানানো হবে।

e g ৳ V x p z 6 l f l x J H r ö u V x p z 8 V y j

APPENDIX D: SAMPLE OF SEMI STRUCTURED QUESTIONNAIRE

QUESTIONS FOR SEMI-STRUCTURED INTERVIEWS

For Clients

1. I have explained you the purpose of this study. Do you agree to be interviewed and the interview recorded?
2. Timing of beginning of case
 - 2.1 When did you file the case?(If the client is plaintiff)
 - 2.2 When the case was filed?(if the client is defendant)
3. What type of case it was?
4. How many times you had to come to the court?
 - 4.1 Why?
5. How much money have you spent each time you come to court?
 - 5.1 For what purpose? Give detail.
6. When was summons finally served after the case was first filed?
7. When did the defendant submit their written statement? (If the client is the plaintiff)
8. When did peremptory hearing start? (If the case is at the hearing stage)
9. Have you ever tried to mediate your case?
 - 9.1 If not, why?
 - 9.2 IF yes, who took the initiative? Judge, or the lawyer?
 - 9.3 If so, was it successful?

9.3.1 If so, how?

9.3.2 If not, why not?

10. How did you choose your lawyer?

10.1 Why?

11. Have you ever changed your lawyer since filing the case?

11.1 If so, why?

11.2 If not, Why not?

12. How cooperative is your lawyer in resolving the case early?

13. From whom do you first get information regarding date of your case?

13.1 Lawyers? How many times?

13.2 Lawyer's assistant? How many times?

13.3 Court staff? How many times?

13.4 Judge? How many times?

14. Does the Judge communicate with you directly or through the lawyers?

14.1 Which mode of communication do you prefer?

15. Did you always obey the court order within time?

15.1 If not, why?

15.2 If yes, how many times?

16. Do you think that the case proceeding was delayed in your case?

16.1 If so, in which stage?

17. Do you think that the cases are delayed because of the procedural complexities?

18. What should be the standard time to resolve a case according to you?
19. Have you ever been to union Parishad information centre?
20. Do you think it would be easier in time saving and cost saving to get information from the Union parishad in relation to your case's date or condition?
 - 20.1 Which would be easier for you: to get information from 'notice board' on the court premises or from the Union Parishad information centre?
21. Do you have any suggestion for speedy disposal of cases?

APPENDIX E: EXAMPLE OF OPEN CODING

Interviews	Coding
<p>Q.1: I have explained you the purpose of this study. Do you agree to be interviewed and the interview recorded?</p> <p>A. 1: Yes</p> <p>Q.2: b. When the case was filed?</p> <p>A. 2: I can't recall</p> <p>Q. 3: What type of case it was?</p> <p>A.3: Suit for declaration of title</p> <p>Q.4: How many times you had to come to the court?</p> <p>A.4: this is the first time I have to attend the case. I have newly transferred</p> <p>Q.5: When was summons finally served after the case was first filed?</p> <p>A.5: I do not know</p> <p>Q.6: When was summons finally served after the case was first filed?</p> <p>A.6: I can't recall</p> <p>Q.6: When did the defendant submit their written statement? (If the client is the plaintiff)</p> <p>A.6: I do not know</p> <p>Q.7: When did peremptory hearing start? (If the case is at the hearing stage)</p>	<p>Knowledge about client's own case which lead to relationship between clients and lawyers</p>

A.7: I do not know	
<p>Q.8: Have you ever tried to mediate your case?</p> <p>A.8: No</p> <p>Q.9: If not, why?</p> <p>A.9: Its government property, so this question does not arose. The plaintiff wants to possess the government property illegally.</p>	<p>Opinion about mediation leads why mediation is/is not successful</p>

APPENDIX F: DATA FROM THE DISTRICT COURT OF NSW

						District Court of NSW (1990-2013)								
Year*	Registration in Sydney	Registration in NSW	Disposal	Disposal in NSW	Number of Pending cases (NSW)	Duration of Disposal (NSW)	Mode of Disposal (District Court, Sydney)							
							Judgment following trial	Default of Judgment	Arbitration	**Settlement Filed	Dismissed	Discontinued	Transferred	Total
1990	18644		8985 (Sydney)		19695	45	Not Found							8985
1991	14430		11538 (Sydney)	27873	21735	Not found	Not Found							11538
1992	6499		9098 (Sydney)	20443	15205	34	1265 (13.9%)		2199 (24%)	5634 (61.9%)				9098
1993	6817		6547 (Sydney)	16984	10324	30	1033 (15.8%)		944 (14.4%)	4570 (69.8%)				6547
1994	7995		5567 (Sydney)	13463	10155	25	801 (14.4%)		657 (11.8%)	4109 (73.8%)				5567
1995	9611		7575 (Sydney)		23311	14.2	1635 (21.6%)		568 (7.5%)	5372 (70.9%)				7575
1996	6536		10341(Sydney)		17392	14.9	2906 (28.1%)		1324 (12.8%)	6112 (59.1%)				10341
1997	9837		7871 (Sydney)		12064	15.7	1653 (21%)		1181(15%)	4329(55%)	709 (9%)			7871
1998	7182		6357 (Sydney)		12073	114	1527(24%)		697 (11%)	3624 (57%)	509 (8%)			6357
1999	8272		6911 (Sydney)		14860	11.1	2480 (35.88%)		1826 (26.42%)	2093 (30.28%)		512 (7.4%)		6911
2000	9348	15070	7311 (Sydney)		16948	11.5	2711 (37.08%)		2046 (27.98%)	2109(28.84%)		452 (6.1%)	93 (1.2%)	7311
2001	12916	20784	14224 (NSW)		23547	11.5	1705 (20%)		511 (6%)	5710 (67%)	682 (7%)			8523
2002	8220	12686	16857 (NSW)		19128	11.3	2778 (26.94%)		3715 (36.03%)	2952 (28.63%)		685 (6.64%)	180 (1.7%)	10310
2003		7912	12931 (NSW)		9104	14.4	2535 (32.5%)		2023 (25.93%)	2611 (33.47%)		535 (6.85%)	96 (1.23%)	7800
2004		6789	8305 (NSW)		7959	14.2	4535 (86.118%)		260 (4.94%)	2230 (42.37%)	1157 (21.98%)	366 (6.95%)	101 (1.9%)	5262
2005		6129	6129 (NSW)		7663	12.4	908 (22.38%)		133 (3.27%)	1843 (45.43%)	725 (17.87%)	346 (8.5%)	101 (2.49%)	4056
2006		5769	5769 (NSW)		6567	11.5	1251 (32.72%)		35 (.91%)	1258 (32.90%)	772 (20.19%)	438 (11.45%)	69 (1.8%)	3823
2007		5508	5598 (NSW)		6125	11.4	1590 (42.96%)		13 (.35%)	949 (25.64%)	660 (17.83%)	405 (10.94%)	84 (2.26%)	3701
2008		5980	5980 (NSW)		5602	11.1	435 (10.75%)	240 (.59%)	4 (.09%)	1727 (42.71%)	1083 (26.78%)	432 (10.68%)	122 (3%)	4043
2009		5531	5531 (NSW)		5366	10.5	478 (12.21%)	92 (2.3%)	0	1523 (38.91%)	1267 (32.37%)	399 (10.19%)	155 (3.96%)	3914
2010		5158	5088 (NSW)		5511	11.2	332 (9.8%)	102 (3%)	0	1695 (50.3%)	805 (23.89%)	317 (9.4%)	165 (4.89%)	3416
2011		4844	5712 (NSW)		5712	11.7	276 (8.1%)	54 (1.6%)	0	1802 (53.48%)	680 (20.18%)	438 (13%)	119 (3.5%)	3369
2012		4849	4956 (NSW)		5629	12.2	301 (8.87%)	25 (.73%)	0	2010 (59.23%)	554 (16.32%)	366 (10.78%)	137 (4.0%)	3393

2013		4968	4792 (NSW)		5804	10	218 (7.3%)	15 (.5%)	0	2175 (73.2%)	372 (12.5%)	317 (10.6%)	91 (.2%)	3188
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*From 1990 till 2002 the Annual Review of the District Courts were published. From 2003 to 2013 online annual reviews are available. This researcher managed to photocopy only few pages with the help of District court Judge Dainne Truss. Reviewing those reports it was found that some data of the entire NSW District Court was not available.

** Settlement means disposal through ADR

APPENDIX G:NODES AND CODES OF THE EMPIRICAL DATA⁷⁹⁸

⁷⁹⁸ Here a few of data is inserted. The detail has been kept in reserved.

Clients

Summary Data of the empirical research

	D1 (C1)	D2 (C2)	D3 (C3)	D4 (C4)	D5 (C5)	D6 (C6)	D7 (C7)
Knowledge about his own case	Do not have any knowledge	Illiterate and have little knowledge	Have some knowledge	Have very little knowledge	Little knowledge	No knowledge	No knowledge
Time and money spend in the court	First time attendance	Every one and half month/ 800-1000 BDT (10-14 AUD)	every month/ 1000/- BDT (14 AUD)	Every month/300-400 BDT (4-5 AUD)	Every month/1200 BDT	Every month/ 2,500 BDT (35 AUD)	Every one and half month/ 2,500BDT (35AUD).
Tried for Mediation?	No/Government Property	Yes/ defendant did not agree	Yes/ defendant (plaintiff's relative) betrayed him	Plaintiff did not take initiative. Defendant took but plaintiff did not agree.	No/Do not even think of mediation	Yes/ because of third person involvement mediation failed.	No/ No party was interested.
Chosing Lawyer	Government appointed the lawyer.	based on lawyer's reputation.	based on lawyer's reputation.	based on lawyer's reputation. Changed lawyer once.	the lawyer is from the village	based on lawyer's reputation.	based on lawyer's reputation. Changed lawyer once.
Clients'-Lawyers' relation	cooperative and good	Cooperative and good	Cooperative and good	Cooperative and good	Cooperative and good	Cooperative and good	Cooperative and good
Information received from	lawyer	Lawyer's assistant	Lawyer's assistant	lawyer.	Lawyer's assistant	Lawyer's assistant	Lawyer
Clients'-Court relation	based on communication mode not good.	based on communication mode not good.	based on communication mode not good.	based on communication mode not good.	based on communication mode not good.	based on communication mode not good.	based on communication mode not good.
Preferred mode of receiving information	Through lawyers	Through lawyers consulting with clients	Through lawyers consulting with clients	Through lawyers	Through lawyers	Through lawyers	No choice
Obeying court's Order	Always	Not Always. Could provide document on time.	Not always	Always	Always	Not always	Always
Court Proceedings delayed in your case?	yes/ Written statement stage	Yes. Until Peremptory hearing stage it was delayed.	yes.	yes.	yes/ in every stage	yes	yes/ Written statement stage
Reasons of delay	1. lack of Court's cooperation; 2. Complex court procedure	1. Pending load; 2. Complex procedure	1. complex procedure; 2. Defendants intention	1. complex procedure	have not found any cause	1. complex procedure	1. complex procedure
standard time to resolve a case	one year	two to two and half years	2 years	No suggestion	two years	6 months.	2 years

Lawyers
Summary Data of the empirical research

	D1 (L1)	D2 (L2)	D3 (L3)	D4 (L4)	D5 (L5)	D6 (L6)	D7 (L7)
Case Load upon the lawyers	200/ disposal rate is higher than newly registered.	400/disposal rate is higher than newly registered.	500/disposal rate is equal to newly registered.	800.disposal rate is higher than newly registered.	800/disposal rate is higher than newly registered.	850 /disposal rate is less than newly registered.	200/ disposal rate is less than newly registered.
Workload upon lawyers could be a cause to delay	Yes	Yes.	Yes.	Sometimes	No	No	No
Obligation in disposing certain number of cases	No	No	There should be consistency between acceptance of new cases and disposal of pending cases.	No	No	No	No
Classification of Case	Permanent Injunction case (one year)/ Declaration of Title (3 years)	Suit for Declaration (3years)/Partition suit (filed in 1990 still going on)	the shortest time of disposal were through exparte, ADR of dismiss for default.	4 cases were resolved within less than 2 years.	2 years	title suit	a case was resolved through mediation
Separate treatment for complex cases	Yes.	Yes.	Yes.	Yes.	Yes.	Yes.	Yes.
Computer training need for court staff	Yes	yes	No	little bit	yes	No	No
Mediation?	Tired but success rate is low	Tired but success rate is low	Tired and success rate was high in the last year.	Tired but success rate is low	Tired but success rate is low	Tired but success rate is low	Tired but success rate is low
present mediation procedure needs to be changed?	yes	Yes	The ADR system should be changed in more easier form.	I think the present system is appropriate for mediation.	Yes	Yes	Yes
Obeying court's order.	Yes	Yes	I always try my best.	yes	yes	Always	yes
Relation among court staff-lawyers	Good and Co-operative	Good and Co-operative	Good and Co-operative	Good and Co-operative	Good and Co-operative	Good and Co-operative	Good and Co-operative
Relation between lawyers-judges	Good and Co-operative	Good and Co-operative	Good and Co-operative	Good and Co-operative	Good and Co-operative	Good and Co-operative	Good and Co-operative
Causes of Delay	1. Present Court procedure; 2. the judges role; 3. Intention of the clients and their lawyers	1. Present Court procedure; 2. the Lawyers role	1. Lawyers role	1. Managing documents	1. Present Court procedure; especially administration.	1. Involvement of Higher judiciary; 2.	1. Number of Fruitless cases; 2. Court system
Number of judges and lawyers are enough ?	No	No	No	No	No	No	No

Judges

Summary Data of the empirical research

	D1 (J1)	D2 (J2)	D3 (J3)	D4 (J4)	D5 (J5)	D6 (J6)	D7 (J7)
Caseload in the courts	2189	1542	2462	2945	3944	624	2735
Classification of cases should be rearranged along with separate treatment?	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Number of the judges is enough?	No	yes.if they work properly they would be able to reduce the backlog.	No	Not at all.	No	Yes. if they work properly they would be ablet to reduce the backlog.	No
‘e-judiciary’ system would be able to reduce delay?	Yes. But will have to make it worthy.	Yes	Yes	Yes	yes	No	No
court staff need computer training?	Yes. That’s a utmost need.	Yes	Yes	Yes	of course	Yes	yes
Mediation	Tried but success rate is too disappointing. Judges need training on mediation. Present ADR is okay.	success rate is too disappointing. 1. clients' intention. 2. Judge cannot try hard because they will be misunderstood by the clients. Judges need training on mediation.	Tried but success rate is too disappointing.1. lawyers intention. Judges need training on mediation. Present ADR is Ok.	Tried but success rate is too disappointing.1. lawyers intention. Judges need training on mediation. Present ADR is Ok.	Tried but success rate is satisfactory (80%). 1. lawyers intention and 2. clients intention. Judges need training on mediation. Present ADR is Ok.	Tried but success rate is too disappointing.1. lawyers intention. Judges need training on mediation. Present ADR is Ok.	Tried but success rate is too disappointing. 1. lawyers intention and 2. clients intention. Judges need training on mediation.
clients obey court’s order?	Yes	No	No	Not always	Not Always.	Yes but lawyers do not assist them.	No
Lawyers obey the court’s order?	With some exceptions, most of the lawyers do not obey the court's order. lawyers do not cooperate the court.	No.	Not always.	the Lawyers are not cooperative always.	Not always	The lawyers delay in obeying court's order.	yes
present law can reduce the backlogs?	The existing law needs change.	The existing law needs change.	the present law is fine.	The law is good but the application is not okay.	The existing law needs change.	Yes	Yes
Knowledge about case management?	Not clear	Yes.	Very little.	Not very clear	Yes.	No	Yes
Court staffs obey court’s orders?	It depends upon the judges.	they are not cooperative in obeying court's order.	They are cooperate if the presiding judge can make a control over them.	the court staffs are cooperative if the judge can handle them properly.	cooperative	They are very cooperative.	cooperative.
Communication with the client?	Mainly through the lawyers and sometimes with the clients in open court.	I, personally always fix date upon the clients availability.	through the lawyers.	I used to try communicate directly with the clients.	not directly with the clients.	I communicate with the clients through their lawyers.	asked the clients and their respective lawyers.

logistic supports can be causes of delay ?	Yes	this is a small cause among others big problems.	Yes.	Yes.	No. though we have no sufficient supports but they do not held responsible for the delaying the court procedure.	The logistic support is not enough. But it does not delay the case proceedings.	yes
Frequent interference of Higher Court delay the case?	Actually I would say not for the interfarence but for stay order lot of cases are pending.	Of course.	Yes.	Yes.	Yes.	Yes. The main cause for delaying court proceedings is the interference of the higher court in all stages.	Yes. The lawyers use this opportunity to delay. So it should be stopped in anyway.
main cause for delaying case procedure?	1. the adversarial system. The lawyer dominate the courts.	the procedure is responsible for delay.	1. the procedural law . 2. the number of experts	1. lawyers intention.	1. shortage of judicial officers, 2. administration procedure.	1. lawyers engagement	1. Court procedure.

Summary Data of the empirical research

Court Staffs

	D1 (S1)	D2 (S2)	D3 (S3)	D4 (S4)	D5 (S5)	D6 (S6)	D7 (S7)
Caseload in the courts	2189	1542	2462	2945	3944	624	2735
Rearrange of Classification of Cases and treatment?	Yes	Yes	Yes	Yes	Yes	Yes	Yes
number of the judges is enough?	No	No	No	No	No	No	No
'e-judiciary' system will reduce case load?	Yes	Do not very clearly. If everything is set in computer and online facilities are available then time will be saved in each stage.	Yes	Yes	Yes	Yes.If the system would be computerized then the backlogs would be reduced too.	No
court staff need computer training?	Yes	To introduce e-judiciary system there is no alternate but to trained up the court staffs properly on computer.	Yes	yes	yes	yes	Yes
Court administration is responsible for delay?	No. the delay occurred due to the lawyers and the clients intention.	Yes.	Yes	yes.court administration is closely relates to service of summon. If the summon is served on time the delay would be reduced to some extent.	yes	Yes. Service of summons relates to administration	Yes. Judges should keep aware of everything.
Courts order obey by court staff.	Yes	Not always. Sometimes we overlook court's order. Sometimes we do it intentionally.	Yes	No. Because of clients and the lawyers.	No. Because of Lawyers and Clients	Yes	No. Sometimes the court staffs are overburden as well.
Relation among clients and Court staff	Not bad	Not good. Clients make delay to produce documents and requisites.	Not good. Clients make delay to produce documents and requisites.	Not good. Clients make delay to produce documents and requisites.	Not good.	Not good. Clients make delay to produce documents and requisites.	Not good. Lawyers make delay to produce documents and requisites.
logistic support can cause delay?	We do not have sufficient logistic support. But we manage them at our own cost.	No.	Yes	Yes. Sometimes we buy papers, forms and other things at our own cost. it causes delay in providing documents to the clients.	No	No. Logistic supports are important, but to me this is not the cause for delay.	yes
Do you know about case management?	very little	Not exactly	Yes	No	No	I know little.	No
causes for delaying?	1. clients and lawyers intention; 2. Load upon the court.	1. Court administration. 2. Low number of judges	1. Intention of the clients.	1. lawyers' intention 2. Judges work time is not enough . 3. Judges need proper training. 4. Interlocutory matters	1. the intention of the clients, 2. the sufficient number of the judges	1. Fruitless cases should be identified at the beginning, 2. lawyers intention	1.The clients, lawyers, the court staffs and the judges are also responsible 2. the court procedure.

Summary Data of the empirical research*																												
Codes	D1 (C1)	D1 (L1)	D1 (J1)	D1 (S1)	D2 (C2)	D2 (L2)	D2 (J2)	D2 (S2)	D3 (C3)	D3 (L3)	D3 (J3)	D3 (S3)	D4 (C4)	D4 (L4)	D4 (J4)	D4 (S4)	D5 (C5)	D5 (L5)	D5 (J5)	D5 (S5)	D6 (C6)	D6 (L6)	D6 (J6)	D6 (S6)	D7 (C7)	D7 (L7)	D7 (J7)	D7 (S7)
Tried for Mediation?	No/Go vernment Property	Tired but succe ss rate is low			Yes/ defend ant did not agree	Tired but succe ss rate is low	Disap pointing .1. clients ' intenti on. 2. judgec ant try in the presen t syste m. Judges need trainin g.		Yes/ defend ant (plainti ff's relativ e) betray ed him	Tired and succe ss rate was high in the last year.	disapp ointing .1. lawyer s intenti on. Judges need trainin g. Present ADR is Ok.		Plainti ff did not take initiati ve. Defen dant took but plaintiff did not agree.	Tired but succe ss rate is low	disapp ointing .1. lawyer s intenti on. Judges need trainin g. ADR is Ok.		No/Do not even think of mediat ion	Tired but succe ss rate is low	satisfac tory (80%). 1. lawyer s and clients intenti on. Judges need trainin g. Prese nt ADR is Ok.		Yes/ becaus e of third person involv ement mediat ion failed.	Tired but succe ss rate is low	disapp ointing .1. lawyer s intenti on. Judges need trainin g. Present ADR is Ok.		No/ No party was interes ted.	Tired but succe ss rate is low	disap pointing for 1. lawye rs and client s intenti on. 2. Judge s need traini ng.	
Reasons for delay	1. lack of Court's cooperat ion; 2. Compl ex court proced ure	1. Court proced ure; 2. judge s role 3. Inten tion of the clients and lawyers	1. the adversari al system. The lawyer domi nate the court s.	1. clie nts and law yers inten tion; 2. Loa d upon the court.	1. Pendi ng load; 2. Compl ex proced ure	1. Prese nt Court proced ure; 2. the Lawyers role	the proced ure is respon sible for delay.	1. Court admini stration. 2. Low number of judges	1. compl ex proced ure; 2. Defen dants intenti on	1. Lawy ers role	1. the proced ural law . 2. the numbe r of experts is very low	1. Inten tion of the clients.	1. compl ex proced ure	1. Mana ging docu ments	1. lawyer s intenti on.	1. lawye rs' intent ion 2. Judge s work time 3. Judge s need traini ng. 4. Interl ocutory mat ters	have not found any cause	1. Presen t Court proced ure; especi ally admini stration.	1. shortag e of judicia l officer s, 2. admini stration proced ure,	1. the intention of the clie nts, 2. the sufficie nt numbe r of the judges	1. compl ex proced ure	1. Invol vement of Higher judiciary	1. lawyer s engage ment	1. Fruit less case s should be identifie d at the be ginning, 2. lawyers intention	1. compl ex proced ure	1. Num ber of Fruit less cases ; 2. Court system	1. Court proced ure.	The clie nts, lawye rs, the cour t staffs and the judges and the cour t procedur e.
Case Load upon Judges and		200/ dispos al rate is	2189			400/d ispos al rate is	1542			500/d ispos al rate is	2462			800.d ispos al rate is	2945			800/di sposal rate is higher than	3944			850 /dispo sal rate is	624			200/ dispo sal rate is	2735	

Lawyers		higher than newly registered.				higher than newly registered.				equal to newly registered.				higher than newly registered.				newly registered.				less than newly registered.			less than newly registered.			
Number of judges is enough?		No	No	No		No	Yes	No		No	No	No		No	No	No		No	No	No		No	yes	No		No	No	No
Need Separate treatment according to Classification of cases?		Yes	yes	yes		Yes	Yes	Yes		Yes	Yes	Yes		Yes	Yes	Yes		Yes	Yes	Yes		Yes	Yes	Yes		Yes	Yes	Yes
Relation between client-court	Based on communication mode not good		Mainly through the lawyers and some times with the clients in open court .		Based on communication mode not good		I, personally always fix date upon the clients availability.		Based on communication mode not good		through the lawyers.		Based on communication mode not good		I used to try communicate directly with the clients.		Based on communication mode not good		not directly with the clients.		Based on communication mode not good		I communicate with the clients through their lawyers.		Based on communication mode not good		asked the clients and their respective lawyers.	
Insufficient logistic Support cause delay ?	Yes		Yes	We do not have sufficient logistic support . But we manage at our		this is a small cause among others big problems.	No			Yes	Yes			Yes	Yes. Sometimes we buy papers, forms and other things at our own cost. it causes delay.			No. though we have no sufficient supports but they do not held responsible for the delaying the court proced	No			The logistic support is not enough . But it does not delay the case proceedings.	No. Logistic supports are important, but to me this is not the cause for dela			Yes	Yes	

				own cost .														ure.					y.				
Client - Lawyers relation	Cooperative and good				Cooperative and good				Cooperative and good				Cooperative and good				Cooperative and good			Cooperative and good				Cooperative and good			
Court Staff- Lawyer		Cooperative and good				Cooperative and good				Cooperative and good				Cooperative and good				Cooperative and good				Cooperative and good			Cooperative and good		
Court - Lawyer		Cooperative and good	With some exceptions, most of the lawyers do not obey the court's order .			Cooperative and good	No good			Cooperative and good	Not good			Cooperative and good	Not good			Cooperative and good	Not good			Cooperative and good	Not good			Cooperative and good	good
Does present Law need change?	Yes		Yes		Yes		Yes		Yes.		Law is good		Yes.		Law is good but not application		Yes.		Yes		Yes.		Yes		Yes.		Yes