FACILITATING ACCESS TO JUSTICE: MANAGING THE COST OF LITIGATION IN THE SUBORDINATE COURTS OF BANGLADESH

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A thesis submitted in fulfilment of the requirements for the degree of

Doctor of Philosophy in Law

Macquarie Law School

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May 2021

Dedicated to my mother, Sheheli Ahmed

and

My father, Md Shamsul Haque

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Abstract

Litigation costs have been identified as one of the key barriers to accessing justice in Bangladesh. Bangladesh has long struggled with a lengthy, expensive, and inefficient court system that has denied most people access to justice. Since the beginning of this century, Bangladesh has started to reduce case backlogs; however, reducing litigation costs has not yet been considered as a means for improving justice. This thesis argues how litigation costs impact access to justice and whether a cost-effective litigation system can be introduced to facilitate access to justice in the subordinate courts of Bangladesh.

The Bangladesh government has introduced legal aid services to improve accessibility for people who are indigent by paying their lawyers' fees and other incidental expenses. However, the effectiveness of these services is hampered in many ways including by the absence of an effective litigant eligibility test, the coverage of only limited litigation costs and significant budgetary constraints. Further, the present cost laws in Bangladesh overlooked economic remedies due to the lack of integrated costs rules. The century-old laws and the manual litigation processes have not been updated to meet the changing legal needs. The prolonged uncertainty about when a case will be resolved decreases the affordability for most people to pursue legal action. Even the case-related individuals (later in this thesis the term case-related individual will be referred to as professional stakeholders), such as lawyers, clients, judges, and court staff, collectively contribute to delaying the processing time for cases and increasing the costs. Thus, the lack of transparency, absence of formal case management, economic disparity of the litigants, manual legal processes, low disposal through alternative dispute resolution (ADR) and limited remedial measures of the expensive, uncertain, and lengthy court processes contributed to increasing the number of pending case backlog to 3,684,728 by 31 December 2020 which consequently deny access to courts for the majority of people in Bangladesh.

This thesis considers the potential for various reforms to develop a cost-effective litigation system for maximising access to justice in Bangladesh. This research employs a doctrinal and empirical research methodology to investigate why and how litigation costs increase, what financial and legal supports are available and what remedial measures can be adopted to optimise access to justice for the majority of people in Bangladesh.

Through examination of the existing literature, laws and data collected from the empirical study, this thesis argues that the legal processes should be cost-effective, accessibility must be ensured, and proper remedies must be provided to facilitate access to justice. This thesis emphasises on

people's accessibility into the justice system. While doing so, it identifies shortcomings in the existing state-provided legal aid scheme and explores other alternative support options. It also examines the existing cost provisions and suggests that introducing clear, systematic, and integrated cost rules would effectively control legal costs and allow the fair distribution of costs between litigants to increase access to justice through remedial measures. This research examines how the current manual legal system became expensive and hinders the majority of Bangladeshis from accessing courts. It further explores why the ADR system has not been successful in dispute resolution process either. Finally, it explores the potential for incorporating technology in the Bangladesh court system to increase efficiency and reduce litigation costs. The findings of this thesis have been drawn from empirical research involving professional stakeholders who are an integral part of the justice sector.

In conclusion, this thesis argues that the facilitation of access to justice requires a combination of legal reforms and sufficient budgetary allocations to reduce the costs of civil dispute resolution.

Certificate of Authorship

I certify that the work in this thesis, entitled 'Facilitating Access to Justice: Managing the Cost of Litigation in the Subordinate Courts of Bangladesh', has not previously been submitted for a degree, nor has it been submitted as part of requirements for a degree to any university or institution other than Macquarie University.

I also certify that this thesis is an original piece of research written by me. Any help and assistance that I have received in my research work and preparing this thesis has been appropriately acknowledged. I have obtained Macquarie University Human Research Ethics Committee Approval (reference number 5201300485).

I certify that all information sources and literature used are acknowledged in the thesis.

Ummey Sharaban Tahura (43220452)

7 May 2021

Acknowledgements

This incredible journey will be meaningless if some contributions are not acknowledged. Every day I have been enriched, and every event has empowered me to pursue my dream.

I am sincerely grateful to my supervisors, Prof. Shawkat Alam, Prof. Rafiqul Islam, Dr Margaret Kelly and Dr Sonya Willis. Without their thoughtful encouragement, careful supervision, tremendous support and critical comments, this thesis would not have been completed. Prof. Alam's steady guidance and scholarly suggestions helped shape this thesis. Dr Willis extended her support since I started even before formally engaging with the journey. Her intense critical review enriched this thesis. I am also thankful to Dr Kelly, who was always with me, without being a physical appearance.

I am indebted to the Australian Government and Macquarie University for offering me a prestigious International Research Training Program scholarship to conduct this research. My thanks to Dr Amy Barrow for continuous research facilitating support and Debbie Loo for all the administrative support, sincere care and advice. I also acknowledge the support of the Macquarie University Law School, Faculty of Arts, Student Wellbeing, Library, Sport and Aquatic Centre for facilitating a steady mental, physical and economic journey. I have been blessed to create some beautiful memories here. I enjoyed the research environment, green ambience and silence of the natural environment at Macquarie University to the fullest.

I must acknowledge the long-distance support from my friends and colleagues, Muajjem Hussain, Samim, Z R Zia, Abu Bakkar Siddique, Shahabuddin, Nayan Bhai and many more. My most heartfelt appreciation to my supportive research fellows, Arif, Atia, Jobair, Humaira Apa, Saif Bhai, Nadira Apa, Noor Bhai, Tawhid Bhai and Atiq Bhai. Their contributions went beyond my PhD life.

I want to thank the Supreme Court of Bangladesh and Ministry of Law, Justice and Parliamentary Affairs for granting me study leave and data collection permission. I cannot express my gratitude enough for providing all the support to conduct my empirical research smoothly. I am also thankful to Capstone Editing for providing copyediting and proofreading services, according to the guidelines laid out in the university-endorsed national 'Guidelines for Editing Research Theses'.

Revised versions of Chapters 5 to 8 of this thesis have been published or are under review in the *Australasian Dispute Resolution Journal, Asian Journal of Law and Society, Justice System*

Journal and *Columbia Journal of Asian Law*. I acknowledge the comments of the editors and the anonymous reviewers that enriched my thesis content.

As always in my life, I have had love and support from my father, Md Shamsul Haque, mother, Sheheli Haque, brother, Babu, and sisters, Runa and Simi. I do not tell them often enough how much their steadfast and unwavering support means to me.

My husband, Md Musa Ibrahim, read a couple of the chapters extensively and shared his opinion. I am more than fortunate to have his support. He has perceived my difficulties, frustrations, anxiety and depression during this journey. My intellectual son, Wasi Ibrahim Raiid, also shared his opinion about my work when he was only in Grade 6. This was not my journey alone; it was a joint venture with my son, who always accompanied me after work time instead of going to the field and tried to keep me up whenever I was down.

I enjoyed the entire journey, and I will always cherish the memory of Sydney.

List of Publications, Conference Presentations, Awards and Funding Related to this Thesis

The publications resulting from this thesis are listed below.

Journal articles:

- Tahura, Ummey Sharaban, 'Can Technology be a Potential Solution for a Cost-Effective Litigation System in Bangladesh?' (2021) *Justice System Journal* (First view, 1-25)
- Tahura, Ummey Sharaban, 'Does Mandatory ADR Impact on Access to Justice and Litigation Costs?' (2019) 30(1) *Australasian Dispute Resolution Journal* 31-8.
- Tahura, Ummey Sharaban, 'Role of Clients, Lawyers, Judges and Institutions in Hiking Litigation Costs in Bangladesh: An Empirical Study' (2021) *Asian Journal of Law and Society* (First view, 1-22)
- Tahura, Ummey Sharaban, 'Evaluating Alternative Dispute Resolution Practices in Bangladesh' (2021) XX *Journal of Judicial Administration Training Institute* 37-55.
- Tahura, Ummey Sharaban, 'The Extent to Which Legal Aid Ensures Access to Justice in Bangladesh' (2021) *Columbia Journal of Asian Law* (under review)

Conference presentations:

- Tahura, Ummey Sharaban, 'Does a Gender-Neutral Legal Aid Service Ensure Women's Equal Access to Justice in Bangladesh?' (Conference Paper, International Association of Women Judges' 15th Biennial Conference: 'Celebrating Diversity', 7–9 May 2021)
- Tahura, Ummey Sharaban, 'Evaluation of ADR in Access to Justice in Bangladesh' (Conference Paper, 9th ADR Research Network Round Table and Civil Justice Research Conference, 1–2 February 2021)
- Tahura, Ummey Sharaban, 'Technology, Transparency and the Judicial Discretion' (Conference Paper, Civil Justice Research Conference, 21 February 2019)
- Tahura, Ummey Sharaban, 'Can You Afford Justice?' (Conference Paper, Law and Society Association of Australia and New Zealand Conference, 12–15 Dec 2018)
- Tahura, Ummey Sharaban, 'Will ADR be able to Impact on Access to Justice and Litigation Costs?' (Conference Paper, 2018 Asian Law and Society Association Conference: Law in the Asian Century, 29 November–1 December 2018)

Newspaper Article:

- Tahura, Ummey Sharaban, ‘Discretionary Power: Is It Conceit or Necessity?’, Daily Star (online, 11 September 2018) <https://www.thedailystar.net/law-our-rights/news/discretionary-power-it-conceit-or-necessity-1631977>

Awards and Funding:

- Received an International Research Training Program Scholarship in 2017 to pursue a Doctor of Philosophy in Law from 2017 to 2021.
- Received a Macquarie University Postgraduate Research Fund to conduct the field study in Bangladesh during 2019.
- Received a scholarship from the International Association of Women Judges to attend the 15th Biennial Conference: ‘Celebrating Diversity’, held at Cordis, New Zealand (7–9 May 2021).

List of Abbreviations

AD	Appellate Division
ADR	alternative dispute resolution
ALRC	Australian Law Reform Commission
BLAST	Bangladesh Legal Aid and Services Trust
BTRC	Bangladesh Telecommunication Regulatory Commission
BLPBCA 1972	*Bangladesh Legal Practitioners and Bar Council Order 1972* (Bangladesh)
BNWLA	Bangladesh National Women Lawyers Association
CBA	cost-benefit analysis
CPC 1908	*Code of Civil Procedure 1908 (Bangladesh)*
CrPC 1898	*Code of Criminal Procedure 1898 (Bangladesh)*
CFA	conditional fee arrangements
CLC	community legal centre
CLS	Community Legal Service
CPR 1998	*Civil Procedure Rules 1998* (UK)
CR	Complaint Register
CR-1 to CR-4	alphanumeric code for criminal case records
CRC-1 to CRC-4	alphanumeric code for clients from criminal cases
CRJ-1 to CRJ-4	alphanumeric code for judges from criminal cases
CRL-1 to CRL-4	alphanumeric code for lawyers from criminal cases
CRS-1 to CRS-4	alphanumeric code for court staff from criminal cases
CV-1 to CV-4	alphanumeric code for civil case records
CVC-1 to CVC-4	alphanumeric code for clients from civil cases
CVJ-1 to CVJ-4	alphanumeric code for judges from civil cases
CVL-1 to CVL-2	alphanumeric code for lawyers from civil cases
CVS-1 to CVS-4	alphanumeric code for court staff from civil cases
DNA	deoxyribonucleic acid
GPS	global positioning system
GR	general registered
HCD	High Court Division
IO	investigating officers
IT	information technology
LAC	Legal Aid Commissions

LSC	Legal Service Commission
NGO	non-government organisation
NGR	non-general registered
NLASO	National Legal Aid Services Organization
NSW	New South Wales
O	Order
OADR	online alternative dispute resolution
OC	officer in charge
r	rule
SMS	short messaging service
UK	United Kingdom
UNDP	United Nations Development Programme
US	United States

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Bangladeshi Legislation

The *Acid Niyontron Ain (Acid Control Act) 2012*

The *Acid Oparadh Niyontron Ain (Acid Crime Prevention Act) 2002*

The *Arbitration Act 2001*

The *Artha Rin Adalot Ain (Money Loan Court Act) 2003*

The *Bangla Bhasha Procholon Ain (The Introduction of Bangla Language Act) 1987*

The *Bangladesh (Adaptation of Existing Laws) Order 1972*

The *Bangladesh Civil Service Recruitment Rules 1981*

The *Bangladesh Judicial Service Commission Rules 2007*

The *Bangladesh Labour Act 2006*

The *Bangladesh Legal Practitioners and Bar Council Order 1972*

The *Bankruptcy Act 1997*

The *Bengal Village Self-Government Act 1919*

The *Birodh Mimangsha (Pouro elaka) Board Ain 2004 (The Conciliation of Disputes (Municipal Areas) Board Act, 2004)*

The *Civil Courts Act 1887*

The *Civil Rules and Orders (Practice and Procedure of Subordinate Courts)*

The *Code of Civil Procedure 1908*

The *Code of Criminal Procedure Code 1898*

The *Constitution of the People's Republic of Bangladesh 1972*

The *Criminal Rules and Orders (Practice and Procedure of Subordinate Courts) 2009*

The *Domestic Violence (Prevention and Protection) Act 2010*

The *Electricity Act 1910*

The *Environment Court Act 2010*

The *Evidence Act 1872*

The *Family Courts Ordinance 1985*

The *Legal Aid Services (Amendment) Act 2013*

The *Legal Aid Services Act 2000*

The *Legal Aid Services Policy 2001*

The *Legal Aid Services Policy 2014*

The *Legal Aid Services Regulation 2015*

The *Legal Practitioners (Fees) Act 1926* (Bangladesh)

The *Madokdrobbo Niyontron Ain (Narcotics Control Act) 1990*

The *Manob Pachar Protirodh o Daman Ain (Prevention and Suppression of Human Trafficking* Act (PSHT) *2012*

The *Mobile Court Act 2009*

The *Money Loan Courts Act 2003*

The *Motor Vehicles Ordinance 1983*

The *National Legal Aid Services Organization (Chowki Special Committee Structure, Responsibilities, Activities) Regulation 2016*

The *National Legal Aid Services Organization (Labour Court Special Committee Structure, Responsibilities, Activities) Regulation 2016*

The *Nirapod Khaddo Ain (Pure Food Act) 2013*

The *Penal Code 1860*

The *Police Act 1861*

The *Police Regulations Bengal 1943*

The *Public Demand Recovery Act 1913*

The *Rules of Business 1996*

The *Sorok Poribohon Ain 2018*

The *Specific Relief Act 1877*

The *Suits Valuation Act 1887* (Bangladesh)

The *Supreme Court of Bangladesh (Appellate Division) Rules 1988*

The *Supreme Court of Bangladesh (High Court Division) Rules 1973*

The *Utilisation of Information Technology by the Courts Act 2020*

The *Village Court Ordinance 1976*

The *Village Court Act 2006*

The *Women and Children Repression Prevention Act (Nari o Shishu Nirjaton Daman Ain) 2000*

The *Zilla Judge, Adhoston Adalatsomuh ebong bivagiyo Bishes Judge Adalotsomuh (kormokorta and kormochari) niyog bidhimale) (Appointment Regulation in District Courts, Subordinate Courts and Special Judge Courts) 1989*

Foreign Legislation

The *Access to Justice Act 1999* (UK)

The *Bankers' Books Evidence Act 1879* (UK)

The *Canadian Charter of Rights and Freedoms 1982* (Canada)

The *Civil Procedure Rules 1998* (UK)

The *Civil Rights Act 1964* (US)

The *Civil Rights Attorney's Fees Award Act of 1976* (US)

The *Code of Civil Procedure 1908* (India)

The *Code of Criminal Procedure 1973* (India)

The *Costs in Criminal Cases (General) Regulations 1986* (UK)

The *Courts and Legal Services Act 1990* (UK)

The *Criminal Practice Directions 2015* (UK)

The *Criminal Procedure Rules 2015* (UK)

The *Federal Rules of Civil Procedure 1938* (US)

The *Federal Rules of Criminal Procedure 1946* (US)

The *Legal Aid Sentencing and Punishment of Offenders Act 2012* (UK)

The *Magistrates' Courts Act 1980* (UK)

The *Mediation Act 2017* (Singapore)

The *Practice Direction (Costs in Criminal Proceedings) 2015* (UK)

The *Prosecution of Offences Act 1985* (UK)

The *Senior Courts Act 1981* (UK)

The *Solicitors' Code of Conduct 2007* (UK)

The *European Convention for the Protection of Human Rights and Fundamental Freedoms 1950*

Australian Legislation

The *Civil Procedure Act 2005* (NSW)

The *Costs in Criminal Cases Act 1967* (NSW)

The *Crimes (Domestic and Personal Violence) Act 2007* (NSW)

The *Criminal Procedure Act 1986* (NSW)

The *Federal Court Rules 2011* (Cth)

The *Justices Act 1902* (NSW)

The *Legal Profession Uniform Law Application Act 2014* (NSW)

The *Suitors' Fund Act 1951* (NSW)

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Chapter 1: Introduction: Litigation Costs and Implications for Access to Justice in Bangladesh

1.1 Introduction

The Constitution of the People's Republic of Bangladesh 1972 ('the *Constitution of Bangladesh*') guarantees legal equality, equal protection of the law and speedy and public trials.[1] These constitutional guarantees guide the principles of access to justice. However, justice is not readily accessible to a large number of the population in Bangladesh for numerous reasons, including cultural barriers, language barriers, complicated court procedures, fear, feelings of powerlessness, unavailability of legal information, distrust or lack of credibility of the justice system and economic incapacity.[2] It is litigation costs which is one of the most significant barriers to accessing justice in Bangladesh and also internationally.[3] Some hurdles coincide, such as the uncertainty about the time for a case to resolve, complex procedures, language barriers or unavailability of legal information, and increased litigation costs, affecting people with limited resources; some are unfettered, such as population growth, economic growth or the enactment of new legislation that creates case burdens and increases expenses.[4] Until recently, legislature and policymakers in Bangladesh have disregarded the combination of factors adversely affecting litigation costs in legal reform initiatives.[5] The lengthy case processing time drags the litigants for years to dispose of a

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[1] The *Constitution of the People's Republic of Bangladesh 1972,* arts 27, 31, 35 (*'the Constitution of Bangladesh'*).

[2] Sumaiya Khair, *Legal Empowerment for the Poor and the Disadvantaged: Strategies, Achievements, and Challenges* (The University Press Limited, 2008) 43.

[3] Ibid; Martin Gramatikov, 'A Framework for Measuring the Costs of Paths to Justice' (2009) 2(2) *Journal Jurisprudence* 111; Rebecca L Sandefur, 'Access to Civil Justice and Race, Class, and Gender Inequality' (2008) 34 *Annual Review of Sociology*, 339; Victoria Gavito, 'The Pursuit of Justice is Without Borders: Binational Strategies for Defending Migrants' Rights' (2007) 14(3) *Human Rights Brief* 5; Hazel Genn and Alan Paterson, *Paths to Justice Scotland: What People in Scotland Think and Do about Going to Law* (Hart Publishing, 1st ed, 2001) 5; Ethan Michelson, 'The Practice of Law as an Obstacle to Justice: Chinese Lawyers at Work' (2006) 40(1) *Law and Society Review* 1; Lord Woolf, *Access to Justice* (Final Report, 1996) Introduction <http://webarchive.nationalarchives.gov.uk/20060213223540/http://www.dca.gov.uk/civil/final/contents.htm> (accessed 29 September 2021) ('*Woolf's Final Report*').

[4] RV Ramana Murthy and Siddik Rubiyath, 'Disposal Rates, Pendency and Filing in Indian Courts: An Empirical Study of Two States of Andhra Pradesh and Kerala' in PG Babu et al (eds) *Economic Analysis of Law in India: Theory and Application* (Oxford University Press, 2010) 3; Hiram E Chodosh et al 'Indian Civil Justice System Reform: Limitation and Preservation of the Adversarial Process' (1997) 30 (1) *New York University Journal of International Law and Politics* 27.

[5] Empirical evidence substantiates that, until now, no reform has been initiated focusing on litigation expenses.

litigation in the subordinate courts of Bangladesh.[6] There is a strong correlation between delays and expenses (see section 7.2). As Bangladesh is plagued by an expensive and lengthy litigation system, these inefficiencies significantly restrict access to justice for the majority of people.[7] This study argues that improving the cost-effectiveness of the litigation process should be a key focus for Bangladesh to increase access to justice (see section 2.1 for more detail).

The researcher argues that there must be four ingredients to optimise access to justice: a person must have *access* to the system, be able to obtain an appropriate *remedy* through a reasonable *process,* and, lastly, the litigant's *satisfaction*. It could be argued that justice is a complete package, combining all stages of the legal process, and any isolated performance of these components will not ensure justice. Access is affected by the litigant's financial capabilities, where legal aid, cost rules and remedies play a role. A proper blending of legislative and procedural laws supporting economic benefits by reimbursing legal expenses can increase the satisfaction of an aggrieved person. It can be deduced that remedies should meet the legal, economical, and psychological needs of the parties. All parts of the litigation processes involve costs. A costly case procedure commonly impedes access to justice. Therefore, processes should be accelerated to reduce costs and improve the litigant's satisfaction with the litigation process. There is a well-known aphorism from Lord Hewart— 'not only must justice be done; it must also be seen to be done'.[8]

1.2 Aims and Objectives

Bangladesh has not focused on minimising litigation costs, even though it is an overwhelming necessity.[9] Currently, the judiciary focuses on case management to reduce case backlogs, following the example from the United Kingdom (UK) (see section 1.4.1.4). However, while examining the success of case management in the UK, many studies have revealed that the system

[6] Ridwanul Hoque, 'Courts and the Adjudication System in Bangladesh: In Quest of Viable Reforms' in Jiunn-rong Yeh and Wen-Chen Chang (eds) *Asian Courts in Context* (Cambridge University Press, 2014) 481. Another survey was conducted by the Bangladesh National Women Lawyers' Association and found the similar findings. See Eshita Binte Shirin Nazrul and Md Mamun-Ur-Rashid, *Report on Court User Survey 2015* (Bangladesh National Women Lawyers Association, 2015) 47.

[7] Khair (n 2) 43.

[8] *R v Sussex Justices, ex parte McCarthy* [1924] 1 KB 256, 259.

[9] Khair (n 2) 43. Also, supported by empirical data.

reduced its backlog but increased litigation expenses (see section 1.4.2.2).[10] Thus, the high litigation costs remain a concern for accessing justice. In Bangladesh, the substantial economic disparity and existing expensive court system exclude the majority of people from accessing the courts.[11] Therefore, this research aims to:

- explore the available financial support for litigants and alternative support options to enhance access for those who cannot afford the high expenses.
- explore how cost rules can be implemented to ensure economic and legal remedies for litigants to maximise access to justice.
- examine the institutional arrangement of Bangladesh's subordinate courts that contribute to increased case delays and litigation costs.
- discover the other factors that increase litigation costs, including individual, institutional and legal factors.
- investigate how alternative dispute resolution (ADR) affects litigation expenses.
- explore whether the existing manual litigation system increases litigation costs and if technology could be a potential solution for establishing an effective judiciary.

1.3 Research Question

This thesis addresses the following research question: How can a cost-effective litigation system be established in the subordinate courts of Bangladesh to facilitate access to justice? Table 1.1 lists the issues that are addressed in this thesis to answer the research question.

Table 1.1: Issues Addressed in This Thesis to Answer the Research Question

Research Issues	Chapter(s)	Methodology
How do the case-related individuals (later in this thesis the term case-related individual will be referred to as professional stakeholders) and institutions contribute to increasing litigation costs that undermine access to justice in the subordinate courts of Bangladesh?	3 and 7	Doctrinal and empirical

[10] Michael Zander, 'The Woolf Report: Forwards or Backwards for the New Lord Chancellor?' (1997) 16 *Civil Justice Quarterly* 208; J Peysner and M Seneviratne, 'The Management of Civil Cases: The Courts and Post-Woolf Landscape' (DCA Research Series 9/05, UK Department of Constitutional Affairs, November 2005) 7. See also Paul Fenn, Neil Rickman and Dev Vencappa, 'The Impact of Woolf Reforms on Costs and Delay (Discussion Paper Series—2009.I, Centre for Risk & Insurance Studies, 2009) 33; Adrian Zuckerman, 'Costs Capping Orders: The Failure of the Third Measure for Controlling Litigation Costs' (2007) 26 *Civil Justice Quarterly* 271; Caroline Sage, Ted Wright and Carolyn Morris, 'Case Management Reform: A Study of the Federal Court's Individual Docket System' (Law and Justice Foundation of New South Wales, 2002) 18.

[11] Hoque (n 6) 483.

How can the existing legal support services be more effective, and what other alternative support options are available to increase access to justice?	6	Doctrinal and empirical
How would ADR affect the litigation costs and access to justice in Bangladesh?	5	Doctrinal and empirical
Why do the current litigation cost rules need to be integrated into a comprehensive, coherent and realistically applicable set of single rules?	4	Doctrinal and empirical
How could technology be used to make the court system more effective?	8	Doctrinal and empirical

1.4 Background

1.4.1 Bangladesh

1.4.1.1 Impact of Litigation Costs on the Subordinate Courts of Bangladesh

Bangladesh, a 'twice-born nation', achieved its independence from the UK as part of Pakistan in 1947 and from Pakistan through a war of liberation in 1971.[12] Currently, Bangladesh has a secular, unicameral government.[13] Before being ruled by the Government of the UK, Bangladesh was ruled by Muslims and Hindus.[14] It had a different legal system during each tenure.[15] Therefore, Bangladesh's legal system is a combination of common, customary and personal laws; however, the present system is greatly derived from the UK system.[16] The pyramid structure of the courts places the Supreme Court of Bangladesh at the top, consisting of the Appellate Division and High Court Division (HCD), and the subordinate courts at the bottom.[17]

The existing adversarial process of litigation in Bangladesh empowers litigants to dominate the procedural justice. The laws are provided in a combination of codified, unified, diverse, civil,

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

[13] 'Bangladesh', *Banglapedia* (Web Page, 22 February 2015) ***http://en.banglapedia.org/index.php?title=Bangladesh*** (accessed 7 December 2020).

[14] BS Jain, *Administration of Justice in Seventeenth Century India: A Study of Salient Concepts of Mughal Justice* (Metropolitan Book, 1st ed, 1970) 1.

[15] MD Abdul Halim, *The Legal System of Bangladesh: A Comparative Study of Problems and Procedure in Legal Institutions* (CCB Foundation, 12th ed, 2017) 42.

[16] Hoque (n 6) 447.

[17] The *Constitution of Bangladesh* (n 1) arts 94, 114.

criminal, and religious personal laws.[18] The major procedural and substantive laws were enacted during the British colonial period and are still in operation with minimal amendments. The UK-derived laws are incomprehensible to people who are functionally or basically illiterate.[19] Therefore, the legal system has always been a complicated sector to the majority of the population (Bangladesh's court system is demonstrated in Chapter 3).

While writing about the history of the Roman Empire, Edward Gibbon explained the legal system, stating that 'the expense of the pursuit sometimes exceeded the value of the prize and the fairest rights were abandoned by the poverty or prudence of the claimants'.[20] He explained how the justice system was expensive and inaccessible to the people who were poor instead it served the affluent people.[21] Thus, costly justice tends to abate the spirit of litigation. Lord Woolf echoed Gibbon's views in the *Access to Justice* report, and identified the English legal system as the most expensive, which often crossed the value of the disputed property.[22] Therefore, he described the system as creating an unequal balance between the powerful, wealthy litigants and under-resourced litigants.[23] Marks also expressed concern regarding the rising costs of legal services worldwide,[24] and Gramatikov argued that the high costs of litigation are the main cause of unresolved legal disputes.[25] The Bangladesh scenario is no exception, particularly in the subordinate courts.

The Bangladesh judiciary is now overwhelmed by delays, extreme backlogs, expensive litigation systems, a lack of transparency, unpredictable court decisions, an absence of formal court and case management, the mismanagement of case records, a shortage of judges and court staff, excessively high lawyer fees, complex legal procedures, limited legal aid facilities and an ineffective judiciary, all of which make the justice system inaccessible to a great number of people.[26] A joint study by

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[18] Khair (n 2) 47.

[19] The present literacy rate in Bangladesh is 73.9%, which includes people who can read and write: see Central Intelligence Agency, 'Bangladesh', *World Fact Book* (Web Page, 15 March 2021) <https://www.cia.gov/the-world-factbook/countries/bangladesh/#people-and-society> (accessed 24 March 2021).

[20] Edward Gibbon, *The History of the Decline and Fall of the Roman Empire*, ed JB Bury (Fred De Fau and Company, 1788) vol 4, 38. See also Chief Justice James Allsop, 'Judicial Case Management and the Problem of Costs' (Jackson Reforms to Civil Justice in the UK, Herbert SmithFreehills, Faculty of Law, University of New South Wales, 9 September 2014) 1.

[21] Gibbon (n 20) 40–4.

[22] *Woolf's Final Report* (n 3) 2.

[23] Ibid 2.

[24] Robert E Marks, 'Rising Legal Costs' in Russell Fox (ed) *Justice in the Twenty-First Century* (Cavendish Publishing, 1999) 227.

[25] Gramatikov (n 3).

[26] Khair (n 2) 41–50; Ummey Sharaban Tahura and Margaret RLL Kelly, 'Procedural Experiences from the Civil Courts of Bangladesh: Case Management as a Potential Means of Reducing Backlogs' (2015) 16(1) *Australian Journal of Asian Law* 16-19.

the Supreme Court of Bangladesh and the United Nations Development Programme (UNDP) found that the cases take longer than they should take to dispose of.[27] Also, the filing rate is much higher than the disposal rate. In Bangladesh, like many other societies globally, the poor cannot access the formal litigation process due to the expenses involved.[28] The prolonged uncertainty to dispose of a case increases the unaffordability for most people. Further, the costs are not reimbursed to the successful litigant, and therefore, even the winner considers justice inaccessible.[29] This research investigates the challenges to enhancing access to justice in Bangladesh. While this research explores ways to reduce litigation expenses, it also identifies the causes of high expenses, and examines the available remedial measures through the cost rules and attempts to provide alternative legal support options.

In Bangladesh, often the civil and criminal cases between the same parties overlap. In a study, Barkat and Roy found that 77% of the total cases are land-related.[30] It is found that the criminal cases arise from civil disputes. Also, the primary research found that due to the absence of a strong prosecution department, both parties in criminal cases appoint private lawyers, even if s/he is a victim or the informant and bear the litigation costs like the defender or any party in the civil suits.[31] Also, the stages of civil and criminal cases are very much similar. Further, from a certain level, the same judge (for example, Joint District Judge, Additional District Judge or District Judge) disposes both civil and criminal cases. Therefore, this study covers the litigation costs of civil and criminal cases, although theoretically, the civil justice system differs from the criminal.

The researcher conducted an empirical research during her Master of Philosophy and found that litigation expenses often exceeded the disputed amount of money.[32] Further, 'the time frames that law allocated for each stage in each case [were] not maintained', consequently dragging cases out for years.[33] The average time to dispose of a case at the trial stage is five or more years.[34] The

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[27] Judicial Strengthening Project, *Summary Report on Court Services Situation Analysis* (Supreme Court of Bangladesh, December 2013) 34.
[28] Maitreyi Bordia Das and Vivek Maru, 'Framing Local Conflict and Justice in Bangladesh' (The World Bank Working paper no 5781, 2011)
[29] Findings from empirical data.

[30] Abul Barkat and Prosanta K Roy, *Political Economy of Land Litigation in Bangladesh: A Case of Colossal National Wastage* (Pathak Shamabesh, 2004) 291.

[31] CRC-1 stated at the time of the interview that he appointed a private lawyer though he had a public prosecutor. Also, a broad analysis on prosecution performance is at section 7.2.1.1.

[32] Ummey Sharaban Tahura, 'Case Management in Reducing Case Backlogs: Potential Adaptation from the New South Wales District Court to Bangladesh Civil Trial Courts' (Master of Philosophy Thesis, Macquarie University, 2015) 175. This researcher conducted empirical research from 2013 to 2014.

[33] Ibid 141; 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>.

[34] Hoque (n 6) 481.

number of pending cases was increased from 3,053,870 in March 2019, to 3,684,728 by 31 December 2020.[35] Another study found that 10.67% of criminal cases took more than five years to be disposed of.[36] Thus, exceeding the time frame of a case increases the case duration and backlogs, thus, escalates litigation costs. The empirical data from the present study (will be subsequently named as Bangladesh Qualitative Research Survey 2019 (*BQRS 2019*)) also suggests that judges rarely impose costs upon the losing party. The following section demonstrates how the cost rules apply in Bangladesh and how its implications for access to justice.

1.4.1.2 How do the Cost Rules Apply in Bangladesh?

1.4.1.2.1 Civil Cases

In Bangladesh, the civil legal provisions allow the courts to impose costs upon parties regarding interlocutory matters, adjournments, or case decisions.[37] The law specifies to impose costs if any false or vexatious claim is made to delay the court proceedings while disposing of interlocutory matters.[38] The compensatory and adjournment costs were found practically ineffective due to inflation because they are subject to a maximum rate and not an assessment of the actual costs. The legal provisions also do not demonstrate 'to what extent' costs should be awarded or how they should be recovered. This relies largely on the judges' discretion, which was identified as inconsistent by this research (for detail, see section 4.3.3). Further, the grounds for applying discretions vary to ensure equality regarding cost orders. Realistically, this discretion is often applied whimsically than rationally.[39]

Lawyers also enjoy the freedom of charging any amount to their clients because the laws do not regulate their fees (see section 7.2.1.1). Further, the accountability of lawyers is not legally prescribed. The *Code of Civil Procedure 1908* (Bangladesh) (*CPC 1908*), *Code of Criminal Procedure 1898* (Bangladesh) (*CrPC 1898*) and *Bangladesh Legal Practitioners and Bar Council Order 1972* (Bangladesh) (*BLPBCA 1972*) do not impose any costs upon lawyers for wilfully delaying court proceedings. Although the Bangladesh Bar Council's 'Canons of Professional Conduct and Etiquette' (framed under the *BLPBCA 1972*) impose some duties on lawyers regarding clients and courts, these do not explicitly relate to legal procedures and provide almost

[35] Data collected from the Supreme Court of Bangladesh during March 2019 and January 2021.

[36] Nazrul and Rashid (n 6) 47.

[37] See *Code of Civil Procedure 1908* (Bangladesh) s 35, Order XVII ('*CPC 1908*').

[38] Ibid ss 35A, 35B.

[39] Ummey Sharaban Tahura, 'Discretionary Power: Is It Conceit or Necessity?', Daily Star (online, 11 September 2018) <https://www.thedailystar.net/law-our-rights/news/discretionary-power-it-conceit-or-necessity-1631977 (accessed 28 September 2021)

no legal remedies.[40] Further, the *Legal Practitioners (Fees) Act 1926* (Bangladesh) works as a legal practitioner's safeguard to sue their clients for fees.[41] The law has ensured their accountability if any loss or injury occurred due to their professional negligence.[42] However, this Act or other laws have not expressly secured any mode of financial remedy from them.

1.4.1.2.2 Criminal Cases

The Bangladesh government bears the prosecution costs of criminal cases.[43] Therefore, people may have less concerns with the litigation expenses involved with criminal cases. On the other hand, the defence bears cost like civil cases unless s/he is eligible for legal aid. The common practice in Bangladesh is that people engage private lawyers in addition to prosecution (see section 1.4.1.1). Therefore, like civil cases, both the victim or informant and the defence bear the same litigation expenses except in a few particular expenses, such as, court fees. Among three types of criminal cases, general registered (GR) and non-general registered (NGR) cases are filed in police stations, and the prosecution becomes a party to the case. Complaint register cases (CR) are filed in courts, and, in the absence of a prosecution, the parties bear the costs.[44] The key legislation covering the criminal justice system include the *CrPC 1898* (Bangladesh), *Penal Code 1860* (Bangladesh), *Police Act 1861* (Bangladesh), *Evidence Act 1872* (Bangladesh) and various special laws that have been subsequently legislated by the Bangladesh National Parliament.

Magistrates primarily administer criminal cases and impose fine upon parties according to the limits determined by the laws.[45] Generally, these fines go to the government revenue unless an alternative is mentioned in the order or judgment explicitly. The victims are neglected at the time of imposing fines because compensation is not generally provided. No comprehensive guidelines exist for victims' compensation. There are also no provisions for compensating an accused who is proven innocent at a trial. However, if a criminal case is proved to be maliciously filed to harass others in the investigation stage or at the trial stage, the court can order the prosecution to file a separate criminal case against the informant.[46]

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[40] 'Canons of Professional Conduct and Etiquette', *Bangladesh Bar Council* (Web Page) chs II, III <http://bangladeshbarcouncil.org/cmsadmin/upload_dir/bar_council_rules.pdf> 119-24 (accessed date 20 Oct 2020).

[41] The *Legal Practitioners (Fees) Act 1926* (Bangladesh) s 4.

[42] Ibid, s 5.

[43] The *CrPC 1898* (Bangladesh) s 196.

[44] If the officer of the police station declines to register any case that is a cognisable offence, the aggrieved person can file the case directly to the court as a complaint petition.

[45] Limited compensations are only fixed for cases triable in magistrate courts: see the *Code of Criminal Procedure 1898* (Bangladesh) ss 32, 36 ('*CrPC 1898*').

[46] The *Penal Code 1860* (Bangladesh) s 211, the *CrPC 1898* (Bangladesh) s 173.

Although there are some provisions for cost rules, they are rarely applied. The subordinate courts and the Supreme Court of Bangladesh mostly restrain themselves from awarding costs because there is no specific method for assessing litigation costs.[47] Additionally, the complicated recovery process discourages awardees from executing cost orders and there are no guidelines for ensuring the application of a cost award. During the early stages of a case, the cost assessment process is absent in civil and criminal cases. This thesis has identified that an integrated cost rule containing a suitable assessment and simple recovery process that can be adjusted using guided discretion is indispensable for an accessible justice system. If a legal remedy is not associated with a reasonable economic indemnity, the wealthier party will be the ultimate winner. Legal and associated costs are often the most critical determinant, where cost rules can play a role in financing litigants.[48]

A principal constraint of this research is the absence of relevant literature about the Bangladesh context. Zahir's finding identified that adjournments cause delay however he has not examined reasons for which adjournments are granted or how.[49] Neither the Law Commission of Bangladesh nor any individual has conducted comprehensive legal research in this field in Bangladesh. However, some international organisations, such as the UNDP and Transparency International Bangladesh, have prepared reports regarding the overall justice sector that focus on the court structures, accountability, integrity, and transparency in the subordinate court system.[50] The Law Commission of Bangladesh had recommended compensation and other relief for victims of crime.[51] However, this report was limited to compensating victims of crime and, arguably, was no more than a piecemeal attempt to improve the situation. The other research conducted by the Law Commission of Bangladesh has focused on reducing case backlog and delay including expediting pending cases. It identified the causes of delayed disposals, including low number of judges, scarcity of special courts, procedural complexities, lack of cooperation from lawyers, service of summons, amendment of pleading at any stage, mode of taking evidence, informing

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[47] The researcher scrutinised more than 100 judgements of the High Court and Appellate divisions to discover if there are any guidelines for costs and found neither guidelines nor costs awarded: see, eg, 'Judgement: Appellate Division', *Supreme Court of Bangladesh* (Database) http://ww2.supremecourt.gov.bd/web/ (accessed 10 May 2021).

[48] Australian Law Reform Commission, *Costs Shifting—Who Pays for Litigation* (Report No 75, October 1995) 23.

[49] M Zahir, *Delay in Courts and Court Management* (Bangladesh Institute of Law and International Affairs, 1988).

[50] Judicial Strengthening Project, *Summary Report on Court Services Situation Analysis* (Supreme Court of Bangladesh, December 2013) ('*Summary Report on Court Services*'); Nazmul Huda Mina, Nahid Sharmin and Shammi Laila Islam, *Subordinate Court System of Bangladesh: Governance Challenges and Ways Forward* (Transparency International Bangladesh, 2017).

[51] Law Commission Bangladesh, *A Final Report on a Proposed Law Relating to the Payment of Compensation and other Reliefs to the Crime Victim* (Report No 75, February 2007) ***http://www.lc.gov.bd/reports/75.pdf*** (accessed 13 October 2020).

informant before submitting police report under section 173, and absence of plea bargaining.[52] Accordingly, it suggested some recommendations such as inserting email and courier in service of summons, introducing compensatory costs if a false case is filed, increasing the number of courts and establishing special courts, increasing cooperation from the lawyers, and maintaining time limit for each stage.[53] Also, in two reports (report no 104, 106),[54] it proposed to execute the provisions of compensatory cost for false cases. However, all these reports focused on reducing case backlog or expediting case disposal and have not considered reducing litigation costs or imposing costs rules after assessing legal costs in order to enhance access to justice. This study (*BQRS 2019*) has identified the factor that has increased litigation expenses and the existing constraints to reducing costs. Additionally, the concept of undermining access to justice due to litigant's unaffordability is addressed in this study.

1.4.1.3 Legal Support Options

Justice tends to be expensive, and the majority of people cannot afford it.[55] To help people in need pay their lawyer's fees and other incidental expenses, Bangladesh established a legal aid program in 2000.[56] However, the *Legal Aid Services Act 2000* (Bangladesh) and the legal aid program need amendments to maximise access to justice.[57] This research also examines alternative support options for people from poor- and middle-income backgrounds. Thus, this critical analysis identifies some factors of the existing services that have decreased access to justice in Bangladesh.

1.4.1.4 Role of Technology

Overburdened courts and manual court systems delay proceedings and increase litigation expenses. Modernising court systems could be a potential solution for optimising disposals and

[52] Law Commission Bangladesh, *Report on to ensure speedy disposal in the Subordinate Courts* (Report No 13, May 1998) 24-8. Law Commission Bangladesh, *Recommendations for Expediting Civil Proceedings* (Report No 106, December 2010) 2-7; Law Commission Bangladesh, *Recommendations for Expediting Criminal Proceedings* (Report No 109, August 2011) 4-12, Law Commission Bangladesh, *Recommendations for Reducing Backlog and Speedy Disposal of Pending Cases* (Report No 128, June 2014) 1-4.

[53] Law Commission Bangladesh (n 52) 24-8; Law Commission Bangladesh (n 52) 2-7; Law Commission Bangladesh (n 52) 4-12, Law Commission Bangladesh (n 52) 1-4.

[54] Law Commission Bangladesh (n 52); Law Commission Bangladesh, *Report on the Execution of ADR in Bangladesh Context* (Report no 104, October) 6.

[55] See James P George, 'Access to Justice, Costs and Legal Aid' (2006) 54 *American Journal of Comparative Law* 305; Hon Russel Fox, *Justice in the Twenty-First Century* (Cavendish Publishing Limited, 2000) 38.

[56] *Legal Aid Services Act 2000* (Bangladesh).

[57] Farzana Akter, 'Legal Aid for Ensuring Access to Justice in Bangladesh: A Paradox?' (2017) 4 *Asian Journal of Law and Society* 273.

curtailing costs.[58] Bangladesh has already introduced information technology (IT) in the judicial sector, theoretically annexing the judiciary as part of the national portal.[59] However, it is yet to be functional practically. One main problem of the IT sector in the judiciary is a shortage of staff. For example, symbolic training has only been allocated to several judges.[60] Thus, inadequately trained judicial officers' discharge their function to maintain and update the judicial portal in addition to their general responsibilities. Where judicial officers are already overburdened with their current workload, this extra load has decreased their efficiency and made the process ineffectual (see section 7.2.1.3). Courtroom technology that is managed by skilled staff could increase the courts' efficiency and transparency.[61] Additionally, it should be ensured that incorporating new technology does not create further barriers to accessing justice.[62] This would be challenging to ensure the effective use of technology in Bangladesh's justice sector.

Due to the increased demand for affordable, timely, and equitable justice, the Bangladesh government has adopted some segregated initiatives. In 2013, the Supreme Court of Bangladesh collaborated with the UNDP and implemented the Judicial Strengthening Project to improve the court's performance by reducing the existing impediments.[63] As part of the pilot project, three districts[64] were chosen to examine how the case management system would increase the efficiency of the courts. A summary report revealed that the disposal rate gradually increased to 76.6%, 77.8% and 82.4% in 2011, 2012 and 2013, respectively.[65] Nevertheless, the backlog was not proportionately decreased, and instead, it continued to increase.[66] This was due to the high rate of filing cases.[67] The project was eventually discontinued. The growing backlog is causing more

[58] Richard Susskind, *Online Courts and the Future of Justice* (Oxford University Press, 2019) 266.

[59] See generally *Judicial Portal Bangladesh* (Web Page) ***http://www.judiciary.org.bd/en*** (accessed 10 May 2021).

[60] The notices are publicly available at *Law and Justice Division, Ministry of Law, Justice and Parliamentary Affairs* (Web Page) < ***http://old.lawjusticediv.gov.bd/static/news.php***> (accessed 10 May 2021).

[61] Fredrick Egonda-Ntende, 'The Role of Information Technology in Modernising the Courts' (Conference Paper, Conference of the Southern African Judges Commission, Imperial Resort Beach Hotel, Entebbe, Uganda, 3–6 February 2005) 9.

[62] Md Muajjem Hussain, 'Implications of E-Judiciary: Bangladesh Perspective' (2016) 16 *Journal of Judicial Administration Training Institute* 139.

[63] *Summary Report on Court Services* (n 50) 7–8.

[64] Districts are the largest administrative unit in Bangladesh. In this project, Dhaka, Rangamati and Kishoreganj were chosen out of 64 districts as the pilot districts.

[65] *Summary Report on Court Services* (n 50) 28–30.

[66] Ibid 28–30.

[67] Ashutosh Sarkar, 'Backlog of Cases', *Daily Star* (Dhaka, 18 March 2013) ***http://www.thedailystar.net/news/backlog-of-cases*** (accessed 10 May 2021).

delays, expenses and frustrations and an increasingly bitter perception of the justice system by the citizens of Bangladesh.[68]

Bangladesh has experienced a digital revolution during the last decade.[69] A vision plan was adopted as part of the government's motto, 'digitised Bangladesh', to ensure good governance through information and communication technology.[70] The judiciary has also been subject to the e-governance information and services that focus on user-oriented, quality web portal services.[71] The Ministry of Law, Justice and Parliamentary Affairs, in collaboration with the Supreme Court and Law and Justice Division, established the access to information program to develop a judicial portal, cause list management system and monitoring dashboard to reach people in remote communities and ensure the accessibility of the justice system.[72] The judicial portal was launched in 2016.[73] This thesis also examines to what extent those actions have achieved the set target for an efficient, transparent and accessible judiciary.

This thesis has discussed the background and context of the legal system in Bangladesh to understand how the legal system contributes to increased litigation expenses. The inflated expenses and tendency to not award costs contribute to the inaccessibility of the justice system in Bangladesh. Thus, this thesis investigates potential methods for making litigation cost-effective and maximising access to justice.

1.4.2 Other Countries

1.4.2.1 Litigation Costs Limit Access to Justice

The meaning of access to justice has been widened beyond access to courts or tribunals through the traditional trial process.[74] Access is associated with affordability. Fox argued that inequalities of wealth and power increase the inequalities of access to justice.[75] Lord Irvine identified the

[68] Chief Justice Mustafa Kamal, 'ADR in Bangladesh' (Conference Paper, International Judicial Conference 2006, Supreme Court of Pakistan, 16 May 2013); Zahidul Islam Biswas, 'Judiciary Must Take Bold Step to Get Rid of Backlog of Cases', *Daily Star* (Dhaka, 28 June 2008) <https://www.thedailystar.net/law/2008/06/04/index.htm>.

[69] Hussain (n 62) 136.

[70] Bangladesh Bureau of Statistics, *ICT Use and Access by Individuals and Households* 2013 (Bangladesh Bureau of Statistics and International Labour Organization, 2015) ***http://203.112.218.65:8008/WebTestApplication/userfiles/Image/LatestReports/ICTUseAccessSurvey2013.pdf*** (accessed 10 May 2021).

[71] *Judicial Portal Bangladesh* (n 59).

[72] Hussain (n 62) 136.

[73] *Judicial Portal Bangladesh* (n 59).

[74] Fox recommended the formation of a body outside the courts, named 'conflict resolution': see Fox (n 55) 93.

[75] Ibid 81.

overall litigation system as inaccessible, especially for people with middle incomes rather than people with high or low incomes because people with low incomes are often funded by governments through legal aid services.[76] His argument might be true in the UK context because they have ensured a legal aid and justice fund is available for economically vulnerable people.[77] However, the scenario in Bangladesh and some other countries differs from the UK because their legal aid programs have not developed to the same degree. Therefore, the high and unpredictable costs of legal services have become the most important concern in the legal system in recent times.[78]

During the mid-1990s, Lord Woolf presented a comprehensive report on the civil justice system and made several recommendations.[79] Sir Peter Middleton revisited the proposals and existing plans to examine their feasibility.[80] Woolf and Middleton focused on ensuring just, efficient and cost-effective access to the civil justice system.[81] Middleton evaluated Woolf's proposal as a coherent program that could improve the court system's efficiency and flexibility.[82] The *Civil Procedure Rules 1998* (UK) (*CPR 1998*) were enacted based on those recommendations. The new legislation was intended to facilitate more proactive judicial management and reduce litigation costs.

In 2005, the then Lord Chancellor's office suggested that another report should examine the effectiveness of Woolf's reforms.[83] Peysner and Seneviratne mentioned that although the disposal rates had improved through settlement and cooperation between stakeholders, the litigation expenses had increased up to the concern.[84] Therefore, in 2009, Lord Justice Jackson was assigned to examine how the cost rules were operating in the UK and identify possible methods for reducing civil litigation costs to promote access to justice.[85] Several changes have been implemented based on his report, the effectiveness of which is yet to be determined (see Chapter 4). William and

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[76] Lord Irvine, 'Civil Justice and Legal Aid Reforms' (Conference Paper, Annual Conference to the Solicitors, London, 18 October 1997) 1; *Access to Justice Act 1999* (UK) pt 1.

[77] Irvine (n 76) 1; *Access to Justice Act 1999* (UK) pt 1.

[78] Zuckerman (n 10) 271; Marks (n 24).

[79] *Woolf's Final Report* (n 3).

[80] Sir Peter Middleton, *Review of Civil Justice: Report to the Lord Chancellor* (Lord Chancellor's Department, 1 January 1997) 3.

[81] Ibid.

[82] Ibid 4.

[83] Peysner and Seneviratne (n 10).

[84] Ibid. See also Fenn, Rickman and Vencappa (n 10); Zuckerman (n 10).

[85] Hon Lord Justice Jackson, *Review of Civil Litigation Cost: Preliminary Report* (Stationary Office, May 2009) vol 1, 10 ('*Jackson's Preliminary Report*').

Williams conducted empirical research in support of the Australian Institute of Judicial Administration.[86] They found that litigation expenses were increasing because of the increasing lawyer fees.[87] However, these fees are not the only factor of the increasing expenses. In another study in the United States (US), Brazil argued that lawyers frequently misused the benefits of the discovery stage in civil cases, thus increasing the litigation expenses.[88] Genn also argued for reduced litigation expenses,[89] stating that this would minimise the demand for legal aid because it would increase the affordability of litigation for people with middle and low incomes. However, expensive litigation systems remain a problem in the UK, Australia, the US and worldwide,[90] and they require further examination to solve this complex problem.

1.4.2.2 Allocating Costs between the Parties

Cases are generally time-consuming and costly processes. The cost provisions have been derived from the principles of equity.[91] A plaintiff or petitioner, who has been forced to go to the courts because they have been aggrieved by a defendant or respondent's illegal acts, is reasonably entitled to reimburse their litigation expenses or vice versa.[92] It is a way of compensating them for the wrongs done by the opposite party and uphold their rights.[93] Thus, cost rules are considered a method for financing litigants, and the cost allocation rules are concerned with 'who is to pay' and 'to what extent'. Two rules are commonly applied around the world to determine the first concern (who is to pay): the loser pays rule, and the party pays rule. The later concern is dealt by standard or indemnity or proper basis. However, these rules are applied differently in civil cases than in criminal cases also varies geographically.

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[86] Phillip L William and Ross A Williams, 'The Cost of Civil Litigation: An Empirical Study' (1994) 14(1) *International Review of Law and Economics* 73.

[87] Ibid 73–4.

[88] Wayne D Brazil, 'Views from the Front lines: Observations by Chicago Lawyers about the System of Civil Discovery' (1980) 5(2) *American Bar Foundation Research Journal* 217, 233–4. See also A Leo Levin and Denise D Colliers, 'Containing the Cost of Litigation' (1985) 37 *Rutgers Law Review* 219.

[89] Hazel Genn, 'Understanding Civil Justice' (1997) 50(1) *Current Legal Problem*s 155, 173–5.

[90] Peysner and Seneviratne (n 10); Manitoba Law Reform Commission, *Costs Awards in Civil Litigation* (Report no 111, September 2005) 3; Australian Law Reform Commission (n 48) overview; Hon Justice Clyde Croft, 'The Management of Costs in Australian Litigation—Reforms and Trends' (Paper Presentation, Supreme Court of Singapore, 13 July 2011) 26.

[91] Australian Law Reform Commission (n 48) 32.

[92] Law Commission of India, *Costs in Civil Litigation* (Report No 240, May 2012) 13; Australian Law Reform Commission (n 48) 32.

[93] Law Commission of India (n 92) 16.

1.4.2.2.1 Civil Cases

The loser pays rule, also known as the cost indemnity rule, imposes costs upon the losing party, and is commonly applied worldwide in civil proceedings.[94] The UK follows the 'standard basis' or 'indemnity basis' to decide 'to what extent' this rule is applied up to a just and reasonable limit.[95] Australia follows an indemnity basis, where the successful parties are generally awarded a greater proportion of their actual costs.[96] However, neither country reimburses the entire amount because a party may be successful on the main issue, but the opposite party may be successful on other issues.[97] Therefore, a flexible jurisdiction has been imposed to ensure appropriate costs are allocated.[98]

Conversely, the US courts follow the second rule; all parties bear their own costs except in some exceptional circumstances.[99] This is because the loser pays rule may dissuade people from pursuing a meritorious case,[100] which may adversely affect access to justice.[101] The Access to Justice Advisory Committee's enquiry report, *Access to Justice: An Action Plan*, stated that this rule might deter people due to the risk of paying the other party's costs even when there is a meritorious case.[102] However, this theory is completely silent about compensating for unnecessary harassment. Therefore, the disadvantages of this rule outweigh the advantages.

The qualified 'one-way costs shifting rule' is also followed in very particular types of cases, such as those relating to the public interest or environmental issues.[103] Under this rule, a successful plaintiff can recover their costs, and if they are unsuccessful, each party bears their own costs.[104]

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[94] Marks (n 24) 228.

[95] Ibid.

[96] Australian Law Reform Commission (n 48) overview.

[97] The *Civil Procedure Rules 1998* (UK) s 44, the *Uniform Civil Procedure Rules 2005* (NSW) reg 42.5

[98] The *Civil Procedure Rules 1998* (UK) s 44.3 ('*CPR 1998*').

[99] Marks (n 24) 235.

[100] Manitoba Law Reform Commission (n 90) 24; Australian Law Reform Commission (n 48) overview.

[101] Australian Law Reform Commission (n 48) 10.

[102] Access to Justice Advisory Committee, *Access to Justice: An Action Plan* (Australian Government Publishing Service, 1994) 54.

[103] Ibid 35.

[104] Ibid.

1.4.2.2.2 Criminal Cases

In the criminal justice system, the primary responsibility lies with the prosecution to prove and bear the prosecution's cost, while the defendants bear their case cost in criminal matters. Initially, criminal cases followed the common law principle that the 'Crown neither receives nor pays any costs'.[105] However, this proposition has changed over time, and cost rules are now applying in criminal cases. In Australia and the UK, the general rule is to award a successful defendant (except on some grounds). For example, a defendant may be successful without having their innocence established or for lack of evidence. In those cases, a successful defendant may not be awarded cost. Based on this principle, New Zealand follows a guideline that considers the grounds for the accused's release when awarding costs in criminal cases.[106]

The Australian Law Reform Commission (ALRC) suggested that a single cost model be applied to all of Australia.[107] Currently, courts have the discretion to award costs to any party. However, New South Wales (NSW) and the Northern Territory have some restrictions on awarding successful defendants.[108] The cost rules for trials are also different from summary proceedings. In the UK, the legal cost award for a successful defendant was introduced in 2012,[109] whereby the cost is paid out from a central fund. The cost awarding rules are different between public prosecutors and private prosecutors. The appropriate authority assesses the costs using the general rules, which are subject to the calculation of the prescribed rates and scales.[110] Australia and the UK focus on using legal aid programs to meet present demands and ensure access to justice.

Like Bangladesh, in India, the costs in criminal cases are generally sourced from fines as compensation, which are very nominal amounts.[111] In 2009, India incorporated a victim compensation scheme in the *Code of Criminal Procedure 1973* (India) in section 357A. Accordingly, every state government coordinates with the Government of India to prepare a scheme for providing funds to compensate victims. Even before a trial starts, if a victim is

[105] The Courts of Equity and Common Law, 'The Jurist' (Vol XIII, part 1, 1849) 973.

[106] New Zealand Law Commission, *Costs in Criminal Cases* (Report No 60, May 2000) 8–9.

[107] Australian Law Reform Commission (n 48) 52.

[108] Ibid.

[109] The *Practice Direction (Costs in Criminal Proceedings) 2015* (UK) s 6.

[110] Ibid.

[111] The *Code of Criminal Procedure 1973* (India) ss 29, 30, 357.

identified, they can apply for compensation to the District Legal Services Authority.[112] However, Bangladesh has not introduced any legal provisions to provide victims with compensation.

1.5 Research Methodology

This research uses a doctrinal and empirical approach to investigate how the judicial system is gradually becoming more expensive and is not affordable for most people and how proper remedial measures can enhance its accessibility. Primary and secondary legal materials are examined for this doctrinal research. Empirical data and related legislation and case laws are examined as the primary sources. The secondary sources include journal articles, books, government, and non-government reports, newspaper articles and websites. Critical thought is used to interpret the laws.[113] Examples from other countries, including the UK, the US, Australia, and India, are also considered to examine their methods for approaching related issues. The reason underpinning this selection is that the laws of Bangladesh were derived from being part of a British colony. Therefore, most of the major Bangladeshi laws were enacted by the British colony and still operate. India and Bangladesh were under British rule and followed the same laws and legal system. India, being a neighbour to Bangladesh, is also facing the similar difficulties. The US is generally considered the pioneer of legal reforms, and Australia is considered an advanced country, especially in this area; both also have their legal origins in the UK. Researchers in the US, the UK and Australia have considered litigation costs specially and the legislatures in those countries have taken some steps to overcome the associated difficulties. This research analyses their methods as potential solutions for the high litigation costs in Bangladesh.

In this study, how the UK, the US, Australia, and India are dealing with litigation costs to enhance access to justice have mainly been analysed. While doing so, the comparative method has been cautiously avoided because the UK, the US, and Australia are economically developed and belong to first-world countries. Their social and cultural values are so different compared to Bangladesh. On the other hand, India faces the same litigation costs problem as Bangladesh (see chapter 7). Therefore, comparing with India will not be beneficial to Bangladesh. Instead, it would be more useful if the best practices could be explored, identified, and modified for Bangladesh. The thesis as such considered the best practices in each jurisdiction and draws a parallel where similar circumstances prevail in Bangladesh.

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[112] Ibid s 357A (4).

[113] See Jay Sanderson and Kim Kelly, *A Practical Guide to Legal Research* (Lawbook, 3rd ed, 2014) 4–5, 117; Robert Watt and Francis Johns, *Concise Legal Research* (Federation Press, 6th ed, 2009) 111.

The relation between legal theory and empirical research are marginal.[114] McConville and Chui defined 'doctrinal research' as desk-based research.[115] There are some criticisms of purely doctrinal analysis because it is too 'intellectually rigid, inflexible and inward-looking' to understanding law and the operation of legal systems.[116] However, there are also some arguments in favour of doctrinal research.[117] McConville and Chui argued that the law's systematic approach could be described qualitatively.[118] Hutchinson echoed this view.[119] She further argued that qualitative research could be used to explore 'social relations and reality through experience'.[120] It also helps identify the gaps between laws in books and laws in action.[121] Roux argued in favour of doctrinal methods of legal research.[122] He stated that recent doctrinal research is more synthesised with legal materials.

Qualitative research[123] involves empirical research of non-numerical data. It involves a disciplined exploration of the unique qualities of individual cases or classes of behaviour to understand how and why certain phenomena occur and not just what occurred.[124] Qualitative analysis involves examining and interpreting data to elicit meanings, gain understanding and develop empirical knowledge.[125] It involves a radically different way of thinking about data.[126] From a social perspective, Luhmann argued that empirical research only examines the legal operations and not

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[114] Denis J Galligan, 'Legal Theory and Empirical Research' in Peter Cane and Herbert M Kritzer (eds) *The Oxford Handbook of Empirical Legal Research* (Oxford University Press, 2010) 980. For example, Glaser and Strauss's grounded theory, which examines the interplay between systematic data collection and analysis: see Barney G Glaser and Anselm L Strauss, *The Discovery of Grounded Theory: Strategies for Qualitative Research* (Aldine Publishing, 1967).

[115] Mike McConville and Wing Hong Chui (eds), *Research Methods for Law* (Edinburgh University Press, 2nd ed, 2017) 4.

[116] Douglas W Vick, 'Interdisciplinary and the Discipline of Law' (2004) 31(2) *Journal of Law and Societ*y 163, 164.

[117] McConville and Chui (n 115) 21.

[118] Ibid 24. Conversely, Cane and Kritzer defined empirical research as the 'systematic collection of information and analysis': see Peter Cane and Herbert M Kritzer (eds) *The Oxford Handbook of Empirical Legal Research* (Oxford University Press, 2010) 4.

[119] Terry CM Hutchinson, *Researching and Writing in Law* (Lawbook, 4th ed, 2018) 51.

[120] Ibid 124.

[121] Ibid 126.

[122] Theunis Roux, 'Judging the Quality of Legal Research: A Qualified Response to the Demand for Greater Methodological Rigour' (2014) 24(1) *Legal Education Review* 177, 183.

[123] For more detail on this research method, see Gina Wisker, *The Postgraduate Research Handbook* (Palgrave Macmillan, 2nd ed, 2008) pt 3, ch 4; see also McConville and Chui (n 115) 19.

[124] Galligan (n 114) 978; Livingston Armytage, *Reforming Justice: A Journey to Fairness in Asia* (Cambridge University Press, 1st ed, 2012) 306.

[125] Glaser and Strauss (n 114) 66.

[126] Anselm L Strauss and Juliet M Corbin, *Basics of Qualitative Research: Techniques and Procedures for Developing Grounded Theory* (SAGE Publications, 2nd ed, 1998) 59.

their environment.[127] For these reasons, Nielsen supported multi-method research.[128] Social science research often applies the grounded theory method because it facilitates meaningful insights into practice and helps identify the gaps in theories.[129] Hutchinson referred to grounded theory as an approach instead of a theory.[130] Also, grounded theory method analyse empirical data to understand legal effectiveness.[131] The concepts and guidelines of grounded theory have been coherently organised, combining theoretical sensitivity, memos, comparative analysis, theoretical sampling, core variables and the generation of specific and general theories.[132] Therefore, this study chose a grounded theory approach for analysing data. The in-depth analysis in this thesis investigates how access to justice is hindered due to high litigation expenses and what contributes to these increased expenses by identifying the most expensive areas and the contributions of professional stakeholders in the litigation process. It also explains how the application of laws is obstructed in practice, determining the gaps in the theory. Sections 1.5.1 to 1.5.2 demonstrate the process applied for the ethical considerations and data analyses (see figure 1.1)

1.5.1 Ethical Considerations

Ethical clearance to conduct this research study was granted by the Macquarie University Human Research Ethics Committee. Following this, the data collection process was commenced. Permission from the Ministry of Law, Justice and Parliamentary Affairs to interview judges and access clients' case records from the different districts in Bangladesh was also duly obtained.

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[127] Niklas Luhmann, *Law as a Social System* (1989) 83(1-2) *Northwest. University Law Review*,138.

[128] Multi-method includes more than one research technique; for example, empirical legal research defines the basic technique and discusses when and why this method is useful. For more detail, see Laura Beth Nielsen, 'The Need for Multi-Method Approaches in Empirical Legal Research' in Peter Cane and Herbert M Kritzer (eds) *The Oxford Handbook of Empirical Legal Research* (Oxford University Press, 2010) 952–3. Legal research has changed over time, and the suggested method is multi-approach: see Corrado Roversi, 'Legal Doctrine and Legal Theory' in Enrico Pattaro (ed) *A Treatise of Legal Philosophy and General Jurisprudence: The Law and The Right* (Springer, 2005) vol. 1, 814–42; Terry Hutchinson, 'Developing Legal Research Skills: Expanding the Paradigm' (2008) 32(3) *Melbourne University Law Review* 1065; Hutchinson (n 119) 143.

[129] Dawn R Deeter-Schmelz, Timothy P Lauer and John M Rudd, 'Understanding Cross-Cultural Sales Manager–Salesperson Relationships in the Asia-Pacific Rim Region: A Grounded Theory Approach' (2018) 39(4) *Journal of Personal Selling & Sales Management* 334; Evert Gummesson, 'All Research Is Interpretative!' (2003) 18(6/7) *Journal of Business & Industrial Marketing* 482.

[130] Hutchinson (n 119) 143.

[131] Juliet Corbin and Anselm Strauss, *Basics of Qualitative Research: Techniques and Procedures for Developing Grounded Theory* (SAGE Publications, 3rd ed, 2008) ch 5; Melanie Birks and Jane Mills, *Grounded Theory: A Practical Guide* (SAGE Publications, 2011); LB Lempert, 'Asking Questions of the Data: Memo Writing in the Grounded Theory Tradition' in A Bryant and K Charmaz (eds) *The SAGE Handbook of Grounded Theory* (SAGE Publications, 2007) pt 3.

[132] Ibid 482–92.

Before conducting the empirical research and collecting the data, the study's effects and objectives were explained to the participants in Bengali, and their written consent was obtained. The entire questionnaires were prepared in Bengali and English.

The issues of anonymity and confidentiality were addressed in a variety of ways throughout the study. The face-to-face interviews were conducted while upholding the requirements for confidentiality and anonymity. The names and addresses of the participants are classified.

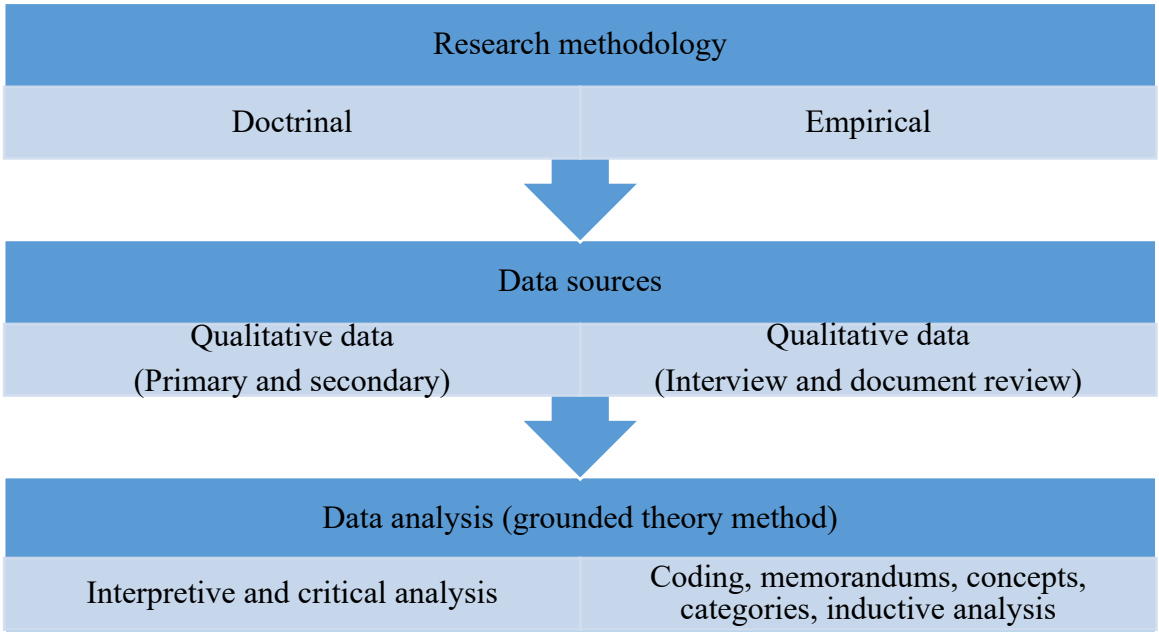

Figure 1.1: Research Methodology Framework

1.5.2 Qualitative Interview Process

In-depth interviews were conducted to collect information about the related factors contributing to the increased litigation expenses in Bangladesh. These were also used to examine how the legal provisions are executed in practice. Different types of selection methods were used to identify the types of participants. Clients, lawyers, judges, and court staff were selected as the potential participants after obtaining the appropriate ethics approval and permission.[133] Civil society representatives who possessed insights into common views, expectations, and thoughts about the legal system were also chosen. The key participants voluntarily participated in semi-structured, open-ended interviews. Each group was provided with a different set of questionnaires, although a few questions were common. Eight case records from civil and criminal cases were selected

[133] For the empirical research, ethics approval was obtained from the Macquarie University Human Research Ethics Committee. The judges' participation and access to court records was permitted by the Bangladesh Ministry of the Law, Justice and Parliamentary Affairs. See Appendix A and B.

along with the potential participants, and constant comparisons of the data were maintained to ascertain the research credibility.

Dhaka is the capital city, and Chattogram is the second-largest city in Bangladesh. Dhaka and Chattogram were purposively selected out of the 64 administrative districts in Bangladesh because they have been burdened with the greatest number of cases. Four courts—equally divided into civil and criminal courts—were selected from the lowest grade, entry-level trials from each district. For civil cases, the *sadar*[134] courts and next to *sadar* courts were chosen, and for criminal cases, the first and second magistrate courts[135] were chosen because they were accumulating the greatest variety and number of cases within the same tier of courts.

On the interviewing date,[136] the newest and oldest[137] cases from the cause list[138] were selected because they had completed most of the court proceedings and experienced the largest expenses. Once a case had been selected, the attendance of clients and their lawyers on that day were checked; these people were approached for interviews based on their availability and willingness to participate in the research. Assistant judge courts or senior assistant judge courts have two assistants: *sheristadar*[139] and *peshkar*.[140] The court assistants in the magistrate courts are known as *peshkar*[141] and *stenographer*.[142] Judges and court staff appointments were publicly available and thus, easily identified.[143] Representatives from the civil society people were randomly selected

[134] Among the assistant judge courts, the most senior court is locally known as the *sadar* court.

[135] The senior magistrate courts are locally named based on numbers, such as the first magistrate court and second magistrate court.

[136] A pre-scheduled interview date was chosen.

[137] Each case contained a number alongside the filing year, and therefore, the older cases were easily identifiable.

[138] The cause list is the publicly available register book that maintains the case number, case date, cause of listing and summary decision. It is a prescribed form of declaring the case status in brief with a scheduled date. See *Civil Rules and Order* (Bangladesh) rule 13.

[139] A *sheristadar* is the official administrative officer. For every court, there is a *sheristadar* who is responsible for the administrative work of the court. They are also appointed by the government, but do not necessarily have a law background.

[140] A *peshkar* helps the court manage the case records, scheduling and allocating time for each case. *Peshkars* are also known as the bench assistants.

[141] The duty of the *peshkar* in criminal courts is the same as in civil courts: helping the courts manage the case records, scheduling and allocating time for each case.

[142] A stenographer takes dictation from the judge and types it accordingly. In Bangladesh, the magistrate has a stenographer; however, in civil courts, there are no stenographers and the judge is responsible for writing the orders or judgements.

[143] The judges are appointed in a particular court for approximately three years, after which they are transferred to another district by the Ministry of Law, Justice and Parliamentary Affairs in consultation with the Supreme Court. However, court staff are transferred to another court in the same district every three years by the district judge or head of the local office (chief judicial magistrate or chief metropolitan magistrate). The inter-district transfers of court staff rely on the HCD.

from police departments, politicians, social workers, and academics who visited courts and were not case-oriented. Matching the clients and lawyers' availability from a relevant case record was the most difficult part of the selection process. Thus, the recruitment process was as below (see figure 1.2).

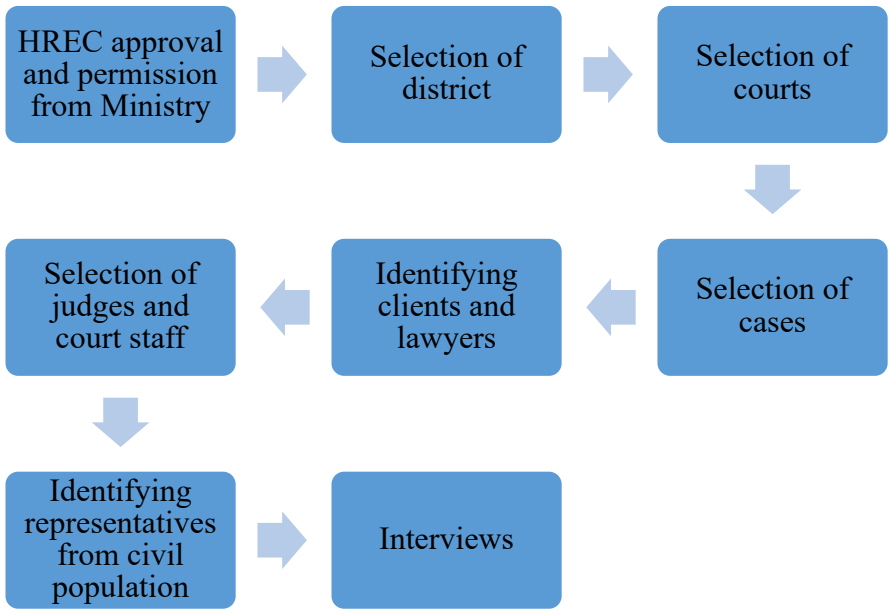

Figure 1.2: The Recruitment Process for the Qualitative Interview

The interviewees were briefed about the purpose of the research, ethics procedures, and privacy policy and provided with a copy of the information and consent form[144] to obtain their written consent. In accordance with the ethics conditions, the participants were given sufficient time to consider whether they wished to participate.

A total of 36 key participants were recruited for the face-to-face interviews, which lasted for one hour on average. All identifying information was removed from the empirical data, with each participant and case record assigned an alphanumeric code to facilitate confidentiality. For example, the two districts were identified as D1 and D2. The civil case records were identified as CV-1 to CV-4, and the criminal case records were identified as CR-1 to CR-4. The relevant judges of the civil cases were identified as CVJ-1 to CVJ-4 and of the criminal cases as CRJ-1 to CRJ-4. Similarly, the clients were identified as CVC-1 to CVC-4 and CRC-1 to CRC-4, while the lawyers were identified as CVL-1 to CVL-4 and CRL-1 to CRL-4. The court staff were identified as CVS-1 to CVS-4 and CRS-1 to CRS-4, and the representatives from civil society were identified as COM-1 to COM-4.

[144] A prescribed consent form was provided by the Macquarie University Human Research Ethics Committee and is available on the website. See, ***www.mq.edu.au/__data/assets/word_doc/0017/600263/PICF-Guidelines-Aug-2017.doc***> (accessed 01 May 2021)

The data collection for the qualitative approach followed a combination of three methods: observation, in-depth interviews and document analysis. While the interviews were recorded digitally, memos, notes and observations were used throughout the study and assisted the process of open, axial and selective coding, as suggested by Corbin and Strauss.[145] Additionally, relevant public documents, case records and government statistics were analysed to enrich the findings. Some data were collected from the Supreme Court of Bangladesh and Ministry of Law, Justice and Parliamentary Affairs. Videos, tapes, newspapers, letters and books related to the research were also used as data sources because grounded theory advises further questioning after ensuring credibility.[146] The researcher's insights and relevant experience and knowledge in this field as a presiding judge in Bangladesh's subordinate courts for more than 12 years provided additional benefits during the interview process. The ethics approval conditions of the Macquarie University Human Research Ethics Committee were maintained throughout the process.

Observational notes were recorded relating to the interviewees' non-verbal communications, court environment and work environment. While it may appear that the data analysis commenced after the interviews were completed, but in accordance with the grounded theory method, the data collection and analysis were drawn simultaneously.[147]

The selected venue for the qualitative research was the court premises. However, due to space constraint in court infrastructure, it was not possible to interview the participants in private rooms. The clients and lawyers were interviewed mostly at the courtroom at a mutually convenient time, ensuring their privacy. The judges were interviewed in their private office rooms, the court staff were interviewed in their offices, and the representatives from civil society were interviewed mostly in their workplaces. These issues were duly addressed as part of the ethics approval. The interview process in qualitative research affects the data collection and theory development.[148] Therefore, it was important to be cautious about the time of the data collection. Besides an audio recording, handwritten notes of the interviews were made during the interviews and transcribed immediately after data collection into a word file on a computer.

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[145] Juliet Corbin and Anselm Strauss, 'Grounded Theory Research: Procedures, Canons, and Evaluative Criteria' (1990) 13(1) *Qualitative Sociology* 3; Ralph LaRossa, 'Grounded Theory Methods and Qualitative Family Research' (2005) 67(4) *Journal of Marriage and Family* 837, 840; Corbin and Strauss (n 131) 56.

[146] Corbin and Strauss (n 145) 6.

[147] Ibid; Corbin and Strauss (n 131) ch 8.

[148] Kathy Charmaz, *Constructing Grounded Theory: A Practical Guide through Qualitative Analysis* (SAGE Publications, 2006) 29–30.

In this research, trustworthiness techniques were followed during the data collection. A constructivist/interpretive paradigm underpinned this research.[149] Accordingly, the researcher analysed the data following the inductive analysis process.[150] Therefore, this research pursues integrating a doctrinal and empirical concept of the legal system to devise theoretical and practical responses to the research questions. The qualitative analysis was adopted to investigate how litigation expenses have increased and deny access to justice in the absence of available legal support and remedial measures. This thesis applied a grounded theory analysis to structure all interviews by employing coding and memorandum writing in accordance with the work of Strauss and Corbin.[151]

1.5.3 Data Analysis Using the Grounded Theory Method

Systematic data collection and microscopic analysis throughout the research process were the main basis for generating the initial categories, as advised by grounded theory.[152] Two rules were followed while analysing the data.[153] First, the data must be organised within concepts as descriptive or explanatory ideas. Second, the data analysis must be conducted in relation to the research question, aims and unit of analysis planned for the research design. Any preconceived perceptions should be avoided unless the purpose is to elaborate or extend that theory.[154] (See, figure 1.1)

Corbin and Strauss highlighted that the grounded theory method is flexible and has no strict rules.[155] However, there are certain principles and canons that act as boundaries to grounded theory.[156] This study utilised Strauss and Corbin's analysis procedure. The procedural steps were

[149] Glenn A Bowen, 'Grounded Theory and Sensitizing Concepts' (2006) 5(3) *International Journal of Qualitative Methods* 12.

[150] Glaser and Strauss argued that there are two main approaches to constructing a theory: inductive and deductive. The inductive analysis process examines the patterns, themes and categories of analysis from the data. Thus, they emerge out of the data rather than being imposed on them prior to data collection and analysis. Chynoweth explained deductive reasoning through open texture rules, analyses and linking from a wide to narrow view that discovers the gaps between law and its application： see Glaser and Strauss (n 125) 3; Michael Quinn Patton, *Qualitative Evaluation Methods* (SAGE Publications, 1980) 306; Paul Chynoweth, 'Legal Research' in Andrew Knight and Les Ruddock (eds) *Advanced Research Methods in the Built Environment* (Wiley-Blackwell, 2008) 32–3.

[151] Corbin and Strauss (n 131) ch 5.

[152] Strauss and Corbin (n 126) 58.

[153] Birks and Mills (n 131) 89.

[154] Strauss and Corbin (n 126) 12.

[155] Corbin and Strauss (n 145) 6.

[156] Ibid; Strauss and Corbin (n 126) 12–14.

not rigidly followed but were applied creatively and flexibly where appropriate.[157] The sequence for analysing the data was performed in the following order: (1) interviews, observations, case records, documents, statistics and relevant sources; (2) coding; (3) memorandums; (4) concepts; (5) categories; (6) analysis; and (7) generation of theories. Section 1.5.3 explains the basic principles and canons of grounded theory.

1.5.3.1 Coding

In the grounded theory method, coding builds the relationships between the data and theory and is considered a fundamental analytical procedure.[158] The data is described using one or two words and then grouped conceptually to develop a theory.[159] Thus, it includes open, axial and selective coding.

1.5.3.1.1 Open Coding

Open coding is the first step that gives the analyst new insights by developing concepts.[160] Corbin and Strauss described how the variables (events, actions, or interactions) are compared with others to discover their similarities and differences and label them as concepts.[161] Open coding encourages the researchers to return to the field to clarify any ambiguities.[162] Therefore, for the initial coding, the labels are generally descriptive, with some using the participant's actual words.

Open coding and constant comparisons enable investigators to categorise the data substantively. In this study (*BQRS 2019*), the codes were initially written manually and then transferred into Microsoft Excel and Word 2010. Then, NVivo 12 software was used to code the *nodes* and make the subsequent analysis easier. However, the analysis process was mostly conducted manually. For example, the question 'how many cases are pending before the court?' created the category of 'case load upon the judges'. Alternatively, the question 'In which stage has your case been set?' created the 'information about their own case' category, which resulted in the 'access to information' category.

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[157] Strauss and Corbin (n 126) 10–13.

[158] Corbin and Strauss (n 145) 12; Strauss and Corbin (n 126) 101; Barney G Glaser, *Theoretical Sensitivity: Advances in the Methodology* (Sociology Press, 1st ed, 1978) 55.

[159] Different scholars have followed different coding processes. For example, Glaser and Strauss (n 95) followed four phases; Glaser (n 139) followed two phases and a set of sub-phases. In this research, three phases of coding will be followed as per Strauss and Corbin (n 126) 101, 123, 143; Corbin and Strauss (n 145) 12. See also LaRossa (n 145) 840–8.

[160] Corbin and Strauss (n 145) 12.

[161] Strauss and Corbin (n 126) 102. See also Corbin and Strauss (n 145); Glaser (n 158) 56.

[162] Corbin and Strauss (n 145) 13.

1.5.3.1.2 Axial Coding

Axial coding is the process of reassembling the data that was fractured during the open coding.[163] In axial coding, the categories are related to their subcategories, and their indicators are identified (why or how it occurs).[164] Thus, the categories and concepts are derived from the data.[165] It examines how the categories are related. Corban and Strauss mentioned that the categories represent a problem, an issue, an event or a happening that is defined as significant.[166] This study used this framework to clarify the links between the categories and their subcategories. For example, the following questions were asked to discover the areas of litigation expenses and how delay has escalated these expenses:

- How much money do you spend on each court visit, and for what purposes?
- How frequently is your case set or adjourned, and why?

The who, why and how elements of these questions were separated into categories to determine the indicators of the events. These questions also clarified how the caseloads affected the delayed proceedings through adjournments.

1.5.3.1.3 Selective Coding

Selective coding unifies all categories around a 'core category' (central category) representing the researcher's main theme.[167] This type of coding occurs in the later phases of a study. The core category represents the central phenomenon of a study.[168] In this study, the core category was identified as the 'causes of increasing litigation costs', comprising the following subcategories: 'relation among clients, lawyers, judges and court staff', 'low rate of settlement', 'delay in-court proceedings', 'case load of the judges and lawyers', 'ADR practice', 'manual court processing system', 'legal and institutional gaps', 'individuals contribution'. These subcategories were directly related to and integrated with the core category and continued until the completion of this thesis. The 'generalisability' of grounded theory is partly achieved through a process of

[163] Strauss and Corbin (n 126) 124.

[164] LaRossa (n 145) 849; see Strauss and Corbin (n 126) 123–5.

[165] Strauss and Corbin (n 126) 130.

[166] Ibid 124.

[167] Ibid 146.

[168] Corbin and Strauss (n 145) 14.

abstraction, which is conducted throughout the entire course of the research.[169] Selective coding allowed the researcher to consider variations within and between the categories.

The open coding helped identify the case load of the judges and lawyers. The axial coding helped identify how the caseloads affected why the judges and lawyers delayed the court proceedings through adjournments. Thus, the selective core highlighted the connection between delays and increasing litigation costs because each adjournment created further expenses.

The process of empirical research under grounded theory, as described by Strauss and Corbin, is demonstrated in Table 1.2.

Table 1.2: The Process of Empirical Research Under Grounded Theory

Source	Codes	Categories	Dimensions	Core Codes	Methods of Theoretical Abstraction
Strauss and Corbin (1998)	Conditions, actions/interactions and consequences; open, axial and selective	Categories and subcategories	Properties, dimensions and coding for processes	Central category	Storyline and the conditional consequential matrix

Source: Melanie Birks and Jane Mills, *Grounded Theory: A Practical Guide* (SAGE Publications, 2011) 90.

1.5.3.2 Memo Writing

Memo writing in grounded theory involves the recording a combination of the thoughts, feelings, insights and ideas concerning the research project, beginning from the first coding session to the end of the research.[170] Glaser stated that memo 'are the theorising write-up of ideas about codes and their relationships as they strike the analyst while coding'.[171] Memos capture the thoughts and comparisons and connect and crystallise the questions and research directions.[172] Memos include notes about the codes, theories, operations, logical and integrative diagrams and sub-varieties of these notes.[173] In this study, the researcher followed the Strauss and Corbin procedure for

[169] Corbin and Strauss (n 145) 15.

[170] Birks and Mills (n 131) 40; Corbin and Strauss (n 145) 10.

[171] Glaser (n 158) 83.

[172] Charmaz (n 148) 72.

[173] For more details about writing memorandums, see Strauss and Corbin (n 126) 218; Charmaz (n 148) 80; L Richards, *Handling Qualitative Data: A Practical Guide* (SAGE Publications, 2005); Chynoweth (n 131).

handwriting the memos when they occurred throughout the analysis process.[174] This helped present the scheme as a single exploration of the data, which involved identifying and developing the properties and dimensions of the concepts and categories; making comparisons and asking questions; elaborating upon the paradigm; identifying the relationships between the conditions, actions/interactions and consequences; and developing a storyline. In this study, the observations included the clients' attitudes and behaviours towards the legal system and non-verbal communication.

Glaser and Strauss highlighted that each form of data is used to verify and generate theories depending on the aims of the research.[175] The law is not simply self-referential but can teach us something about the real world. Thus, qualitative research refers to 'the real world of reform practice' as a means to identify truths, develop theories and appraise the literature.[176] This document-based, analytic approach provides a 'rich vein' of material as a data source.[177]

1.6 Significance of the Study

The huge costs of litigation have made justice system inaccessible,[178] especially for people with middle and low incomes. This research focuses on enhancing accessibility to the justice system by identifying the indicators that have made the Bangladesh court system expensive. This research will enhance access to justice in Bangladesh and also in the international contexts.

1.6.1 Bangladesh Context

Litigation expenses have not been given serious attention in Bangladesh, and policymakers have focused on reducing backlogs instead of costs. Therefore, no comprehensive research on litigation costs in Bangladesh is currently available. This research identifies the most expensive areas of litigation and how these expenses are incurred to help develop a more cost-effective litigation system and enhance access to justice in Bangladesh. An in-depth analysis using empirical research underpins this study's outcome. This study can provide a way forward to increase access to justice by discovering the causes of high litigation expenses. Another significant contribution is the investigation of integrated cost rules focusing on remedial measures to indemnify successful

[174] Corbin and Strauss (n 131) 118–21.

[175] Glaser and Strauss (n 125) 31.

[176] Livingston (n 124) 305.

[177] Ibid.

[178] Christopher Hodges, Stefan Vogenauer and Magdalena Tulibacka, 'Costs and Funding of Civil Litigation: A Comparative Study' (Working Paper No 55, Legal Research Paper Series, University of Oxford, December 2009) 19; Mauro Cappelletti and Bryant G Garth, 'Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective' (1978) 27 *Buffalo Law Review* 188.

litigants. This research identifies how the non-application of cost awards demonstrates a partial remedy to litigants in Bangladesh because it is economically unsubstantiated. Additionally, this study explains how the application of cost rules could reduce the backlogs that impose costs on unsuccessful parties by controlling the huge pressures of unmeritorious, false and vexatious filing. Further, identifying gaps in the existing legal aid services will help ensure a more suitable service for increasing access to justice. Therefore, this study examines the available legal support services and suggests alternative supports. Another contribution of this study is identifying the gaps in the existing ADR process and demonstrating why mediation has not been popular in Bangladesh. This will also contribute to filling the gaps in the existing literature.

1.6.2 Wider Implications

Bangladesh is not the only country experiencing rising litigation costs. Although this research was conducted in Bangladesh, the outcome of this research will benefit other countries. Developing countries, such as India and Pakistan, which share common legal contexts, are also facing similar legal, economic and political challenges, and this research may provide concepts to help increase access to justice in those countries. Further, developed countries can also benefit from this research because it considers how application of law can contribute to litigation expenses and decrease access to justice.

1.7 Research Limitations and Scope

Access to justice may be denied due to several reasons, including language barriers, complex legal procedures, the unavailability of legal information, economic incapacities, inadequate remedies, and limited resources. Although economic challenges can be related to other obstacles, which are covered in this research where relevant, the main focus of this study is the economic challenges that litigants encounter that deny their access to justice. There are two types of litigation expenses incurred in litigation processes: public and private. Also, the private costs can be monetary, psychological, and temporal. This research is limited to considering private monetary expenses and legal remedies; however, public expenses are discussed where relevant. In this thesis, the costs of litigation meant private monetary costs. Between the two tiers of the Bangladesh judiciary, this research is limited to the subordinate courts in Bangladesh while focusing on access to justice in Bangladesh. Also, qualitative data was collected from two districts in Bangladesh due to the limited scope of this study. The procedures of the Supreme Court of Bangladesh are different from the subordinate courts and are outside the scope of this study. In terms of the methodology, this empirical research addresses the key research question using qualitative rather than quantitative data.

1.8 Thesis Structure

This thesis is divided into nine chapters.

Chapter 1 entitled, 'Litigation Costs and its Implications for Access to Justice in Bangladesh: A Prologue' introduces the research, research questions, aims and objects, background of the research, methodology and significance of the study.

Chapter 2 entitled 'The Philosophical Aspect of Access to Justice and Litigation Costs Barrier' describes the philosophical aspect of the research based on access to justice and litigation expenses, and Rawls' distributive theory to ensure equal access.

Chapter 3 entitled 'Bangladesh Judiciary: the Institutional Arrangements' describes the court system in Bangladesh and critically analyses how the institutional arrangements may contribute to increasing the litigation costs and delaying the delivery of justice.

Chapter 4 entitled 'Bangladesh Cost Rules' examines the hurdles of the existing cost rules by analysing and identifying the gaps in the laws and practices from the empirical findings. It analyses how unguided judicial discretion is applied and explains how the absence of integrated cost rules affects access to justice. Chapter 4 examines how cost rules are applied in other countries using a cost-benefit analysis for the sake of justice to identify a better cost management procedure for Bangladesh.

Chapter 5 entitled 'Role of ADR in Litigation Costs and Access to Justice' critically analyses whether the current ADR provisions are cost-effective. It examines why the ADR provisions have not been successful based on the empirical findings.

Chapter 6 entitled 'Legal Support Services to Enhance Access to Justice in Bangladesh' examines how access to justice is hampered due to the financial position of the litigants. It analyses alternative financing methods to ensure access to justice, such as legal aid, conditional fees arrangements, and contingency fees. Chapter 6 also critically examines how the Bangladesh government administers legal aid funding, identifying the weakness of the system based on the pragmatic outcomes. It further argues that the middle-income group is being denied access to justice by the restrictive eligibility criteria of the legal aid system and how the gender-biased legal aid provisions are depriving women of access to justice.

Chapter 7 entitled 'Role of Lawyers, Judges, Clients, Court Staff and Institutions in Raising Litigation Cost' investigates how professional stakeholders, such as judges, lawyers, clients, court staff and investigating officers, are increasing litigation costs in Bangladesh. It explores how the existing laws, procedures and key institutions such as the Bangladesh Police, Ministry of Land contribute to extended trials and create additional litigation costs. The analysis is accompanied by contemporary legal research.

Chapter 8 'Digital Solution to Litigation Costs Reduction' examines whether the manual court system contributes to delays and increased litigation expenses. The empirical research identifies the most expensive areas of litigation in Bangladesh and reveals how these costs arise. It investigates how technology can be integral to introducing a transparent and effective judiciary to reduce litigation costs and backlogs. It also addresses the legal and practical limitations of incorporating technology.

Chapter 9 entitled 'Conclusion: Devising a Better and More Cost-Effective Litigation System in Bangladesh' highlights the recommendations and concludes the thesis**.** Based on the study's analyses and findings, Chapter 9 proposes some ways forward, including introducing integrated cost rules and guidelines for lawyers' fees, judges and court staff accountability, reforming ADR methods, incorporating courtroom technology for an effective judiciary and introducing alternative funding methods to maximise access to justice.

1.9 Conclusion

This thesis focuses on enhancing access to justice in Bangladesh by identifying the areas that increase litigation costs, lacked by providing reasonable financial remedies, exploring legal support options, and investigating ADR processes. All these are linked with the litigant's economic capacity. Based on this context, the research question was developed to explore a cost-effective litigation system to facilitate access to justice in Bangladesh. Empirical research and the causes of high litigation costs in Bangladesh were explored to contextualise the thesis' argument. Identifying the gaps, this chapter argues that the current system does not adequately enable access to justice in Bangladesh. Accordingly, it has demonstrated the research context, key research questions and methodology for analysing how access to justice can be enhanced through a cost-effective litigation system.

Chapter 2: Philosophical Aspects of Access to Justice and Cost Barriers

2.1 Introduction

This thesis concerns the development of an affordable and efficient justice system for the majority of people in Bangladesh. However, it is necessary to determine what affordable justice is while considering the underlying aims of the Bangladesh Judiciary for achieving the constitutional obligation of equal justice.[1] Therefore, this chapter aims to define justice and access to justice from a philosophical perspective. It further connects how distributive justice could be accommodated to enhance access to justice, highlighting the role of litigation costs.

The concept of equal justice is usually interpreted as 'equal access to justice', which comprises equal access to the law and legal systems.[2] The notion of access to justice has been strongly expressed but weakly protected in Bangladesh.[3] Therefore, thousands of Bangladeshis are denied access to justice, let alone equal access. The empirical findings substantiate that the leading causes of limited access to justice include the unequal economic capacity of the litigants, expensive and uncertain litigation system, political influence, power imbalance, geographical position, language barriers, lack of information and lawyer-dominated adversarial legal system.[4] Rhode's assertions that we tolerate a system where money often matters more than merit and equal protection principles are routinely subverted in practice[5] are relevant to the Bangladesh context. Even if equal access is ensured, the litigation system has become too costly due to procedural hurdles and enforcement difficulties. Consequently, it can be perceived that the litigants may win in court but lose in reality. Therefore, the costs associated with litigation are central to whether the courts are delivering justice. Prohibitive costs prevent access to justice and result in unjust courts.

Determining affordable justice in courts necessitates the consideration of what constitutes justice and how access to justice can be maximised in light of the hefty associated costs. It is widely accepted that the equality of justice should not depend on a litigant's financial situation.[6] Rhode

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[1] The *Constitution of the People's Republic of Bangladesh 1972* arts 8, 27 (*'the Constitution of Bangladesh'*).

[2] Deborah L Rhode, 'Access to Justice' (2001) 69(5) *Fordham Law Review* 1785; Jack B Weinstein, 'The Poor's Right to Equal Access to the Courts (1981) 13 *Connecticut Law Review* 651, 655.

[3] Somoy newstv, 'Bicharer bane kadche sorobe prokasshe' (Facebook, 12 February 2021, 4.45 pm) ***https://www.facebook.com/somoynews.tv/videos/811949849399724*** (accessed 10 April 2021).

[4] The outcome from this empirical study.

[5] Rhode (n 2) 1786.

[6] Ibid 1790.

argued that embracing access and equality is not enough if it is not supported by serious practical efforts.[7] This chapter defines justice in the context of costs to understand the concept of access to justice. Therefore, it focuses on the philosophy of access to justice and how it is hindered by litigation expenses. This chapter concludes by arguing that distributive justice could be applied to broaden access to justice in Bangladesh.

2.2 Justice, Access to Justice and the Cost Barriers

Justice is a complex phenomenon and defining justice in a single definition is onerous. Each person connected with the justice delivery process has a different perspective. For example, how litigants perceive justice may not be the same for lawyers or the judges. Beauchamp defined justice as the state of affairs when a 'person has been given what he [sic] is due or owed, and therefore, has been given what he [sic] deserves or can legitimately claim'.[8] Rawls equated justice with 'fairness'.[9] He defined justice as the process of judgement that develops from some principles and is made by competent persons upon deliberation and reflection.[10] Fox reflected the same description and elaborated that the concept of justice does not only mean acting within the legislation; it involves the procedural matters and institutional capacities guaranteed by the integrity, impartiality and independence of the judges to act and decide based on the legislation, whether it operates in or out of court.[11] Later, he argued that the justice system must be one that the people regard as satisfactory and has strong, transparent moral ethics.[12] Sen elaborated on Rawls' 'fairness' and included objectivity, equality of opportunity, removal of poverty and freedom when defining justice.[13] Thus, Sen's distributive justice is based on the notions of function and capabilities. In Dworkin's view, justice must be an interpretive theory of what is 'just'.[14] He emphasised that the analyst's sense of value must come from on a neutral basis while exercising their proposition.[15] Hon Marilyn Warren, the Chief Justice of the Supreme Court of Victoria (Australia), stated that defining justice is intractable, but attaining justice is the central aim of litigation.[16] However, the reality is that justice

[7] Ibid.

[8] TL Beauchamp, 'Distributional Justice and the Difference Principle' in H Gene Blocker and Elizabeth H Smith (eds) *John Rawls' Theory of Social Justice: An Introduction* (Ohio University Press, 2nd ed, 1982) 132–3.

[9] John Rawls, 'Justice as Fairness' (1958) 67(2) *Philosophical Review* 164.

[10] Ibid 193.

[11] Hon Russel Fox, *Justice in the Twenty-First Century* (Cavendish Publishing Limited, 2000) 2–4.

[12] Ibid 8.

[13] Amartya Sen, *The Idea of Justice* (Belknap Press, 2009) 52–74.

[14] Ronald Dworkin, *Justice in Robes* (Belknap Press, 2008) 225.

[15] Ibid 234.

[16] Hon Marilyn Warren, 'Should Judges be Mediators?' (2010) 21 *Australian Dispute Resolution Journal* 77, 79.

is defined, it is not free, and litigants must spend money to attain justice. Thus, justice and litigation expenses are strongly correlated. Therefore, it is necessary to discuss how access to justice is affected by high litigation expenses in Bangladesh and beyond in light of distributive justice from a philosophical perspective. Section 2.2.1 demonstrates how the concept of justice has been developed in relation to distributive justice and how it is critically connected to litigation expenses.

2.2.1 Distributive Justice in Ancient History

Throughout ancient history, people have explored and attempted to define 'justice'. Several attempts by the ancient Greek philosophers have influenced the modern philosophy of law. The ancient Greek notions of justice emphasised morality and found that 'the just man [sic] is happy'.[17] Honesty and integrity were inseparable from justice. Justice was also portrayed as the virtue of the soul; a just person was considered to have all the virtues. The ancient great Greek philosopher Socrates identified it as 'more precious than gold'; however, he had difficulty defining it.[18] Later, he confined justice as a set of rules for society,[19] although he realised that his definitions were inherently weak. Socrates believed that an unjust person would lose their inner peace and could not, ultimately, be happy. He stated the following:

> I am not satisfied as yet with the exposition that has been given to justice and injustice; for I long to be told what they respectively are and what force they exert, taken simply by themselves, when residing in the soul, dismissing the consideration of their rewards and other consequences.[20]

Thus, Socrates's individualistic approach placed justice at the highest level of things right in themselves and their consequences; the community comes from individuality. Socrates's balanced soul could be a sign of a happy person; however, he overlooked the probability that a balanced soul could do evil work. His inner peace action cannot be applied evenly to all human minds. Therefore, Sachs argued for considering the connection between the balanced soul and the socially just actions that Socrates overlooked.[21] Socrates identified the relationship between citizens where the law is not coercive. Instead, it is the citizen's choice to live in a city that implies an agreement

[17] Plato, 'Republic' in Robert C Solomon and Mark C Murphy (eds) *What is Justice?: Classic and Contemporary Readings* (Oxford University Press, 2nd ed, 2000) 24–5; Rachana Kamtekar, 'Social Justice and Happiness in the Republic: Plato's Two Principles' (2001) 22(2) *History of Political Thoughts* 189, 190.

[18] Plato (n 17) 25.

[19] Ibid 26.

[20] Plato, *The Republic of Plato*, tr Benjamin Jowett (Oxford University Press, 3rd ed, 1908) vol 2.

[21] David Sachs, 'A Fallacy in Plato's Republic' (1963) 72(2) *Philosophical Review* 141, 151.

to abide by the laws of that city.[22] However, justice is more than merely obeying laws in exchange for others obeying them too.

Plato was heavily influenced by Socrates and defined justice as having and doing what is one's own.[23] Thus, Plato described that through justice, 'no citizen should have what belongs to another or be deprived of what is his [sic] own'.[24] Plato's eudemonistic view defined happiness or wellbeing as the goal of moral thoughts and conduct. His individualistic approach expressed the essential qualities of moral life through justice, where the legal content may have less significance. However, he divided the activities of the soul into rational and irrational. His principle of happiness echoed Socrates's views and was aimed at the happiness of all citizens. Thus, the principles of social justice and happiness sketched in Plato's ideal city were 'from each according to her [sic] ability to each according to her [sic] capacity for enjoyment'.[25] He argued that distributing social goods to the citizens that need them most would maximise happiness in a society.[26] His 'distribution' aimed to make all the people in a state happy rather than few. His philosophical concerns were to ethically and politically correlate justice with happiness; distributive justice is only one of several such factors. Arguably, Plato's 'happiness' could resemble 'satisfaction' with justice—a satisfied citizen can be a happy person (see section 1.2).

Following this, Aristotle developed his theory of justice. He believed that all the creations are destined for a special aim and that people aspire to find real happiness.[27] He considered justice the highest virtue and united lawfulness and fairness with justice. He defined 'just' through his theory of proportionality as people receiving the proportion of involvement from the state.[28] Thus, Aristotelian distributive justice determines that peoples' rights, duties, and rewards correspond with their merit and contribution to society. He also argued that justice is manifested by the distributions of honour, money or other things that are divided among those who share the constitution.[29] Aristotle founded the theory of distributive justice and corrective justice within the political sense. He echoed Plato's idea that the ultimate goal of the human being is happiness,

[22] Plato (n 17) 32–34; Celeste Friend, 'Social Contract Theory', *Internet Encyclopaedia of Philosophy* (Online Article) <https://www.iep.utm.edu/soc-cont/> (accessed 15 Oct 2018).

[23] Kamtekar (n 17) 190; Plato (n 17) 32.

[24] Kamtekar (n 17) 197.

[25] Ibid 212–13.

[26] Ibid 200.

[27] Aristotle, 'Nicomachean Ethics' in Robert C Solomon and Mark C Murphy (eds) *What is Justice?: Classic and Contemporary Readings* (Oxford University Press, 2nd ed, 2000) 37.

[28] Ibid 39–40.

[29] Aristotle, *The Nicomachean Ethics*, tr H Rackham (Harvard University Press, 1975) book 5, ch 2; Fred Feldman, *Distributive Justice: Getting What We Deserve From Our Country* (Oxford Scholarship Online, 2016) 7.

which is the soul's activity. Rawls developed Aristotle's theory of distributive justice 2000 years later (see section 2.2.3) page no 41). Although there are significant differences between their theories of justice, Plato and Aristotle aimed for unity, harmony, virtue, and happiness in society, which are not merely legal factors but dominating moral principles.

Aristotle's distributive justice greatly influenced Aquinas's philosophy of justice.[30] Aquinas developed the concept of natural law based on Greek philosophy. He proposed that the principles of rational conduct for human beings are the principles of natural law.[31] However, Aristotle considered justice a habit, whereas Aquinas defined it as a will. He stated that 'the definition of justice mentions first the will to show that the act of justice must be voluntary, and mention is made afterwards of its constancy and perpetuity to indicate the firmness of the act'.[32] Aquinas wished to provide a theory of political obligation that accounted for the sources and limits of the moral requirements to comply with the demands of the law.[33] Thus, natural law posits that the law is a moral force. Finnis developed the natural law theory in *Natural Law and Natural Rights* and extended the classical concept into legal validity.[34] He defined justice as encompassing three elements: inter-subjective or interpersonal, duty and equality.[35] However, he set equality with proportionality.[36] His theory was based on pursuing seven valuable basic goods, including life, health, knowledge, play, friendship, religion, and aesthetic experience, within authoritative rules that solve coordination problems.[37] He argued that the application of these seven goods should be equal for everyone in a society. Hence, the principle of equal distribution began to emerge.

The Greek philosophers were more concerned with inner peace, and therefore, they rated moral values highly to substantiate justice. Inner peace or happiness could resemble satisfaction, which largely depends on remedial measures. If we connect Aristotle's distributive theory to litigation costs, it indicates the reimbursement of invested property. Implementing cost rules could help achieve this in a similar way that many of the ancient philosophers considered that the equality of social rewards, rights and duties corresponded to their contribution to society to make all people

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[30] Thomas Aquinas, 'Summa Theologica' in Robert C Solomon and Mark C Murphy (eds) *What is Justice?: Classic and Contemporary Readings* (Oxford University Press, 2nd ed, 2000) 49.

[31] Mark C Murphy, 'Natural Law Theory' in Martin P Golding and William Edmundson (eds) *The Blackwell Guide to the Philosophy of Law and Legal theory* (Blackwell Publishing, 2005) 15.

[32] Aquinas (n 30) 50.

[33] Murphy (n 31) 15.

[34] John Finnis, *Natural Law and Natural Rights* (Oxford University Press, 1st ed, 1980) 23–4.

[35] John Finnis, *Natural Law and Natural Rights* (Oxford University Press, 2nd ed, 2011) 161–3.

[36] Ibid 163.

[37] Finnis (n 34) 276. See also Einar Himma, 'Natural Law', *Internet Encyclopedia of Philosophy* (Online Article) ***https://www.iep.utm.edu/natlaw/*** (accessed 28 September 2021).

in a society happy. However, the ancient and medieval philosophers commonly disregarded the allocation of social resources.[38] Naturalists have also argued for equality, although little focus has been given to situations where inequality already exists. Equal distribution can be effectively applied when the citizens are already equal. However, due to inequalities, people with low- and middle incomes need additional support to access equality in justice in the forms of financial support, cost rules, cost-effective systems, and other alternative support to minimise inequality and inaccessibility. This empirical study (*BQRS 2019)* examines how economic inequality deprives people of access to justice. In this study, CVC-1, CVC-2, CRC-1 and CRC-3 expressed that their opponents were more economically solvent, and it was challenging for them to continue with this expensive litigation process. They assumed if they quit the case due to economic incapacity, their opponents would win the case and they would be deprived of justice. This study further suggests some remedial and reformative measures to reduce inaccessibility where distributive justice could play a vital role to increase accessibility.

2.2.2 Development of Justice in Modern History

During the Age of Enlightenment, the concept of justice was heavily influenced by the social contract theory and the individualistic approach developed into the communitarian approach.[39] The social contract theory justified the state's control over the individual.[40]

During the early modern period, Thomas Hobbes expressed social contract theory in connection with justice in his book, *Leviathan*.[41] Hobbes famously stated that human life would be unbearably brutal in a 'state of nature'.[42] In his view, the individual's actions are bound only by personal power and conscience.[43] Thus, he posited that justice and injustice are qualities that relate to people in society, not in solitude.[44] He defined natural law as a set of rules that restricted people from doing any harmful act.[45]

John Locke described the 'state of nature' from a different perspective. He argued that the law of nature is created by everyone being equal and independent; no one will harm another in their life,

[38] Samuel Fleischacker, *A Short History of Distributive Justice* (Harvard University Press, 2004) 1.

[39] Friend (n 22).

[40] Ibid.

[41] Robert C Solomon and Mark C Murphy, 'Justice and the Social Contract' in Robert C Solomon and Mark C Murphy (eds) *What is Justice?: Classic and Contemporary Readings* (Oxford University Press, 2nd ed, 2000) 60.

[42] Friend (n 22).

[43] Thomas Hobbes, *Leviathan* (Printed for Andrew Crooke, 1651) chs 10–14.

[44] Solomon and Murphy (n 41) 66.

[45] Hobbes (n 43) ch 14.

health, liberty or possession.[46] Thus, the state of nature is the combination of perfect freedom and equality. He described justice from the operational perspective, arguing that judges protect the law using their authority.[47]

In his influential social contract theory, Rousseau outlined a different version, of the theory as a foundation of political rights based on unlimited popular sovereignty.[48] He believed that sovereignty was indivisible and inalienable. He argued that a citizen could not pursue their true interests by being an egoist but must subordinate themselves to the law created by citizens as a collective.[49] Thus, the law is not a limitation of individual freedom but rather its expression. Social contract theory was continuously developed into the 20th century by Rawls, Nozick, Gauthier and Baier.

The conflict between positivism and naturalism was developed during modern times as legal positivists started dominating the legal arena. Dworkin was one of the modern critics and argued that law and legal validity are not conceptually separated from morality and moral worth.[50] The legal positivists argued that the law's validity is separate from its merits. Conversely, natural law theorists argued that any legal status should be equated with its moral status.[51] Legal positivism was mostly developed during the 18th and 19th centuries by Jeremy Bentham and John Austin. During the mid-20th century, Hart expressed the common usage of positivism as applied to the law. In Pound's view, justice is the end of law.[52] Though he also has focused on ethics and morality. Bentham, Austin, Hart, and Pound each approached positivism differently.[53]

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[46] John Locke, 'Second Treaties of Government' in Robert C Solomon and Mark C Murphy (eds) *What is Justice?: Classic and Contemporary Readings* (Oxford University Press, 2nd ed, 2000) 75.

[47] Ibid 76–7.

[48] Jean-Jacques Rousseau, 'On the Social Contract' in Robert C Solomon and Mark C Murphy (eds) *What is Justice?: Classic and Contemporary Readings* (Oxford University Press, 2nd ed, 2000) 89.

[49] Ibid 90–1.

[50] Ronald Dworkin, *A Matter of Principle* (Oxford University Press, 1985) 31–44.

[51] Brian H Bix, 'Legal Positivism' in Martin P Golding and William A Edmundson (eds) *The Blackwell Guide to the Philosophy of Law and Legal Theory* (Blackwell Publishing, 2005) 32.

[52] Roscoe Pound, 'The Popular Dissatisfaction with the Administration of Justice' (Presented at the annual convention of the American Bar Association, 1906) 1; Roscoe Pound, 'Justice according to Law' (Reprinted from the Columbia Law Review, 1913-14) 15.

[53] For example, Harts argued for the rule of recognition within the basic criteria of legal validity. See HLA Hart, *Essays in Jurisprudence and Philosophy* (Clarendon Press, 1983) 181. Raz argued that law purports to play a particular role in citizens' practical reasoning and that legal rules are to be 'pre-emptive reasons' or 'exclusionary reasons for action: see Joseph Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Oxford University Press, 1994) 199–204. Weber emphasised enforcement: see Max Weber, *On Law in Economy and Society*, ed Max Rheinstein (Harvard University Press, 2nd ed, 1954) 13. Fuller said that there is no law unless certain minimum requirements of procedural justice are met: see Lon L Fuller, *The Morality of Law* (Yale University Press: 1965) 34.

All of these theorists from ancient till modern time emphasised legal authority, morality, validity or enforcement; however, the price of justice and equal access was not considered earnestly. Modern theorists have disregarded how justice can be impeded by high costs and how the existing economic inequalities make justice available for the wealthy few and deprive the majority who cannot afford it. Justice has a price and therefore, it available to them who can pay. However, Rawls did use distributive theory to highlight equal access and distribution of wealth. Therefore, this study has selected Rawls's distributive theory after considering all the above-mentioned theories from ancient till modern times, to enhance access to justice by addressing litigation costs as a barrier.

2.2.3 Application of Rawls' Distributive Theory to Enhance Access to Justice

'Distributive justice', 'social justice' or 'economic justice' explains how a society or group should allocate its resources between individuals with competing needs or claims.[54] Thus, the principle of distributive justice can be examined from the domestic, global, individual or community perspective. Hinsch clarified that distributive justice is an exclusively domestic idea, regulating social and economic inequalities within states or societies; whereas, the global perspective applies beyond national borders, aiming for each citizen to receive a due share of global wealth as determined by a global concept of justice.[55] Hansson referred to distributive justice between groups, addressing, for example, inequalities between rich and poor people or females and males, and individualistic approaches focusing on the inequalities between the same groupings of people.[56] The present study is confined to the domestic view of economic inequalities that hinder a wider group from accessing justice in Bangladesh.

Bangladesh has a several hundred years legal history and therefore, the legal and judicial systems have been greatly influenced by the ancient Hindu, Buddhist, Muslim and also by the English legal system.[57] The pluralistic nature of the legal system is based on a complex pre-colonial indigenous legal cultures, Anglo-Indian legal tradition, and post-independence developments.[58] The legal system is more inclined toward societal or collective duties and public obligations rather than

[54] Fleischacker (n 38) 1.

[55] Wilfried Hinsch, 'Global Distributive Justice' (2001) 32(1–2) *Metaphilosophy* 58.

[56] Sven Ove Hansson, 'Technology and Distributive Justice' in Sven Ove Hansson (ed) *The Ethics of Technology: Methods and Approaches* (Rowman & Littlefield Publishers, 2017) 58.

[57] Ridwanul Hoque, 'Courts and the Adjudication System in Bangladesh: In Quest of Viable Reforms' in Jiunn-rong Yeh and Wen-Chen Chang (eds) *Asian Courts in Context* (Cambridge University Press, 2014) 447; M. S. Alam, 'Bangladesh' in Herbert M. Kritzer (ed), Legal Systems of the World: A Political, Social, and Cultural Encyclopaedia (ABC-CLIO, 2002) Vol 1, 122.

[58] Hoque (n 56) 447.

Western-style individualistic rights.[59] Scholars find that individuals typically view courtrooms as an arena to compete for social status and political and economic dominance, and consider the litigation process a means through which to gain prestige.[60] Nayeen also argued that unequal power and position is the main obstacle to accessing justice in Bangladesh.[61] Reluctance to approach the justice system became a social and traditional practice for the weaker group in society (more in chapters 5 and 7).

Arguably, the *Constitution of Bangladesh* does not use the phrase 'distributive justice'; however, this can be implied from the equality and social justice that it ensures.[62] Also, the preamble of the Constitution of Bangladesh pledges to secure equality and justice for all citizens.[63] Article 35 reassures the right to a speedy and public trial, though it confines to the accused of a criminal case.[64] Thus, the spirit of the *Constitution* underlines to secure equal justice eliminating existing disparity, especially economic. To minimise inequality, Bangladesh provides some financial support, such as legal aid based on a person's needs. Thus, 'equity' is covered by 'equality' to substantiate a balance in society. This means it is always better to provide needs-based assistance than equal assistance. Rehman argued that social justice, also known as distributive justice, is virtually an effective modality for the disadvantaged groups.[65]

Rawls' theory requires independent criteria of fairness and the possibility of devising a procedure guaranteed to produce the desired fair outcome, which he considered rare.[66] His fair distribution adjusts preferences, abilities, income, opportunities, and wealth. He further argued that economic inequalities must be restricted. Applying Rawls' egalitarianism to the matter of litigation costs indicates that access to justice is impeded by unequal economic capacity and an expensive legal system. As Rawls argued, the equal distribution would be ensured when the people in a society have equal possession, which is very uncommon.

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[59] Ibid.

[60] Robert Moog, 'Delays in the Indian Courts: Why the Judges Don't Take Control' (1992) 16(1*) The Justice System Journal* 20–1; Ridwanul Hoque, 'Courts and the Adjudication System in Bangladesh: In Quest of Viable Reforms' in Jiunn-rong Yeh and Wen-Chen Chang (eds) *Asian Courts in Context* (Cambridge University Press, 2014) 447; M. S. Alam, Alam, M Shah, 'Bangladesh' in Herbert M. Kritzer (ed), Legal Systems of the World: A Political, Social, and Cultural Encyclopaedia (ABC-CLIO, 2002)

[61] Sekander Zulker Nayeen, 'Social and cultural barriers in accessing civil justice system' *The Daily Star* (Online, 11 Feb 2020) <https://bit.ly/3nJFeXR> (accessed 19 Sep 2021).

[62] The *Constitution of Bangladesh* (n 1) arts 8, 27.

[63] Ibid, preamble.

[64] Ibid, art 35(3).

[65] M Habib-Ur-Rehman, 'Human rights under the Bangladesh constitution: pro and anti-national and international perceptions' (1993) 10(2) *Journal of the Society for the South Asian Studies* 1.

[66] Rawls (n 67) 85.

The concepts of justice and equality are strongly related. John Rawls's extremely influential *A Theory of Justice* upheld contemporary egalitarianism. Rawls considered justice the first virtue of social institutions that ensures liberty and the protection of rights, duties and social interests equally.[67] The moral and political views expressed by Rawls emphasised the arrangement of social and economic institutions to distribute benefits and social burdens fairly.[68] Rawls argued that the moral and political point of view could be discovered via impartiality.[69] Rawls's theory, also known as 'justice as fairness', was derived from two principles of justice.[70] First, each person should have an equal right to the most extensive system of equal basic liberties compatible with a similar system of liberty for all. Second, social, and economic inequalities should be arranged to create the greatest benefit for the least advantaged, consistent with the just savings principles, and are attached to offices and positions open to all people under the conditions of fair equality of opportunity. The justice as fairness theory specified how the presumption laid down by the first principle may be put aside. The general concept of justice as fairness requires that all primary social goods be distributed equally unless an unequal distribution would be to everyone's advantage.[71] Rawls's principles expressed justice as a combination of three ideas: liberty, equality and reward for services contributing to the common good.

Rawls took a different position from the social contract tradition. Specifically, he developed the principles of justice from behind a veil of ignorance.[72] This veil is one that blinds people to all the facts about themselves, so they cannot tailor principles to their advantage. Rawls said that 'the original position's idea is to set up a fair procedure so that any principles agreed to will be just. The aim is to use the notion of pure procedural justice as a basis of theory.'[73] However, he also identified that the main problem would be designing a just procedure.[74] Rawls considered fairness a fundamental principle of justice.[75] He also argued that justice included social practices and the formulation of restrictions regarding how practices may define positions and offices and assign

[67] John Rawls, *A Theory of Justice* (Belknap Press, rev ed, 1971) 3.

[68] *A Theory of Justice* is a work of political philosophy and ethics in which John Rawls attempts to solve the problem of distributive justice (the socially just distribution of goods in a society) by utilising a variant of the social contract.

[69] Friend (n 22).

[70] Rawls (n 67) 60–1; John Rawls, 'A Theory of Justice' in Robert C Solomon and Mark C Murphy (eds) *What is Justice?: Classic and Contemporary Readings* (Oxford University Press, 2nd ed, 2000) 282–3.

[71] Ibid 286.

[72] Rawls (n 67) 19.

[73] Rawls (n 70) 104.

[74] Rawls (n 67) 197.

[75] Rawls (n 9) 165.

powers, liabilities, rights and duties.[76] He posited that social cooperation and reciprocity are fundamental to distributive justice.[77] Though Rawls theory has a naturalistic view, it has been criticised that the theory lacked careful empirical examination.[78]

In short, Rawls's theory prescribed equal access to justice when the citizens are on equal footing, and if they are not, then the disadvantaged group should be compensated to escape injustice. Thus, in its modern sense, distributive justice obliges the state to guarantee that property is distributed throughout society so that everyone has a certain level of material means.[79] Further, access should not be denied due to the scarcity of economic capacity. Alternative supports should be apportioned based on an individual's needs to ensure access to distributive justice. This implies state's affirmative action to eliminate inequalities. The interviewees from this study opined that ensuring access to justice requires alternative supports that are not limited to legal or economic assistance but extend to other remedial measures, such as increasing self-help assistance and ensuring a cost-effective system, to broaden access to legal service (CRJ-1, CRJ-2, CRJ-4, CVC-3, CVJ-4, CRL-3, CRS-4 and COM-2). This thesis demonstrates how access to justice in Bangladesh is impeded for the majority due to economic incapacity. An empirical analysis identifies and explores the most expensive area of litigation in Bangladesh. This evidence substantiates that state funding minimises inaccessibility to some extent. However, additional alternative support (see Chapter 6) would enhance access. Even if some alternative financial supports are available for people with low incomes, a costly legal system can limit access for people with middle incomes who may not be eligible for state funding. Remedial measures, such as cost rules, would help these people pursue their legal rights. This research investigates some incentives for ensuring that access is not impeded on economic grounds. This is consistent with Rawls's distributive theory of justice, which could be applied to the legal costs in Bangladesh to reduce the social and economic inequalities of wealth and authority by compensating the low- and middle-income groups of society.

The application of Rawl's distributive justice would also ensure the proper utilisation of the state's resources. However, this study finds that the current financial support provided is insufficient for ensuring access for all. Even the existing ADR mechanism fails to provide a satisfactory outcome (see Chapter 5). Therefore, this study further investigates the other services that could be delivered and what measures could be taken to ensure access to justice for all. Overall, this thesis argues for

[76] Rawls (n 70) 282.

[77] Samuel Freeman, 'Rawls on Distributive Justice and the Difference Principle' in Serena Olsaretti (ed) *The Oxford Handbook of Distributive Justice* (Oxford University Press, 2018) 109.

[78] Ho Mun Chan, 'Rawls' Theory of Justice: A Naturalistic Evaluation' (2005) 30(5) *Journal of Medicine and Philosophy* 449-50.

[79] Fleischacker (n 38) 4.

a cost-effective litigation system that would broaden citizens' access to the justice system. Therefore, the application of Rawls's distributive theory of justice to litigation expenses to enhance access to justice in Bangladesh would be challenging.

2.2.4 Access to Justice and the Cost Barriers: Global Practices

Generally, 'access to justice' includes access to the formal litigation process involved in administering justice, which should, ideally, be equally available to all.[80] Inequality of wealth hampers equal access. In *Griffin v Illinois*, the Supreme Court of the US observed that '[t]here can be no equal justice where the kind of trial a man [sic] gets depends on the amount of money he [sic] has'.[81] However, Rhode stated that equal justice is the most proudly declared and widely violated legal principle.[82] Further, Smith argued that equal access to justice means that disputes are determined by the intrinsic merits of the parties' arguments, not the inequalities of wealth or power.[83] Notably, it is also argued that access is not confined exclusively to delivering judgements within courts or tribunals,[84] although an efficient court system promotes private bargaining, settlements, self-help and other dispute resolution mechanisms.[85] Consequently, the result of the denial of universal access is not justice. Russel identified that access involves affordability, which affects accessibility to institutions and the maintenance of proceedings.[86]

At the end of the Second World War, the access to justice movement was accentuated by the influential Italian thinker Mauro Cappelletti.[87] Cappelletti defined justice with two pillars: the system must be equally accessible to all, and it must lead to results that are individually and socially just.[88] Cappelletti approached the transformation of access problems with a three-wave

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[80] Fox (n 11) 81.

[81] *Griffin v Illinois*, 351 US 12, 19 (1956).

[82] Deborah L Rhode, *Access to Justice* (Oxford University Press, 2004) 3, 6.

[83] Roger Smith, *Justice: Redressing the Balance* (Legal Action Group, 1997) 3–11.

[84] Fox (n 11) 93; Ross Cranston, *How Law Works: The Machinery and Impact of Civil Justice* (Oxford University Press, 2006) 6; New Zealand Law Commission, *Delivering Justice For All: A Vision for New Zealand Courts and Tribunals* (Report No 85, March 2004) 6; Roderick A Macdonald, 'Access to Justice and Law Reform' (1990) 10 *Windsor Yearbook of Access to Justice* 287.

[85] Cranston (n 84) 6.

[86] Fox (n 11) 84.

[87] John Peysner, *Access to Justice: A Critical Analysis of Recoverable Conditional Fees and No-Win No-Fee Funding* (Palgrave Macmillan, 2014) 13; Jasminka Kalajdzic, 'Access to Justice for the Masses? A Critical Analysis of Class Actions in Ontario' (Masters Thesis, University of Toronto, 2009) 46–7; Mauro Cappelletti and Bryant G Garth, 'Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective' (1978) 27 *Buffalo Law Review* 181–2.

[88] Cappelletti and Garth (n 87) 182.

solution.[89] The first wave (beginning in the mid-20th century) included people with low incomes through legal aid programs. In the second wave (during the 1960s), the concept of community became more dominant than individuality, with a focus on collective legal action. The third wave started at the end of the 1970s and, due to economic pressure on state budgets, the pivotal role was shifted to dispute resolution arrangements.

Thus, the individualist approach of 'access to justice' refers to the right to seek a remedy before a court of law or tribunal that is constituted by law and can guarantee independence and impartiality in applying the law.[90] Lord Neuberger identified that the components of access to justice include a competent and impartial judiciary, accessible courts, properly administered courts, a competent and honest legal profession, an effective procedure for launching a case before the court, an effective legal process, effective execution and affordable justice.[91] Thus, access includes affordability and accessibility to seek and obtain a remedy for grievances through a formal or informal institution.

Scholars have identified various factors as 'barriers' to equal access to justice that restrain people from attaining their legitimate claims. Hutchinson argued that barriers create a difference between the availability of and access to justice.[92] Duggan and Ramsay highlighted that access to justice is not exclusively a poverty-related concern.[93] When discussing barriers to access to justice, scholars have broadly identified two different types of barriers: subjective and objective barriers or substantive and structural barriers. McDonald explained that subjective barriers relate to intellectual and physiological issues, including 'age, physical or intellectual deficiency [and] the attitude of state functionaries such as the police, lawyer[s] and judges'.[94] Conversely, objective barriers relate to 'purely physical barriers', including the geographic dispersion of courts, availability of claims officers and lawyers, 'cost of obtaining legal redress', 'delay in legal proceedings' and 'structural complexity of the legal system'.[95] Cranston categorised legal

[89] Ibid 196.

[90] Francesco Francioni, 'The Rights of Access to Justice under Customary International Law' in Francesco Francioni, *Access to Justice as a Human Right* (Oxford University Press, 2007) 3.

[91] Lord David Neuberger, 'Justice in an Age of Austerity' (Speech, Justice–Tom Sargant Memorial Lecture 2013, 15 October 2013) 11.

[92] Allan C Hutchinson, *Access to Civil Justice* (Carswell, 1990) 181.

[93] Anthony Duggan and Iain Ramsay, 'Front-End Strategies for Improving Consumer Access to Justice' in Michael Trebilcock, Anthony Duggan and Lorne Sossin (eds) *Middle Income Access to Justice* (University of Toronto Press, 2012) 95.

[94] Roderick A Macdonald, *Study Paper on Prospects for Civil Justice* (Ontario Law Reform Commission, 1995) 298; Macdonald (n 84) 299–300.

[95] Macdonald (n 84) 301.

complexities, such as cultural, psychological, geographical and affordability concerns, as substantive barriers and procedural complexities as structural barriers. Notably, the mere presence of legal rights does not ensure justice if there is no effective mechanism to make those legal rights accessible and achievable for those who need them.[96] Although there are many objective and substantive barriers, this study is limited to investigating the 'litigation expense or cost' barrier connected to litigants' financial capacities that impede their access.

In Lord Woolf's *Access to Justice* (Final Report, 1996) (*Woolf's Final Report*), litigation costs were considered the most severe problem in the English litigation system, extending its influence globally.[97] *Woolf's Final Report* aimed to reduce the litigation backlog, lessen litigation costs and widen access to the justice system in the UK.[98] Woolf's reforms reduced case backlogs but increased litigation costs and procedural complexities.[99] In the UK, litigation is still considered overly expensive, unpredictable and time-consuming.[100] The same scenario can be observed in Bangladesh. The expensive litigation system and inadequate funding for legal assistance preclude the majority from accessing justice. Therefore, only the wealthy few can afford justice. The developed states allocate funding to those who cannot afford the expense. However, judicial allocation in the national budget in Bangladesh does not allow a wide distribution of legal aid. Litigation costs that could be covered by financial support, remedial measures, alternative payment mechanisms or self-help assistance, which may broaden access to legal services,[101] are limited in Bangladesh.

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[96] JA Chowdhury, Women's Access to Fair Justice in Bangladesh: Is Family Mediation a Virtue or a Vice? (Unpublished PhD Dissertation, University of Sydney, 2011) 219.

[97] Lord Woolf, *Access to Justice* (Final Report, 1996) Introduction <http://webarchive.nationalarchives.gov.uk/20060213223540/http://www.dca.gov.uk/civil/final/contents.htm> (accessed 9 May 2018).

[98] The most significant recommendations in the proposal included increasing the pecuniary jurisdiction of the small claims, introducing fast-track for medium to heavy cases and multi-track for complex cases, actively dealing with judicial case management and time restrictions, imposing cost awards to deter unwarranted steps in the proceedings and more cooperative and less adversarial systems to increase the rate of dispute resolutions. His attempt to solve the cost problem has been proven unsuccessful. For more details, see *Woolf's Final Report* (n 97) Introduction; J Peysner and M Seneviratne, 'The Management of Civil Cases: The Courts and Post-Woolf Landscape' (DCA Research Series 9/05, UK Department of Constitutional Affairs, November 2005) 7; A.A.S Zuckerman, 'Costs Capping Orders- the Failure of the Third Measure for Controlling Litigation Costs' (2007) 26 *Civil Justice Quarterly* 271; Paul Fenn, Neil Rockman, and Dev Fencappa, Discussion Paper Series, *The impact of Woolf reforms on costs and delay*, Centre for Risk & Insurance Studies No (2009) 33.

[99] Peysner and Seneviratne (n 98); Ronald Sackville, 'Law and Poverty: A Paradox' (2018) 41(1) *UNSW Law Journal* 90.

[100] Martin Gramatikov, 'A Framework for Measuring the Costs of Paths to Justice' (2009) 2(2) *Journal Jurisprudence* 111.

[101] Pascoe Pleasence and Deborah Macourt, 'What Price Justice? Income and the Use of lawyers' (2013) 31 *Updating Justice* 1, 4.

The formal dispute resolution process is very expensive in most modern societies, particularly in the courts.[102] Sackville argued that access to justice requires more sweeping measures designed to allow the realisation of economic, social and cultural rights and redress the power imbalances created by extensive wealth inequality.[103] Economic inequality leads to increase corruption and undue influence, creating a barrier for most citizens to access the justice system.[104] The ALRC also found that the variable costs of litigation hamper access to justice.[105] Hadfield explained how the US has failed to ensure access to justice.[106] He argued that the access problem initially relates to costs, including identifying, securing and implementing legal help.[107] Cranston also identified costs as the most obvious obstacle to accessing the formal justice system.[108] People who are very rich or very poor (when provided with sufficient legal aid) have access to the court; however, the middle-income group has been left out.[109] Lord Irvine explained the British context, where the majority of people are in the middle-income group.[110] Lord Irvine's statement is equally pertinent for other developed and developing countries. He described the problem faced by people who earn a middle-income:

> they cannot litigate because the lawyer's fees are so high and because they cannot afford the risk of losing and having to pay their opponent's lawyers' fees as well. Not only is civil justice far too expensive for people to afford because of the scale of the costs: they are deterred from pursuing good cases because they cannot make any rational assessment of how much it will cost them in the end. These and the level of costs are the biggest bars to access to justice.[111]

Based on Lord Irvine's concerns, it could be argued that even if cost rules could be used to secure a remedial measure for litigants who are unnecessarily brought to the courts, an expensive litigation system would still deny most people's access to the legal system. An accessible justice system is connected to the dispute resolution process that is widely available, explicable and

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[102] Cappelletti and Garth (n 87) 186.

[103] Sackville (n 99) 89.

[104] Fox (n 11) 81; Siri Gloppen, 'Courts, Corruption and Judicial Independence' in Tina Søreide and Aled Williams (eds) *Corruption, Grabbing and Development: Real World Challenges* (Edward Elgar Publishing, 2013) 70.

[105] Australian Law Reform Commission, *Costs Shifting—Who Pays for Litigation* (Report No 75, October 1995) 7.

[106] Gillian K Hadfield, 'The Cost of Law: Promoting Access to Justice Through the (Un)corporate Practice of Law' (2014) 38 *International Review of Law and Economics* 43.

[107] Ibid 44.

[108] Cranston (n 84) 35.

[109] Lord Irvine, 'Civil Justice and Legal Aid Reforms' (Conference Paper, Annual Conference to the Solicitors, London, 18 October 1997) 1. See also Hon Beverly McLachlin, 'The Challenges We Face' (2008) 4(2) *High Court Quarterly Review* 33-4.

[110] Irvine (n 109) 1; Fox (n 11) 81.

[111] Irvine (n 109)1.

affordable.[112] The ALRC stated that when litigants and the public discuss 'access to justice', they usually proceed from an understanding of the legal system as a service provider to address their particular grievance, justifying their rights and achieving their desired outcomes.[113] The Commission of the European Communities identified a gap between the law and the reality of individuals seeking to vindicate their rights in terms of access to justice.[114] Thus, they found that true access to justice would take the form of relatively equitable access to the legal process.

The struggle to balance access to justice and limited resources has been continuing for over a decade globally.[115] The cost of justice is the resources that need to be assessed and ensured throughout the entire journey of justice. The increased public and private litigation costs have become a growing international concern with dispute resolution processes rarely considered affordable and accessible.[116] The costs involved in identifying, securing and implementing legal help to ensure a person's wellbeing and access.[117]

Modern justice is too expensive and exclusive, and many people cannot access it due to the lack of affordability in many jurisdictions, including Bangladesh. Rhode critically explained that money might not be the root of all evil in our justice system, but lack of money is undoubtedly a critical contributor.[118] Empirical research in Slovak,[119] Japan,[120] New Zealand[121] and England[122] found that costs have been an obstacle to access to legal services. Zander defined 'access to justice' as 'the term of art signifying the arrangements made by the state to ensure that the public at large and especially those who are indigent can obtain the benefits available through the use of law and

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[112] Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System* (Report No 89, 17 February 2000) 90.

[113] Ibid.

[114] Commission of the European Communities, *Green Paper: Access of Consumers to Justice and the Settlement of Consumer Disputes in the Single Market*' (COM (93) 576 final, 16 November 1993) 15.

[115] Colleen F Shanahan, Anna E Carpenter and Alyx Mark, 'Can a Little Representation be a Dangerous Thing' (2016) 67(5) *Hastings Law Journal* 1367.

[116] Gramatikov (n 100) 111.

[117] Hadfield (n 106) 44.

[118] Deborah L Rhode, 'Access to Justice: Again, Still' (2004) 73(3) *Fordham Law Review* 1013.

[119] GfK Slovakia, *Legal Needs in Slovakia II* (GfK Slovakia, 2004) 49.

[120] I Sato et al, 'Citizens' Access to Legal Advice in Contemporary Japan: Lumpers, Self-Helpers and Third-Party Advice Seekers' (Conference Paper, Joint Annual Meeting of the Law and Society Association and the Research Committee on Sociology of Law, July 2007).

[121] Ignite Research, *Report on the 2006 National Survey of Unmet Legal Needs and Access to Services* (Legal Services Agency, 2006) 79.

[122] Genn, *Paths to Justice: What People Do and Think about Going to Law* (Hart Publishing, 1999) 80.

the legal system'.[123] Due to worldwide economic inequality, access to justice has only been considered seriously within the last century.[124] Eventually, it has become the state's responsibility to ensure 'equal' access to justice.[125]

2.3 Conclusion

The definition of justice has changed over time. The ancient Greek philosophers focused on moral virtue, which continued through to the Middle Ages. They also emphasised the distribution of social resources for their optimal use, although they broadly disregarded the existing inequalities. Rawls's distributive theory of justice also emphasised the equal distribution of social resources unless it is for the benefit of the least advantaged. This research attempts to accommodate the distributive theory of justice while connecting justice with litigation costs. The majority of the interviewees from this study claimed that justice would not be ensured without proper remedial measures (CRC-4, CVL-2, CVL-3, CVC-3 and CVJ-1) also this expensive process does not constitute justice for all. They further opined that alternative support should be available to enhance access to justice, identifying the causes of increasing litigation costs. More importantly, the system (court) costs should be reduced to a level that everyone can access (COM-2). Thus, access to justice should not be confined to people with high incomes.

More than half the interviewees from this study stated that the economic incapacity of most Bangladeshi citizens precludes them from accessing the formal justice system in Bangladesh. Distributive justice emphasises that a state's resources should be distributed to the people to enable a larger group to access the justice system. Further, the court system costs should be minimised so that the majority of people can access them. Following Rawls's distributive theory of justice, economic inequalities should be considered to provide alternative support options to those who cannot access justice to minimise substantial injustices. Bangladesh is also obliged to uphold its constitutional commitment to widening access to the justice system where distributive justice can be applied.

[123] Michael Zander, *The State of Justice* (Sweet and Maxwell, 2000) 6.

[124] Michael Zander, *A Matter of Justice* (IB Tauris, 1988) 45.

[125] Fleischacker (n 38) 4.

Chapter 3: Bangladesh Judiciary: The Institutional Arrangements

3.1 Introduction

The judiciary is the institution that administers justice and has a vital role in widening access to justice. The institutional arrangements of the Bangladesh judiciary are discussed to examine how access to justice is being obstructed by the high litigation expenses in Bangladesh (Research Issue A). Chapter 3 investigates how the institutional arrangements of the Bangladesh judiciary contribute to increasing the litigation costs by analysing the empirical evidence. While doing so, it also demonstrates how the separation of power, court structure of the subordinate judiciary, stages of court proceedings, law-making powers and connections between the judiciary and other associated departments affect the increasing litigation costs.

3.2 Bangladesh Judiciary

The Bangladesh legal system mostly modelled on English common law[1] while Bangladesh was under British colonial rule (from 1857-until 1947) before becoming part of the Indian subcontinent (governed by Muslims and Hindus).[2] This pluralistic legal system is evident in the customary, personal, secular state-law, and English laws that govern modern-day Bangladesh.[3] The first enacted law in Bangladesh was a British initiative that followed lengthy debates and challenges.[4] A significant portion of the substantive and procedural laws are borrowed from the written and unwritten common laws of England, which were blended with the local laws during the British colonial period.[5] After gaining independence from Pakistan (26 March 1971), the *Bangladesh (Adaptation of Existing Laws) Order 1972* was passed to include all the Acts, Ordinances, Regulations, Rules, Orders and By-laws that were enforced immediately before 26 March 1971.[6] Therefore, using a very nominal amendment, the British-enacted laws are still functioning in Bangladesh.

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[1] Ridwanul Hoque, 'Courts and the Adjudication System in Bangladesh: In Quest of Viable Reforms' in Jiunn-rong Yeh and Wen-Chen Chang (eds) *Asian Courts in Context* (Cambridge University Press, 2014) 447.

[2] BS Jain, *Administration of Justice in Seventeenth Century India: A Study of Salient Concepts of Mughal Justice* (Metropolitan Book, 1st ed, 1970) 1.

[3] Hoque (n 1) 447.

[4] MD Abdul Halim, *The Legal System of Bangladesh: A Comparative Study of Problems and Procedure in Legal Institutions* (CCB Foundation, 12th ed, 2017) 42.

[5] M Shah Alam, 'Bangladesh' in Herbert M Kritzer (ed) *Legal Systems of the World: A Political, Social, and Cultural Encyclopaedia* (ABC-CLIO, 2002) vol 1, 122.

[6] The *Bangladesh (Adaptation of Existing Laws) Order 1972* (Bangladesh) s 2.

The *Constitution of Bangladesh* structured the judiciary to include the Supreme Court of Bangladesh, subordinate courts, specialised courts and tribunals.[7] Bangladesh is a 'unitary' country; therefore, the judiciary is vertically structured with one Supreme Court, consisting of the Appellate Division and HCD.[8] The permanent seat of the Supreme Court of Bangladesh is based in Dhaka (the capital); however, the sessions of the High Court may be held any place outside the permanent seat, as determined by the Chief Justice and approved by the president of Bangladesh.[9]

The subordinate courts (which allocate to the administrative unit)[10] have a hierarchical order under the applicable district court and session court and have jurisdiction over civil and criminal matters.[11] The government determines the sitting place and territorial jurisdictions of the civil courts and magistracy.[12] Generally, these courts are district-based, although there are some remote places where Chowki[13] courts have been established to ensure access to the courts for the local people. Apart from this, some specialised tribunals and courts also operate within a constitutional and statutory hierarchical order.[14]

[7] The *Constitution of the People's Republic of Bangladesh 1972* pt 4 ('The *Constitution of Bangladesh'*). See also M Rafiqul Islam, 'The Judiciary of Bangladesh: Its Independence and Accountability' in Hoong Phun Lee and Marilyn Pittard (eds) *Asia-Pacific Judiciaries: Independence, Impartiality and Integrity* (Cambridge University Press, 2018) 35.

[8] The *Constitution of Bangladesh* (n 7) art 94.

[9] Ibid art 100.

[10] Administrative units are divided into districts in Bangladesh. However, the smallest administrative unit is called a 'union'. See generally *Bangladesh National Portal* (Website) <https://bangladesh.gov.bd/index.php>.

[11] Islam (n 7) 36.

[12] The *Civil Courts Act 1887* (Bangladesh) s 14; The *CrPC 1898* (Bangladesh) ss 6, 8.

[13] Chowki courts are remote from the administrative unit. In Bangladesh, there are a few Chowki courts that are under the district jurisdiction. For example, Sondeem Chowki court, Shahzadpur Chowki court.

[14] Islam (n 7) 36.

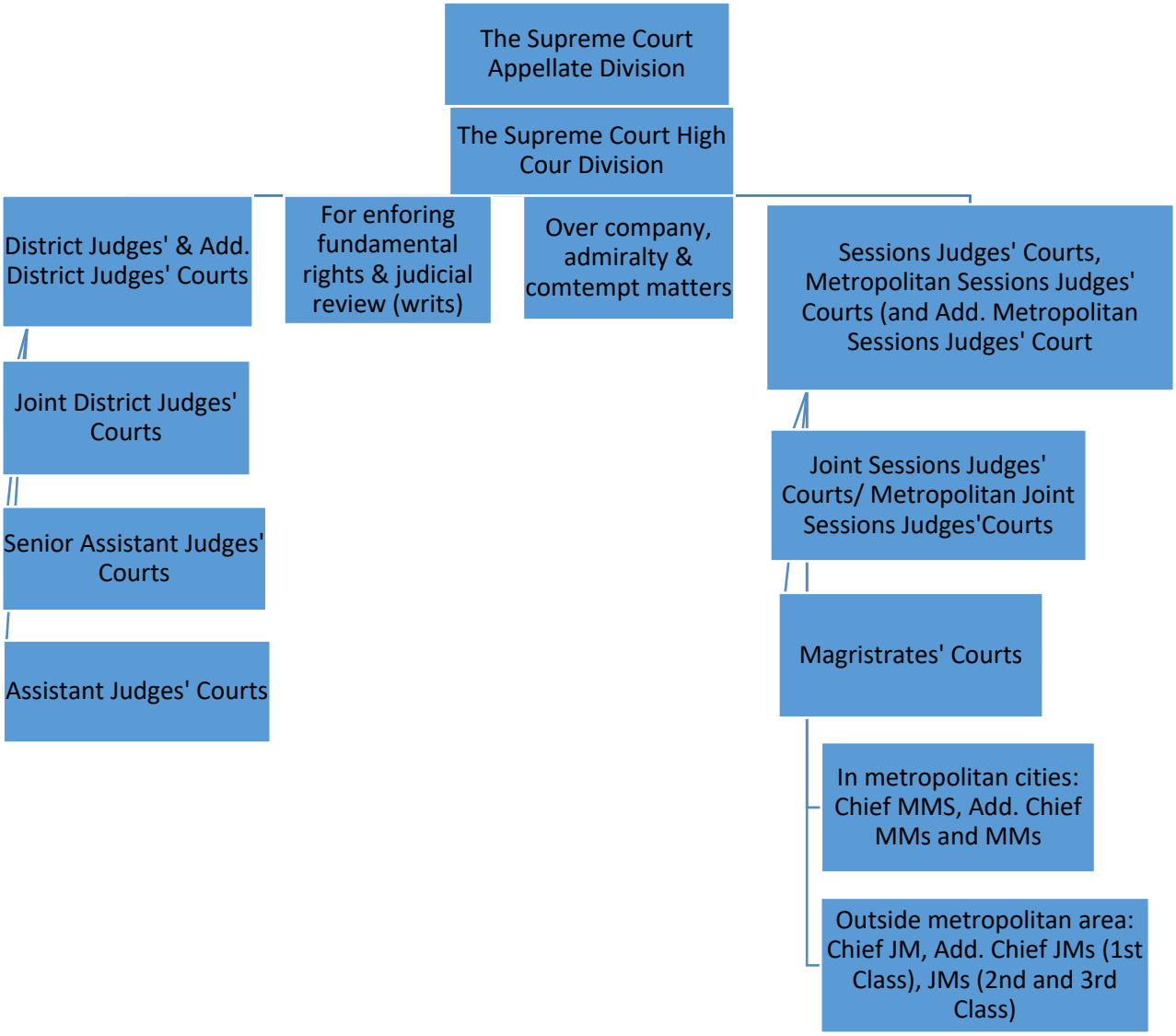

Figure 3.1: The Court Structure in Bangladesh [JM-Judicial Magistrate, MM-Metropolitan Magistrate][15]

3.2.1 Separation of Powers

Political theory demonstrates that the three organs of the government, the legislature, executive and judiciary, should be separated from each other to establish a proper system of checks and balances.[16] Within a Westminster-type parliamentary system, the executive and legislature may not be entirely separated because they are controlled by the same authority; however, the judiciary should be separated from the executive and legislature.

[15] Hoque (n 1) 455.

[16] RH Brookes and KC Wheare, 'Political Theory: The Separation of Powers' (1951) 3(1) *Political Science* 53.

The separation of the judiciary in Bangladesh has been constitutionalised through a number of articles. Article 22 states that the state shall ensure the separation of the judiciary from the executive organs of the state and this is one of the fundamental principles of the state policy. The *Constitution of Bangladesh* ensures the Supreme Court's separation from the Executive through the appointment procedure for the judges, their tenure, their institutional and individual independence while exercising any judicial function.[17] The Supreme Court of Bangladesh governs the control, discipline, and other institutional management under the *Supreme Court of Bangladesh (High Court Division) Rules 1973* and *Supreme Court of Bangladesh (Appellate Division) Rules 1988*. Under article 96(3) of the *Constitution,* there would be a Supreme Judicial Council comprising of the Chief Justice of Bangladesh and two other senior judges from the appellate division. The council will be responsible for the Supreme Court judges' removal other than retirement in normal due course followed by an investigation. In the 16th amendment of the Bangladesh *Constitution* abolished the provision the Supreme Judicial Council and delegated this power to the legislature and consequential judge from the Supreme Court can be removed if a resolution is passed by the majority of the members of parliament and the president endorses that.[18] However, this process is subject to an investigation and prove of misbehaviour and misconduct.[19] In 2017, the Appellate Division declared the amendments unconstitutional.[20] However, the validity of the amendment is the subject matter of a pending review case before the Supreme Court.

The *Constitution* also ensures the independence of the judges of the subordinate courts in the exercise of their judicial functions.[21] However, the separation of power in the subordinate courts can be discussed in two phases. Before 2007, they were treated similar to other civil service offices in Bangladesh because the Public Service Commission appointed both. On 8 January 1994, the Ministry of Finance issued an order regarding pay allowances, which was discriminatory for judicial officers. In 1995, Masdar Hossain, a judge from the subordinate courts, and 441 other judicial officers from the HCD filed a writ petition known as *Masdar Hossain's Case*.[22] The

[17] The *Constitution of Bangladesh* (n 7) arts 94(4), 95(1), 96(1)(2); The *Supreme Court of Bangladesh (High Court Division) Rules 1973* (Bangladesh) ('*High Court Division Rules'*); The *Supreme Court of Bangladesh (Appellate Division) Rules 1988* (Bangladesh).

[18] The *Constitution of Bangladesh* (n 7) art 96(2).

[19] Ibid 96 (3).

[20] *Government of Bangladesh and Others v Advocate Asaduzzama Siddiqui and Others*, Civil Appeal No. 06 of 2017 of Appellate Division (Bangladesh, 2017) emerged from writ petition no 9989 of 2014. See also Fairooz Binte Hafiz and Nahian Rahman, 'Sixteenth Amendment of the Constitution of Bangladesh: A Governance Perspective' (2019) 8(7) *International Journal of Science and Research* 1250–4.

[21] The *Constitution of Bangladesh* (n 7) s 116A.

[22] *Md Masdar Hossain and Others v Secretary, Ministry of Finance*, 18 BLD 558 (Bangladesh, 1997).

historic verdict was pronounced by the HCD and reaffirmed by the Appellate Division.[23] In June 2001, the Appellate Division directed the government to implement its 12 directive points,[24] which included forming a separate Judicial Service Commission to appoint, promote and transfer members of the judiciary in consultation with the Supreme Court of Bangladesh. However, despite the judgement, no significant changes were made to the judicial structure until 2007.

Following the Appellate Division's directives, the caretaker government (also known as non-party caretaker government)[25] amended section 6 of the *CrPC 1898* to ensure the separation of the judiciary from the executive in 2007. This amendment classified magistrates into executive and judicial magistrates[26] along with their jurisdictions.[27] Accordingly, the appointment, tenure and security of the executive magistrates are now governed by the *Bangladesh Civil Service Recruitment Rules 1981* and the judicial magistrates are governed by the *Bangladesh Judicial Service Commission Rules 2007*.[28] The jurisdiction of the executive magistrate is specified by the *Mobile Court Act 2009* (Bangladesh). However, many have criticised the function of the executive magistrate because they exercise judicial powers.[29] It is considered as direct interference in the judicial function by the executive. It also violates the constitutional rights of the fair trial[30] as the conviction by the mobile court is based on witness testimony and circumstantial evidence without giving the accused any opportunity to defend himself.[31] The Supreme Court of Bangladesh

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[23] *Secretary, Ministry of Finance v Md Masdar Hossain and Others*, 52 DLR (AD) 82 (Bangladesh, 2 December 1999).

[24] These 12 directions were part of the judgement and had binding force over the government under the *Constitution of Bangladesh* (n 7) arts 102, 112; *Secretary, Ministry of Finance v Md Masdar Hossain and Others*, 29 CLC (AD) (Bangladesh, 2 December 2000). See also M Rafiqul Islam, 'Judicial Independence Amid a Powerful Executive in Bangladesh: A Constitutional Paradox?' (2009) 18(4) *Journal of Judicial Administration* 237; M Rafiqul Islam and SM Solaiman, 'Public Confidence Crisis in the Judiciary and Judicial Accountability in Bangladesh' (2003) 13(1) *Journal of Judicial Administration* 29.

[25] Since the independence of Bangladesh in 1971, the practice of democracy was impeded by military rule. In 1990, Bangladesh entered a new phase of democratic government. In 1996, Bangladesh established a non-party caretaker government system to ensure the holding of free and fair elections which was constitutionalised through the thirteenth amendment to the constitution (chapter IIA of the Bangladesh *Constitution)*. Accordingly, after the dissolution of the national parliament, there will be an 11-member non-party caretaker government headed by a chief advisor. The chief advisor will hold the prime minister's status and will assist the election commission to hold general polls impartially, fairly, and peacefully. Later on, in 2011, the provision of caretaker government was abolished by the fifteenth amendment. See, Md Nazrul Islam, 'Non-Party Caretaker Government in Bangladesh (1991-2001): Dilemma for Democracy? (2013) 3(8) *Developing Country Studies* 116-127.

[26] The *CrPC 1898* (Bangladesh) s 6(2).

[27] Ibid ss 10, 11.

[28] Ibid.

[29] Mizanur Rahman Khan, 'If Judges Can't Do, How Can Administrators?' *The Prothom Alo* (online, 1 September 2020) ***https://bit.ly/3lR1YCt*** (accessed 26 March 2021). Tribune Report, 'Are Mobile Courts Serving Justice?' *Dhaka Tribune* (online, 14 March 2020) ***https://bit.ly/2P9LRDV*** (accessed 26 March 2021).

[30] The *Constitution of Bangladesh* (n 7) art 35.

[31] Md Milan Hossain, 'Separation of Judiciary in Bangladesh–Constitutional Mandates and Masdar Hossain Case's Directions: A Post Separation Evaluation' (2020) 11(2) *International Journal for Court Administration* 14

delivered several judgements questioning the legality of the mobile courts, considering it as overstepping the theory of the separation of judiciary.[32] Against the judgement of the HCD, the government made three appeals to the AD and got permission to run the mobile courts until the final disposal of the cases.[33] Thus, the mobile courts are operating and extending their jurisdictions with government support.

The President of Bangladesh established four sets of rules to achieve the separation, including the *Judicial Service Commission Rules 2007*, *Judicial Service (Pay-Commission) Rules 2007*, *Judicial Service (Formation of Service, Appointment, Promotion in the Service and Temporary Suspension and Removal) Rules 2007* and *Judicial Service (Determination of Service Place, Controlling of Granting Leave, Maintaining Discipline and Other Conditions of Employment) Rules 2007*. Most of these rules have been implemented since 1 July 2007. They rendered the Supreme Court independent and brought magistrates exercising judicial functions under the Supreme Court's supervision, free from executive influence. The Bangladesh Judicial Service Commission is responsible for the appointment procedure for all judges and judicial magistrates. A general administrative committee headed by the Chief Justice of Bangladesh and three other judges from the Supreme Court was established to control and administer the judges of the subordinate courts.[34] However, a separate pay scale under the *Judicial Service (Pay-Commission) Rules 2007* has not commenced until recently.

3.2.2 Influence of the Separation of Powers on Increasing Litigation Costs

Although the institutional independence of the subordinate courts has been ensured through the *Masdar Hossain Case* theoretically, it is yet to be executed effectively due to the absence of a separate secretariat or administrative arrangement. Therefore, the promotion and transfer of the subordinate courts' judges are still controlled by the Ministry of Law, Justice and Parliamentary Affairs in consultation with the Supreme Court. Also, the judiciary is largely dependent on the executive for finance, increasing workforces or allocating resources. Indeed, the lack of resources aggravates the situation, particularly because (according to several interviewees in this study) the government does not allocate sufficient means for providing services to all the people in Bangladesh equally. Rather, the interviewees in this study explained that the staff of the

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[32] *State v Ministry of Law, Justice and Parliamentary Affairs and Others* (Bangladesh, HCD, Md Imman Ali J and Md Bazlur Rahman J, 3 September 2009) ***https://bit.ly/311Yxdq*** (accessed 26 March 2021); writ no. 8437 & 10482 of 2011, and 4879 of 2012. See also, Star Online Report, "Running of mobile courts by executive magistrates unconstitutional" *The Daily Star* (Dhaka, 12 July 2019) https://bit.ly/3yJfKfk (accessed 30 Sep 2021)

[33] Staff Correspondence, 'Mobile Court can operate until disposal of petitions' *The Daily Star* (online, 10 Jan 2018) <https://bit.ly/38Gso3W> (accessed 30 Sep 2021); Hossain (n 30) 15.

[34] *High Court Division Rules* (n 17).

subordinate courts receive bribes to provide more services to litigants and that although many recognise the corruption plaguing the sector, the courts often disregard unlawful activities to remain functional (see Chapter 7, section 7.3).

Judges are discouraged from taking proactive steps to improve the justice system or any internal management because administrative control over the subordinate judiciary in Bangladesh is divided between the executive and judiciary (CRJ-4). Maintaining a dependent judiciary has helped the executive establish political control with judicially endorsed immunity.[35] The executive tried to influence the judiciary in various ways, and the 16th amendment,[36] was a step forward (see section 3.2.1). Thus, it can be argued that the ruling executive is trying to dominate the judiciary for the political interests instead of establishing it as an independent organ of the state.[37] This dual institutional control[38] over the subordinate courts created bureaucratic complexities, power tensions and unnecessary delays in the decision-making processes, which has, in turn, created delay and higher expenses.

Several interviewees in this study (from *BQRS 2019*) stated that most of the institution's heads refrain from appointing new court staff to avoid political pressure and endorsements (executive control over the judiciary), which has resulted in vacancies in the subordinate courts (CVS-1, CVJ-1 and CRJ-3). This shortage in the workforce increases the workload on already overworked court staff. This workload also allowed them to show extra favour to additional charges. For example, during an interview for this study (from *BQRS 2019*), one judge shared that one court staff in a copying section[39] expediently disposed petitions for certified copies at special costs due to long queues, terming them 'special petitions' and defying the law; this certainly increases litigation costs.

The judiciary in Bangladesh holds a weaker position than the executive or legislature. Power is centralised in the hands of the cabinet and heads of the government to exert authority and

[35] M Rafiqul Islam and SM Solaiman 'The New Speedy Trial Law to Maintain Order in Bangladesh: Its Constitutional and Human Rights Implications' (2004) 46(1) *Journal of the Indian Law Institute* 79–98.

[36] *Government of Bangladesh and Others v Advocate Asaduzzama Siddiqui and Others*, Civil Appeal No. 06 of 2017 of Appellate Division (Bangladesh, 2017). See also M Rafiqul Islam, 'Judging Apex Judges by Parliamentarians', *Daily Star* (online, 18 July 2017) ***https://www.thedailystar.net/law-our-rights/law-vision/judging-apex-judges-parliamentarians-1434616*** (accessed 01 May 2021).

[37] Islam (n 7) 54.

[38] Though the Constitution of Bangladesh vested the power to appoint, transfer and take disciplinary action upon the President of Bangladesh. See articles 115, 116 and 116A of the Bangladesh Constitution. However, in practice, the Ministry of Law, Justice and Parliamentary affairs initiated any proposal in relation to transfer, appointment or disciplinary action in consultation with the Supreme Court of Bangladesh. Thus, the control power is delegated to both the Ministry of Law, Justice and Parliamentary Affairs and the Supreme Court of Bangladesh.

[39] A copying section is responsible for providing a certified copy of the order or judgement of the court.

unjustified power.[40] Theoretically, the subordinate courts are separate and independent. In practice, the administrative control over the courts is exerted by the executive and judiciary is subject to political pressures and corruption.[41] This division extends to taking any adequate enterprises to make the judiciary more effective.

3.2.3 Law-Making Process in Bangladesh

The *Constitution of Bangladesh* empowers the parliament to enact primary and secondary legislation. Though the customary practice is that the Parliament delegates the power to enact subsidiary legislation to the Ministries or Departments under the Ministries.[42] While enacting any laws, maintaining consistency with the basic principles of the *Constitution* is a fundamental mandate.[43] The legislature's law-making process involves the pre-legislative, legislative, and post-legislative stages. However, every proposal to make a law in Parliament is made in the form of a Bill, whether submitted as a government or private member's Bill.[44]

During the pre-legislative stage, the concerned Ministry submits a proposal to the Cabinet for approval on a casual basis. The Cabinet is an integral part of the Parliament and approves initial legislative proposals. The relevant Ministry, generally, sends the file to the Ministry of Law, Justice and Parliamentary Affairs to prepare the draft or review the preliminary draft Bill that has been developed and approved by the Cabinet.[45] The Ministry of Law, Justice and Parliamentary Affairs has a legislative drafting wing for this purpose, which can hire experts if necessary. When an acceptable version of the Bill is achieved, it is forwarded to the cabinet for consideration as an official Bill of the government. After final endorsement by the Cabinet, the concerned Ministry arranges with the parliamentary secretary to commence the legislative phase, which is presented by a Minister.[46]

The legislative phase follows three distinct stages, including the first, second and third readings. A seven-day notice for a government Bill and a 15-day notice for a private member Bill to the

[40] Dilip Kumar Roy, 'Governance and Development: The Challenges for Bangladesh' (2005) 31(3&4) *Bangladesh Development Studies* 99, 107.

[41] Ibid.

[42] The *Constitution of Bangladesh* (n 7) art 65.

[43] Ibid, art 7.

[44] Ibid art 80(1).

[45] The *Rules of Business 1996* (Bangladesh) rule 14. All members of the cabinet (with some exceptions) are also members of parliament.

[46] Gavin Murphy, 'How the Legislation is Drafted and Enacted in Bangladesh' (2006) 27(3) *Statute Law Review* 133.

Parliament secretary is required before the legislative phase begins.[47] The notice should be accompanied by two to three copies of the Bill and an explanatory statement of the objects and reasons for the Bill.[48] Following debates and possible amendments, the Speaker puts the Bill for a vote of the house to settle. When the bill is introduced, it is published in the *Bangladesh Gazette*. During the second reading, the concerned minister clarifies the proposal, and the Bill may be referred to a standing committee or circulated for public opinion. Considering the motion and countermotion, the Speaker then provides the issue on a vote to proceed to the next stage. The speaker fixes a day for discussions and amendments. Every debate is taken through a vote, and additional amendments are incorporated during this stage. The third reading is generally a short phase. The concerned Minister or member of Parliament presents the final version, and the Speaker puts for a vote without allowing any further debates. When a majority of the members vote in favour of the Bill, subject to a quorum of the session, it will be passed by Parliament.

The post-legislative stage involves the President's assent.[49] Every Bill passed by the parliament must be presented to the President, who may assent the Bill or send it back for further considerations within 15 days.[50] The parliament considers the President's requests and sends the Bill back for the President's assent. The President will then assent or be deemed to have assented within seven days.[51] The recommendations of the government and the President's role is merely a formality.[52] When the assent is confirmed, either expressly or impliedly, the Bill becomes an act of the parliament.[53] The same procedure applies to separate provisions for amending or repealing existing laws. Once an acceptable version is achieved, the Acts, Rules or Regulations are published in the *Bangladesh Gazette* stating the enforcement date.

In practice, an intense discussion is commonly absent during the legislation making process. The ad hoc tendency for members to change their mind is *fait accompli* requiring only approval. Further, the members of the Parliament are more vocal about their local problems or success stories

[47] Bangladesh Parliament, *Rules of Procedure of Parliament of the People's Republic of Bangladesh* (2007) rule 75 <http://www.parliament.gov.bd/index.php/en/parliamentary-business/procedure/rules-of-procedure-english> ('*Rules of Procedure*') (accessed 20 april (2020).

[48] Ibid rules 72, 75.

[49] The *Constitution of Bangladesh* (n 7) art 80(2).

[50] Ibid art 80(3).

[51] Ibid art 80(4).

[52] Murphy (n 46) 134.

[53] The *Constitution of Bangladesh* (n 7) art 80(5). The authoritative process of rule making power is available at < ***http://www.parliament.gov.bd/index.php/en/parliamentary-business/business-of-the-house/bill-and-legislation/legislative-procedure***> (accessed 29 September 2021)

than critiquing or legislating.[54] Also, the absence of strong opposition has made the law-making process less formative. Weak opposition cannot contribute to legislation or question the government's policy preferences.[55] In the present system, the scope for contributions from a private member is very limited. Even at the committee level, the routine abdication of meaningful debates is more frequent than substantial contributions. Additionally, post-legislative scrutiny for verifying the effectiveness of the laws passed by the Executive in the frame of the Legislature does not occur, and often, the laws barely comply with the expectations of the citizens.[56]

Apart from their formal legislative functions, the President possesses the power to make Ordinances.[57] When the Parliament is dissolved or not in session, the President can create an Ordinance with immediate force if required, subject to the Ordinance being presented to the Parliament at its next meeting.[58]

The Supreme Court of Bangladesh can also create rules and regulations for practices and procedures.[59] The Supreme Court can delegate this function to any court or judges to expedite and ensure the administration of justice.[60] However, this power is not frequently applied; instead, they wait for the parliamentary processes of enactment, which is a lengthy process, and often it does not meet the internal requirements of the judiciary. During COVID-19, when it was time-demanding to issue some rules to confront the ongoing emergency, the Supreme Court was cautious to issue some practice directions only instead of making new rules (see Chapter 8). In *Bangladesh National Women Lawyers Association* v *Bangladesh*,[61] the Supreme Court of Bangladesh directed the government to enact laws regarding domestic workers. Directions to the government were also made in *Masdar Hossain's Case.*[62] However, these directions do not generally elicit an earnest or prompt action from the executive as evident from *Masdar Hossain's case* that took more than a decade to be effective. Therefore, it can be argued that the complex

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[54] M Jashim Ali Chowdhury, 'Our "Problematic" Law Making Process', *Daily Star* (online, 28 May 2019) ***https://www.thedailystar.net/law-our-rights/news/our-problematic-law-making-process-1750039*** (accessed 01 May 2021).

[55] Ibid.

[56] Ibid.

[57] The *Constitution of Bangladesh* (n 7) art 93(1).

[58] On 13 October 2020, an Ordinance passed to control rape: *Women and Children Repression Prevention (Amendment) Ordinance 2020* (Bangladesh). See also, the *Constitution of Bangladesh* (n 7) art 93.

[59] The *Constitution of Bangladesh* (n 7) art 107.

[60] Ibid.

[61] 17 MLR (HCD) 121 (Bangladesh, 2012).

[62] *Secretary, Ministry of Finance v Md Masdar Hossain and Others* 52 DLR (AD) 82, (Bangladesh, 2 December 1999).

law-making process often not met the judicial urgency or scruitiny, nor does the Supreme Court utilise its Rule-making power to meet up any dire need.

3.2.4 Influence of Law-Making Processes on Litigation Costs

Evidence suggests that newly-enacted laws are often not synchronised diligently with the existing laws in Bangladesh. They can contradict each other and contribute to increased court cases. For example, following inappropriate attempts to upgrade the land records in Bangladesh (which have not yet been completed), 297,702 new cases were filed as of 31 March 2019.[63] Policymakers cannot anticipate how a newly enacted Act will affect the population prior to its enactment. CRJ-2 stated that 'when the laws are enacted they are not properly coordinated with [the] existing laws and situation and creates [sic] complexities. For example, in a recent Act, it has been stated that the appeal will lie [with] the tribunal. However, no tribunal has been established yet, but the Act has been commenced effective[ly]. Consequently, thousands of cases are pending for disposal.' This increased work pressure thus, contributes to delaying case disposal.

Furthermore, for example, in motor vehicle matters, the law provides that the cases must be filed on the spot by traffic police. While a police officer registers a case, many of them seldom check an offender's address. One respondent stated that for such an act of the police officers, cases may last for years. Consequently, many cases remain pending and unprepared for trial after exhausting all the legal requirements of serving summons.' Another example is the *Suits Valuation Act 1887* (Bangladesh),[64] which was enacted by the British colonial government to collect revenue. This Act is still in operation without substantial amendments, and the suits valuation rates that determined by the legislature are arbitrary does not consider the socio-economic conditions of the majority. In turn, the court fees end up increasing the litigation costs and burdening the litigants.

The inconsistencies between the laws in Bangladesh do not provide litigants a complete relief. For example, in multiple occasions, an individual has to file more than one case for a single incident to ensure s/he receives all the relief s/he required (hence, increase the number of filings). Such as, for a motor vehicle accident claim, the litigants must file one case under the penal provisions and another if they wish to receive compensation. Further, if a case involves several parties, each party will often file a separate case for the same matter. Consequently, they will each have their own

[63] Data collected from the Supreme Court of Bangladesh.

[64] The *Suits Valuation Act 1887* (Bangladesh).

attorneys and file separate pleadings[65], time schedules, procedural documents, and evidence.[66] This complicates matters and creates a time-consuming process that increases the litigants' expenses.

Thus, new laws in Bangladesh are not diligently enacted or synchronised with the existing laws. Further, the laws are not updated to meet the existing socio-economic conditions. Often, amendments may even be disregarded. The rule-making power of the Supreme Court and subordinate courts is not frequently used to expedite the processing time for cases or improve internal management. These results creating backlog of cases and litigation expenses.

3.2.5 Jurisdiction of the Subordinate Courts in Bangladesh

The subordinate judiciary for civil and criminal matters originates from section 3 of the *Civil Courts Act 1887* and section 6 of the *CrPC 1898*,[67] and governed by the procedural laws. There are five tiers of civil and criminal courts from the entry to district court levels in Bangladesh, each with different economic and territorial jurisdictions stipulated by different laws.[68] The entry-level courts are the Assistant Judge Courts for civil cases, and the Judicial Magistrate courts are for criminal cases.[69] An Assistant Judge can try the value of a suit that does not exceed 15 lac (AUD 24198.42),[70] and a Senior Assistant Judge can try a case of up to 25 lac (AUD 40330.70).[71] A Joint District Judge court has the original (if the value of the suit exceeds 25 lac) and appellate jurisdiction (assigned by the District Judge).[72] An Additional District Judge Court generally holds the same power as the District Judge Court. However, they are appointed to expedite disposals and held responsible for trying the matters assigned to them.[73] District Judges exercise administrative control over all civil courts within the local limits of their jurisdiction. While exercising their

[65] Pleadings include both plaint and written statement.

[66] Especially for land disputes in civil cases and offences against the human body in criminal cases, which mostly involve a number of parties creating claims, counterclaims, cases and counter-cases and increase the volume of cases. See also Hiram E Chodosh et al., 'Indian Civil Justice System Reform: Limitation and Preservation of the Adversarial Process' (1997) 30 (1) *New York University Journal of International Law and Politics* 36.

[67] Halim (n 4) 105, 115.

[68] The *Civil Courts Act 1887* (Bangladesh) s 3; the *CrPC 1898* (Bangladesh) s 6.

[69] Between the two types of magistrate courts, the Judicial Magistrates are appointed by the Bangladesh Judicial Service Commission and typically have a law background, and the Executive Magistrates are appointed by the Bangladesh Public Service Commission and do not necessarily have a legal background but form part of the administration. See *CrPC 1898* (Bangladesh) s. 6.

[70] The currency exchange rate is BDT 1= AUD 0.015, see 'Currency Converter', *OANDA* (Web Page, 2021) https://www1.oanda.com/currency/converter/ (access 27 September 2021).

[71] The *Civil Courts Act 1887* (Bangladesh) s 19.

[72] Ibid ss 18, 21.

[73] Ibid s 8.

judicial functions, the court mainly hears and determines appeals and revisions from the lower tiers within their jurisdiction. Apart from civil cases, an Assistant or Senior Assistant Judge court also tries family matters.[74]

A Sessions Judge or Additional Sessions Judge may pass any sentence authorised by law; however, any death sentences passed by such a judge shall be subject to confirmation by the HCD.[75] A Joint Sessions Judge may pass any sentence except death sentences and imprisonment for a term under 10 years.[76] A Metropolitan Magistrate or magistrate of the first class can pass imprisonments of under five years and fines under BDT 10,000 (AUD 161.32).[77] A second- or third-class magistrate can pass any sentence for three years' imprisonment and fines under BDT 5000 (AUD 80.66) or two years' imprisonment and fines under BDT 2000 (AUD 32.26), respectively.[78] The Sessions Judge is the highest post for managing criminal matters in the subordinate courts.

There are also specialised courts and tribunals, which transpire by special statutes due to market demands and ensure the quick disposal of cases.[79] These courts generally function under a constitutional and statutory hierarchical order.[80] Examples of these specialised tribunals include the Land Survey Tribunal, Women and Children Repression Prevention Tribunal, Acid Crime Suppression Tribunal, Labour Appellate Tribunal, Special Tribunals, Administrative Tribunals, Speedy Trial Tribunal, Cybercrime Tribunal and Stock Market Tribunal.[81] Examples of the special courts include the children's, environment, anti-corruption, money loans, marine, food, forest, special, labour, small causes, family, village and municipal courts. These tribunals and courts are established under separate special acts, and their jurisdictions and functions are separated by the acts within the administrative unit. Although these courts are established through newly legislated acts, they predominantly follow the British procedure under either the *CPC 1908* or *CrPC 1898*.

[74] Due to enormous pressure, in some district, family cases are separately tried by the Assistant Judge or Senior Assistant Judge Court to try those family matters. For example, in the Dhaka district, the family cases are tried separately.

[75] The *CrPC 1898* (Bangladesh) s 31(2).

[76] Ibid s 31(3).

[77] The currency exchange rate is BDT 1= AUD 0.015, see 'Currency Converter', *OANDA* (Web Page, 2021) https://www1.oanda.com/currency/converter/ (access 27 September 2021).

[78] Ibid s 32.

[79] Hoque (n 1) 461–2.

[80] Islam (n 7) 36.

[81] Halim (n 4) 81.

3.2.6 Appointment of Judges in the Subordinate Courts of Bangladesh

Single-judge courts and tribunals are a key attribute (with few exceptions) of Bangladesh's subordinate courts.[82] Graduates from law schools with good academic records can be appointed as judges or magistrates if they pass a competitive examination conducted by the Bangladesh Judicial Service Commission.[83] There is no pre-appointment judicial training required, but they must possess a pragmatic understanding of how the justice system operates in practice. There is no scope for lateral entry to any other higher tiers of service. However, upon completing a certain period[84] in each stage with a satisfactory performance at a judicial post, the service member may be promoted to the next superior post, subject to availability of. After 10 years' experience in the subordinate courts, a judicial officer can be appointed as a judge of the HCD in consultation with the Chief Justice by the President.[85] The General Administration Committee can control and direct the appointment, transfer and promotion of subordinate court judges upon approval by the full committee of the Supreme Court.[86] However, in practice, these appointments and disciplinary measures are controlled by the executive branch.[87] The court of a District or Sessions judge is the highest post of service in the subordinate courts.

There are around 2000 subordinate courts and 1800 judges and magistrates, of which around 250 judges are appointed on deputation posts, which are not related to judicial work.[88] Several courts had been theoretically introduced to ease the pressure on the court. However, empirical observations show that those enterprises are ineffectual in practice due to the absence of efficient supports. For instance, in 1985, family courts were established to try family disputes; however, no judges were appointed, and instead, Assistant Judges or Senior Assistant Judges were assigned to try family disputes in addition to their existing workloads in the civil courts.[89] Further, the Vested Property Return Tribunal and the small causes, rent control, speedy trial, children's, forest, environmental, pure food, narcotics and special power courts (along with some other civil and

[82] Hoque (n 1) 449.

[83] 'Examination', *Bangladesh Judicial Service Commission* (Web Page, 2019) <http://www.bjsc.gov.bd/#> (accessed 30 April 2021).

[84] The President of Bangladesh determines the periods for each stage. For example, the entry post for subordinate courts is the assistant judge position, and after four years of work experience, they can be promoted to the senior assistant judge position.

[85] The *Constitution of Bangladesh* (n 7) art 95(2)

[86] The General Administration Committee comprises the chief justice and three other judges, and the full courts comprise all the judges from the HCD.

[87] Hoque (n 1) 463.

[88] Data collected from the Ministry of Law, Justice and Parliamentary Affairs.

[89] The *Family Courts Ordinance 1985* (Bangladesh) s 4.

criminal courts) have been created; however, no dedicated judges have been appointed, and no new courts or posts have been created to try those matters. The number of courts is almost constant, no matter how many new filings there are. The already overburdened judges have been put in charge of those courts. The substitute judges always set aside these cases from their priority cases while disposing of and inviting delay.

3.2.7 Associated Departments of the Subordinate Courts

Apart from the judges, the Bangladesh judiciary comprises the court staff, public prosecutors and government pleaders, attorney's office, lawyers and legal aid counsels, who play a vital role in the justice sector. Court staff are not considered judicial employees, and therefore, they are not entitled to any judicial benefits.[90] However, their appointment, promotion and transfer within the district are under the District Judge's control, and inter-district transfers are made by the Supreme Court of Bangladesh.[91] Public prosecutors and government pleaders are mainly politically appointed through the Ministry of Law, Justice and Parliamentary Affairs on a selection basis. Though the Legal Remembrancer's manual 1960 (Bangladesh) states that 'whenever the officer of Government Pleader becomes permanently vacant, the Collector, in consultation with the District Judge, shall inform the Legal Remembrancer whether sufficient suitable candidates are available locally or whether applications of candidates from outside the district should be called for.[92]' In the same way public prosecutors are also appointed.[93] According to this manual the appointment procedure would be competitive. The office and post of the Legal Remembrancer is now not in use in Bangladesh. Instead, influential political leaders with high positions prepare a list from which the Ministry of Law, Justice and Parliamentary Affairs appoint (temporarily) public prosecutors and public pleaders on selection basis based on the candidate's political affiliation.[94] Thus, lawyers are appointed as public prosecutors, additional public prosecutors, and assistant

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[90] The judges receive 30% of their salary as a judicial allowance; however, the court staff do not.

[91] *Appointment Regulation in District Courts, Subordinate Courts and Special Judge Courts 1989* (*Zilla Judge, Adhostono Adalatsomuh ebong bivagiyo Bishesh Judge Adalotsomuh (kormokorta and Kormochari) Niyog Bidhimala*, 1989 (Bangladesh).

[92] The *Legal Remembrancer's Manual 1960* (Bangladesh) ch II, r 9.

[93] Ibid, ch II, r 27 (17) and the *CrPC 1898* (Bangladesh) s 492.

[94] Upon independence from the British Government, Bangladesh, India, and Pakistan inherited the colonial model of the prosecutorial service which had two distinguishing features. First, the service was usually headed by a professional called the legal remembrance. Second, the Collector and the District Judge had great influence in the appointments process. India and Pakistan have established separate services while Bangladesh still lacks a permanent cadre of prosecutors under an organized prosecutorial service. See, 'Bangladesh Prosecution System' ***https://www.lawyersnjurists.com/article/bangladesh-prosecution-system/*** (accessed 30 September 2021)

public prosecutors to prosecute offences before the court. Generally, their appointment is based on territorial jurisdiction and are not transferable.

The Bangladesh Police department is an integral part of the justice system and has a key role in administering criminal justice. They manage the case filings, investigations, execution of warrants and production of witnesses. Police officers are appointed as prosecuting sub-inspectors, prosecuting inspectors, and deputy superintendents of police prosecution to prosecute offences before the judicial magistrates at the investigation stage. They are permanent members of the police service. The Ministry of Home Affairs controls the police functions and prisons, while the operational responsibilities are vested in the police themselves and are guided by the *Police Act 1861* (Bangladesh) and *Police Regulations, Bengal 1943* (Bangladesh).[95] The police department operates through the traffic, special and detective branches. There is a Criminal Investigation Department (CID) that deals with high profile cases. Another new department has been established as the Police Bureau of Investigation (PBI) to investigate sensitive cases and has achieved a reputation for solving delicate cases. The police force gazetted category comprises the Inspector General of Police, Additional Inspector General, Deputy Inspector General and Superintendent of Police, who are well trained and well paid. The non-gazetted category consists of the inspector, sub-inspector and assistant sub-inspector. The lower levels of the police include the constables, who constitute 90% of the police force and are poorly trained and with low education levels.[96]

The other associated departments and enforcement agencies in Bangladesh include the Ministry of Health and Family Welfare, Department of Immigration and Passports, Land Record and Survey Department and Land Registry Office, which are appointed and supervised by the Bangladesh Civil Service. However, the promotion and transfer of the district registrar and nikah registrar are vested with the Ministry of Law, Justice and Parliamentary Affairs. This study found that these departments often lack coordination and follow a bureaucratic complexity to comply with any judicial decisions (see Chapter 7). These delayed processes increase expenses. It could be argued that these individuals and institutions are closely related to the judiciary; however, they are not under judicial supervision, although their key roles are important for administering justice.

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[95] Mohammed Bin Kashem, 'The Social Organization of Police Corruption: The Case of Bangladesh' in Rick Sarre, Dilip K Das and HJ Albrecht (eds) *Policing Corruption: International Perspectives* (Lexington Books, 2005) 238; Mohammed Bin Kashem, Mahfuzul I Khondaker and Mohammad Azizur Rahman, 'Bangladesh: Issues and Introspections on Crime and Criminal Justice' in K Jaishankar (ed) *Routledge Handbook of South Asian Criminology* (Routledge, 1st ed, 2019) 22.

[96] Kashem (n 95) 238.

3.2.8 Case Stages

Currently, the civil litigation process in Bangladesh involves the submission of a plaint, service of summons, submission of written statements, framing of issues, attempts to mediate, trial and presentation of arguments, pronouncement of judgements and executions.[97] Apart from these formal stages, there are interlocutory hearings that can occur at any stage to meet the needs of justice. Appeals or reviews can extend the time required for a judgement, and many types of orders can be made during the proceedings in the form of appeals, reviews or revisions as determined by the laws.[98] In civil cases, the time limitations for each stage are restrained; however, the judges have the discretion to extend or allow extra time within legal stipulations.[99]

Conversely, a criminal case is filed in a local police station as a GR case for cognisable offences or NGR for non-cognisable offences.[100] Further, criminal cases can be filed in the court for either cognisable or non-cognisable offences if the concerned police station refuses to record the matter; this is known as a Complaint Registered (CR) case. For NGR cases, prior permission from the concerned magistrate is required to instigate an investigation.[101] The stages for criminal cases include the filing, investigation, summons, warrant, proclamation and attachment of property, paper publication, charge frame, trial and presentation of arguments and pronounce of judgement.[102] In a criminal case, the most prioritised interlocutory matters are bail hearings at any stage. Like the civil laws, the criminal laws also have provisions for appeals, revisions, reviews and motions if any party is aggrieved by any decision of a trial or cognisance court. Unlike civil cases, the stages of criminal cases do not generally have time limits, except for investigations and trials.[103] After ascertaining the condition of a stage, the case may proceed to the next stage. The criminal case proceedings involve other departments, where the courts do not have any active supervisory control.

Several interviewees (from *BQRS 2019*) in this study found that the surfeit stages and tiers of the courts have overcomplicated the legal system. CVJ-3 stated that ‘too many stages and [the]

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[97] See the *CPC 1908* (Bangladesh) pts I–XX.

[98] Ibid ss 104, 114, 115.

[99] The *CPC 1908* (Bangladesh) O V, VIII, XI, XIV.

[100] A list of the cognisable offences and non-cognisable offences have been articulated in schedule II of the *CrPC 1898* (Bangladesh).

[101] Ibid s 155.

[102] Ibid pts XIV–XXVI.

[103] For the investigation, the general time limit is 120 days: See *CrPC 1898* (Bangladesh) s 167(5). For a magistrate-triable case, the time limit at the trial stage is 180 days, and for Sessions court, it is 360 days: see *CrPC 1898* (Bangladesh) s 339C(1)(2).

involvement of people in one case invites delay in case disposition[s]'. Currently, the civil and criminal litigation process in Bangladesh involves an extensive number of stages.[104] For example, there are too many segregated stages in the current court process, which contribute to the backlog of cases.[105] The interviewees in this study also agreed that the legal process is overly burdensome. Therefore, most litigants do not want to deal with the complexities of the system and instead follow judicial instructions, despite knowing or believing that their lawyers do not always guide them accurately. Additionally, the case procedures include the *nejarat*,[106] records section and copying section. The empirical evidence suggests that six to seven people are involved (or that a copy of any order or judgement entails several people) to execute a summon in civil cases. Excessive involvement slows the process and minimises accountability because it is difficult to determine any person's negligence precisely. Often, this system is exploited purposefully to delay litigation and increase costs. Although the laws specify the time restraints for each stage during civil cases and a few of the stages during criminal cases, these restraints are rarely maintained in practice.[107] The tendency of the judges or magistrates to consider the legal timeframes so loosely stagnates the case proceedings. The adversarial legal system allows lawyers and litigants to control and delay the case process. Further, the scope of higher courts' involvement in interlocutory matters delays the disposal of cases.[108] Empirical evidence have also found that when an appeal or revision is filed against any orders or interlocutory matters, the general proceedings of cases are postponed in the trial courts; this delays the process and increases litigation costs. Often, these interlocutory matters are found to be less efficient than resolving the litigation quickly.

3.3 Conclusion

The judiciary is an institution that is accountable to society to administer justice that is fair, efficient, cost-effective and has a high degree of professionalism and skill.[109] Middleton mentioned that justice is more than a decision-making process, where timeliness and affordability are equal

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[104] See the *CPC 1908* (Bangladesh) pts I–XX; the *CrPC 1898* (Bangladesh) chs XIV–XXVI, ch 3.

[105] The same view is expressed by Chodosh et al (n 66) 29; Lord Woolf, *Access to Justice* (Final Report, 1996) pt II, <http://webarchive.nationalarchives.gov.uk/20060213223540/http://www.dca.gov.uk/civil/final/contents.htm> (accessed 9 May 2018).

[106] Nejarat is an administrative section of the District Courts that primarily executes the service of the summon.

[107] Ummey Tahura, *Case Management in Reducing Backlog: Towards Transplant of Australian Practice to Bangladesh Courts* (Bangladesh Institute of Law and International Affairs, 2019) 152.

[108] Ibid 161.

[109] Colin Doherty, 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?' (Conference Paper, Asia Pacific Courts Conference, 7–9 March 2013) 1 ***https://aija.org.au/wp-content/uploads/2017/08/DoogueDoherty.pdf*** (accessed 30 April 2018)

aspects.[110] In Bangladesh, the judiciary has been at the centre of controversy regarding transparency, impartiality and accountability.[111] Despite it being one of the state's most corrupted organs,[112] the judiciary generally holds high public esteem in Bangladesh.[113] The outdated and complicated court procedures, manual court systems and low human resources combined with the high volume of pending cases, political manipulations, infrastructural limitations, budget constraints, lack of coordination among the associated institutions and institutional incapacities contribute to the inefficiency of the judiciary. Even with the existing long delays and costly proceedings, people regard the judiciary as a last resort for finding a resolution.[114] Although the glory of the judiciary is fading and people perceive that justice is only accessible to people with the economic capacity, most of the interviewees in this study stated that appropriate judicial reforms could re-establish its glory through an efficient, transparent, and cost-effective justice system.

Chapter 3 provided an overview of the subordinate judiciary in Bangladesh and how it functions. It is mostly geographically close to the people of Bangladesh and has a significant role in ensuring justice. However, the courts are overburdened with cases and have a small workforce. A theoretical separation of powers is yet to be executed (see section 3.2.1). The executive-controlled judiciary makes the subordinate judiciary outdated, slow and ineffective for decision-making and the execution of justice. The institutional arrangements and associated departments also affect the delayed processes due to the lack of coordination between departments. The appointment procedure for judges' and jurisdiction divisions also complicates the case-processing systems. Further, the existing law-making process in Bangladesh also contribute to the huge backlog and delayed case proceedings experienced by the judiciary and thus, increasing litigation expenses.

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[110] Sir Peter Middleton, *Review of Civil Justice: Report to the Lord Chancellor* (Lord Chancellor's Department, 1 January 1997) 20.

[111] Islam (n 7) 53.

[112] Nazmul Huda Mina, Nahid Sharmin and Shammi Laila Islam, *Subordinate Court System of Bangladesh: Governance Challenges and Ways Forward* (Transparency International Bangladesh, 2017) 3. A Transparency International Bangladesh (TIB) report in 2010 that found the judicial sector as the most corrupt sector. Though this corruption does not necessarily mean judge's corruption. See, TIB's Policy Brief on the Judiciary of 27 February 2011 at ***https://www.ti-bangladesh.org/beta3/index.php/en/research-policy/111-policy-brief/3737-policy-brief-on-judiciary*** (accessed 28 September 2021).

[113] Hoque (n 1) 483.

[114] Ibid.

Chapter 4: Bangladesh Cost Rules

4.1 Introduction

The litigation costs are one of the main obstacles to accessing justice,[1] so as in Bangladesh. Although it is expected that these costs should be just and proportional to the disputed amount,[2] empirical research has found that they often exceed or consume a significant portion of the claim amount, thereby making litigation futile.[3] Middleton argued that it could not be considered justice if a judicial system presents excessive delays or unaffordable costs.[4] The case delays, uncertainty about the time to dispose of a case and high and unpredictable litigation costs generate financial burdens on the litigants.[5] Costs rules may present a method for financing litigation, especially for litigants who endure their own expenses. They play an indispensable role in blending the legal and economic remedies to maximise justice. If the costs or risks are too high for either party in a case and there are no alternative remedies, then there is a denial of justice.[6]

Cost rules can have some particular outcomes, including early settlements, ADR, deterring unmeritorious cases and, most importantly, reimbursing successful litigants. These rules should not be used to obstruct access to the courts and justice, deter citizens with genuine claims, restrict people with low or middle incomes from alleging that a legal right has been affected or force

[1] Christopher Hodges, Stefan Vogenauer and Magdalena Tulibacka, 'Costs and Funding of Civil Litigation: A Comparative Study' (Working Paper No 55, Legal Research Paper Series, University of Oxford, December 2009) 19; Mauro Cappelletti and Bryant G Garth, 'Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective' (1978) 27 *Buffalo Law Review* 188; Michael E Stamp, 'Are the Woolf Reforms an Antidote for the Cost Disease--The Problem of the Increasing Cost of Litigation and English Attempts at a Solution' (2001) 22(2) *University of Pennsylvania Journal of International Law* 349; Martin Gramatikov, 'A Framework for Measuring the Costs of Paths to Justice' (2009) 2(2) *Journal Jurisprudence* 111; Gillian K Hadfield, 'The Cost of Law: Promoting Access to Justice Through the (Un)corporate Practice of Law' (2014) 38 *International Review of Law and Economics* 43; Florencio López-de-Silanes, 'The Politics of Legal Reform' (2002) 2(2) *Economia* 91, 123.

[2] Senate Legal and Constitutional Affairs Committee, *Inquiry into Access to Justice* (Law Council of Australia, 2009) 2; Dorcas Quek Anderson, 'The Evolving Concept of Access to Justice in Singapore's Mediation Movement' (2020) *International Journal of Law in Context* 1.

[3] Michael Zander, *Cases and Materials on the English Legal System* (Cambridge University Press, 10th ed, 2007) 323; Gramatikov (n 1) 111; Cappelletti and Garth (n 1) 189.

[4] Sir Peter Middleton, *Review of Civil Justice: Report to the Lord Chancellor* (Lord Chancellor's Department, 1 January 1997) 20. See also Peter Cashman, 'The Cost of Access to Courts' (Conference Paper, Conference on 'Confidence in the Courts', 9–11 February 2007) 3.

[5] A.A.S Zuckerman, 'Costs Capping Orders- the Failure of the Third Measure for Controlling Litigation Costs' (2007) 26 *Civil Justice Quarterly* 271; Robert E. Marks, 'Rising Legal Costs' in Russell Fox (ed), *Justice in Twenty-First Century* (Cavendish Publishing, 1999) 227–8.

[6] Hodges, Vogenauer and Tulibacka (n 1) 10–11. 'Everyone has the right to an effecting remedy': see *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, UN Doc A/810 (10 December 1948) art 8.

unwarranted compromises.[7] The uncertainty about litigation costs is a barrier for those with limited resources.[8] Following the prospect theory, Kahneman and Tversky argued that uncertainty about costs discourages litigants from protecting their rights, hindering access to justice.[9]

The empirical investigation in this study (*BQRS 2019*) substantiates that the existing cost rules in Bangladesh are scattered and that their application is rarely visible. COM-2 shared that 'the present law relies on judicial discretion for the application of cost rules, and therefore, we rarely find their application in cases'. Consequently, even if the judgements favour the litigants; often, they are not supported by any financial remedy either in civil or criminal cases which constitutes a substantial gap in accessing justice. Chapter 4 demonstrates how the absence of integrated cost rules has thwarted access to justice in Bangladesh (Research Issue D). It analyses how cost rules could enhance access to justice by pursuing distributive justice. Chapter 4 focuses on identifying the hurdles of the existing inoperative cost rules and analyses the gaps in the theory. It also analyses how unguided judicial discretions are applied to the cost rules. Examples from the other countries are examined through a cost-benefit analysis (CBA) to find how the principles of cost rules can enhance access to justice.

4.2 Contemporary Principles Governing Cost Rules

There are two types of litigation costs within the justice system in Bangladesh: public and private. Public costs are incurred by the government, while individuals bear private costs. Private costs include legal costs, direct or indirect monetary loss, physical and psychological suffering and disrupted livelihoods.[10] Semple classified private costs into three: monetary, temporal and psychological costs.[11] The costs associated with psychological matters or loss of life are beyond restoration using just money and cannot be easily assessed.[12] However, the monetary costs are visible and can be assessed and indemnified to some extent by the litigants through economic

[7] The Law Commission of India, *Cost in Civil Litigation* (Report No 240, 2012)7; Manitoba Law Reform Commission, *Costs Awards in Civil Litigation* (Report no 111, 2005) 6; Leonard S Janofsky, 'A.B.A Attacks Delay and the High Cost of Litigation' (1979) 65(9) *American Bar Association Journal* 1323.

[8] Gramatikov (n 1) 125.

[9] Daniel Kahneman and Amos Tversky, 'Prospect Theory: An Analysis of Decision under Risk' in Daniel Kahneman and Amos Tversky (eds), *Choices, Values, and Frames* (Cambridge University Press, 2000) 17; Gramatikov (n 1) 126.

[10] Abul Barkat and Prosanta K Roy, *Political Economy of Land Litigation in Bangladesh: A Case of Colossal National Wastage* (Pathak Shamabesh, 2004) 114.

[11] Noel Semple, 'The Cost of Seeking Civil Justice in Canada' (2016) 93(3) *Canadian Bar Review* 639. Semple categorised the costs arising as monetary (including court fees, miscellaneous goods and services and legal fees), temporal (duration, workload and opportunity) and psychological (from interactions with individuals and the system).

[12] Barkat and Roy (n 10) 114.

remedies. The monetary costs can be divided into common and one-off (occasional) costs. Common costs relate to each court visit and include the lawyers' fees,[13] travel costs, food costs, accommodation expenses and tips for the staff and lawyers' assistants. One-off costs generally include costs for collecting documents, court fees, expert witness fees, commissioner fees and cost at the time of argument.[14] Although one-off costs are usually paid once during the entire case time, their combined amount is comparatively higher than the common costs. This research has found that actual litigation costs are generally much higher than predicted one because the time, externalities (including physical and mental suffering), lost opportunities and care for the health and education of family members, deteriorating social relationships and corruption are not assessable in financial terms.[15] Thus, the monetary, temporal and psychological costs of seeking justice are high and often prohibitive for individuals. However, an economic remedy may indemnify the litigants to some extent. This research focuses on private monetary costs incurred by the litigants.

Apart from litigants' own finances, other modes of financing for litigations include government funding (legal aid), insurance, speculative or contingency fee arrangements and pro bono services. Self-financing is the most practiced mode of financing.[16] Cost rules are a widely recognised self-financing mechanism that helps determine who between the two parties will cover the litigation expenses.[17] Aiyar described 'costs' as:

> certain allowances authorized [sic] by statute to reimburse the successful party for expenses incurred in prosecuting or defending an action or special proceeding. They are in the nature of incidental damages allowed to indemnify a party against the expense of successfully asserting his [sic] rights in court. The theory upon which they are allowed to a plaintiff is that the default of the defendant made it necessary to sue him [sic], and to a defendant, that the plaintiff sued him [sic] without cause. Thus, the party to blame pays costs to the party without a fault.[18]

[13] The common practice in Bangladesh is that lawyers charge per appearance basis, without any fixed rate or contract.

[14] Sometimes, at the argument stage, renowned lawyers are hired with high fees: see Shishir Tripathi, 'Huge Cost of Litigation has Turned Justice into a Dream for the Weaker Sections in India', *Firstpost* (online, 17 August 2016) < https://bit.ly/3eQJArq> (accessed 30 March 2019); Ahmad Sohaib et al, 'Cost of Justice and Exclusion' (2019) 15(11) *European Scientific Journal* 1, 17.

[15] Barkat and Roy (n 10) 292.

[16] Australian Law Reform Commission, *Costs Shifting- Who pays for litigation* (Report no 75, 1995) 24.

[17] Ibid 33; Manitoba Law Reform Commission (n 7) 5.

[18] P Ramanatha Aiyar, *The Major Law Lexicon* (LexisNexis, 4th ed, 2010) 1571.

The 'costs' in cost rules indicate the sum of money that the court orders one party to pay another party for the expenses incurred during the litigation. The award of costs is generally not considered a penalty but rather a method for reimbursing the litigation expenses of the other party.[19]

The costs rules for civil or criminal cases vary according to the relevant geographic area and legal systems. It is necessary to examine the principles of cost rules that are applied around the world to identify the gaps in the present cost rules in Bangladesh. Therefore, Sections 4.2.1 and 4.2.2 examine how cost rules are applied in different countries.

4.2.1 Civil Cases

4.2.1.1 Party Pays Rule

In contrast with the English rule, the US courts' general principle is that litigants bear their own attorneys' fees except in unusual circumstances.[20] Initially, the US adopted the English rule and allowed the prevailing party to collect the opponent's attorney fees.[21] However, the English rule lost its admissibility because a restriction was imposed on attorneys' charges and the public opinion was that the rule was unjust.[22] In 1796, the Supreme Court of the US determined in *Arcambel* v *Wiseman*[23] that the English rule was not appropriate for allocating attorneys' fees and that it was the opposite of the US's general principle. Since then, the American rule (the user pays or party pays rule) has been enforced, ensuring that each party bears their own costs regardless of the outcome unless the case is proved vexatious.[24] The argument behind the American rule is that if people (even those with legitimate claims) encounter the prospect of paying their opponents' legal costs if they do not prevail at trial (for whatever reason), they may be dissuaded from

[19] *Johnstone v The Law Society of Prince Edward Island* (1988) 2 PEIR B 28 (Canadian Court of Appeal); *Latoudis* v *Casey* (1990) 170 CLR 534.

[20] Edward F Sherman, 'From Loser Pays to Modified Offer of Judgment Rules: Reconciling Incentives to Settle with Access to Justice' (1997–98) 76 *Texas Law Review* 1863; Alexander G Osevala, 'Let's Settle This: A Proposed Offer of Judgment Rule for Pennsylvania' (2012) 85 *Temple Law Review* 185.

[21] Robin Stanley, 'Buckhannon Board and Care Home, Inc v West Virginia Department of Health and Human Resources: To the Prevailing Party Goes the Spoils … and the Attorney's Fee!' (2003) 36(2) *Akron Law Review* 365–6; Jennifer M Smith, 'Credit Card, Attorney's Fees and the Putative Debtor: A Pyrrhic Victory? Putative Debtors May Win the Battle but Nevertheless Lose the War' (2009) 61 *Maine Law Review* 171; Christopher R McLennan, 'The Price of Justice: Allocating Attorney's Fees in Civil Litigation' (2011) 12 *Florida Coastal Law Review* 357, 365–6.

[22] David A Root, 'Attorney Fee-Shifting in America: Comparing, Contrasting, and Combining the "American Rule" and "English Rule"' (2005) 15(3) *Indiana International & Comparative Law Review* 583, 584–5.

[23] 3 US (3 Dall) 306 (1796). See Osevala (n 20) 192; McLennan (n 21) 366; Root (n 22) 585.

[24] Root (n 22) 585; James W Hughes and Edward A Snyder, 'Litigation and Settlement under the English and American Rules: Theory and Evidence' (1995) 38(1) *Journal of Law and Economics* 225.

pursuing or defending their rights.[25] This rule has often been criticised because an injured person may have to bear substantial expenses and it may encourage meritless cases and actually increase the legal expenses.[26] Nevertheless, the US and Japan follow the user pays rule,[27] and it is applied to family and industrial matters in Australia and the UK.[28]

After 200 years of adopting the American rule, at the end of the 20th century, statutory exceptions began to emerge to encourage meritorious litigation and discourage frivolous litigation.[29] There are six categories of exceptions:[30] contracts,[31] bad faith,[32] the common fund, the substantial benefit doctrine,[33] contempt and fee-shifting statutes.[34] More than 200 federal and nearly 2000 state statutes allow the shifting of attorneys' fees; there are four categories of suits for these provisions:[35] civil rights, consumer protection, employment and environmental protection. There is another exception, known as the contingency fee system (see Chapter 6). This system applies when any individual files a suit against a corporation or institution, whereby the plaintiff is not obliged to pay for their attorney's fees if they do not collect anything.[36]

Although the American rule introduced some exceptions, Sherman argued that it is against the fundamental assumption of remedy laws in America; that is, a party with a valid claim should be returned whole.[37] However, the party pays rule never enables a party to be made whole because they must bear their attorney's fees. Vargo and Osevala also identified the following drawbacks of the rule:

- Only people with high incomes can afford the legal expenses.

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[25] Sherman (n 20) 1863–4; Manitoba Law Reform Commission (n 7) 24.

[26] Avery Katz, 'Measuring the Demand for Litigation: Is the English Rule Really Cheaper?' (1987) 3(2) *Journal of Law, Economics, & Organization* 143.

[27] Cappelletti and Garth (n 1) 187.

[28] Australian Law Reform Commission (n 16) 22.

[29] Stanley (n 21) 367; Osevala (n 20) 192.

[30] John F Vargo, 'The American Rule on Attorney Fee Allocation: The Injured Person's Access to Justice' (1993) 42 *American University Law Review* 1567, 1578–93; McLennan (n 21) 366.

[31] The attorney's fees shifted if the litigation arose from a contract between the parties: see, Ibid 1578; Osevala (n 20) 192.

[32] The attorney's fees can be recovered from one party when the opposite party acts from bad faith or presents a frivolous case.

[33] 'Common fund' and 'substantial benefit' are similar and based on equitable principles: see, Osevala (n 20) 194–5.

[34] Ibid 195.

[35] Root (n 22) 588.

[36] Osevala (n 20) 196.

[37] Sherman (n 20) 1864.

- The rule fails to compensate the winner fully.
- It ignores the defendant's compensation if they can defend themselves successfully.
- It encourages non-meritorious cases that congest the courts.[38]

Thus, the party pays rule may have some positive attributes. For example, it does not discourage people from pursuing their legal rights. However, in the context of Bangladesh, where the number of false and vexatious cases are high and cases filed as a mode of harassment, this party pays rules may not be appropriate and can restrict access to justice, especially for the economically backward groups.

4.2.1.2 Offer of Settlement or Hybrid Rule

Although the party pays rule remains the bedrock of American jurisprudence, it was heavily criticised, and the loser pays rule was thought to be a solution.[39] Since the 1930s, many statutes have been passed that allow the recovery of an attorney's fees by the prevailing plaintiff; for example, the *Civil Rights Act 1964* (US).[40] In 1938, the US introduced the offer of judgement rules in the *Federal Rules of Civil Procedure 1938* (US) that is popularly known as 'rule 68'.[41] This rule was borrowed from the practices of the few states in the US.[42] This legislative history highlights the nexus between the loser pays and offer of judgement rules.[43] Both rules handle the shifting of attorneys' fees. Under the English rule, attorneys' fees are automatically shifted to the winner, while under the offer of judgement rule, they are shifted to an offeree who has refused their opponents offer to settle and has not done better at trial.[44] Osevala termed this rule a 'hybrid' of English and American rules.[45]

Under this rule, a defendant may only offer a definite sum to the plaintiff 14 days before the trial starts.[46] If the plaintiff accepts the offer, the judgement is entered for the offer. If the plaintiff rejects the offer and recovers less than the amount offered at trial, the plaintiff must pay for the

[38] Vargo (n 30) 1591–3; Osevala (n 20)198.

[39] Sherman (n 20) 1866.

[40] Ibid.

[41] The *Federal Rules of Civil Procedure 1938* (US) rule 68. See also, Sherman (n 20) 1784.

[42] Jay N Vaaron, 'Promoting Settlements and Limiting Litigation Costs by Means of the Offer of Judgment: Some Suggestions for Using and Revising Rule 68' (1984) 33(4) *American University Law Review* 813, 816.

[43] Sherman (n 20) 1868.

[44] Ibid.

[45] Osevala (n 20)199.

[46] Originally, it was 10 days before the trial started; later, it was modified to 14 days before the hearing.

defendant's post-offer costs and cannot recover their own post-offer costs.[47] However, the final judgement must result from an actual trial and not from a settlement or voluntary dismissal.

The purpose of rule 68 is to promote settlement, and it is the only federal rule that directly inflicts consequences upon litigants who irrationally refuse to settle. Thus, the offer of judgement rule has an added settlement potential because a party must be prepared to settle if their offer is accepted. In *Delta Air Lines Inc. v August*,[48] the Supreme Court of the US decided that rule 68 provides an added incentive to settle in cases where there is a strong probability that the plaintiff will obtain a judgement, but the amount of the recovery is uncertain.[49] Sherman considered this rule less punitive and complex than the loser pays rule.[50]

Despite its ambitious goal, rule 68 has had minimal effects on encouraging settlements. Osevala identified that the penalty for rejecting an offer is nominal to induce settlement because it only includes minimal taxable court costs and excludes the most expensive part of litigation, the attorneys' fees.[51] Rule 68 has also been criticised because it is only available for the defendants, it requires a judgement rather than a settlement and the timing requirements make it challenging to use.[52] As a result of this criticism, scholars have proposed amendments to rule 68, and most states have imposed variations of the rule.[53]

Rule 68 is treated as a threat of punishment if the plaintiff does not settle and cannot achieve a better result. Further, it narrowed the scope of applying judicial discretions. It does not give the plaintiff and defendant equal opportunities and is considered harsh because if the plaintiff receives a less favourable judgement, they will have to pay the defendant's costs. It does not require that the defendant receives a judgement in their favour. Although rule 68 does not include the attorneys' fees, it directly conflicts with the *Civil Rights Attorney's Fees Award Act of 1976* (US).[54]

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[47] Litigation costs include those directly related to preparing the case for trial and actual trial expenses, including reasonable attorney's fees, deposition costs and fees for expert witnesses: *Civil Rights Act 1968* (US) rule 68. See Sherman (n 20) 1784.

[48] 450 US 346 (1981).

[49] Osevala (n 20) 201.

[50] Sherman (n 20) 1869.

[51] Osevala (n 20) 186.

[52] Ibid.

[53] Ibid.

[54] This Act provides referral courts with discretionary authority to award attorneys' fees to the prevailing parties in private lawsuits when enforcing the civil rights acts from the Reconstruction era. See Note, 'The Conflict between Rule 68 and the Civil Rights Attorneys' Fees Statute: Reinterpreting the Rules Enabling Act' (1985) 98(4) *Harvard Law Review* 828, 839; Scott Hamilton, 'The Civil Rights Attorneys' Fees Awards Act of 1976' (1977) 34(1) *Washington and Lee Law Review* 205.

Section 1988 of the Act gives the court discretion to award reasonable attorney fees and expert fees as part of the costs.[55] Section 1988 favours the prevailing party being awarded their attorney fees, while rule 68 favours the defendant only with all other costs except the attorney's fees. However, if there is any conflict between rule 68 and section 1988, section 1988 will prevail.[56]

The party pays rule is a safeguard against paying the other party's costs or causing unnecessary delays.[57] It is assumed that the American rule ensures more accessibility to the court due to the absence of pecuniary risk. Its accessibility is so ensured that it has turned America into a litigious country.[58] It does not compensate the winner fully; therefore, the rule is still under examination, and the courts are looking for a better option. It also does not provide any assistance to a party who cannot pursue a valid claim or defence for lacking financial support unless it is provided externally, for example, legal aid.[59] It also weakens people with lower incomes if their opponent has a higher income and can prolong litigation. Rule 68 had been considered an experimental option to overcome the shortcomings of the party pays rule and encourage parties to settle; however, the rule has already failed to achieve its goal.

4.2.1.3 Loser Pays Rule

This English rule was deeply influenced by the principle that 'victory is not complete in civil litigation if it leaves substantial expenses uncovered'.[60] Technically, the application of this rule began through the *Statute of Gloucester 1278*[61] and was developed through subsequent legislation.[62] It is known as the loser pays rule or cost indemnity rule or costs following the event rule, is a two-way fee-shifting system that allows the prevailing party to receive all the legal expenses,[63] including the attorney's fees, from the losing party.[64] The cost indemnity rule reflects

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[55] The *Civil Rights Attorney's Fees Award Act of 1976* (US) 42 US Code, s 1988.

[56] 'The Conflict between Rule 68 and the Civil Rights Attorneys Fees Stature: Reinterpreting the Rules Enabling Act', (1985) 98(4) *Harvard Law Review* 828, 839.

[57] Australian Law Reform Commission (n 16) 35.

[58] McLennan (n 21) 359–60; John D Wilson, 'Attorney Fees and the Decision to Commence Litigation: Analysis, Comparison and an Application to the Shareholders' Derivative Action' (1985) 5 *Windsor Yearbook of Access to Justice* 142, 144.

[59] Australian Law Reform Commission (n 16) 35.

[60] W Kent Davis, 'The International View of Attorney Fees in Civil Suits: Why is the United States the "Odd Man Out" in How It Pays Its Lawyers?' (1999) 16 *Arizona Journal of International and Comparative Law* 361, 404.

[61] (UK) 6 Edw 1.

[62] Geoffrey Woodroffe, 'Loser Pays and Conditional Fees—An English Solution?' (1998) 37 *Washburn Law Journal* 345; Root (n 22) 591.

[63] In England, the costs include all legal expenses incurred in preparing and concluding a case: see Vargo (n 30) 1606.

[64] McLennan (n 21) 369; Osevala (n 20) 185; Root (n 22) 589.

the actual motives of cost rules. Although there are some variations, the countries favouring this system include Australia, Austria, Belgium, England, France, Germany, the Netherlands and Sweden.[65] The ALRC simplified the application of the principle in civil cases: the losing party pays their own costs and the reasonable costs of the winning party.[66]

The underpinning hypothesis of this English cost rule is that the successful party can enforce or defend their legal rights and should not be out of pocket for doing so.[67] Davis identified the two factors of the rule:[68]

- The objective fact of defeat is sufficient grounds for imposing legal costs on the loser, without having regard to bad faith, fault or frivolity.
- The costs to be reimbursed include the court fees and related costs and the attorney fees and other expenses incurred by the winner.

In short, there are multiple benefits of the English rule along with some demerits.[69] First, it gives full compensation to those who have a strong ground for their case. A defendant who has been dragged into litigation and had their property put in jeopardy deserves compensation for having had to rebuff an invalid claim. Conversely, a plaintiff with a valid claim deserves a measure of damages, including recognition of the legal fees paid in defeating a recalcitrant defendant.[70] Second, it deters frivolous litigation.[71] It also discourages unnecessary delays through interim costs orders.[72] Thus, cost rules encourage litigants to follow the court orders and rules, ensuring procedural efficacy.[73] England is less litigious than the US because the threat of losing and paying a defendant's legal costs forces the plaintiffs to assess their cases more carefully;[74] however, its experimental application in the form of offer of judgment has not been come out with positive

[65] Cappelletti and Garth (n 1) 187. However, judges have a wide range of discretion while allocating the cost rules between the parties.

[66] Australian Law Reform Commission (n 16) 33.

[67] Andrew Higgins, 'Referral Fees—The Business of Access to Justice' (2012) 32(1) *Legal Studies* 109, 113.

[68] Davis (n 60) 405.

[69] Root (n 22) 604.

[70] Walter Olson and David Bernstein, 'Loser-Pays: Where Next' (1996) 55 *Maryland Law Review* 1161, 1162.

[71] Manitoba Law Reform Commission (n 7) 5; Australian Law Reform Commission (n 17) 33; The Law Commission of India (n 7) 8.

[72] Manitoba Law Reform Commission (n 7) 5; The Law Commission of India ((n 16) 7.

[73] Manitoba Law Reform Commission (n 7) 6. See also Thomas J Miceli, 'Deterrence, Litigation Costs, and the Statute of Limitations for Tort Suits' (2000) 20(3) *International Review of Law and Economics* 383.

[74] Sherman (n 20) 1870.

results in the US.[75] Third, it encourages reasonable settlements during the early stages of a case by providing financial incentives;[76] however, some scholars deny this notion. The loser pays rule does not aim to determine justice on the merits of a case; instead, it encourages settlements without judging the facts. It is also argued that the rule places extra burdens that deter parties from filing cases even when there are valid grounds to do so.[77] Zuckerman considered the rule 'wasteful and unjust'.[78]

Fee-shifting is not always automatic under the English rule; however, it is considered semi-automatic.[79] While exercising the cost rules, the courts apply their discretion to determine whether to award costs and, if awarded, the amount of the costs.[80] The application of this discretionary power is guided by *Halsbury's Laws of England: Courts, Cremation and Burial*.[81] However, Professor Pfennigstorf identified nine types of cases that can qualify for a waiver of the English Rule, including unprovoked actions, excusable ignorance of material facts, substantial mutual doubts about facts, doubts about the laws, appeals, vexatious actions, unnecessary procedures, actions among relatives and matters not subject to party dispositions.[82] Small claims disputes, litigation in industrial tribunals and cases where one party receives legal aid are also considered exceptions to the English rule.[83]

The loser pays rule has the basic principle that the party who can successfully enforce or defend their legal rights should be able to recover their legal expenses up to a reasonable amount.[84] This rule aims to control unreasonable expenses.[85] Some states have capped the costs at the initial

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[75] Harvey Weitz, 'Loser Pays: A Deterrent to Frivolous Claims? (1996) *New York Law Journal* 2.

[76] Manitoba Law Reform Commission (n 7) 6.

[77] Olson and Bernstein (n 70) 1162.

[78] AAS Zuckerman, 'A Reform of Civil Procedure: Rationing Procedure Rather Than Access to Justice' (1995) 22(2) *Journal of Law and Society* 155, 166.

[79] Root (n 22) 591.

[80] Until 1875, the cost automatically followed the event. In 1875, order 55 provided certain exceptions that the costs of all incidents and proceedings in the high court would be at the discretion of the court: see Arthur L Godhart, 'Costs' (1929) 38(7) *Yale Law Journal* 849, 852. Osevala (n 20) 188; The Law Commission of India (n 7) 7.

[81] Lord Mackay of Clashfern, *Halsbury's Laws of England: Courts, Cremation and Burial* (Butterworths LexisNexis, 4th reissued ed, 2002) vol 10, [22].

[82] Werner Pfennigstorf, 'The European Experience with Attorney Fee Shifting' (1984) 47(1) *Law and Contemporary Problems* 37, 47–54. See also Osevala (n 20)188.

[83] Woodroffe (n 62) 346–7; Osevala (n 20)188.

[84] Osevala (n 20) 187; Higgins (n 67) 113; John Peysner, *Access to Justice: A Critical Analysis of Recoverable Conditional Fees and No-Win No-Fee funding* (Palgrave Macmillan, 2014). See *CPR 1998* (UK) rule 44.3(2); Vargo (n 30) 1599. Fargo argued that in England, the recovery rate is two-thirds of their actual solicitor charges, and in Australia, the winning parties usually recovered between one-half and two-thirds of their costs.

[85] Peysner (n 84) 50.

assessment to prevent a profit-making mechanism.[86] Therefore, the costs are assessed, and the court awards a cost order accordingly (more detail in section 4.4).

While a party may be indemnified up to a reasonable limit, the English rule has increased plaintiff success rates at trial, average jury awards and out-of-court settlements to control unreasonable costs.[87] Another initiative introduced in England and Wales to control costs (other than fixed costs) is to exchange the cost estimates between parties. The court may order that this be done at any stage during the case. The parties must estimate the costs and disbursements already incurred that they intend to recover from the other party if successful in the case.[88] However, Peysner argued that these estimates are ineffective for controlling costs because the claims often exceed the estimates.[89]

Despite the wider application of this rule, legal scholars have identified some drawbacks. Posner and Shavell have argued that the loser pays to decrease the likelihood of settlement.[90] They highlighted that parties might pursue litigation because they are overly optimistic about their chances of winning, which causes them to discount the attorney's fees, making a settlement less attractive. However, this position has been challenged by Donohue, who argued that Posner and Shavell failed to consider the Coase theorem[91] and showed that the settlement rate would be identical when applying either the American or British rules.[92] Considering the filing and settlement effects, Hylton also argued that the incentive to litigate rather than settle is greater under the British rule than the American rule.[93] Hughes and Snyder also argued that fee-shifting rules encourage some plaintiffs to establish their rights while discouraging a portion of plaintiffs from

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[86] Ibid.

[87] Ibid.

[88] Her Majesty's Courts Services, *Practice Direction About Costs* (2017, 45th update) 6.3–6.4; Victorian Law Reform Commission, *Civil Justice Review* (Report No 14, 4 March 2008) 654 < ***https://www.lawreform.vic.gov.au/sites/default/files/VLRC%2BCivil%2BJustice%2BReview%2B-%2BReport.pdf***> (accessed 30 August 2019).

[89] Peysner (n 84) 46–50.

[90] Richard A Posner, 'Economic Analysis of Law' in Alain Marciano and Giovanni Battista Ramello (eds) *Encyclopedia of Law and Economics* (Springer-Verlag, 2019) 633; Steven Shavell, 'Suit, Settlement, and Trial: A Theoretical Analysis under Alternative Methods for the Allocation of Legal Costs' (1982) 11(1) *Journal of Legal Studies* 55, 65.

[91] Coase theorem is a legal and economic theory that affirms that where there are complete competitive markets with no transactional costs, an efficient set of inputs and outputs to and from an optimal production distribution are selected, regardless of how the property rights are divided: see Duncan Kennedy, 'Cost-Benefit Analysis of Entitlement Problems: A Critique' (1981) 33(3) *Stanford Law Review* 387, 392–3.

[92] John J Donohue III, 'Opting for the British Rule: Or, If Posner and Shavell Can't Remember the Coase Theorem, Who Will?' (1991) 104 *Harvard Law Review* 1093, 1099.

[93] Keith N Hylton, 'Fee Shifting and Predictability of Law' (1995) 71(2) *Chicago-Kent Law Review* 427, 444–5.

filing cases.[94] They further argued that it increases the defendant's costs and remains unappealing for procedural efficiency.[95] Katz found that the English rule is more expensive than the American rule.[96] Re-examining Hughes and Snyder's findings, Helland and Yoon argued that the English rule decreases the probability of settlements but increases the settlement amounts.[97] Due to uncertainty and unpredictability, the litigants cannot control their opponents' costs.

The prospect of paying the winner's attorney's fees along with one's own lawyer's fees presents a daunting risk that falls equally on plaintiffs and defendants.[98] It has a more severe effect on people with low or middle incomes than people with high incomes. Based on this disparate effect, in 1995, the Economist called for abolishing the English rule because it makes no economic sense and denies most citizens' judicial access.[99] Additionally, it can be difficult to determine the real winner if multiple issues are decided where one issue favours one party and the others go to the opposing party.[100] Awards for counterclaims also cause complications, as do multiple parties in a case.[101]

Loser pays rule's merit outweighs its demerit, and therefore it received wider acceptance. Still, it has some shortcomings. For example, it increases litigation expenses. However, in the context of Bangladesh, the loser pays rule can be a better option to reduce the backlog. Also, it enhances justice through financial remedies for those who are unnecessarily dragged into a court.

4.2.1.4 Settlement Offers in the Loser Pays Rule

Following the US, the UK also introduced a settlement offer in part 36 of the *CPR 1998*.[102] The purpose of the settlement offer was to pressure litigants to settle. In 2015, this part was amended to adopt significant changes, introducing new time limits and withdrawing the offer of a counterclaim. Thus, the time for settlement offers is limited to 21 days before a trial starts.[103] When

[94] Hughes and Snyder (n 24) 248; Edward A Snyder and James W Hughes, 'The English Rule for Allocating Legal Costs: Evidence Confronts Theory' (1990) 6(2) *Journal of Law, Economics, and Organization* 345, 377.

[95] Hughes and Snyder (n 24) 248.

[96] Katz (n 26) 145.

[97] Eric Helland and Jungmo Yoon, 'Estimating the Effects of the English Rule on Litigation Outcomes' (2017) 99(4) *Review of Economics and Statistics* 37.

[98] Sherman (n 20) 1871.

[99] William W Schwarzer, Fee-Shifting Offers of Judgment—An Approach to Reducing the Cost of Litigation (1992) 76 *Judicature* 147, 148.

[100] Sherman (n 20) 1873.

[101] Ibid.

[102] The *CPR 1998* (UK) pt 36.

[103] Ibid rule 36.5.

the offeree accepts the offer within the allotted time and in the prescribed manner, they will be entitled to the costs of the proceedings, including their recoverable pre-action costs up to the date on which the notice of acceptance was served on the offeror (unless the court orders otherwise).[104] Conversely, if the offeree fails to obtain a better money term in the judgement than the offer that is made, the defendant will be entitled to the costs from the date on which the relevant period expired and the interest on those costs.[105] Further, if the defendant fails to acquire a judgement that is at least advantageous to the claimant, the claimant will be entitled to some advantages, for example, interest on the awarded money or the costs of the indemnity basis.[106] However, the court has tremendous discretion to award costs considering the issues and consequences of making such an order.[107]

Australia also follows the loser pays rule and introduced offers to settle in the *Federal Court Rules 2011* (Cth).[108] Rule 25.14 states that if an offer is not accepted and the offeree does not obtain a more favourable judgement, then:

(a) 'the applicant is not entitled to any costs after 11:00 am on the second business day after the offer was served; and
(b) the respondent is entitled to an order that the applicant pays the respondents' costs after that time on an indemnity basis'.[109]

In short, the general rule in Australia for civil and judicial review proceedings is that the loser pays subject to certain exceptions. For family, industrial and administrative appeal tribunal proceedings, the cost rule is that each party bears their own costs subject to a disciplinary or case management costs order or an order for costs in favour of a party who would otherwise not have sufficient resources to present their case properly or negotiate a fair settlement.[110]

Compared to the UK and US, Australia is more specific when applying the offer to settlement rule. The offer of judgement rule clarifies that the fees will be shifted to the losing party only when they unreasonably refuse to accept a settlement offer. Some provisions have also been made for shifting the costs from the date the offer is accepted or rejected. Although there are many similarities

[104] Ibid rule 36.13.

[105] Ibid rule 36.17.

[106] Ibid.

[107] Ibid pt 36.

[108] The *Federal Court Rules 2011* (Cth) pt 25.

[109] Ibid rule 25.14.

[110] Australian Law Reform Commission (n 16) 8.

between these rules, they also have some differences, including the time limits, insertion of attorneys' fees and interests applied to the cost awards. However, they both aim to encourage negotiation and punish litigants who unreasonably refuse to settle. While considering the costs rules in civil cases, Bangladesh follows the US practice, although the interpretation of law demonstrates to follow the UK method. The empirical findings suggest there is a gap in the theory used to execute these rules (detail in section 4.3).

4.2.1.5 One-Way Cost-Shifting Rule

The one-way cost-shifting rule is another type of cost rule for criminal cases and particular types of civil cases.[111] Under this rule, the claimant can recover their costs only if they are successful. Otherwise, each party will bear their own costs.[112] The rule is usually subject to the court's discretion,[113] and its application is limited to certain types of civil cases, for instance, public interest litigation. (See figure 4.1). The benefit of not having these types of litigation stifled due to the threat of adverse costs orders.[114] However, many responses considered it inequitable to have a general rule providing for one party to be deprived of an entitlement to claim costs while remaining liable to pay costs if the other party succeeds.[115]

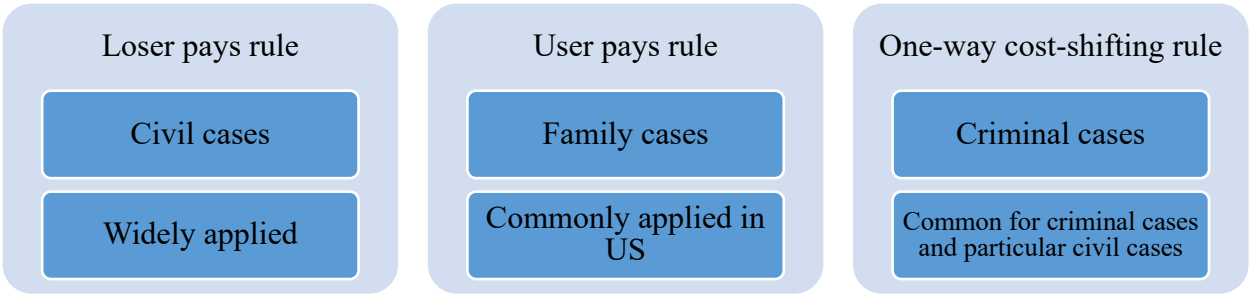

Figure 4.1: The Common Application of the Cost Rules (by this researcher)

4.2.2 Criminal Cases

Cost rules apply differently in criminal cases because the prosecution bears the expenses. The criminal justice system is built on the proposition that the prosecution must prove the defendant is guilty beyond all reasonable doubt (with some exceptions where the burden of proof is shifted to the accused). Initially, criminal cases followed the common law principle that the 'Crown neither

[111] Ibid 52.

[112] Hodges, Vogenauer and Tulibacka (n 1) 23.

[113] Australian Law Reform Commission (n 16) 36.

[114] Ibid.

[115] Ibid.

receives nor pays any costs'.[116] However, this proposition has changed over time, and one-way cost-shifting has been adopted. The underpinning principle of the rule is to not impose a substantial financial burden on defendants.[117] More recently, some countries have adopted the loser pays provision for criminal cases, arguing that it would be unjust if an innocent person suffers a financial hardship and is later unable to recover the costs. It is also argued that the criminal justice administration might be adversely affected if the prosecutions' initiation and conduct are unduly influenced by the risk of an adverse costs order.[118] However, a defendant's innocence is not always clearly established. Therefore, Mason CJ observed in *Latoudis v Casey* that:

> it would not be wise to award cost[s] upon the prosecution in all cases. If, for example, the defendant, by his or her [sic] conduct after the events constituting the commission of the alleged offence brought the prosecution upon himself or herself [sic], then it would not be just reasonable to award costs against the prosecutor.[119]

The cost rules in criminal cases are similarly applied around the world, except for when awarding costs upon the successful defendant and providing legal aid for the accused. The general rule in the UK is that an order for the payment of a successful defendant's costs should be made unless there are positive reasons for not doing so (the defendants' suspicious conduct or ample evidence supporting a conviction but acquitted on technical grounds).[120] In the UK, costs are usually awarded under the *Prosecution of Offences Act 1985* (UK) and *Costs in Criminal Cases (General) Regulations 1986* (UK). The costs awarded to either party must be just and reasonable.[121] The prosecution is also entitled to award costs if the defendant is unsuccessful.[122] However, the prosecution costs are limited to the case preparation, counsel fees and witness expenses. These payments are made from the central funds.[123] In the US, there are no specific cost provisions.[124] However, fines are imposed upon defendants if the case is proven beyond all reasonable doubt.[125] India and Bangladesh also follow the US practice and do not impose a cost in criminal cases.

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[116] Ibid 52. See also, The Courts of Equity and Common Law, 'The Jurist' (Vol XIII, part 1, 1849) 973.

[117] Ibid 53.

[118] Ibid.

[119] (1990) 170 CLR 534, [17].

[120] The *Prosecution of Offences Act 1985* (UK) s 16.

[121] Ibid ss 16, 18.

[122] Ibid s 18.

[123] Ibid s 17.

[124] The *Federal Rules of Criminal Procedure 1946* (US) rules 32, 48.

[125] Ibid rule 38.

Like the UK, the local court in NSW have identified some circumstances where costs may be ordered in criminal cases: (1) the costs are awarded to the defendant at the end of a committal if a defendant is discharged, a matter is withdrawn or dismissed in the summary trial or the proceedings are found invalid; (2) the costs are awarded to the prosecutor if the defendant is convicted or an order is made against the defendant;[126] (3) the costs against either the defendant or prosecutor are satisfied if the matter is adjourned; and (4) a party may incur additional costs because of unreasonable conduct or delay.[127] Sections 117 and 214 of the *Criminal Procedure Act 1986* (NSW) specify the grounds where a successful defendant may be awarded costs. Under the *Costs in Criminal Cases Act 1967* (NSW), a magistrate may grant a certificate during the committal or summary proceeding if the defendant is successful upon their satisfaction.[128] Upon receiving a certificate, the defendant can apply for the payment from the consolidated funds of the proceedings.[129] In personal violence cases, an order under the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) may award costs to an unsuccessful complainant only if the complaint was made frivolously or vexatiously.[130] Like the UK, Australia has also ensured for just and reasonable costs only, and the onus is on the balance of probabilities. The cost rules for criminal cases in Australia are as follows:

- The prosecution always pays its own costs unless the accused unreasonably fails to comply with the court's directions or the legislation creating the offence provides a right to recover costs.
- The prosecution pays the defendant's reasonable costs if they successfully obtain a dismissal, acquittal, or withdrawal of charges unless the court is satisfied that in all the circumstances of the case, some other order should be made regarding the costs.[131]
- All criminal cases that are dismissed or not proven should not be awarded costs because the acquittal does not always mean the defendant is innocent. Fox argued that the criminal law system is inadequate and incomplete and that sometimes the corrupt or brutish investigation of a crime may obscure the accused's innocence.[132] Fabricated police

[126] The *Criminal Procedure Act 1986* (NSW) s 215.

[127] Ibid s 216.

[128] The *Costs in Criminal Cases Act 1967* (NSW) s 2.

[129] Ibid s 4.

[130] The *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 99(3).

[131] Australian Law Reform Commission (n 16) 52.

[132] Hon Russel Fox, *Justice in the Twenty-First Century* (Cavendish Publishing Limited, 2000) 143.

evidence, confessions or corruption involved in criminal prosecutions are common in NSW[133] , and similarities have been found in Bangladesh (more discussion in chapter 7).

Gravelle identified some criteria for assessing the two most common cost rules (loser pays and user pays), including whether they promote settlements, the increase or decrease in payments from defendants to plaintiffs or how they affect the number of legal disputes and amount of the costs.[134] Settlements only occur if a defendant's estimate of losing exceeds the plaintiff's estimate of their net gain.[135] Bowles argued that the loser pays rule risks that the potential expenses may cause litigants not to sue in the first place.[136] It could be argued that the English rule controls vexatious litigations but encourages meritorious claims. Alternatively, the American rule encourages meritless litigations but increases the volume of cases. Katz argued that the English rule affects the number of filings but increases the average costs.[137] Thus, it is not clear whether the English rule is more effective than the American rule; however, it is clear that neither provides sufficient incentives for parties to settle their dispute when a legal liability is clear. Though neither of the rules can be termed as perfect, however, considering the above discussion, it can be argued that Bangladesh should ensure the application of the indemnity rule or loser pays rule not only in theory but also in practice. This is because a large volume of filing with low workforces is increasing the case backlog. The application of loser-pays rules would control the false and vexatious case filing and thus would reduce the backlog. The following section 4.3 justifies the argument.

4.3 Existing Cost Rules in Bangladesh

4.3.1 Civil Laws

The laws in Bangladesh have not used the term 'the loser pays rules'. However, in civil cases, the *CPC 1908* imposes an obligation to write a reason if the 'cost [that] follows the event' is not complied.[138] Thus, the rationality of legal provisions conforms to the English rule. Thus, the principles of costs provisions under the *CPC 1908*, can be categorised into four: compensatory

[133] Ibid 145.

[134] HSE Gravelle, 'The Efficiency Implications of Cost-Shifting Rules' (1993) 13(1) *International Review of Law and Economics* 3.

[135] Katz called this the 'optimism model'. See Katz (n 26) 157–8.

[136] Roger Bowles, 'Settlement Range and Cost Allocation Rules: A Comment on Avery Katz's "Measuring the Demand for Litigation: Is the English Rule Really Cheaper?" ' (1987) 3(2) *Journal of Law, Economics, and Organization* 177, 178; Theodore Eisenberg and Geoffrey P Miller, 'The English Versus the American Rule on Attorney Fees: An Empirical Study of Public Company Contracts' (2013) 98(2) *Cornell Law Review* 327, 337.

[137] Katz (n 26) 171.

[138] The *CPC 1908* (Bangladesh) s 35(2).

costs regarding false or vexatious claims, costs for the delays of making an application regarding interlocutory matters, costs for adjourning hearings and costs at the time of judgements.[139]

The law limits the compensatory costs for false or vexatious claims to BDT 20,000 (AUD 322.64).[140] To impose this cost, law requires an object to any claims or defences on the grounds must be raised by the other party earlier that they are false or vexatious, which was disallowed by the court at that time.[141] However, the law is not clear if no objection is made, whether or not to impose cost. The long duration of trials can fade the memory of any claims, even if the objections are made during the proceedings. Therefore, these provisions are hardly ever imposed.

For interlocutory matters, the law specifies that costs may be imposed up to BDT 2000 (AUD 32.26)for not complying with a court order within the allotted time and BDT 3000 (AUD 48.40) for delaying court proceedings by submitting any application that should be filed earlier.[142] The application of cost orders for interlocutory matters has not been clearly articulated. The huge amount of pressure on the courts (see Chapter 7) and non-cooperation from lawyers have been identified as the main reasons for this lack of clarity.

The cost may be between BDT 200 (AUD 3.2) and BDT 1000 (AUD 16.13) if adjournments are made more than six times.[143] The *CPC 1908* also adds non-compliance for adjourning hearing times if the plaintiff renders the suit dismissed or if the defendant disposes of the case as ex parte.[144] It further advises that the court shall not grant more than three adjournments to a party.[145] If both parties submit for an adjournment, the costs shall be imposed on them, and the court will not adjourn any hearing without recording a reasonable explanation. Further, if a suit is dismissed or disposed of ex parte under this provision, the suit shall not be re-opened unless the concerned party makes an application within 30 days of the order with the cost of BDT 2000 (AUD 32.26) deposited into the court, in which case the deposited amount shall be paid to the other party.[146] The law states that judges may charge interests in addition to the award costs. This study found that these adjournment costs are rarely applied in Bangladesh. However, compared to other cost

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[139] The *CPC 1908* (Bangladesh) s 35, O XVII.

[140] The *CPC 1908* (Bangladesh) s 35(A). BDT 1 = AUD 0.016: see 'Currency Converter', *OANDA* (Web Page, 2021) ***https://www.oanda.com/currency/converter/*** (access 28 September 2021).

[141] *CPC 1908* (Bangladesh) s 35(A)(1).

[142] Ibid s 35(B)(1), (2).

[143] Ibid pt XVII, rule 3.

[144] Ibid.

[145] Ibid pt XVII, rule 4.

[146] Ibid pt XVII, rule 7.

categories, the courts order these adjournment costs most often because the execute process is simpler than the other cost provisions.

The costs at the time of a judgement largely depend on the court's discretion. The judges are empowered to determine by whom or out of what property and to what extent such costs should be paid.[147] The laws do not articulate that the costs should be imposed in a judgement. However, they do mention 'the costs of an incident to all suits', which includes judgements.[148] The *CPC 1908* also articulates that the details of the costs must be specified in a decree, including any set-off payments.[149] The *Civil Rules and Orders* (Bangladesh) state the following:

> Costs in decrees should be very carefully calculated. A party who has been awarded costs in the judgment [sic] or order shall be allowed all such costs, charges and expenses, as shall appear to have been necessary or proper for the attainment of justice or for defending his [sic] rights; no costs shall be allowed which appear to the court to have been incurred or increased unnecessarily or through procrastination, negligence or mistake.[150]

Although the law states that the court must not indemnify if costs are incurred from a mistake or negligence, it does not clarify whether costs should be imposed on a lawyer who makes a mistake or is negligent. The law indicates that the decree will explicitly mention the amount of the expenses, which is limited to the court fees (including all petition fees), process fees (including all postage fees), expenses of the witnesses and any other costs, such as commissions or charges of affidavits.[151] However, the *CPC 1908* does not articulate how the costs should be assessed or whether any documentation is required as proof of assessment. Even if a case is decreed or dismissed with costs, the party against whom the judgement is pronounced must deposit some expenses; however, they do not bear the costs of the opposite party. The expenses in the decree are very different from the actual expenses. Further, because the cost provisions are not mandatory, the court is reluctant to impose cost awards and often follows the American rule. The law defines that the '[p]roper and necessary costs should exclude expenses like the following unless the court specially directs otherwise:

i. [c]ourt-fee stamps on all applications dismissed or not allowed or not pressed

[147] Ibid s 35(1).

[148] Ibid.

[149] Ibid pt XX, rule 6(2), (3).

[150] The *Civil Rules and Orders* (Bangladesh) rule 164(1).

[151] Ibid chs 26, 27.

ii. [c]ourt-fee stamps on all unnecessary or defective applications or applications to suit the convenience of a party, such as for adjournment of hearing, for time to file written or other statement or to take some step for showing cause in case of any default or omission for withdrawing a claim for amendment of any pleading or petition
iii. [e]xpenses of affidavits improperly or unnecessarily incurred
iv. [e]xpenses for filing and proving all unnecessary document or documents [that] the other party was not previously called upon to admit by notice or of exhibiting all unreasonable interrogatories
v. [p]rocess-fees for serving persons dismissed from the suit, or found by the court to have been unnecessarily impeded, or the claim against whom have been dismissed, withdrawn or prosecuted
vi. [c]harges incurred in procuring the attendance of unnecessary witnesses'.[152]

Rule 165 of the *Civil Rules and Orders* (Bangladesh) clarified that:

> where 'proportionate costs' are allowed, such costs shall bear the same proportion to the total costs as the successful part of the claim bears to the total claim when 'corresponding costs' or 'cost according to success' are decreed, [and] the assessment is to be made as if the suit had originally been brought at an amount representing the value of the successful part of the claim.

This indicates that the law advises to follow the loser pays rule; however, the user pays rule dominates in practice. In Bangladesh, the existing law focuses on the necessary or proper costs of attaining justice while calculating costs. Thus, rule 164 states:

> Costs in decrees should be very carefully calculated. A party who has been awarded costs in the judgment [sic] or order shall be allowed all such costs, charges and expenses, as shall appear to have been necessary or proper for the attainment of justice or for defending his rights; no costs shall be allowed [that] appear to the Court to have been incurred or increased unnecessarily or through procrastination, negligence or mistake.[153]

The law is not specific about what 'proper or necessary costs' includes; instead, it clarifies what it excludes. An analysis of these provisions shows that all unnecessary or unsuccessful costs will be deducted from the proper cost calculations. Further, the absence of a specific procedure for obtaining the costs from the opposite party, the winner generally does not execute the procedure. The law indicates that even if the court awards a cost order, the party will have to file a separate case to recover the money, which is another complex process; thus, the outcome of the case is

[152] Ibid rule 164(2).

[153] Ibid.

often futile.[154] In practice, from the moment a case is filed, hundreds of petitions are submitted until the case is disposed of. Some of them are allowed and some not. Therefore, it is not clear how possible it is to deduct all the unsuccessful petitions and identify their necessity to estimate the costs that have occurred.[155] This is an unreasonable and very complex, time-consuming process.

Volume II of the *Civil Rules and Orders* (Bangladesh) prescribes a format for drawing a decree where the litigation costs (specifically, the costs of all successful court stamps, affidavits, witness appearances, commissioner appointments or documents) are to be mentioned. The court determines the process, court, witness appearance and commissioner fees, and an idea of the costs can be drawn from the court order; however, no specific provisions help determine the lawyer fees, and the decrees do not mention the lawyer fees, except the cost of the *vakalatnama*.[156] In practice, lawyers charge per appearance (see Chapter 7); therefore, there is no effective way of calculating the lawyer fees. The more substantial portion of the litigation costs arise from the lawyer fees. However, disregarding this portion, it is necessary to address how possible it is to estimate the proper or necessary costs. The laws do not specify how to determine litigation costs; there are no models for assessing expenses or any specific provisions for recovering money if any cost award is ordered. This may be considered as a major defect of the *CPC 1908.*

4.3.2 Criminal Laws

For criminal cases, the *CrPC 1898* does not suggest any cost orders unless there is a property-related dispute.[157] If the case is related to immovable property, the magistrate has the discretionary power to order costs against any party. However, it is expected that the costs will not exceed the actual expenses. This expense does not cover the legal expenses. Also, the law does not provide any specific provisions for assessing the legal monetary costs. When an accusation is proved to be false or vexatious, the magistrate may order for a compensation.[158] Though the limit

[154] The *CPC 1908* (Bangladesh) pt XXI, rules 10–12.

[155] The *Civil Rules and Orders* (Bangladesh) rule 164(2)(ii).

[156] *Vakalatnama* is the document that confers power upon the lawyer to plead on behalf of their client; it is mandatory for a case to proceed.

[157] The *CrPC 1898* (Bangladesh) ch XII.

[158] Ibid s 250(1).

for compensation is any amount up to BDT 1000.[159] The law also allows the magistrate to provide a copy of the judgement to the accused free of charge if they think it is required.[160]

In Bangladesh, the general penal provisions, such as, the offences, the amount of punishments and fines relate to the offences, are described in the *Penal Code 1860* (Bangladesh).[161] The limit of imposing fine is determined by the pecuniary jurisdiction of the concerned magistrate or judge and not the victim's financial loss (unless the victim files a separate case claiming compensation in civil courts, which is another complicated and lengthy process). As mentioned, this financial loss does not necessarily cover victim's legal costs. However, the law allows the courts to convert the fine to the compensation fully or partly with some conditions.[162] For example, when the victim encounters any loss or injury resulting from the offence and a substantial compensation is recoverable in a civil court or when the offence includes theft, criminal misappropriation, criminal breach of trust, cheating or dishonestly receiving stolen property and the victim encounters any resulting financial losses. When it exceeds magistrate's financial jurisdiction, the victim needs to file civil cases. Also, the State must follow section 386 of the *CrPC 1898* to recover any fines, which is a complicated and inoperative process and has been found to be ineffective.[163] Therefore, these provisions are rarely applied. All these provisions deal with the compensation and not legal costs of the litigants or victims. The fine imposed on an accused is usually credited to the government's funds, if not alternatively directed, which does not benefit the victims.

Apart from the general penal provisions, some special laws were later enacted that made provisions for compensating victims. The *Women and Children Repression Prevention Act 2000* (Bangladesh) allows victims the right of compensation for some specific offences.[164] This Act also empowers tribunals to attach and sell the accused's property and compensate the victim. The *Environment Court Act 2010* (Bangladesh) also allows compensation to be sourced from the accused's property.[165] The *Domestic Violence (Prevention and Protection) Act 2010* (Bangladesh) has broadened the scope of victimisation, including personal injury, financial trauma,

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[159] Ibid s 250(2).

[160] Ibid s 371.

[161] Ibid s 4(o).

[162] Ibid ss 545(1), 546. In this reference, *Dilruba Akter* v *AHM Mohsin* (2003) 55 DLR 568, is an example of applying section 545 of the CrPC 1989 (Bangladesh), where the court ordered to pay the fine of offence to the first wife.

[163] In this section, the law advises that the collector from the district should recover the money through the attachment of property.

[164] *Women and Children Repression Prevention Act 2000* (Bangladesh) ss 4–14.

[165] The *Environment Court Act 2010* (Bangladesh) s 9.

psychological damages, or material damages to any property.[166] This Act considers compensation a victim's right. The *Prevention and Suppression of Human Trafficking* Act (PSHT) *2012* (Bangladesh) confers power on tribunals to pass an order to the accused to pay compensation to the victim.[167] This law considers the victim's physical and mental condition while imposing an order for compensation, and the victims can go to the civil courts to recover the compensation. The *Acid Control Act 2002* (Bangladesh) and *Acid Crime Prevention Act 2002* (Bangladesh) cover compensation for acid victims. Motor accident victims are also entitled to compensation claims under the *Sorok Poribohon Ain 2018* (Bangladesh) (*Motor Vehicle Act 2018*).[168] All these special Acts deal with particular offences only, and their application is also limited to the victim's compensation and the court's pecuniary jurisdiction. However, these compensations do not necessarily consider the victim's legal costs, nor do the provisions specify how to assess or calculate the legal costs. Even if the court order for a compensation the execution process is complicated both for the victims and the State itself.

A landmark court decision in this regard was pronounced in 2017.[169] Two separate cases were filed regarding the same incident: one for offences under penal provisions and another for compensation in the tribunal (under tort law). The later case was transferred to HCD.[170] The HCD awarded 4.6 crores compensation to the victim's family against the bus owner, bus driver and insurance company to set significant legal principles.[171] This was an exceptional pronouncement due to the amount of media coverage and public sensitivity. However, the award was not made on assessing victim's legal cost instead it had been set an example for tort law. Significantly, there are no provisions to assess victim compensation to help them financially. Although the general penal provisions allow imposing a fine of only a certain amount (*CrPC 1898,* s 32.), however, these fine limits do not apply to special laws. The law also allows the payment of the expenses of the complaint and witnesses incurred at the time of the proceedings; however, if their presence is delayed unreasonably, the court may not allow the witness's costs to appear in the court,[172]

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[166] The *Domestic Violence (Prevention and Protection) Act 2010* (Bangladesh) s 16.

[167] The *Prevention and Suppression of Human Trafficking Act 2012* (Bangladesh) s 28.

[168] The *Acid Control Act 2002* (Bangladesh) s 47; the *Motor Vehicles Ordinance 1983* (Bangladesh) has been replaced by the *Sorok Poribohon Ain 2018* (Bangladesh). See, s 52 of the *Sorok Poribohon Ain 2018* (Bangladesh). The new Act delegated the trial power on the exeutive magistrates (s 114).

[169] *Catherine Masud and others* v *Md Kashed Miah and others*, 70 DLR (HCD) 349 (Bangladesh, 2016).

[170] See *the Motor Vehicles Ordinance 1983* (Bangladesh) ss 127, 128.

[171] Taqbir Huda, 'A Landmark Compensation Suit', *Daily Star* (online, 5 December 2017) <https://www.thedailystar.net/law-our-rights/landmark-compensation-suit-1500478> (accessed 25 April 2020).

[172] The *CrPC 1898* (Bangladesh) s 544; *Criminal Rules and Orders (Practice and Procedure of Subordinate Courts) 2009* (Bangladesh) rule 128(2).

however, this is not applied in practice. It can be argued that the present provisions do not assess the litigant's actual losses but instead compensate in lump sums.

From the above discussion, it can be inferred that the limited and scattered cost provisions in the *CrPC 1898* are nominal. Further, there are no laws or guidelines for assessing a victim's actual expenses or the accused's expenses if they are falsely prosecuted. There is also a lack of simple and specific provisions for recovering from an opposing party without filing a new case. Thus, the existing provisions are not for assessing the litigant's costs but for allowing partial compensation.

To summarise, it can be argued that the existing cost rules do not indemnify the litigants in civil or criminal cases. The vague appearance of the legal provisions affects the implementation process. The absence of cost assessments and simple execution processes (an integrated cost rule) makes those provisions imperceptible. The current rules only offer a mode of compensation for any wrong deed where judicial discretion plays a vital role. Another gap in the existing cost rules is that neither civil nor criminal laws include the lawyer's fees, which is the most considerable litigation expense (see section 7.2.1.1.). Section 4.3.3 analyses how the existing cost provisions are applied through judicial discretions.

4.3.3 Application of Judicial Discretion to Cost Awards

The *Constitution of Bangladesh* promises to ensure speedy trials for criminal offences.[173] However, the factual enigma persistent with the justice delivery system delays the case-processing time. The delay of trial in criminal cases is further aggravated by appeals, motions and revisions, which often remain pending for years.[174] Further, the average time to dispose of a civil case is five years.[175] This empirical evidence (*BQRS 2019*) suggests that applications for cost award in litigations are rare. Along with the 36 interviewees from different groups, eight records from civil and criminal cases were scrutinised to examine the application of the existing cost rules. Another 50 judgements from the cause lists were analysed to discover whether any costs were awarded.

The civil and criminal legal provisions confer immense discretionary powers upon the courts for imposing cost awards. The law suggests applying court discretion within a reasonable scope,

[173] The *Constitution of the People's Republic of Bangladesh 1972* arts 35(3).

[174] Ridwanul Hoque, 'Courts and the Adjudication System in Bangladesh: In Quest of Viable Reforms' in Jiunn-rong Yeh and Wen-Chen Chang (eds) *Asian Courts in Context* (Cambridge University Press, 2014) 481.

[175] Ibid; Ummey Sharaban Tahura, *Case Management in Reducing Case Backlogs: Potential Adaptation from the NSW District Court to Bangladesh Civil Trial Courts* (Master of Philosophy Thesis, Macquarie University, 2015) 141; 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*** (Accessed 17 April 2018).

although this application depends on the judge's qualifications and background. Further, the law does not define 'discretion' in the context of costs or provide any guidelines for its application.[176] The word discretion often appears differently, such as 'as the court deems proper', 'as the court thinks reasonable' or 'as the court otherwise directs'. Judges have unbridled discretionary power no matter the form of the words used.[177] The unguided and wide range of discretion means that judges can choose not to award costs because it is not mandatory. Therefore, the winning party rarely receives any financial benefits. Additionally, this wide range of discretion extends the possibility of unevenly imposed cost rules and increases the possibility of disrupting the equality principle. The witness-based criminal laws also leave little space for a wrongly accused party to receive any financial remedies.

This study has found that the award of costs at the time of a judgement are rare in civil cases, even if the case is found false or vexatious.[178] Further, costs are rarely awarded for delaying the progress of a case. However, costs are awarded occasionally at the time of a hearing on the grounds of adjournment. For criminal cases, fines are commonly imposed along with the term of imprisonment at the time of a judgement. If a case is found false or vexatious, the accused receives the only remedy of acquittal or discharge, whatever the form is, without any financial compensation. Victims are also not awarded any compensation unless they file a separate case, which is rarely done. Section 4.3.3.1 and 4.3.3.2 demonstrate how the cost rules have been applied in practice.

4.3.3.1 Civil Cases

This study found that CV-1 was a declaration case for the correction of a record of rights, which was filed in 2007. On 7 January 2014 (seven years after filing), the first date was fixed for the hearing. As of the interview date (1 April 2019), the case had been scheduled for a hearing 37 times, and, as of 7 February 2019, only the examination-in-chief of one witness had been completed. After scrutinising these dates, this study found that the parties had submitted time petitions on 25 dates fixed for hearing, and the judge had imposed a cost of BDT 500 three times. The judge postponed the hearing on four dates because they were busy with other cases and could

[176] *Bangladesh Legal Aid and Services Trust and Others* v *Bangladesh and others*, 1 SCOB (AD) (Bangladesh, 2015).

[177] Hon Lord Justice Bingham, 'The Discretion of the Judge' (1990) 5(1) *Denning Law Journal* 27, 28.

[178] In this regard, the false, frivolous, or vexatious cases can be clarified, such as false or fraudulent cases (based on untrue facts and lack of legal merits), frivolous cases (technically correct cases but done essentially to be vindictive), vexatious cases (cases without legal merit). Apart from this, there may be other categories – such as baseless claims (facts are not falsified but lack evidence). In criminal cases, if a case is proved fraudulent or vexatious, the remedy lies in filing a separate case against the informant. See section 211 of the *Penal Code 1860* (Bangladesh).

not record the witness depositions.[179] Three dates were postponed on lawyers' grounds, including one instance where the plaintiff's lawyer was absent. During the remaining five days, the deposition was partially recorded (See figure 4.2). Although the law allows up to six adjournments during a trial by each party, it is obligated to impose costs if this exceeds the limit no more than three times.[180] It was also observed that the hearing was postponed another five times to resolve interlocutory matters, such as amendments to pleadings (which should be solved earlier). However, the court did not impose any costs for late submissions. Several petitions were also submitted at a later stage, and the case was reversed to an earlier stage without any cost orders. Therefore, it was deduced that the practice was very different from the applicable theory.

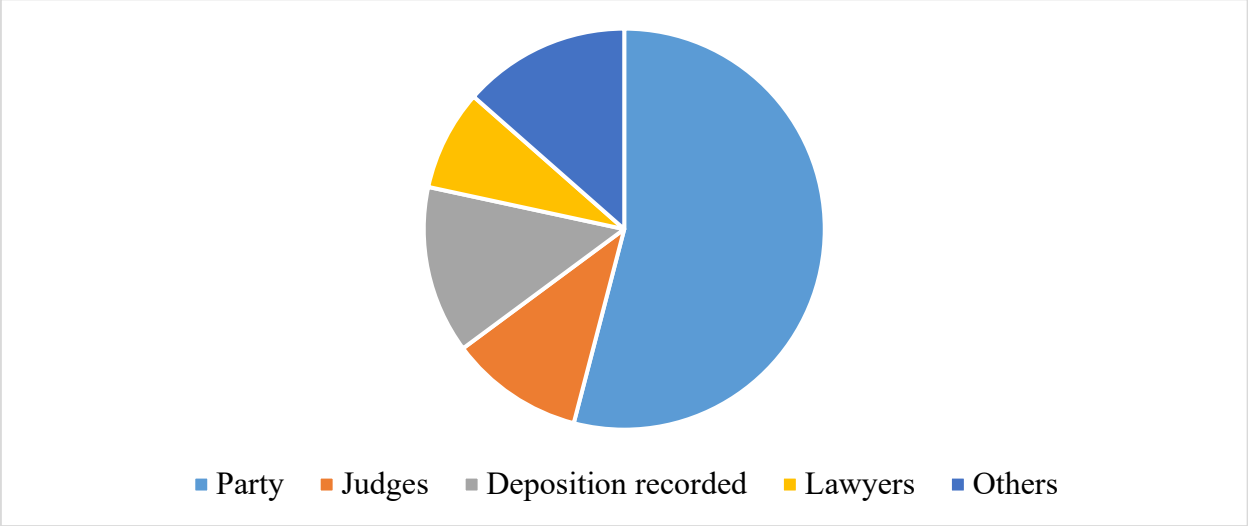

Figure 4.2: Dissection of the Allocated Dates During the Trial for CV-1

CV-4 was a case for a declaration of title that was filed in 2017. At the time of the interview (1 April 2019), the case had not been prepared for a hearing. During most of the stages, both parties had filed time petitions, and the court had allowed adjournments liberally without awarding any costs. Since filing, the case had been scheduled 28 times to complete five stages of the case proceedings. Although the law allows adjournments at any stage with sufficient cause, the cause list did not explain anything or indicate whether any costs were awarded to the defaulter.

The law permits adjournments on exceptional grounds, it is often difficult to identify the real purpose for an adjournment (see Chapter 7). The empirical study tried to find the causes of non-compliance with the law. One interviewee judge shared that he generally imposes costs for

[179] The law mandates that five cases are arranged for hearing each day and the court time runs from 9:30 am to 4:30 pm. Thus, it can be difficult to testify and write the deposition of all the witnesses present before the court on that date: see The *Code of the Civil Procedure 1908* (Bangladesh) pt XVIII, rule 20.

[180] Ibid pt XVII, rules 1, 4.

adjournments at the trial stage but never during the judgement on the losing party or for any late submissions. CVJ-4 further clarified his standing:

> *A civil case is failed for two reasons: if there is a lack of evidence or if it is a false or meritless case filed to harass others. We compare the balance of convenience–inconvenience, and sometimes if it goes in favour of one party [it] does not mean that the other party is at fault. However, even if we find a case false, we do not impose costs. One reason is [the] absence of [a] proper assessment process of litigation expense[s] and non-cooperation from lawyers.*

The lawyers' acts of non-cooperation were prioritised by several interviewees. Other reasons included in the interviews included the huge workloads for the judges to process the case records at the time of granting the adjournments, the complex recovery process that discouraged them from awarding costs, the scattered and vague cost provisions that do not provide a complete method for assessing litigation expenses, the existing legal provisions that ignored the largest expenditure (lawyers' fees) and the cost awards being largely left to judicial discretion. The ratio of judges to pending cases in Bangladesh is inconsistent and might affect how the legal obligations are followed. Another CVJ-1 clarified this:

> *The cost calculation provisions are so vague, inadequate and complex that no one even wants to award costs at the time of judgement[s]. Also, the lawyers' fees are not included in the existing costs rule, which is the largest amount of litigation expenses. It would be difficult to insert them as they work on cash and do not provide any receipt [for] their payment.*

This substantiated that the largest amount of the litigation expenses is overly ignored. Due to the absence of proper documentary proof for lawyers' fees, the assessment process is often incomplete.

The execution process is also difficult to accomplish. In civil cases, recoveries are generally initiated through *the Public Demand Recovery Act 1913* (Bangladesh) or a money suit through the money loan recovering courts, which can further delay case proceedings. Due to the complicated and time-consuming process, litigants can rarely execute money recovering processes even if the court orders cost awards.

This empirical study found that the interviewees supported the implementation of cost orders. Most of the interviewees thought that without financial remedy, the legal remedy does not constitute justice. CVC-1 stated: 'I already spent thrice than the disputed land worth. If I do not receive an economic remedy, how would I say that justice has been delivered?' The judges and court staff also had similar views. However, the lawyers and representatives from civil society had mixed opinions. For example, COM-2 stated that the 'economic remed[ies] definitely enhance justice,

but [the] application of cost rules would be challenging'. Cost rules would provide them with legal and economic relief and increase justice. Several interviewees expressed their frustration, stating that they had already expended a large amount of their disputed property and ultimately received nothing, even though they might win. Some lawyers emphasised on implementing cost rules, and others were opposed to the rules because they may impose additional financial burdens on the litigants. Notably, Bangladesh legal provisions do not impose costs upon lawyers.

The data also demonstrated that due to the inflation of land prices, the rate of filing false cases had been increased. Cases are often filed to harass others or for monetary benefits. Mostly, people with lower incomes lose because they must drop their legal claims due to the absence of economic capacities. A total of 32 interviewees expressed that the cost awards should be mandatory for false or vexatious cases. This would decrease the rate of false cases. They also indicated that the costs should be assessed to indemnify the litigants who were brought to the courts unnecessarily. If the application of cost rules were precise, then the case filings would be reduced automatically. It was also noted that the current cost rates are outdated and too low to deter people from filing vexatious cases. Therefore, the objects of the cost rules have been thwarted. The current low rate of the cost awards and complicated implementation processes have made their application futile. This study suggests that the costs should be realistic, actual, and reasonable, and their execution should be visible. However, if a genuine case fails for lack of evidence, it should also be considered. The invisible costs that result from tips or bribes also hinder access to justice (see Chapter 7). Further, cost rules may not be useful for covering the visible costs if a proper assessment process is absent, and it would be difficult to enforce the assessment process without establishing a proper body.

The present study also found that a cost calculation should be a mandatory requirement in a decree of a civil case. It complies with the stamp fees, *vakalatnama's* stamps, affidavits, service of summons, commissioners' fees and paper costs for the plaintiffs (see section 4.3.1). The amounts referred in decrees are often significantly different from the actual costs incurred by the litigants. At the time of the interview, the court staff who had written decrees stated that their estimations were based on the legal prescriptions, which are outdated, and that no detailed assessment procedures were available. No documentation or evidence is legally required to support their estimations. In most cases, the courts do not award any costs at the time of a judgement, or, in the award, the court mentions the costs as prescribed by the law or simply mentions 'with costs'.[181] Therefore, these rough estimations of costs as directed by the law or impulsive calculations do not positively indemnify the winner and leave the largest amount of the expenses (lawyers' fees) to be covered. Thus, the case records and interviews demonstrate that the costs rules are not effectively

[181] The limit of awarding costs for false cases is BDT 20,000.

applied in practice, except with a limited application when adjourning a hearing, which is also inconsistent with the laws. Section 4.3.3.1 discussed how the cost rules have been applied in civil cases in Bangladesh. Section 4.3.3.2 examines how the cost provisions are applied in criminal cases.

4.3.3.2 Criminal Cases

CR-2 was an offence against human body (grievous hurt) case filed on 2 April 2011. On 20 June 2011, the charge sheet[182] was filed, and the case was scheduled for hearing on 17 November 2011. Since then, the case has been scheduled for hearing 44 times, and only one witness deposition had been recorded. On the other dates, the hearing was adjourned due to the absence of witnesses. Between 25 February 2016 and 22 January 2019, the case record was sent to the higher court to resolve a criminal motion. During this time, the case was postponed due to the absence of the physical case record in the court. The same order stating that 'the prosecution had failed to present witnesses' was passed on each of the dates. The court continuously issued summonses, witness warrants and non-bailable witness warrants;[183] however, no compliance reports for those summonses or warrants were submitted, and no witnesses appeared. Initially, the accused presented at the court or submitted a time petition; however, after a certain time, the accused's presence became irregular, and the court issued a warrant to the accused to ensure their presence. Analysis of the case records deduced that the case was ready for trial within seven months of its filing. However, due to the absence of the witnesses and the report of the witnesses' summons and warrants, the case could not proceed to the next stage. Ironically, the prosecution was not held accountable for failing to produce witnesses while the accused was not compensated for their financial losses to track their attendance in the court.

CR-3 was filed under a special Act on 4 October 2016, and the charge sheet was submitted within 15 days of the investigation. On 17 May 2017, the case was ready for trial. By the interview date, 18 dates had elapsed, and no depositions of any witnesses had been recorded. Like CR-2, the court repeatedly issued witness summons and warrants, and the prosecution failed to ensure their presence. During these dates, the defendants appeared regularly to secure their bail.

It is evident from the empirical data that the fines imposed on the accused parties are generally credited to the government account and not the victim unless the courts say differently. Therefore,

[182] A charge sheet is an investigation report by an investigating officer containing the charges against a person under the law.
[183] The general process of witness appearance in the court is to issue a summons; if the witness does not appear, then a witness warrant and finally a non-bailable witness warrant is issued in the local police station.

it can be assumed that the victims are extremely unprotected from the state's mechanisms.[184] Further, the law does not widen the definition of a crime victim. A primary victim's or their dependant's suffering can be physical, mental, psychological, economic or social and have long-term effects. However, these factors are only considered if a case is filed under special laws. Recently, a judge in a rape/murder case (filed under a special law) ordered that the bus place of occurrence) be given to the victim's family.[185] He also ordered that the victim's family be compensated out of the fine imposed upon the accused. Generally, if a victim wants compensation, they must file a separate case (see section 4.3.2). CRJ-1 shared that 'in Bangladesh, generally, victims do not get any compensation unless through filing a separate case'. COM-2 stated the same and added that 'they even are not aware that a separate case filing option is available for availing compensation'. The other cost provisions, such as the informant or witness appearance costs at the time of the trial or inquiry, are rarely implemented.[186] These costs are all for compensation rather than recovering the litigation expenses. It was also exposed that these provisions support informants, witnesses or victims with a nominal amount that is connected with the magistrate's pecuniary jurisdiction. However, in the special laws, for example, the *Pure Food Act 2013* (Bangladesh) (*Nirapod Khaddo Ain 2013*)[187] or *the Electricity Act 1910* (Bangladesh), the magistrates' pecuniary jurisdictions have been extended beyond their general capacity, and the application of these provisions largely depends on the judicial discretion, which is rarely applied.

One interviewee (CRJ-3) expressed that the legal limit does not impose costs upon the defaulter in criminal cases because there is a lack of cost assessments in criminal law, and in most cases, the prosecution fails to prove the case, which does not always mean that the accused is innocent. The data demonstrated that the punishment rate is very low in Bangladesh. Following the common law principle, the prosecution in Bangladesh does not pay or receive any legal costs. The microscopic cost provisions in criminal proceedings are hardly visible in practice. It can be deduced that the criminal laws aim to ensure the imprisonment of any offenders; however, this is the only real remedy for the victims. Neither a victim nor a wrongly accused can receive any financial remedies through the law. However, certain types of cases demand financial remedies,

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[184] Fhameda Qudder, 'Crime Victims' Right to Compensation in Bangladesh: A Comparative Approach' (2015) 11(31) *European Scientific Journal* 305.

[185] *State* v *Md Shamim and Others*, GR Case No 188/2017 (Madhupur, Tangail, Bangladesh). This case was filed under *Women and Children Repression Prevention Act 2000* (Bangladesh) s 9(3)/30 and the *Penal Code 1860* (Bangladesh) s 201. The facts of the case are that was Rupa (a 20-year-old female) was raped and killed on a bus by three assistants of the driver. Her body was thrown out of the bus in an empty forest area on Tangail-Mymensingh Highway. Tangail and Mymensingh are two districts (district is the second largest administrative unit) in Bangladesh.

[186] The *CrPC 1898* (Bangladesh) 143(2).

[187] The *Pure Food Act 2013* (Bangladesh) ss 23-42.

such as personal injury cases, which are absent from the existing laws. Therefore, if the victims are not adequately compensated, the argument persists, only penalising the accused how far would constitute justice to them, if the remedial measures are not available.

Out of the 36 interviewees, 20 were optimistic that limiting the judicial discretions available for applying cost rules would reduce the number of false and vexatious cases. The costs amount should be proper and reasonable to make these rules effective. The interviewees opined that cost rules are more suitable for false cases. This study substantiates that the lack of proper assessments has resulted in a steady increase of false, vexatious and frivolous cases. It has also increased the number of adjournments on frivolous grounds, the length of trials and the litigation expenses. Lengthy trials create a convenient position for people with high incomes to win because people with lower incomes eventually drop their cases. The uncertainty about the law does not allow them to estimate the costs until the judgement is delivered.

The scope for assessing a party's actual expenses is limited during a judgement. This study has also found that litigation expenses often exceed the disputed amounts. One interviewee shared that he had already spent three times the amount that the property was worth. Even if he wins the case, his total economic loss would be larger than the disputed amount. He believed that if he is not indemnified reasonably, it will not amount to justice.

The fine for false cases is also minimal in civil and criminal cases. The absence of financial threats encourages people to file meritless cases. The general costs rule (namely, costs shall follow the event) does not guarantee that the winner will be able to recover their litigation expenses, and therefore, in most cases, they will still be out of pocket. The assessment process is not accurate and does not cover all the legal expenses. The complicated legal system favours people with high incomes by bypassing legal issues and has made the justice system inaccessible for people with lower incomes who experience adjournments and must repeatedly pay for the same events. The hidden costs, such as tips, photocopying or copying court orders, further increase the litigation expenses. Hence, the fundamental right to access justice remains illusory.

4.4 Cost-Benefit Analysis: In Pursuit of Best Practices

The high cost of litigation is a matter of concern for the litigants and the litigation system. Therefore, Cost-Benefit Analysis (CBA)s are substantial. If the private cost is not returned as per the CBA, people consider it an injustice.[188] The CBA provisions are applied differently in the loser

[188] Gramatikov (n 1) 119.

pays and party pays rules. CBAs are less material to the party pays rule; therefore, the US does not often consider them. Predominantly, they have become institutionalised in the loser pays rules. The rationale for CBAs is that the amount of the benefit should be calculated before proceeding with any risks.[189] Hansson argued that the fundamental principle of CBAs is that the advantage should be weighed against the disadvantages and the costs against the benefits.[190] He explained that of the two relevant and inter-connected philosophical issues, consequential evaluation and counterfactual analysis, CBA closely relates to the former. The litigation costs should be at least partially returned, if not entirely, to the aggrieved whose legal rights have been violated. Sen identified that the basic rationale of CBA is that things are worth doing if the benefits resulting from the acts outweigh their costs.[191] CBAs may not determine the precise results, but they may propose some efficient solutions.[192]

4.4.1 Civil Cases

4.4.1.1 United Kingdom

The history of CBAs demonstrates that the English rule initially emphasised the 'necessary or proper' basis for the attainment of justice; then, the concept of the 'standard basis' or 'indemnity basis' assessment was introduced.[193] When the new *CPR 1998* was introduced, these two assessments rules were redefined based on Woolf's suggested reforms.[194] *Woolf's Final Report* identified that the main principle of imposing costs is to deter unwarranted steps in legal proceedings and compensate a party who has had to incur costs as a result of the other party taking such steps.[195] Since then, the standard basis for assessing costs has included a requirement of proportionality and not indemnity. Woolf's reforms brought some general success in increasing speedy disposals; however, the costs of civil litigation have continued to rise.[196] In 2009, Lord Justice Jackson examined the cost rules in the UK and submitted a report promoting access to

[189] Kennedy (n 91) 389.

[190] Sven Ove Hansson, 'Philosophical Problems in Cost-Benefit Analysis' (2007) 23(2) *Economics and Philosophy* 163.

[191] Amartya Sen, 'The Discipline of Cost-Benefit Analysis' (2000) 29(S2) *Journal of Legal Studies* 931, 934.

[192] Kennedy (n 91) 392.

[193] Hon Lord Justice Jackson, *Review of Civil Litigation Cost: Final Report* (Stationary Office, December 2009) 28 ('*Jackson's Final Report*').

[194] The *CPR 1998* (UK) rule 44.3(1).

[195] Lord Woolf, *Access to Justice* (Final Report, 1996) 370 <http://webarchive.nationalarchives.gov.uk/20060213223540/http://www.dca.gov.uk/civil/final/contents.htm> (accessed 9 May 2018) 370.

[196] Hon Lord Justice Jackson, *Review of Civil Litigation Cost: Preliminary Report* (Stationary Office, May 2009) vol 1, 10 ('*Jackson's Preliminary Report*') 1; Hodges, Vogenauer and Tulibacka (n 1) 10.

justice.[197] The current *CPR 1998* provisions provide that the court must not allow costs that have been unreasonably incurred or are difficult following the standard basis.[198] The court can apply its discretion to decide whether the costs are payable to one party by another, the amount of those costs and when they should be paid. The law is specific, and the scope of applying this discretion is limited. The Act states that this cost-capping procedure must consider the conduct of the parties, efforts to resolve the dispute, value of the property, importance of the matter, complexity of the matter, time spent on the case, reasonableness of the amount, receiving party's approved or agreed budget.[199] The principal cost rules in the civil courts are set out in rules 43 to 48 of the Act alongside the practice directions about costs.[200]

Proportionality is a very important feature for assessing costs on a standard basis.[201] It aims not to exceed the actual litigation costs. The proportionality of costs is not simply a matter of comparing the sum in issue with the costs incurred. It is also necessary to evaluate any non-monetary remedies sought and any rights in issue to compare the overall value of what is at stake in the action with the costs of a resolution.[202] Zuckerman expressed that 'the aim of the proportionality test is to maintain a sensible correlation between costs, on the one hand, and the value of the case, its complexity and importance on the other hand'.[203] The principle of assessment does not apply if the costs are provided on an indemnity basis. Access to justice is only possible when the costs of litigation are proportionate to the disputed amount.

In Jackson's report, a technology-based new format of a costs bill was recommended, stating that it would record the time and capture relevant information and automatically generate schedules for summary assessment or bills for detailed assessments.[204] Simultaneously, it should be used for cost budgeting, cost management, summary assessments and detailed assessments. This early estimation limits the overall litigation costs. While awarding a cost order, the court may order that a costs officer conduct summary or detailed assessments.[205] The law is also specific about

[197] *Jackson's Preliminary Report* (n 196) 10.

[198] The *CPR 1998* (UK) rule 44.4(1).

[199] Ibid rule 44.4(3).

[200] This is known as 'the costs practice direction'.

[201] *Jefferson* v *National Freight Carriers plc* [2001] EWCA Civ 20182, [39]–[41].

[202] *Jackson's Final Report* (n 193) 36.

[203] Adrian Zuckerman, *Civil Procedure: Principles of Practice* (Sweet and Maxwell, 2nd ed, 2006) 26, 88.

[204] *Jackson's Final Report* (n 193) 460–1.

[205] The *CPR 1998* (UK) rule 44.6(1).

complying with the cost order within 14 days of the order or judgement.[206] The UK provisions also provide scope for the liability of legal representatives for any misconduct so that they must pay costs or be refused the entirety or part of the costs they were entitled to.[207]

The UK has clarified the role of lawyers while assessing costs. It became their professional duty under the *Solicitors' Code of Conduct 2007* (UK):

1. 'You must give your client the best information possible about the likely overall cost of a matter both at the outset and, when appropriate, as the matter progresses. In particular, you must:
    a. advise the client of the basis and terms of your charges;
    b. advise the client if charging rates are to be increased;
    c. advise the client of likely payments which you or your client may need to make to others; and
    d. discuss with the client how the client will pay, in particular:
        i. whether the client may be eligible and should apply for public funding;
        ii. whether the client's own costs are covered by insurance or may be paid by someone else such as an employer or trade union;
        iii. advise the client that there are circumstances where you may be entitled to exercise a lien for unpaid costs;
        iv. advise the client of their potential liability for any other party's costs; and
        v. discuss with the client whether their liability for another party's costs may be covered by existing insurance or whether specially purchased insurance may be obtained.'[208]

The UK provisions include fees, charges, disbursements, expenses, remuneration, reimbursement allowed to a litigant under the *CPR 1998*, any additional liability incurred under a funding arrangement and any fee or reward charged by a lay representative for acting on behalf of a party in proceedings allocated to the small claims track within the definition of costs.[209]

Jackson's report proposed a new rule for CBAs approaching different types of cases differently, requiring an amendment in the existing cost rules to follow either the standard basis or indemnity

[206] Ibid rule 44.7(1).

[207] Ibid rule 44.11.

[208] The *Solicitors' Code of Conduct 2007* (UK) rule 2.03(1).

[209] The *CPR 1998* (UK) rule 43.2.

basis.[210] In 2017, Jackson proposed in his supplementary report, measures for effective cost control in litigation.[211] He proposed either a general scheme of fixed recoverable costs or a budget for each case, which is popularly known as 'cost management' or 'cost budgeting'. Cost management or budgeting is a process whereby the parties prepare their budgets in advance, and the recoverable costs are assessed accordingly. Thus, these rules are applied in conjunction with the proportionality rules.[212] Jackson aimed to promote access to justice with proportionate costs.[213] Therefore, for assessing the costs on a standard basis, the *CPR 1998* provided that the court must consider all the circumstances while deciding whether the costs were:[214] (1) proportionately and reasonably incurred; and (2) proportionate and reasonable in amount. However, it also advises that the total costs of the litigation and financial value of the claim may not be the only reliable guide for determining the proportionality. It also included the importance of the case, complexity of the issues and party's financial position.[215] In *Lownds v Home Office*, Lord Woolf MR provided guidance on the meaning of proportionality:

> Because of the central role that proportionality should have in the resolution of civil litigation, it is essential that courts attach the appropriate significance to the requirement of proportionality when making orders for costs and when assessing the amount of costs … In particular, there is uncertainty as to the relationship between the requirement of reasonableness and the requirement of proportionality. In other words, what is required is a two-stage approach. There has to be a global approach and an item-by-item approach. The global approach will indicate whether the total sum claimed is or appears to be disproportionate having particular regard to the considerations which CPR r 44.5(3) states are relevant … If on the other hand the costs as a whole appear disproportionate, then the court will want to be satisfied that the work in relation to each item was necessary and, if necessary, that the cost of the item is reasonable.[216]

However, Zuckerman found that the proportionality test may not reduce litigation costs.[217] Jackson's earlier report proposed fixed recoverable costs that applies only for fast-tracked cases. However, the supplementary report widened its jurisdiction from fast-tracked cases to a proposed intermediate track for fixed-cost cases.[218] Nonetheless, it elucidated ensuring that no one can profit

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[210] Hodges, Vogenauer and Tulibacka (n 1) 10; *Jackson's Final Report* (n 193) 38.

[211] Hon Lord Justice Jackson, *Review of Civil Litigation Costs: Supplemental Report—Fixed Recoverable Costs* (Judiciary of England and Wales, July 2017) 9 ('*Jackson's Supplemental Report*').

[212] The *CPR 1998* (UK) rule 44.3(2).

[213] *Jackson's Final Report* (n 193) 28.

[214] The *CPR 1998* (UK) rule 44.5(1).

[215] Ibid rule 1.1(2); *Jackson's Final Report* (n 193) 30.

[216] [2002] EWCA Civ 365, [10], [31].

[217] Adrian Zuckerman, 'Civil Procedure: Principles of Practice' (Sweet and Maxwell Ltd, 2nd ed, 2006) 26.74–26.88.

[218] *Jackson's Supplemental Report* (n 211) 99.

from it. Following this direction, the UK has introduced cost-capping measures. Critics have articulated that this cost-capping procedure does not provide a complete indemnity.[219] Others have found that the cost budget in advance is vital for achieving access to justice by controlling litigation costs and providing clarity about financial commitments.[220]

4.4.1.2 Australia

Like the UK, NSW also awards costs either on an ordinary or indemnity basis, which is largely determined by the discretion of the court.[221] The *Civil Procedure Act 2005* (NSW) clarifies that a party cannot recover money from others without a court order. A court order can be made at any stage of the legal proceedings. It also states that before assessing the costs, the court may make an order stating a range of costs, specified proportion of the assessed costs, specified gross sum instead of assessed costs or such proportion of the assessed costs as does not exceed a specific amount during any stage of the proceedings.[222] The Australian Advisory Committee on Access to Justice suggests that lawyers should provide clients with the following information at the outset of their services: details about the methods of costing, an estimate of the total likely costs, comparative market information about the costs, the likely chances of success, the implications of failure, an explanation of the process and their costs.[223]

The *CPA 2005* (NSW), the costs include the administration of any estate or trust, the proceedings giving rise to any appeals and any proceedings before they are transferred or removed.[224] However, the court must also consider that if any costs have occurred due to negligence, incompetence or serious misconduct of a legal practitioner or improperly or without reasonable cause in circumstances for which a legal practitioner is responsible, they may direct the legal practitioner to pay to the client (including the former client) the whole or any part of the costs.[225] The court may also direct the legal practitioner to indemnify any party against the costs payable by that party.[226] The accountability of the legal practitioner is more specifically articulated in NSW than in the UK.

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[219] Hodges, Vogenauer and Tulibacka (n 1) 10.

[220] *Jackson's Supplemental Report* (n 211) 12.

[221] The *Civil Procedure Act 2005* (NSW) s 98 (1).

[222] Ibid s 98 (4).

[223] Zuckerman (n 78) 176.

[224] The *Civil Procedure Act 2005* (NSW) s 98 (6).

[225] Ibid ss 99(1), (2).

[226] Ibid s 99(2)(c).

In NSW, the court may appoint a cost assessor to assess the legal costs. How the legal costs should be assessed are described in part 7 of the *Legal Profession Uniform Law Application Act 2014* (NSW). After assessing the litigation costs (either for the entire proceedings or a particular stage) and receiving the supporting documents from the concerned party, the costs assessor must issue a certificate determining the costs to the parties containing the costs incurred, remuneration of the costs assessor, who must pay those costs and extent to which they are payable.[227] However, the case law has demonstrated that a party seeking a costs assessment is not always required to provide a bill.[228] A costs assessor may issue more than one certificate in relation to an application for a costs assessment. Such certificates may be issued at the same time or different stages of the assessment process (even for interlocutory matters).[229] While considering the costs, the costs assessor is responsible for determining whether a valid costs agreements exists and if the costs are fair and reasonable.[230] While doing so, the assessor must also consider whether the law practitioners have complied with the law and uniform rules, disclosing the total costs, any foreign lawyers' involvement, or other relevant matters to the Goods and Services Tax (GST).[231] The determinations regarding reasonableness and fairness are the court's discretion. The court also considers the claimant's intentions and whether they have clean hands.[232]

4.4.1.3 India

Like Bangladesh, India follows similar cost rules derived from the British enacted law. The *Code of Civil Procedure 1908* (India) does not specify whether to follow the loser pays rule or user pays rule. However, subsection 35(2) of the *Code 1908* (India) directed to 'follow the event' i.e the loser pays rules. However, the application method for this rule, which states that the costs should follow the event, is observed in the breach.[233] The Law Commission of India discovered that cases are often disposed of either by stating that there is 'no order as to costs' or that the 'parties [must] bear their own costs' and that the reasons are seldom recorded.[234] Such cryptic decisions rarely indicate the mind of the court as to why the costs are being disallowed. Like Bangladesh, section 35 of the *Code of Civil Procedure 1908* (India) covers the cost provisions. The application of the

[227] The *Legal Profession Uniform Law Application Act 2014* (NSW) s 70.

[228] *Wende* v *Horwath (NSW) Pty Limited* [2014] NSWCA 170, [12].

[229] Ibid [3].

[230] The *Legal Profession Uniform Law Application Act 2014* (NSW) s 199.

[231] Ibid s 200.

[232] *Atanaskovic Hartnell* v *Birketu Pty Ltd* [2019] NSWSC 1006.

[233] Law Commission of India (n 7) 16.

[234] Ibid.

cost rules rests upon the judge's discretion. Although the *Code 1908* (India) does not impose a ceiling for calculating the litigation costs, a ceiling applies for the compensatory costs for false and vexatious cases.[235] In 2010, the Supreme Court of India made the following observations in *Vinod Seth v Devinder Bajaj and Another*: 'the provision relating to compensatory cost (sec[tion] 35A) in respect of false and vexatious claims or defences has become virtually infructuous and ineffective, on account of inflation. But under the said section the compensatory cost is subject to a ceiling'.[236]

In 2006, India amended the cost rules and inserted order XXA:

> 'Provision relating to certain items
>
> Without prejudice to the generality of the provisions of this Code relating to costs, the Court may award costs in respect of:
>
> (a) [e]xpenditure incurred for the giving of any notice required to be given by law before the institution of the suit;
> (b) [e]xpenditure incurred on any notice which [sic], though not required to be given by law, has been given by any party to the suit to any other party before the institution of the suit;
> (c) [e]xpenditure incurred on the typing, writing or printing of pleadings filed by any party;
> (d) [c]harges paid by a party for inspection of the records of the Court for the purposes of the suit;
> (e) [e]xpenditure incurred by a party for producing witnesses, even though not summoned through Court; and
> (f) [i]n the case of appeals, charges incurred by a party for obtaining any copies of judgments [sic] and decrees which [sic] are required to be filed along with the memorandum of appeal'.[237]

This provision also empowers the High Court of Delhi to determine cost rules.[238]

The Indian judiciary is also overburdened with cases, poor infrastructure, and a scarcity of workforce.[239] This is very similar to Bangladesh (see chapter 8). It has been reported that, on average, a litigant spends 10% of their earnings attending court hearings (other than legal fees) in a year.[240] The average time for disposing of a case is more than 10 years in India, which comprises

[235] The *Code of Civil Procedure 1908* (India) ss 35, 35A.

[236] 8 SCC 1 (India, 2010), [10]; see also The Law Commission of India (n 7) 11.

[237] The *Code of Civil Procedure 1908* (India) pt XXA.

[238] Ibid.

[239] Siddhartha Dave, 'The Price of Justice: Government Needs to Invest More in the Judiciary to Reduce Pendency', *Indian Express* (online, 25 December 2017) https://bit.ly/3uUAK1l (accessed 10 May 2021). This article states that there 3.4 crore cases were pending across the country. See also Tripathi (n 14).

[240] Tripathi (n 14).

several adjournments and delays on frivolous grounds that increase the litigation costs.[241] The rare application of the cost rules results in the filing of frivolous cases and overburdening of the courts. Therefore, litigants with low or middle incomes are being overlooked in a system with expensive court procedures. The proper application of cost rules would finance the litigants with genuine grounds and control the wave of vexatious cases. The cost award could then be treated like any other monetary judgement and enforced. However, there is no guarantee of payment.

In 2012, the Law Commission of India submitted a report that recommended the execution of the 'cost follows the event' rule that should only occasionally be deviated from.[242] The report also recommended that the compensatory costs for false and vexatious claims should be increased and that the cost recovery rules should be executed in some cases.[243] The report argued for 'realistic and reasonable' costs to decide to what extent these should be applied.[244]

4.4.2 Criminal Cases

4.4.2.1 United Kingdom

In the UK, the relevant provisions for awarding costs in criminal cases are section 45.2 of the *Criminal Procedure Rules 2015* (UK), part II of the *Prosecution of Offences Act 1985* (UK) (sections 16 to 19B), section 109 of the *Magistrates' Courts Act 1980* (UK), section 52 of the *Senior Courts Act 1981* (UK) and section 8 of the *Bankers' Books Evidence Act 1879* (UK). Other relevant legislation includes the *Access to Justice Act 1999* (UK), *Legal Aid, Sentencing and Punishment of Offenders Act 2012* (UK) and *Costs in Criminal Cases (General) Regulations 1986* (UK). While awarding a costs order in criminal cases, the UK courts prioritise the actual, reasonable and proper basis, considering the following factors:

(a) the conduct of all the parties
(b) the particular complexity of the matter or the difficulty or novelty of the questions raised
(c) the skill, effort, specialised knowledge and responsibility involved
(d) the time spent on the case
(e) the place where and the circumstances in which the work or any part of it was done

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[241] Usha Rani Das, 'Litigation Expenses: High Cost of Justice?' *Indian Legal* (online, 4 December 2017) ***https://www.indialegallive.com/special-story/litigation-expenses-the-long-quest-and-high-cost-of-justice/*** (accessed 10 May 2021).

[242] Law Commission of India (n 7) 10–12.

[243] Ibid 28–9.

[244] Ibid 28.

(f) any directions or observations made by the court that made the costs order.[245]

The costs awarded in favour of the defendant include the legal representative's fees, disbursements paid by a legal representative and other costs incurred in connection to the case.[246] The prosecution costs include those incurred during the preparation of the case, counsel fees and disbursements, and witness expenses.[247] A court can make a costs order at any stage to be paid by any party on an application or of its own initiative.[248] However, the costs award may not be made in favour of a convicted defendant.[249] If a party incurs costs due to the negligence, unreasonable or improper acts of their legal representatives, the court may order that the legal representative must pay on behalf of the client.[250] An application for assessing costs must be submitted within three months of the cost order to the assessing authority, along with the required documents.[251] Accordingly, the court will serve the assessment on the parties.[252] The above provisions have revised the general rule that the Crown never pays costs; instead, it promotes the equal application of the cost rules. Like Australia, the UK cautiously applies costs against prosecutions only on reasonable grounds. The costs awarded to the defence are generally paid out of the central funds.[253] Apart from these general provisions, the UK categorises cases and applies the cost rules accordingly. This may include personal injury, clinical negligence, business, and property litigation.

4.4.2.2 Australia

In NSW, following the common law principle, there were no provisions for awarding costs against the Crown in prosecutions until 1967.[254] The *Costs in Criminal Cases Act 1967* (NSW) provides that under certain circumstances, defendants in criminal proceedings may have their legal costs reimbursed. The other related legal provisions for awarding costs against the prosecution are sections 116 to 120 of the *Criminal Procedure Act 1986* (NSW) for committal hearings and sections 213 and 214 of the *Suitors' Fund Act 1951* (NSW) for summary proceedings. In committal

[245] The *Criminal Procedure Rules 2015* (UK) rule 45.2(6)(a).

[246] Ibid, rule 45.1(2).

[247] 'Costs', *the Crown Prosecution Service* (Web Page, 2018) <https://www.cps.gov.uk/legal-guidance/costs#a03>.

[248] The *Criminal Procedure Rules 2015* (UK) rule 45.4(1)–(3).

[249] Ibid, rule 45.4(5).

[250] Ibid, rule 45.9(1).

[251] Ibid rule 45.11(4)

[252] Ibid, rule 45.11(6)–(7).

[253] The *Prosecution of Offences Act 1985* (UK) ss 16–19; The *Criminal Practice Directions 2015* (UK) s 1.3.

[254] Luke Brasch and Samuel Griffith Chambers, 'Costs in Criminal Cases' (Conference Paper, Legal Aid Commission Conference, Winter 2012) 6 <https://www.legalaid.nsw.gov.au/__data/assets/pdf_file/0011/17786/Recovering-Costs-in-Criminal-Matters.pdf>.

and summary proceedings, the prosecution must pay the professional costs[255] to an accused by order of the court if the matter is dismissed or withdrawn.[256] A person to whom a certificate[257] has been granted under the *Costs in Criminal Cases Act 1967* (NSW) may apply to the director-general for payment from the consolidated fund of costs incurred during the proceedings.[258] Like civil cases, the court also has the power to award adjournment costs in criminal cases.[259] However, a successful defendant cannot consider a costs order as of right. Instead, it is the court's discretion to order and fix the amount if it seems just and reasonable.[260] Generally, no costs are awarded for a bail application.[261] While awarding a costs order, the court must consider whether:

(a) the investigation into the alleged offence was conducted in an unreasonable or improper manner
(b) the proceedings were initiated without reasonable cause or in bad faith or were conducted by the prosecution in an improper manner
(c) the prosecution unreasonably failed to investigate (or to investigate properly) any relevant matter of which it was aware or ought reasonably to have been aware and which suggested either that the defendant might not be guilty or that, for any other reason, the proceedings should not have been brought
(d) because of other exceptional circumstances relating to the conduct of the proceedings by the prosecution, it is just and reasonable to award costs.[262]

However, in *Latoudis v Casey*,[263] it was observed that the courts in NSW are always cautious when awarding costs against the police.

[255] Professional costs include professional expenses and disbursements (e.g., witnesses' expenses) regarding proceedings before a magistrate: see *Criminal Procedure Act 1986* (NSW) s 116(5).

[256] The *Criminal Procedure Act 1986* (NSW) ss 116(1), 213(1).

[257] A certificate may be granted by a magistrate court or judge under certain conditions: see *Costs in Criminal Cases Act 1967* (NSW) s 2.

[258] Ibid s 4.

[259] The *Criminal Procedure Act 1986* (NSW) ss 118, 216.

[260] The *Criminal Procedure Act 1986* (NSW) ss 213(2); Brasch and Chambers (n 254) 33.

[261] *DPP* v *Donaczy* [2007] NSWSC 923.

[262] *Justices Act 1902* (NSW) s 41A; *Criminal Procedure Act 1986* (NSW) s 214.

[263] (1990) 170 CLR 534, [52].

4.4.2.3 India

India has introduced a victim compensation scheme in the *Code of Criminal Procedure 1973* (India) to support victims financially.[264] Before introducing the victim support scheme, the general provisions to compensate a person who had suffered from a crime were included in the fine sentence.[265] This fine was recoverable by the civil court. Accordingly, in coordination with the central government, every state government prepares a scheme to compensate the victim or their dependents who have suffered loss or injury as a result of a crime. Based on the courts' recommendations, the District Legal Services Authority or the State Legal Services Authority decide the amount of compensation under the scheme.[266] This compensation is provided in addition to the compensation made out of the fine under section 357 of the Code. If no trial occurs, but a victim is identified, this victim can apply for compensation to the District Legal Services Authority. It could be stated that apart from the special laws, India has made developments to support victims or anyone suffering from a crime in the general provisions. Although a limitation exists, it does not cover the accused's financial loss in a vexatious case or assess the actual legal costs of the litigants. The amount of the compensation depends upon the judge's discretion, which mainly covers the physical or mental loss or rehabilitation. India also lacks any proper legal provisions to assess the legal costs and recover them easily.

4.4.2.4 Other Countries

Singapore has introduced hearing fees to ensure that court time is used realistically and expeditiously and provide more accurate assessments.[267] In Singapore, more than 80% of cases are disposed of on the first day of a trial because the first day is free and because the court fees will progressively accrue over subsequent days.[268] Critics have argued that this process may sacrifice access to justice for people with low or middle incomes where their cases are too complex to solve in one day.[269] Singapore has also restricted judicial discretions and issued a directive to

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[264] The *Code of Criminal Procedure 1973* (India) s 357A(4).

[265] Ibid s 357.

[266] Ibid s 357A (2).

[267] Ng Peng Hong, 'Judicial Reform in Singapore: Reducing Backlogs and Court Delays' in Malcolm Rowat, Waleed Haider Malik and Maria Dakolias (eds) *Judicial Reform in Latin America and the Caribbean: Proceedings of a World Bank Conference* (Technical Paper No 280, World Bank, August 1995) 127, 132; Gary Chan Kok Yew, 'Access to Justice for the Poor: The Singapore Judiciary at Work' (2008) 17(3) *Pacific Rim Law & Policy Journal* 595, 607.

[268] Yew (above n 267) 605; López-De-Silanes, Buscaglia and Loayza (n 1) 123.

[269] López-De-Silanes, Buscaglia and Loayza (n 1) 123.

all judicial officers to not allow adjournments as a matter of course.[270] In Canada, though they follow the loser pay rules, however, they classified the cases based on the claims and accordingly, the courts determine the limit of costs on 'standard bases'.[271]

That is to say, both Australia and the UK have introduced cost provisions for criminal cases that consider CBAs. Unlike the UK, Australia specifies when a defendant can be awarded a costs order including their legal representatives' costs. Both states possess independent cost assessment departments for civil and criminal cases to analyse the real costs incurred by the parties. However, aside from the material costs, the other costs, such as psychological costs, are difficult to assess using a CBA. Dolan et al. defined the intangible costs of crimes as the costs that are much more difficult to measure and quantify.[272] Pain, emotions, stress, suffering and the fear of crimes are examples of such costs in the context of criminal justice. Other effects of the negative perceptions about justice included lowered self-esteem, depression or self-degradation.[273]

Each of the above-mentioned Commonwealth countries follows a unique assessment process to award costs using the loser pays rule. They all calculate the benefit and the costs of the litigants. They emphasise the use of checks and balances through cost-capping and indemnifying proportionally. They also ensure the accountability of litigants and lawyers for the best use of public resources. The UK practice adds some conditions to the time for awarding costs, which may be widened to consider the litigant's economic condition and needs. In relation to the Bangladesh practice, this study has found that the old British laws recommend following 'the indemnity rule' for CBAs. After considering the practices of different countries, if could be argued that the indemnity rule or loser pays rule could be better utilised in Bangladesh. Of course, this rule needs updating after carefully assessing CBAs, easy execution process and also should be synchronised with the socio-economic context to broaden access to justice in Bangladesh.

4.5 Conclusion

The failure to implement cost rules in civil and criminal cases do not constitute justice because it does not indemnify successful litigants. It also creates a system that is inaccessible for people with low or middle incomes. Therefore, cost rules should be applied to reimburse successful litigants,

[270] Hong (n 267) 127–33.

[271] Manitoba Law Reform Commission (n 7) 9.

[272] Paula Dolan et al, 'Estimating the Intangible Victim Costs of Violent Crime' (2005) 45(6) *British Journal of Criminology* 958.

[273] Stewart Levine, 'Breaking Down Costs: What You are Losing by Not Using ADR' (2009) 19(10) *Alternatives to the High Cost of Litigation* 235.

which follows the incentives of distributive theory. The application of cost award differs in criminal and civil cases and varies according to the legal system. The loser pays rule is the most commonly used of the two most popular cost rules. Although neither of the rules is entirely appropriate for case filing, maintaining litigation costs and encouraging settlements, they play a vital role in access to justice because the principles of these rules also determine the financial and legal remedies and thus, widen access to justice.

In Bangladesh, the absence of any standard measures for assessing litigation costs is clear. Scattered provisions for compensating false or vexatious civil cases or unnecessary adjournments mean they are rarely applied. While they are awarded on rare grounds, they do not indemnify the winner through a CBA. Instead, the cost rules are applied with very nominal amounts. There is no manageable, comprehensive, integrated cost rule for assessing a litigant's legal costs accurately. Further, the execution process is vague, complicated and incomplete. Therefore, the aims of indemnifying a successful winner or securing the effective use of public resources have been ineffectual. This results in a large number of vexatious cases that burden the workload of the courts. In Bangladesh, no costs award is imposed either on the prosecution or on the accused in criminal cases. Therefore, the defendants do not encounter any economic threats, the victims are not compensated, and the prosecuting parties and legal professionals are not held accountable for any wrongful or negligent acts. The application of judicial discretion should also be appropriately guided, preferably through guidelines. The practices of other countries with similar legal systems could be used as examples. The UK and Australia impose the loser pays rule after assessing the actual or reasonable litigation costs. In the UK, the proportionality test is mandatory when allocating the costs. In India, the situation is not that much better than in Bangladesh, although they have incorporated a victim compensation scheme to support victims in criminal cases. Thus, it could be argued that to facilitate access to justice through litigation, economic remedy should be associated with a legal remedy for those whose legal rights have been violated, preferably through a proper CBA.

Chapter 5: Role of Alternative Dispute Resolution in Litigation Costs and Access to Justice

5.1 Introduction

Growing litigation expenses often exceed the disputed amounts,[1] and the failure to efficiently dispose of cases has stimulated the growth of alternatives to the traditional litigation process.[2] Alternative Dispute Resolution (ADR) has been defined as a procedure other than adjudication by a judge in a court where a neutral third party assists in or resolves the dispute.[3] The origins of ADR date back to ancient Greece and Rome.[4] The modern ADR system evolved during the early 20th century due to dissatisfaction with the existing court system that was suffering from backlogs, inefficiency, complexity and expenses.[5] Therefore, during the last few decades, the aspirations of the dispute resolution process have been realised beyond the courtroom. Realistically, it involves providing all possible assistance to litigants to resolve their disputes fairly and equally. Due to increased criticism of the traditional justice delivery process, ADR has epitomised a change in the understanding of justice.[6]

This study aims to find a cost-effective dispute resolution process to widen access to justice in Bangladesh. ADR has been widely accepted as a timely and cost-saving dispute resolution process around the world. However, it functions differently in Bangladesh. After two decades of formal introduction, ADR has not achieved popularity among litigants as a dispute resolution method in Bangladesh. Consequently, the rate of case disposals through ADR is very low. While exploring a cost-effective litigation system, this research was confined to formal or court-annexed ADR.

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[1] Michael Zander, *Cases and Materials on the English Legal System* (Weidenfeld and Nicolson, 4th ed, 1984) 323.

[2] Hon Beverly McLachlin, 'The Challenges We Face' (2008) 4(2) *High Court Quarterly Review* 34; Ronald Sackville, 'Access to Justice: Towards an Integrated Approach' (2011) 10(2) *Judicial Revie*w 221, 230; Hon Thomas F Bathurst, 'The Role of the Courts in the Changing Dispute Resolution Landscape' (2012) 35(3) *UNSW Law Journal* 870; Mauro Cappelletti and Bryant Garth, 'Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective' (1978) 27 *Buffalo Law Review* 186.

[3] Lukasz Rozdeiczer and Alejandro Alvarez de la Campa, *Alternative Dispute Resolution Manual: Implementing Commercial Mediation* (World Bank, November 2006) 1.

[4] Humeyra Zeynep Nalcacioglu Erden, 'The History of Alternative Dispute Resolutions in the United States', (2011) 1(2) *Law and Justice Review* 241; Steven A Certilman, 'This is a Brief History of Arbitration in the United States', (2010) 3(1) *New York Dispute Resolution Lawyer* 10.

[5] Deborah R Hensler, 'Our Courts, Ourselves: How the Alternative Dispute Resolution Movement is Reshaping Our Legal System' (2003) 108(1) *Penn State Law Review* 165, 170–81. See also Orna Rabinovich-Einy, 'Beyond Efficiency: The Transformation of Courts by Technology' (2008) 12(1) *UCLA Journal of Law and Technology* 8.

[6] Dorcas Quek Anderson, 'The Evolving Concept of Access to Justice in Singapore's Mediation Movement' (2020) *International Journal of Law in Context* 130-1.

This empirical study (*BQRS* 2019) demonstrates that the ego-centric mentality of litigants, lack of information regarding the advantages of ADR, absence of incentives for lawyers to engage, time constrained reluctant judges, and the possibility of unfair solutions due to the unequal position of the parties combine to discourage use of ADR . Chapter 5 investigates whether the existing format of ADR, transferred from the Western legal system, positively affects litigation costs and accelerates the administration of justice (Research Issue C). Finally, this chapter argues that the current ADR methods might not be the solution to reducing litigation costs and ensuring access to justice in Bangladesh.

5.2 Evolution of Alternative Dispute Resolution (ADR) and State Initiatives

It seems that ADR eases the litigation process because it saves money and time,[7] is convenient,[8] identifies real issues,[9] maintains confidentiality,[10] repairs damaged relationships,[11] is less stressful,[12] limits the use of court resources,[13] promotes other options other than only the winner enjoying all the outcomes[14] and is more participatory and conciliatory.[15] Mediation also offers the opportunity to achieve 'justice from below' based on the litigant's interest and values instead of 'justice from above', as imposed by the traditional litigation process.[16] Mediation has been associated with the transformation of justice from an adversarial, hierarchical and formal process

[7] Dwight Golann, 'Making Alternative Dispute Resolution Mandatory: The Constitutional Issues' (1989) 68 *Oregon Law Review* 487, 488–9; Access to Justice Advisory Committee, *Access to Justice: An Action Plan* (Australian Government Publishing Service, 1994) 300.

[8] Craig A McEwen and Richard J Maiman, 'Small Claims Mediation in Maine: An Empirical Assessment' (1981) 33 *Maine Law Review* 256–8.

[9] Michael McManus and Brianna Silverstein, 'Brief History of Alternative Dispute Resolution in the USA' (2011) 1(3) *Cadmus* 100, 104.

[10] Hazel Genn, 'What is Civil Justice For? Reform, ADR, and Access to Justice' (2012) 24(1) *Yale Journal of Law & the Humanities* 397, 411.

[11] Jessica Pearson, 'An Evaluation of Alternatives to Court Adjudication' (1982) 2 *Justice System Journal* 422.

[12] Eugene Clark, George Cho and Arthur Hoyle, 'Online Dispute Resolution: Present Realities, Pressing Problems and Future Prospects' (2003) 17(1) *International Review of Law, Computers & Technology* 7, 8.

[13] Ronald Sackville, 'The Future of Case Management in Litigation' (2009) 18(4) *Journal of Judicial Administration* 211, 212. See also Maggie Vincent, 'Mandatory Mediation of Custody Dispute: Criticism, Legislation, and Support, (1995) 20 *Vermont Law Review* 290; Carol J King, 'Burdening Access to Justice: The Cost of Divorce Mediation on the Cheap', (1999) 73(2) *St. John's Law Review* 375, 390; *Aon Risk Services Australia v Australian National University* (2009) 239 CLR 175, [27].

[14] Sackville (n 2) 230.

[15] Anderson (n 6) 130.

[16] Jonathan M Hyman and Lela P Love, 'If Portia were a Mediator: An Inquiry into Justice in Mediation' (2002) 9 *Yale Clinical Law Review* 157, 160.

to a consensual, participative and informal one.[17] Therefore, ADR is thought as the first step before ordinary court proceedings, especially for civil, family and commercial disputes.[18]

The US has one of the world's most advanced and successful systems for dispute settlement through mediations and arbitrations outside the formal legal system.[19] In the US, the formal institutionalisation of ADR began during the Boston strike in the late 19th century regarding a collective bargain in a dispute.[20] The US and UK have significant success rates in disposing of cases through ADR. The settlement rate ranged from 21% to 60% in four districts surveyed in the US.[21] In 1990, the rate of settlements was nearly 95% of civil cases filed in the federal courts.[22] In a UK pilot project, the settlement rate was more than 90% for small claims disputes and 59% for personal injury cases.[23] In 2009, almost 60% of cases in NSW[24] and 70% in Victoria were settled through mediations.[25]

Meditation is the most popular form of ADR,[26] and arbitration has become popular for settling commercial disputes. The other common types of ADR are negotiation, conciliation and consensus-building. There are also hybrid models of ADR, such as med-arb, structured settlement conference and early neutral evaluation.[27] Emphasising the process, Boulle and Field categorised

[17] Anderson (n 6) 130.

[18] Bathurst (n 2) 870.

[19] McManus and Silverstein (n 9) 100.

[20] Joseph Slater, 'Interest Arbitration as Alternative Dispute Resolution: The History from 1919 to 2011' (2013) 28(2) *Ohio State Journal on Dispute Resolution* 387, 397–8; McManus and Silverstein (n 9) 101.

[21] James S Kakalik et al, *An Evaluation of Mediation and Early Neutral Evaluation Under the Civil Justice Reform Act* (Rand Corporation, 1996) 34–6. See also Sally Engle Merry, 'Going to Court: Strategies of Dispute Management in an American Urban Neighborhood' (1979) 13(4) *Law & Society Review* 891, 892.

[22] Ellen J Pollack and Edward Felsenthal, 'Private Civil Cases in Federal Courts Rarely Reach Trial' (1990) *Wall Street Journal* B2. See also Timothy K Kuhner, 'Court-Connected Mediation Compared: The Cases of Argentina and the United States' (2005) 11(3) *ILSA Journal of International and Comparative Law* 519.

[23] Civil Justice Council and Justice Studies Board, *Civil Court Mediation Service Manual* (Her Majesty's Courts Service, version 3, February 2009) 4, 8 https://bit.ly/3tWN7bP (accessed 2 May 2021).

[24] Warren (n 16) 78.

[25] Tania Sourdin, *Mediation in the Supreme and Country Courts of Victoria* (Department of Justice, Victoria, April 2009) 137. See also Harry D Nims, 'The Cost of Justice: A New Approach' (1953) 39(6) *American Bar Association Journal* 455, 456.

[26] McManus and Silverstein (n 9) 104.

[27] ABM Mahmudul Hoque, *Alternative Dispute Resolution in Bangladesh: Challenges and Prospect* (Law Book Company, 2015) 49.

ADR into seven categories: self-help, without impartial intervention, facilitative, advisory, determinative, transformative and blended process.[28]

Several studies have found that ADR may save the state's money by limiting the use of court resources but not the litigants.[29] Therefore, the developed state has changed its policy and mandates that litigants must mediate by deterring them from excessive economic loss due to the shrinking state budget.[30] In the US, more than 2500 statutes contain mediation provisions,[31] one of which is the 'offer of judgement' (see Chapter 4, section 4.2.1.2).[32] The same provisions have been adopted in the UK and Australia under 'offer of settlement' (section 4.2.1.4). These provisions do not aim to provide a direct incentive to the parties to settle disputes but to impose a future threat of financial penalty on a party if they unreasonably refuse an offer of mediation.[33] This raises the question of how far this justifies imposing a solution on litigants instead of allowing the litigants to choose their solutions.

Recently, the UK and Australia have moved towards online ADR (OADR).[34] In the UK, OADR is the point of entry into the court system if the disputed amount is less than GBP 25,000.[35] In the OADR system, artificial intelligence plays the role of the human.[36] Non-verbal clues can be implemented rather than face-to-face conversations. The body language, touch or emotions—the strengths of ADR—will be completely eliminated.[37] The OADR systems mandate the litigants to access the court through mediation and leave no other option.

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[28] Laurence Boulle and Rachael Field, *Australian Dispute Resolution: Law and Practice* (LexisNexis Butterworths, 2017) 50; National Alternative Dispute Resolution Advisory Council, *Dispute Resolution Terms: The Use of Terms in (Alternative) Dispute Resolution* (September 2003) 25.

[29] Kuhner (n 22) 518, Kakalik et al (n 21) 34–6.

[30] Tang Houzhi, 'Worldwide Use of Mediation', *City University of Hong Kong* (Online Article) < https://bit.ly/3uTpXVj > (accessed 3 May 2021) 5–11.

[31] Ibid 10.

[32] In the UK, it is known as a 'settlement offer', and in Australia, it is an 'offer of settlement'.

[33] Genn (n 10) 402.

[34] Michael Legg, 'The Future of Dispute Resolution: Online ADR and Online Courts' (2016) 27(4) *Australian Dispute Resolution Journal* 207.

[35] Lord Justice Briggs, *Civil Courts Structure and Review: Interim Report* (Judiciary of England and Wales, December 2015) 2.

[36] Scott Shackelford and Anjanette H Raymond, 'Building the Virtual Courthouse: Ethical Considerations for Design, Implementation, and Regulation in the World of ODR' (Research Paper No 2014-10, 2014) *Wisconsin Law Review* 628; Nadja Alexander, 'Mobile Mediation: How Technology is Driving the Globalization of ADR' (2006) 27(2) *Hamline Journal of Public Law and Policy* 243, 248.

[37] Clark, Cho and Hoyle (n 12) 9–10.

The argument in favour of introducing this mandatory mediation is that people should solve their problems privately rather than turn to the courts.[38] It has been highlighted that the courts should not be used as areas of conflict, argument and debate when a more mature and considered discussion of the issues between the parties could produce better outcomes.[39] It is also argued that sensible people resolve their disputes through discussions, not through the court.[40] Inspired by this proposition, in the UK, from 2014 to 2015, the government reformed legal aid and initiated policies providing alternatives to the court system (see Chapter 6).[41] Genn criticised the argument of fiscal tightening because it does not allow a litigant to choose any alternative but mediation.[42] Fiss also found a lack of justice in the dispute resolution process where consent is coerced, and the absence of a trial and judgement renders subsequent judicial involvement troublesome.[43] However, the fact remains that, if courts do not resolve disputes, it would be better to replace them with mediation centres.

Section 5.3 focuses on how ADR works in Bangladesh.

5.3 Alternative Dispute Resolution in Bangladesh

Bangladesh has a range of local justice mechanisms with varying degrees of formality.[44] Informal ADR has existed since the emergence of Bangladesh society.[45] If any conflicts arose between ancient people, a village *panchayat* was organised as a traditional way to resolve disputes.[46] Informal ADR is popularly known as *shalish*, which is popular in the local villages.[47] ADR within

[38] Ministry of Justice, *Proposals for the Reform of Legal Aid in England and Wales* (Consultation Paper CP12/10, November 2010) 16 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/228970/7967.pdf >.

[39] Ibid.

[40] Ibid.

[41] Ibid.

[42] Ken Clarke, 'Future Litigation Event' (Speech, Clifford Chance, UK 14 September 2011) ***https://bit.ly/3hvbXgH*** (accessed 17 May 2021); Genn (n 10) 413–14.

[43] Owen M Fiss, 'Against Settlement' (1984) 93(6) *Yale Law Journal* 1073, 1075.

[44] Maitreyi Bordia Das and Vivek Maru, 'Framing Local Conflict and Justice in Bangladesh' (The World Bank Working paper no 5781, 2011)

[45] Jamila A Chowdhury, *ADR Theories and Practices: A Glimpse on Access to Justice and ADR in Bangladesh* (London College of Legal Studies, 2013) 57–8; Md Abdul Halim, *ADR in Bangladesh: Issues and Challenges* (CCB Foundation, 2nd ed, 2011) 60.

[46] Kamal Siddiqui (ed), *Local Government in Bangladesh* (University Press, 2005) 19; Hoque (n 27) 25–6. Village Panchayat is also an assisted mediation process led by village leader.

[47] Shalish is an assisted, participatory mediation process, often led by community elders and elites. See, Das and Maru (n 44) 8.

the formal judicial system is a comparatively new phenomenon.[48] Chief Justice Mustafa Kamal took the initiative to introduce formal ADR into the legal system at the beginning of this century.[49] In his statement, CJ Kamal explained how he was influenced by Mr Steve Mayo from USA, executive director of the Institute for the Study and Development of Legal Systems and how he helped to implement ADR into the formal judicial system starting with a pilot project.[50] Subsequently ADR was formally adopted in 2003 in *CPC 1908* and *Artha Rin Adalot Ain 2003*. Though ADR of a quasi-judicial nature had already been adopted in some Acts (see the section 5.3). Despite having a significant history of ADR, Bangladesh has adopted a Western model of ADR, overlooking the autochthonous legal system. The formal mode of ADR has been developed by incorporating ADR into some special laws and adjudication procedures[51] to achieve two main objectives: (1) reducing excessive litigation costs and delays; and (2) encouraging public participation and honouring the diversity of legal traditions.[52] Mediation is the most popular form of ADR in Bangladesh.

The ADR system was recognised through Kazi's court and village *panchayat* during the Mughal Empire and formalised during the British period in 1919 through the *Bengal Village Self-Government Act 1919* (Bangladesh) to resolve minor disputes locally.[53] Then, it was reshaped in the *Village Court Ordinance 1976* (Bangladesh).[54] Also, the *Birodh Mimangsha (Pouro elaka) Board Ain 2004* (Bangladesh) contains provisions for disposal through compromise for petty criminal offences.[55] In *Panchayat* or *Salish* system, the Chairman of union Parishad is authorised to try petty local cases and small crimes within their jurisdiction and make consensual decisions.[56] Thus the role of *Panchayat* or *Salish* system is non-court-based ADR where a committee or board will be constructed under a legal framework. This type of ADR is also defined as quasi-judicial

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[48] Chief Justice Mustafa Kamal, 'Judicial Settlement and Mediation in Bangladesh' (2004) <https://www.hrpb.org.bd/upload/PDF_File_%20RPB/Justice%20Mustafa%20Kamal.pdf> (accessed 20 September 2021).

[49] Mahua Gulfam, 'Introducing Alternative Dispute Resolution (ADR) in Criminal Justice System: Bangladesh Perspective' (2014) 13(1) *Banglavision* 208.

[50] Kamal (n 48).

[51] Halim (n 45) 60.

[52] Ridwanul Hoque, 'Courts and the Adjudication System in Bangladesh: In Quest of Viable Reforms' in Jiunn-rong Yeh and Wen-Chen Chang (eds) *Asian Courts in Context* (Cambridge University Press, 2014) 473.

[53] Md Habib Alam, 'Alternative Dispute Resolution (ADR): A New Key for Implementing Civil Justice in Bangladesh' (2014) 19(1) *IOSR Journal of Humanities and Social Science* 88, 90.

[54] The *Village Court Ordinance 1976* (Bangladesh) was replaced by the *Village Court Act 2006* (Bangladesh).

[55] *Birodh Mimangsha (Pouro elaka) Board Ain 2004* (Bangladesh) s 4.

[56] Md. Habib Alam,'Alternative Dispute Resolution (ADR): A New Key for Implementing Civil Justice in Bangladesh' (2014) 19(1) *IOSR Journal of Humanities and Social Science (IOSR-JHSS)* 90.

ADR.[57] Court-sponsored or compulsory ADR was introduced to the family courts in 1985 to reduce the large number of pending cases in the civil courts. The family court judge must attempt to mediate between the parties before the hearing; if this fails, a second attempt must be made after taking the evidence but before pronouncing the verdict.[58] When the parties agree and reach a solution, the outcome becomes the court's verdict. In 1990, the ADR system was introduced to the money loan courts. These courts, reconstituted under the *Artha Rin Adalot Ain 2003* (Bangladesh) *(Money Loan Court Act 2003)*,[59] facilitate the settlement of claims for the recovery of financial loans advanced by financial institutions through settlement conferences or arbitrations. Apart from these the other Acts that have the ADR mechanism to dispose a case are the *Labour Act 2006* (Bangladesh),[60] the *Bankruptcy Act 1997* (Bangladesh).[61]

In Bangladesh, voluntary and compulsory ADR have been incorporated into different Acts. Unlike in the US, UK or Australia, these acts have not provided any financial threats to make ADR successful, such as settlement offers or an offer of judgement. For example, the *Bankruptcy Act 1997* (Bangladesh) (sections 43 to 46) provides for voluntary settlements, whereas the *Bangladesh Labour Act 2006* (Bangladesh) mandates a compulsory attempt to resolve disputes before accessing the courts.[62] The most notable presence of ADR within the formal justice system was introduced by an amendment to the *CPC 1908* in 2003.[63] The amended law incorporated the voluntary mediation of disputes or appeals by the court and allowed parties to seek referrals for the arbitration of their disputes. In 2012, the *CPC 1908* was amended to make court-sponsored mediation compulsory. The *CPC 1908* provides that, after all the parties to the suit are in attendance, the court, after adjourning the hearing of the suit, must mediate the dispute or refer it to the engaged pleaders or a panel of mediators to settle the dispute. If a compromise or solution is reached, the court may pass a decree accordingly, or when the pleaders or mediators mediate the dispute, the court may transform the mediation report into a court verdict against which no appeal is permitted. If the mediation led by the court or a mediator fails, the suit shall proceed towards a

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[57] Mohammad Saidul Islam, 'Efficiency and Effectiveness of Alternative Dispute Resolution Schemes Towards the Promotion of Access to Justice in Bangladesh' (2011) 8 *IIUC Studies* 101; M. M. H. Patoari, Nor, A. H. M., Awang, M. N. B., Chowdhury, A. H., & Talukder, J, 'Legal and Administrative Challenges of Alternative Dispute Resolution (ADR) as a Peaceful Means of Resolving the Land Dispute in the Rural Areas of Bangladesh'(2020) 11 *Beijing Law Review* 417.

[58] The *Family Courts Ordinance 1985* (Bangladesh) ss 10, 13.

[59] The *Money Loan Court Act 2003* (Bangladesh) ss 22–24.

[60] The *Labour Act 2006* (Bangladesh) s 210. It has widened the scope to dispose dispute through mediation, conciliation, or arbitration.

[61] The *Bankruptcy Act 1997* (Bangladesh) s 43-46.

[62] The *Bangladesh Labour Act 2006* (Bangladesh) ch XIV.

[63] Section 89A, 89B were inserted by section 3 of the *Code of Civil Procedure* (Amendment) Act, 2003 (Act No. IV of 2003).

hearing.[64] Mediation under section 89A of the *CPC 1908* by ordinary civil courts is a formal, non-binding and consensual settlement process, and only the court or mediator may facilitate a compromise of the dispute between the parties without dictating the terms.[65] According to section 89C, the appellate courts are also required to attempt to mediate appeals or refer them to a mediator to settle disputes. Conversely, under section 89C, the parties to a suit pending before a civil court may agree to settle the dispute through arbitration and seek the withdrawal of the suit. In such a case, the court must allow the withdrawal and permit their disputes to be arbitrated in accordance with the *Arbitration Act 2001* (Bangladesh).[66] The other laws that incorporate the ADR provisions include the *Village Court Act 2006* (Bangladesh), the *Conciliation of Disputes (Municipal Areas) Board Act 2004* (Bangladesh) and *Legal Aid Services Act 2000* (Bangladesh). Alongside the formal adjudication process, semi-formal adjudication has also been adopted in Bangladesh in a quasi-judicial form. This includes village courts, arbitration councils under union councils and reconciliation boards under municipalities in urban areas.[67]

The ADR system has also been incorporated into the criminal justice system.[68] Victims and offenders can settle their dispute if the offence is within the 'compounding offences' listed in schedule II of the *CrPC 1898* without the court's consent; this is popularly known as a form of 'restorative justice'. The application of restorative justice exists in practice in various forms within the ADR system; however, this form of mediation is not institutionally encouraged if it is within the purview of non-compounding offences. Compounding offences are of two types: (a) Compounding with the permission of the Court; (b) Compounding without the permission of the court.[69] Latha and Thilagaraj also found that public unawareness regarding its (restorative justice's) methods and effectiveness is low.[70] Section 5.4 demonstrates why the disposal rate through ADR is unsatisfactory based on the findings from this empirical study.

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[64] The *CPC 1908* (Bangladesh) s 89A (7) (9).

[65] The *CPC 1908* (Bangladesh) s 89A (1).

[66] Hoque (n 52) 475.

[67] Ibid 473.

[68] The *CrPC 1898* (Bangladesh) s 345, sch II. Some of the particular types of offences listed here have been made compoundable.

[69] The *CrPC 1898* (Bangladesh) s 345 (1)(2).

[70] S Latha and R Thilagaraj, 'Restorative Justice in India' (2013) 8(4) *Asian Criminology* 309, 318.

5.4 Evaluating Alternative Dispute Resolution Practices in Bangladesh

Although the formal ADR system in Bangladesh is being prioritised by incorporating it into court procedures, the disposal rate shows that it has failed to achieve mass popularity.[71] Data collected from the Supreme Court of Bangladesh (for *BQRS 2019*) demonstrates that the ADR disposal rate is around 5% of the total disposal rate, with the majority of ADR disposals occurring in family cases. In 2010, research conducted by the Law Commission Bangladesh on Dhaka and Gazipur districts, found that the ADR disposal rate in these two districts was less than 2.5%.[72] The present study has found that litigants do not consider ADR a win-win situation but to compromise with their claim. Further, the non-binding effects and restriction on appeals make it less attractive. ADR is also often disregarded because when many disputes arise, people initially attempt to settle them locally, and if this fails, they go to the courts. Because the first attempt has already unsuccessful, the litigants are usually not motivated to attempt it a second time. However, some litigants are eventually converted from non-consenting to willing participants. Spigelman CJ named these people 'reluctant starters'.[73] The ADR disposal rate clearly indicates that these ADR provisions have been ineffective in Bangladesh. This chapter sought to determine why. It also examines whether the present ADR method is cost-effective and enhances access to justice in Bangladesh.

5.4.1 A Transplanted Method that Disregarded the Local Sentiment

The concept of legal transplant has become integral to the study of law and development.[74] Erin and Ha argued that legal transplant has become accepted into scholarly vocabulary as one of the main vectors of how a donor state moves its legal system or rules to a recipient state.[75] Conventionally the donor agency influences the recipient state to promote their interests via law and development. Accordingly, the formal ADR mechanism was imported (section 5.3) by Chief Justice Mustafa Kamal from the US system into Bangladesh, disregarding its local customs.

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[71] Ummey Sharaban Tahura, *Case Management in Reducing Case backlogs: Potential Adaptation from the NSW District Court to Bangladesh Civil Trial Courts* (Master of Philosophy Thesis, Macquarie University, 2015) 149–51.

[72] Law Commission Bangladesh, *Report on the Execution of ADR in Bangladesh Context* (Report no 104, October, 2010) 6. In this report Law Commission also proposed for appointing professional mediator, enacting new rules for mediation which has not come into force till today.

[73] Hon James Spigelman, 'Mediation and the Court' (2001) 39(2) *Law Society Journal* 63.

[74] Matthew S Erin and Do Hai Ha, 'Law and Development Minus Legal Transplants: The Example of China in Vietnam' (2021) *Asian Journal of Law and Society*, First View, 2.

[75] Ibid.

Bangladesh chose to follow the trend of ADR due to the worldwide familiarity with its advantages.[76] While adopting ADR into the formal legal system, Bangladesh did not consider the autochthonous legal system, and instead, transplanted a Western method and overlooked the various forms of social action and their cultural constructions. Despite informal ADR's general accessibility, low cost and quick disposal, the literature on shalish has underscored its elitist character and the hazard that it perpetuates existing power structures.[77] This study has found that the egoistic mentality of the litigants often dissuades them from sitting at a discussion table. Merry and Silbey argued that social values might explain the recurring questions about the low voluntary usage rate of ADR better than a CBA.[78] This might be the core reason for the low rate of disposal through ADR in Bangladesh.

In this study (*BQRS 2019*), the 'client's ego' has been identified as the primary reason for the low rate of settlements in Bangladesh (more detail in section 7.2.1.2). Often, the litigants do not want to sit at a discussion table when their wounds are fresh. One lawyer shared that in one case, he advised a client to mediate and the next day, that client changed their lawyer. Since then, he never advises any clients to mediate. Another interviewee argued that people come to the courts for a decision, not to settle. CVC-1, CVC-2, CVL-2, CVL-4 and CVJ-2 claimed that clients do not find ADR attractive. Three out of four civil litigants shared that they never attempted ADR. CVL-3 stated that he 'did not find the ADR process useful to reduce backlog or litigation expenses'. Therefore, it can be argued that the litigants in Bangladesh generally do not consider the process useful or encouraging. Although, several interviewees reported that they found the process cost-effective and time efficient.

In a Singapore court, it was found that within their short 25 years of ADR history, they have successfully incorporated the method into their legal system. They did not emphasise the use of ADR to reduce backlogs, but instead focused on a non-confrontational way of resolving disputes and preserving relationships.[79] Singapore has maintained a fine balance between a Western-style and indigenous model and reintroduced conciliatory approaches contextualised to its unique circumstances.[80] The ADR provisions in Singapore have been aligned with the country's traditional Asian roots. Chan CJ highlighted that mediation was a part of Asian traditions, and

[76] Chief Justice Mustafa Kamal, 'ADR in Bangladesh' (Conference Paper, International Judicial Conference 2006, Supreme Court of Pakistan, 16 May 2013).
[77] Das and Maru (n 44) 10.

[78] Sally Engle Merry and Susan S Silbey, 'What do Plaintiffs Want? Reexamining the Concept of Dispute' (1984) 9 *Justice System Journal* 151, 176.

[79] Hon Yong Pung How, 'Speech at the Opening of the Legal Year 1996' in Yong Pung How and Sheau Peng Hoo (eds) *Speeches and Judgments of Chief Justice Yong Pung How* (FT Law & Tax Asia Pacific, 1996).

[80] Anderson (n 6) 128.

therefore, offered a better form of dispute resolution than adversarial justice.[81] Yong CJ commented (ironically) that they had to relearn their practices from the West.[82] Singapore embedded their indigenous sentiments into the ADR provisions, and therefore, the method was familiar to the people. Unlike Bangladesh, Singapore piloted a mediation program to test how it worked before formally establishing a court of mediation centre, which is currently known as the State Courts Centre for Dispute Resolution.[83] Singapore has focused on a co-equality perspective of mediation to establish a positive correlation between access to justice and mediation.[84] Considering these cultural assumptions, Singapore enacted the *Mediation Act 2017* (Singapore) and adopted codes of conduct for the mediation process. The Act allows the mediated settlements to be recording as court orders to give a binding effect to the results.[85]

The readiness of the parties to mediate is an essential factor that increases the settlement rate. That is to say this can be highly variable and depends on the personalities, depth of grievances, degree of conflicts, and willingness to negotiate and compromise.[86] The method used in Bangladesh that determines a fixed stage for ADR attempts does not consider the litigant's readiness and other variable factors. One lawyer (CVL-1) stated that an 'ADR attempt before filing a case would be useful to reduce litigation costs. But after the case filing, [an] ADR attempt would increase the litigation costs'. Therefore, diagnosing each case separately would allow an appropriate case to be selected at the right time to make ADR successful. Mediation may be appropriate for certain cases, for example, family disputes. A proper dispute or conflict diagnosis should consider the timing, nature, and complexity[87] of each case to determine whether a dispute is appropriate for referral to mediation.[88] Proper analysis will increase the ADR success rate. A flexible, case-based referral practice approach would be better than a one-size-fits-all model.[89]

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[81] Sek Keong Chan, 'Opening of Legal Year' (Speech, Opening of the Legal Year, Singapore, 6 January 1996) ***https://www.agc.gov.sg/docs/default-source/speeches/2010---1992/speech-1996.pdf*** (accessed 30 September 2021).

[82] Hon Yong Pung How, 'Launch of "DisputeManager.com" ' (Speech, Launch of "DisputeManager.com", Singapore, 31 July 2002) <https://www.supremecourt.gov.sg/news/speeches/launch-of-disputemanagercom---speech-by-the-honourable-the-chief-justice-yong-pung-how> (accessed 30 September 2021).

[83] Anderson (n 6) 131.

[84] Ibid 133.

[85] *Mediation Act 2017* (Singapore) s 12.

[86] Genn (n 10) 458.

[87] Bathurst (n 2) 877.

[88] Machteld Pel, *Referral To Mediation: A Practical Guide for an Effective Mediation Proposal* (Sdu Uitgevers, 2008) 19.

[89] Bathurst (n 2) 877.

In this *BQRS 2019* study, CRJ-1 and CVJ-4 shared that at the time of negotiation, the economically inferior or less powerful party lost their voice. One lawyer shared that sometimes the solvent party dominated the ADR process; even the mediators are sometimes biased towards the more powerful party. Due to varying economic conditions and political influence, the more solvent party dominates the decision-making process at the time of negotiation, and the vulnerable party feels insecure about relinquishing their rights, regardless of the merit of their case. This study found that the litigants' general assumption is that if they mediate, they will have to fully or partially waive their legal right. Kim's argument also supports these findings.[90] Kim argued that the wealth disparity between the parties might put the weaker parties at risk in mandatory mediation, limiting their negotiating options. Fiss described how financial inequality affects the weaker party in three ways: lack of information limits their ability to predict the outcome of the litigation, which may affect the bargaining process; they may seek immediate damages and then realise they are receiving less than what they might otherwise have received; and lack of resources to finance the litigation may force them to settle.[91] A compulsory mediation does not consider the disparity in the position of the disputants. Therefore, at the time of negotiation, the status of the parties should be carefully considered before proceeding to mediation. Thus, the findings of this study and those presented in the literature revieweds indicate that the existing ADR provisions in Bangladesh do not demonstrate equal participation of the litigants in the negotiation process and, therefore, do not engender trustworthiness among the litigants.

5.4.2 Overburdened Courts and the Mediator's Role

Initially, formal court-connected ADR was introduced in Bangladesh to reduce the case backlog and relieve the court from the existing case burden. The statute delegated the mediator's role to the court.[92] Later, options to appoint a panel of mediators from outside the court were added;[93] the legal aid officer was the latest addition to this panel. The law prioritised the litigant's choice of mediator, and findings from this study (*BQRS 2019*) showed that litigants prefer judges as mediators. However, using judges as mediators was ineffective, as the time limitations of the

[90] Anne S Kim, 'Rent-A-Judges and the Cost of Selling Justice' (1994) 44(1) *Duke Law Journal* 199. See also, The Law Commission of India, *Cost in Civil Litigation* (Report No 240, 2012) 28; Lord Neuberger, 'Justice in an Age of Austerity' (JUSTICE Tom Sargant Memorial Annual Lecture, 15 October 2013) <https://files.justice.org.uk/wp-content/uploads/2015/02/06172428/Justice-in-an-age-of-austerity-Lord-Neuberger.pdf> (accessed 3 May 2021).

[91] Fiss (n 43) 1075.

[92] In 2017, an amendment was made that authorised the court to delegate to a legal aid officer or a pleader to mediate. See the *CPC 1908* (Bangladesh) s 89; the *Legal Aid and Services Act 2000* (Bangladesh) s 21A.

[93] The *CPC 1908* (Bangladesh) s 89A.

already loaded court prevented judges from playing the role of an active mediator. As a result, judges entrusted the entire process to the lawyers. One interviewee (CVJ-2) shared that:

> *As we have a long queue for every day's hearing, we cannot allocate sufficient time to convince clients for mediation. Instead, we request their lawyers to discuss outside the court or privately and come back with a decision. Practically, the court is not aware of the entire discussion, though we often receive a negative outcome from the mediation.*

In Singapore, judges play an authoritative mediator's role due to overwhelming public preference for judges.[94] Lee and Hwee found that in the Asian perspective, mediation occurs differently than in Western countries and, in practice, is incompatible with the rules of mediation.[95] For example, a common assumption in Asia is that the mediator will be at the heart of the mediation—mediators hold a high social status and guide the parties—while disputants may be reserved and prefer to communicate through non-verbal cues or in more subtle ways. Satisfying the individual interests may not be considered 'proper conduct'.

In this study (*BQRS 2019*), CVJ-2 stated that 'existing law does not allow [the judges] to play an active role in the mediation process. Also, scarcity of trained mediators influences ADR outcome'. Thus, empirical evidence substantiated that the ADR outcome largely depends on how the mediator facilitates the mediation process. Generally, mediators act as a neutral facilitator and/or a trusted adviser. This study found that the lack of a skilled mediator was one factor in the low rate of mediation. In Bangladesh, there is no established profession for mediators; either the judge or a lawyer, usually without sufficient training, acts as the mediator in the general dispute process.[96] Furthermore, the traditional mode of the mediator's role discourages them from active participation and encourages that solutions and suggestions should come from the litigants. Unlike Singapore, Bangladesh has not provided any code of conduct or law that explains the mediator's role. As is the case in the Singaporean system, a mediator who plays an advisory role to the disputant and is trusted to ensure the fairness of the process would be more effective in Bangladesh.

Litigant's sentiments still possess more respect for judges than lawyers. Some interviewees opined that the active role of the mediator would be a prime factor in convincing them to settle; however, the existing legal provisions require the mediator to take a passive role. One interviewee shared that if the judges played an active role in mediation, the settlement rate would be higher. The settlement rate is higher in family cases owing to judges' assertive participation mostly in a non-formal ambience. Therefore, it could be assumed that a hybrid form of mediation that is med-

[94] Anderson (n 6) 135.

[95] Joel Lee and Teh Hwee (eds), *An Asian Perspective on Mediation* (Academy Publishing, 2009) 67–70.

[96] Though some trained arbitrators from lawyers' groups may be engaged for high fees to settle commercial disputes.

conciliation would be more successful in settling the dispute. However, it would be unreasonable to delegate the responsibility to overburdened judges—a better outcome could be achieved by creating a mediator position in the ADR process.

Courts in Bangladesh are overburdened, and the justice system is crippled. The existing litigation system is too complicated and time-demanding and has failed to provide efficient and affordable justice. This view was also expressed by participant CRJ-1: 'our laws are old and complex to navigate'. Therefore, ADR is thought to be the best alternative to costly and dilatory court proceedings, especially for some cases, such as family cases (CVJ-2). However, the mechanism is not still flawless. Lord Neuberger, the Master of the Rolls and Head of Civil Justice, also gave cautious support for the mediation project in the UK, which is equally pertinent in Bangladesh:

> Let us not get carried away by zeal. Zeal for justice, zeal for one's client are fine but zeal for a form of dispute resolution or any other idea, theory or practice is not so healthy. It smacks of fanaticism, and it drives out one of the three most important qualities a lawyer should have- scepticism, honesty, and ability.[97]

He argued that citizens are bearers of rights—they are not merely consumers of services—and civil justice exists to secure those rights.[98] It is the state's responsibility to secure justice through a recognised proceeding.

5.4.3 Lawyers' Role and Increasing Costs

Lawyers play a vital role in the entire ADR process. Litigants from this study shared that their lawyers do not convince them to mediate. Most of the lawyers were less interested in the ADR process, as they consider it a financial threat to their income. Participant CVL-1, a lawyer, also admitted that lawyers are responsible for a poor rate of mediation:

> *Apart from the client's ego, lawyers are also responsible for the low rate of mediation. They do not encourage their clients to mediate. The ADR rate in family cases is high, but, overall, the performance is not satisfactorily.*

Another lawyer also expressed similar views:

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[97] Lord Neuberger, 'Equity, ADR, Arbitration and the Law: Different Dimensions of Justice' (The Fourth Keating Lecture, 19 May 2010).

[98] Ibid; Genn (n 10) 417.

> *As per the legal provisions of the* Artha Rin Adalot Ain 2003*, the court appoints the lawyer as a mediator of this type of case. Often, we witnessed that the mediator tempers the clients in various way against settlement. Also, they demand extra money.*[99] (CVL-3)

Lawyers in Bangladesh charge per appearance. They assume an early resolution may limit their financial income (for a more detailed discussion, see Chapter 7, section 7.2.1.1). Therefore, they do not disclose the advantages of ADR to their clients. The present ADR provisions do not provide any incentive to encourage lawyers to mediate.

This study ascertained that ADR is compulsory in a number of Bangladeshi laws, therefore, the court will schedule a date for mediation. Lawyers charged a higher rate for mediation, even when it fails. In addition to paying the lawyer's fee, by law, litigants must also pay the mediator's fee unless the judge is appointed as mediator.[100] As there is no fixed rate for a mediator, the fee for the mediator is often high. Three interviewees (CVJ-2, CVL-3 and CVS-1) shared that lawyer sometimes claimed a percentage of the settlement amount in addition to their regular fee. All these expenses are ultimately paid for by the litigants and increase the litigation expenses. Litigants are strongly influenced by their lawyers. Lawyers in Bangladesh dislike mediation as a dispute resolution process; therefore, the process has not been popular.

5.4.4 Legal Dilemma of Alternative Dispute Resolution Provisions and Increasing Costs

Among the features of the ADR mechanism, 'non-bindingness' and 'no appeal' are the most pertinent legal provisions.[101] A number of interviewees shared that the non-binding nature was the catalyst for ADR failure. If one party does not execute the conditions of settlement, the only option left to the other party is to seek assistance in the traditional dispute resolution method; thus, the entire process starts from the beginning. Meanwhile, the party has spent a considerable amount of time and money, which further adds to the cost of the process. In Singapore, settlement can have a binding force.[102] Due to the mandatory provisions of ADR, all cases attempt mediation but a few of them are mediated successfully. The mandatory requirement forces to set a specific date for mediation, and sometimes more than one date; consequently, the entire process increases litigation costs and takes longer than the usual case proceedings.

[99] The *Artha Rin Adalot Ain 2003* (Bangladesh) is an Act that regulates the recovery of loan money by financial organisations.

[100] The *CPC 1908* (Bangladesh) s 89A (6).

[101] Ibid s 89A (12).

[102] The *Mediation Act 2017* (Singapore) s 12.

To make ADR attractive to and cost-effective for litigants, the law directs that the court fees paid with the pleadings are refunded to both parties;[103] however, the execution of this provision is rare in practice. The total cost of court fees is dwarfed by the expenses for the entire litigation, thus, failing to increase the litigant's interest in mediation.

A successful mediation may reduce cost. The success of ADR depends on the time at which mediation is approached. Some scholars argue for the early attempts to reduce private and public costs,[104] while others argue for attempts at a later stage as it would increase the success rate because litigants will know the strengths and weakness of their case.[105] Nims stated that the best time for an ADR attempt is soon after filing the written statement.[106] He also argued that to hold a conference with the litigants in advance would not only detect the strike suits early but also eliminate many motions at the conference stage, saving time and money. Therefore, it is not plausible to draw a conclusive argument that ADR will be more successful at the early stage of litigation as litigants are neither ready to compromise with their fresh grievance nor are they aware of the weaknesses of their cases. In Bangladesh, the ADR attempt has been set after the submission of the written statement.[107] Therefore, attempting ADR at the later stage raises the question of whether the litigants would be prepared to compromise when they already have spent a significant portion of their litigation costs preparing documents or submitting a written statement. This study found that it would be improper to fix a stage in the litigation procedure for an ADR attempt; it would be more appropriate to make the time of attempted ADR flexible after proper diagnosis of each case.

This study also found a scarcity of trained judges, assisted by court staff and volunteers, who can act as mediators in Bangladesh. Therefore, the mediator cannot play an active role in the dispute settlement process. Furthermore, there are no legal guidelines to show how each individual should play their role. A code of conduct could elaborate on the role of individuals involved in the ADR process and recommend proper, practical training to make the ADR effective in enhancing justice.

In Bangladesh, there is no scheduled date for mediation in criminal cases. However, Schedule II of the *CrPC 1898* (Bangladesh) has differentiated the compoundable and non-compoundable offences list. This study found that the criminal cases containing non-compoundable crimes as per

[103] The *CPC 1908* (Bangladesh) s 89A (11).

[104] Sourdin (n 25) 160.

[105] Genn (n 10) 404; Bathurst (n 2) 878.

[106] Nims (n 25) 523.

[107] The *CPC 1908* (Bangladesh) s 89A; the *Family Court Ordinance 1985* (Bangladesh) s 10.

law—such as murder or rape—are compromised by coercion, financial inducement or by evoking social costs. Although such compromise is not acceptable in legal terms, the out-of-court settlement delays trial processes in various ways, for example, parties lose interest, witnesses are dropped from the case or, if the court compels them to come and testify, , they depose as if they are not aware of the incident. It seems that the degree of success of an ADR system, whether voluntary or compulsory, depends on the enthusiasm, willingness, confidence, awareness, and training of all actors concerned, including the parties to the dispute. The party cannot mediate the case, if it is listed as a non-compoundable offence. This inadequacy in the substantive law has complicated legal procedures and caused delays in trials. Also, it does not ensure victim's protection, thereby denying access to justice. Therefore, people are less interested in settling criminal cases unless there are some cases and counter cases between them. Another study found that repeat players take advantage of the ADR process, and there is a possibility that they do not participate in the ADR process in good faith.[108] This practice is also common in Bangladesh and raises the caution that the characteristics of the dispute should be considered well before selecting the dispute resolution process.

Throughout the 20th century, ADR has become better known. Remarkably, even with so many advantages, litigants are reluctant to participate in ADR processes voluntarily.[109] Factors that lead to litigants resisting settling the dispute include being unaccustomed with the ADR process;[110] the possibility of financial compromise,[111] achieving an undesired settlement result[112] or taking advantage of the adversary system by lengthening the court procedure and the lawyer's involvement;[113] and the attraction of the traditional litigation process.[114] In addition to these factors from the existing literature, this study added non-popularity of ADR provisions, litigant's ego, lawyers less interest, judge's passive role, legal dilemma are the main reasons for the low settlement rate in Bangladesh. It also argued that the ADR process is contributing to increasing litigation expenses. Section 5.5 will demonstrate how ADR enhance access to justice.

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[108] Mary Anne Noone and Lola Akin Ojelabi, 'Alternative Dispute Resolution and Access to Justice in Australia' (2020) 16 *International Journal of Law in Context* 119.

[109] Merry and Silbey (n 78) 151–3.

[110] Pearson (n 11) 428–30.

[111] Stephen B Goldberg, Eric D Green and Frank EA Sander, 'ADR Problems and Prospects: Looking to the Future' (1985–86) 69 *Judicature* 292.

[112] Archibald Cox, 'The Duty to Bargain in Good Faith' (1958) 71(8) *Harvard Law Review* 1401.

[113] Gordon Tullock, 'Negotiated Settlement' in JM Von der Schelulenburg and G Skogh (eds) *Law and Economics and the Economics of Legal Regulation* (Martinus Nijhoff Publishers, 1986) 40–1.

[114] Golann (n 7) 491.

5.5 Influence of Alternative Dispute Resolution (ADR) on Access to Justice and Litigation Costs

The role of the court is not merely to resolve disputes; it also ensures and determines the legal rights of the litigants.[115] Due to economic disparity, justice may become inaccessible through a formal litigation process.[116] Therefore, the multifaceted justice has widened its scope beyond the courts and tribunals.[117] Access to justice is not only about equal access to courts but also about ensuring a just outcome.[118] The existing litigation system includes complications, high costs of lawyers, delays, uncertainty, fragmentation, and limited resources and has failed to provide efficient and affordable justice. Given the existing case backlogs and the ability of the court to ensure quick disposal of cases, it is pertinent to consider alternatives that complement rather than substitute the existing court proceedings. Therefore, ADR emerged. ADR may widen access to justice and be cost-effective; however, this study found that the present form of ADR may not produce the expected outcomes. Bangladesh has transplanted the Western-style ADR into its judicial system, disregarding the autochthonous legal system, social norms, and emotions. Therefore, it is still less popular among litigants.

The success of the ADR in reducing time and cost is yet to be supported by empirical evidence.[119] It is assumed that justice and ADR are significantly connected; therefore, there is also a critical need for empirical and in-depth research to investigate the outcome and quality of ADR in connection with constituting justice. Bathurst described justice in ADR in two forms: individual and broader community justice.[120] For the individual, justice for those who avoid confrontation would be flexibly presented through ADR, saving them time and money. For the wider community, timeliness and affordability would be ensured through ADR.[121] Sackville also considered timeliness and affordability as the essential elements in access to justice.[122] As the

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

[116] Noone and Ojelabi (n 108) 111.

[117] Marc Galanter, 'Justice in Many Rooms' in Mauro Cappelletti (ed), *Access to Justice and the Welfare State* (Sijthoff & Noordhoff, 1981) 161–2.

[118] Mauro Cappelletti and Bryant G Garth, 'Access to Justice: The World-Wide Movement to Make Rights Effective' in Mauro Cappelletti and Bryant G Garth (eds), *Access to Justice: A World Survey* (Sitjhoff & Noordhoff, 1978) 68–9.

[119] Hazel Genn, 'Civil Mediation: A Measured Approach?' (2010) 32(2) *Journal of Social Welfare and Family Law* 200.

[120] Bathurst (n 2) 871.

[121] See ibid.

[122] Sackville (n 13) 212.

existing court system has been found to be more expensive than ADR,[123] this alternative mechanism is considered an effective tool to bypass the formal litigation process.

Woolf's reform proposal[124] to reduce litigation delay, time, and complexity through introducing pre-trial conferences has already been shown to not only increase the costs but also, to some extent, the procedural complexities.[125] Although the civil justice reforms intended to reduce delay, complexity, and cost in the civil justice system, it is evident that some of the critical objectives, for example, costs, have not been met. In comparing court-based mediation schemes with standard court procedures, Genn found no differences in case length duration between mediated and non-mediated cases.[126] Genn also added that even if mediation reduced costs, it is difficult to quantify by how much. In another study, Kakalik found that ADR had no major effect on litigation cost or delay.[127] Other research found that the state could save money through mandatory mediation laws, but that came at a financial and temporal cost to the majority of disputants[128] as the litigants had to bear the cost of the mediator. This finding supported those of the present study—that the ADR process is not cost-effective. Even the average amount of time and money spent in mediation does not vary significantly from the average time and money that would have been spent in court litigation.[129]

Mediation aims at problem-solving, promoting relinquishing legal rights instead of contributing to substantive justice.[130] Mediators are also concerned only with settling the dispute instead of solving the legal issues. However, some cases are very much involved with legal issues, and it would not be wise to resolve those disputes by mediation.[131] In this present study, CVJ-2 shared:

> *I faced a case where two parties of a case were agreed for mediation. Before sending them to a mediator, I was looking at the documents and found that the disputed land*

[123] Nims (n 25) 455.

[124] Lord Woolf, 'Introduction' *Access to Justice: Final Report of Lord Chancellor on the Civil Justice System in England and Wales* (1996) (Web Page) ***https://webarchive.nationalarchives.gov.uk/20060214041307/http://www.dca.gov.uk/civil/final/intro.htm*** (accessed 20 March 2020).

[125] John Peysner and Mary Seneviratne, *The Management of Civil Cases: The Courts and Post-Woolf Landscape* (DCA Research Series 9/05, UK Department of Constitutional Affairs, November 2005) 7; A.A.S Zuckerman, 'Costs Capping Orders- the Failure of the Third Measure for Controlling Litigation Costs' (2007) 26 *Civil Justice Quarterly* 271; Paul Fenn, Neil Rockman and Dev Fencappa, *The Impact of Woolf Reforms on Costs and Delay*, Centre for Risk & Insurance Studies Discussion Paper Series 2009.I (2009) 33.

[126] Genn (n 10) 405.

[127] James Kakalik, 'Just, Speedy and Inexpensive?' (1997) 80(4) *Judicature* 188.

[128] Kuhner (n 22) 518.

[129] Kakalik et al (n 21) 34–36.

[130] Genn (n 10) 411.

[131] McLachlin (n 2) 37.

belonged to the government who was not included a party of the case. If I would send the case for mediation without scrutinising the papers, which we usually do, the mediator would settle the dispute distributing the government property between the parties as they had no scope to look into the legality of the subject matters. This certainly would not constitute justice.

In certain issues, such as when a power imbalance exists, inadequate consideration can prevent parties from effectively participating and achieving justice through ADR.[132] Through mandatory mediation, the government is focusing on saving costs and also keeping people away from the justice system.[133] It is evident from schemes in England and Wales that voluntary mediation is more likely to achieve higher settlement rates than mandatory mediation.[134] Genn argued that people mediate to avoid the anticipated costs, delays and uncertainties of trial and, more recently, to avoid the risk of adverse cost penalties imposed by law (offer of judgement, see chapter 4, section 4.2.1.2 and 4.2.1.4).[135] Thus, the deterring theory (such as offer of settlement imposes costs upon the litigants who decline to mediate) always less popular and cannot achieve a better result. Furthermore, this rule narrowed the scope for applying judicial discretion.

The formal adjudication process ensures the values embodied in authoritative texts, such as the Constitution and Statutes, and interprets those values that are absent in the ADR process.[136] ADR rarely meets the genuine need for an authoritative interpretation of the law. Lord Neuberger termed it as 'antipathetic to our commitment to equal access to justice'.[137] Forced mediation also violates the constitutional rights of disputants to access the courts in the first instance; the process does not follow law and fails to ensure equal protection.[138] Mandatory mediation forces the parties to sit face-to-face[139] to reach an amicable solution. Though the OADR does not even require a face-to-face sitting. This binding affects parties' free will and may lead them to undervalue their rights or be convinced to settle the litigation by exaggerated or false information.[140]

ADR is considered as an efficient way to resolve disputes and a fundamental component in legal proceedings. Recently, the law has played an active role in facilitating and promoting ADR by

[132] Noone and Ojelabi (n 108) 116.

[133] Genn (n 10) 413–14.

[134] Civil Justice Council (n 23) 6.

[135] Genn (n 119) 199.

[136] Fiss (n 43) 1085.

[137] Lord Neuberger, 'Has Mediation Had Its Day?' (The Gordon Slynn Memorial Lecture 2010, 11 November 2010).

[138] Golann (n 7) 493.

[139] Though OADR does not require a face-to-face meeting.

[140] Kuhner (n 22) 541.

encouraging parties in a different way, even after the commencement of trial.[141] CVL-4 shared, 'when the mediation [local] failed, people come to the court as their last resort'. The same view was shared by several interviewees. Thus, most disputes do not progress far in the dispute cycle—they are settled or dropped early in the process. Only a small number of disputes go to court. Now that the states are initiating mandatory mediation, cases that are not mediated face a greater possibility of financial penalty. As mandatory mediation precludes access to the court and reduces litigant's satisfaction limiting their choice, it may not ensure access to justice.[142] Furthermore, mandatory mediation does not consider the equal position of the litigants. This mandatory provision leaves only one outcome: settlement or more financial loss as proceeding to litigation consumes more time. As Giles J stated, "What is enforced is not co-operation and consent, but participation in a process from which co- operation and consent might come".[143] This sense could be the essence of mandatoriness. However, the researcher would like to highlight the sentiments of Friedman: 'litigation does not mean, necessarily, trials, which have, on the whole, decreased in the latter part of the 20th century. Litigation will never disappear, but it will continue, no doubt, to evolve.'[144] We would do better to leave the dispute resolution process to the litigant's choice instead of imposing a mandatory provision for settling the dispute. Imposed choice reduces satisfaction and limits access; this does not necessarily promote justice.

Interminable, time-consuming, complex, and expensive court procedures impel jurists to search for an alternative forum that would be less formal, more effective and quicker to resolve the dispute, thereby avoiding procedural claptrap.[145] However, there is still debate about whether ADR constitutes justice and can reduce litigation costs.[146] The disposal statistics in Bangladesh show that litigants do not prefer ADR for several reasons. This thesis argues that the dispute resolution process should be the litigants' choice, not the state's. ADR should be considered an additional process rather than substituting the normal process of the court. The empirical findings from this study and those in the literature suggest that the present form of ADR process in Bangladesh does not constitute justice, nor does it provide a cost-effective method for all kinds of legal suits.

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[141] The *CPC 1908* (Bangladesh) 89(a). Mediation is also allowed in appeals (the *CPC 1908* (Bangladesh) s 89(c)).

[142] Ummey Sharaban Tahura, 'Does Mandatory ADR Impact on Access to Justice and Litigation Costs?' (2019) 30 *Australasian Dispute Resolution Journal* 37.

[143] *Hooper Bailie Consolidated Ltd* v *Natcon Group Pty Ltd* (1992) 28 NSWLR 194

[144] Lawrence M Friedman, *Total Justice* (Russel Sage Foundation, 1985) 194.

[145] Md. Habib Alam, 'Alternative Dispute Resolution (ADR): A New Key for Implementing Civil Justice in Bangladesh' (2014) 19(1) *IOSR Journal Of Humanities And Social Science* 88.

[146] Tahura (n 142) 37; Francesco Francioni, *The Rights of Access to Justice Under Customary International Law* (Oxford University Press, 2007) 5.

5.6 Conclusion

To ensure equal access to justice, an inexpensive system would play a vital role as argued in distributive theory. This chapter has examined whether ADR would be a cost-effective way to enhance access to the justice system. This chapter has demonstrated that ADR can be an alternative way to resolve cases unless and until the court system can ensure affordable, timely disposition that ensures access to justice for all. However, mandatory mediation adopted by the state serves it with financial benefits that counter the basic argument of ADR: free will. Such endeavours raise the question of whether mandatory mediation will ensure justice to litigants when they are not prepared to mediate. ADR may risk the existence of the court system and lose value for the courts.

Despite having an ambitious goal, mediation has been proven to have minimal effect on encouraging settlement in Bangladesh. This chapter concludes that the lawyer's role, litigant's emotion, judge's workload, and social sentiments are not adequately reflected in the existing ADR provisions. Therefore, its popularity and effectiveness remain less attractive. The design of ADR should be varied instead of a one-size-fits-all arrangement—considering the type of disputes, priorities of the parties and best utilisation of available resources—to enhance access to justice.

Chapter 6: Legal Support Services to Enhance Access to Justice

6.1 Introduction

The high costs of litigation deny the majority of the population access to justice.[1] Therefore, many countries have created alternative services for economically disadvantaged groups who cannot afford the expenses of litigation. These services include legal aid, speculative or contingency fee arrangements, conditional fee arrangements (CFAs), insurance, pro bono, third-party funding, self-representation and more. Among them, legal aid services are a well-known government subsidy that empowers people to overcome barriers to justice.[2] Chapter 4 focused on broadening access to justice through legal and economic remedies for the litigants who can fund their litigation expenses. This chapter critically examines how the existing legal aid services ensure access to justice for those who cannot bear their legal expenses and explores the alternative services that could be administered to support indigent people in Bangladesh to maximise access to justice (Research Issue B).

An expensive justice system gives an artificial advantage to the wealthy few and denies a fair chance for justice to many.[3] Rhode expressed the irony in society tolerating a system in which money matters more than merit, where equal protection principles fail in practice.[4] The costs of litigation often prohibit people from litigating valid claims. Sackville argued that the legal system aims to reduce inequalities in society to achieve its traditional goal of justice in individual cases according to principles that emphasise stability and continuity.[5] However, the courts and tribunals cannot resolve the problem of poverty, even if the problem has a legal dimension.[6] Lord Irvine stated that people must have ways to uphold their rights and defend their interests.[7] It is undesirable if they cannot do so due to high litigation costs.

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[1] Gary Chan Kok Yew, 'Access to Justice for the Poor: The Singapore Judiciary at Work' (2008) 17(3) *Pacific Rim Law Policy Journal* 599; Chief Justice Yong Pung How, 'Chief Justice's Response: Opening of the Legal Year 2003' (Speech, Opening of Legal Year 2003, 4 January 2003) <https://bit.ly/3eRsYjn> (accessed 2 May 2021).

[2] Access to Justice Advisory Committee, *Access to Justice: An Action Plan* (Australian Government Publishing Service, 1994) 226.

[3] Leonard S Janofsky, 'A.B.A Attacks Delay and the High Cost of Litigation' (1979) 65 *A.B.A Journal* 1323; Deborah L Rhode, *Access to Justice* (Oxford University Press, 2004) 3.

[4] Rhode (n 3) 3.

[5] Ronald Sackville, 'Law and Poverty: A Paradox' (2018) 41(1) *UNSW Law Journal* 81.

[6] Ibid 95.

[7] Lord Chancellor's Department, *Modernising Justice White Paper* (Cm. 4155) (HMSO, 1998), cited in Steve Hynes and Jon Robins, *The Justice Gap: Whatever Happened to Legal Aid?* (Legal Action Group, 2009) 134.

It is generally thought that there will always be a substantial gap between the concept of access to justice and the ability to access justice.[8] Access to justice is defined as the ability to seek and obtain a remedy through formal or informal institutions of justice for grievances.[9] Further, Lord Neuberger found affordability was a severe problem in accessing the courts for two reasons: first, legal service and advice are beyond litigants' means; and second, most governments are restricting funding for legal aid through tightening eligibility criteria.[10] Access to justice is now a part of the universal choice to settle a dispute through methods chosen by the litigant, regardless of economic factors, through a state-recognised legal proceeding that ensures timely disposal. Thus, access to justice has been at risk due to the unequal economic situations of litigants.[11]

This chapter critically examines the alternatives services that are available to ensure access to justice and how such services are administered in Bangladesh. It addresses the gaps between theory and practice of the present *Legal Aid Services Act 2000* (Bangladesh), scrutinising the loopholes. After considering examples from other states, Chapter 6 critically examines how poor and middle-income groups are denied access to justice due to the inadequacies of existing services and lack of available alternative services. Finally, Chapter 6 argues that in the absence of a complete package of alternative services, enhancing access to justice would not be possible.

6.2 Legal Aid

As stated, it has become the state's responsibility to ensure equal access to the legal system through allocating publicly funded legal aid services to those who cannot afford access. At the beginning of the 19th century, legal aid was a combination of law and charity that was allocated to marginalised and disadvantaged groups.[12] In the 21st century, legal aid has developed into a constitutional, political, and social right. The 19th-century approach has been changed such that legal aid is now a right to be protected by the force of law, requiring affirmative state action that must be actual and effective, not merely formal.[13] Cranston found four bases for justifying publicly funded legal services: equality before the law, legal rights, unmet legal needs, and social

[8] Ronald Sackville, 'Access to Justice: Towards an Integrated Approach' (2011) 10 *The Judicial Review* 233

[9] UNDP, *Access to Justice*, Practice Note (2004) 3–4.

[10] Lord Neuberger, 'Justice in An Age of Austerity' (JUSTICE Tom Sargant Memorial Annual Lecture, 15 October 2013) <https://files.justice.org.uk/wp-content/uploads/2015/02/06172428/Justice-in-an-age-of-austerity-Lord-Neuberger.pdf> 15.

[11] Other barriers have been mentioned above; however, this research is limited to high litigation expenses only.

[12] Mauro Cappelletti, James Gordley and Earl Johnson, Jr, *Toward Equal Justice: A Comparative Study of Legal Aid in Modern Societies* (Oceana Publications Inc, 1975) 50–75; Prasanna Mutha-Merennege, 'Insights into Inequality: Women's Access to Legal Aid in Victoria' in Asher Flynn and Jacqueline Hodgson (eds), *Access to Justice and Legal Aid: Comparative Perspectives on Unmet Legal Need* (Hart Publishing, 2017) 255.

[13] Cappelletti, Gordley and Johnson (n 12) 79.

exclusion.[14] Accordingly, states have taken several initiatives, of which legal aid is one. There are three categories of economic background that are considered within legal aid funding and policies: those who can afford their own legal representation (the high-income group), those who cannot afford representation and are thereby allocated legal aid funding (the low-income group), and one who is not eligible for legal aid but who cannot afford privately funded legal services either (the middle-income group).[15] This division has been considered a class struggle since it relates largely to litigants' socio-economic conditions.

Legal aid services that are provided to the poor include 'information, ability to surmount cost barriers and skills to navigate restrictive procedural requirements'.[16] Cranston found two characteristics of legal aid: individual and structural.[17] Individual legal aid is provided by way of advice, assistance, or representation for family matters, disputes over property and accident compensation claims to assist poorer individuals to cope with legal problems. Conversely, structural legal aid uses legal services to assist groups and communities as well as individuals in the pursuit of legal rights and social change. Fundamentally, individual legal aid relies on lawyer expertise rather than client empowerment.[18] Section 6.2.1 will focus on the initiatives that are being implemented by other states and how legal aid funding is managed. This is followed by a critical examination of how the legal aid program is being operated in Bangladesh (section 6.2.2) and the loopholes that exist. Finally, it will examine how effective the legal aid program is in maximising access to justice.

6.2.1 Contemporary Legal Aid Services in Other Countries

Access to legal services and advice is an essential facet to the rule of law, irrespective of its means.[19] The responsibility belongs to the government to ensure justice for all, including the economically and socially disadvantaged group. The legal aid system plays a crucial role in promoting access to justice at proportionate costs in key areas.[20] As mentioned, the legal aid

[14] Ross Cranston, *How Law Works: The Machinery and Impact of Civil Justice* (Oxford University Press, 2006) 36.

[15] Asher Flynn et al, 'Access to Justice: A Comparative Analysis of Cuts to Legal Aid. Report of the Monash Warwick Workshop' (Monash University, 2015) 12.

[16] Marc Galanter, 'Why the Haves Come out Ahead: Speculations on the Limits of Legal Change' in Richard Abel (ed), *The Law and Society Reader* (New York University Press, 1995) 297, 309.

[17] Cranston (n 14) 88.

[18] Ibid.

[19] Senate Legal and Constitutional Affairs Committee, *Inquiry into Access to Justice*, Law Council of Australia (2009) 3.

[20] Lord Justice Jackson, 'Review of Civil Litigation Cost: Final Report' (The Stationery Office, December 2009) 28, 68.

program expanded with a formal interpretation linking with the access to justice program.[21] Later on, due to the fall shortage of the state's budget, the wave shifted to some other points as the legal aid funding became a burden as public expenditure. However, the legal aid funding program is not the same worldwide, nor it had the same priority. The following part will examine how some states, pioneer in legal aid funding, are dealing with their legal aid programs.

6.2.1.1 United Kingdom

The legal aid scheme in England and Wales was established as a result of the Rushcliffe Report, published in 1945.[22] The aim of the report was not to limit legal aid funding to those normally classed as poor but to include those of small or moderate means.[23] The scheme was initially limited mostly to family matters, but the express intention was to create a scheme with high eligibility. At the beginning of the legal aid scheme, 80% of the population was eligible for civil legal aid.[24] As the costs involved in providing the legal aid program were high, eventually, it turned into a political issue.[25] Subsequently, over the last two decades, national spending on legal aid has been cut by one-third though the expenditure for legal aid services has proliferated.[26] Along with decreasing the budget, the government also has capped legal funding,[27] which has increased the number of unrepresented cases.[28] Furthermore, legal assistance among the most vulnerable groups has decreased.[29] In April 2000, the Legal Service Commission (LSC) assumed responsibility for the administrative functions of the Legal Aid Board and the Department for Constitutional Affairs (formerly the Lord Chancellor's Department) in both civil and criminal legal aid, which are now

[21] Ross Cranston, 'What Do Courts Do?' (1986) 5 *Civil Justice Quarterly*, 233; Sumaiya Khair, *Legal Empowerment for the Poor and the Disadvantaged: Strategies, Achievements, and Challenges* (The University Press Limited, 2008) 5.

[22] Roger Smith, 'Middle Income Access to Civil Justice: Implication of Proposals for the Reform of Legal Aid in England and Wales' in Michael Trebilcock, Anthony Duggan and Lorne Sossin (eds), *Middle Income Access to Justice* (University of Toronto Press, 2012) 175.

[23] Steve Hynes and Jon Robins, *The Justice Gap* (Legal Action Group, 2009) 3.

[24] Jackson (n 20) 68.

[25] Smith (n 22) 175.

[26] Rhode (n 3) 3; Hynes and Robins (n 23) 70–1; Neil Rickman, Paul Fenn and Alastair Gray, 'The Reform of Legal Aid in England and Wales' (1999) 20(3) *Fiscal Studies* 262; Richard Susskind, *Online Courts and the Future of Justice* (Oxford University Press, 2019) 28.

[27] AAS Zuckerman, 'A Reform of Civil Procedure: Rationing Procedure Rather Than Access to Justice' (1995) 22(2) *Journal of Law and Society* 155.

[28] Mutha-Merennege (n 12) 264.

[29] Natalie Byrom, 'Cuts to Civil Legal Aid and the Identity Crisis in Lawyering: Lessons from the Experience of England and Wales' in Asher Flynn and Jacqueline Hodgson (eds), *Access to Justice and Legal Aid: Comparative Perspectives on Unmet Legal Need* (Hart Publishing, 2017) 233.

performed in the context of the Community Legal Service (CLS) and Criminal Defence Service respectively.[30]

The LSC works in conjunction with the local authorities and other organisations who support the provision of CLS to assess local levels of need for publicly funded civil legal services and to plan how resources can best be targeted to meet these needs.[31] Criticised for ineffectiveness and inadequate coverage, the CLS is now focusing on assessing the needs of the people while granting legal aid.[32] The CLS was developed to meet the legal services most effectively, considering the different populations, their varying legal needs, the accessibility of advice with a limited budget and the real needs of people for legal advice.[33] In 2013, through the enactment of the *Legal Aid Sentencing and Punishment of Offenders Act 2012*, the most devastating cuts to legal aid in England and Wales began, mainly in the areas of family law, immigration, welfare benefits, employment, and clinical negligence.[34]

Peysner found the reason for reducing the legal aid budget was that spending more public money helped fewer and fewer people.[35] Therefore, the eligibility criteria were tightened; hence, a larger portion of the population falls outside the legal aid net. Hynes and Robins mentioned that more than two-thirds of the population was declared ineligible purely on financial grounds.[36] Lord Neuberger stated that in the UK, the eligibility for legal aid funding is decreasing.[37] He elaborated that this restriction has two effects: it denies justice and increases litigation costs.

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[30] Pascoe Pleasence et al, 'Needs Assessment and the Community Legal Service in England and Wales' (2004) 11(3) *International Journal of the Legal Profession* 214. See also, the *Access to Justice Act 1999* (UK) s.22.

[31] Stephen M Orchard, 'Needs Assessment and Prioritization of Legal Services in England and Wales' (2000) 33(2) *University of British Columbia Law Review* 467.

[32] Lord Chancellor's Department, *Legal Services: A Framework for the Future* (HMSO, 1989); Rickman, Fenn and Gray (n 26) 262.

[33] Pleasence et al (n 30) 215–16; Cyrus Tata, 'Comparing Legal Aid Spending: The Promise and Perils of a Jurisdiction-Centred Approach to (International) Legal Aid Research' in Francis Regan, Alan Paterson, Tamara Goriely and Don Fleming (eds), *The Transformation of Legal Aid: Comparative and Historical Studies* (Oxford University Press, 1999) 150–1.

[34] Asher Flynn and Jacqueline Hodgson, 'Access to Justice and Legal Aid Cuts: A Mismatch of Concepts in the Contemporary Australian and British Legal Landscapes' in Asher Flynn and Jacqueline Hodgson (eds), *Access to Justice and Legal Aid: Comparative Perspectives on Unmet Legal Need* (Hart Publishing, 2017) 1.

[35] John Peysner, *Access to Justice: A Critical Analysis of Recoverable Conditional Fees and No-Win No-Fee Funding* (Palgrave Macmillan, 2014) 46.

[36] Hynes and Robins (n 23) 70–1.

[37] Neuberger (n 10) 15.

Wallman described how the legal aid system works in England and Wales.[38] For incidents that require legal attention, clients first visit a lawyer, where they receive advice under a different administering legal aid scheme. If court proceedings are needed, the lawyer lodges the application to the legal aid administration, which mostly consists of government employees. After confirmation of financial eligibility and the merit of the case, the administration determines whether legal aid will be granted. For criminal cases, the administration determines the interests of justice and considers pleas (guilty or not guilty).[39] In this process, the administration ensures the appropriate use of court resources.[40] To do so, they have prioritised the funding area according to the nature and gravity of the cases (e.g., criminal cases receive more emphasis than civil cases). Therefore, Hynes and Robins recommended that the budget for civil cases should be separate from criminal cases.[41] However, legal aid is still not available in some key areas of litigation, for instance, particular clinical negligence, housing cases and judicial review.[42]

Despite this rigorous process, there remain weaknesses of legal aid service in the UK: it is as expensive as private legal services, there is no mechanism to ensure quality service, and, more importantly, access is not guaranteed.[43]

6.2.1.2 United States

The legal aid funding situation in the US is similar to England in some respects. Initially, the legal aid program was developed as pro bono services, mostly with private practices.[44] In the 1970s and 1980s, the legal aid services provided by the Legal Services Corporation and law school clinics had grown.[45] Due to changes in the global economy, the legal aid service became a combination of private and public interest in the 1980s.[46] However, even with a large number of lawyers, the US people experienced inadequate legal assistance.[47] The US had offered nearly comprehensive

[38] Russell Wallman, 'Legal Aid in England' in Douglas J Besharov (ed), *Legal Services for the Poor* (The AEI Press, 1990) 194–97.

[39] Tata (n 33) 143.

[40] Wallman (n 38) 194–97.

[41] Hynes and Robins (n 23) 135.

[42] Jackson (n 20) 70.

[43] Wallman (n 38) 196–97.

[44] Philip L Merkel, 'At the Crossroads of Reform: The First Fifty Years of American Legal Aid: 1876-1926' (1990) 72 *House Law Review* 13–14.

[45] Louise G Trubek, 'U.S. Legal Education and Legal Services for the Indigent: A Historical and Personal Perspective' (1994) 5(2) *Maryland Journal of Contemporary Legal Issues* 388.

[46] Ibid 392–3.

[47] Rhode (n 3) 3.

coverage to clients that included adjudicative proceedings, policy advocacy, legal advice and group presentation, unlike most European countries who were abstaining from policy advocacy and group presentation as part of legal aid service.[48] Like the UK, the US also shredded its national spending on legal aid and restricted eligibility.[49] The legal vulnerability turned to political vulnerability, and millions of Americans were excluded from legal protection due to its unaffordability.[50]

Studies of legal needs consistently showed that around 90% of legal needs had gone unaddressed.[51] The US prioritised criminal cases over civil cases when granting legal aid.[52] Besharov argued that as the legal aid fund is limited, the priority should be ensuring the most efficient use of existing funding.[53] He found the priorities for allocating legal aid funding were mostly based on lawyers' choices instead of the apparent needs of poor people.[54] O'Steen also echoed Besharov, stating that lawyers possess a paternalistic view that controls the legal aid selection category and service delivery in the US.[55] Johnson has described the basic format of legal aid in the US for the next 90 years as follows:[56] (1) funding through private charitable donations; (2) representation provided by government attorneys; (3) attorney-based services delivered at special legal aid offices; (4) administration by local non-profit organisations, usually called legal aid societies, rather than the courts or government; and (5) service limited to a number of clients who can be handled by appointed lawyers.

6.2.1.3 Australia

In Australia, legal aid is funded by both federal (Commonwealth) and state governments. The Australian legal aid system is described as a 'mixed model' of providing charitable, judicare,[57]

[48] Cappelletti, Gordley and Johnson (n 12) 218–19.

[49] Rhode (n 3) 3.

[50] Ibid 3; Alan W Houseman, 'The Future of Legal Aid: A National Perspective' (2007) 10 *University of the District of Columbia Law Review* 43–6.

[51] Legal Service Corporation, *Documenting the Justice Gap in America: The Current Unmet Civil Legal Needs of Low-Income Americans* (Legal Services Corporation, 2nd ed, 2007) 13.

[52] Rhode (n 3) 8.

[53] Douglas J Besharov (ed), *Legal Services for the Poor* (The AEI Press, 1990) 3.

[54] Ibid 3–4.

[55] Van O'Steen, 'Private Sector Innovations in the Delivery of Low-Cost Legal Services' in Douglas J Besharov (ed), *Legal Services for the Poor* (The AEI Press, 1990) 97–8.

[56] Earl Johnson, Jr, 'Justice and Reform: A Quarter Century Later' in Francis Regan, Alan Paterson, Tamara Goriely and Don Fleming (eds), *The Transformation of Legal Aid: Comparative and Historical Studies* (Oxford University Press, 1999) 15.

[57] The judicare model is where public funding pays private lawyers who take on clients largely as if they were fee-paying.

government-appointed as well as pro bono services of legal aid.[58] Australia is also facing similar kinds of fiscal restrictions as the UK and US, and has shifted to a public management system since the public Australian Legal Aid Office was established in 1973 by the Commonwealth.[59] In Australia, the legal service system has benefited from the operation of a service delivery partnership between Legal Aid Commissions (LACs), Community Legal Centres (CLCs) and the private legal aid professions to provide free, accessible and easily understandable legal services.[60] It is a community-based and community-managed organisation with limited resources to provide extensive litigation services.[61] Private lawyers have focused on ongoing casework and representation services, while LACs have combined strong casework practices in criminal and family law with the delivery of community legal education. CLCs have traditionally focused heavily on community legal education, legal advice, and various forms of strategic casework.[62] Due to changes in legislation, pressure on legal aid from regulations has increased. As a result, legal aid has been restrained through capping the budget, tightening of criteria for means and merits tests, and increasingly difficult access to legal service, even for the people who were punished with imprisonment or detention through summary trial.[63]

In 1994, the Law Council of Australia expressed its concern that insufficient funding was alienating more people from access to justice.[64] Since 1997, there have been consistent decreases in the level of Commonwealth funding for LACs.[65] Restriction of the eligibility criteria has meant that the number of legal aid recipients is decreasing.[66] However, the selection criteria now

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[58] Mary Anne Noone, 'Challenges Facing the Australian Legal Aid System' in Asher Flynn and Jacqueline Hodgson (eds), *Access to Justice and Legal Aid: Comparative Perspectives on Unmet Legal Need* (Hart Publishing, 2017) 24; Jeff Giddings, 'Rhyme and Reason in the Uncertain Development of Legal Aid in Australia' in Asher Flynn and Jacqueline Hodgson (eds), *Access to Justice and Legal Aid: Comparative Perspectives on Unmet Legal Need* (Hart Publishing, 2017) 43.

[59] Mary Anne Noone, 'Access to Justice Research in Australia' (2006) 31(1) *Alternative Law Journal* 30–1; Law Council of Australia et al, *Erosion of Legal Representation in the Australian Justice System* (Law Council of Australia, 2004) 20.

[60] Jeff Giddings, 'Legal Aid: at the Crossroads Again' in Jeff Giddings (ed), *Legal Aid in Victoria: at the Crossroads Again* (Fitzroy Legal Service, 1998) 10–14; Frederick H Zemans and Aneurin Thomas, 'Can Community Clinics Survive? A Comparative Study of Law Centres in Australia, Ontario and England' in Francis Regan, Alan Paterson, Tamara Goriely and Don Fleming (eds), *The Transformation of Legal Aid: Comparative and Historical Studies* (Oxford University Press, 1999) 66.

[61] Zemans and Thomas (n 60) 66.

[62] Jeff Giddings, 'Casework, Bloody Casework' (1992) 17(6) *Alternative Law Journal* 261; Jeff Giddings and Michael Robertson, 'Informed Litigants with Nowhere to Go: Self-Help Legal Aid Services in Australia' (2001) 28(4) *Alternative Law Journal* 189.

[63] Australian Law Reform Commission, *Managing Justice: Review of the Federal Civil Justice System* (ALRC Report No 89, 2000) 73–4; Flynn and Hodgson (n 34) 3; Noone (n 59) 35.

[64] Law Council of Australia (n 59) 8–9.

[65] Flynn and Hodgson (n 34) 3.

[66] Law Council of Australia (n 59) 14.

prioritising on the merit test and also ensure that the limited resources can provide benefits for a larger group.[67] The funding procedure has been simplified by limiting state-funded legal aid to criminal law, Commonwealth-funded legal aid to family law mostly, and allocating minimal funding for civil matters.[68] Though the incorporation of technology into the legal aid sector has improved efficiency, the overall legal aid infrastructure is still under stress.[69] Nevertheless, Noone found the Australian legal aid service is vibrant and creative given the limited funding.[70]

6.2.1.4 Canada

In Canada, the *Legal Aid Act 1967* was enacted as a statutory right that acknowledged the obligation of the government to individuals who cannot afford a lawyer.[71] This Act ensured the same quality of legal services as was available as a paid service. The Act followed the judicare model, and the legal services were provided through private lawyers as service providers.[72]

In Canada, only selective areas of civil cases are covered by legal aid funding.[73] The recently completed Ontario civil needs project, 'Listening to Ontarians', revealed that access to justice for low-income and middle-income earners requires only accurate legal information that empowers proper action.[74] In this study, Canada has taken an example from the Finnish legal aid system where the best utilisation of resources have been ensured by enhancing accessibility and widening the program's range. Studying the Finnish legal aid system in comparing with other countries, Regan and Johnsen used a best practice model to analyse the efficacy of a legal aid system, concluding that the Finnish system came closest to the legal aid goal, with its comprehensive and universal plan, in which three-quarters of the Finnish population were eligible under the means cap.[75] In addition to the means test, the Finns also apply a merit test. The main criterion for merit

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[67] Johnson (n 56) 66.

[68] Noone (n 58) 25.

[69] Ibid 33.

[70] Ibid.

[71] Russell Engler, 'Opportunities and Challenges: Non-Lawyer Forms of Assistance in Providing Access to Justice For Middle-Income Earners' in Michael Trebilcock, Anthony Duggan and Lorne Sossin (eds), *Middle Income Access to Justice* (University of Toronto Press, 2012) 149; Zemans and Thomas (n 60) 71.

[72] Zemans and Thomas (n 60) 71.

[73] Michael McKiernan, 'Lawyers Integral in Making Justice Accessible: McLachlin' *Law Times* (online, 21 February 2011) <https://www.lawtimesnews.com/news/general/lawyers-integral-in-making-justice-accessible-mclachlin/258631>.

[74] Paul A Vayda and Stephen B Ginsberg, 'Legal Services Plans: Crucial-Time Access to Lawyers and the Case for a Public-Private Partnership' in Michael Trebilcock, Anthony Duggan and Lorne Sossin (eds), *Middle Income Access to Justice* (University of Toronto Press, 2012) 248.

[75] Francis Regan and Jon Johnsen, 'Are Finland's Recent Legal Services Policy Reforms Swimming against the Tide of International Reforms? (2007) 26 *Civil Justice Quarterly* 341.

is that the applicant needs a lawyer to handle the issue completely. Coverage relates to seriousness, not the legal nature of the problem.[76] The Finnish system provides publicly funded, government-employed lawyers who deliver a wide array of legal services, including legal advice, litigation, and non-litigation aid. The private bar also provides litigation representation, paid for by public funds.[77] Like Finnish practice, the Singaporean government also test the merits of the cases at a very early stage.[78]

It is clear that legal aid services vary between states and societies, just as the population ratio who need legal services varies. The tests for eligibility, priority of cases, process of identifying the real needs of the people and the welfare strategies within or outside the court are different. Regan argued that societal priorities in civil law and common law are different.[79] Common law emphasises 'inside litigation' services while civil law emphasises 'outside litigation' but, for the future development of legal aid services, combining these two schemes would be more advantageous. Despite the differences, the common scenario is that all countries are struggling with integrating supply and demand of the legal aid funding. Cranston argued that there must be a balance struck between rights, needs, and resources.[80] As public funding is limited, the legal services demand a justification. Most countries are still battling with questions of affordability, rationing and prioritising to produce a strategic plan. However, the harsh truth is that cutting the legal aid budget will mean the legal and court system is less accessible and less affordable.[81] Research has also shown that a positive connection between reducing legal aid fund and increasing legal costs and delays in-court proceedings.[82] Therefore, the primary concern should be identifying legal clients and responding to their needs through effective service. Although some believe that legal aid enables the lower-income group to utilise legal service, thereby increasing access to justice, reducing the legal aid budget is depriving the lower-income and middle-income groups from accessing justice.

[76] Ibid 350.

[77] Vayda and Ginsberg (n 74) 250.

[78] Yew (n 1) 605.

[79] Tata (n 33) 197–200.

[80] Cranston (n 14) 6.

[81] Richard Susskind, *Tomorrow's Lawyer* (Oxford University Press, 2013) 87.

[82] Law Council of Australia et al (n 59) 9; Flynn et al (n 15) 12.

6.2.2 Contemporary Legal Aid Services in Bangladesh

Bangladesh is the eighth most populous country globally and is ranked 94th in population by size, with a population of approximately 164 million.[83] Bangladesh is classified as a least developed country.[84] However, its Constitution enshrines equality of justice and equal protection under the law.[85] Unfortunately, those protections exist only in theory. Many people are living below the poverty line, and it has become a burden for them to access justice as they cannot afford a lawyer or other litigation costs. Research has demonstrated that litigation expenses often exceed the disputed amount of money.[86] From the empirical data, this study found (*BQRS 2019*) that each party spent an average of BDT 2875 (AUD 46.38)[87]on private costs for each date (which is set at an average of one month) of the case.[88] As mentioned before, the average time for case disposal is approximately five years.[89] Therefore, on a conservative basis, the amount spent on litigation is BDT 34,500 (AUD 556.55) per year by each party, which is almost 20% of the average per capita income.[90] This shows how costly the justice system is in Bangladesh.

Bangladesh has an expensive litigation system, excessively high lawyer's fees, complex legal proceedings, limited legal aid facilities, and an ineffective judiciary, all of which make the justice system inaccessible to a great number of indigent people.[91] Approximately 20.5% of its population falls below the poverty line, 10.5% is in extreme poverty,[92] 41.7% of the population is

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[83] Central Intelligence Agency, 'Bangladesh', *World Fact Book* (Web Page, 15 March 2021) <https://www.cia.gov/the-world-factbook/countries/bangladesh/#people-and-society> (accessed 30 April 2021).

[84] Bangladesh is still classified as a least developed country, but the United Nations declared that if the economic growth sustainably continues, by 2024, Bangladesh will be upgraded to a developing country. See United Nations, Department of Economic and Social Affairs, 'Leaving the LDCs Category: Booming Bangladesh Prepares to Graduate' (Web Page, 13 March 2018), <https://www.un.org/development/desa/en/news/policy/leaving-the-ldcs-category-booming-bangladesh-prepares-to-graduate.html> (accessed 30 September 2020).

[85] The *Constitution of the People's Republic of Bangladesh 1972,* preamble, art 27.

[86] Ummey Sharaban Tahura, 'Case Management in Reducing Case Backlogs: Potential Adaptation from the NSW District Court to Bangladesh Civil Trial Courts' (Master of Philosophy Thesis, Macquarie University, 2015) 175.

[87] 1 BDT = 0.016 AUD 30 September 2021.

[88] BDT is the Bangladeshi currency, with a currency rate of BDT 1 = AUD 0.015 on 6 February 2018.

[89] Ridwanul Hoque, 'Courts and the Adjudication System in Bangladesh: In Quest of Viable Reforms' in Jiunn-rong Yeh and Wen-Chen Chang (eds) *Asian Courts in Context* (Cambridge University Press, 2014) 481.

[90] The average per-capita income rose to USD 1855.74 in 2019. The currency rate on 24 March 2021 was BDT 1 = USD 0.012: see 'GDP per capita (current US$) - Bangladesh', *World Bank* (Web Page, 2021) <https://data.worldbank.org/indicator/NY.GDP.PCAP.CD?locations=BD>. See also Central Intelligence Agency (n 19).

[91] Khair (n 21) 41–50.

[92] Bangladesh Bureau of Statistics, 'Poverty and extreme poverty, 2017, 2018 and 2019' (Web Page, 2019) <https://bit.ly/3ePukuM> (accessed 20 April 2020).

multidimensionally poor,[93] and the average per capita monthly income is BDT 3940 (AUD 63.56).[94] The Bangladesh government has sought to provide legal aid services to those who cannot afford lawyers or other litigation costs since 2000.

Deeply rooted economic inequality between two parties in a case, ensures that access to justice will not prevail while this inequality persists. Like other countries, Bangladesh has also begun to execute the constitutional mandate of equality before the law and equal protection for all.[95] Legal aid service for the indigent is one of the enterprises within this mandate. Before the *Legal Aid Services Act 2000* (Bangladesh) formally came into effect,[96] scattered provisions existed in various laws to deal with legal aid. For example, the *CPC 1908* has the provision for a pauper suit.[97] A person is declared a pauper if he or she does not have sufficient means to pay the fees for the pleading or is not entitled to property worth more than BDT 5000. This indicates that only plaintiffs are entitled to the benefits of this suit. Similarly, the *CrPC 1898* also ensures that a person against whom a case has been instituted has the right to be defended by a pleader.[98] Further, the *Acid Control Act 2002* ensures medical aid, rehabilitation, and legal aid for acid victims.[99] Additionally, the legal aid services are not flawless and struggle to maximise its access to the justice sector.

6.2.2.1 Government-Funded Legal Aid and the Legal Aid Services Act 2000 (Bangladesh)

The government of Bangladesh enacted the *Legal Aid Services Act 2000*, which came into effect on 28 April 2000.[100] To determine the eligibility of the applicants, the government adopted the

[93] United Nations Development Programme, 'Human Development Report 2020. The Next Frontier: Human Development and the Anthropocene. Briefing Note for Countries on the 2020 Human Development Report. Bangladesh' (Web Page, 2019) ***http://hdr.undp.org/sites/all/themes/hdr_theme/country-notes/BGD.pdf*** (accessed 20 April 2020).

[94] Bangladesh Bureau of Statistics, *Household Income and Expenditure Survey (HIES)* (2016) 29. The currency exchange rate was BDT 1 = USD 0.012 on 27 May 2020. See currency exchange rate at 'Currency Converter' (n 507).

[95] The *Constitution of the People's Republic of Bangladesh 1972* arts 27, 31.

[96] The *Legal Aid Services Act 2000* (Bangladesh).

[97] The *CPC 1908* (Bangladesh) o XXXIII, r 1.

[98] The *CrPC 1898* (Bangladesh) s 340.

[99] The *Acid Control Act 2002* (Bangladesh) s 8.

[100] The *Legal Aid Services Act 2000* (Bangladesh). From 1994 initiatives were taken to raise legal aid funds and a National Legal Aid Committee was established in 1997. See also Farzana Akter, 'Legal Aid for Ensuring Access to Justice in Bangladesh: A Paradox?' (2017) 4 *Asian Journal of Law and Society* 258–9; Nazmul Ahsan Chowdhury and Shahdeen Malik, 'Awareness on Rights and Legal Aid Facilities: The First Step to Ensuring Human Security' in ATR Rahman and Dolgo Solongo (eds), *Human Security in Bangladesh: In Search of Justice and Dignity* (United Nations Development Programme, Bangladesh, 2002) 42.

Legal Aid Services Policy 2001 (Bangladesh).[101] In 2014, this policy was amended and replaced by the *Legal Aid Services Policy 2014* (Bangladesh).[102] In 2001, the *Legal Aid Services Regulation* was adopted to process legal aid applications, nominations for legal aid lawyers and their rates of charge. The regulation was later amended and replaced by the *Legal Aid Services Regulation 2015* (Bangladesh).[103] This Regulation decentralised legal aid activities to the district, *upazila* and union levels.[104] The National Legal Aid Services Organization (NLASO) controls and supervises legal aid activities all over the country.[105] In 2013, the Supreme Court Committee[106]—and, in 2016, two more committees—were constituted for Labour Courts[107] and Chowki Courts.[108] The NLASO works under the supervision of the Ministry of Law, Justice, and Parliamentary Affairs.

Initially, the District and Sessions Judges chaired the district committees. However, this was found ineffective, as the district and Sessions Judges were overburdened with judicial and administrative work.[109] In 2014, after the amended policy came into force, a legal aid officer was appointed from the judicial service members (judge) in each district.[110] Since then, the development of the legal aid program has increased in pace. To ensure effective service, the NLASO organises training for legal aid officers, court staff, and lawyers.[111] Nevertheless, legal scholars criticise the government's legal aid program as lagging in its promotion of access to justice.[112] Some changes have occurred since the criticisms were made and, therefore, this study argues from a different

[101] *Legal Aid Services Policy 2001* (Bangladesh).

[102] The *Legal Aid Services Policy 2014* (Bangladesh). No fundamental changes were adopted by the new policy and, therefore, literature before the new policy came into force are still relevant in this context.

[103] The *Legal Aid Services Regulation 2015* (Bangladesh).

[104] Districts are the largest administrative unit, *upazilas* are the middle administrative units and unions are the lowest level of administrative unit; the corresponding legal aid committees are known as District Legal Aid Committees, Upazila Legal Aid Committees and Union Legal Aid Committees, respectively.

[105] The *Legal Aid Services Act 2000* (Bangladesh) s 3, 7.

[106] The *Legal Aid Services (Amendment) Act 2013* (Bangladesh).

[107] The *National Legal Aid Services Organization (Labour Court Special Committee Structure, Responsibilities, Activities) Regulation 2016* (Bangladesh).

[108] The *National Legal Aid Services Organization (Chowki Special Committee Structure, Responsibilities, Activities) Regulation 2016* (Bangladesh).

[109] Chowdhury and Malik (n 100) 43–4.

[110] The *Legal Aid Services (Amendment) Act 2013* (Bangladesh) s 15.

[111] NLASO, *Annual Report (2018-19)* (Report, 2019) 13–16 <http://nlaso.portal.gov.bd/sites/default/files/files/nlaso.portal.gov.bd/annual_reports/4264134d_fcc9_487c_906a_8531a0539460/0559eb416edf65806136ac1b440b231d.pdf> (accessed 30 September 2020).

[112] Jamila Ahmed Chowdhury, 'Legal Aid and Women's Access to Justice in Bangladesh: A Drizzling in the Desert' (2012) 1 *International Research Journal of Social Sciences* 11; Akter (n 100) 260–2; Khair (n 21) 224–6.

perspective than those of previous scholars. Section 6.2.2.1.1 critically examines how the government's legal aid services do not meet the expectations of maximising access to justice.

6.2.2.1.1 Eligibility for Legal Aid Funding: Flawed Criteria

The *Legal Aid Services Policy 2014* (Bangladesh) determines an applicant's eligibility for the service; applicants' annual income should be less than BDT 100,000 (AUD 1613.18)[113] to be eligible.[114] However, the policy also incorporates some categories of applicants who are entitled to legal aid services irrespective of their annual income[115]—for example, acid victims (women or children), any child, victims of human trafficking, homeless people or vagrants, physically or mentally disabled people, poor widows, deserted wives, destitute women, victims of domestic violence, people receiving aged care assistance or people declared insolvent by the court or a jail authority. In 2016, the *Legal Aid Services Regulation (Special Committee for Labour Court)* (Bangladesh) and the *Legal Aid Services Regulation (Special Committee for Chowki Court)* (Bangladesh) were adopted to broaden the coverage of the *Legal Aid Services Policy*.

Excluding the abovementioned exceptions, the primary eligibility test for legal aid funding depends on an individual's average income. This raises the question of whether the income stipulated in the test is commensurate with the present socio-economic conditions in Bangladesh.[116] According to the Bangladesh Poverty Assessment, as labour incomes have increased, so has the average annual income.[117] Akter argued that the cost of living has also increased proportionately during this time, meaning that many remain below the poverty line despite increases in their income.[118] In Bangladesh, 70.4% of families comprise three to five members, generally with a single income-earning member.[119] Therefore, the eligibility criteria should also consider the financial burden of the applicants and the household income threshold rather than confining the assessment to individuals' incomes only, which is rarely an accurate proxy for actual needs.[120] As such, a one-size-fits-all mechanism cannot truly bring a large volume

[113] 1 BDT = 0.016 AUD on 30 September 2021.

[114] The *Legal Aid Services Policy 2014* (Bangladesh) raises this limit to BDT 150,000 if the applicant is applying for Supreme Court legal aid funding.

[115] The *Legal Aid Services Policy 2014* (Bangladesh) s 2.

[116] Akter (n 100) 261.

[117] World Bank, 'Bangladesh Poverty Assessment: A Decade of Progress in Reducing Poverty 2000-2010' (Web Page, 20 June 2013) <https://www.worldbank.org/en/news/feature/2013/06/20/bangladesh-poverty-assessment-a-decade-of-progress-in-reducing-poverty-2000-2010> (accessed 30 September 2021).

[118] Bangladesh Bureau of Statistics (n 94) 29–33; Akter (n 100) 262.

[119] Bangladesh Bureau of Statistics (n 94) 13.

[120] Akter (n 100) 262.

of indigent people within the support of legal aid. Interviewees from this study also stated that no proof of income documentation is required during the application assessment process unless there is any doubt. This lack of necessary evidence of income may leave the utilisation of the legal aid funding at risk of abuse.

The constitutional guarantee for equal access to justice, in practice, privileges and allows favourable access for the rich due to the costly nature of the litigation process.[121] Maru stated that legal aid is a classic corrective initiative to balance widening inequality between the poor and the rich.[122] However, Regan argued that legal aid is a complex field in which different motives, legal systems and models determine the aid provided.[123] Further, Greene et al. stated that the eligibility criteria for legal aid recipients reflect the state's political considerations.[124] Therefore, the extent to which the legal aid program is able to achieve its vision, given the abovementioned restrictive eligibility criteria, remains unclear.[125]

The consideration of other jurisdictions demonstrates that no legal aid system is perfect. However, the Bangladesh problems with the eligibility test demonstrate the extent of the flaws in the Bangladesh legal aid system. When legal aid services began in the UK, the emphasis was on case category; for example, more allocation was provided for family cases and criminal cases. Later, a merit test with financial ability was added to the eligibility criteria to ensure the best utilisation of state resources. The combination of merit and means tests is also used in Australia, Canada, and Singapore at the time of allocating legal aid. In criminal cases, the nature and gravity of the cases is considered at the time of merit test. In the US, the practice of prioritising legal aid is based on the lawyer's choice rather than the need of the people. US lawyers control the selection category and service delivery process. In Bangladesh, there is no merit test for eligibility in legal aid funding and, as explained, the needs test is flawed because of its low threshold, its failure to consider the actual demands on the litigant's income and the lack of evidentiary process for establishing income. The absence of a merit test means that, sometimes, cases with no merit obtain legal aid funding—including false or vexatious cases. This is an unacceptable waste of public funding. This

[121] Vivek Maru, 'Allies Unknown: Social Accountability and Legal Empowerment' (2010) 12 *Health and Human Rights* 84.

[122] Ibid.

[123] Francis Regan, 'Why Do Legal Aid Services Vary Between Societies? Re-Examining the Impact of Welfare States and Legal Families' in Francis Regan, Alan Paterson, Tamara Goriely and Don Fleming (eds), *The Transformation of Legal Aid: Comparative and Historical Studies* (Oxford University Press, 1999) 199.

[124] Clifford M Greene, David R Keyser and John A Nadas, 'Depoliticizing Legal Aid: A Constitutional Analysis of the Legal Services Corporation Act' (1976) 61 *Cornell Law Review* 775–6, 734–6.

[125] The NLASO published a diary in 2019 that states its vision of ensuring equal access to justice for all and facilitating the path to justice. See NLASO (n 111).

empirical data (*BQRS 2019*) analysis substantiated that the real needs of the people are disregarded because the sole criterion applied in cases is based on income. Aside from economic eligibility, applicants' family responsibilities, the complexity of the case and the relevant socio-political conditions are overlooked. The eligibility criteria for legal aid in Bangladesh should be revisited to include a merit test and an assessment of needs beyond income to increase access to justice. This would also ensure the optimal utilisation of public resources in providing legal aid in Bangladesh.

6.2.2.1.2 Legal Aid Services: Insufficient for Those in Real Need

The *Legal Aid Services Act 2000* (Bangladesh) lists the services provided for eligible people.[126] The list includes legal advice and services for filed cases or cases pending filing, remuneration for appointed mediators or arbitrators, the appointment of lawyers, remuneration of the lawyers at the rate prescribed by the regulation, provision of a copy of the order or judgement at no cost, provision of the cost of a deoxyribonucleic acid (DNA) test, provision of a paper publication for criminal cases, provision of a *vakalatnama* at no cost, and other assistance and relevant expenses. However, the limits of the 'relevant expenses' have not been defined in the Act. Therefore, ambiguity arises regarding whether they cover the witness's cost, expert opinion costs, bail bond, fees to prepare the power of attorney or costs related to discovery. The present study found that these costs are borne by the litigants. As will be discussed (see Chapter 8), the trial stage is the costliest stage in litigation, comprising expenses for witnesses and expert opinion. One interviewee stated that the government bears part of the legal costs, but the rest is not covered by legal aid; this became a burden for them. Further, this study found that bail bond often arises repeatedly, and litigants must bear the costs each time.[127] Apart from the legal costs, the litigants also have to bear costs related to travel, food and other costs not directly associated with legal proceedings. Participants in this study (*BQRS 2019*) revealed that travel and food costs account for 20% of the average personal costs in each visit to court.[128] Legal aid funding does not cover these costs. During interviews, the lawyers claimed the government-provided fees are inadequate. However, in contrast, another interviewee (COM-4) argued that the lawyers should consider that this service is providing aid and accept lower legal fees.

[126] The *Legal Aid Services Act 2000* (Bangladesh) s 2(a).

[127] It was observed that the bail condition of the accused appearing on each hearing date is mandatory. If they do not appear, the court will cancel their bail and the accused will have to apply for bail again; this happens repeatedly until the end of the trial.

[128] This estimation was drawn from the average spending of the eight litigants who participated in this study.

In Bangladesh, there is no set category or limitation regarding the types of criminal cases that can make use of legal aid. However, legal aid funding is limited to those civil cases with fixed court fees. In the case of ad valorem court fees,[129] which are generally large amounts of money, these are borne by the litigants. One interviewee (CVJ-2) stated, 'we try not to leave anyone with no service if the legal eligibility is met, unless the applicant is found solvent'. However, there is no set parameter in law by which to declare an applicant solvent.

Legal aid services are provided both manually and digitally. In the manual process, the applicant appears in court physically with paper documents. In terms of digital services, the NLASO has introduced e-legal aid services via their website, email, the BD Legal Aid application, short messaging service (SMS) notification, helpline, and social media to ensure information is easily available.[130] However, litigants only receive advice and basic information through these e-services, and manual processes must be followed to avail a service regarding court matters. One interviewee stated that new technology and the e-services processes are not user-friendly. A Bangladesh Bureau of Statistics report indicated that, as of 2013, the percentage of the national population that could use the internet was 4.8%;[131] a Central Intelligence Agency report showed that this had risen to 15% by 2018[132] and 64.7% by 2021(June).[133] Since the percentage of internet users in Bangladesh is low, the effectiveness of e-legal aid services remains questionable. Those most vulnerable and in need of support to access justice are also those least likely to have access to the internet.

Like the other countries as discussed above—for example, the UK, US or Australia—Bangladesh has developed the proposition that the legal aid service is not a complete package. Instead, it bears only partial litigation costs, while the remaining expenses—including those not directly associated with the litigation (e.g., travel, food, accommodation)—must be borne by litigants. However, in Bangladesh, the shortfall is more significant, with empirical data finding litigants responsible for costs associated with documentary and witness evidence. In Bangladesh, more so than in other jurisdictions, the services provided through legal aid are insufficient.

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[129] Ad valorem court fees are calculated proportionately to the value of the disputed property, rather than as fixed court fees.

[130] Information received through empirical data.

[131] Bangladesh Bureau of Statistics, 'ICT Use and Access by Individuals and Households' (Web Page, 2013) 8 <http://203.112.218.65:8008/WebTestApplication/userfiles/Image/LatestReports/ICTUseAccessSurvey2013.pdf> (accessed 27 May 2020).

[132] Central Intelligence Agency (n 83).

[133] Bangladesh Telecommunication Regulatory Commission (BTRC), 'Home' ***http://www.btrc.gov.bd/content/internet-subscribers-bangladesh-june-2021*** (accessed 30 September 2021)

6.2.2.1.3 Legal Aid Budget and Management: Inadequate and Poorly Distributed

Data analysis from this study demonstrated that legal aid funding remained mostly unused when the district judges administered it.[134] This was because the district judges were too occupied to assess the legal aid matter thoroughly.[135] Notably, the new legal aid provisions were not welcomed by judges and lawyers.[136] Khair criticised the government's intention, finding that it was to seek donor agencies' attention through the fake appearance of serving the poor instead of broadening access.[137] Khair added that the involvement of local chairmen made access to legal aid more difficult for many who had been victims of the chairmen in the past.[138]

The scenario started to change when district legal aid officers were appointed for close supervision of the process, and the primary responsibility for monitoring legal aid shifted from the district judges to them. However, CRJ-4 stated that legal aid officers were supplied with inadequate infrastructure and staffing. According to available statistics, the recorded expenses did not exceed the budget in 2016–17 but surpassed the limit in 2017–18 and have exceeded it by larger margins in subsequent years.[139] The budget allocation is increasing annually, though not consistent with the demand. Nevertheless, it is a positive scenario that the allocated budget is being utilised. In 2018–19, the NLASO received a budget of BDT 45,000,000 (AUD 725,931.86)[140] for District and Supreme Court Legal Aid Committees, and a total of 100,806 beneficiaries received legal services through NLASO—a significant increase from 75,912 beneficiaries in the previous financial year (2017–18).[141] Scrutiny of the budget finds that a large portion of it was allocated for the salaries of legal aid employees, who are appointed to administer the scheme and other associated costs, and a smaller portion is actually designated for the aid services. This *BQRS 2019* study further finds that the budget allocation for legal aid is not increasing compared to the number of beneficiaries. This proposition was drawn after scrutinising the budget allocation and the number of legal aid recipients over three years. Budget restriction encourages those administering the scheme to award only partial coverage of litigation expenses.

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[134] Chowdhury and Malik (n 100) 43; Khair (n 21) 232; S Muralidhar, *Law, Poverty and Legal Aid: Access to Criminal Justice* (LexisNexis Butterworth, 2004) 359.

[135] Chowdhury and Malik (n 100) 43.

[136] Muralidhar (n 134) 359.

[137] Khair (n 21) 224–6.

[138] Ibid 224.

[139] NLASO (n 111) 4 [17].

[140] 1 BDT = 0.016 AUD on 30 September 2021.

[141] Ibid.

The budget and beneficiaries' figures indicate that the number of legal aid applicants is consistently increasing, and an additional budget is required to support them all. The question may then arise regarding the extent to which it would be possible to cover all applications, given that the entire judiciary is allocated only 0.352% of the national budget.[142] The statistics already show that in the last financial year (2020-21 fiscal year), the supply could not meet the demand, and it can be assumed that the gap between the growing number of applicants and the budget is likely to increase in future years. If awareness about legal aid service processes and budget restrictions were to increase, then cases may begin to be categorised and prioritised instead of service being provided to all.

As discussed above, the UK, Australia, and other countries are reducing their legal aid budget and have capped the coverage. In Bangladesh, the entire judicial budget is very low. The lack of funds throughout the sector exacerbates the difficulties caused by the inadequacies of the legal aid scheme. Also, the primary concern may remain unsolved as the legal aid program still strives to accomplish a partial coverage. Another question may also arise about the extent to which the poor will be able to access justice if they do not have sufficient economic support to bear the incidental expenses not covered under the legal aid provision. Even if the issues with the distribution of the funds were rectified, the insufficiency of the budget would remain, preventing the achievement of the key aim of providing equal access to justice.

6.2.2.1.4 Barriers to Legal Aid Awareness

Each district of Bangladesh displays a large billboard at the main entrance of any court premises that describes, in Bangla, the legal aid services. The board clearly states what legal aid is, its range of service and who is entitled to it. Brochures, magazines, dramas, seminars, legal debate programs, and public hearings are common initiatives to extend awareness that are undertaken throughout the year. Moreover, 28 April is observed as National Legal Aid Day. A special procession fills the road, brochures are distributed, and dramas and commercials are broadcast on television and radio to increase awareness. In the capital city, the day is observed on a large scale; the Prime Minister of Bangladesh was the chief guest in 2019.[143] All these enterprises help to increase the number of service recipients. From 2009 to June 2019, a total of 430,773 persons

[142] Mizanur Rahman Khan, 'Independence of Judiciary in the Independence of Budget' *The Prothom Alo* (a popular daily Bangla newspaper in Dhaka) (19 June 2019). In the latest fiscal year (2020–21), the judicial allocation is 0.34% of the national budget.

[143] Data collected from empirical evidence. See also *Bangladesh Sangbad Snagstha*, 'Country to Observe National Legal Services Day Tomorrow' (online, 27 April 2019) <https://www.bssnews.net/?p=203640> (accessed 30 April 2020).

received legal aid service.[144] Among them, 100,806 received legal aid service during the 2018–19 fiscal year.[145]

Despite the abovementioned initiatives, public awareness has not yet reached the expected level. Akter identified that the program is not being circulated widely due to budgetary constraints.[146] Also, the urban-centric program has failed to reach the regional or remote area. The empirical findings of this study support the argument that legal aid circulation has not aware majority people in Bangladesh. Through participant interviews, the researcher found that one in four lawyers was not familiar with of the government's legal aid program. The ratio was also high among litigants. The surprisingness of this finding is encapsulated in the following interviewee's comment:

> *How could this be possible? We can understand litigants do not know about it as they come to court occasionally. But a lawyer comes almost every day, and every court in each district has a big billboard on legal aid services. So, how is it possible he is not aware of the program? Moreover, the bench and bar celebrate Legal Aid Day together. Even then, the irony is people still are not aware of the legal aid program* (CVJ-2).

Whatever the reason, knowledge of the legal aid program in the community is yet to increase in such a way that they will be aware of it and will utilise the funding, if needed.

Four of the 16 lawyers and court staff who were interviewed for this study admitted that even though they knew about the legal aid program, they were reluctant to share information with potential legal aid recipients. This study also found that as legal aid committees' work free of charge, the committee members were unwilling to perform their duties. The UK practice differs from the practice in Bangladesh. If any incident arises, clients first meet their lawyers. The lawyers then lodge the application to the legal aid administration for approval. It is the lawyers' awareness that matters, not the clients. In Bangladesh, the Legal Aid Board frequently does not make potential recipients aware of legal aid and remain unaccountable. Also, the lawyer's role is passive in referring clients for legal aid. Overall, the awareness programs are having notable effects but are yet to achieve their goal.

[144] NLASO (n 111) 21.

[145] Ibid 4.

[146] Farzana Akter, 'Legal Aid for Ensuring Access to Justice in Bangladesh: A Study of Standard and Practice' (PhD Thesis, The Vrije Universiteit Brussel and Universiteit Gent, 2015) 247–8.

6.2.2.1.5 Service Delivery: A Bureaucratic Puzzle

A prescribed application form must be submitted to the relevant legal aid committee to apply for legal aid funding.[147] Each committee comprises numerous members. In a district, a committee will include a District and Sessions Judge, a Chief Judicial Magistrate, a Dstrict Magistrate, a superintendent of police, a civil surgeon, a jail superintendent, a district social welfare officer, a district women's and children's affairs officer, a district information officer, an *upazila* chairman, a mayor, a president and general secretary of the district bar association, a government pleader, a public prosecutor, a legal aid officer and more.[148] The applications, addressed to the chairman of the committee,[149] are submitted through the legal aid officer and meetings are scheduled to be held at least once a month with a mandate of a quorum.[150] At these meetings, the committee decides on the outcome of applications and what kind of aid will be provided if granted.[151] The only legal requirement upon which application acceptance is based is annual income. However, in practice, no evidence of annual income is submitted with applications unless the legal aid officer requests it. Procedural complications ensue if a monthly meeting is not held due to the lack of a quorum and two to three months pass before a successful meeting is held. Further, if the committee demands that documents be supplied for an application to be deemed valid, the meeting bears no result, and, again, months may pass before a decision is reached. Thus, the laborious process of granting legal aid is another impediment to access to justice.

If an application is rejected, then the litigant may appeal to the capital-based National Governing Board within 60 days; decisions of the board are final.[152] To appeal, the applicant must bear the costs of transport, food, accommodation, and other associated expenses—these costs are not fundable by legal aid committees or budget. These costs become considerable when the applicant is from another district. This is ironic for a person seeking legal aid. Though e-services are available, neither litigants nor lawyers are accustomed to it and prefer manual processes.

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[147] The *Legal Aid Services Act 2000* (Bangladesh) s 16. In the district, it will be submitted to the district legal aid committee. Other relevant committees are the Supreme Court Legal Aid Committee (*Legal Aid Servicse Act 2000* (Bangladesh) s 8A) and special committee.

[148] The *Legal Aid Services Act 2000* (Bangladesh) s 9.

[149] The *Legal Aid Services Regulation 2015* (Bangladesh) s 3.

[150] The *Legal Aid Services Act 2000* (Bangladesh) s 11(2) (4). A quorum requires the presence of one-third of the committee members.

[151] Ibid s 10.

[152] Ibid s 16 (2), s 6. This National Governing Board is constituted of a several people who hold high official ranks and positions.

6.2.2.1.6 Legal Aid Panel Lawyers: A Domain of Inefficiency

The goal of the national legal aid organisation is to ensure access to justice and high-quality legal assistance.[153] Accordingly, the *Legal Aid Services Act 2000* (Bangladesh) established eligibility criteria for panel lawyers.[154] A lawyer with five years of work experience in the respective court can apply to be a panel lawyer, and one-third of the panel lawyers should be women.[155] There is no specific number of panel lawyers to be selected according to the Act. However, the committee decides the number for the betterment of the service. Though the committee engages a lawyer from the panel for a specific case after reviewing a legal aid application, the litigant's choice is considered with the highest priority.[156] The state remunerates the lawyer, and the amount is fixed by the Act for a particular procedure.[157] In Bangladesh, the legal aid lawyer selection procedure does not follow any competitive process because few lawyers express any interest.

This empirical research finds that, largely, inefficient lawyers with insufficient clients express their interest in serving as panel lawyers. Senior, efficient, and expert lawyers are too busy with their clients to be available for legal aid services. Concerns with the quality of legal aid lawyers are not unique to Bangladesh. Khair's research found that in Bangladesh, the local bar also resents having to develop and administer a comprehensive legal aid program.[158] Therefore, it is an open secret that quality, competency, and efficiency are compromised when recruiting panel lawyers. Consequently, incompetent lawyers deliver legal aid services for their survival in the profession in Bangladesh.[159] This empirical research revealed that the poor fees received by legal aid lawyers are the main reason for the general disinterest in assisting clients. O'Steen observed that the quality of the legal aid service provided to poor or middle-income groups is disgraceful.[160] He further argued that money is at least a partial motivator that could improve the lawyers' performance.[161] Cox addressed the issue from an economist's perspective within the US jurisdiction: price

[153] NLASO (n 111) 2.

[154] The *Legal Aid Services Act 2000* (Bangladesh) s 15.

[155] Ibid s 15 (2), s 15 (3).

[156] Ibid s 15 (4).

[157] The *Legal Aid Services Regulation 2015* (Bangladesh) s 6.

[158] Khair (n 21) 235.

[159] Akter (n 100) 269.

[160] O'Steen (n 55) 94–5.

[161] Ibid 96.

motivates both consumers and producers to be more efficient in their utilisation of resources.[162] This sentiment is equally applicable to Bangladesh.

After considering panel lawyers' allegation of low fees, which leads to poor service delivery, the government of Bangladesh raised the payment rate in 2015,[163] and another proposal for a further increase in pay is under review. However, it is unlikely that the government will increase the fees to the level that lawyers would charge for a private case. Since lawyers generally do not work on a fixed-fee basis, it may be difficult to set a fee standard that motivates them to be legal aid lawyers.

One litigant who sought legal aid complained that 'my legal aid assigned lawyer demanded an extra fee from me. As I was not able to pay his [extra] fees, he did appear in court on the hearing date' COM-2 stated.

The current study further found that sometimes the lawyers also demand a percentage of settlement money (see section 5.4.3). This demand has become commonplace, and many lawyers do not provide scheduled services without it. Thus, the litigation costs have exceeded the financial capacity of the litigants. The only remedy a litigant can receive is a change of lawyer upon lodgement of a written allegation against the lawyer to the legal aid committee. The bar council is the only institute that can act against lawyers if any allegation is proved; research has revealed that the bar council rarely chastise lawyers (see section 7.2.1.1).

The value of properly remunerating legal aid lawyers is demonstrated by the practice in Canada. As described in section 6.2.1.4, Canada emphasises the quality of the legal aid service and pays legal aid lawyers' rates that are equivalent to those of private lawyers. Conversely, in Bangladesh, most skilled lawyers remain sceptical about undertaking legal aid services due to poor payment, and the quality of service is compromised because of inefficient lawyers. Additionally, the ethical aspect of legal aid has not been developed in the socio-economic context of Bangladesh, and the lawyers involved emphasise economic gain, not serving people. As such, many charge 'extra' fees from legal aid litigants, as mentioned. Further, this study found additional reasons why lawyers do not take legal aid cases seriously. For example, legal aid litigants do not have strong political or economic power; the monitoring system does not hold lawyers and aid committees accountable, and they are rarely punished for inefficiency or unethical dealings. Also, the Act does not have any penal provisions in the case of an allegation being proven. Additionally, the lack of an

[162] Steven R Cox, 'Pricing Legal Services for the Poor' in Douglas J Besharov (ed), *Legal Services for the Poor: Time for Reform* (The AEI Press, 1990) 193–94.

[163] The *Legal Aid Services Regulation 2015* (Bangladesh) s 6.

integrated approach renders the legal aid service ineffective. If these flaws are not addressed, the legal aid service may not be fit to ensure access to justice.

6.2.2.2 Legal Aid Services by Non-Government Organisations

Before the government's legal aid services was initiated in 2000, non-government organisations (NGOs) had started their services just after independence in 1971.[164] The NGOs started a different movement.[165] The NGOs widely known for their legal aid activities in or outside court are the Bangladesh Legal Aid and Services Trust (BLAST), Bachte Shekha, Madaripur Legal Aid Association, Ain-O-Salish Kendra, Manobadhikar Bastobayan Songstha, Bangladesh National Women Lawyers' Association, Bangladesh Environmental Lawyers' Association, Bangladesh Rural Advancement Committee, Bangladesh Shishu Adhikar Forum and more.[166] Some of these NGOs act locally, and the services are different from each other.[167] For instance, the Madaripur Legal Aid Association was established in 1978 in Madaripur district and considered the pioneer of the out-of-court settlement process.[168] Bachte Shekha is an NGO based in the Jessore district and is focused on a different kind of mediation that emphasises and strengthens women voices.[169] The Ain-O-Salish Kendra and the Bangladesh National Women Lawyers Association are also working for local awareness with the aim to benefit women.[170] BLAST was established in 1993 and now provides legal and advocacy services in 19 districts when mediation fails.[171] Though the NGOs are constituted with different aims and missions, they all provide legal aid services on awareness, advocacy, ADR, counselling, public interest litigations and more, irrespective of the financial status of the different target groups, such as, women, children, and the minority.[172] NGOs commonly provide legal aid services for civil and family matters, but criminal matters are left aside unless the victims are women or children, particularly in subordinate courts.[173] Most NGOs

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[164] Chowdhury (n 112) 9.

[165] Ibid 9.

[166] Jamila Ahmed Chowdhury, *Women's Access to Justice in Bangladesh through ADR in Family Disputes: Present Limitations and Remedial Measures with Some Lessons from Egypt* (Modern Bookshop, 2005) 34–5.

[167] Khair (n 21) 227; The Asia Foundation, *Access to Justice: Best Practices under the Democracy Partnership* (The Asia Foundation, 2002) 18.

[168] Chowdhury (n 112) 8.

[169] Jamila Ahmed Chowdhury, 'Women's Access to Fair Justice in Bangladesh: Is Family Mediation a Virtue or a Vice? (PhD thesis, The University of Sydney, 2011) 219.

[170] Bangladesh National Women Lawyers' Association, 'Core Competency of BNWLA' (Web Page) <http://bnwla-bd.org/what-we-do/> (10 May 2021).

[171] Bangladesh Legal Aid and Services Trust, 'What We Do' (Web Page, 2010) <https://www.blast.org.bd/whatwedo> (10 May 2021).

[172] Khair (n 21) 229.

[173] Ibid 231.

have victim support accommodation and rehabilitation centres where victims can stay and receive counselling and legal advice. Some NGOs render paralegal support. For example, BLAST's paralegal team works with the government's legal aid service, especially in jail, for people who cannot afford a lawyer.

If the service relates to legal advocacy—comprised mainly of advice, victim support, rehabilitation centre and informal mediation where the physical transfer of money is not directly associated with legal aid service—then NGOs bear the entire expenses. But if it is a matter of court, then the NGOs only finance the lawyer's fees, and, commonly, this lawyer is their employee. Other associated costs—court fees, document collection fees, costs associated with summons and discovery, witness costs and expert witness costs—are not included. This leaves justice inaccessible to people who cannot afford the associated costs.

In comparing the government legal aid services with NGOs, the recipients of these two sources do not overlap.[174] However, both government and NGOs are struggling to find adequate funding for legal aid services. Khair argued that even if sufficient fund were available, the service would remain ineffective due to unawareness in the community and the lack of government commitment for necessary infrastructure.[175] This study also demonstrates that the NGOs are more experienced, sincere and accountable, and have a stronger mechanism for monitoring service delivery than the government; this is because the government service is still under experiment and is yet to prove its efficiency. As both the government and the NGOs are aiming to serve the poor to ensure access to justice, this could be achieved faster if they worked on a common platform.

6.3 Alternative Services in Other Countries

Due to the shrinking legal aid budget, the proportion of people who are eligible for legal aid has steadily become smaller. Alternatives sources of legal assistance have been examined by a number of countries. The aim of these initiatives is to broaden access and legal assistance, especially for the middle-income groups, so that they can access justice. Also, alternative services would reduce pressure on legal aid funding. The restricted eligibility criteria have made these services popular as they fill the gaps left by the legal aid system.

[174] Chowdhury (n 169) 219.

[175] Khair (n 21) 232.

6.3.1 United States, Australia, and Contingency Fees

In the US, for almost a century, speculative or contingency fees have been used to fund litigation.[176] Contingency fees are based on a percentage of the recovered amount, whether by settlement, trial, or ADR, and a losing party pay nothing. It is proportional to the damage recovered and never exceeds the recovered amount.[177] A JUSTICE report found contingency fees simple as they eliminate the need for bureaucracy, and excess can be curbed by rules that impose a limit on the proportion of winning parties.[178] However, critics found that this offer does not go well with certain types of cases, for example, criminal cases, disputes over children, public law or complex cases where no money is recovered.[179] In Australia, speculative and contingency fee arrangements are commonly used by the plaintiff's lawyer in personal injury cases, claims for damages from the contingency legal aid funds.[180] Contingency legal aid funds are a self-funding scheme designed to pay the legal fees and disbursements of eligible clients in civil litigation.[181]

6.3.2 The United Kingdom and Conditional Fee Arrangements (CFAs)

England and Wales have introduced CFAs,[182] popularly known as 'no win, no fee' agreements. Apparently, it is similar to contingent fees arrangement, but the basic difference in conditional fees is that lawyers cannot take any part of the client's recovery as a fee.[183] This provision is based on the 'loser pays' rule. This indicates that in a CFA, the clients have a substantial risk of paying an opponent's legal costs if they lose the case.[184] It ensures that the risks of litigation are shared between the lawyer and the client. Clients do not pay the lawyers' fees unless they win.[185] It has already proved its positive effects.[186] Along with the conditional fee agreement, the solicitor can

[176] Cranston (n 14) 62.

[177] Ibid 63.

[178] JUSTICE, *CLAF: Proposals for Contingency Legal Aid Fund* (Justice Educational and Research Trust, 1978) 4.

[179] Marc Galanter, 'Anyone Can Fall Down a Manhole: The Contingency Fee and its Discontents' (1998) 47 *De Paul Law Review* 475.

[180] Australian Law Reform Commission, *Cost Shifting—Who Pays For Litigation* (ALRC Report No 75, 1995) s 3.23.

[181] Ibid s 3.29.

[182] *Courts and Legal Services Act 1990* (UK) s 58.

[183] Cranston (n 14) 65.

[184] Richard Moorhead, 'Conditional Fee Agreements, Legal Aid and Access to Justice' (2000) 33(2) *University of British Columbia Law Review* 480.

[185] The *Courts and Legal Services Act 1990* (UK) s 58.

[186] Peysner (n 35) 46.

charge another amount up to 25% of the success fee.[187] The idea of a CFA, derived from a contingency legal aid fund, is that it pays part of the recovery to benefit the fund.[188] Under the *Access to Justice Act 1999* (UK), conditional fees are permissible in all civil cases, even when no finance is involved.[189] Under the *Conditional Fee Agreements Order 1995* (UK), conditional fee agreements are permitted for personal injury, bankruptcy, insolvency or administration, and in some human rights cases.[190] Therefore, the government has limited legal aid where the CFAs applies.[191] CFAs primarily deal with meritorious cases only. Some countries do not encourage conditional or contingency fee agreements; for example, Singapore has prohibited these funding arrangements. Yew argued that this prohibition encourages litigants to be more flexible.[192]

6.3.3 Legal Insurance

Apart from these two very popular types of alternative private funding schemes, countries are also focusing on legal insurance to finance litigants. People take out legal expenses insurance against the risk that they may need to take legal action or, alternatively, may become liable to a legal claim.[193] Legal expenses insurance typically covers lawyers' and expert's fees, and the opponent's cost if a case is unsuccessful where the loser pays rule is applicable, up to a specified amount.[194] This insurance also has a close connection with the CFA agreement. A client who commences a claim under a CFA agreement can obtain insurance coverage to bear the cost of litigation. Moorhead described how this insurance policy was issued on a case-by-case basis.[195] He stated the insurance company assesses the merits of the applications received from law firms and decides whether to grant coverage and to what extent. Also, there are many other ways of paying lawyers to deliver legal aid services, such as contingency legal aid fund, legal aid vouchers, and government-appointed lawyers. But these options are being utilised rarely, and opinion remains divided.

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[187] Ibid 47.

[188] David Capper, 'The Contingency Legal Aid Fund' (2003) 30 *Journal of Law and Society* 66; Moorhead (n 184) 471.

[189] The *Access to Justice Act 1999* (UK) s 27.

[190] Moorhead (n 184) 477.

[191] Rickman, Fenn and Gray (n 26) 275.

[192] Yew (n 1) 599.

[193] Cranston (n 14) 68.

[194] Ibid 69.

[195] Moorhead (n 184) 483.

6.3.4 Pro Bono Activities

Pro bono is another example of charity that serves people in need of legal aid. This initiative came from lawyers' ethical duty to serve the community as a part of the social contract through mandatory pro bono work. There are also class action litigations that are funded from the contingency fund that are suitable for a range of people.

The above discussion (section 6.3) indicates that the alternative to legal aid services is largely based on the nature and merit of the cases. It has always been a challenge to find a successful balance between private and government-funded legal aid services. However, even if the funding arrangement is managed or covered, providing quality service will remain uncertain. It can be argued from this discussion that the funding from government, non-government or any other sources do not cover all expenses arising from litigations (see Chapter 4, sections 4.2 and 4.3); it primarily covers the lawyer's fees but no other associated costs. Therefore, the question of access to justice remains the same for those who are unable to bear the associated costs.

6.3.5 Alternative Services in Bangladesh

This study finds that there is no contingency fee system, CFA or 'no win, no fees' provisions in Bangladesh. Lawyers work on daily appearances basis with no fixed rate. CVC-1 stated, 'either no win, no fees or conditional arrangement for lawyers fee would be very helpful for them and to some extent it would ensure justice. As the provision will save a large amount of litigant's money'.

More than 50% of all participants agreed that if CFAs were introduced, the number of false or vexatious cases would reduce significantly as lawyers would be more careful in entertaining a meritless case. It would benefit the courts by reducing the case burden and ensuring the effective use of public resources. The majority of the interviewees agreed that these provisions would benefit the litigants economically and would hasten case disposal as well. However, the downside of contingency fee arrangements should also be considered while adopting it into the legal provisions. That is to say, unless the conditional fee arrangement is regulated carefully, it may not return adequate damages to the plaintiff, instead predominantly benefitting the lawyers.[196] (section 6.3.2)

Interviewee lawyers and one civil society representative opined that the provision of CFAs would be helpful and realistic, although one lawyer supported this provision conditionally. CVL-1 stated,

[196] John Peysner, 'What's Wrong with Contingency Fees' (2001) 10 *Nottingham Law Journal* 22-46

'if we introduce this provision for meritless cases, then the lawyer would be cautious representing a meritless case. This provision must oblige the lawyer to uphold their ethical obligation.'

Six out of eight interviewee lawyers suspect that these provisions would not work in Bangladesh. It would not provide them with any monetary benefit and, therefore, they would lose interest. Thus, the proposition can be drawn that the lawyers in Bangladesh appear to prioritise their economic benefit above their ethical commitment. Therefore, it can be argued that their lack of interest does not assist their clients to achieve affordable justice. Another interviewee expressed:

> *The 'no win, no fees' system may not be suitable for civil cases because we consider the balance of the case and none is completely winning or losing. So, it would be difficult to determine how much a litigant should receive*. (CVJ-3)

In this regard, it could be argued that the costs can be assessed when considering the balance of the cases. This study further found no substantive culture of 'pro bono' legal services among lawyers, with some occasional exceptions, as the sense of social service or ethical consideration has not been developed. Therefore, they consider any case, including legal aid cases, as their business.

This study also finds that, in Bangladesh, legal aid cases are either overlooked or not prioritised compared to privately funded cases. Lawyers and court staff do not handle legal aid cases seriously as they consider them economically detrimental. Therefore, they allocate a lengthier hearing date for legal aid cases than privately funded cases. Often, judges do not take prompt action to resolve legal aided cases earlier. As such, legal aid cases take longer to be resolved than necessary—for example, lawyers are often unavailable at the time of hearing (see section 6.2.2.1.6)—unbearably increasing litigation costs for the poor. Additionally, the litigants cannot avail themselves of any other funding benefits, such as contingency fee arrangements and CFAs, to support their legal costs. With limited legal aid funding (see section 6.2.2.1.3), access to justice becomes too costly, and the poor often abandon cases before their dissolution or chose not to pursue their legal rights because of their limited financial capacity.

6.4 People with Middle Incomes and Self-Representation

The abovementioned enterprises (chapter 6) aim to increase access to justice for those who cannot otherwise seek lawyers' support because of their low income. However, a large portion of the global population who are in the middle-income group is being excluded from the discussion about access to justice. In one regard, they are the most vulnerable group who forfeit their rights and basic human needs not because the law and facts are against them but because of a lack of legal

representation due to its unaffordability.[197] Gramatikov argued that many countries revealed the publicly funded legal aid schemes as a well-known middle-income trap.[198] People in the middle-income group can neither afford their legal costs nor receive assistance from governments or other organisations, since their economic status exceeds the upper eligibility parameter for securing legal aid funding.

An Australian survey by Hunter, Giddings and Chrzanowski found that one-quarter of unrepresented litigants did not seek legal aid funding, but the remaining three-quarters did not pass the means test for legal aid.[199] Examples from other countries found that many unqualified people choose self-representation because they cannot afford a lawyer. The limited legal aid budget is another reason that legal services remain unavailable to a range of people; the lack of representation causes many people to plead guilty and numerous cases to be abandoned.[200] Rhode estimated that approximately four-fifths of the civil legal needs of the poor and up to three-fifths of the needs of middle-income individuals remain unmet.[201] Therefore, Pleasence and Balmer advised policymakers to address the difficulties that the middle-income group may face.[202] However, O'Steen argued that self-help services with limited lawyer involvement would be better since there is no way to reduce litigation costs without restricting lawyers' involvement.[203]

In Australia[204] and Canada,[205] unrepresented or self-represented cases are increasingly becoming a regular phenomenon in court. In the US, most family law cases involve at least one party, and often two, with no counsellor.[206] Dealing with this increasing number of unrepresented litigants is

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[197] Engler (n 71) 172.

[198] Martin Gramatikov, 'A Framework for Measuring the Costs of Paths to Justice' (2009) 2(2) *Journal Jurisprudence* 118.

[199] Rosemary Hunter, Jeff Giddings and April Chrzanowski, *Legal Aid and Self-Representation in the Family Court of Australia* (Socio Legal Research Centre, Griffith University 2003) 33–34.

[200] Law Council of Australia et al (n 59) 14; Gramatikov (n 198) 4.

[201] Rhode (n 3) 3

[202] Pascoe Pleasence and Nigel J Balmer, 'Caught in the Middle: Justiciable Problems and the Use of Lawyers' in Michael Trebilcock, Anthony Duggan and Lorne Sossin (eds), *Middle Income Access to Justice* (University of Toronto Press, 2012) 50.

[203] O'Steen (n 55) 97–8.

[204] Oscar G Chase, 'Civil Litigation Delay in Italy and the United States' (1988) 36(1) *The American Journal of Comparative Law* 41. Approximately 28% of litigants appear unrepresented before Single High Court Judges in Australia. See High Court of Australia, *Annual Report 1998/99* (Report, 1999) <***https://cdn.hcourt.gov.au/assets/corporate/annual-reports/1999annual.pdf***> (accessed 12 May 2021); Law Council of Australia et al (n 59) 13.

[205] Alberta Rules of Court Project, 'Self-Represented Litigants' (Consultation Memorandum, 2005) 12.18; Engler (n 71) 174.

[206] Russel Engler, 'And Justice for All-Including the Unrepresented Poor: Revisiting the Role of Judges, Mediators and Clerks (1999) 67 *Fordham Law Review* 1987, 2047–52.

becoming a concern for the court.[207] Some issues can be effectively addressed without a lawyer's intervention, but some legal problems unavoidably require a lawyer's presence.[208]

To ease the court procedure for self-represented cases, Canada and other developed countries have implemented measures, such as hotlines, technological assistance, clinics and prose clerk offices, and have also incorporated advice from non-lawyers, non-paralegals, paralegals and duty counsellors.[209] Shanahan et al. termed such measures 'a little representation'.[210] A little representation also includes self-help centres,[211] non-lawyer representation,[212] and unbundled legal services[213] for a litigant in a court system. Systematic research found that non-lawyers can be effective advocates and, in some situations, better advocates than licensed attorneys.[214] Non-legal contributors include court personnel, paralegals, volunteers, law students, and the staff of social service agencies, government officials, and law librarians.

In Australia, CLCs have taken several initiatives for self-represented litigants. These include a wide range of self-help kits and handbooks that focus on a particular area of law; videos and workshops for self-represented litigants; and technology-based self-help centres.[215] Rhode doubted whether this technology-based assistance is useful for litigants who are not tech-friendly.[216] Apart from ushering in this objective assistance, several countries are also taking initiatives to educate people associated with the justice sector. In Massachusetts, the Supreme Court responded to the swarm of unrepresented cases by established a steering committee that recommended guidance for judges on ethical conduct and useful courtroom techniques, simplified forms, an educational program for courtroom staff, expanded use of technology and more.[217]

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[207] Giddings and Robertson (n 62) 187.

[208] Michael Trebilcock, Anthony Duggan and Lorne Sossin (eds), *Middle Income Access to Justice* (University of Toronto Press, 2012) 6.

[209] Engler (n 71) 155.

[210] Colleen F Shanahan, Anna E Carpenter and Alyx Mark, 'Can a Little Representation Be a Dangerous Thing?' (2016) 67(5) *Hastings Law Journal* 1367, 1368.

[211] Richard Zorza, *The Self-Help Friendly Court: Designed from the Ground Up to Work for People without Lawyers* (National Centre for State Courts, 2002) 12.

[212] Russell Engler, 'Connecting Self-Representation to Civil Gideon What Existing Data Reveal About When Counsel Is Most Needed' (2010) 37 *Fordham Urban Law Journal* (2010) 85–86; Deborah L Rhode, 'Access to Justice' (2001) 69 *Fordham Law Review* (2001) 1806.

[213] Stephanie Kimbro, 'Using Technology to Unbundle in the Legal Services Community' (Occasional Paper Series, 2013) *Harvard Journal of Law and Technology* 1–4.

[214] Herbert M Kritzer, 'Rethinking Barriers to Legal Practice' (1997) 81 *Judicature* 100.

[215] Giddings and Robertson (n 62) 185–6.

[216] Rhode (n 3) 14.

[217] Massachusetts Supreme Judicial Court, 'Supreme Judicial Court Steering Committee on Self-Represented Litigants Presents Final Report and Recommendations to Justices' (Press Release 6 January 2009).

Though countries are trying to improve the handling of self-represented cases, not all cases suit the self-help legal services. Giddings and Robertson found cases involving substantial repetition and routine are best suited for self-help, for instance, consumer disputes, probate applications, conveyancing, power of attorney, wills, debt collection, and personal injuries.[218]

Studies have also found that self-represented cases are facing drawbacks, such as failing to obtain fair outcomes.[219] They are often found less likely to be a winning party compared to represented litigants.[220] Conversely, it is also argued that unrepresented litigants are sometimes using their status to gain an unfair advantage over represented parties.[221] Carpenter et al. observed that non-lawyer representation cannot participate in law reform efforts, case-focused challenges or system-focused challenges for several reasons, such as, they cannot learn from interactions, operate in different norms and do not know the professional norms or conduct well.[222] They also do not engage in case-focused or system-focused challenges.[223] Giddings and Robertson argued that self-help legal services do not suit people with low levels of literacy.[224] They added that cultural issues might limit the usefulness of self-help legal services. As mentioned, Semple argued that the costs of seeking justice included psychological costs, which are higher in unrepresented cases.[225] Semple argued that the monetary and temporal costs are almost in same ration to lawyer presented cases and unrepresented cases.[226] However, temporal cost is higher in unrepresented cases than cases represented by lawyers. The final report of the Canadian National Self-Represented Litigants Study identified that stress and trauma, sometimes leading to physical health problems, are among the more commonly reported consequences of the self-representation experience.[227] Semple,

[218] Giddings and Robertson (n 62) 188.

[219] Andre Galant, 'The Tax Court's Informal Procedure and Self-Represented Litigants: Problems and Solutions' (2005) 53 *Canadian Tax Journal* 333; Nova Scotia Department of Justice, *Self-Represented Litigants in Nova Scotia* (Needs Assessment Study, 2004); Mutha-Merennege (n 12) 258.

[220] Law Council of Australia et al (n 59) 15.

[221] Engler (n 206) 1988.

[222] Anna E Carpenter, Alyx Mark & Colleen F Shanahan, 'Trial and Error: Lawyers and Nonlawyer Advocates' (2017) 42(4) *Law and Social Inquiry* 1045.

[223] Shanahan, Carpenter and Mark (n 210) 1371–72.

[224] Giddings and Robertson (n 62) 188.

[225] Semple (n 11) 635; Gramatikov (n 198) 38.

[226] Semple (n 225) 18–22.

[227] Julie Macfarlane, 'The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants' (2013) 108–9.

further suggested that these psychological costs can be mitigated by making the justice system user-friendly.[228]

In a Canadian survey, 67% of respondents of self-represented cases found that navigating the court system was difficult or very difficult.[229] The procedural complexity also prevented them from continuing along the legal track.[230] Regan also expressed similar concern that self-reliance easily degenerates into neglect if the legal problems are complex and if a litigant is unable to deal with it.[231] Self-represented cases also demand more time from court staff to explain the procedures and support,[232] which can increase the duration of proceedings and hearings in the court.[233] Unrepresented litigants struggle with the process and tend to raise concerns in the courtroom that are irrelevant to legal issues, thereby causing frustration for judges.[234] Court clerks, and sometimes even judges, become hostile to the unrepresented litigants.[235] They also feel challenged by needing to explain legal and procedural advice.[236] Engler argued the adversarial system prohibits clerks, mediators or other court players from providing legal advice to unrepresented litigants.[237] He explained, in theory, the prohibition is intended to protect the unrepresented litigant from receiving legal advice from someone not qualified to give such advice. However, in practice, the prohibition deprives the unrepresented litigant of the opportunity to obtain legal advice throughout the course of the proceeding.

Against this backdrop, the truth in Bangladesh is that no one considers the middle-income group, as they are neither entitled to seek legal aid due to economic ineligibility nor can afford litigation costs, despite more than half of the population belonged to the middle-income group. Also, self-representation in cases is a relatively new phenomenon that people are not familiar with it. An

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[228] Semple (n 11) 660.

[229] Rachel Birnbaum, Nicholas Bala and Lorne Bertrand, 'The Rise of Self-Representation in Canada's Family Courts: The Complex Picture Revealed in Surveys of Judges, Lawyers and Litigants' (2013) 91(1) *Canadian Bar Review* 83; Pauline Spencer, 'A View from the Bench: A Judicial Perspective on Legal Representation, Court Excellence and Therapeutic Jurisprudence' in Asher Flynn and Jacqueline Hodgson (eds), *Access to Justice and Legal Aid: Comparative Perspectives on Unmet Legal Need* (Hart Publishing, 2017) 90.

[230] Rhode (n 3) 14.

[231] Regan (n 123) 181.

[232] Spencer (n 229) 90–1. Law Council of Australia et al (n 59) 15.

[233] Rosemary Hunter, 'Legal Aid Research in Australia and Future Needs' (Legal Aid Congress, 2004); Rosemary Hunter et al, *Legal Services in Family Law* (Report, 2000) 200–4.

[234] Engler (n 71) 150.

[235] Rhode (n 3) 14

[236] Law Council of Australia et al (n 59) 15.

[237] Engler (n 206) 1988.

underlying assumption of the adversary system is that both sides will be represented by a lawyer.[238] Though legal provisions technically allow individuals to present their own cases, the application of such provisions is very rare. Before the British introduced lawyers in the formal litigation process, history demonstrates that litigants used to present their case in past eras.[239] One interviewee opined that the old, British-enacted laws are too complicated for a lay person to navigate; therefore, they are discouraged from facing the legal procedure unrepresented. Instead, they chose to forgo their legal rights.

In the present study, 25 of the 36 interviewees who shared their experience stated, that a large number of cases are not filed due to economic incapability. Litigants often withdraw their claim or surrender their legal rights. They also opined that self-represented cases would limit lawyers' involvement, resulting in reduced litigation costs. The legal system in Bangladesh is not user-friendly for self-represented litigators. One judge expressed:

> *Self-representation will not be a good idea to initiate, as the court will have to spend more time for them due to their unfamiliarity with the court norms and legal requirement. At the present state, it will be hard to implement.* (CVJ-3)

In cases where one party is represented but the other is not, equal treatment would be difficult to ensure. A government unit that provides technical and procedural support for unrepresented litigants would minimise these inequalities. However, to facilitate access to the court proceedings, laws and the court system, the entire legal system should be made more user-friendly. Until and unless the courts make fundamental changes to their handling of unrepresented litigants, these litigants will continue to forfeit important legal rights due to their lack of representation.[240] Therefore, Engler argued that if the true goals of the legal system are justice and fairness—of which the unrepresented, poor litigants are deprived but equally entitled to attain—it is time to start making change.[241]

Though legal aid services are available for poor people, a large portion of the middle-income group is being overlooked and excluded from access to justice. No alternative services or mechanisms are available to support the middle-income group to increase their access to justice.

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[238] Ibid.

[239] Ludo Rocher, 'Lawyers" in Classical Hindu Law' (1968) 3(2/3) *Law and Society Review* 383; The Law Commission of India, *Role of the Legal Profession in Administration of Justice* (Report No 131, 1988) 1.

[240] Engler (n 206) 2069.

[241] Ibid 2070.

6.5 Legal Aid Services and the Deprivation of Women

The eligibility criteria for legal aid are gender-neutral and non-discriminatory.[242] When allocating legal aid, some countries prioritise the severity of cases, with criminal cases being the highest priority.[243] Recently, the UK has begun focusing on the needs of applicants.[244] In Bangladesh, the general practice for legal aid funding is 'first come, first served', based on availability. However, the unequal distribution of funding favours men over women. Research from Ontario concluded that, in Canada, the legal aid funding favours men's legal problems, which are primarily criminal cases, over women's legal problems, which are primarily matrimonial.[245] Hughes argued that men are apparently more likely to be involved in criminal cases, while the participation of women in matrimonial cases is equal to men.[246] Therefore, if criminal cases are a higher priority when allocating legal aid, women are more deprived of access to the legal system than men. The legal system and allocation of legal aid funding through gender-neutral language actually conceal the gender bias in practice.

Allocating legal aid based on the seriousness of cases results in difficulties in achieving the goal of gender-equality. Mossman demonstrated that inequality exists in access to legal aid funding, as criminal offences are treated as public matters and are significant for men's experience; in contrast, family matters are mostly treated as private matters and are significant for women's experience.[247] Hughes argued that the legal aid funding experience is primarily based on men's experience.[248] It is widely accepted that women experience family violence more often than men and seek legal assistance. Conversely, restricting legal aid in family cases may significantly increase the risk of violence and/or death; financial hardship and poverty; homelessness; and diminished emotional, mental and physical wellbeing for women.[249]

Gender-neutral language promotes sameness approaches that undermine the substantial equality of legal aid services and fails to respond to women's needs.[250] The sameness approaches treat

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[242] Mary Jane Mossman, 'Gender Equality, Family Law and Access to Justice' (1994) 8 *International Journal of Law and the Family* 363.

[243] Ibid 394; Hynes and Robins (n 23) 135.

[244] Pleasence et al (n 30) 214. See also, The *Access to Justice Act 1999* (UK) c.22.

[245] Mossman (n 242) 393.

[246] Patricia Hughes, 'Domestic Legal Aid: A Claim to Equality' (1995) 2(2) *Review of Constitutional Studies* 205.

[247] Mossman (n 242) 366; Hughes (n 246) 219.

[248] Hughes (n 246) 210.

[249] Mutha-Merennege (n 12) 261.

[250] In the sameness approach, men and women are treated equally. See Mossman (n 242) 368.

people equally; however, substantial equality admits that women's needs are distinctly different to the needs of men. Therefore, Mossman argued for testing the legal aid programs in terms of outcomes and results, not just the aspiration that gender-neutral language will equally provide legal aid services for men and women.[251] Rhodes argued that the current gender-equal legal aid provisions and arrangements should be reassessed to attain substantive equality, irrespective of gender.[252] An effective legal aid service should be ensured that meets the needs of applicants. Women's needs for legal aid services may be different from men's needs; this factor is often overlooked.

Mossman argued that identifying and eradicating gender bias in law and legal processes are complicated because of their hidden nature.[253] In Canada, it is also clearly explicated that mandating legal aid services will not discriminate between men and women.[254] The Canadian focus is to ensure substantive equality, not language equality. Nevertheless, it is evident that legal aid is granted to men more often than to women.[255]

From an economic perspective, the reasons for women's poverty are different from men, and therefore, the needs are also different. The rate of poverty among women has increased over last 20 years.[256] Canadian research found a number of factors that contribute to women's poverty, such as levels of education, poor health, housing, childbearing, sole parenting and unemployment.[257] The number of female-headed families in Canada increased from 19% in 1973 to 27% in 1986; similarly the number of poor, female-headed, single-parent families also increased.[258] According to the Australian Bureau of Statistics, women continue to be the primary carer in 82% of single-parent families,[259] and they face the most financial hardship and poverty.[260]

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[251] Ibid.

[252] Deborah Rhode, *Justice and Gender: Sex Discrimination and the Law* (Harvard University Press, 1989) 320.

[253] Mary Jane Mossman, 'Gender Equality and Legal Aid Services: A Research Agenda for Institutional Change' (1993) 15(1) *Sydney Law Review* 30.

[254] *Canadian Charter of Rights and Freedoms 1982* (Canada) s 15.

[255] Mossman (n 253) 43.

[256] Erika Abner, Mary Jane Mossman and Elizabeth Pickett, 'No More Than Simple Justice: Assessing the Royal Commission Report on Women, Poverty and the Family' (1990) 22(3) *Ottawa Law Review* 586.

[257] David P Ross and Richard Shillington, *The Canadian Fact Book on Poverty 1989* (Canadian Council on Social Development, 1989) 46; Abner, Mossman and Pickett (n 256) 598.

[258] National Council of Welfare, *Poverty Profile 1988* (Supply and Services Canada, 1988) 46.

[259] Australian Bureau of Statistics, 'Household and Family Projections, Australia' (Web Page, 14 March 2019) < ***https://bit.ly/2Rnh5bY***> (accessed 17 May 2021) .

[260] Ibid.

In Victoria, Australia, the recent changes to eligibility criteria limited access to legal aid for family matter trials.[261] Therefore, most women have only two options: face the trial without representation or force settlement. In this context, it is clear that achieving access to justice for women has become nearly impossible.[262] Women need legal assistance to defend themselves against violence or abuse, mostly by men.[263] While defending themselves, women find that the legal system is not equally available to them compared to men. In practice, the existing legal system does not allow women equal access or protection.

Mossman recommended that the significant efforts to reduce the cost, complexity and contentiousness of dispute resolution processes and strategies, and removing the psychological and financial barriers to the legal process, necessitate reconsideration of the eligibility criteria for legal aid services.[264] Access to legal aid in family law cases does not only assist women to secure from a better legal outcome, but also promotes safety, housing security, economic security and overall wellbeing.[265]

Equality of opportunity has been defined as the assertion that 'each man should have equal rights and opportunities to develop his own talents and virtues and that there should be equal rewards for equal performances'.[266] Even if women were offered an equal opportunity for full-time employment and wages, the question arises whether they are ready to accept them without ancillary support, such as childcare centres and flexible working hours. Equal opportunity, in fact, promotes substantial inequalities.[267] Miles argued that formal equality is necessary but insufficient and, therefore, it is time to move towards the achievement of substantive equality for women.[268] The principle of equality cannot be based solely on gender-neutral language; rather, we should accept the differences and take different measures to achieve substantive equality.

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[261] In 2013, Victoria introduced Victoria Legal Aid, which revisited the eligibility criteria for legal aid applicants. See Mutha-Merennege (n 12) 256.

[262] Ibid 259.

[263] Hughes (n 246) 206

[264] Mossman (n 253) 56.

[265] Mutha-Merennege (n 12) 260.

[266] J Schaar, 'Equality of Opportunity and Beyond' in JR Pennock and JW Chapman (eds), *Nomos IX Equality* (Atherton Press, 1967) 229.

[267] Abner, Mossman and Pickett (n 256) 593; Frances E Olsen, 'The Family and the Market: A Study of Ideology and Legal Reform' (1983) 96(7) *Harvard Law Review* 1577.

[268] AR Miles, 'Feminism, Equality and Liberation' (1985) 1 *Canadian. Journal Women and Law* 64–8.

In Bangladesh, the *Legal Aid Services Act 2000* includes some special provisions that are available only to women; the eligibility criteria prioritise women over men.[269] This is a promotion of women's access, though the statistics describe a different story. The number of male recipients is much greater than female recipients in all type of provided services.[270] This finding may be the result of more male than female litigants; awareness is another factor. In the socio-economic context, most women stay at home; therefore, they may be less informed about legal aid services than men. As a result, the number of women who receive legal aid services is low in Bangladesh. Furthermore, Bangladesh is a male-dominated society, where a woman's economic entitlement is more limited than a man, even though their earnings are the same.

6.6 Conclusion

Following Rawls' distributive justice theory,[271] this chapter argues that economically inadvanced groups should be provided with some incentives, legal aid can be one of them. Chapter 6 has demonstrated that legal aid is an important tool for access to justice, but the current system of legal aid in Bangladesh is fundamentally flawed in a number of ways, posing procedural, structural, and cultural difficulties as well as insufficient funding. Procedural difficulties arise from poor accountability and monitoring systems, lengthy decision-making processes and delayed execution processes due to bureaucratic complexities. These factors contribute to the complex and ineffective legal aid procedures. Further, the lack of knowledge in legal aid services and evidence-based decisions on legal aid applications mean that the service is unproductive.

Structural difficulties arise from poorly articulated eligibility criteria, uninterested lawyers, inefficient services, and opaque political involvement. Introducing a merit test in addition to the means test to determine eligibility would optimise the use of public resources in Bangladesh. Like Canada, Bangladesh also should emphasise maintaining the quality of services. In this regard, skilled and efficient lawyers could be encouraged to become panel lawyers. Bureaucratic complexities should be reduced to make the execution process prompt and effective. These changes would require legislative amendment.

Cultural difficulties arise when the most vulnerable litigants do not know how to apply or gain access to legal aid, and when lawyers are motivated solely by money and consider the work demeaning. Increasing awareness is resulting in increased budget demands that yet remain unmet.

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[269] The *Legal Aid Services Policy 2014* (Bangladesh) r 2(2).

[270] NLASO (n 111) 9.

[271] John Rawls, *A Theory of Justice* (Belknap Press, rev ed, 1971)

Insufficient funding is an ongoing challenge—there simply is not enough to cover the needs, even if the procedural, legislative and cultural difficulties were fixed. Due to budget constraints, only a modest number of people can access legal aid. That frustrates the aim of legal aid funding and the constitutional right of the people.

To overcome these obstacles promptly, the government can work with NGOs to reduce overlap and ensure proper use of public resources. In addition to reducing the burden from legal aid funding, other alternative financial arrangements (e.g., contingency fees arrangements, CFAs, pro bono practices and legal insurance) can be introduced.

A number of middle-income groups have been denied access to justice due to excessive costs. From a gender-equality perspective, prioritising criminal cases during the allocation of legal aid limits women's access. After years of investment in an expensive litigation system, exorbitant lawyer fees—coupled with an almost non-existent legal aid system—have made the system inaccessible to the majority. Therefore, unless and until we can minimise litigation costs, access to justice will be deferred.

Chapter 6 addressed the financial or alternative support options that could be utilised to enhance access for the poor, middle-income and women in Bangladesh. Analysis of other jurisdictions demonstrated that, while there are difficulties inherent in the distribution of legal aid, there are practices that Bangladesh could adopt to improve the ability of the legal aid system to assist in the delivery of justice. In particular, revising the eligibility criteria, where allocation would be made based on means and merit tests, and ensuring efficient and prompt services will broaden access to justice.

Chapter 7: The Role of Justice Sector Actors and Institutions in Raising Litigation Costs

7.1 Introduction

This chapter examines the ways in which professional stakeholders—such as judges, lawyers, clients, court staff and investigating officers (IOs)—are increasing litigation costs in Bangladesh. The existing law and procedures and the key institutions that are closely involved in administering justice—police department, prosecution, land management department—further contribute to prolonging a trial and increasing litigation costs. In-depth interviews of the participants from this study were analysed, and the individuals' contribution in delaying case-processing time and increasing litigation costs were identified. Data analysis also assessed community views and expectations of the justice sector. Contemporary legal research was critically analysed, where necessary. This chapter examines the contributions of individuals and institutions to increase litigation costs (Research Issue A).

The excessive cost of litigation is a common barrier to access to justice[1] and has been posited as the most serious problem of the legal system.[2] Even developed nations like the UK, the US and Australia are struggling with high litigation costs.[3] In particular, case congestion increases delay,

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[1] Australian Law Reform Commission, *Costs Shifting—Who Pays for Litigation* (ALRC Report No 75, 1995) 7 <http://www.alrc.gov.au/report-75>; Gillian K Hadfield, 'The Cost of Law: Promoting Access to Justice through the (Un)Corporate Practice of Law' (2014) 38 *International Review of Law and Economics* 44; Ross Cranston, *How Law Works: The Machinery and Impact of Civil Justice* (Oxford University Press 2006) 35; GFK Slovakia, *Legal Needs in Slovakia II* (2004) 49; I Sato, H Takahashi, N Kanomata and S Kashimura, 'Citizens Access to Legal Advice in Contemporary Japan: Lumpers, Self Helpers, and Third-Party Advice Seekers' (Joint Annual Meeting of the Law and Society Association and the Research Committee on Sociology of Law, 26 July 2007); Ignite Research, 'Report on the 2006 National Survey of Unmet Legal Needs and Access to Services' (Legal Services Agency, 2006) 79; Hazel Genn, *Paths to Justice: What People Do and Think about Going to Law* (Hart Publishing 1999) 80; Leonard S Janofsky, 'ABA Attacks Delay and the High Cost of Litigation' (1979) 65 *American Bar Association Journal* 1323.

[2] Martin Gramatikov, 'A Framework for Measuring the Costs of Paths to Justice' (2009) 2(2) *Journal Jurisprudence* 111; Philip L Williams and Ross A Williams, 'The Cost of Civil Litigation: an Empirical Study' (1994) 14 *International Review of Law and Economics*, 73.

[3] Lord Woolf, *Access to Justice* (Final Report, 1996) pt II <http://webarchive.nationalarchives.gov.uk/20060213223540/http://www.dca.gov.uk/civil/final/contents.htm> (accessed 9 May 2018) ('*Woolf's Final Report*'); Hiram E Chodosh et al, (1997) 'Indian Civil Justice System Reform: Limitation and Preservation on the Adversarial Process' 30 (1&2) *New York University Journal of International Law and Politics* 29; Mauro Cappelletti, James Gordley and Earl Johnson, Jr, *Toward Equal Justice: A Comparative Study of Legal Aid in Modern Societies* (Oceana Publications Inc, 1975) 218–19; Legal Service Corporation, *Documenting the Justice Gap in America: the Current Unmet Civil Legal Needs of Low-Income Americans* (2nd ed, 2007) 13.

and increases litigation costs.[4] After considering the systemic expense of the litigation process, it appears that justice is only available to those who can afford it, thereby excluding a significant portion of the population from accessing justice.[5] Shoaib et al. explained this phenomenon through the economic equilibrium theory, arguing that clients who are seeking a fair trial must be able to pay the price for it; in contrast, lawyers who supply a means to do so will demand a (high) price and the equilibrium of justice reaches those who can pay the demanded price.[6] Botero et al. found that a lack of incentives for judges, lawyers, and litigants are the main obstacles of efficient judiciaries, where their inefficient counterparts inevitably contribute to increasing the price of litigation.[7] Complicated legal procedures also contribute to increased litigation costs.[8] Chapter 7 divulges how individuals and institutions closely involved in the case-processing system increase the litigation costs in Bangladesh.

Notably, the laws in Bangladesh that regulate the rate at which cases are disposed of invite a host of problems throughout the judicial system, mainly related to new case filings. Currently, the statutory timeline for concluding a civil case is 340 days;[9] the timeline is 180 days for criminal cases triable by Judicial Magistrate and 360 days for criminal cases triable by Sessions Court.[10] However, in practice, the average time to conclude at the trial level is five years or more.[11] Appeals, revision and review further prolong the trial. Data collected from the Supreme Court of Bangladesh

[4] Takeshi Kojima, 'Civil Procedure Reform in Japan' (1990) 11 *Michigan Journal of International Law* 1218; Richard B Cappalli, 'Comparative South American Civil Procedure: A Children Perspective' (1990) 21 *International American Law Review* 306; Oscar G Chase, 'Civil Litigation Delay in Italy and the United States' (1988) 36 *American Journal of Comparative Law* 55–6; Jon O Newman, 'Rethinking Fairness: Perspectives on the Litigation Process' (1985) 94(7) *Yale Law Journal* 1645; Robert Moog, 'Indian Litigiousness and the Litigation Explosion: Challenging the Legend' (1993) 33(12) *Asian Survey* 1136; RV Ramana Murthy and Siddik Rubiyath, 'Disposal Rates, Pendency and Filing in Indian Courts: an Empirical Study of Two States of Andhra Pradesh and Kerala' in PG Babu et al, (eds), *Economic Analysis of Law in India: Theory and Application* (Oxford University Press, 2010) 3.

[5] Deborah L Rhode, *Access to Justice* (Oxford University Press, 2004) 3; Alan W Houseman, 'The Future of Legal Aid: a National Perspective' (2007) 10 *University of the District of Columbia Law Review* 43–6; Russell Engler, 'Opportunities and Challenges: Non-Lawyer Forms of Assistance in Providing Access to Justice For Middle-Income Earners' in Michael Trebilcock, Anthony Duggan and Lorne Sossin (eds), *Middle Income Access to Justice* (University of Toronto Press, 2012) 172.

[6] Ahmad Sohaib et al, 'Cost of Justice and Exclusion' (2019) 15(11) *European Scientific Journal* 4.

[7] Juan Carlos Botero et al, 'Judicial Reform' (2003) 18(1) *The World Bank Research Observer* 62.

[8] Edgardo Buscaglia and Maria Dakolias, 'An Analysis of the Causes of Corruption in the Judiciary' (1999) 30 *Law and Policy in International Business* 100.

[9] Ummey Sharaban Tahura and Margaret RLL Kelly, 'Procedural Experiences from the Civil Courts of Bangladesh: Case Management as a Potential Means of Reducing Backlogs' (2015) 16(1) *Australian Journal of Asian Law* 4.

[10] *CrPC 1898* (Bangladesh) 26, s. 339C. In Bangladesh, there are two classes of criminal courts: The Court of Sessions and the Courts of Magistrates. A magistrate can try all offences not punishable by death to imprisonment or a term not exceeding 10 years, and a Sessions Court can try crimes punishable by death (s. 6, 29C).

[11] Ridwanul Hoque, 'Courts and the Adjudication System in Bangladesh: In Quest of Viable Reforms' in Jiunn-rong Yeh and Wen-Chen Chang (eds) *Asian Courts in Context* (Cambridge University Press, 2014) 481.

found that between 2008 and 31 March 2019, there were 15,905,661 instances of new filings and restoration of cases. In comparison, 13,863,250 cases were concluded. Until March 2019, 30,53,870 cases are pending at subordinate courts—among them, 5,85,834 cases are older than five years.[12] By the end of 2019, the number of pending cases had increased to 31,72,043. Of the total cases, 86% are pending before the subordinate courts[13] and the ratio of civil to criminal cases is 44:56. The present disposal rate of cases of the 1800 judges at the subordinate courts is 87.15%. The average disposal number each year is more than 1.2 million cases. Several new courts and tribunals have been established to increase the disposal rate, but many are either vacant or have already overburdened judges placed in charge, in addition to their existing courts.[14] Also, these courts and tribunals mostly face the traditional litigation process, i.e., trial, due to low rate of ADR disposal and have failed to achieve their purpose. Therefore, the backlog of cases is rising (see Figure 7.2), as is the time needed to dispose of a case.

As mentioned, 24.3% of the population is below the poverty line (in 2016, Bangladesh was ranked 58 in world rankings), and another 33% belong to the middle class (see Chapter 6, section 6.2.2).[15] Thus, this expensive, inefficient litigation system has made the justice system inaccessible for the majority of the nation's people, resulting in poor public confidence in the administration of justice.[16] Against this backdrop, Chapter 7 investigates how those who are intimately involved in court proceedings—including judges, lawyers, clients, court staff, prosecution and IOs—contribute to increasing litigation costs. Findings from the current study highlight the contributing factors, which included the delayed case-processing time, the extra privileges availed by spending more money on defying the law, using litigation as a tool of harassment, the uncompromising mindset of the litigants, the lack of available information relating to case proceedings, the uncertainty of case length, the lawyer-dominated, adversarial legal system, the passive role of the judges in tracking case records, the lack of mandatory application of cost rules for unnecessary adjournments and compensation, and the dearth of accountability of police, prosecution and lawyers. Participants in the study (*BQRS 2019*) opined that delay and elevated legal expenses are closely connected. The research further analyses how key institutions and the existing law and

[12] Data collected from the Supreme Court of Bangladesh (March 2019).

[13] Nazmul Huda Mina, Nahid Sharmin and Shammi Laila Islam, *Subordinate Court System of Bangladesh: Governance Challenges and Ways Forward* (Transparency International Bangladesh, 2017) 3.

[14] Data collected from the Supreme Court of Bangladesh, courtesy of Judge Akramul Hoque Samim.

[15] Central Intelligence Agency, 'Bangladesh' *World Fact Book* (Web Page, 24 March 2021) <https://www.cia.gov/the-world-factbook/countries/bangladesh/#economy>.

[16] M Rafiqul Islam, 'The Judiciary of Bangladesh Its Independence and Accountability' in Hoong Phun Lee and Marilyn Pittard (eds), *Asia-Pacific Judiciaries: Independence, Impartiality and Integrity* (Cambridge University Press, 2018) 53. See also Edgardo Buscaglia and Thomas Ulen, 'A Quantitative Assessment of the Efficiency of the Judicial Sector in Latin America' (1997) 17 *International Review of Law & Economics* 278.

legal procedures in Bangladesh—in place to ensure universal access to justice—are also increasing litigation costs.

7.2 Influence of Backlogs and Delays on Litigation Costs

Backlog and delay are the most significant problems in the administration of justice, not only in Bangladesh but throughout the world.[17] However, Fox and Macdonald argued that not all delay is to be frowned upon.[18] Storey found that delay can be useful.[19] Economides et al. identified delay as desirable within an adversarial system.[20] All authors explained that the parties should be given adequate time to reach a fair resolution. Conversely, the recognised principle is that if justice is not available within a reasonable time, this indicates inaccessibility.[21] Church identified delay as the most notorious phenomenon.[22] Francioni likened the excessive length of proceedings to a denial of justice,[23] although 'adequate' and 'reasonable' are vague concepts that often vary. Chief Justice Martin draws a crucial distinction between the lapse of time and delay—where an excessive delay is unacceptable, while lapse of time is essential for the administration of justice.[24] Delay also invites abuse of the system as well as increasing litigation costs.[25] A study found that although the litigation costs are very high compared to economic affordability, the litigants chose to go to the court as their last option.[26] All the participants from this empirical research have strongly connected delay with increasing litigation costs.

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[17] Kojima (n 4) 1218; Cappalli (n 4) 306; Chase (n 4) 55–6; Newman (n 4) 1645; *Woolf's Final Report* (n 3) II; Chodosh et al (n 3) 29.

[18] Hon Russel Fox, *Justice in the Twenty-First Century* (Cavendish Publishing Limited, 2000) 32; Roderick A Macdonald, 'Access to Justice and Law Reform' (1990) 10 *Windsor Yearbook of Access to Justice* 301.

[19] Moorfield Storey, *The Reform of Legal Procedure* (Yale University Press, 1911) 4.

[20] Kim Economides, Alfred A Haug and Joe McIntyre, 'Toward Timeliness in Civil Justice' (2015) 41(2) *Monash University Law Review* 417.

[21] *European Convention for the Protection of Human Rights and Fundamental Freedoms 1950* art 6 (1); Mauro Cappelletti and Bryant Garth, 'Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective' (1978) 27 *Buffalo Law Review* 190.

[22] Thomas Church, Jr, et al, *Justice Delayed: The Pace of Litigation in Urban Trial Courts* (National Center for State Courts, 1978) 2.

[23] Francesco Francioni, *The Rights of Access to Justice under Customary International Law* (Oxford University Press, 2007) 55.

[24] Wayne Martin, 'Timeliness in the Justice System: Because Delay is a Kind of Denial' (Paper No 16, Monash University Conference on Timeliness in the Justice System: Ideas and Innovations, 17 May 2014) 22

[25] Moog (n 4) 1136. An empirical study on court delay was first crucially conducted at the University of Chicago. The study, led by Thomas Church Jr, was titled 'Justice Delayed: The Pace of Litigation in Urban Trial Courts'. The National Centre held the subsequent follow-up studies for State Courts. See also Church Jr et al (n 22).

[26] Marc Galanter and Jayanth K Krishnan, 'Bread for the Poor: Access to Justice and the Rights of the Needy in India' (2004) 55 *Hastings Law Journal* 789. Though Galanter and Krishnan's study was conducted in the Indian context, it is also applicable to Bangladesh.

This study (*BQRS 2019*) identified that private costs increased through an individual's involvement in the case proceedings and the long duration of specific stages of the case proceedings, i.e. system generates delay (see Figure 7.1). The individual's contribution has been enunciated in Chapter 7 demonstrates how their contribution impact on case duration and increase litigation costs. Chapter 8 identifying the costliest area in litigation and how the system generating delay invites litigation costs in case process.

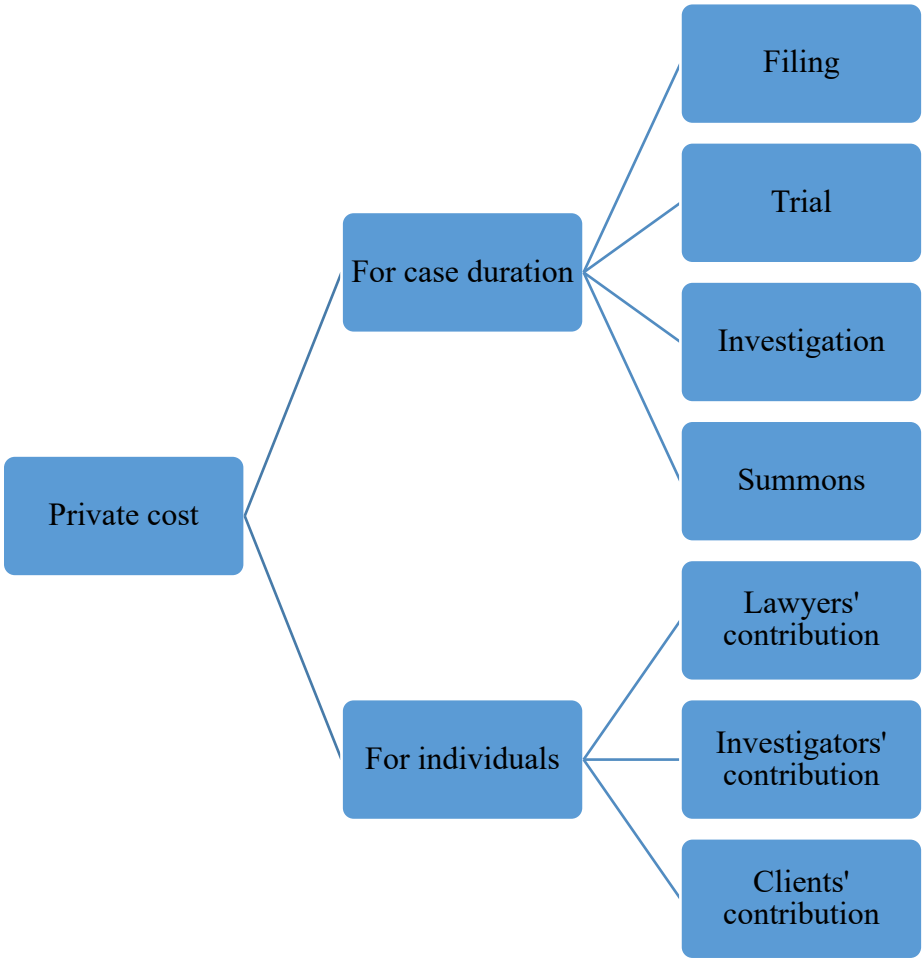

Figure 7.1: Participants' Views of the Causes of Increasing Private Costs

Thus, this study found a positive correlation among case pendency, delay, and litigation. That is, pendency in courts increases when the rate of filing exceeds case disposal.[27] Some factors that arise with an increasing filing rate are beyond the control of procedural reform and judicial authority. These include population growth, poor communication systems, the enactment of new legislation and regulations that results in a dramatic increase in litigation, increasing awareness of legal rights, and economic growth.[28] However, other factors that significantly increase litigation costs are within judicial control. Chapter 7 limits the scope to those individuals and institutions

[27] A similar finding was reached by Murthy and Rubiyath (n 4) 3.

[28] Chodosh et al (n 3) 27; Murthy and Rubiyath (n 4) 3.

directly associated with the case proceedings and how they contribute to elevating litigation costs. Murthy and Rubiyath drew the proposition that the disposal rate relates to court efficiency and filing follows the disposal, while pendency discourages new filing.[29] Therefore, if the disposal rate is high, the filing rate would be high; in contrast, high pendency discourages new filing. Figure 7.2 depicts the filing, disposal and pendency rate in the subordinate courts of Bangladesh between 2008 and 2019.

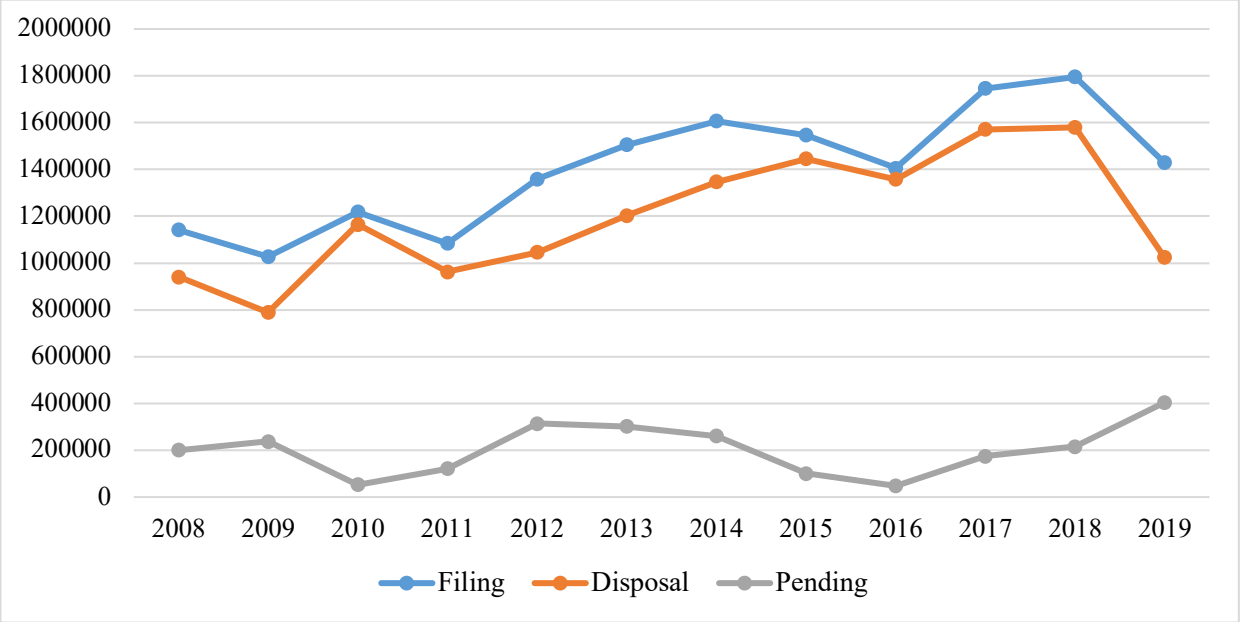

Figure 7.2: The Filing, Disposal and Pending Rate in the Bangladesh Judiciary Between 2008 and 2019[30]

7.2.1 Contributions of Individuals to the Escalating Litigation Costs

7.2.1.1 Lawyers

The legal profession that exists at present in Bangladesh has no relevance to subcontinental history.[31] Across the Indian subcontinent, the concept of lawyers derived from the British legal system.[32] Prior to this, the ruling king or judges were solely responsible for delivering justice. Introduced by the British, lawyers became essential members, or officers of the court system,[33]

[29] Murthy and Rubiyath (n 4) 18.

[30] Data courtesy of the Supreme Court of Bangladesh and Judge Akramul Hoque Samim.

[31] Law Commission of India, *Role of the Legal Profession in Administration of Justice* (Report No 131, 1988) 1.

[32] Ludo Rocher, 'Lawyers" in Classical Hindu Law' (1968) 3(2/3) *Law and Society Review* 38–4.

[33] RK Mahajan, 'Boycott of Courts by Lawyers-Legitimacy and Alternatives' (1989) 1 *The Supreme Court Journal* 1.

often referred to as 'friends of the court' when their services were engaged on an amicus curiae basis at the request of the courts.

Initially, membership of the legal profession was a sign of prestige and wealth;[34] later, though the glory faded, lawyers' involvement in resolving disputes became inevitable.[35] Indeed, the administration of the law becomes too challenging to carry out without lawyers' cooperation, but professional intervention inevitably adds to the cost of pursuing legal matters. Lawyers' fees, the complexity of the court process and lengthy litigation all combine to accelerate legal costs.[36] Empirical research by Trubek and other scholars' also found that among litigation expenditure, the majority constituted lawyers' fees.[37] Therefore, Zorza proposes that lawyer's fees is the most desirable area to reduce litigation costs.[38] Other expenses (e.g., expert witness fees, stenographic costs and travel expenses) comprise only a small percentage of the total bill.[39] The high cost of lawyers' fees was also found in the current study. COM-4 described, 'lawyer's involvement creates difficulty in maintaining a case timeframe and increases the litigation costs', while CRJ-1 stated, 'in a case, the larger amount in litigation expenses is derived by lawyers'.

From the sample cases, it was found from a conservative estimation that each party spent approximately BDT 34,500 each year per case, of which BDT 25,050 (AUD 404.10)[40] was for lawyers' fees—this amounts to 72% of their common litigation expenses. This estimation indeed suggested that the average lawyer's fees are beyond affordability for the majority of Bangladeshis.

Two client interviewees stated that they never received any reduction of lawyers' fees. However, at the filing stage, they were offered to pay by instalment as the filing stage involve a larger amount of expenses (more in chapter 8, section 8.3.1).

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[34] Eric W Ives, 'The Common Lawyer in Pre-Reformation England' (1968) 18 *Transactions of the Royal Historical Society* (5th series) 148–9.

[35] Brian Abel-Smith and Robert Stevens, *Lawyers and the Courts: A Sociological Study of the English Legal System 1750–1965* (Harvard University Press, 1967) 462. An exception to this was the prohibition of lawyers where a case is filed under *Birodh Mimangsha (Pouro elaka) Board Ain 2004* (Bangladesh) s 16.

[36] Richard Zorza, 'Courts in the 21st Century: the Access of Justice Transformation' (2010) 49(1) *Judges Journal* 16.

[37] David M Trubek et al, 'The Costs of Ordinary Litigation' (1983) 31 *UCLA Law Review* 111–12. Trubek's research is limited to the lawyer who is paid on a contingency fee basis and parties mostly recovered from the litigation. Sohaib et al (n 6) 5; Noel Semple, 'The Cost of Seeking Civil Justice in Canada' (2015) 93(3) *Canadian Bar Review* 648.

[38] Zorza (n 36) 17.

[39] Trubek et al (n 37) 111–12.

[40] 1 BDT = 0.016 AUD on 30 September 2021.

The legal profession in Bangladesh is entirely motivated by profit, with very few exceptions. For example, some close relatives and friends of lawyers receive free legal advice. However, government-funded legal aid services have been available since the enactment of the *Legal Aid Services Act 2000* (Bangladesh) to assess the eligibility of legal aid recipients (see Chapter 6, section 6.2.2).[41] No charitable contributions to serve people from a social justice perspective are generally available.[42]

Lawyers' unwillingness to serve the poor, along with formal substantive and institutional limits, has only decreased the prospect of supplying widespread access to justice.[43] In Bangladesh, there are no professional standards that govern lawyers' fees, meaning that they are free to charge as they please and that the rates will vary according to the financial capacity of litigants and the complexities of the case at hand.

CVC-2 stated, 'I need lawyer's assistance as I found the law and court procedure complex. I am not that much literate to navigate the process without any assistance.' Most of the interviewees believed that lawyers assisted in tracking the complex legal proceedings, though their involvement contributed to a significant portion of litigation costs. Without them, it became arduous to navigate the administration of justice. This proposition was substantiated by Zorza,[44] who argued that the system should be simpler to reduce lawyer's involvement in the case proceedings. Inadequate incentives and overly complicated procedures account for most of the problems. Paperwork should be reduced to save time, and technology could be used to reduce the number of people involved and to maximise the use of court time and resources (see Chapter 8).[45] A successful example from the Japanese judicial system showed that the absence of lawyers in 90% of summary court cases reduced litigation expenses.[46]

A by-product of charging per hearing or appearance (which fluctuates by hearing date) is that lawyers are not obliged to finish a matter within a set period of time, encouraging many to prolong cases purposely (see section 7.2.1.2). Empirical data found that there are no contingency fees

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[41] *Legal Aid Services Policies 2014* (Bangladesh) s 2. Accordingly, a person will be eligible for legal aid funding if their annual income is less than BDT 100,000.

[42] Jayanth K Krishnan and C Raj Kumar, 'Delay in Process, Denial of Justice: The Jurisprudence and Empirics of Speedy Trials in Comparative Perspective' (2011) no 155 *Georgetown Journal of International Law* 747–8.

[43] Sohaib et al (n 6) 17.

[44] Zorza (n 36) 15–16. See also Derek C Bok, 'A Flawed System of Law Practice and Training' (1983) 33(4) *Journal of Legal Education* 579.

[45] Zorza (n 36) 34; Fox (n 18) 210.

[46] Florencio López-De-Silanes, Edgardo Buscaglia and Norman Loayza, 'The Politics of Legal Reform' (2002) (2) *Economia* 123.

arrangement system, CFA or 'no win, no fees' provisions in Bangladesh (see Chapter 6, section 6.3.5). Lawyers work with no fixed rate, and they can continue to earn money for the duration of the litigation. CRL-3, a lawyer, also admitted that charge per-hearing would benefit them financially. Another lawyer, CRL-2, also stated, 'the longevity of a case benefits the lawyers financially'. Thus, four of the eight lawyers interviewed agreed that the length of cases profits them financially, lending support to Kidder's findings.[47] Therefore, the inclusion of lawyers in the litigation process, in part, makes the justice system irrationally costly. Indeed, a lawyer's economic gain and the length of litigation both follow the supply rule in economics.[48] The longer a case remains active, the more it will benefit the lawyers involved and vice versa. As the duration of litigation is unpredictable, no one can estimate their legal costs before a matter has ended. Hence, the Indian Law Commission has contemplated that the absence of alternative services and a central regulatory committee to controls legal fees means there is a lack of options and decisive authority in place when it comes to regulating the price of litigation.[49]

The increased number of lawyers in Bangladesh also contributes to the growing volume of legal proceedings. Though scholars find a scarcity of service providers as one of the reasons for increasing costs from an economic perspective,[50] Stamp illustrates it through the Baumol hypothesis;[51] however, this scenario was not relevant to Bangladesh, as increasing the number of service providers also requires quality and efficacy. The fall in efficiency and standards at the bar examination has meant that more underqualified and unprepared lawyers are entering an already saturated field. In Bangladesh, a lawyer's licence is allocated for life and, excluding the payment of yearly fees, means there is no requirement for renewal.[52] This does not encourage lawyers to pursue further professional development or help quell the excessive number of people joining the profession. The already large volume of practitioners in Bangladesh only raises the filing rate of proceedings, supposedly set to maintain their own living costs. Indeed, both the volume of

[47] Robert L Kidder, 'Formal Litigation and Professional Insecurity: Legal Entrepreneurship in South India' (1974) 9(1) *Law and Society Review* 28.

[48] The law of supply in economic theory states that if all other factors are constant, an increased price results in an increase in quantity supplied, or vice versa. Both the price and supply correspond to the price changes.

[49] Law Commission of India (n 31) 14.

[50] Hadfield (n 1) 48; Victorian Law Reform Commission, *Civil Justice Review,* (Report No 14, 2008) 78 <http://www.lawreform.vic.gov.au/inquiries/civil-justice>.

[51] Michael E Stamp, 'Are the Woolf Reforms an Antidote for the Cost Disease--The Problem of the Increasing Cost of Litigation and English Attempts at a Solution' (2001) 22(2) *University of Pennsylvania Journal of International Law* 364. Baumol's hypothesis is that the salaries of one job may rise even if there is no increase in labour productivity because of rising salaries in other jobs that have experienced labour productivity growth. For more detail, see William Baumol and William Bowen, *Performing Arts: the Economic Dilemma; a Study of Problems Common to Theater, Opera, Music and Dance* (Twentieth Century Fund, 1966).

[52] *Bangladesh Legal Practitioners and Bar Council Order and Rules 1972* (Bangladesh) r 22, 27.

practitioners and the filing rate can only move in the same direction if the disposal rate does not eclipse the rate at which new cases are being pursued. According to data from 2018, 5000 new members were set to join the Dhaka Bar Association alone, which will inevitably multiply the rate of case filings.[53] One interviewee (CVJ-4) said:

> *If a woman seeks support from a lawyer to file a divorce case, she will be advised to file another three or four cases under different acts such as violence against women statutory named as* Nari-o-Shishu Nirjatan Daman Ain 2000 *(Bangladesh), the* Dowry Prohibition Act 1980 *(Bangladesh), the* Domestic Violence (Prevention and Protection) Act 2010 *(Bangladesh) and the* Family Courts Ordinance 1985 *(Bangladesh).*

However, an interviewee lawyer had a counter argument. He stated, 'our laws do not offer an entire relief through one case' (see section 4.3.2). Thus, where relief could be provided just through one case, most lawyers will instead encourage their clients to file separate cases, despite the overwhelming number of filings and an ever-increasing backlog of lawsuits already in the system. The reasons for such steps are to impress the clients with their 'multidimensional' skills of handling a variety of cases and to keep the pressure on the opponent through multiple cases.

Most of the clients stated that they receive case information from their lawyers or lawyers' assistants. Two clients stated that they checked with the court's staff after obtaining information from their lawyers. Thus, without the involvement of personnel, it is not easy to obtain case or legal information in Bangladesh. The lack of information available to the public is another key contributor to litigation costs. Krishnan also observed this tendency for lawyers to withhold information from clients.[54] As legal information is not widely available in Bangladesh, litigants have to rely on their lawyers for news and materials, particularly as illiteracy is disproportionately high. Left with little choice but to follow their lawyers' advice, lawyers will purposely withhold legal information in advance for fear of losing their clients, and instead assure them that cases are in their favour, even if they are not. CVL-1, a lawyer, stated that:

> *Sometimes the lawyers are not honest in attending a meritless case hiding the case [potential] outcome. That type of case also run for 10 years, though from the very beginning the lawyer knew the case's future. They do so either dishonestly, unethically or because their client pressures to do so.*

Importantly, lawyers in Bangladesh do not face any reputational, professional, or economic damage for attaining meritless cases. This is also another lacking professional commitment. As in

[53] This information was received during the interview with one lawyer who held a position in the Dhaka Bar Association committee.

[54] PG Krishnan, 'The Litigant, the Legal Profession and the Judicial Process' (1981) 8(4) *Journal of the Bar Council of India* 640.

Australia or the UK, legal practitioners in Bangladesh do not face any sort of liability for incurring any unnecessary costs in a case process.[55]

Lack of professional accountability causes further delay and increases litigation costs. Lawyers will often deliberately overburden themselves with work and relentlessly attempt to secure new clients, regardless of their ability to provide quality service. This is because many lawyers believe that the greater their case load, the higher their income flow—in other words, the 'best' lawyers are those who always have new case filings.[56] Many lawyers use techniques known as 'lawyers' rhetoric' to retain clients,[57] which includes unnecessarily long and vague pleadings to impress their clients. However, maintaining a high volume of cases means that lawyers rarely have sufficient time to prepare for a case, therefore, prolonging proceedings even further by unnecessary adjournments.[58] The typical scenario observed in this study (*BQRS 2019*) was that a few lawyers handle a large number of cases, often face multiple hearing in a day. Therefore, they send their junior to the concerned court with an adjournment petition as they cannot manage to attend all the hearings. Lawyer CVL-2 stated, 'I never tried to mediate a case when it is filed. Before filing, sometimes I tried'. Another lawyer held a different view for not attempting mediation. CVL-3 stated that 'if I try to encourage my clients to mediate, they change lawyer. Then why should I risk my earning?' Data substantiated that to maintain this standard of work, lawyers will be unwilling to handle or encourage settlement or negotiation, as it affects their earnings.

The prosecution department in the case of criminal cases also contributes to increasing litigation costs. In fact, in Bangladesh there is no 'prosecution department' instead present laws dictate that the public prosecutor and police force work at distinctly different stages being part of prosecution. The ratio of public prosecutor to criminal cases is inadequate in Bangladesh. One interviewee from the prosecutor department, CRL-2, said, 'I am handling around 300 cases'. Even though he has a few staff to assist him, the large number of cases affects case preparation. CRL-2 also shared that 'we deal with a criminal case at the trial stage only. At the investigation stage, we do not have any involvement.' The public prosecutor is involved only at the trial stage. Before that, the police department file, investigate, collect evidence, and prepare the case investigation report. This dissociation gives the public prosecutor the ability to reject responsibility for losing a case. There

[55] *Civil Procedure Act 2005* (Australia) s 99; *CPR 1998* (UK) r 44.11.

[56] Marc Galanter, 'Law and Society in Modern India' ed Rajeev Dhavan (Oxford University Press, 1989) 282.

[57] Kidder (n 47) 15.

[58] Oliver Mendelsohn, 'The Pathology of the Indian Legal System' (1981) 15(4) *Modern Asian Studies* 823; Robert Moog, 'Delays in the Indian Courts: Why the Judges Don't Take Control' (1992) 16(1*) The Justice System Journal* 20–1.

are many instances where good cases did not achieve the expected outcome due to the inefficiency of public prosecutors.

Another research study showed that prosecutors use the tactics of delay in manipulating the law by not producing the necessary witnesses or evidence, submitting adjournment petitions on minor grounds.[59] The current study found that public prosecutors often remain absent at the time of the hearing, mainly because they do not maintain accountability, and poor payment discourages them from appearing in court. Thus, the problematic delay affects the case decision. Also, the political appointment of a public prosecutor in Bangladesh often compromises the quality. Younger and less-experienced lawyers managed their appointment as prosecutors through personal and political channels. Interviewees from this study claimed that the dearth of an efficient and dedicated prosecution department, where police and lawyers work together from case preparation until their appearance in the courts, is the leading cause of the low punishment rate.[60] CRL-2 even alleged corruption against prosecutors, accusing them of taking bribes from the defendant as a reason for their absence or for not producing evidence at trial. Similar allegations of low-quality case preparation, taking bribes, delaying case process at the time of submitting a written statement, and lack of enthusiasm have been made against the government pleader in civil cases.

Lawyers are overburdened with case preparation and prefer to submit adjournment petitions. In this study, CVL-1 was handling 120 cases, CVL-2 had 250 cases, and CVL-4 had 50–60 cases. The number of cases handled by the criminal lawyers is higher than civil. CVL-2 admitted that 'if the ratio were less, he would serve better'. Thus, the lack of preparation sees lawyers adjourn the process for a number of reasons, including to amend pleadings.

Lawyers' assistants contribute further to increased litigation costs. Observational findings from this research (*BQRS-2019*) found that the custom in Bangladesh is that every lawyer maintains two types of assistants—'juniors' (would-be lawyers) who have a law background, and assistants who have no formal legal training, known locally as *munshi*, who mainly perform clerical duties. In the case of the latter, sometimes one assistant works for several lawyers, and sometimes one lawyer employs several assistants. For juniors, the customary practice is that one lawyer employs a number of juniors. The number of *munshis* and juniors that remain present during a hearing becomes a matter of pride. CRS-3 stated that 'sometimes lawyers' juniors are not paid

[59] Krishnan and Kuman findings in the Indian context are also applicable in Bangladesh. See Krishnan and Kumar (n 42) 779.

[60] A study found that the average conviction rate during 2002–2014 was 32.56%. See Mohammed Bin Kashem, 'Issues and Challenges of Police Investigative Practices in Bangladesh: An Empirical Study' in Shahid M Shahidullah (ed), *Crime, Criminal and the Science of Criminology in South Asia: India Pakistan and Bangladesh* (Palgrave Macmillan, 2017) 285.

sufficiently'. One lawyer admitted the fact and stated, 'poor payment to junior is a custom for long. They (junior lawyer) come to learn'. Morrison, in his study in the Indian context, found similar sentiments. He argued that the new juniors often find themselves maltreated and economically exploited, which frustrates them at the initial age of their practice.[61] Thus, the established disproportionate distribution of income emboldens them to find some alternate ways to make money from clients unethically. Morrison found that this lawyer–assistant relationship is often tense and hostile.[62] This allegation is similarly applied in the Bangladesh context. From this *BQRS 2019* study, one court staff shared that lawyers' assistants occasionally charge extra from clients to liaise between them and lawyers.

Much of this systemic turmoil arises from the fact that members of the legal profession in an adversarial court system enjoy a position of absolute indispensability.[63] This means that the legal profession in Bangladesh operates in a mostly monopolistic market. A large number of the members of Parliament have law backgrounds and favour this community. Dominated by a strong political background, commonly, lawyers tend to exercise political affiliation beyond merit. Neither court staff nor judges embrace any conflict with them. In every district, lawyers have created local bar associations that are politically organised and possess diplomatic power to influence the courts.[64] Such associations may choose to incite court boycotts[65] to exert their will. Recently, a district judge was withdrawn from his workplace immediately after rejecting a bail petition of a politician of the ruling government,[66] and another district judge experienced a court boycott as he refused to grant bail of an accused in a rape case.[67] This became an unacceptable practice to exercise political power to obtain a favourable order; that is, if something goes against

[61] Krishnan (n 54) 641.

[62] Charles Morrison, 'Clerks and Clients: Paraprofessional Roles and Cultural Identities in Indian Litigation' (1974) 9(1) *Law & Society Review* 46.

[63] Law Commission of India (n 31) 3.

[64] In the US, lawyers also possess a reputation for being too powerful—dominating the legislatures, running the government, and shaping the policies of administrative agencies and private corporations. See also Lawrence M Friedman, *Total Justice* (Russell Sage Foundation, 1985) 10.

[65] The courts will stage a boycott if lawyers refuse to enter the courtroom of a particular judge.

[66] See Prothom Alo English Desk, 'Judge Withdrawn to Ease Volatile Situation: Law Minister' *The Daily Prothom Alo* (Online 5 March 2020) < ***https://en.prothomalo.com/bangladesh/government/judge-withdrawn-to-ease-volatile-situation-law-minister***> (accessed 12 May 2021).

[67] See Local Correspondence, 'The Lawyers Boycott Courts in Jamalpur' *The Daily Prothom Alo* (4 July 2019); Staff Correspondence, 'The Court work has been postponed since last twelve days in Jamalpur' *The Daily Bangladesh* (Online newspaper 14 July 2019) < ***https://www.daily-bangladesh.com/country/119389***> (accessed 13 May 2021)

that desired order, lawyers will resort to withdrawing or releasing the judge, or staging a boycott.[68] Even though lawyers can file a complaint against judges with the Supreme Court of Bangladesh if there is any allegation of corruption or misbehaviour, but boycotting provides a more immediate result. This practice is observed mainly in this subcontinent. As Mahajan explained:[69]

> I have not come across a single case … that the lawyers have boycotted the court providing facilities for sitting to the clients or better conditions of service for the subordinate judiciary. The lawyers are part of the administration of justice, but they have not raised a voice towards this aspect.

However, lawyers seldom use this tactic to challenge the presiding judge or to establish control over the flow of a case. The rules of the bar council have not articulated lawyers to boycott a court for indefinite periods, however, in practice this applied differently. Importantly, clients will suffer the most from these lengthy (and costly) ordeals.[70] Moog found boycotts can cause delay and damage the reputation of a judge, prompt premature transfer and possibly suspend a promotion.[71] Recently, in India, the Uttarakhand High Court declared advocate strikes or court boycotts as illegal.[72] But in Bangladesh this tactic is seldom used.

Legal ethics is either overlooked or nominally maintained in Bangladesh. As mentioned in Chapter 1, professional etiquette and conduct are maintained under the *Bangladesh Bar Council Canons of Professional Conduct and Etiquette* (framed under the Legal Practitioners and Bar Council Order 1972 (Bangladesh)). However, this is not explicitly related to the legal procedure and does not formulate any legal remedy. As mentioned by CRL-1 (see section 7.2.1.1), lawyers are not strongly committed to maintaining professional ethics due to a lack of legal framework. CVJ-4 and other interviewees also asserted the same view. Therefore, empirical findings confirmed the view that ethics is often overlooked within the Bangladeshi legal profession. All the interviewee judges and clients claimed that the advocates have extensive power to control the court as well as the cases,

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[68] Staff Correspondence, 'The Lawyers Boycott Courts in Mymensingh' *The Daily Kalerkantho* (online, 28 February 2019) ***https://bit.ly/2RWFoxh*** (accessed 17 May 2021); District Correspondence, 'The Lawyers Boycott Courts in Bagerhat' *The Bangla News 24* (online, 6 May 2019) ***https://bit.ly/3uUAz6b*** (accessed 17 May 2021); Local Correspondence, 'The Lawyers Boycott Courts in Meherpur' *The BDNews 24* (online, 6 May 2019) ***https://bit.ly/2Rreuxz*** (17 May 2021).

[69] Mahajan (n 33) 2.

[70] Law Commission of India (n 31) 3.

[71] Moog (n 58) 29.

[72] Gaurav Talwas, 'Lawyers Strike and Boycott of Court Work Illegal, Could Amount to Contempt of Court: Uttarkhand High Court' *The Times of India* (online, 26 September 2019) ***https://bit.ly/3eTqaly*** (accessed 17 May 2021).

and it results in case delay and escalates the litigation costs while contributing to the client's suffering. Moog's findings also asserted this study outcome.[73]

During the COVID-19 pandemic, when virtual hearings were a time-demanding issue, the government allowed physical appearances at the court after receiving pressure from lawyers. The lawyers felt threatened by adopting a transparent technological system that would affect their earning.[74] In Bangladesh, the Bangladesh Bar council (with nationwide oversight), as well as local bar councils, are formally responsible for ensuring ethics and entertaining complaints against lawyers—although these organisations are likely nothing more than 'empty threats'. The only visible execution of a complaint against a lawyer is a suspension of their license for a short period. Nevertheless, it seems that legal advocates in Bangladesh have extensive power to control the courts and the cases.

CVL-1 stated that 'we often give some tips to the court staff. Even if they do not demand, we offered them'. A similar view was also stated by a number of interviewees. In contrast, the court staff had admitted the fact of receiving tips from clients and lawyers. CVS-1 stated that 'We take tips from clients or lawyers. Though lawyers discourage their clients from coming to us, with the fear that the clients may reveal the true picture. Though we try to maintain a good relationship with lawyers.'

Thus, the moral chasm has fostered an environment in which lawyers frequently bribe court staff to act in their favour. Both staff members and lawyers maintain interest-oriented relations and often function as partners in fulfilling joint interests. Though lawyers have the option to file complaints against illegal acts of bribery, rarely do they prefer to attain an unfair advantage over courtroom staff through illicit economic transactions. Only two out of eight client participants in this study stated that they paid tips directly to the court staff (CVC-1 and CVC-3). Others claimed their lawyers did so on their part for a favourable hearing date or to attain other unfair advantages. CVC-3 stated that 'as my lawyer advised to give tips to the *peshkar*. I gave BDT 200'. Conversely, CVC-2 stated that 'I gave the entire money to my lawyer, and he managed the fragmentation of my case expenses'. However, all eight client interviewees shared that they have paid the courtroom staff, and the courtroom staff have admitted to receiving payments. The court staff will maintain their silence against lawyers, as they believe lawyers dominate the legal process. Whatever the cause, the money for bribes or tips typically comes out of litigants' pockets.

[73] Moog (n 58) 31.

[74] Bangla Tribune Desk, 'Lawyers Are Not Interested in Virtual Courts' *Bangla Tribune* (online, 13 May 2020) <https://bit.ly/3eXEzKF>.

Unlike the US, the lawyers in this subcontinent are oriented to litigation rather than advising, negotiating, or planning.[75] Litigants are not encouraged to pursue their own case (see Chapter 6, section 6.4), and the existing legal system demands lawyers' representation. Lawyers are expensive and show more interest in lucrative profitable cases than representing the indigent. Hufstedler and Nejelski are optimistic that lawyers and bar associations can make a significant contribution to reduce litigation costs and delay.[76]

Among the total litigation costs, lawyers do contribute to increasing the majority of expenses; however, some of the delays and costs are avoidable. While there will always be a waiting period when awaiting the collection of evidence (which should be a considerable time limit), the lack of a ceiling or contract of lawyers' fees means that many lawyers will try to extend the litigation process for as long as possible. They fix their fees according to the economic ability of the clients rather than the merit of the case. Taking a high rate from a solvent client or a repeated charge on the same occasion is a common incident, irrespective of the disputed amount. Some will intentionally refrain from participating in trials and will instead focus solely on the economic benefits of litigation. At the administrative level, the absence of proper regulation endows lawyers with the power to repeatedly charge for single issues. Part of this problem derives from the quality of lawyers admitted to the bar in Bangladesh each year, without proper maintenance of their qualification to practise. Likewise, exemplary punishments are not in place to set an example for a breach of professional ethics and/or regulations by legal practitioners.

Overall, it seems that the unrestricted nature of legal fees in Bangladesh contributes to extending trials and accumulating hefty legal bills. The absence of any regulatory body to supervise the way lawyers charge results in uncapped fees, as lawyers maintain a strong political hold on justice (see section 7.2.1.1). Absolute dependency on lawyers for dispute resolution provides them with undivided power to control the case and court proceedings. The feeble local and Bangladesh bar council is ineffective in ensuring lawyers' accountability.

[75] Marc Galanter, 'The Study of the Indian Legal Profession' (1989) 3(2/3) *Law & Society Review* 206–7.

[76] Seth Hufstedler and Paul Nejelski, 'ABA Action Commission Challenges Litigation Cost and Delay' (1980) 66(8) *American Bar Association Journal* 966.

7.2.1.2 Clients

Poverty, lack of legal literacy, complex court procedures, bureaucratic complexities, the involvement of multiple people[77] and the legal language barrier[78] all discourage litigants from actively participating in court proceedings. Empirical evidence found that among the litigants, the number of illiterate litigants is higher than literate litigants. Therefore, clients face difficulties understanding the track, while lawyers face challenges in educating the client about the track and restraining clients from initiating the case (see the quotation from CVC-2 on page 180). Instead, clients find it easier to follow the lawyers' direction, knowing or predicting that this may not always be accurate. A study found that a lack of involvement of litigants in case matters undermines lawyer–client accountability and reduces the likelihood of settlement.[79] If the lawyer's billing system is predominantly per appearance, this discourages mediation processes.[80]

Given that legal information in Bangladesh is inaccessible and difficult to navigate for most laypeople, this leaves litigants' wholly unaware of their case's strengths and/or weaknesses. Clients being forced to consult practitioners eager to reap the financial benefits of a trial inevitably raises legal fees even further. Empirical evidence found that clients occasionally did not know that lawyers had submitted a petition to extend proceedings, even if they were present at court (for details, see section 8.3.2). Six of the client interviewees could not articulate the scheduled stage of their cases. This was attributed to the client's lack of knowledge about their case.

Some clients use the litigation process not as a means to resolve a dispute but instead for harassment, profiteering, degradation and maintaining political dominance.[81] Cohn's findings in the Indian context are equally relevant to this study. As CRJ-4 stated, 'we found a number of cases are filled just to harass the other out of enmity'. The same view was expressed by COM-2, COM-

[77] For example, a civil case is filed in the office under *serestadar* (court clerk) upon judge's approval. When a case is ready for trial, the record is then sent to the *peshkar* (bench assistant), who presents the case before a judge.

[78] Although the official language in Bangladesh is Bangla, English was the principal language used in legislation until 1987. See, the *Introduction of Bangla Language Act, 1987* (Bangladesh). Most of the parent laws—such as the *CPC 1908* (Bangladesh), *CrPC 1898* (Bangladesh), *Evidence Act 1872* (Bangladesh), *Penal Code 1860* (Bangladesh), *Specific Relief Act 1877* (Bangladesh), and so many others—were enacted by the British in English. Amending legislation and new laws are now drafted in Bangla. Legislation that amends pre-1987 laws is prepared in English and Bangla; however, amendments incorporated into English texts are made in English. Bangla is chosen if there is any conflict between the English and Bangla texts. Many laws that were originally drafted in English still need to be officially translated into Bangla.

[79] Though the study was conducted in India, it is equally applicable to Bangladesh. See Chodosh et al (n 3) 49.

[80] Moog (n 58) 26.

[81] Bernard S Cohn, 'Some Notes on Law and Change in North India' (1959) 8(8) *Economic Development and Cultural Change* 90; Bernard S Cohn, 'Anthropological Notes on Disputes and Law in India' (1965) 67(6) *American Anthropologist* 105; Robert L Kidder, 'Courts and Conflict in an Indian City: A Study in Legal Impact' (1973) 11(2) *Journal of Commonwealth and Comparative Politics* 121.

3, CVJ-2, CVS-4, CRJ-4. Also, the lawyers already admitted that they entertain meritless cases (see section 7.2.1.1). Moog found these individuals typically view courtrooms as an arena to compete for social status and political and economic dominance, and consider the litigation process a means through which to gain prestige.[82] The most common tactic clients use to delay court proceedings is submitting adjournment petitions frequently; this worldwide practice also exists in Bangladesh[83] and causes additional financial burden that forces economically inferior parties to drop matters or accept unfavourable settlements.[84] Generally, these egoist and uncompromising clients who are unwilling to mediate with the other party are known as *mukadamabaz*,[85] or chronic litigants,[86] and tend to view the process as a way to punish the opposing party. Krishnan argued that they tend to overrate themselves as crafty and avoid payment when the decision is unfavourable.[87]

Such chronic litigants increase the number of cases and the length of dispute resolution. Empirical research found that, generally, these kinds of clients would rather welcome the financial loss than compromise. This is why, even 19 years after the introduction of ADR methods in Bangladesh, the number of cases resolved through ADR is unsatisfactory (see Chapter 5, section 5.3). COM-2 shared his experience, stating that:

> *One of my relative's family had a dispute with another family and went to the higher court to settle an interlocutory matter, which is now pending before the court for more than 10 years. The higher court has postponed the trial of that dispute, worth BDT 30,000. By this time, these two families have filed another 25 cases and counter cases. For BDT 30,000, they already have spent more than two million BDT.*

Thus, this *BQRS 2019* study found that there is a tendency of filing cases and counter cases between rural families, regardless of whether there is a real legal issue up for dispute. However, litigation in Bangladesh is passed down from generations, so the values these families hold and the relationships they have often result in their 'uncompromising attitudes'[88]—and unreasonably lengthy trials.

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[82] Robert Moog, 'Conflict and Compromise: The Politics of Lok Adalats in Varanasi District' (1991) 25 *Law & Society Review* 551; Kidder (n 81) 129; Morrison (n 62) 52.

[83] Moog (n 82) 551. See also 'Woolf's Final Report' (n 3) 307; Economides et al (n 20) 414–17.

[84] See also Harry D Nims, 'The Cost of Justice: a New Approach' (1953) 39(6) *American Bar Association Journal* 455; Sally Engle Merry and Susan S Silbey, 'What Do Plaintiffs Want to Do? Re-Examining the Concept of Dispute' (1984) 9 *Justice System Journal* 154; Cappelletti and Garth (n 21) 190.

[85] In Bengali, this refers to the person who finds the only solution to a dispute by filing a case.

[86] Morrison termed the phrase 'chronic litigants'. See Morrison (n 62) 59.

[87] Krishnan (n 54) 648.

[88] Mendelsohn termed the phrase 'uncompromised attitudes'. See Mendelsohn (n 58) 823.

This study further detects that the legal expenses often exceed the disputed amount of money. Two out of four client interviewees (from civil cases) in this research estimated that they had already spent three times more than the disputed amount and that from one litigation between parties, almost half a dozen lawsuits were then going forward. Indeed, they could not recall when the number of cases increased and how. Records show that case filings typically increase through counter cases and become a never-ending process that results in grievous social and economic loss for everyone involved. Based on the interviews conducted in this study (*BQRS 2019*), these litigants often allow or even urge their lawyers to utilise all sorts of delaying tactics in the hope that witnesses will eventually become unavailable, unwilling or unable to testify, or insist that an important document or record had been lost. These approaches are taken mainly by the party in a weaker position, comparing the merit of the case.

CVJ-1, a judge, stated, 'I never ordered [for] a cost upon the losing party'. She further stated, 'this is a common picture in Bangladesh that a number of cases derive from one incident'. She admitted that this happened due to the absence of integrated costs rules. Almost all of the interviewees held the same view.

Thus, this study substantiated that the rate of filing cases is high in Bangladesh, as the litigants do not face a financial threat if the case is not won. The application of indemnity principles is entirely absent in Bangladesh, and the law is not specific regarding indemnifying the winner of the litigation. Though some scattered provisions[89] that impose costs for false or vexatious civil cases or delaying case proceedings exist in law, their application is rarely visible (see Chapter 4, section 4.3). In criminal cases, only nominal fines are available against the convicts that are realised in favour of the state. Victims are frequently denied compensation unless the law is particular on that issue. This results in the number of case filings increasing as people do not hesitate to file a case.

This study found it was the public's view that, if they do not spend (extra) money, they will not receive (extra) favours (for more detail, see section 8.3.5). Supporting this assertion are studies that show litigants believe they will not receive due justice without forfeiting additional expenses.[90] This research found paying tips to court staff is not only typical in Bangladesh but is also expected in some cases. Conversely, four of the eight staff members interviewed (CRS-1, CRS-4, CVS-2, CVS-1) claimed that 'if they refuse to accept tips from clients, they (clients) will consider them (court staff) to be biased towards the opposing party'. CVS-1 stated, 'most of the time, the lawyers and clients give them tips at their pleasure. However, it is also true that some

[89] The *CPC 1908* (Bangladesh), s 35, O. XVII, r 3; XX, r 6.

[90] Kidder found that bribery was so commonplace in Indian subcontinent that most people believe that nothing can be achieved without financial intervention. See Kidder (n 81) 126.

court staff demand money to serve some extra (illegal) benefits.' Court staff from this study also admitted that they take tips from both parties to give each the impression that they are on their side. Astonishingly, most of the clients interviewed had a favourable view towards court staff. They claimed that they normally do not bribe staff directly but instead rely on their lawyers to distribute money on their behalf (see the quotation from CVC-2 on page 187). This study found the clients spent 3% of their total expenses on tips. Both clients and staff shared that there is no fixed rate for tips and, generally, court staff do not insist; however, one client (CVC-4) shared a negative experience where the courtroom staff in his case refused to proceed without a bribe. Other clients considered court members as decision-makers and, therefore, want to make them 'happy' through tips. Judging by the interviews, failure to do so may adversely affect one's case.

Clients also believed their lawyers were responsible for delaying litigation processes, as the latter profit from the delay. Despite appointing their lawyers based on their reputation or local acquaintance, four of the eight clients (CVC-1, CVC-2, CVC-4, CRC-4) attributed their distress to their lawyer, such as, CRC-4 stated, 'I suffered a lot for my lawyers'. How they get to know their lawyer, to clarify this CVC-1 stated, 'I know my lawyer from my local area.' No matter how they appoint their lawyer, they (litigants) consider courts as a 'means of expense and trouble, and the attorneys lie'.[91] Therefore, they neither trust their lawyers entirely nor do they disclose all the relevant facts at the beginning of a case. Amending pleadings several times in civil cases is the most common consequence of non-disclosure of facts. In this regard, CVL-4 stated, 'sometimes clients hide facts from us and cause amendment of pleadings at a later stage' (for more details, see the quotation from CVJ-1 on page 226). Often it causes a case to stage back from trial to service of summons as new parties need to be added. However, the 'deep mutual mistrust'[92] between lawyers and clients was not completely one-sided. One client stated that his lawyer fixed the rate for each hearing date and CRL-4 justified the ground:

> *We receive our fees on each case date. If we received our fees too early, some lawyer may not be sincere at the time of the hearing. Alternatively, if the clients received relief earlier, they may not pay the lawyer fees later.*

Interviewee lawyers also shared their own negative experiences with clients, highlighting issues such as failure to pay lawyers' fees, omitting facts, changing narratives, failure to appear before the courts on time and frequently switching lawyers—all of which delay trials and increase costs. Evidently, it could be deduced from this empirical research that the non-compromising and

[91] Moog (n 82) 552.

[92] Kidder (n 47) 21.

egoistic litigants who fail or resist committing to and cooperating with lawyers—who also use the courts as a tool to harass the opposition—make litigation a lengthy and expensive process.

Section 7.2.1.2 demonstrates the contribution of increasing litigation costs by the litigants. The absence of any indemnity rule or financial threat, accountability to each other and distrusted relations encourage litigants to file a number of cases and compounds the number of cases pending. Litigants use the court as a platform to harass others. These issues also increase litigation costs exponentially.

7.2.1.3 Judges

Church et al. argued that there is a remote connection between case load per judge and processing delay.[93] In contrast, a Singaporean study found that increasing the number of judges can reduce case backlog;[94] this shows that the connection between the number of judges and reduction in case backlog is not universally static. In Bangladesh, the judge-to-population ratio is among the lowest in the world, at one judge for every 100,000 people.[95] Subjected to overcrowded courts, judges are challenged to hear and decide an average of 70 to 100 listed matters in a single day. Though the law officially limits the number of scheduled daily hearings (at trial stage),[96] this restriction is rarely maintained. If the law were maintained in limiting the number of hearings, it would increase the gap between two scheduled dates for the same case by up to one year, which would cause frustration for all parties involved. Therefore, bench assistants schedule two or three times more cases than permitted by law, with the assumption that a significant number will be postponed upon the client's request.

In CVS-1's court, the number of pending cases was around 2200 and in CVS-2's courts, it was around 2500. In one court, it was as high as 6000 (CRJ-1). All the judges and court staff stated that the number of pending cases was on average more than 2500. CRJ-4 stated that:

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[93] Church Jr et al (n 22) 49.

[94] Ng Peng Hong, 'Judicial Reform in Singapore: Reducing Backlogs and Court Delays' in Malcolm Rowat, Waleed Haider Malik and Maria Dakolias (eds), *Judicial Reform in Latin America and the Caribbean: Proceedings of a World Bank Conference* (World Bank Technical Paper, 1995) 129.

[95] The population of Bangladesh in July 2018 was estimated at 1,64,098,818. See Central Intelligence Agency, 'The World Factbook—Bangladesh' (Web Page, 2021) ***https://www.cia.gov/the-world-factbook/countries/bangladesh/#people-and-society*** (accessed 13 May 2021). The number of judges at the subordinate court in Bangladesh is less than 1800 (as of March 2019). Data collected from the Supreme Court of Bangladesh. See also Hoque (n 11) 469.

[96] See the *Civil Rules and Order* (Bangladesh) r 12 and the *CPC 1908* (Bangladesh) O. XVIII r 20. It says that there must not be more than five cases on the list for peremptory hearings each working day, and the total number of cases set for hearing (taking evidence) must not exceed 100 cases in total at a time.

Due to the huge number of pending cases, we have made our hearing list longer. Though we know that it is not possible to hear all the listed matters and decide accordingly. But we maintain this list as often adjournment petitions are filed.

As a result, most of the cases scheduled for hearing are adjourned. Interviewee judges and court staff estimate that the proportion of adjournments would be 60%. As the target to chase is almost unreachable, one judge (CVJ-2) expressed that they treat a proportion of the listed matters so casually and grant time petitions easily, even without looking into the case records. In empirical research, Zahir found that frequent adjournments cause delay in 50% of the court proceedings in Bangladesh.[97] During the interview, one judge shared that if they do not allow the adjournment petition, lawyers will go to the higher court, which would be more time-consuming. Workload and lawyer's pressure are also caused to grant an adjournment. Thus, this trend in adjournments became institutionalised by Bangladeshi judges on insignificant grounds, to increase litigation length and cost. A long waiting list for a case hearing allows judges to spend three to four minutes on each hearing. Given the short time period, it is very difficult for a party to convince a judge of a specific relief they need; hence, an adjournment becomes the more convenient option. Each delay means rescheduling appropriate court appearances for all parties to attend and consumes more time, energy, and costs.

That said, judges rarely exercise their judicial authority to hasten proceedings. Scanning the case records of CV-1, CV-2, CV3 and CV-4 and CR1-4 (see section 4.3.3.1) it was found that pre-trial preparation or pre-trial control on a case-by-case basis is entirely absent. This is despite judges having the ability to set the court calendar and consolidate segments of a trial. Indeed, judges are legally authorised to schedule several stages of proceedings (i.e., presentation of pleadings, the framing of issues, and presentation of evidence, final arguments, and judgements) for one appearance, if practicable.[98] They can also limit the issues heard at the time of the admission hearing, order discovery, inspect and order the production of documents, and actively encourage parties to pursue settlement. However, despite this power, the actual established practice in both the districts observed was to set separate dates for each stage and become longer as adjournments are frequently granted. It was also noted that one or two appearances every two months is typical duration for most cases. Bangladeshi laws have stipulated a time frame for each stage of the court process, which exacerbates the problem, but it is rarely complied with in actual practice.[99]

[97] M Zahir, *Delay in Courts and Court Management* (Bangladesh Institute of Law and International Affairs, 1988) 8–9.

[98] The *CPC 1908* (Bangladesh) O. XV, r. 1–3.

[99] See The *CrPC 1898* (Bangladesh) s. 167(5), 339C (1); Tahura and Kelly (n 9) 4.

COM-2 stated that:

> *The salary scale for judges, comparing within this subcontinent, is very poor. That dissatisfies the judges. If compared with other departments in Bangladesh, the disparity is so visible. The administrative officers or police enjoy some advantages that are not available for judges.*

The same view was held by the judges as well. Even one court staff (CRS-4) also expressed a deep grievance regarding salary and other benefits. Thus, a judge's frustration with the job—spurred by underpayment, intense work pressure, lack of relevant facilities (especially in comparison with other government jobs) and general lack of appreciation—only increases their reluctance to take a more proactive role in a case proceeding. Also, overcrowding, inadequate airflow, insufficient light, congested spaces, and interrupted electricity mean the working environment of the court is frustrating and unhealthy for working long hours.[100] The court staff and judges worked in a court space that was fully occupied by case documents (see image 7.3). Compared with the civil courts, the newly constructed criminal courts were found to be in better condition, although not all criminal courts were equally well constructed or managed. Thus, the court environment affects the working capacity of judges, lawyers and court staff while influencing clients' satisfaction with the justice system.

[100] Recently, a judge fainted from heatstroke while he was adjudicating. See Abu Bakkar Yamin, 'Judge Fainted on Heat Stroke' *The RisingBD* (online, 24 May 2019).

Image 7.3: Inside a Court in Bangladesh.[101]

Apart from job-related frustration, the observational findings from this *BQRS 2019* study asserted that several other factors also encourage judicial passivity in regard to case management. These include pressure from lawyers, the public's presence in a courtroom, undue political influence, unavailability of witnesses on a scheduled date, fear of being transferred midyear, unskilled or unqualified office staff, excessive administrative commitments, lack of logistical and technical support and promotions on the basis of seniority, not performance. Indeed, non-local, temporarily appointed judges mostly live isolated from the locals and lawyers. COM-2 stated, 'judges in Bangladesh are discouraged from public acquaintance'. Judge's short-term[102] appointment sometimes obstruct to co-opt with the working ambient, execute a courtroom plan, or manage a personal calendar. Judges interacting solely with their colleagues and courtroom staff; this imposed isolation often makes them mysterious to the public. Meanwhile, most lawyers will maintain good relationships with judges, mainly to bypass the more enthusiastic ones who otherwise threaten lawyers' economic benefit from their clients. To avoid conflict with lawyers' (see section 7.2.1.1), judges will attempt to restrain their proactivity, which inevitably contributes to increased litigation expenses. Office heads (e.g., Chief Judicial Magistrates, Chief Metropolitan

[101] Photo credit – the researcher.

[102] Judge's average posting time is three years in the same court in Bangladesh. Very often, they transfer to another district or court before their scheduled time. Their transfer, promotion and the posting are determined by the Ministry of Law, Justice and Parliamentary Affairs (the executive organ of the State) in consultation with the Supreme Court.

Magistrates, District Judges, and Metropolitan Sessions Judges) also have some managerial capacity and authority to introduce certain procedural practices to expedite the litigation procedure. Exceptionally, they make rules to accelerate the process of the case.

CRJ-3 stated, 'due to high volume of workload, sometimes we allow our court staff to schedule case dates. In a number of cases, it was found that by either dishonestly or taking bribes from clients, they overcrowd our daily list'. Of note, the dependency of judges on court staff, who are mostly from the local area, does result in a portion of courtroom staff misappropriate this trust for personal gain. Overloaded daily hearing lists, non-local cases and judges' preference to maintain social isolation are the main reasons that many will rely on court assistants to deal with litigants and the general public. Administrative load, in addition to the judicial burden, compel them to depend on court staff. However, some court staff misguide judges and schedule cases at their choosing on account of bribery. In other countries, law clerkships or judicial assistants are trained properly to do legal research, prepare bench memorials, produce the first draft of orders and opinions (including editing and proofreading the judge's orders and opinions), and verifying citations. They do so to decrease the workload of judges. However, such roles are not available in Bangladesh. The absence of judicial clerkships requires judges to conduct the entire process, which is time-consuming and burdensome.

Many judges are equally unenthusiastic to make cost orders for intentional delays by parties. Jacob described judges' powers as bureaucratic in actuality, which is why rules are rarely enforced.[103] The Hon Michael Black AC[104] found that judges are reluctant to enforce issues such as time limits because doing so often results in penalising clients for their lawyers' actions. The current study found that cost orders were made for less than 10% of total adjournments in four civil case records, despite the laws that make such orders mandatory. Rather, judges will merely choose to deny requests for adjournment unless satisfied with the reasons given. In turn, the lack of cost orders encourages parties to push for more delays.

CRJ-4, a judge, stated that:

> *We do not follow and execute our laws properly … Also, we want to avoid trouble. If we were sincere, we could control case load to some extent. For example, at the admission hearing, a number of cases found meritless can be dismissed. In my court, I emphasise on admission hearing, and now the number of filing rate became low. People think twice*

[103] Herbert Jacob, 'Trial Courts in the United States: The Travails of Exploration' (1978) 17 *Law & Society Review* 414–17.

[104] Hon Michael Black, 'The Role of the Judge in Attacking Endemic Delays: Some Lessons from Fast Track' (2009) 19 *Journal of Judicial Administration* 91.

before filing case in my court. Unfortunately, all the judges do not hold the same view and attend many groundless cases.

Interrupting the disposal of cases subsequently feeds the perception that courts are notoriously inefficient. A proactive judge can, to some extent, mitigate delays in proceedings and control filing at the maintenance hearing to save time, money and energy for both the clients and the state. Yet, to do so, they also require some immunity or safeguard provided by the state or appropriate organisation, as proactive judges are often exploited. The absence of any protection or strong organisational affiliation will cause insecurity among judges to action against any illogical or illegal activities in which lawyers are engaged. Indeed, the judges in Bangladesh are backed by the Bangladesh Judicial Service Association, but this institute is not sufficiently organised to work as an effective safeguard. Therefore, some judges prefer to avoid conflict with lawyers and instead maintain a good relationship with the bar in allowing time petitions and granting bail. They consider it as 'avoiding trouble'. Truly, judges rarely enjoy constitutional immunity[105] in practice for their judicial work. Alternatively, lawyers possess strong political ties that often threaten a judge's promotion, posting, and transfer. Lawyers do not welcome a proactive judge who might be a threat to their income sources.

Judges cannot avoid their responsibility to confront the causes of delay due to the associated costs involved and ever-increasing backlogs. They also cannot overlook their responsibility for a case from beginning to end.[106] Information relating to the length and cost of a case is seldom accessible to litigants because judges tend to depend on lawyers and typically refrain from disseminating case information directly to litigants—hence, keeping them uninformed and uncertain about their case. Judges' heavy workload, lack of infrastructure and facilities, and inefficient administrative structures further deter them from working enthusiastically and imaginatively to attack the causes of delay and the unnecessary costs of a trial. Indeed, the absence of a long-term reformist plan to address escalating litigation costs and case backlogs calls for immediate, but gradual, steps to improve the functioning of the judiciary of Bangladesh. Until the control of cases is shifted away from lawyers, judges will not be able to play an active role in the justice system. The active participation of judges in court processing has already proven to reduce time and cost.[107]

It could be deduced that workload compels judges to allow adjournment petitions, depending on a court assistant who is tasked to schedule a case date. Disappointment with the job and lack of

[105] The *Constitution of the People's Republic of Bangladesh 1972* art 116A.

[106] Steven Flanders, 'Case Management in Federal Courts: Some Controversies and Some Results' (1978) 4(2) *The Justice System Journal* 150.

[107] Ibid; Frank A Hooper, Judicial Preparation for the Pre-Trial Conference 29 FRD 315.

safeguards drive them to maintain a compromised relationship with the local bar. To secure their promotion and posting, they escape from being active. All these contribute to escalating litigation expenses.

7.2.2 Institutional Contributions Escalating the Litigation Costs

7.2.2.1 Police Departments

In Bangladesh, the criminal justice system has developed in combination with police, courts and corrections.[108] Criminal cases are largely dealt with by the police, who have been portrayed as the most corrupt department.[109] Among all tiers of police officers, a superintendent police officer of the district police, a traffic police sergeant and an officer in charge (OC) of a police station have the most occasion to acquire illicit money that varies by location.[110] This department is considered the most crucial administrative department of the ruling government, and top-level posts are customarily politicised.

The involvement of police in criminal cases can be discussed in three aspects: filing, investigation, and trial. Among the three types of criminal cases, GR and NGR cases, as per offences categorised by the *CrPC 1898*,[111] are filed in the police station, locally known as *thana*. The CR case is filed in the court if the concerned OC refuses to register. In GR cases, the OC assigns an IO to investigate the recorded matter. As per law, the IO can arrest any suspect or accused during the investigation.[112] But for NGR cases, prior permission from the concerned court is required before executing an investigation or arrest. In either case, the person in the hold must be presented before a court within 24 hours of the arrest.[113] This study shows that every step by police in criminal cases drains money from the complainant or accused in the forms of forced payment or bribery, respectively, that escalates litigation cost. Interviewee clients asserted (see the quotation from CRS-4 on page 221) that if they refuse the forced payment, the OC denies recording their case,

[108] Mahfuzul I Khondaker and Eric G Lambert, *Crime and Punishment in Bangladesh,* The Encyclopedia of Crime and Punishment (John Wiley and Sons, 2016) 1; Mohammed Bin Kashem Mahfuzul I Khondaker, and Mohammad Azizur Rahman, 'Bangladesh: Issues and Introspections on Crime and Criminal Justice' in K Jaishankar (ed), *Routledge Handbook of South Asian Criminology* (Routledge, 2019) 21. There are a total of over 1,39,546 police officers assigned to more than 629 police stations.

[109] Kashem (n 60) 237; Habib Zafarullah and Noore Alam Siddiquee, 'Dissecting Public Sector Corruption in Bangladesh Issues and Problems of Control' (2001) 1 *Public Organization Review* 467; Mohammed Bin Kashem, 'The Social Organization of Police Corruption: The Case of Bangladesh' in Rick Sarre, Dilip K Das and HJ Albrecht (eds), *Policing Corruption: International Perspectives* (Lexington Books, 2005) 237.

[110] Kashem (n 60) 238–9.

[111] The *CrPC 1898* (Bangladesh) Sch II.

[112] Ibid, s. 54, 157.

[113] Ibid, s. 167.

especially if it is a document-related offence of a civil nature, not a human body that too visibly strong to avoid. Even if a case is recorded, police favour the accused or suspect in delaying or avoiding arrest reciprocated by economic gain. Empirical data also found that the police are politically biased, and often they abuse their power for monetary benefit.

Another major defect in the criminal law system lies in the inadequate, incomplete, inefficient, and sometimes corrupt or brutish investigation of crime that is mainly the responsibility of the police. Contrary to countries with civil law, where the prosecution department is held responsible for the investigation, Bangladesh Police exclusively perform this role (see also page183).[114] Understandably, the public lacks confidence in its thoroughness and reliability. The investigations are mostly conducted by lower ranked police officers who are mostly unskilled and inefficient, with limited technical knowledge in conducting a scientific investigation. In Bangladesh, the prosecutor's department engages at the trial stage, and they work separately from the police (see section 7.2.1.1). The lack of collaboration between the prosecution and investigation team frequently produces an investigation report that is weak on legal perspectives, creates situations where evidence is not collected and presented before the court, and where the accused receive the benefit. The common practice during the investigation is to apply 'third-degree methods' to interrogate on remand.[115] Often, police obtain a confession by coercion or using excessive force.[116] The interviewees shared that the accused or suspect has to pay heavily to avoid police's 'third-degree methods' during the interrogation on remand.

Although the law of Bangladesh limits the duration of investigations to 120 days,[117] this is rarely maintained. The IO also frequently violates the time limits due to administrative workloads, political pressure, demanding bribes, and lack of proper equipment and training, which delays the process even further. In this study, empirical research found that often the investigation reports require reinvestigation, either because the clients are not satisfied with the report, or the concerned magistrate finds it faulty. One interviewee stated that the police department operates with a lack of logistics, including proper equipment, training, technical assistance, and officers trained in handling forensic evidence. Also, usage of the global positioning system (GPS), mobile phone trackers and closed-circuit television footage is not available in the police departments of each

[114] Kashem (n 60) 274.

[115] James Vadackumchery, *Policing the Largest Democracy: 50 Years and After* (APH Publishing Corporation, 1998) 218.

[116] Mohammed Bin Kashem, 'The Reform of Evidence-Based Investigations in Bangladesh: A Rhetoric or Reality' (2020) *Police Practice and Research* 4–5; Bina D'Costa, 'Bangladesh in 2011: Weak State Building and Different Foreign Policy' (2012) 52 *Asian Survey* 152.

[117] The *CrPC 1898* (Bangladesh) s. 167. However, other special laws also limit the investigation time, which varies.

district. This, too, is a cause of developing weak investigation reports (for more discussion, see Chapter 8, section 8.3.3). The fact that most accused are acquitted at trial (see section 7.2.1.1) indicates either many people—especially those who are innocent—are wrongly accused or proper evidence is unavailable. CRJ-4, a judge, shared his experience that in his court, he often found investigation reports were incomplete and, therefore, he ordered further investigation. This prolongs an already long and expensive investigation, mainly funded by public expenditure. Demands for bribes from clients to prepare favourable reports consequently invite additional (private) litigation costs.

As mentioned, the trial is the lengthiest part of cases. Interviewee judges identified non-appearance of expert witnesses in criminal cases as the most significant reason for delayed trials. Generally, the local police station serves a witness summons or to execute a witness warrant. However, they are reluctant to submit the summons/warrant execution report to the concerned court as it does not benefit them financially. CRL-2 shared that 'police usually delayed the appearance of witnesses at the court or do not submit the witness summon execution report'. Similar views held by other judges give the perception that the police are too busy with other administrative works to comply with the court order. The study also found that the delayed appearance of IO triggers a lengthier trial. Finally, the number of experts (e.g., fingerprint or chemical expert) is so few that it difficult to schedule them to appear in the court. This intentional or unintentional delay incurs private as well as public costs.

The allegation of 'open secret' bribery in the police department suggests that they are beyond the law.[118] This study finds that there is no independent and separate authority to control, monitor or review complaints against police. Lack of accountability makes them free to corrupt and abuse their power—all these increase public and private expenditure.

7.2.2.2 Complex Land Management System

Bangladesh is a populous country where the less-skilled population experience rapid socio-economic change marked by increasing landlessness and impoverishment.[119] In reality, 38% of rural households in Bangladesh no longer own land or operate family farm production systems.[120] Of the total land, only 59% is arable,[121] making each piece virtually priceless and (unsurprisingly)

[118] Kashem (n 60) 244.

[119] Marty Chen, 'Poverty, Gender, and Work in Bangladesh' (1986) 21(6) *Economics and Political Weekly* 221.

[120] Ibid.

[121] Central Intelligence Agency, 'The World Factbook—Bangladesh' (Web Page, 2021) < ***https://www.cia.gov/the-world-factbook/countries/bangladesh/#people-and-society***> (accessed 13 May 2021).

responsible for 77% of the total number of lawsuits in Bangladesh.[122] Throughout history, land has been recognised as the primary source of wealth, social status and power.[123] This study also revealed that most crimes and corruption are in land-related services. The current study found that population growth, limited resources, outdated land management system, corruption in land offices, agricultural-based economy, lack of transparency and inconsistency in land administration, complex hereditary rules, manual record keeping systems, conventional methods of land survey, and availability of forged documents all contribute to making each piece of land highly valuable and have been identified as the leading causes for a higher number of land litigations. CVS-1 stated, 'recently, the number of filing cases increased remarkably due to inflation of land prices'.

The land administration includes revenue, survey and certification that deals with the creation, transfer and extinguishment of land rights.[124] The land management and administration in Bangladesh are jointly maintained by the Ministry of Land and the Ministry of Law, Justice and Parliamentary Affairs, but the two ministries are not coordinated. The accountable land administration offices are the union land office (locally known as *tahsildar*), the assistant commissioner (land), deputy commissioner (collectorate), divisional commissioner, land reform board and land appeal board.[125] Their main duties include the recording of corrections and update, revenue collection, maintenance of a record of rights and public properties, such as, *khas* land,[126] *hat-bazar*[127] and water bodies.[128] The three core functions of land management, record keeping and settlement are maintained by the Ministry of Land, while the Ministry of Law, Justice and Parliamentary Affairs supervises the registration.

The general land record survey occurs every 10 years. This empirical evidence finds each survey and record keeping procedure causes thousands of cases due to unskilful handling, and a simple case for record correction takes a decade to complete. In this study, one civil case was for record corrections (the detail of the case is in Chapter 4, section 4.3.3) and was filed in 2007. CVC-2 shared that the name of the landowner was wrongly recorded in the new record of rights. Since

[122] Abul Barkat and Prosanta K Roy, *Political Economy of Land Litigation in Bangladesh: A Case of Colossal National Wastage* (Pathak Shamabesh, 2004) 291.

[123] Ibid 294.

[124] Shahidul Islam, Golam Moula and Mominul Islam, 'Land Rights, Land Disputes and Land Administration in Bangladesh—A Critical Study' (2015) 6 *Beijing Law Review* 195.

[125] Ibid 196.

[126] *Khas* land is the land where the government is the owner.

[127] *Hat-bazar* is a place where local markets take place and also owned by the government.

[128] Barkat and Roy (n 122) 291.

then, she kept returning to the court and, at the time of the interview (in 2019), she had not yet received a court decision.

This empirical research found that the preparation of civil cases involves a large amount of money. Case preparation includes the lawyer's initial fees for drafting pleadings, document collection, court fees and process fees (as mentioned by CVC-3, see section 8.3.1). Among these expenses, the government receives only the court fees and process fees as revenue, a nominal amount (less than 1% of the preparation cost) (for further details, see section 8.3.1). A major portion of expenses is for document collection connected to the land offices and registration offices. Without spending extra money (bribe), it is virtually impossible to obtain a document in a timely manner from these offices. People on low incomes are the main victims of this corruption, as they can neither lobby nor afford the bribe. The manual management system demands time, causes random errors and adds expense to obtain a quick response.

Despite the overwhelming necessity for land reforms since the independence of Bangladesh, no significant changes to land reforms have occurred. Not even the Constitution guarantees land reform or proper distribution. Barkat and Roy argued the prime cause of land litigation are the opaque and inconsistent land management laws and the malfunctioning body of land management.[129] They also added that the complex process of the judicial system and the ignorance of people about laws contribute to case filing. Billah found that the land laws were reluctantly enacted as a temporary response to political necessity; were overburdened with complexity, ambiguity and discretion; and mostly served the politicians.[130]

Recently, the Law Commission- Bangladesh consolidated 22 Land Acts relating to land matters into one and drafted the *Bangladesh Land Act 2020* (draft).[131] Since the draft was made publicly available, judges, lawyers, academics and civil society staged a protest.[132] Later, due to public pressure, the Law Commission-Bangladesh removed the draft Act from their website. The proposed Draft Act vested the administrative bodies with judicial power, diminishing the role of the civil courts on the land dispute. The Act proposed to establish a land tribunal consisting of an administrative body of the government (additional deputy commissioner, assistant commissioner or an assistant settlement officer) to decide record corrections, partitions, boundary disputes and

[129] Ibid 285.

[130] SM Masum Billah, *The Politics of Land Law: Poverty and Land Legislation in Bangladesh* (Ph.D thesis, Victoria University of Wellington, 2017) 151.

[131] Law Commission Bangladesh, *Bangladesh Land Act 2020* (Draft*)* (Report No 155, February 2020).

[132] Staff Correspondence, 'Proposed Bangladesh Land Act 2020: What Legal Experts Say' *The Daily Star* (online, 15 September 2020) <https://bit.ly/3An08j3> (accessed 16 Sep 2021).

illegal possession; the decision of the tribunal will be final and no appeal will lie from that decision.[133] In the draft, several old Acts were not declared obsolete, which indicates that both the old and new laws will run in parallel, creating further complexity.

Land laws and land administration are conducive to the reproduction of land disputes; land records, surveys and administration processes are adequately corrupt not only to generate anomalies for conflicts but also to sustain and perpetuate those conflicts.[134] Due to the considerable costs of litigation, even the winner does not benefit from land litigation. Apart from other associated costs (e.g., psychological costs not measured in financial terms), the monetary cost of litigation exceeds the market price of the disputed land. The outdated record system invites corruption in the land department, although a project has been approved to prepare a digital database for ensuring a transparent land management system in the country.[135] However, it will take time to prove its eminence as a remedy to the existing corruption. Thus, justice is swayed equality, and the increased expenses are a barrier for the poor.

7.2.2.3 Laws, Legal Systems and Other Institutions

In Bangladesh, 100-year-old British-era laws are still in operation, with few amendments. These laws were legislated in a foreign language and, thus, remain complicated and difficult for most litigants to understand (CRJ-1). It also impedes access to the justice delivery system. The British court procedures transplanted into the country likewise failed to uphold local values. They were indeed introduced for political and economic control over colonies,[136] including contemporary Bangladesh. Throughout their rule, the British exclusively focused on collecting revenue and had experimented and changed the legal system to increase the possibilities for manipulation.[137] López-De-Silanes et al. find a strong connection between complicated legal procedures and corruption that increase litigation costs.[138]

Therefore, the current legal system in Bangladesh fails to resolve most disputes in the sense of providing a mutually acceptable settlement for both parties. This is especially the case given that

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[133] The *Bangladesh Land Act 2020* (Draft) (Bangladesh) s 263, 271, 231.

[134] Barkat and Roy (n 122) 297.

[135] Shahiduzzaman Khan, 'Digital Land Management on the Cards' *The Financial Express* (online, 3 October 2020) ***https://bit.ly/2RnkjMC*** (accessed 17 May 2021).

[136] Cohn (n 81) 90. Thus, transplantation of such procedures from the developed country does not automatically mean they will be effective for developing countries, for two reasons: first, blindly copying the laws from developed countries and providing rights to creditors and shareholders will not necessarily work in developing countries. Second, reform needs to follow the local legal system. See López-De-Silanes, Buscaglia and Loayza (n 46) 92.

[137] Cohn (n 81) 110.

[138] López-De-Silanes, Buscaglia and Loayza (n 46) 128.

most Bangladeshi litigants possess an uncompromising attitude (detail in Chapter 5, section 5.4). Procedural complexity, long overdue court reform, cumbersome rituals, unavailable assistance for unrepresented parties obstruct efforts to institutionalise an efficient dispute resolution system in Bangladesh. The low settlement rate leads to long discontinuous trials, which are expensive and time-consuming. Indeed, Mendelsohn argued that Western-style justice does not work well in Bangladesh,[139] and Kidder observed that the factual ambiguity common in land disputes (especially for complex succession laws) could produce unusual difficulties in litigation.[140] The lack of simplification of substantive rules and the absence of an alternative to the standard legal system encourages people to use the legal system.

As mentioned, current laws in Bangladesh consider litigation a never-ending process. One of the interviewees stated that 'if anyone wants to run a case for 30 years, he [sic] would be able to do so without violating any legal provisions. The law itself allows elongation of the process. A joint study by the Supreme Court of Bangladesh and UNDP found that cases take longer to resolve than they should.[141] In that empirical research, the shortest time to resolve a case was three and a half years, and the longest time was 20 years. The existing laws limit the scope to execute a tight deadline required to establish case priorities. Indeed, the laws in Bangladesh are very flexible, and there is more judicial discretion allowed than in most countries. However, this is rarely applied with caution, and such flexibility is often misused. This is unfortunate given there are legal provisions that allow a higher court to be involved in almost every order and for every interlocutory matter. To dispose of interlocutory matters, the proceedings for an original case are sometimes adjourned for an unlimited time, meaning that interlocutory matters will often fracture a case into many parts. Moog argued that appeals combined with revisions or reviews from interlocutory orders delayed the case process.[142] The discovery process and the way in which evidence is presented takes time and induces delays. American Bar Association President Janofsky (quoted in Hufstedler and Nejelski) correctly stated that most 'existing legal procedures, designed for complex cases with large amounts in controversy, may well be overdesigned for smaller, less complex cases'.[143] Thus, different types of cases require different procedures. Simplified and expeditious procedures would preserve the essentials of a fair and effective process.

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[139] Mendelsohn (n 58) 863. Though Mendelsohn's proposition was made in India, however, it is also applicable to Bangladesh.

[140] Kidder (n 81) 122.

[141] Judicial Strengthening Project, *Summary Report on Court Services Situation Analysis* (Supreme Court of Bangladesh, December 2013) 34.

[142] Moog (n 4) 1148

[143] Hufstedler and Nejelski (n 76) 966; Janofsky (n 1) 132.

Evidence has shown that the trial stage is the lengthiest part of both civil and criminal cases, as the appearance of a witness is not under court control (for further details, see section 8.3.2). In civil cases, the parties are responsible for witness appearances, while in criminal cases, the respective police department is liable. Further, the process of proofing a case or obtaining evidence is overly repetitive, arduous and rigid, which becomes tiresome for everyone involved.[144] Chodosh et al. found the justification for in-court testimony is to allow judges to evaluate a witness's demeanour,[145] as it is a significant element of the oral evidentiary process. From the study case records, it was found that almost 90% of interlocutory matters disposed of in the trial courts are appealed at a higher court and, in most of those cases, the original decision is upheld. In this regard, CVJ-2's statement is notable: 'the higher court upheld most of our decisions, even then, the lawyers advise to their clients to go for a revision or appeal. This consumes time and money'.

Further, the current rate of service is now sufficiently outdated. Empirical evidence found that the rates charged for cost orders and public legal services are exceedingly low and that the government has yet to upgrade the relevant legal provisions to reflect present living standards. For example, CVJ-1 stated, 'the adjournment costs at trial stage start from BDT200. This is so nominal to set an example or effective for not adjournment.' Therefore, a cost order for adjournment will fail to deter litigants, as the financial penalty incurred is not substantial. Due to the government's failure to update governing costs, hidden costs and extra charges are also requested from clients. For example, the government rate for a processing fee is only BDT 3.[146] This amount is unrealistically low and only further incentivises the process server to demand additional money from clients. This underscores the urgency and necessity of the amendment to all relevant laws and processes associated with litigation costs and backlogging cases.

The adversarial legal system discourages judges from actively participating and providing an outline of the case to the party at the beginning rather than relying on their lawyers. Chodosh et al. argued that the system patronises party-controlled litigation processes that contribute to delay and backlog through unnecessary adjournment, meritless motions, causeless extension and discontinuity with the trial process, excessive judicial intervention and limited opportunity for consensual settlement.[147] Chodosh's argument in the Indian context is equally pertinent to Bangladesh. The system promotes inequality and endorses the wealthy. Though the law allows

[144] In Bangladesh, judges take notes of the entire deposition of the witness/es by hand. However, in 2016, a digital witness deposition system was introduced. Through this system, a stenographer types the deposition of a witness in the presence of both parties and their lawyers at the courtroom under the judge's supervision.

[145] Chodosh et al (n 3) 38.

[146] The *Civil Rules and Order* (Bangladesh) r 597.

[147] Chodosh et al (n 3) 26.

adjournment with cost,[148] this rarely applies in practice (see Chapter 4, section 4.3.3). Thus, allowance without financial threat enables the defaulting party to delay with impunity.[149] The party also purposely uses the flexibility of the procedural systems to delay the court proceedings.

Unskilled court staff constitutes another key institutional weakness that further delays the legal process. Not all the court staff are necessarily required to have a background in law. Due to their lack of legal knowledge, they cannot function effectively in legal procedure. The interviewed judges and court staff shared that office staff are appointed mostly either from political pressure or through bribery, both of which compromise the quality of judicial services. In this regard, CVJ-3 stated, 'the appointment procedure for the court staff should be transparent, as I feel the court effectiveness and prompt delivery largely depends on the court staff, which is lacking in the present situation'. Indeed, dishonest appointments are morally repugnant, but that does nothing to quell the demand for tips, even for mundane tasks. The corruption of court staff is widely known and has been reported by Transparency International Bangladesh.[150] The underqualified staff are slowing the case process by way of low production rate in overloaded courts, erroneous clerical jobs that demand review from the higher court. Unskilled judicial support staff affect the system for delivering justice, the court's effectiveness and the organisation's internal system. Limited resources for proper training mean that court staff remain ineffectual.

As mentioned in the previous chapter, the justice system is mainly urban based (see Chapter 6, section 6.2.2.1.4). In the absence of proper decentralisation, litigants must travel a great distance on each hearing date, requiring time, energy and money. Thus, the travel costs became an extra burden for poor litigants. Further, the system is more expeditious for people with money, power and influence than those with minimal or no economic clout.[151] Non-compliance with rules or delaying the execution process means the system revolves inefficiently.

Budget constraints are another reason for an inefficient judiciary. In Bangladesh, as in other countries, the executive and legislative branches of government have an overarching constitutional duty to provide a functional judiciary with an adequate budget and resources. Dependency on the budget influences judiciary when an important judicial decision on government administration is pending. However, the national budget (2019–2020 financial year) shows how neglected the

[148] The *CPC 1908* (Bangladesh) O XXVII.

[149] Chodosh et al (n 3) 39.

[150] Nazmul Huda Mina, Nahid Sharmin and Shammi Laila Islam, *Subordinate Court System of Bangladesh: Governance Challenges and Ways Forward* (Transparency International Bangladesh, 2017) 7.

[151] Sumaiya Khair, *Legal Empowerment for the Poor and the Disadvantaged: Strategies, Achievements, and Challenges* (The University Press Limited, 2008) 50.

judiciary is, allocating a mere 0.352% to the justice sector.[152] In the 2020–21 fiscal year, the allocation was raised to more than BDT 17 billion (AUD 27424092.43)[153] for the subordinate judiciary.[154] This is vastly lower than what the other executive departments receive. Thus, the budgetary allowance reflects that a transparent, independent or efficient judiciary is not the government's priority. The utilisation of the public offices for private gains demonstrates weak institutional capacity and inefficiency (see Chapter 3, section 3.2.1). Efforts to create effective judicial reform are facing tremendous political obstacles (see section 3.2.2). Economides et al. argued that underfunded courts and poor case management influence case progression.[155] Economic freedom through judicial independence would positively affect judicial reform.

Administrative control over the subordinate judiciary in Bangladesh is divided between the executive and judiciary (discussed in Chapter 3, section 3.2). This further discourages people from taking any proactive steps to improve the justice system. Indeed, the lack of resources only aggravates the situation, particularly as (accordingly to a number of interviewees in this study) the government does not allocate sufficient resources to provide services to all people equally. All the judges in this study (*BQRS 2019*) admitted that they were aware that court staff take tips, though they did not take legal action unless a written allegation was submitted to them. Rather, they explained that the bribes that office staff receive actually provide more resources for litigants and that, although many recognise the corruption plaguing the sector, the courts will simply disregard unlawful activities to remain functional.

As courts are commonly viewed as a last resort for resolving disputes, the justice system should be more transparent and easily accessible for all to engage. Indeed, many will not pursue litigation due to the exorbitant costs and time involved, and failure to do so will only result in fewer people inclined to seek justice in the future. The consequences have a disrupting effect on society, particularly in more impoverished nations like Bangladesh. Recently, some incidents showed that people in Bangladesh have lost their patience for justice; this has created a perverse incentive for people to take justice into their own hands.[156] Such incidents cannot be desired or expected in the

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[152] Mizanur Rahman Khan, 'Independence of Judiciary in the Independence of Budget' *The Prothom Alo* (19 June 2019).

[153] 1 BDT = 0.016 AUD on 30 September 2021.

[154] Data collected from the Ministry of Law, Justice and Parliamentary Affairs, Bangladesh.

[155] Economides et al (n 20) 418.

[156] Several incidents occurred recently in which people were brutally killed by mobs for minor offences or no offence. See Star Report, 'Mobs Beat Five Dead for Kidnapping' (online, 21 July 2019), ***https://bit.ly/3onPWS4*** (accessed 17 May 2021). See also David R Sherwood and Mark A Clarke, 'Toward an Understanding of "Local Legal Culture" ' (1981) 6(2) *The Justice System Journal* 200. Sherwood and Clarke argued that if people become dissatisfied with the effectiveness or efficiency of the administration of justice, they may attempt to effect changes.

interest of the rule of law. This indicates that justice has been accessible to fewer people, depriving the majority, and litigation expenses play a vital role—that is where distributive justice could function.

To summarise, the lawyers possess case control in an adversarial legal system. The lack of control discourages judges from actively participating in the court process and providing a case outline to all parties. This results in parties relying on their lawyers for assistance. Judges' passiveness further contributes to delay and backlog and allows unnecessary adjournments to occur, meritless motions to be placed forward, extensions to be given carelessly, trials to be discontinued and fewer opportunities for settlement. The scattered cost rules are rarely applied to control false or vexatious cases and unnecessary adjournment. Instead, parties are allowed to cause a delay, facing no financial threat and exploiting the system's flexibility in suspending court proceedings. The institutional capacity relating to the justice sector should be reorganised, and accountability should be closely monitored. Evidently, then, the urgency and necessity to amend all relevant laws and processes associated with litigation costs and backlogging are dire.

7.2.3 Conclusion

From the discussion in this chapter, it appears that no one person or entity is exclusively responsible for delaying court proceedings and/or elevating litigation costs in Bangladesh. Instead, litigation expenses increase collectively through the client's actions, lawyers, judges, courtroom staff, institutions, other departments involved in the legal process, and the law itself. In order, to find an inexpensive system consistent with distributive justice theory, this chapter examines how the system becomes expensive and what is the best way forward.

Overall, this setting created the environment where some litigants use the litigation process in Bangladesh for harassment through the legal process. Litigants' ignorance of a case permits lawyers to lengthen proceedings, but litigants in Bangladesh will, due to their egoistic and uncompromising nature, welcome financial loss rather than compromise. As clients are mostly passive in the litigation process and follow what their lawyers advise, this further reduces the likelihood of settlement. Indeed, many are ready to pay for anything that improves their outlook, regardless of price.

The above discussion deduced that if judges are prepared to work strenuously and imaginatively to attack the causes of delay and unnecessary cost, the profession will respond with cooperation and enthusiasm. However, the heavy workload warrants more judges to be appointed, which also requires infrastructural facilities and efficient administrative structures. This cannot be achieved in the short term, as it requires support from the national budget. A long-term reform plan to

address the continually escalating litigation costs and cases requires immediate steps as the foundation for gradual progression each year. Minimising litigation costs and duration may be considered a condition of employment and/or an incentive for judges in their terms of appointment and promotion.

What is equally lacking is a mandatory application of cost rules for unnecessary adjournments, and compensation is inconsistent with the contemporary, socio-economic conditions of the population (for more discussion see section 4.3.3). This invites the possibility for cases to unnecessarily fragment, halting illegal pressure placed on courts (either through political or institutional means) and disallowing unnecessary motions and involvement of superior courts for interlocutory matters (which inevitably increase litigation costs and delays). The legislative inconsistencies affect administering justice, increasing the unnecessary volume of cases. Other institutions that closely work with the judicial system, such as police departments, should also be held accountable. However, expeditious trials do not necessarily mean compromising justice. Rather, the prolongation of trials and high litigation costs have been steadily eroding public confidence in the justice system of Bangladesh. If judges can reduce costs and delay by focusing on the causes through well-focused case management, they should do so. Since no one particular group involved in litigation can be held responsible for increasing legal costs, coordinating the whole system would contribute substantially to combating the price of litigation.

Chapter 8: Digital Solutions to Reduce Litigation Costs

8.1 Introduction

Chapter 8 builds on the published literature, examining whether the increased use of technology could solve the existing problems in Bangladesh's subordinate judiciary, that is, the existing backlog and huge expenses. Chapter 8 examined the need to implement technology to increase efficiency and transparency in a court proceeding by analysing how litigation costs increase at each stage of the court process and identifying the costliest areas (Research Issue E). The empirical findings were blended with the theoretical knowledge to investigate how technology could be utilised to limit expenses by examining the present challenges of technological adaptation in Bangladesh's judiciary. The research has also focused on both continuous logistics support and litigants' capabilities to become savvy users of technology. Countries that have successfully implemented technology into court proceedings were compared. Finally, this research argued that to ensure transparency, increased access to justice, and cost-effectiveness in legal proceedings in subordinate judiciary, implementation of technological innovation is inevitable.

To overcome the impediments that the Bangladeshi judiciary has been facing—huge case backlog, an opaque justice system, costly litigation process and lengthy trial—some restorative initiatives have been implemented to improve the situation, such as the appointment of new judges', creation of new courts, and some minor amendments of laws. However, these efforts were futile. Therefore, increased efficiency through judicial reform is thought to be a potential solution. Moreover, research has found that an efficient judiciary is strongly correlated with economic advancement.[1] Judicial efficiency is primarily tested by reducing litigation costs and time while increasing the accuracy of the dispute's result—but this precision is always hard to ascertain.

The existing literature has identified many obstacles that create inefficiency in the judiciary.[2] One school considers the lack of funding as the main cause of inefficiency and finds the solution in providing more resources.[3] Another view finds the problem in easy access to courts as it increases

[1] Richard E Messick, 'Judicial Reform and Economic Development: A Survey of the Issues' (1999) 14(1) *The World Bank Research Observer* 122–3; Douglass C North, *Institutions, Institutional Change and Economic Performance* (Cambridge University Press, 1990) 54; Matthieu Chemin, *Does Judicial Quality Shape Economic Activity? Evidence from a Judicial Reform in India* (CIRPEE Working Paper No 07-25, 2007) 2.

[2] Juan Carlos Botero et al, 'Judicial Reform' (2003) 18(1) *The World Research Observer* 62.

[3] Oscar G Chase, 'Civil Litigation Delay in Italy and the United States' (1988) 36(1) *The American Journal of Comparative Law* 52.

new filing as well as piling cases, and their solution lies in ADR.[4] Another suggests finds that the lack of incentives for judges, lawyers and litigants is the main obstacle to an efficient judiciary, and the solution remains in incentive-oriented programs, particularly for the judges.[5] Another group finds the impediment is complicated legal proceedings that increase the scope of corruption and find the solution in making litigation as simple as possible.[6]

All the above views have been criticised by scholars with differing views. Some scholars argue that increased efficiency achieved by providing more resources (increasing human resources, providing computers or training the judicial officers) will not extricate the judiciary from the present problems;[7] however, Singapore is an exceptional example of the positive effects of increasing the number of judges in reducing backlogs.[8] Prillaman further argued that judicial reform is not an individual or technical action; instead, it is more political, and it would not be wise to implement one isolated initiative for the betterment of the entire judiciary; instead, it should be in a complete package.[9] Decreasing the filing rate by implementing procedural hurdles to increase judicial efficiency has also been criticised. Feeley found that the number of filings rarely affects judicial efficiency.[10] Some scholars support ADR to make the court less burdensome. However, the ADR process has also been criticised,[11] especially mandatory ADR, which has been

[4] Dwight Golann, 'Making Alternative Dispute Resolution Mandatory: The Constitutional Issues' (1989) 68 *Oregon Law Review* 488; M Cappelletti and B Garth, 'Access to Justice: the Newest Wave in the Worldwide Movement to Make Rights Effective' (1978) 27 *Buffalo Law Review* 196.

[5] Botero et al (n 2) 62.

[6] Edgardo Buscaglia and Maria Dakolias, 'An Analysis of the Causes of Corruption in the Judiciary' (1999) 30 *Law and Policy in International Business* 97–99.

[7] William C Prillaman, *The Judiciary and Democratic Decay in Latin America: Declining Confidence in the Rule of Law* (Praeger Publishers, 2000) 163; W LaBar, 'The Modernization of Court Functions: A Review of Court Management and Computer Technology' (1975) 5 *Rutgers Journal of Computers and Law* 102; Sudhir Krishnaswamy, Sindhu K Sivakumar and Shishir Bail, 'Legal and Judicial Reform in India: a Call for Systemic and Empirical Approaches' (2014) 2 *Journal of National Law University, Delhi* 3; Edgardo Buscaglia and Thomas Ulen, 'A Quantitive Assessment of the Efficiency of the Judicial Sector in Latin America' (1997) 17 *International Review of Law and Economics* 282.

[8] Ng Peng Hong, 'Judicial Reform in Singapore: Reducing Backlogs and Court Delays' in Malcolm Rowat, Waleed Haider Malik and Maria Dakolias (eds), *Judicial Reform in Latin America and the Caribbean: Proceedings of a World Bank Conference* (World Bank Technical Paper, 1995) 129.

[9] Prillaman (n 7) 163–4.

[10] Malcolm M Feeley, *Court Reform on Trial: Why Simple Solutions Fail* (Basic Books Inc, 1983) 25.

[11] Jessica Pearson, 'An Evaluation of Alternatives to Court Adjudication' (1982) 2 *Justice System Journal* 428–30; Archibald Cox, 'The Duty to Bargain in Good Faith' (1958) 71(8) *Harvard Law Review* 1401; Gordon Tullock, 'Negotiated Settlement' in J-M Von der Schelulenburg and G Skogh (eds) *Law and Economics and the Economics of Legal Regulation* (Martinus Nijhoff Publishers, 1986) 40–1.

criticised as being less beneficial[12] and slower for processing cases.[13] Other arguments for why the existing ADR system may not be effective in Bangladesh in reducing case expenses have been presented in Chapter 5.

Botero et al.'s argument for improving judges' engagement to increase judicial efficiency may not be effective in a country like Bangladesh, where judges are overburdened, and the case process is controlled exclusively by lawyers (for more detail, see Chapter 7, section 7.2.1.1). Incentive-oriented programs can be useful in countries that have sufficient resources, may not be effective in Bangladesh where scarcity of resources is a big problem. To ensure court effectiveness, simplifying the case process could be a solution to reduce lawyer involvement and encourage self-represented cases. Also, the execution process should be seriously considered; for example, the time limit for cases is seemed ineffective, due to vast judicial discretion.[14]

Prillaman tested judicial reform through independence, effectiveness, and accessibility.[15] Judicial reform largely depends on the political will of the dominant political group.[16] The success of these reforms, in turn, relies on the perception that the courts are accessible for the average citizen. Public confidence in the judiciary is fading because of its lengthy process.[17] Judicial corruption is the critical consideration that affects the justice system, and, in Latin America, corruption contributes to 15% of the total litigation costs.[18] Improved efficiency is associated with a decrease in corruption, creating a more accessible and equitable judiciary.[19] Therefore, technology could increase judicial efficiency by reducing costs and shortening the process.[20]

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[12] Ummey Sharaban Tahura, 'Does Mandatory ADR Impact on Access to Justice and Litigation Costs?' (2019) 30(1) *Australasian Dispute Resolution Journal* 38.

[13] Thomas Church, Jr, et al, *Justice Delayed: The Pace of Litigation in Urban Trial Courts* (National Center for State Courts, 1978) 33.

[14] Feeley (n 10) 162–3; Ummey Sharaban Tahura and Margaret RLL Kelly, 'Procedural Experiences from the Civil Courts of Bangladesh: Case Management as a Potential Means of Reducing Backlogs' (2015) 16 *Australian Journal of Asian Law* 4.

[15] Prillaman (n 7) 15; Richard A Posner, 'Creating a Legal Framework for Economic Development' (1998) 13 *The World Bank Research Observer* 9.

[16] Posner (n 15) 8.

[17] M Rafiqul Islam, and SM Solaiman, 'Public confidence crisis in the judiciary and judicial accountability in Bangladesh' 2003 13(1) *Journal of Judicial Administration* 31–2.

[18] Prillaman (n 7) 26.

[19] Buscaglia and Dakolias (n 6) 113.

[20] Allison Stanfield, 'Online Courts: The Way of the Future?' March 2015 *Law Society of NSW Journal* 50.

8.2 Courtroom Technology for Increasing Efficiency

We live in a technological age. Technology has dominated the globe since the 1980s, when it became available for household use and connected us with the internet.[21] It has also extended its influence to the legal sector.[22] Sourdin described the adaptation of technology in to justice sector into three ways: supportive technology, replacement technology and disruptive technology.[23] She argued supportive technology are the basic level to support and distribute information; replacement technology replaces human workforces and disruptive technology actually provide for different forms of justice, such as using artificial intelligence to develop alternatives dispute resolution process. At the first phase of adopting technology in the justice sector, countries took advantage of technology to manage the court system, ensure adequate storage and wider distribution of information,[24] present more accurate and timely evidence, reduce delays in court proceedings and minimise litigation costs to ensure greater access to courts.[25] The effectiveness of technology in reducing litigation costs and time has already been tested, and subsequently implemented, in many countries. For example, the US courts launched a pilot program in 1998,[26] after which technology became an integral part of the courtroom.[27] Computerised document management and litigation support systems were developed in Australia in the early 1980s.[28] All these experiments proved effective.

Countries that have reached the second phase of using courtroom technology capable of electronically filing cases (e-filings) or presenting evidence, digitising court records and

[21] Julie A Singer, Monica K Miller and Meera Adya, 'The Impact of DNA and Other Technology on the Criminal Justice System: Improvements and Complications' (2007) 17 (1) *Albany Law Journal of Science and Technology* 90.

[22] Richard L Marcus, 'The Impact of Digital Information on American Evidence-Gathering and Trial—The Straw That Breaks the Camels Back?' in Miklós Kengyel and Zoltán Nemessányi (eds), *Technology and Civil Procedure: New Paths to Justice from Around the World* (Springer, 2012) 29.

[23] Tania Sourdin, 'Judge v Robot: Artificial Inteligence and Judicial Decision Making' (2018) 41(4) *University of New South Wales Journal* 1118; Tania Sourdin, 'Justice and Technological Innovation' (2015) 25 JJA 96-8.

[24] Christine Cnossen and Veronica M Smith, 'New Technology: Implications For Legal Research Methodology' (12th BILETA Conference, 24–25 March 1997); Frederic I Lederer, *The World of Courtroom Technology* (Faculty Publications, 1999) 1.

[25] Richard Zorza, 'Courts in the 21st Century: the Access to Justice Transformation' (2010) 49(1) *Judges Journal* 16.

[26] The publicly funded pilot program, 'Effective use of courtroom technology: Judges guide to pre-trial and trial', examined the use of advance technology for selected courtrooms.

[27] Nicole J De Sario, 'Merging Technology with Justice: How Electronic Courtrooms Shape Evidentiary Concern' (2002) 50 *Cleveland State Law Review* 58–9.

[28] Jeff Leeuwenburg and Anne Wallace, *Technology for Justice Report* (AIJA, 1999) 8.

maintaining a remote two-way testimony via video conferencing, forensic expert, oral argument.[29] When a substantial portion of case proceedings, including remote witness testimony, is conveyed electronically, this is termed 'virtual court'.[30] Thus, the virtual court uses technologies that provide for hearing and trials with participants in geographically distant places, in which the physical location of the court does not dictate the process or the conduct of the proceedings. Face-to-face communication will be replaced by visual transmission over high-speed, high-quality electronic networks. Paper documents are being replaced by electronic records, creating paperless courts, and the internet is transforming courtroom accessibility beyond geographical and time boundaries.[31] Electronic documents can also save on physical space, increase speed and ease of access to court documents, organise case files more successfully, secure court information, reduce data entry time and be environmentally friendly.[32] Thus, technology has influenced practices within courtrooms and courthouse operations. Fox termed this combined operation as 'unified collaborative communications'.[33] Unified collaborative communications have eliminated the need for individuals to attend courts physically; instead, they can appear via high-quality video conferencing technology.

The next generation in courtroom technology is artificial intelligence, which may be used in the legal sector to solve legal problems and draft legal documents.[34] Digital justice through decision support software is thought to assess costs through CBA, including sentencing decisions, treatments, case management and recidivism outcomes.[35] The automated decision-making processes of software, algorithms and IT without human supervision is thought to be replacing human resources in digital societies.[36] Though the ongoing debate is still considering the entire

[29] Fredric I Lederer, 'The Road to the Virtual Courtroom? A Consideration of Today's--and Tomorrow's--High-Technology Courtrooms' (1999) 50(3) *South Carolina Law Review* 801; Jashpal Kaur Bhatt, 'Role of Information Technology in the Malaysian Judicial System: Issues and Current Trends' (2005) 19(2) *International Review of Law Computers & Technology* 199–200; Hon Russel Fox, *Justice in the Twenty-First Century* (Cavendish Publishing Limited, 2000) 210–11.

[30] Robin Widdison, 'Beyond Woolf: The Virtual Courthouse' (12th BILETA Conference, 24–25 March 1997); F. I. Lederer, *The World of Courtroom Technology* (Faculty Publications, 1999) 2.

[31] Zorza (n 25) 16; Sri AC Upadhaya, 'Information and Communication Technology and Judiciary' 4 <http://jaassam.gov.in/pdf/article/Article-63.pdf>.

[32] James E McMillan, 'Electronic Documents: Benefits and Potential Pitfalls' in Carol R Flango et al (eds), *Future Trends in State Courts 2010* (National Center for State Courts, 2010) 180–1.

[33] Fox (n 29) 211.

[34] Richard Susskind, *Online Courts and the Future of Justice* (Oxford University Press, 2019) 266.

[35] Tim Brennan, William Dieterich and Beate Ehret, 'Evaluating the Predictive Validity of the COPAS Risk and Needs Assessment System' (2009) 36(1) *Criminal Justice and Behavior* 22–3; Pedro Rubin and Borges Fortes, 'Paths to Digital Justice: Judicial Robots, Algorithmic Decision-Making, and Due Process' (2020) 00 *Asian Journal of Law and Society* 3.

[36] Rubin and Fortes (n 35) 1.

replacement of the AI to judicial sector.[37] Instead they argued for a hybrid system where both traditional and digital pathway can operate together.[38] Information and law being available online would also raise litigants' awareness of their rights. Thus, technology has increased the speed of the justice delivery process, reduced travel time for litigants and witnesses, and improved witness protection; in turn, this has enabled transparency, reliable deliberation and sharing of critical court resources.[39] The developed countries are now concentrating on reducing litigation costs using disruptive technology phase through creating a client-friendly environment, ensuring transparency and reducing litigation time. However, Bangladesh is still at the very first stage of incorporating supportive technology in the justice sector.

8.3 Use of Technology in Subordinate Courts in Bangladesh: Findings from the Empirical Study

In Bangladesh, the ratio of judges to cases demonstrates the need to increase the number of courts; however, the judicial allocation is decided by the policymakers. It can be assumed that expanding the judiciary to an appropriate-sized workforce would be a very lengthy and costly process for a least developed country. Therefore, adopting technology within the court system could be a better and quicker option, with less expense for a functioning court. It is assumed that courtroom technology can produce results beyond human capabilities and interference.[40] The enduring manual court system is complicated, expensive, inaccessible, and unjustifiably cumbersome.[41] By adopting IT, the dispensation of justice can be made more accessible, more accurate, more convenient, less time-consuming and less expensive by reducing human labour. Technology in court management has reduced the movement of files and records, ensured long-distance services and enabled customisation to meet the needs of the individual with increased transparency.[42] An

[37] Gordon Bermant, 'Courting the Virtual: Federal Courts in an Age of Complete Inter-Connectedness' (1999) 25 *Ohio Northwestern University Law Review* 528.

[38] John M Scheb II et al., 'State Trial Court: A Virtual Future?' (2012) 4 *Baker Center Journal of Applied Public Policy* 58-72.

[39] Thomas M Clarke, 'Technology and Reengineering' in Carol R Flango et al (eds), *Future Trends in State Courts 2010* (National Center for State Courts, 2010) 154–7; Susskind (n 34) 220.

[40] Roy N Freed, 'Computers in Judicial Administration' (1959) 52(10) *Judicature* 419; Masanori Kawano, 'Electronic Technology and Civil Procedure—Applicability of Electronic Technology in the Course of Civil Procedure' in Miklós Kengyel and Zoltán Nemessányi (eds), *Technology and Civil Procedure: New Paths to Justice from Around the World* (Springer, 2012) 3; JS Verma, *New Dimensions of Justice* (Universal Law Publishing Co, 2000) 105.

[41] Zorza (n 25) 16; Freed (n 40) 420; Hiram E Chodosh et al, 'Indian Civil Justice System Reform: Limitation and Preservation of the Adversarial Process' (1997) 30(1) *Journal of International Law and Politics* 4.

[42] Zorza (n 25) 16; Upadhaya (n 31) 2.

efficient court administration demands court staff who are equipped with contemporary technologies.

Therefore, Bangladesh decided to introduce e-judiciary, and 2009 was the beginning of this new era of digitisation.[43] A national web portal was established for e-governance, of which the judiciary became a part through the judicial portal, the cause list management system and the monitoring dashboard.[44] In 2011, a project was introduced in the Dhaka and Gazipur districts for an online cause list system that disseminates necessary case information (e.g., next scheduled date, summary, order or judgement). In 2012, another project was implemented in the Dhaka, Kishoreganj and Rangamati districts on case management, and a digital witness deposition system was instituted in Sylhet in 2016. All districts that were part of the e-judiciary project owned a judicial portal containing judicial information (e.g., the option to choose lawyers and finding a notary public) and other services connected to a mother portal to ensure better transparency of services.[45] The judicial dashboard was another initiative to monitor judges' performance and track long-pending cases.[46] Some international organisations—such as the Department for International Development, the UNDP and the Canadian Development Agency—funded the Bangladesh government on occasion to establish an e-judiciary system to increase court efficiency, develop ADR mechanisms, strengthen state organisations related to the judiciary and enhance access to justice.[47] However, this study found that these projects were unsuccessful as a result of funding constraints; lack of a well-researchedlong-term plan; lack of maintenance; lack of post-project planning; and lack of prudence of policymakers.[48] Relevantly, the e-judiciary is yet to commence.

During the ongoing global COVID-19 pandemic, the entire Bangladesh was shut down for three months to control the virus's spread, which significantly increased case backlogs even further. However, to resume the static economic flow, the government of Bangladesh introduced a limited form of a virtual court to attain bail petitions in criminal cases only, as the prisons were overcrowded with prisoners under trial. Following the virtual court's introduction, an Ordinance was passed in June titled *Utilisation of Information Technology by the Courts Act—2020*

[43] Md. Muajjem Hossain, 'Implications of e-Judiciary: Bangladesh Perspective' (2017) 16 *Journal of Judicial Administration Training Institute* 136.

[44] A2i, 'e-governance' (Web Page, 2020) <https://a2i.gov.bd/e-governance/>.

[45] Hossain (n 43) 136.

[46] Ibid 137.

[47] Sumaiya Khair, *Legal Empowerment for the Poor and the Disadvantaged: Strategiess Achievements, and Challenges* (The University Press Limited, 2008) 225.

[48] In 2016, when the digital witness deposition system was introduced in Sylhet, I was posted as an Additional Chief Metropolitan Magistrate at that time. I experienced that after the digital system's introduction, no technical expert was there to support post-setup difficulties. Therefore, after a few months, two courts went on the manual system as they could not solve some technical errors.

(Bangladesh).[49] This Ordinance allowed litigants to appear virtually through audio, video or other technological means at a trial, inquiry, deposition of witnesses, argument and passing order or judgement. The Supreme Court of Bangladesh, alongside this Ordinance, also issued practice directions to incorporate the technology to keep the judiciary functional. These practice directions relate to filing, bail hearing, surrendering, resolving other urgent matters through virtual presence,[50] and maintaining health regulations issued by the health department. However, neither this ordinance nor the practice directions have addressed all the issues related to court procedures, such as whether a witness deposition could be taken, an argument heard, or a judgement pronounced virtually. When the first practice direction was issued to deal with an urgent matter, many lawyers in the community protested to a virtual hearing.[51] Consequently, the operation of virtual courts was limited to bail hearings. Since the courts resumed their regular proceedings at the end of August 2020, all virtual activities have ceased.[52] The only achievement during this time was the creation of official email addresses by the courts, which was not in existence before.

This empirical research identified the costliest areas of litigation and investigated how technology could be exploited to minimise litigation costs and increasing transparency in the justice delivery system. From the 36 interviews, the costliest stages identified as filing, trial, investigation and service of summons (see figure 8.1). The following discussion will examine the reasons why and how these stages contribute substantially to the cost.

[49] This Ordinance later became an Act: the *Utilisation of Information Technology by the Courts Act 2020.*

[50] The Practice Directions No 08J, 06J, 07J, 230, 216 and 214 issued by the Supreme Court of Bangladesh are available at <http://www.supremecourt.gov.bd/web/> (accessed 31 August 2020).

[51] Bangla Tribune Desk, 'Lawyers Are Not Interested in Virtual Courts' *Bangla Tribune* (online, 13 May 2020) ***https://bit.ly/3eXEzKF*** (accessed 30 June 2020).

[52] After resuming the normal court process, a judge who recorded the deposition of a witness virtually was advised by the judicial authority to retake the deposition manually. The judicial authority argued that virtual deposition was allowed only during emergency periods, not when the normal court proceedings had restarted.

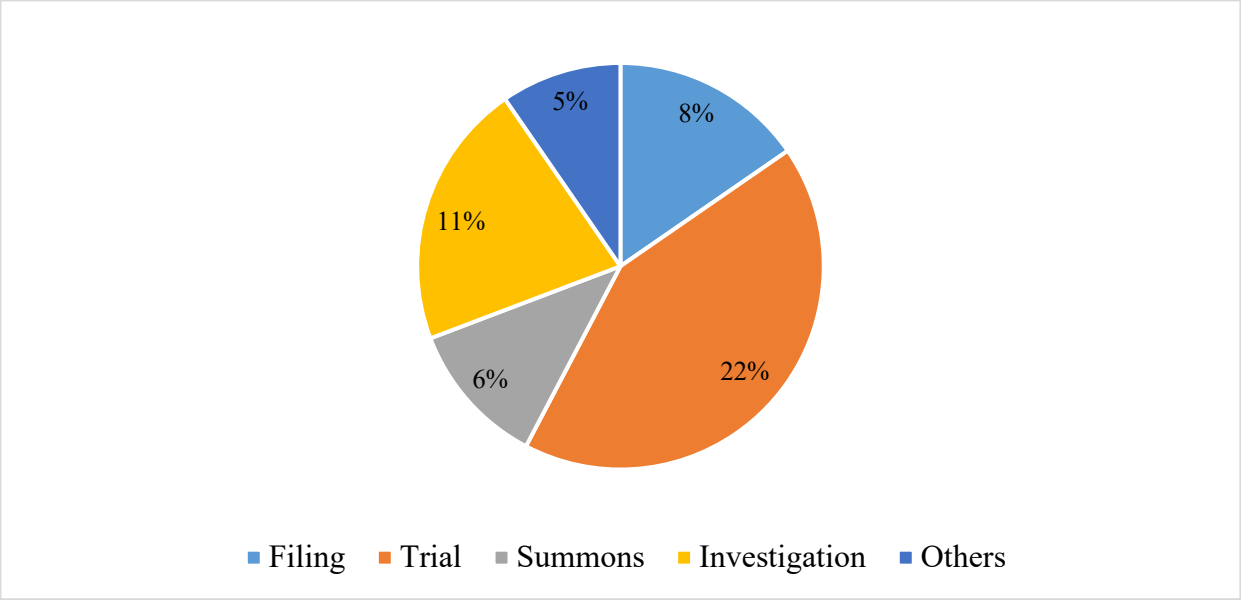

Figure 8.1: Percentage of the Costs of Different Stages in Court Proceedings in Bangladesh

8.3.1 Filing Stage

The present study found that the third most costly stage in both civil and criminal cases was the filing stage (see Figure 8.1). A civil filing involves costs for document collection, court fees, preparing pleadings, and fees for services of summons. Presumably, filing a criminal case should be less costly, as the prosecution bears the cost, but legal practice is different in Bangladesh. Among the three types of criminal cases (see Chapter 3, section 1.4.1.2.2), the CR cases were similar to civil cases and included all the above-mentioned costs, except court fees. When filing a GR case or a general diary, bribes were demanded to record an offence at the police station,[53] especially when related to offences related to document. Conversely, crimes related to the human body (grievous harm, murder or trafficking) that are publicly visible and difficult to avoid registration at the police station generally did not require a bribe. Like criminal cases, the current research found some unrecorded costs at the filing stage of civil cases. Examples included bribing court staff to obtain a suitable hearing date or convincing court staff to disregard a missing document or accept a late submission.

COM-3 and CRL-4 stated that without giving tips to the court staff, they may not set the case on a suitable date, or the gaps between the dates will be unnecessarily long. On the contrary, court staff admitted that they take tips from the clients or lawyers (mentioned in the earlier chapter, section 7.2.1). However, the court staff claimed that this demand is not forceful.

[53] Mahfuzul I Khondaker and Eric G Lambert, *Crime and Punishment in Bangladesh* The Encyclopedia of Crime and Punishment (John Wiley and Sons, 2015) 1.

Another study conducted in Bangladesh found that among the incidental costs, 50% were bribes.[54] This study found that more than 3% of the total common costs were associated with tips to the court staff or lawyer's assistant (see Figure 8.2).[55]

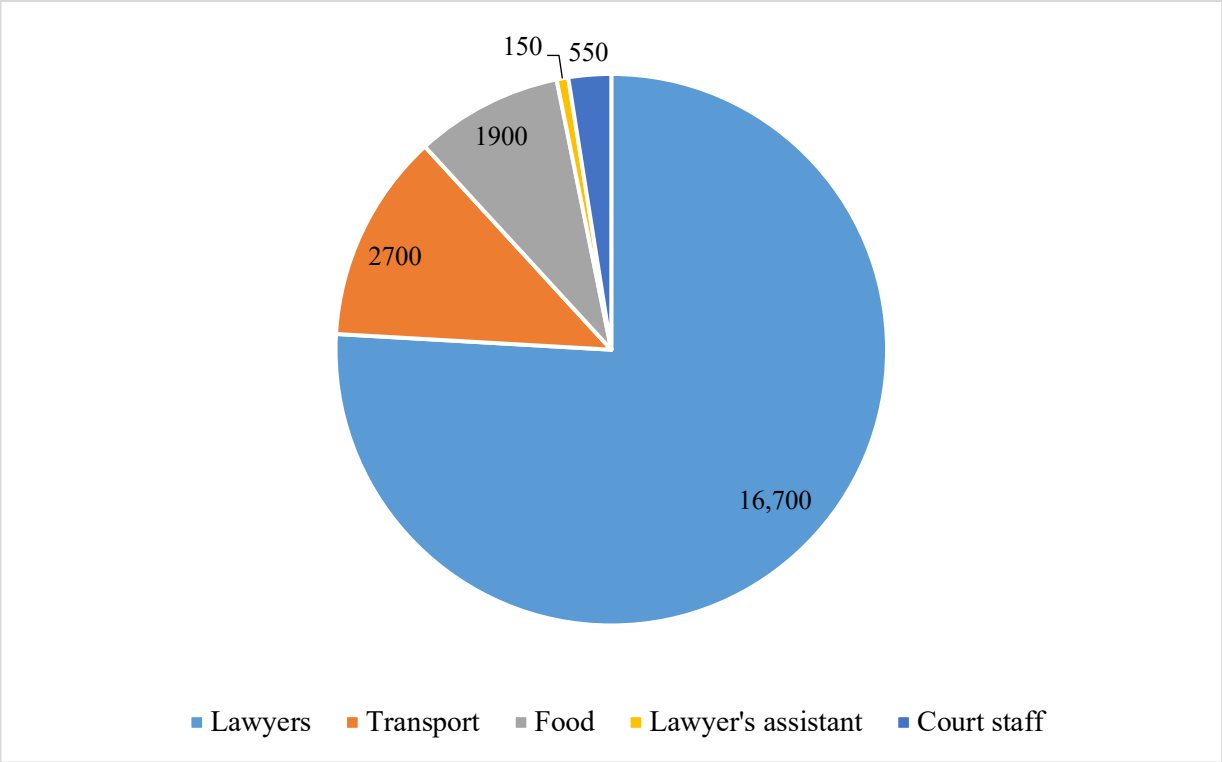

Figure 8.2: Common Costs for Each Court Visit in Bangladesh (BDT) (Prepared from the Average Cost for Litigants)

The present study found that pleadings preparation was one of the highest costs at the filing stage, which varied substantially depending on the client's economic capacity. Though lawyers allowed instalment payments (CVC-2 and CVC-4) for hefty fees (see section 7.2.1.1), the common practice in Bangladesh is to pay the entire amount in advance in cash.

For example, CRC-3 stated, 'I cannot divide the entire expenses or payment. I paid to the lawyer the entire amount he asked for, and the rest of the fragmentation was done by him.' The same view was held by all the interviewee clients. None of them was aware of the amount of fees rated by the government. One lawyer stated that 'as we do not have a fixed payment rate, we receive cash from the clients. We have a client–lawyer mutual trust (informal agreement); therefore, no payment receipts are required'.

[54] Abul Barkat and Prosanta K Roy, *Political Economy of Land Litigation in Bangladesh: A Case of Colossal National Wastage* (Pathak Shamabesh, 2004) 292.

[55] Eight clients from civil and criminal cases explained their expenditure in each visit. The above percentage had been drawn from this fraction of expenditure on a conservative basis.

Thus, the related costs, such as court fees and the cost of summons, were entrusted with lawyers based on their advice. The clients were not aware of the breakdown of their expenditure as a result of package deals. However, the *BQRS 2019* study found only a small portion of the expenses were credited to government revenue. For example, as mentioned (see section 6.2.2), each litigant spent an average of BDT 2875 (AUD 46.38) per appearance in the court, and the government rate of court fees for general attendance is BDT 10 (AUD .16).[56] The entire process of fixing client fees and settling other costs verbally is usually unsupported by documentation, such as receipts. CVC-2 stated, 'On average, on each date, I spend around BDT 2000 (AUD 32.26). I give it to my lawyer.' The same view has been expressed by a number of interviewees.

This study (*BQRS 2019*) found that manually fixing case date increases private costs, as it involves tips for the court staff.[57] Four of the eight clients stated they did not directly pay any tips to court staff; instead, their lawyers distributed tips on their behalf. This indicates that the lawyers retained economic control over clients' money (see the quotation from CRC-3 on page 220). One interviewee (COM-3) shared that, usually, the *peshkar* demands a sizeable tip at the time of filing. Giving tips to court staff at the time of case filing has become a custom to ensure a favourable scheduling date or scope for late submission of a required document. This endures in criminal case filing at the police station at a higher rate. Recording a criminal case at these police stations also involves extra expenses if the informant was solvent and demanded prompt action. Moreover, including a suspect in the case or ensuring a case was recorded as dictated sometimes required extra payments. CRS-4 shared that he experienced an incident in which a murder case was recorded as a suicide case, as the informant of that case refused to provide money to the police.

CVC-1 stated, 'I had to spend a lot for collecting documents for my case. I cannot remember the amount. As it was filed long ago, in 2003, by my brother. After his death, I am handling the case'. CVC-3 stated, 'I had to spend more than BDT 100,000 (AUD 1613.18)[58] to arrange the documents for my case'.

Documents required in civil cases or medical certificates in criminal matters are mostly collected by clients and are not included in the package deal. Gathering these documents demands a considerable fee in civil cases. As mentioned in Chapter 7, section 7.2.2.2) corruption in land

[56] The *Civil Rules and Order* (Bangladesh) ch 26.

[57] Previously, the Supreme Court of Bangladesh published the cause lists and lawyers had to buy those to check their case information. Now that amount is saved due to the online cause list system.

[58] 1 BDT = 0.016 AUD on 30 September 2021.

offices increase document collection expenses for civil cases. Also, in criminal cases, the manual process of gathering expert opinion demands extra cost.

Storing and retaining vast quantities of original documentation also requires space, creating problems.[59] Only one of the eight courts examined in this research was found to have sufficient space to safely maintain case records; the remaining courts were too cramped. Two participants had experienced of losing documents or not receiving an appropriate file on time. One of the participants (CVJ-2) shared her experiences:

> *Paper documents need space and should be organised and kept in a safe place. But we do not have that space, and, therefore, all the paper documents—for example, the case records—are not safely stored in the court. As a result, losing documents or witness deposition or some valuable deed is a common incident in our court proceedings. Sometimes we do not find the case record when it is needed.*

CVJ-4 stated during the interview:

> *This is a common incident in Bangladesh, that if a person fails in one case, then his brother, or sometimes changing his own name, files another case on the same issue. This happens as we have no legal provisions for checking the identity of the parties*.

A review of the legal provisions showed that the traditional filing system does not require proof of identification at the time of filing, which encourages numerous filings to occur at one incident.[60] The law prohibits the filing of repeat cases on the same issue;[61] however, filing a number of cases and counter cases is a common practice to place pressure on the opposition. Some participants pointed to a lack of identification as the reason for the number of filings cases on the same matter. The absence of identification also delays the service of the summons process and the entire court proceedings. Work within the court process is manual, repetitive, time-consuming, and prone to human error. For instance, the parties' addresses are sometimes inaccurately written on summons notices, causing delays in the commencement of court proceedings and vexatious harassment of others uninvolved in the case. Freed argued that identifying plaintiffs and defendants enabled the identification and appropriate distribution of cases among the lawyers, creating a substantial

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[59] Lederer (n 29) 804.

[60] The *CPC 1908* (Bangladesh) O I, II, IV.

[61] Section 11 of the *CPC 1908* (Bangladesh) states regarding *res judicata*:

No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.

reduction in case backlogs.[62] The manual process allows for more errors than the digitised process, as judges and court staff are overburdened and hurried to increase their production. Manual filing of cases requires the physical appearance of litigants, which incurs transport, meal and accommodation costs. This study found that these costs comprised 20% of their common costs in each visit.

Many countries have found the solution to the abovementioned filing problem in e-filing.[63] Benefits of e-filing include fewer filing delays, better document management and the automatic generation of cause lists; e-filing provides a complete package for submitting pleadings electronically (including court and process fees) and allows convenient online access to court documents, case information and reliable court records.[64] Such systems increase court efficiency and transparency, and reduce associated expenses; they reduce costs for printing, binding and review, which would improve document storage and retrieval.[65] Digitisation would eliminate physical storage costs and reduce transmission time.[66] The e-filing process would also reduce the need for litigants to physically appear at the court or police station, saving their travel time and associated costs. Moreover, this system would remove lawyers' economic control over their litigants and establish a transparent process of disbursing clients' money at court. System-generated pleadings could reduce the lawyer's charge at the filing stage.[67] An e-filing system linked with suitable applications or software can calculate court fees and the limitation period.[68] Studies have found that the process would eliminate up to 60% of court clerical work, thereby reducing payroll expenses and allowing staff resources to be allocated to other functions.[69] Thus, an e-filing system would increase court efficiency.

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[62] Freed (n 40) 419.

[63] McMillan (n 32) 180–1.

[64] Clarke (n 39) 154–7; Carol R Flango et al (eds), *Future Trends in State Courts 2010* (National Center for State Courts, 2010) 39; Jessica Vapnek, 'Cost-Saving Measures For the Judiciary' (2013) 5(1) *International Journal for Court Administration* 3; Fox (n 29) 211.

[65] Vapnek (n 64) 3.

[66] Lederer (n 29) 806.

[67] Susskind (n 34) 266.

[68] India has already introduced an application to calculate limitation and court fees. See the Supreme Court of India <https://www.sci.gov.in/limitation> and Supreme Court of India <https://sci.gov.in/court-fees-calculator>. While Bangladesh has not introduced similar software, the country has introduced a Muslim inheritance calculator application that helps calculate property ratio. See <https://play.google.com/store/apps/details?id=com.landcalculation&fbclid=IwAR15NeWsYfWn3ZWzBVGivYkr51orpZzq_JxwJmPcxh5eSJOwHFcc1gSJQV0>.

[69] Clarke (n 39) 154–7; Flango (n 64) 39; Vapnek (n 64) 3.

Further, the e-filing system would arrange court fees and process fees for the service of summons via electronic funds transfer, thereby reducing the cost spent on court staff.[70] Some interviewees in this study (CVL-2, CVL-3, CVC-4 and CVJ-3) claimed that reducing court fees would decrease litigation costs; however, the net effect of reducing court fees would be insignificant, as they are dwarfed by lawyer's fees. The discussion in section 8.3.1 also demonstrates that litigants are not aware of the fragmentation of court fees, as they usually bear the cost as a package deal. Further, it was found that the government actually receives a lesser amount than the clients believed. Appropriate software can also generate cause lists automatically and send them to the advocates by email or make them available on a website that is accessible to the advocates and litigants.[71] Automatic generation of these lists would ensure impartiality, prevent extra spending for illegal favours and establish a transparent court process. This system may also include electronic communication between the court and the parties.[72] Consequently, the current system that favours the rich would be indifferent to all, demoting favouritism.

An e-filing system with biometric and proper identity cards would improve the identification process at the filing stage, including reducing repeat filings and determining the eligibility of case filing.[73] The e-filing system may specify the list of documents required for particular types of cases, and a secure system with carefully planned access would protect clients' privacy. The system can create a chain of justice stretching between the judiciary and law enforcement agencies—such as courts, police, prosecutors' offices and prison departments—with proper coordination via integrated information and communication technology architecture.[74]

During the COVID-19 pandemic outbreak, when bail petitions and other urgent matters were dealt with virtually under the practice direction of the Supreme Court of Bangladesh,[75] a direction was expected regarding case filing. However, no practice direction was issued to clarify case filing; instead, the Supreme Court reconfirmed that the virtual appearances would be limited to bail issues only. On 10 May 2020, the first practice direction was issued regarding a virtual hearing to deal

[70] Clarke (n 39) 155.

[71] Upadhaya (n 31) 3.

[72] Fox (n 29) 212.

[73] Francesco Contini and Antonio Cordella, 'Law and Technology in Civil Judicial Procedures' in Roger Brownsword et al (eds), *The Oxford Handbook of Law, Regulation and Technology* (Oxford University Press, 2018) 246, 254.

[74] Ibid 252.

[75] The Practice Directions No 214 issued by the Supreme Court of Bangladesh is available at ***http://ww2.supremecourt.gov.bd/resources/contents/Notice_20210429_17.pdf*** (accessed 12 May 2021).

only with bail matters.[76] A series of directions have been issued since then. On 1 July and 11 July, two separate practice directions were issued directing how cases would be filed in civil courts and in magistrate courts.[77] In both directions, it was stated to file cases on physical appearance following the health rules. Neither direction included a statement regarding e-filing systems. Two platforms for lawyers and judges (https://mycourt.judiciary.org.bd and http://myorder.judiciary.org.bd, respectively) have been developed to manage bail matters. To file an online petition, a lawyer first has to register, then can submit a bail petition without physically appearing. These websites are still under construction.[78] Then, on 30 July 2020, a practice direction was issued that confirmed resumption of the regular court process through physical appearances.[79] Even though a platform had been established, the filing system in Bangladesh was always manual and required physical appearances except for very short periods of time during COVID-19 outbreaks. Moreover, virtual bail petition hearings have also ceased to exist because normal court processes have resumed. A study found the public need time to trust new mechanisms for the supply of justice.[80] Analysing the present scenario in Bangladesh, it could be argued that insufficient time was allocated for planning and preparing the virtual movement, and the resultant system that was temporarily developed was not user-friendly. Despite these criticisms, the virtual system achieved people's support.[81] However, it appears that the attempt to introduce technology into the Bangladesh legal system has failed, and changes have reverted back to the old system. Hypothetical reasons for this failure have been highlighted in the following section 8.4.

8.3.2 Trial Stage

This study found that the trial stage was the most protracted and expensive in both civil and criminal cases. As a result of long delays at trial, litigants were required to bear common expenses on each case date. Lawyers also set a higher rate at trial due to the absence of any fixed rate or contract. Although the law mandates a trial length of 120 days for civil cases and 180 days for criminal cases (see section 7.1), these time frames are rarely maintained. In addition, this stage

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[76] The Practice Direction No 211 issued by the Supreme Court of Bangladesh is available at ***http://supremecourt.gov.bd/resources/contents/notice_20200510_211.pdf*** (accessded 9 September 2021).

[77] The Practice Directions No 1 and 08 issued by the Supreme Court of Bangladesh are available at http://ww2.supremecourt.gov.bd/resources/contents/notice_20200704_06.pdf (accessed 12 May 2021).

[78] See, a2i, <mycourt.judiciary.org.bd> (accessed 13 May 2021).

[79] The Practice Directions No 14J issued by the Supreme Court of Bangladesh is available at <http://ww2.supremecourt.gov.bd/resources/contents/notice_20200730_14a.pdf> (accessed 31 July 2020). Subsequently, several times the virtual courts were started, and then regular courts resumed depending on the numbers in the Covid-19 outbreak.

[80] Buscaglia and Ulen (n 7) 275.

[81] Hasan Tarik Chowdhury, 'Utilisation of Technology in Court and Virtual Court' *The Protho m Alo* (online, 12 July 2020) <https://bit.ly/3cx2ylG> (accessed 13 May 2021).

mandates each party's presence along with their witnesses, so clients must bear these extra costs. As stated by CRJ-3:

> *As we cannot determine the length of the trial in advance, therefore, on each hearing date, the clients have to present and bear some common cost—for example, lawyer's fees, travel, food, witness's cost, et cetera.*

CVJ-1 stated, 'the trial stage is the longest stage, as it involves the manual process of witness deposition writing (by hand) line-by-line as written in pleadings. This is so time-consuming and monotonous.' Another interviewee stated that 'at the trial stage, often it is found that pleadings needs amendment. Rarely a case can be found in civil cases, where the trial is closed without amending the pleadings. The entire process is time-consuming' (CVJ-2).

Thus, the current investigation found that trials are delayed in civil cases because of incomplete pleadings, lack of information for advance preparation, repetition in the witness deposition system, line-by-line handwritten deposition recordings, and long, vague pleadings. Moreover, conventional delays of case dates and resuming deposition after one or two months also slowed case flow. Lawyers' workloads were found to be a reason for submitting frequent adjournment petitions. As observed from the case record, trial dates for both civil and criminal cases are often adjourned by litigants (see section 4.3.3.1). However, at the time of the interview, litigants expressed a different view. One litigant (CVC-2) shared that she was always ready for trial, though she did not know any details of her case. Even though she was not aware of the changing case dates, after critically examining the case record and client's interview, it was evident that the client's lawyer lengthened the case, and the manual process allowed the presiding judge to assist inviting the delay.

Lack of available information means that litigants are uninformed. The only way that litigants receive case information is through their lawyer or lawyer's assistant, which increases dependency. Another interviewee, CRC-3, shared her experience that when she received the court summons, she contacted her lawyer and was advised to visit the court on the specified day, yet she did not know why had she come or the situation of her case.[82] After perusing the case records, this study found that she was called for witness deposition (examination-in-chief), which required preparation in advance. This investigation found that the deposition of CRC-3 was not taken. A time petition was submitted, which was granted, and the case was scheduled to another day. All

[82] The interviewee did not see her lawyer on the day that the hearing was held, although she paid his fees through his assistant.

these divulge that the manual process of disseminating information allows one group to dominate the case proceedings.

In criminal cases, trials are delayed due to the non-appearance of witnesses, especially medical officers, IOs or expert witnesses. CRL-2, a public prosecutor, stated that the law does not allow a case to be closed before all the processes have been exhausted for all witnesses. The local police are responsible for executing the witnesses' processes, and often they do not submit the summons/warrant execution report to the concerned court. Also, the manual procedure for completing a witness summons is time-consuming and costly, as the litigants have to pay extra to hasten the process. CRJ-4 also stated that this is overly bureaucratic and complex procedure lowers the witness appearance rate.

Expert evidence in a technological age powerfully influences the case outcome. This study found that all the expert witnesses (i.e., handwriting expert, medical officer and chemical examination expert) were government employees who held a transferrable job. If these individuals are transferred or retire from their job, it becomes difficult to trace their present location or workplace to serve a summons, as all records are maintained manually. However, the police department has introduced a new process to track police officers quickly through their identification number.[83] CRJ-4 explained that criminal courts are entwined with numerous departments and do not have proper coordination. He further added that the few available expert witnesses are mostly based in Dhaka, which means it is challenging for them to appear physically throughout Bangladesh to record their deposition. CVL-3 stated, 'for an expert opinion on handwriting, his client had to spend almost BDT 30,000 (AUD 483.95), which is huge. The litigants have to bear the costs of the expert, though they are mostly government officials.' Thus, the entire process of their physical appearance is time-consuming and costly, as litigants must spend a great deal of money to obtain their testimony. However, regardless of whether a witness is able to appear before the court on the scheduled date, the accused's presence is compulsory, and they are required to bear common costs. If the informant engages a private lawyer, they also need to pay their lawyer's fees. The practice of collecting and presenting evidence is governed by the rules of evidence and statutory and common law, which are premised on outdated laws and preclude accurate results.

CRJ-4 stated, 'lacking in investigation, sometimes we have to order for reinvestigation at trial stage and the case go back to an earlier stage. In a criminal case, the investigation takes time, apart

[83] Every police office receives an identification number at the time of joining.

from trial'. A number of interviewees shared those trials were delayed due to the non-appearance of witnesses.

A lack of evidence (both oral and material), a delayed trial process, and a weak investigation report are the main reasons for lengthy trials. This study found that inaccessible case information is the primary cause for a delayed trial and the non-appearance of witnesses. As mentioned, litigants receive case information primarily from their lawyers. An online cause list would solve this problem. In Bangladesh, only the apex court has introduced an online cause list system, containing the case date, cause of appearing before the court and a summary of the order. It allows litigants to navigate their case from any location and reduces their dependency on their lawyer for case information. In the COVID-19 era, the virtual presence of the parties and lawyers was acceptable at bail petition hearings only. All practice directions state that this is a temporary method to adapt to the 'new normal' in the global pandemic. Once normal court procedures resumed, all virtual presence and hearings were strongly discouraged by the judicial authority.

Individual case calendars have been found to be important in some Latin American countries to establish judges' control and accountability on the trial process where individual calendar can have positive impact.[84] Though other studies have found that neither individual nor master calendars have 'a clear and consistent impact on elapsed time to disposition'.[85] In Bangladesh, the individual case calendars are absent and therefore, the judges' accountability is beyond question for timely dispose of a case. However, to ensure judges accountability individual calendar can play a role in Bangladesh judiciary.

In Australia, high-tech courtrooms[86] have been transformed into virtual trials, with evidence, such as remote witness testimony and electronic information interchange, being provided through technology.[87] Even virtual law and clerk offices permit faster, more efficient and cheaper operations of these offices.[88] Most court registries have adopted electronic mechanisms to store and manage court records and transcripts and to produce judgements. Prior research has shown that electronic presentations help judges to manage court proceedings and engage them (the

[84] Gerald S Blaine, 'Computer-Based Information Systems Can Help Solve Urban Court Problems' (1970) 54 *Judicature* 153; Juan Carlos Botero et al, 'Judicial Reform' (2003) 18(1) *The World Research Observer* 65; Chase (n 3) 62.

[85] Raymond T Nimmer, *The Nature of System Change: Reform Impact in the Criminal Courts* (Chicago, American Bar Association, 1978) 142.

[86] High-tech courts rooms are able to present evidence electronically, with remote two-way testimony via video conferencing. Such courts have a digitised court record system and allow forensic experts, oral arguments and even judges to appear via technology.

[87] Lederer, (n 29) 805.

[88] Ibid.

judges) in cases more effectively.[89] Implementing contemporary technology would reduce the length of hearings and save time and money, both private and public.[90] In Spain, an e-justice project created a domain for judges to respond to issues they face during court proceedings. The domain uses a question-and-answer format with legal references.[91] Therefore, it could be argued that when equipped with proper information, it would be arduous to mislead individuals and delay case proceedings. In addition, the use of technology at trial would facilitate document and evidence management and electronic presentation of exhibits, whereby every person in the courtroom could view the evidence simultaneously. Scheduling the duration of a case at the beginning through computerised case management could more effectively monitor case progress and its outcomes.[92] Thus, e-trials could promote accuracy, transparency and accountability. Video conferencing would also be a potential timesaving and cost-saving measure—especially for expert witnesses, such as medical officers and IOs—whose appearance at court is generally costly and time-consuming.

8.3.3 Investigation Stage

The investigation of a reported crime begins with a first information report lodged at the police station and governed by the *Evidence Act 1872* (Bangladesh) and *CrPC 1898* (Bangladesh) or the relevant special laws. This stage takes time and increases criminal litigation expenses as shared by several interviewees (CRS-2, CRS-4, CRJ-1, CRJ-2, CRJ-4 and CRC-1) and costs more for the accused than it does for the informant. The assigned IO visits the crime scene, collects evidence and records witness testimony. The law authorises an IO to arrest a suspect during an investigation without any warrant if the offence is cognisable.[93] Therefore, the expense begins when the investigation starts. Detaining people in jail, even for a day, is a serious matter in the Bangladeshi social context. CRL-2 explained that if the informant or victim can keep the accused in prison even for a few days at the time of the investigation, they consider it a success. In contrast, the accused is egoistic and tries not to be arrested or detained in jail. Therefore, both parties compete, spending money to fulfil their desires. The offer of a bribe goes back and forth between the IO and litigants. Once bail is granted, the tension of litigation decreases between the parties as if the case is closed.

[89] Ibid 815.

[90] Fox (n 29) 210; Singer, Miller and Adya (n 21) 89; Richard Susskind, *The Future of Law: Facing the Challenges of Information Technology* (Clarendon Press, 1996) 73.

[91] Marta Poblet et al, 'Judges as IT Users: The Iuriservice Example' in Agusti Cerrillo i Martinez and Pere Fabra i Abat (eds), *E-Justice: Information and Communication Technologies in the Court System* (Information Science Reference, 2009) 39.

[92] Anne Wallace, 'E-Justice: An Australian Perspective' in Agusti Cerrillo i Martinez and Pere Fabra i Abat (eds), *E-Justice: Information and Communication Technologies in the Court System* (Information Science Reference, 2009) 206.

[93] See *CrPC 1898* (Bangladesh) ss 156, 167 and schedule II for cognisable offences. However, the law mandates that arrested person(s) must be presented before a magistrate within 24 hours of their arrest.

The expense at this stage is not limited to bail petitions only but to manipulating the investigation report (CRJ-1 and CRJ-2). After obtaining information and collecting evidence, the IO submits the report to the concerning magistrate court.[94] Although the law limits the investigation time to 120 days,[95] the IO rarely maintains this time frame (CRJ-4).

CRJ-4 further stated:

> *IOs are not properly trained. They neither collect the material objects from the crime scene nor produce [the objects] before the court properly. Therefore, when the investigation report is submitted before the court, we find the reports are faulty, and we send back for further investigation. In the meantime, the evidence is lost or damaged. This takes not only time, but also increases the public as well as private costs.*

The witness-based criminal justice system has lowered the punishment rate, as witnesses are exploited easily, and their credibility is often dubious. The common method of criminal investigation in Bangladesh is to obtain a confession, which is used as an effective tool to build the prosecution's case. The limited use of forensic science and technology was identified as one reason for the inappropriate, ineffective, manipulated and lengthy investigation reports. The use of forensics can reduce pressure on the IO to prepare a confession-based investigation report. This study further found that the local police are inadequately trained or equipped to protect the crime scene; they also lack the support services for the collection, preservation and analysis of evidence, and preparation of the report. Often this evidence is not properly presented before the judge due to poor coordination between the prosecution and investigation department. COM-4 explained:

> *Our local police are not well equipped with technological advancement. Only some investigation departments—for example, CID [Criminal Investigation Departments] and PBI [Police Bureau of Investigation, an investigation department of Bangladesh Police]—have some facilities, but those are not common for local police. For a handwriting expert or mobile phone tracking, they have to depend on other departments.*

The manual process of collecting evidence is not only time-consuming but also allows evidence to be manipulated easily. Conversely, media-sensitive cases are indulged by departments well equipped with a trained or tech-savvy officer; otherwise, the manual process is followed, and forensics technology is rarely applied.[96] One example is the mandate of preparing a sketch map of the crime location during an investigation of a cognisable offence (see image 8.3). The traditional

[94] The *CrPC 1898* (Bangladesh) s 173.

[95] Ibid s 167(5). This time limit is for general penal offences. However, special laws provide different limits for the time allowed for investigation. For example, investigation reports are to be submitted within 15 days for offences under the narcotics law. See *Madokdrobbo Niyontron Ain 1990* (Bangladesh) s 42(kha).

[96] Mohammed Bin Kashem, 'Issues and Challenges of Police Investigative Practices in Bangladesh: An Empirical Study' in Shahid M Shahidullah (ed), *Crime, Criminal and the Science of Criminology in South Asia: India Pakistan and Bangladesh* (Palgrave Macmillan, 2017) 280.

way to sketch a crime scene map is by hand rather than using map locators or GPS. Often these hand sketches are found to be inappropriate and incomplete.

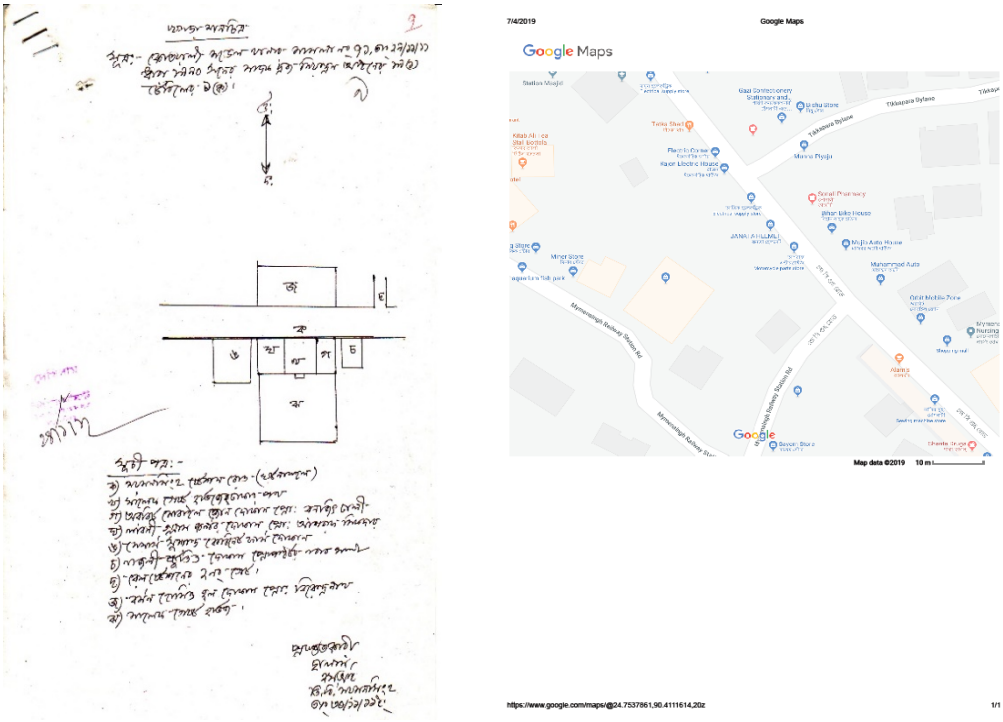

Image 8.3: Map Sketched Manually by IO (Left) and Image from Google Maps (Right) of the Same Location Showing the Dissimilarity Between the Images[97]

Developed countries have been increasing their use of technology in investigations to improve accuracy and transparency. For example, a DNA index system or combined DNA index system can identify murders or sex offenders with a high degree of accuracy,[98] and can even prevent crimes.[99] Fingerprinting is another scientific innovation that has increased the possibility of identifying offenders.[100] Research suggests that eyewitnesses make errors, people falsely confess to crimes, and individuals cannot always remember circumstances years after the occurrence.[101] Moreover, it is also challenging to identify an eyewitness or a coerced confessor.[102] The Bangladesh Police have reportedly obtained numerous confessions through third-degree methods,

[97] This sketch was taken from a case record and the other image used from google maps (right).

[98] Singer, Miller and Adya (n 21) 96, 102.

[99] Nicholas P Lovrich, Travis C Pratt, Michael J Gaffney, Charles L Johnson, Christopher H Asplen, Lisa H Hurst and Timothy M Schellberg, *National Forensic DNA Study Report, Final Report* (National Criminal Justice Reference Service, 2004) <https://www.ncjrs.gov/pdffiles1/nij/grants/203970.pdf> (8 May 2021).

[100] Singer, Miller and Adya (n 21) 96.

[101] Ibid.

[102] Barry Scheck, Peter Neufeld and Jim Dwyer, *Actual Innocence: Five Days to Execution and Other Dispatches from the Wrongly Convicted* (Doubleday, 2000) 210.

and many confessions and eyewitness identifications have been demonstrated to be erroneous.[103] Alternatively, using a technology-based system would yield consistent results.

Bangladesh has already launched its first DNA profiling laboratory, which includes an automated fingerprint identification system and an integrated ballistics identification system.[104] However, the national DNA database is under construction. The use of these scientific tests is still limited at the time of this investigation. Further, the limited use of GPS tracking systems, closed-circuit television footage, mobile phone tracking, vehicle location trackers, digital fingerprints or DNA testing lengthens the investigation process and makes it more costly and inaccurate, which negatively influences the justice system. This demonstrates that the entire criminal justice system is based on witnesses and aims to construct the case rather than find the truth. Therefore, the litigants have to pay out of their pocket to secure justice.

8.3.4 Service of Summons

Among the participants, five claimed that the service of a summons is another stage that delays court proceedings and increases litigation costs (CRL-1, CVS-1, CRS-1, CVC-3, and CVJ-2). The service of summons matter has persisted for a long time. In 2012, amendments were made to the service of summons.[105] In civil cases before 2012, the mode of service of summons was by the officer of the court and registered post. The amendments expanded the delivery modes, allowing service of summons by courier services, fax, email, personal delivery to the plaintiff and newspaper advertisements.[106] However, these amendments have not significantly improved the scenario, as most litigants and lawyers still follow the old methods. CVJ-3 shared his experience:

> *Since the amendment until now, I have not experienced even one case that the summons has been served either by courier or fax or electronic process. People are not aware of the amendment and found the old version easier than the new addition. So, we also follow the old practice.*

In criminal cases, the law specifies the offences for which a warrant will be issued to the offender in the first instances.[107] All other crimes require a summons first, after which a warrant is issued if the defendant does not appear, the proclamation of attachment follows and, finally, a newspaper

[103] Mohammed Bin Kashem, 'The Reform of Evidence-Based Investigations in Bangladesh: A Rhetoric or Reality' (2020) *Police Practice and Research* 2.

[104] Kashem (n 96) 287; Staff Correspondence, 'Country's First DNA Profiling Lab Inaugurated at DMCH' *bdnews24.com* (online, 22 January 2006) < https://bdnews24.com/bangladesh/2006/01/22/country-s-first-dna-profiling-lab-inaugurated-at-dmch > (accessed 14 May 2021)

[105] The *CPC 1908* (Bangladesh) O-v.

[106] The *CPC 1908* (Bangladesh) O-v, r 9(1), 9(2), 9(3), 9A(1), 19B, 20(1A).

[107] The *CrPC 1898* (Bangladesh) sch II.

publication is required.[108] Until all modes are exhausted, the case cannot proceed to the next stage, and it can take years to complete the process. Furthermore, the rate of process service is unrealistically low and demands readjustment to align with socio-economic conditions. The entire procedure is complicated and time-consuming. Technology could be used for the service of summons, as discussed below.

In Bangladesh, the total number of internet customers is more than ninety millions mobile internet users is more than one hundred and ten millions and the number of mobile connections is more than 150 million, making up 87.3% of the population.[109] Therefore, mobile phones could provide a better solution than the current manual process for service. A court assistant would inform individuals of the case date and information through their mobile phone, and the conversation could be recorded for future reference (see Figure 8.4). By installing an application containing the cause list, litigants and lawyers would then be able to track their cases. In addition, case information could be sent via SMS and whether the SMS is read could be identified through the application. Thus, the process would save time as well as private and public money.

[108] Ibid ss 87, 88, 39B.

[109] Bangladesh Telecommunication Regulatory Commission (BTRC), 'Home' ***http://www.btrc.gov.bd/content/internet-subscribers-bangladesh-june-2021*** (accessed 30 September 2021). See also, Bangladesh Bureau of Statistics. *ICT Use and Access by Individuals and Households* (Web Page, 2015) <https://bit.ly/3bvGS8x> (accessed 17 May 2021); Staff Correspondence, 'Bangladesh Positioned 13 in the Price of Mobile Data' *The Prothom Alo* (online, 10 March 2019) <https://bit.ly/2OXxfDU> (accessed 17 May 2021).

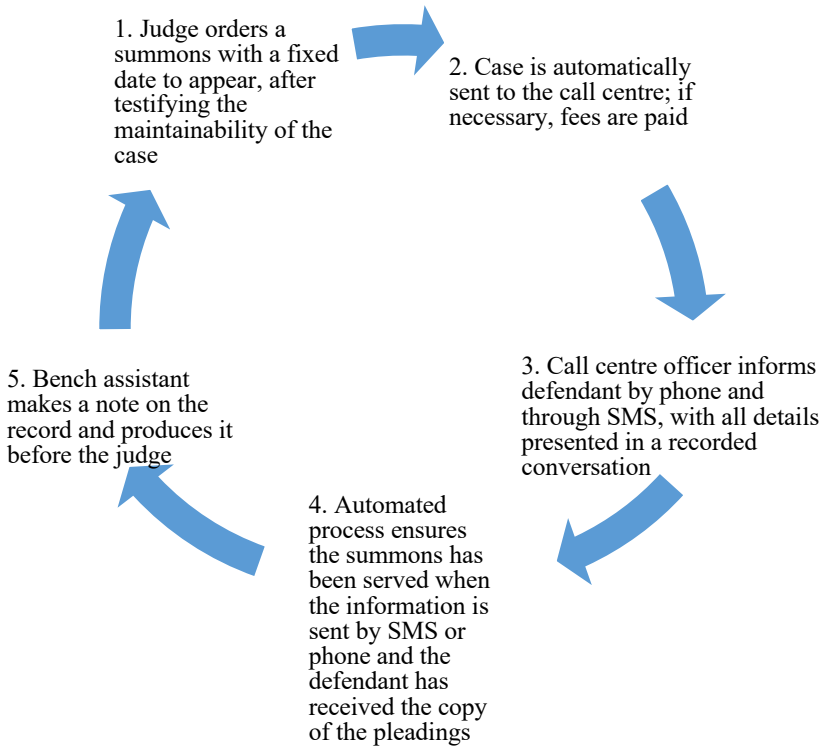

Figure 8.4: Proposed Summons Service in the Civil Courts of Bangladesh (Developed by the Researcher)

8.3.5 Case Management and Administrative Work

Judges and court staff are overburdened with significant workloads. Judges' workload was a common topic of discussion at the time of judicial reformation, while court staff workload was often overlooked. CRS-4 expressed his grievance:

> *Our workload is also very high. Most of our people work twice of their capacity. We have to complete our work on a daily basis, unlike other departments, but, in return, we are not getting proper rewards. Our office hour is eight hours, but every court staff, especially bench assistant, has to work 12–16 hours on average.*

Other staff expressed the same view. During this research, some court staff positions were vacant, which placed an additional burden on employed staff. CVS-1 elaborated, 'in my court, there are five posts but, at the moment, three posts are vacant. As the recruitment process is postponed, I have to do the work of the other three persons … in addition to my job'. Thus, at times, clients and lawyers take advantage of their workload and spend extra money for their benefit. CVS-1 explained the situation with an example:

> *Suppose my work capacity allows me to copy up to 30 pages per day, but each day we received the application for 200 pages. So, among them, individuals who want his or her [sic] work on an urgent basis … pay extra. We then manage the work by hiring people unofficially. This is not legal … but, due to our huge pressure, this became an open secret and custom.*

Research has found that weak monitoring is the leading cause of corruption.[110] Thus, courtroom technology would reduce the workload of court staff and improve court efficiency through robust monitoring. It would ensure transparency by reducing corruption, such as bribing court staff, police or judges. Bosnia and Herzegovina have introduced a computerised case management system (BiH CCMS), which tracks cases to identify whether any delays have occurred due to corruption.[111] This BiH CCMS introduced a combination of database entries and word processing software that has the following effects on court administration:

- increasing the chance of detecting corruption to manipulate files and cases,
- reducing processing and disposal time,
- reducing the number of steps needed to reach a judicial decision, and establishing time standards,
- reducing opportunities and incentives for bribery.[112]

The courts are facing a scarcity of physical storage space. Therefore, it has become difficult to locate a case record quickly. The manual process of storage can easily damage, delay, falsification or lose documents.[113] The current Bangladesh court registry is entirely paper based, and judgements and transcripts often require a copy of the official version of any court decision, increasing litigation costs. Online storage would ease court staff and judges' workload, enabling documents to be easily accessed for future reference, preventing document loss or manipulating an important document. Online storage can manage large quantities of information; thus, the system would save time and litigation expenses. More importantly, it would lead to a paperless, friendly environment, and a transparent court system.

8.4 Limitations of Adopting Technology in the Court System

Technological advancements have already proven their capabilities in the legal sector; however, it has some limitations that require prudent management. For example, technology cannot identify voluntary, induced or edited conversations, which can make a significant difference when

[110] Gary Becker and George Stigler, 'Law Enforcement, Malfeasance and Compensation of Employees' (1974) 3 *Journal of Legal Studies* 1.

[111] James E McMillan, 'The Potential of Computerised Court Case Management to Battle Judicial Corruption' in Agusti Cerrillo I Martinez and Pere Fabra I Abat (eds), *E-Justice: Information and Communication Technologies in the Court System* (Information Science Reference, 2009) 60.

[112] Ibid 60-1.

[113] Ibid 60.

determining an offender.[114] It is also possible to fabricate anecdotal evidence, which is another concern in using technology.[115] However, taking appropriate precautions when using technology can minimise the scope of these fabrications. The possibility for hacking (i.e., the electronic eavesdropping up to and including penetration and alteration of the court's electronic records) is also a concerning and sensitive matter.[116]

Challenges to the successful implementation of technology-based systems—particularly for a least developed country such as Bangladesh—include technical infrastructure deficiencies, shortages of technically competent personnel and limited budgets for ongoing maintenance and operating costs (for more details about budget allocation, see section 7.2.2.3). To prioritise these backlog problems, Bangladesh initiated several pilot projects that did not positively influence court efficiency through reducing backlogs; they all failed for various reasons, some of which are discussed below.

Even in developing countries, prospective users of new technologies may not be highly computer literate and may require extensive training. During data collection, it was found that 50% of clients were accustomed to using mobile phones, while the rest had only a basic knowledge of the technology. Thus, the issue arises as to how technology could be utilised by litigants. Though the interviewees were optimistic that they would acquire the required knowledge once the technology was incorporated into the court system, they would otherwise remain technology illiterate without additional training. Further, court staff must be adequately trained to use the technology. For example, the online cause list pilot project and the witness deposition system failed because of a lack of skilled and technologically sound court staff and logistic support.

Technological improvements come with a considerable monetary cost. Technology adoption and training expenses are significant, especially with a substantial number of computer-illiterate court and bar personnel.[117] This requires commitment from the state budget. The current national budget allocates only 0.345% to the Bangladesh judiciary,[118] which is insufficient to adopt the

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[114] Lederer (n 29) 817; David L Faigman, 'The Law's Scientific Revolution: Reflections and Ruminations on the Law's Use of Experts in Year Seven of the Revolution' (2000) 57 *Washington and Lee Law Review* 667–9.

[115] Lederer (n 29) 817.

[116] Ibid 839–40.

[117] Lederer (n 29) 806.

[118] In the latest budget for Bangladesh (2020–21fiscal year), the judiciary allocation was BDT19620 million, of which BDT2230 million was for the Supreme Court and BDT17390 million was for the law and justice division, including the subordinate judiciary.

technology.[119] Along with the need for a sufficient budget, a long-term, well-researched plan is necessary for judicial modernisation. In addition to public costs, technology also calls for private costs. For example, the cost of DNA test is very expensive, and may not be affordable to majority of the litigants, also the test is time-consuming.[120] There, the economically backwards should be provided with some government funding to bear these costs.

A computerised court management system would reduce the workload of judges and court staff and ensure transparency. However, the expense of such a system may vary over its life cycle, including costs for development, purchasing, implementation, operation, maintenance and management. Policymakers in Bangladesh usually focus on the initial purchase price and underestimate the long-term costs to maintain the system.[121] Appropriate training could enhance and improve the system and would support staff to adapt to the changing work environment. A separate budget for system maintenance should be allocated at the time of initial planning.

Technology demands technology literacy of its users. Technology illiteracy may lead a judge to a wrong decision if they do not understand the system and have not had sufficient training. Limited understanding might discourage use, though Boggs argued that a wrong perception on scientific decisions made by a court would not be fatal to scientific advancement or the social good—it may just slow the progress.[122] Vidmar and Diamond found that jurors felt complicated technical evidence was not adequately explained to them when assessing and considering the testimony of scientific experts.[123] Einy also found a significant number of judges were uncomfortable with computers.[124] In this present research, one of the eight judges (CRJ-3) stated that she was not comfortable with technology, as she found it difficult to manage. Moreover, lawyers' willingness to adopt technology is another factor that determines the success of courtroom technology.[125] When virtual hearings for bail petition were adopted in Bangladesh, the first protest came from

[119] Buscaglia and Ulen (n 7) 275.

[120] Paul E Tracy and Vincent Morgan, 'Big Brother and His Science Kit: DNA Database for 21st Century Crime Control' (2000) 90(2) *Journal of Criminal Law and Criminology* 687.

[121] At the time of data collection, an online case diary board that had been implemented several years prior was found to be inoperative due to lack of proper maintenance.

[122] Danny J Boggs, 'Science and Technology Advice in the Judiciary' (1988) 10 *Technology in Society* 320.

[123] Neil Vidmar and Shari Seidman Diamond, 'Juries and Expert Evidence' (2001) 66 *Brooklyn Law Review* 1145; Jason Schklar and Shari Seidman Diamond, 'Juror Reactions to DNA Evidence: Errors and Expectancies' (1999) 23(2) *Law and Human Behavior* 160.

[124] Orna Rabinovich Einy, 'Beyond Efficiency: the Transformation of Courts through Technology' (2008) 12(1) *UCLA Journal of Law and Technology* 18.

[125] Lederer (n 29) 829.

lawyers.[126] Therefore, the ministry and the Supreme Court reassured that the virtual hearing was a temporary measure to adapt to the new normal.[127]

Another limitation of technological advancement in the justice sector is the possibility of the technology being misused and exploited by the people using it. The DNA laboratory of Houston Police underwent a grand jury investigation in 2003 following the accusation of sloppy and incomplete work.[128] Further, in 1997, a whistle-blower at a Federal Bureau of Investigation crime laboratory alerted officials that several laboratory technicians were falsifying data, not maintaining accurate records and failing to disclose pieces of evidence.[129] Thus, technologies can be manipulated. However, even established techniques, such as fingerprint matching, have recently met with criticisms.[130]

The most challenging aspects for the Bangladesh judiciary are the legal dilemmas, including the potential for new, unproven technologies to exonerate persons because of the admissibility of scientific and technical evidence into court cases. The current evidence law in Bangladesh is ambiguous in admitting digital evidence.[131] Only recently, the *Utilisation of Information Technology by the Courts Act 2020* (Bangladesh) (*Adalot Kortik Tottho Projukti Bebohar Ain* 2020) has legalised the digital presence of the litigants.[132] Some special laws[133] admit the evidentiary value of digital evidence, such as audio and video recordings. Thus, the Bangladesh evidence law desperately requires amendment. If the alignment between information-enabled and communication technology–work practices and legal constraints are not synchronised properly, it will cause difficulties to implement technology in the justice sector.[134] The nature of the judiciary

[126] Bangla Tribune Desk (n 51).

[127] Emran Hossain Sheikh, 'Virtual Is Not for Normal Time' *Bangla Tribune* (online, 28 June 2020) <https://bit.ly/2ZVQVym>.

[128] Singer, Miller and Adya (n 21) 109.

[129] Associated Press, 'FBI Database Botched Check in Serial-Killer Investigation' *Herald Tribune* (online, 5 May 2005) ***https://bit.ly/3bxtsZL*** (accessed 16 May 2021).

[130] Tracy and Morgan (n 120) 670–3.

[131] The *Evidence Act 1872* (Bangladesh) s 3.

[132] In July 2020, an Act was passed, titled the *Utilisation of Information Technology by the Courts Act 2020* (Bangladesh).

[133] Narcotics law, human trafficking law, acid control laws and speedy trial laws have provisions for accepting digital evidence.

[134] Claudio U Ciborra et al, *From Control to Drift: The Dynamics of Corporate Information Infrastructures* (Oxford University Press, 2000) 4–5.

necessitates the alignment of both law and technology to guarantee the effectiveness of judicial proceedings.[135]

Another limitation encountered while implementing technology during the COVID-19 era was the state's infrastructure; interrupted electricity and the lack of high-speed internet connection created challenges. While planning for a virtual hearing, proper logistic support was not provided; for example, lodging court fees electronically,[136] or *e-chalan*,[137] were unavailable. Also, there were no legal provisions to accept the e-document of electronic banking transfers receipt, nor was any online storage available for the submitted documents for future use. Also, it is important to consider who will run these electronic devices, how the data will be collected and preserved. The human forces involved in the process and their accountability, and responsibility, would require a legal framework. Their training, the devices' maintenance and back up should be also a significant concern. Thus, the lack of planning transformed the system into a mix of manual and digital processes. Therefore, instead of being useful, it baffled system users. Moreover, the judicial bureaucracy at the policy level resulted in confused decision-making, which was reflected in the level of execution in transitioning to a virtual court. It can be argued that as the corruption extends from policy level to execution, neither is enduring technology in the court system. The court staff and other organisations at the level of execution, such as police, were somewhat apprehensive that the economic benefits might be bypassed. Simultaneously, lawyers may be concerned they might lose control over the case and financial flow from their clients. Therefore, they strongly influenced policymakers. During this pandemic, in which most countries have moved forward with technology,[138] Bangladesh has moved one step forward and two steps backwards.

Use of technology also raises the question of privacy and data security. Collecting information from web browsing and selling this information without permission threatens users' privacy.[139] Electronic court information presents real and meaningful changes regarding the level of privacy in the court process—changes that diminish individual privacy.[140] Similarly, DNA profiling databases maintained in many countries raise questions regarding the exploitative, illegal or

[135] Contini and Cordella (n 73) 258.

[136] Md Motahar Hossen Saju, 'The Problems and Solutions of the Virtual Courts in Higher Courts' *Daily Ittefaq* (online, 24 May 2020) <https://bit.ly/2ZYlCmz> (accessed 2 January 2021).

[137] A mode of submitting government fees.

[138] Richard Susskind, 'Covid-19 Shutdown Shows Virtual Courts Work Better' *The Financial Times* (online, 7 May 2020) ***https://www.ft.com/content/fb955fb0-8f79-11ea-bc44-dbf6756c871a*** (accessed 10 January 2021).

[139] Tracy and Morgan (n 120) 670–3.

[140] Lederer (n 29) 806.

unethical use of DNA information.[141] If the security of data is not ensured, the constitutional mandate- 'right to privacy' would be at stake.[142] However, this issue can be rectified by restricting access to the case records (until disposal of a case) to concerned parties and their legal representatives through user identification and password.

The courtroom provides a place for the involved parties and judges to communicate, witnesses to be sworn in and give evidence, and for judges to pronounce binding decisions. All these activities are mediated and shaped by the specific design of the courtroom. The courthouse in Bangladesh provides a sense of solidity and has been set since long ago. Thus, there is concern that virtual courtrooms and trials threaten courthouses' sense of place and solemnity.[143] One interviewee (CRJ-3) expressed concern about how technology would affect the justice delivery system. She stated:

> *When someone appears and deposits before the court, the entire ambience impacts on the judge to take any decision. His [sic] body language, gesture, posture impact the court to conclude. I doubt how far it would be possible in a virtual court if the face to face presence is absence. The video conferencing or virtual court frame our view. The court structure and environment also have a psychological impact, totally absent in a virtual court.*

This indicates that the administration of justice through technological involvement may be perceived as a heartless, inhuman disposition process.[144]

Despite its limitations, technology could lead to positive outcomes if supported by a long-term, comprehensive plan and sufficient budget. However, if the process of adopting technology in the justice sector is flawed, it is unlikely that the expected benefits will flow from the technology, and it could result in wasted resources. Although the possibility of failure when introducing technology is a concern, we cannot consider a judicial sector without technology. As stated by Justice Chin, 'there is hardly any demerit worth mentioning regarding the use of IT by those concerned with the administration and dispensation of justice'.[145] This transformation process must be incorporated within the legal framework—a difficult task without a long-term plan. In Italy, it took about eight years to develop an e-filing system with the necessary legislative requirements.[146] Whether a

[141] Tracy and Morgan (n 120) 670–3.

[142] The *Constitution of Bangladesh 1972,* Art 43.

[143] Lederer (n 29) 842.

[144] Fredric I Lederer and Samuel H Solomon, 'Courtroom Technology—An Introduction to the Onrushing Future' (1997) *Faculty Publications* 5.

[145] Bhatt (n 29) 208.

[146] Contini and Cordella (n 73) 254.

virtual court should replace the entire existing system has been a great debate in this decade.[147] However, even without replacing the current system, virtual courts could supplement it to improve access and provide a cheaper, transparent, and more accurate method to achieve timely justice.

8.5 Conclusion

This chapter uses empirical analysis to examine how the increased use of technology could reduce litigation expenses in Bangladesh. It concludes that the present justice system is a mostly manual system that is underfunded, slow and utterly inefficient for the present workload. The manual process contributes to the information gap and consumes time and space. It also precludes easy access to the court. As discussed in Chapter 8, technology could solve these problems.

While the other developed countries are implementing the third phase of technological advancement into the justice sector, Bangladesh is in the first phase. This study explained how information and communication technology can play a crucial role in the justice sector, managing a case load, publishing information for court users, supporting the case preparation and conduct of litigators, presenting evidence, providing transcripts, reducing delay, and preparing and disseminating a judgement. Technology can handle transactions between courts and their users, including facilities, to enable parties to file documents electronically and search court records easily. Online storage would ensure easy access to information and a paperless court system. Thus, technology is now an indispensable tool for modernising the judiciary. However, if not handled with skill and competence, it may frustrate efforts. Therefore, the process of adopting is equally, if not more, crucial than merely purchasing and installing the required hardware and software. Moreover, all stakeholders must be ready to implement the technological advantages.

This study also detected that due to substantial workloads, judges and court staff are unable to concentrate on each case. The judges' lack of control enables lawyers to lengthen case proceedings, which increases litigation costs. Some of the issues in the Bangladesh judiciary are generated for personal gain or as a result of dishonesty, professional misconduct, and lack of accountability, while other issues are systemic; it is in these realms that technology can play a vital role.

Incorporating technology into the court system should be undertaken progressively. Sincere initiatives with a long-term implementation plan are needed from policymakers to execute this change. A virtual court may not replace the entire system; however, it could supplement the current system to improve access and provide a cheaper, transparent, and more accurate method to achieve

[147] Ibid.

timely justice. The successful use of technology in the judiciary will depend on the acceptance of all people involved in the justice sector. Skilled technological replacement within the judicial sector would ensure the shortest possible duration of proceedings with the lowest possible cost and greater accuracy in case disposal. Another key challenge would be to establish a meaningful privacy policy for internet users. Thus, based on the discussion in this chapter, it can be argued that incorporating courtroom technology would make the justice system transparent and effective in Bangladesh.

Chapter 9: Conclusion: Devising a Better and More Cost-Effective Litigation System in Bangladesh

9.1 Context of Litigation Cost and Access to Justice in Bangladesh

The adversarial legal system and some century-old laws have failed to ensure access to justice in Bangladesh. An insurmountably expensive litigation system is exacerbating the problems in accessing justice. There is a strong connection between delay and increased litigation costs militating against access to justice. In Bangladesh, delay in litigation occurs due to excessive filing and low disposal rates in combination with shortages in the judicial workforce, absence of efficient ADR mechanisms and poor application of costs rules. Since the independence of Bangladesh in 1971, the number of cases has increased compared to the population, but the judicial workforce has not increased accordingly (see chapter 7. Section 7.1). Overburdened courts cannot ensure timely disposal of cases. Existing law also assists people with sufficient means to prolong case proceedings using their lawyers' strategic litigation or the judges' vast discretionary power. The economically inferior group are not provided with sufficient alternative financial assistance or legal support to avail justice. In addition, remedial measures are not adequately provided to the winner. Consequently, the Bangladeshi justice system effectively denies access to the majority of people in the middle-income and lower-income groups. This thesis examined the ways in which the subordinate judiciary of Bangladesh could be made cost-effective and accessible. Empirical research was conducted to ascertain the causes of high litigation costs. This study identified the costliest aspects of litigation and investigated the contributions of litigants, lawyers, judges and institutions to the increasing litigation costs. This thesis considered the potential effects of implementing cost rules that enhance affordability and provide an indemnity remedy to ensure access to justice. It critically examined how the existing financial and alternative support could be better shaped to increase accessibility. It further examined whether the ADR process could be a cost-effective resolution process that ensures timely and equitable justice.

These issues were addressed throughout the study within the scope of the research question: 'how can a cost-effective litigation system be established in the subordinate judiciary of Bangladesh to facilitate access to justice?' While answering the research question, each chapter addressed research issues identified in Chapter 1. In Chapter 1, this research outlined a definition of access to justice within the scope of this study that includes access, process, remedy and satisfaction (see chapter 1, section 1.1). These components were connected with the litigant's financial situation and their ability to afford access to justice. Chapter 6 addressed the accessibility of litigants to

justice, Chapter 4 examined litigant's remedial measures, and Chapters 3, 5, 7 and 8 reflected on the litigation process. All these components collectively impact on litigant's satisfaction, which was discussed in Chapter 2. The above research issues were based on the following theoretical basis.

9.1.1 Conceptual Framework

Distributive justice demonstrates the allocation of social resources according to needs or claims for optimal use (see Chapter 2, section 2.2.1). Greek philosopher emphasised morality and argued that just people are happy. This research argued that such happiness resembles satisfaction (see section 2.2.1). After scrutinising a number of theories, distributive theory was considered the most suitable for this research. Applying Rawls' egalitarianism to litigation costs indicates that access to justice is impeded by unequal economic capacity and an expensive legal system. This thesis has focused on two key tenets of Rawl's theory, i.e., first, that each person should have an equal right to the most extensive system, and second, that social and economic inequalities should be arranged to create the greatest benefit for the least advantaged (see section 2.2.3). Reflecting Rawls' theory of distributive justice, this study argued that the existing economic disparity allows inequality to be preserved for the disadvantaged groups of society. Following Rawls' theory, this study argued for some incentives to ensure that access to justice is not denied due to the unaffordability of litigation for some litigants. These incentives may not be enough if the litigation process itself is too expensive. This study argued that the system should be affordable, and all expenses should be reasonable and affordable. It further argued that some additional measures could be taken to maximise access for neglected groups while protecting their rights. In order to approach Rawls' utopian concept of justice, it is necessary for Bangladesh to adopt all of the measures in this thesis. Chapters 3-8 have been developed to address each aspect of distributive justice. In summary, this study has semonstrated that justice would be enhanced when affordable access is ensured, an inexpensive process is available, and proper remedial measures are executed, thereby increasing the litigant's satisfaction.

9.1.2 Contributions of Individuals and Institutions to Increasing Litigation Costs

Chapter 3 identified how the judicial institutional arrangements increase litigation costs and influence the justice delivery system. Chapter 3 revealed that the ratio of workforce to work is inadequate, and the dual control over the subordinate judiciary made the policymaking system bureaucratic and complicated. Furthermore, there was a lack of coordination among the institutions involved in administering the judicial process, the institutional capacity was inefficient, and limitations were noted in infrastructure. Political manipulations were observed in the complex

law-making process, which involves too many tiers of cases and courts, and issues were identified with the procedure for appointing judges. All of these factors contribute to increasing litigation costs and make the process lengthy and ineffective.

Chapter 7 investigated how the litigation costs increase due to the collective actions of clients, lawyers, judges, courtroom staff, institutions, and other departments closely associated with the administration of justice and the law process itself. Among the total litigation costs, lawyers are major contributors to the increasing litigation expenses. Lawyer-related factors that are key contributors to increasing litigation costs are the profit-oriented legal profession, the absence of strong professional and ethical commitment, the small number of efficient and committed public prosecutors, the adversarial court system that allows absolute indispensability to the lawyers and the absence of a central committee to regulate lawyers' fees.

Client-related factors that contribute to increasing litigation costs include a harassment mentality, low interest in mediation, a propensity to spend extra money to obtain favour, and lack of information about cases. Judges' contributions to litigation costs include excessive workload, reckless application of judicial discretion, reluctance in awarding costs, job frustration and lack of incentives for being (pro) active. The contributions of court staff include excessive workload, low salary, taking tips (bribes) from clients, lack of resources, inefficiency and insufficient workforces. The contributions from other institutions include open bribery in the police department, preparation of corrupt or brutish investigation reports, non-execution of a witness summons, complex land management system, outdated laws and legislative inconsistency that affects the administration of justice.

In the light of these gaps and challenges, this thesis offers the following recommendations.

9.1.2.1 Lawyers' Fees

Lawyers' fees can be on a contractual basis, submitted with a cost budget at the beginning of a case (see Chapter 7). As lawyers' fees comprise the largest proportion of litigation expenses, a predetermined contract would positively influence the length of litigation. Based on the outcomes of this thesis, it can be argued that, in Bangladesh, if the lawyers' fees are not capped by contractual conditions at a reasonable amount, the per-appearance charge will motivate them to delay the proceedings. Providing a predetermined contract would also assist in determining the costs budget in the early stages of litigation. Proper documentary evidence of lawyers' fees is essential as, without robust execution, the costs rule would be futile. Also, a rule allowing courts to award costs personally against errant practitioners should be considered.

9.1.2.2 Lawyers' Ethics and Accountability

The Bangladesh Bar Council should be restructured with a focus on maintaining a lawyer's ethics and accountability (see Chapter 7). The bar should also take initiatives to maintain professional ethics, accountability, responsibility, and discipline, and there should be close supervision of adherence to the regulations. Also, the offender should be punished exemplarily, not leniently. Thus, accountability should be ensured through institutional control, liability control and disciplinary control. The necessary legal instruments can be adopted or redesigned.

9.1.2.3 Judges' Accountability

The accountability of judges can be ensured through individual case calendars (see Chapter 8). An incentivised program should be introduced to encourage judges to play an active role in case proceedings, and systems implemented to ensure effective monitoring.

Administrative tasks can be centralised in a single office with trained administrative employees; this would reduce judges' workload and increase judicial efficiency. A separate secretariat under the supervision of the Supreme Court would establish an effective judiciary, ensuring the separation of powers (see Chapter 3). The most indispensable action is to increase the number of judges commensurate with the existing workload (see Chapter 7).

9.1.2.4 Procedural Simplification

The existing, outdated laws should be reviewed to ensure procedural simplification (see Chapter 7). Simple and accessible law and legal procedure would increase self-representation, thereby decreasing the inevitability of a lawyer's involvement that contribute the larger amount of litigation costs. It would also benefit the judges as well as lawyers in navigating the system and ensuring justice.

9.1.2.5 Prosecution Department

The prosecution department should be reorganised into an efficient criminal justice delivery system. The police and prosecution should work jointly from the beginning of a case. Such a collaborative arrangement will increase the quality of the investigation report and ensure evidence is collected in a legally admissibly way. This will increase prosecution accountability to increase the currently low rate of punishment (see Chapter 7). This would also minimise the case delay and costs (see section 7.2.1.1 and 7.2.2.1) at the trial of criminal cases.

9.1.2.6 Other Associated Departments

Coordination with other departments involved in the justice delivery process needs to be better integrated and prompt. For instance, there should be greater coordination between the police department, land management department, medical experts, and experts from the other department of government; this will reduce delay in disposing litigation and decrease litigation costs.

Reformation is also inevitable to ensure transparency in the appointment of court staff. A group of clerks can be adequately trained for effective use of court procedures; this could include tasks such as legal research, preparing bench memorials, making the first draft of orders and opinions, editing and proofreading the judge's orders and opinions, and verifying citations to reduce the judge's workload.

9.1.3 Financial Support Options to Enhance Accessibility

Chapter 6 investigated the alternative financial support options that are available in Bangladesh to ensure accessibility for the majority of the people. The investigation identified gaps in the existing legal aid services, including poorly articulated eligibility criteria, unavailability of efficient lawyers, lack of accountability and monitoring systems, incomplete coverage of costs, inefficient service providers, lengthy decision-making processes, opaque political involvement and limited budget. The investigation also explored other support options that can be offered to broaden the accessibility. While searching for alternative services, this study found that contingency funds, CFAs, pro bono activities, insurance or self-representation are not widely available in Bangladesh.

The following solutions are recommended to address the identified gap.

9.1.3.1 The Existing Legal Aid Act Should Be Amended

Delivering an efficient service with sufficient budgetary allocation requires amendment of the *Legal Aid Services Act 2000* (Bangladesh). The service selection priority should include a merit test as well as the revised means test (see Chapter 6, section 6.2.2); this would ensure effective use of public resources. A penal provision with a robust monitoring system can also be incorporated into the Act.

9.1.3.2 Alternative Support Should Be Available

Alternative services can be introduced to reduce the financial burden on legal aid services, for example, contingency fund, CFAs, pro bono activities, legal insurance (see Chapter 6, section 6.3) and establishing facilities to encourage self-representation (see chapter 6, section 6.4).

9.1.4 Effects of Alternative Dispute Resolution on Litigation Costs

Chapter 5 evaluated the success of ADR in hastening disposal, saving money and widening access to justice in Bangladesh. Chapter 5 substantiated by empirical research, identified that the disposal rate through ADR is very poor (see chapter 5, section 5.4). Several causes of the low disposal rate were identified: the existing ADR system upholds the Western system of justice and disregards the local sentiment and social values; the loss of attraction to the egoistic local people; waive of a legal right conception; non-binding effect of judgements; discouragement of lawyers; time constraints on judges; restricted provisions for appeal; lack of a role for a separate mediator; and absence of incentives for lawyers.

Several recommendations are made to address these difficulties.

9.1.4.1 Reforms to the Alternative Dispute Resolution Process

The ADR provisions should be reviewed to ensure they are aligned with local sentiments (see chapter 5, section 5.4.1) and to ensure an adequate workforce. The role of trained and enthusiastic mediators should be separated from judges. Instead of making ADR mandatory, the requirement should be varied considering the type of disputes and the parties' priority for the best use of public and private resources to enhance access to justice.

9.1.5 Lack of Integration in the Existing Cost Rules

Chapter 4 discovered the lack of indemnity for a successful litigant who is brought into the court unnecessarily. These remedial provisions are incomplete, and their applications are rare in Bangladesh (see chapter 4, section 4.3). The identified gap in the existing costs rules demonstrate that the existing costs rules are vague, scattered and unrealistic to implement in civil and criminal cases. They do not include the cost assessment process, nor do they calculate the litigant's actual costs. The execution process of costs rules is also very complex; therefore, even if judges' order for a costs award, litigants cannot achieve an effective outcome due to complicated execution process (see chapter 4, section 4.3.3). In criminal cases, the victims are not compensated due to the absence of a victim support fund (see Chapter 4). Thus, the empirical findings suggest that the lack of remedial measures would not constitute justice for litigants (see Chapter 4).

The abovementioned gaps lead to the following recommendations.

9.1.5.1 Integrated Cost Rules

The existing scattered, vague and unrealistic costs rules should be integrated into a comprehensive, coherent and realistically applicable set of rules. While doing so, the process of assessing actual costs and simplifying the execution process should be prioritised. Also, the cost rules should be synchronised with the socio-economic context of Bangladesh. An independent cost assessment body can be established to ensure transparency. A cost budget, as mentioned, should be a part of these rules.

9.1.5.2 Victim Compensation Fund

Constituting a separate government fund for victims and their families, and ensuring a simple execution process, would enhance the ability of victims to access the justice delivery process. In this regard, a legal provision to assess a victim's actual or reasonable costs can be incorporated in the law with a simple execution process.

9.1.5.3 Judicial Discretion

Judges' vast judicial discretion should be guided by proper regulation to decrease inequality in the application of costs rules (see Chapter 4, section 4.3.3). To execute the legal provisions that allow adjournment petition or imposition of costs rules, the application of judicial discretion should be minimal, and grounds should be specific. For example, the application of costs provisions should be mandatory with limited scope for judicial discretion.

9.1.6 Manual Courtrooms Contributing to Increase Delays and Costs

Chapter 8 also focused on the process of the justice delivery system. Based on empirical findings, Chapter 9 identified the costliest areas in litigation within the Bangladeshi legal system and investigated the causes behind them. The costliest areas in litigations are case filing, trial, investigation, service of the summons and court administration. Causes of these costs include bribes or tips at the filing stage, repetitive charges by lawyers for the same occasions (see Chapter 4, page 98), allowing frequent adjournments cause delays beyond legal perimeters, unavailability of witnesses, expensive physical appearance fees for expert witnesses (see Chapter 8, page 227), insufficient workforce, limited use of forensic evidence, manual summons service process and manual court administration. Chapter 9 identified the relationship between these causes and the manual court process, which also decreases court efficiency.

Recommendation to address the identified gaps is as below.

9.1.6.1 Digitised Courtrooms for a Transparent and Efficient Judiciary

Increased use of courtroom technology—such as e-filing, use of forensic evidence and smart summons service, e-trial system would ensure transparency and efficiency in the justice delivery process. E-filing or e-trial could be incorporated in court proceedings to reduce the number of appearances in the court. Online cause lists can provide information to the clients and reduce dependency on their lawyers or court staff for case information. Examples can be taken from the Supreme Court of Bangladesh, which has successfully introduced an online cause list system (see Chapter 8, page 228). This could also reduce dependency on lawyers for case information. Also, the increased use of forensic evidence in criminal cases would be cost-effective and more accurate.

9.2 Potential Challenges of Implementing the Thesis Findings

The above findings led to the conclusion that budgetary problems in Bangladesh's legal system cannot be resolved by a single reform. Instead, a multifaceted approach to reforming legal costs is required to optimise access to justice in Bangladesh. Benefits to the system can be achieved by considering the following factors.

9.2.1 Legal Reforms

The legal reforms demand the inclusion of integrated costs rules, ADR, accountability of judges and lawyers, contractual fee schemes for lawyers, and available financial support options in the legal aid provisions. However, these reforms are vastly dependent on the legislative organ in Bangladesh. As mentioned, the involvement of the judiciary or judicial feedback in the law-making process would allow the enactment of a greater number of efficient laws (see chapter 3, section 3.2.3).

9.2.2 Budgetary Allocations

A budgetary allocation must be made to improve infrastructural deficiencies, increase the number of technically competent personnel, and increase the judiciary workforce in Bangladesh. This would accelerate the effective use of technology in the courtroom but relies on policymakers proposing sincere initiatives that have a long-term execution plan. Training a group of skilled people who are involved in the court process—for instance, judges, lawyers and court staff—also needs budgetary support.

9.2.3 Implementation Process

All these reforms will not expand access to justice if they are not implemented properly. The administration of justice is largely dependent on the judges' ability to execute it in the purview of law; that is where the intrepid role of the judiciary would be inevitable. While implementing these processes, some cultural difficulties might be faced, such as a revolutionary change in the judges' proactive role (see section 7.2.1.3), lawyers' attitudes towards serving the people (see section 7.2.1.1), litigants' perspectives on litigation (see section 7.2.1.2) and staff accepting tips or bribes as a reward (see section 7.2.1.1).

9.3 Summary

This thesis has examined a range of ways and means to establish a cost-effective litigation system in the subordinate courts in Bangladesh. By examining the present status, this study found that the justice system in Bangladesh is flawed. Findings from empirical evidence demonstrated how the increased litigation costs impacts access to justice in Bangladesh. Professional stakeholders, manual case-processing systems, ineffective ADR provisions, imperfect legal aid provisions, judicial institutional arrangements and inadequate relief due to absence of proper indemnity—all contribute to escalating litigation costs which narrows the scope of access to justice for the majority of people in Bangladesh. This thesis has demonstrated that the facilitation of access to justice requires a combination of legal reforms and sufficient budgetary allocation with a long-term goal and implementation plan. High priority should be given to increasing the use of courtroom technology and introducing integrated cost rules to enhance access to justice. These two areas need urgent reappraisal. In addition, other aspects of the Bangladeshi litigation dispute system—such as ADR systems, legal aid provisions and institutional arrangements, also require reform. The present US based form of ADR, in particular, has not achieved popularity and must be reformed to enable consistency with Bangladesh's society and culture. This thesis has demonstrated that a proper and balanced blend of legislative reform, reform in the execution of procedures and judicial reform, each designed to reduce the current exorbitant cost of litigation, would manifestly improve access to justice in the subordinate courts of Bangladesh.

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APPENDICES

Appendix A: Ethics Clearance from Macquarie University Human Research Ethics Committee

Arts Subcommittee
Macquarie University, North Ryde
NSW 2109, Australia

MACQUARIE University

14/08/2018

Dear Professor Islam,

Reference No: 5201831153488
Project ID: 3115
Title:The Subordinate Judiciary of Bangladesh: Making Litigation Cost-Effective and Justice Friendly

Thank you for submitting the above application for ethical review. The Arts Subcommittee have considered your application.

I am pleased to advise that ethical approval has been granted for this project to be conducted by Professor Muhammad Islam.

This research meets the requirements set out in the National Statement on Ethical Conduct in Human Research 2007 (Updated July 2018).

Standard Conditions of Approval:

1. Continuing compliance with the requirements of the National Statement, available from the following website: https://www.nhmrc.gov.au/_files_nhmrc/file/publications/national-statement-2018.pdf.
2. This approval is valid for five (5) years, subject to the submisson of annual reports. Please submit your reports on the anniversary of the approval for this protocol. You will be sent an automatic reminder email one week from the due date to remind you of your reporting responsibilities.
3. All adverse events, including unforeseen events, which might affect the continued ethical acceptability of the project, must be reported to the subcommittee within 72 hours.
4. All proposed changes to the project and associated documents must be submitted to the subcommittee for review and approval before implementation. Changes can be made via the Human Research Ethics Management System.

The HREC Terms of Reference and Standard Operating Procedures are available from the Research Services website: https://www.mq.edu.au/research/ethics_integrity_and_policies/ethics/human_ethics.

It is the responsibility of the Chief Investigator to retain a copy of all documentation related to this project and to forward a copy of this approval letter to all personnel listed on the project.

Should you have any queries regarding your project, please contact the Faculty Ethics Officer.

The Arts Subcommittee wishes you every success in your research.

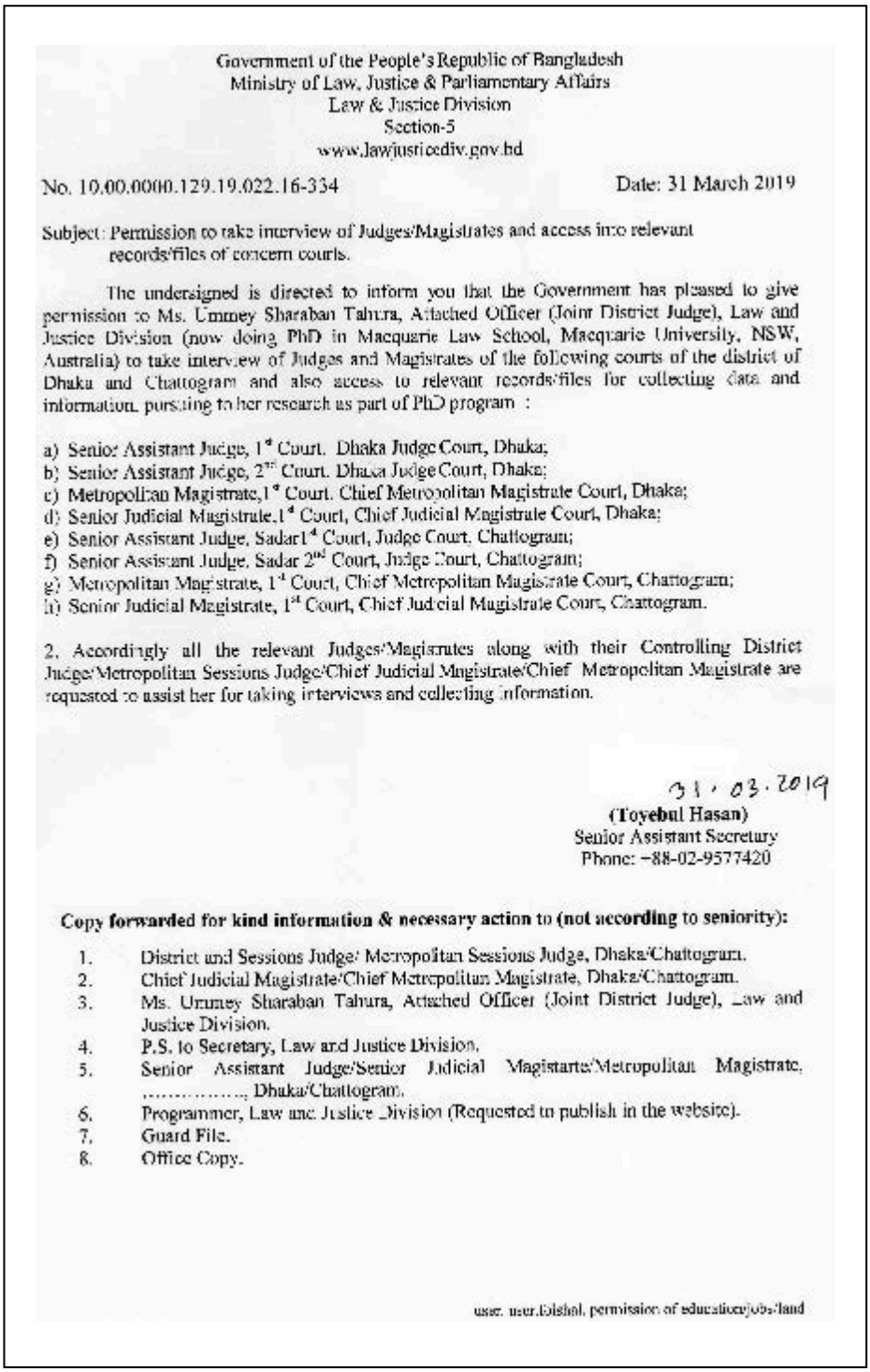
Yours sincerely,

Dr Mianna Lotz

Chair, Arts Subcommittee

The Faculty Ethics Subcommittees at Macquarie University operate in accordance with the National Statement on Ethical Conduct in Human Research 2007 (updated July 2018), [Section 5.2.22].

Appendix B: Approval from the Ministry of Law, Justice and Parliamentary Affairs (Bangladesh)



Government of the People's Republic of Bangladesh
Ministry of Law, Justice & Parliamentary Affairs
Law & Justice Division
Section-5
www.lawjusticediv.gov.bd

No. 10.00.0000.129.19.022.16-334 Date: 31 March 2019

Subject: Permission to take interview of Judges/Magistrates and access into relevant records/files of concern courts.

The undersigned is directed to inform you that the Government has pleased to give permission to Ms. Ummey Sharaban Tahura, Attached Officer (Joint District Judge), Law and Justice Division (now doing PhD in Macquarie Law School, Macquarie University, NSW, Australia) to take interview of Judges and Magistrates of the following courts of the district of Dhaka and Chattogram and also access to relevant records/files for collecting data and information pursuing to her research as part of PhD program :

a) Senior Assistant Judge, 1st Court, Dhaka Judge Court, Dhaka;
b) Senior Assistant Judge, 2nd Court, Dhaka Judge Court, Dhaka;
c) Metropolitan Magistrate,1st Court, Chief Metropolitan Magistrate Court, Dhaka;
d) Senior Judicial Magistrate,1st Court, Chief Judicial Magistrate Court, Dhaka;
e) Senior Assistant Judge, Sadar1st Court, Judge Court, Chattogram;
f) Senior Assistant Judge, Sadar 2nd Court, Judge Court, Chattogram;
g) Metropolitan Magistrate, 1st Court, Chief Metropolitan Magistrate Court, Chattogram;
h) Senior Judicial Magistrate, 1st Court, Chief Judicial Magistrate Court, Chattogram.

2. Accordingly all the relevant Judges/Magistrates along with their Controlling District Judge/Metropolitan Sessions Judge/Chief Judicial Magistrate/Chief Metropolitan Magistrate are requested to assist her for taking interviews and collecting information.

31.03.2019
(Toyebul Hasan)
Senior Assistant Secretary
Phone: +88-02-9577420

Copy forwarded for kind information & necessary action to (not according to seniority):

1. District and Sessions Judge/ Metropolitan Sessions Judge, Dhaka/Chattogram.
2. Chief Judicial Magistrate/Chief Metropolitan Magistrate, Dhaka/Chattogram.
3. Ms. Ummey Sharaban Tahura, Attached Officer (Joint District Judge), Law and Justice Division.
4. P.S. to Secretary, Law and Justice Division.
5. Senior Assistant Judge/Senior Judicial Magistarte/Metropolitan Magistrate, ..., Dhaka/Chattogram.
6. Programmer, Law and Justice Division (Requested to publish in the website).
7. Guard File.
8. Office Copy.

user, user.Dishal, permission of education/jobs/land

Appendix C: Participant Information and Consent Form

Macquarie Law School
Faculty of Arts
MACQUARIE UNIVERSITY NSW 2109

Phone: +61 (0)2 9850 7082
Fax: +61 (0)2 9850 7686
Email: rafiqul.islam@mq.edu.au

Chief Investigator's / Supervisor's Name & Title: Professor Muhammad Rafiqul Islam, Professor of Law.

Participant Information and Consent Form

Name of Project: The Subordinate Judiciary of Bangladesh: Making Litigation Cost-Effective and Justice Friendly

You are invited to participate in a study of finding the causes of escalating the litigation expenses high in Bangladesh sorting out the gaps between the law and practice. The purpose of the study is to find why the cost rules are not applying properly. It will also find out the stages where the costs lie most and also find scope to reduce the litigation expenses.

The study is being conducted by Ummey Sharaban Tahura, PhD Candidate of Macquarie Law School, Macquarie University; +61(2)98508647; email: ummey.tahura@students.mq.edu.au as being conducted to meet the requirements of (Doctor of Philosophy) under the supervision of (Professor Muhammad Rafiqul Islam, Professor of Law, Macquarie Law School, Macquarie University; Phone: +61(2) 9850 7082; email: rafiqul.islam@mq.edu.au.

If you decide to participate, you will be asked to participate in an interview of approximately one hour duration. During this time you will be asked a range of question relevant to the board aims of the research. You may be asked to comment on what are the common concerns and queries complaints have about pursuing the court proceedings you are facing with while seeking justice. You may also be asked about whether you have any particular views on or experience with court environment.
With your consent, the interview will be digitally (audio) recorded to ensure that data is accurately recorded and that reliable records are maintained. Once the record is done it will be transcribed by Tahura as soon as possible. The transcribed interviews will be securely stored at Macquarie University for five years for safety reasons if needed. There will be no secretive use of this recording. Do you agree for me to digitally record this interview?

Yes ☐ No ☐

This research will be done for academic purpose and no remuneration is involved.

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 consent. During the thesis writing 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.

Professor Rafiqul Islam (Chief Investigator) and Ummey Sharaban Tahura (Co-Investigator) will be the person who will have access to the data.

Appendix D: Semi-Structured Questions for the Interviews

Clients

1. What type of case is it?
2. When have you filed the case?
3. How often do you come to the Court?
4. How much do you earn/month?
5. How much do you need to spend each time you come to the court?

   5.1 Can you fragment the expense?

Persons	Lawyers	Lawyer's Assistant	Court Staff	Copy Section	Convinces and Food	Others
Cost (BDT)						

   5.2 For what purpose you have to spend most?

   5.3 Do you think the expenses are reasonable?

   5.4 In which Stage you had to spend most? Why?

Civil Cases

Stages	Summons	Plaint/ W/S	Interlocutory Matters	ADR	Framing of Issue	Steps for Discovery	PH	Argument	Judgement
Cost (BDT)									

Criminal Cases

Stages	Filling (Court/Police Station)	Interlocutory Matters	Investigation	Charge Frame	PH	Argument	Judgement	Others
Cost (BDT)								

5.5 For whom the cost raises most?

6. Do you think the court fees are reasonable? If not, please explain.
7. How do the Court staff cooperate with you in sharing information?

   7.1 Do you need to spend for access to information?
8. Do you use smartphone?

   5.1. If some information is given through the internet, will you be able to access it?

   5.2 Do you think information through internet or phone will save your time and money?
9. How cooperative is your lawyer? Did he ever advise you not to file a case if it is weak in merit?
10. Do you think the lawyer's fees are reasonable? (no win no fee)

    10.1 Do you pay the lawyer on contract basis?

    10.2 How are the ranges of the lawyer's fee?

    10.3 Does it include the lawyer's assistant's fee?

    10.4 If the lawyer's fees would be contractual, will it be cost-effective?

    10.5 Do you think there should be a guideline for lawyers limiting their charge to avoid the disparity?

    10.6 Do you think a 'no win no fees' would enhance access to justice? How would you justify this?
11. Have you ever tried to mediate the case?

    11.1 Who took the initiative?

    11.2 Why it was unsuccessful?

    11.3 Do you think if you would mediate, then the case would less expensive?

    11.4 Do you think mediation would benefit you economically?
12. Have you heard about the legal aid?

    12.1 How have you heard about it?

    12.2 Do you think the legal aid would help you to reduce your litigation cost?
13. How the cost rules would impact upon you if applied properly?

    11.1 Do you think if the other party (if fails to prove his case) would provide you the cost would it be easier to pursue justice?
14. How would you define justice? What is your expectation from the court?

Lawyers

1. How many cases are you taking care of?
   1.1 Do you think the burden upon the lawyers compromises the quality of their service?
2. Do you think the litigation expenses are being higher gradually? Why?

3. In which stage the cost lies most?

4. How do the Court staffs cooperate with you in sharing information?
   4.1 Do you need to spend for access to information?

5. Do you think the technology can make the way easier to access the information?
   5.1 Will it be easy to access through internet or phone?
   5.2 Do you think technology can reduce the litigation cost?

6. Have you ever tried to mediate?
   6.1 Was it successful? If not, why?
   6.2 Do you think mediation could reduce the litigation cost? Or benefit client economically?
   6.3 Why the success rate in mediation is so poor?

7. How much do you charge for your cases? (no win no fee)
   7.1 Do you charge at a time or date wise?
   7.2 Does the charge vary from case to case? If yes, please explain.
   7.3 Does the charge vary from client to client? If yes, could you range the charge?

8. Do you think there should be a guideline for the lawyer providing a standard of charge considering the nature of cases?

9. What reasons are escalating the litigation cost?

10. Have you ever told your client that the case has ‘no merit’?

    10.1 Have you ever tried to convince your client not to file a meritless case?
    10.2 Did they listen to your advice?

11. If the lawyer's fees would be insured, would it be helpful?

12. How often are the cost rules applied?
    12.1 Do you think the cost rules need to change?
    12.2 What should be the maximum cost in civil and criminal cases?
    12.3 Do you think cost rules could limit the number of litigation if would apply properly?
    12.4 Why are the rules not applying properly?
13. Have you heard about legal aid?
    13.1 How do you evaluate legal aid program?
    13.2 Have ever tried to serve through legal aid?

Judges

1. How many cases are pending in your court?
2. What types of cases take time most to resolve?
3. In which stage of the cases take time most? Explain.
4. Do you impose a cost upon the parties?
   4.1 How often do you impose?
   4.2 On which ground have you imposed a cost upon parties? Interlocutory matters or final decision?
   4.3 How much have you imposed a cost upon the parties? (Maximum limit)
   4.4 Do you think the cost rules are implying properly? If not, why?
   4.5 Do you think cost rules can ensure the access to justice to an extent?
   4.6 Do you think cost rules can control the number of litigation if applied properly?

5. Do you think the cost rules need to be changed?
   5.1 What should be the maximum cost in civil and criminal cases? Or should there be any limit?
6. Do you think judicial discretion properly implied while imposing cost award?
7. Do you think there should be a guideline for the lawyer providing a standard of charge considering the nature of cases?

8. What reasons are escalating the litigation cost? Explain
9. Do you think the technology can make the way easier to access the information?
   9.1 Will it be easy to access through the internet?
   9.2 Do you think technology can reduce the litigation cost?
   9.3 What should be the primary need to introduce technology effectively?
10. Do you think court staff escalating the litigation expenses?
    10.1 Will it be possible to control through the proper monitor?
    10.2 How the monitoring system could be developed?

11. Do you think mediation could reduce the litigation expenses? Or benefit client economically?
    11.1 How would be the judge's role to mediate?
    11.2 Why the success rate in mediation is so poor?

Court Staff

1. How long are you working in the present post?
2. How many cases are pending in this court?
3. Do you think the litigation is being expensive day by day?
   3.1 Is there any reason behind it? Explain.
4. Do you charge for disseminating information?
   4.1 Is there any rate? Or the clients do it voluntarily?
   4.2 How much do you get for disseminating information?
5. Do you know about the legal aid program?
   5.1 Have you ever referred to anyone about legal aid?
6. In which stage the cost lies most?
7. Do you think cost rules can control the number of litigations?
8. Do you think if the litigant would get back their legal cost reasonable it would help them to ensure justice?
9. Do you think the technology can make the way easier to access the information?
   9.1 Will it be easy to access through the internet?
   9.2 Do you think technology can reduce the litigation cost?
   9.3 What should be the primary need to introduce technology effectively?
10. Do you think mediation could reduce the litigation expenses? Or benefit client economically?
    10.1 Why the success rate in mediation is so poor?
11. Do you think the cost rules need to be changed?
    10.1 What should be the maximum cost in civil and criminal cases?
12. Do you think there should be a guideline for the lawyer providing a standard of charge considering the nature of cases?
13. Do you think proper monitoring could ensure the responsibility of the staff towards clients?

Community People

1. Do you think people refrain themselves from access to justice, just because the procedure became too expensive and complex?
   1.1 If yes/no, explain.
   1.2 How this problem can be solved?
2. Do you think if the litigant would get back their legal cost reasonable it would help them to ensure justice?
3. Who plays a vital role to escalate the litigation cost? How?
4. Do you think mediation could be a solution to reduce the litigation cost?
   4.1 Why the the rate of mediation is not satisfactory?
   4.2 How the rate could be increased?
5. Do you think there should be a guideline for the lawyer providing a standard of charge considering the nature of cases?
6. Do you think the technology can make the way easier to access to the information?
   6.1 Will it be easy to access through internet?
   6.2 Do you think technology can reduce the litigation cost?
7. Do you think cost rules can control the number of litigations?
8. Do you think court staff escalating the litigation expenses?
   8.1 Will it be possible to control through proper monitor?
   8.2 How the monitoring system could be developed?
9. Have you heard about legal aid?
   9.1 Will it help the poor to access to justice?
10. Could you comment on how the overall justice system is working in Bangladesh?