

RESEARCH ARTICLE

Role of Clients, Lawyers, Judges, and Institutions in Hiking Litigation Costs in Bangladesh: An Empirical Study

Ummey Tahura*

Macquarie University

*Corresponding author. E-mail: rimi1982@gmail.com

Abstract

This paper investigates how individuals such as judges, lawyers, clients, and court staffers as well as institutions are elevating litigation costs in Bangladesh in multiple ways. It explores how the existing law and procedures as well as key institutions further promote case delay. It also examines the ways in which police departments and the prosecution contribute to elongate criminal trials and invite additional litigation costs. Empirical data collected through in-depth interviews are analyzed, drawing propositions to individuals' contributions to delay in case-processing time and hike up litigation costs. Data analysis also assesses common people's perceptions and expectations from the justice sector. Contemporary legal research has been critically analyzed, where needed.

Keywords: litigation cost; Bangladesh legal system; empirical research; individual and institutional contribution

1. Introduction

Excessive litigation costs are a common barrier to access to justice.¹ Even developed nations like the UK, the US, and Australia are struggling with high litigation costs.² In particular, case congestion increases delay and hikes up the litigation costs.³ Considering the cost associated with litigation, it may be argued that justice is only available to those who can afford it. Conversely, a significant portion of the population is excluded from accessing justice due to general unaffordability.⁴ Sohaib 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.⁵ The contemporary legal scholar found that lack of incentives for judges, lawyers, and litigants is the main obstacle for efficient judiciaries, where their

¹ Australian Law Reform Commission (1995), p. 7; Hadfield (2014), p. 44; Cranston (2006), p. 35; GFK Slovakia (2004), p. 49; Sato et al. (2007); Legal Services Agency (2006), p. 79; Genn (1999), p. 80.

² Woolf (1996), Part II; Chodosh et al. (1997), p. 29; Cappelletti et al. (1975), pp. 218–19; Legal Service Corporation (2007), p. 13.

³ Kojima (1990), p. 1218; Cappalli (1989), p. 306; Chase (1988), pp. 55–6; Newman (1985), p. 1645; Moog (1993), p. 1136; Murthy & Rubiyath (2010), p. 3.

⁴ Rhode (2004), p. 3; Houseman (2007), pp. 43–6; Engler (2012), p. 172.

⁵ Sohaib et al. (2019), p. 4.

inefficient counterparts inevitably contribute to increasing the price of litigation.⁶ Another group finds that complicated legal procedures also hike the litigation costs.⁷

Bangladesh is a populous country with rapidly growing wealth inequality, attributed to a lower-skilled workforce facing increasing rates of landlessness and impoverishment.⁸ Of the total land, only 52% is arable,⁹ making each piece virtually priceless and (unsurprisingly) responsible for 77% of the total number of lawsuits in Bangladesh.¹⁰ With some 24.3% of the population being below the poverty line (58 in terms of world ranking) and another 33% belonging to the middle class,¹¹ expensive litigation, excessively high lawyers' fees, complex legal proceedings, limited legal-aid facilities, and corrupt judiciaries have together made the justice system inaccessible for a majority of the nation's people, resulting in poor public confidence in the administration of justice.¹² Now, with a mixed-justice system—which was mostly modelled on English common law and sharia law¹³ while Bangladesh was under British colonial rule (until 1947) before becoming part of the Indian subcontinent (governed by Muslims and Hindus)¹⁴—the pluralistic legal system remains evident in the customary laws, various personal laws, and English laws that govern modern-day Bangladesh.¹⁵

In the meantime, the Constitution of the People's Republic of Bangladesh structured the judiciary to the Supreme Court of Bangladesh, the subordinate courts, and the specialized courts and tribunals.¹⁶ Being a "unitary" country, Bangladesh has only one Supreme Court that consists of the Appellate Division and the High Court Division.¹⁷ The subordinate courts (which allocate to the administrative units/districts)¹⁸ function in their hierarchical order under the applicable district court. At that level, ordinary courts are grouped as civil or criminal courts. Magistrates have jurisdiction on specified criminal matters.¹⁹ Specialized tribunals and courts,²⁰ established by special statutes, operate within a statutory hierarchical order,²¹ some under the hierarchy of the district courts and the magistracy.²²

After the emergence of Bangladesh in 1971, no significant changes were made to the country's judicial structure until 2007, when the subordinate courts were separated from the executive²³ as a consequence of a historic judgment in the *Masdar Hossain* case.²⁴ Following the directives of the Appellate Division of the Supreme Court of Bangladesh,

⁶ Botero et al. (2003), p. 62.

⁷ Buscaglia & Dakolias (1999), p. 100.

⁸ Chen (1986), p. 221.

⁹ Central Intelligence Agency (2020).

¹⁰ Barkat & Roy (2004), p. 291.

¹¹ Central Intelligence Agency, *supra* note 9.

¹² Islam (2017), p. 53.

¹³ Hoque (2014), p. 447.

¹⁴ Jain (1970), p. 1.

¹⁵ Hoque, *supra* note 13.

¹⁶ Constitution of the Peoples' Republic of Bangladesh 1972, Part IV. See also Islam, *supra* note 12, p. 35.

¹⁷ Constitution of the Peoples' Republic of Bangladesh 1972, *supra* note 16, Art. 94.

¹⁸ Administrative units are called districts in Bangladesh. However, the smallest administrative unit is called a "union."

¹⁹ Islam, *supra* note 12, p. 36.

²⁰ Examples of specialized tribunals include the administrative tribunals, labour tribunals, cybercrime tribunals, and so on.

²¹ Islam, *supra* note 12.

²² Examples of specialized courts are the family court, children's courts, municipal court, environment court, anti-corruption court, money loans court, and marine court.

²³ Panday & Mollah (2011), p. 14; Halim (2017), pp. 68–9.

²⁴ *Secretary, Ministry of Finance v. Md. Masdar Hossain and others* (1999) 52 DLR (AD).

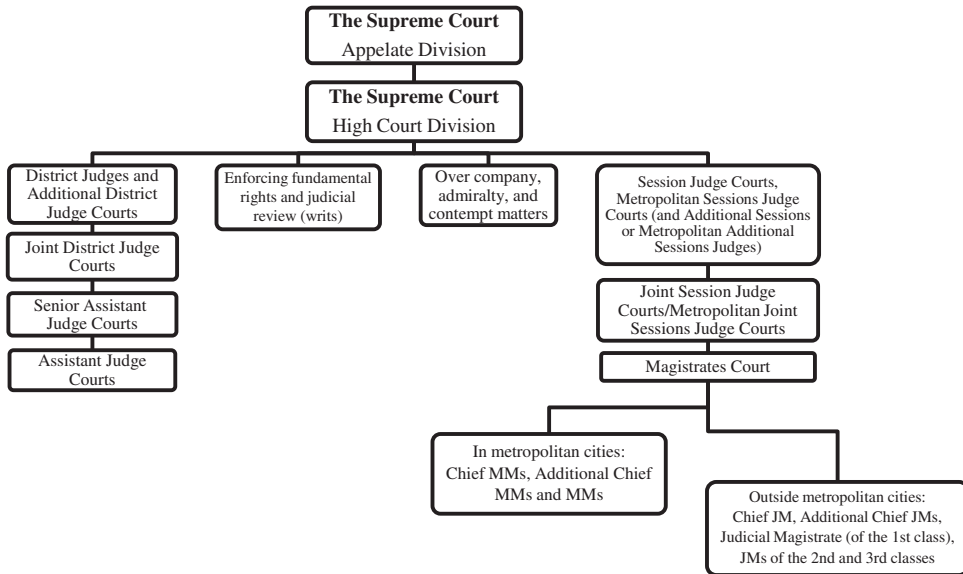


Figure 1. The court structure in Bangladesh. JM, judicial magistrate; MM, metropolitan magistrate.

the then-caretaker government amended section 6 of the Code of Criminal Procedure 1898 to ensure the separation of (criminal) judiciary from the executive.

The subordinate judiciary in both civil and criminal matters originate from section 3 of the Civil Courts Act 1887 and section 6 of the Code of Criminal Procedure 1898, respectively.²⁵ There are separate procedural laws for civil and criminal courts. Subject to some nominal amendments, the British-era laws are still functioning in Bangladesh.

There are five tiers of ordinary civil courts in Bangladesh, each of which has different pecuniary and territorial jurisdictions stipulated in law. For example, the entry-level courts are assistant judges' courts for civil cases and judicial magistrates' courts are for criminal cases.²⁶ Single judge-composed courts and tribunals (with few exceptions) are one key attribute of Bangladesh's subordinate courts.²⁷ Graduates from law school can be appointed as a judge or magistrate if they pass a competitive examination conducted by the Bangladesh Judicial Service Commission.²⁸ However, upon completing a certain period of time²⁹ in each stage with satisfactory performance in a judicial post, a service member may be promoted to the next superior post subject to availability. The highest post of service is the district and sessions judge, who sits as the court of district judge in civil matters or as the Court of Sessions judge in criminal matters.³⁰ Figure 1 shows the structure of the court system in Bangladesh.

²⁵ Halim, *supra* note 23, pp. 105, 115.

²⁶ There are two classes of magistrate courts: judicial magistrates and executive magistrates. The former are appointed after recommendations from the Bangladesh Judicial Service Commission and have a law background, and the latter are appointed after recommendations from the Bangladesh Public Service Commission. Executive magistrates do not necessarily have a legal background, but they form part of the administration. See the Code of Criminal Procedure 1898 (Bangladesh), s. 6.

²⁷ Hoque, *supra* note 13, p. 449.

²⁸ Bangladesh Judicial Service Commission (2019).

²⁹ These periods for each stage are determined by the president of Bangladesh. For example, the entry post for subordinate courts is assistant judge. After four years of work experience, s/he can be promoted to senior assistant judge.

³⁰ Hoque, *supra* note 13, p. 453, 455.

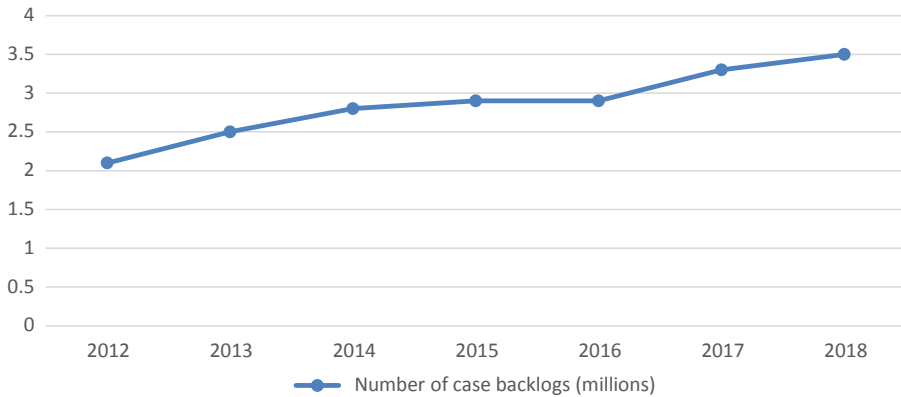


Figure 2. The pending rate of case backlogs since 2012 in the Bangladesh judiciary (prepared by the researcher). Source: based on data retrieved from the Supreme Court of Bangladesh and various newspaper articles.

Yet, the Bangladesh judiciary is now plagued by delays, extreme backlogs, high litigation costs, lack of transparency, unpredictability in court decisions, absence of formal court management and case management, mismanagement of case records, shortage of judges, and limited access to justice. Notably, the laws in Bangladesh that regulate the rate at which cases are disposed of invite a host of problems throughout the entire judicial system, mainly in relation to new case filings. Currently, the statutory timeline for concluding a civil case is 340 days,³¹ 180 days for judicial magistrate-triable criminal cases, and 360 days for a session-triable criminal case³²; however, in practice, the average time to do so at the trial level actually takes five years or more.³³ Appeals, revision, and review further aggravate the ordeal delay in trials. Data collected from the Supreme Court of Bangladesh 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. Currently, there are 3,053,870 cases that are pending at subordinate courts—among them, 5,85,834 cases are older than five years.³⁴ The present disposal rate of cases at the subordinate courts is 87.15%, with 1,800 judges. A few new courts and tribunals have been established to uplift the disposal rate, but many are either vacant or have already-overburdened judges placed in charge, in addition to their existing courts.³⁵ Therefore, the increased backlog of cases is rising (see Figure 2), along with the time needed to dispose of a case.

Against this backdrop, this paper investigates how those who are intimately involved in court proceedings—including judges, lawyers, clients, and court staff—contribute to increasing litigation costs in various ways, such as by delaying the case-processing time, availing extra privileges by spending more money on defying the law, the uncompromising mindset of the litigants, unavailable information relating to case length, the lawyer-dominated adversarial legal system, the passive role of 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. This is based on

³¹ Tahura & Kelly (2015), p. 4.

³² The Code of Criminal Procedure 1898, *supra* note 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 session court can try crimes punishable by death (s. 6, 29C).

³³ Hoque, *supra* note 13, p. 481.

³⁴ Data collected from the Supreme Court of Bangladesh.

³⁵ Data collected from the Supreme Court of Bangladesh. I thank Akramul Hoque Samim for his apt assistance.

findings from participants in the study, who all opined that delay and elevated legal expenses are closely connected. The paper further analyses how key institutions and the existing law and legal procedures in Bangladesh—in place to ensure universal access to justice—are also hiking up litigation costs. Their contributing measures will lead the way forward to minimizing legal expenses.

2. Data-collection method and procedure

Individuals involved in the court proceedings, such as judges, lawyers, court staff, clients, and representatives from civil society, were interviewed using a semi-structured and open-ended questionnaire to gather data from Bangladesh. Thirty-six key participants were recruited for face-to-face interviews, and eight cases were selected from the two districts that accumulated the most significant number of cases. Empirical evidence was obtained through an approved process following rigorous deliberations by the ethics committee. This in-depth analysis showed civil-services participants' perceptions about and expectations of the justice sector.

The data-sampling method used a two-stage sampling process—the first stage involved selection of case records from the relevant courts. On the day of the interview,³⁶ the most progressed and oldest³⁷ cases from the cause list³⁸ were chosen as, in those cases, most of the trial had already occurred and the majority of the expenses had already been incurred. The second stage involved identifying the individuals related to the case records. Once a case had been selected, the clients and lawyers linked to the case were identified and their presence checked. The courtroom staff and judges presiding over the court of the relevant case were easily identified, as their appointments records were publicly available. Representatives from the civil services who were checked as having experience in court procedures, but not necessarily from a legal background, were randomly selected. Case records and government statistics were also analyzed to support the findings. Some statistics were taken from the Supreme Court of Bangladesh and the Ministry of Law, Justice and Parliamentary Affairs. The ethics conditions set by the Macquarie University Human Research Ethics Committee were met throughout the empirical research.

3. Findings on increasing litigation costs in Bangladesh

Case pendency, delay, and litigation costs are positively correlated. That is, pendency in courts increases when the rate of filing exceeds case disposal.³⁹ Some factors that arise when increasing the 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 resulting in an explosion of litigation, increasing awareness of legal rights, and economic growth.⁴⁰ However, other factors that greatly increase litigation costs *are* within judicial control. This study limits the scope to those individuals and institutions directly associated with the case proceedings and, within judicial control, contribute to elevating litigation costs.

There are two types of litigation costs: public costs, incurred by the government; and private costs, incurred by the justice-seekers. Previous research has shown that costs

³⁶ A pre-scheduled interviewing date was chosen.

³⁷ Each case contained a number alongside the filing year. This is how older cases were easily identifiable.

³⁸ 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 the Civil Rules and Order (Bangladesh), r. 13.

³⁹ Murthy & Rubiyath, *supra* note 3.

⁴⁰ Chodosh et al., *supra* note 2, p. 27; *ibid.*, p. 3.

directly incurred by litigants are a barrier to accessing justice.⁴¹ Therefore, the increase in private-litigation expenses has been a growing concern in the West for the last four decades.⁴² This research categorized two types of expenses related to private costs. The first is the common expenses typically incurred at each appearance in court, including lawyers' fees, travel and food costs, and tips for courtroom staff and lawyers' assistants. Other one-off costs include court fees, expenses for collecting documents, expert-witness fees, Commissioner's fees, discovery costs, and fees for hiring special lawyers for a special hearing. The gross amount of common costs typically exceeds one-off costs. Nonetheless, both measures borne of an individual litigant can converge to make litigation a financially draining process.⁴³ The following section examines how these common and one-off costs are further enhanced by those who are closely connected to the procedure, despite the duty to curb injustice.

3.1 How lawyers contribute to increasing litigation costs

The concept of lawyers across the Indian subcontinent had been derived from the British legal system.⁴⁴ 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,⁴⁵ often referred to as "friends of the court" when their services are engaged on an *amicus curiae* basis at the request of the courts. Initially, the legal profession was a sign of prestige and wealth⁴⁶; later on, though, the glory faded and their involvement in resolving disputes became inevitable.⁴⁷ Indeed, the administration becomes too challenging to carry out without lawyers' co-operation, 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.⁴⁸ Trubek and other scholars' empirical research also found that, among litigation expenditure, the majority constituted of lawyers' fees.⁴⁹ Other expenses (e.g. expert-witness fees, stenographic costs, and travel expenses) made up a small percentage of the total bill.⁵⁰

That is to say that the legal profession in Bangladesh is entirely profit-oriented, with very few exceptions. For example, some close relatives and friends of lawyers get free legal advice. However, government-funded legal-aid services have been available since the enactment of the Legal Aid Services Act in 2000.⁵¹ Empirical research has found that there are no pro bono associations of lawyers in Bangladesh to help economically disadvantaged individuals. Lawyers' unwillingness to serve the poor, along with formal substantive and institutional limits, has only decreased the prospect of supplying widespread access to justice.⁵² In Bangladesh, no concrete regimes are available that govern lawyers' fees, meaning that they are free to charge as they please and that the rates will vary on the financial muscle of litigants and the complexities of the case at hand. From the sample cases, it was found that each party spent an average of 2,875 Bangladeshi Taka (BDT) on each

⁴¹ Gramatikov (2009), p. 118; Genn & Paterson (2001), p. 98.

⁴² Williams & Williams (1994), p. 73.

⁴³ Tripathi (2016); Sohaib et al., *supra* note 5, p. 17.

⁴⁴ Rocher (1968), pp. 383–4.

⁴⁵ Mahajan (1989), p. 1.

⁴⁶ Ives (1968), pp. 148–9.

⁴⁷ Abel-Smith & Stevens (1967), p. 462.

⁴⁸ Zorza (2010), p. 16.

⁴⁹ Trubek et al. (1983), pp. 111–2. See also Sohaib et al., *supra* note 5, p. 5; Semple (2015), p. 648.

⁵⁰ Semple, *supra* note 49, p. 648.

⁵¹ The Legal Aid Services Policies 2014 (Bangladesh), s. 2. Accordingly, a person will be eligible for legal-aid funding if his annual income is less than BDT 100,000.00.

⁵² Sohaib et al., *supra* note 5, p. 17.

appearance (which is set as an average per month) in the court as their personal cost. Based on a conservative estimate, each party will spend approximately BDT 34,500 each year, of which BDT 25,050 is made up of lawyers' fees—or 72% of their common litigation expenses and almost 24% of their average per-capita income.⁵³ This estimation indeed suggests that the average lawyer's fees are beyond the affordability range for the majority of Bangladeshis.

A by-product of charging “per hearing or appearance” (which fluctuates by hearing date) is that lawyers are not stipulated to finish a matter within a set period of time, encouraging many to purposely prolong cases. Empirical data found that there are no “contingency fees arrangement system” or “conditional fees agreement” or “no-win no-fees” provisions in Bangladesh. Lawyers work with no fixed rate and they can make money for the active duration of the litigation. Half of the lawyers interviewed (the total number of interviewee lawyers was eight) agreed that the length of cases profits them financially, lending support to Kidder's findings.⁵⁴ 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.⁵⁵ 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 that controls legal fees means there is a lack of options and decisive authority in place when it comes to regulating the price of litigation.⁵⁶

The increased number of lawyers allowed to practise in Bangladesh also contributes to the growing volume of legal proceedings. 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 on a lifetime basis and, excluding the payment of yearly fees, means no requirement for renewal. This does not encourage lawyers to pursue further professional development or help to quell the excessive number of people joining the profession.⁵⁷ 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 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 the data, in 2018, 5,000 new members were set to join the Dhaka Bar Association alone, which will inevitably multiply the rate of case filings.⁵⁸ One interviewee said that, 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 other laws such as the laws on violence against women or prohibition of dowry and domestic violence. 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 in handling a variety of cases and to keep the pressure on the opponent through multiple cases.

Lack of available information to the public is another key cash contributor. As legal information is not widely available in Bangladesh, litigants have to rely on their lawyers

⁵³ The average per-capita income rose to BDT 1,698.26 in 2018 (currency rate BDT 1 = USD 0.012 on 9 February 2018). See also Worldbank.org (2018); Star Online Report (2017); Central Intelligence Agency, *supra* note 9.

⁵⁴ Kidder (1974), p. 28.

⁵⁵ 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.

⁵⁶ The Law Commission of India (1988), p. 14.

⁵⁷ Anyone who passes the bar council examination initially is granted a licence to practise.

⁵⁸ This information was received at the time of interview from one interviewee lawyer who held the position of the Dhaka Bar Association.

for news and materials, particularly as illiteracy is disproportionately rife. Left with little choice but to follow their lawyers' advice, justice-seekers 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. Importantly, lawyers in Bangladesh do not face any reputational, professional, or economic damage for attaining meritless cases. As in Australia or the UK, legal practitioners in Bangladesh do not face any sort of liability for incurring any unnecessary costs in a case process.⁵⁹

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.⁶⁰ To retain clients, many use techniques that are known as “lawyers’ rhetoric,”⁶¹ which includes unnecessarily long and vague pleadings that are written arguably to impress their clients. However, maintaining a high volume of cases means that lawyers rarely have sufficient time to prepare for a case, thereby prolonging proceedings even further.⁶² The typical scenario observed in this study was that a few lawyers deal with a large number of cases and often face multiple hearings a day. Therefore, they send their juniors to the concerned court with an adjournment petition, as they cannot manage to attend all the hearings. Data also found that, to maintain this standard of work, lawyers seem to 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, the ratio of public prosecutors is inadequate in Bangladesh compared to the number of criminal cases. Public prosecutors will also, by law, only become involved in a case at the time of trial. Lacking thorough knowledge about the case and adequate case preparation, many will inevitably submit a petition for an extension, thus delaying the proceedings and outcomes of a trial. This is an especially dire aspect of criminal litigation, as witnesses can forget key knowledge, lose interest in a case, change residential address, or even die. Data found that most court-appointed public prosecutors are underqualified lawyers who come from an affluent political background. In addition, public prosecutors often remain absent at the time of hearings, mainly because (1) their accountability is not strongly maintained and (2) poor payment discourages them from appearing in court. One client interviewed for this study even alleged corruption against prosecutors, accusing them of taking bribes from the defendant to abstain from attending a trial.

Lawyers’ assistants contribute further to increased litigation costs. Empirical research found that the tradition in Bangladesh is that every lawyer maintains two types of assistants—one type are known as “juniors” or freshly enrolled lawyers, aspiring to be “independent” lawyers; and the other type do not necessarily have 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 possesses a number of juniors. The number of *munshis* and juniors that remain present during a hearing becomes a matter of pride. Morrison found that this lawyer–assistant relationship is often tense and hostile.⁶³ For example, one court staff member interviewed for this study shared that lawyers’ assistants occasionally charge extra from clients to liaise between them and lawyers.

⁵⁹ Civil Procedure Act 2005 (Australia), s. 99; Civil Procedure Rules 1998 (UK), r. 44.11.

⁶⁰ Moog (1992), p. 27; Galanter (1989), p. 282.

⁶¹ Kidder, *supra* note 54, p. 15.

⁶² Mendelsohn (1981), p. 823.

⁶³ Morrison (1974), p. 46.

Much of this systemic turmoil comes down to the fact that members of the legal profession in an adversarial court system enjoy a position of absolute indispensability.⁶⁴ This means the legal profession in Bangladesh operates in a mostly monopolistic market. A good number of the members of parliaments are from the law background and favour this community. In every district, lawyers have created local bar associations that are politically organized and possess diplomatic power to dominate the courts. Such associations may choose to incite court boycotts⁶⁵ to exert their will. Recently, a district judge was withdrawn from his workplace immediately after rejecting a bail petition for a politician of the ruling government⁶⁶ and another district judge experienced court boycott as he refused to grant bail to an accused of a rape case.⁶⁷ It became unacceptable practice to exercise political power to obtain a certain order; that is, if something goes against that order, lawyers will resort to withdrawing or releasing the judge, or stage a boycott. Even though lawyers can file a complaint against subordinate court judges with the Supreme Court of Bangladesh if there is any allegation of corruption or misbehaviour, boycotting provides a more immediate result. This practice is observed mainly in this subcontinent. As Mahajan explained:

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.⁶⁸

However, this tactic is seldom used by lawyers to challenge the presiding judge or to establish control over the flow of a case. The rules of the bar council do not permit lawyers to have indefinite periods of a boycott and preserve this only in theory. Importantly, clients will suffer the most from these lengthy (and costly) ordeals.⁶⁹ Moog found that boycotts can cause delay and damage the reputation of a judge, prompt premature transfer, and possibly suspend a promotion.⁷⁰ Recently, in India, the Uttarakhand High Court declared advocate strikes or court boycotts as illegal.⁷¹

Empirical findings only feed the perception that ethics are often overlooked within the Bangladeshi legal profession. The advocates have extensive power to control the court as well as cases, and such control results in case delay and escalates the litigation costs while contributing to the client's suffering.⁷² In Bangladesh, the central bar council, as well as local bar councils, are formally responsible for ensuring ethics and entertaining complaints against lawyers—although these organizations are likely nothing more than “empty threats.” The only visible execution of a complaint against a lawyer is a suspension of their licence for a short period. Nevertheless, it seems that legal advocates in Bangladesh have extensive power to control the courts as well as cases.

This moral chasm has fostered an environment in which lawyers frequently bribe members of the 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

⁶⁴ The Law Commission of India, *supra* note 56, p. 3.

⁶⁵ The courts will stage a boycott if lawyers refuse to enter the courtroom of a particular judge.

⁶⁶ See Prothom Alo English Desk (2020).

⁶⁷ See Local Correspondence (2019a); Local Correspondence (2019b); Staff Correspondence (2019); District Correspondence (2019).

⁶⁸ Mahajan, *supra* note 45, p. 2.

⁶⁹ *Ibid.*, p. 3.

⁷⁰ Moog, *supra* note 60, p. 29.

⁷¹ Talwas (2019).

⁷² Moog, *supra* note 60, p. 31.

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. Others claimed their lawyers did so on their part for a favourable hearing date or to attain other unfair advantages. All the interviewee clients (eight) shared that they have paid for the courtroom staff. Alternatively, the court staff will maintain silence against lawyers, as they believe lawyers dominate the legal process. Whatever the cause, issuing bribes or tips typically comes out of litigants' pockets.

Overall, it seems that the unrestricted nature of legal fees in Bangladesh contributes to extending trials and racking up hefty legal bills. The absence of any regulatory body to supervise the way in which lawyers charge fees remains uncapped, as they maintain a strong political hold on justice. Absolute dependency on lawyers for dispute resolution provides them with undivided power to control the case and court proceedings. The feeble bar council both locally and nationally became ineffective in ensuring lawyers' accountability.

3.2 How clients contribute to increasing litigation costs

Poverty, lack of legal literacy, complex court procedures, bureaucratic complexities, the involvement of multiple people,⁷³ and the legal-language barrier⁷⁴—all discourage litigants from actively participating in court proceedings. Foremost, lack of their involvement in such matters undermines lawyer–client accountability and reduces the likelihood of settlement.⁷⁵ Given that legal information in Bangladesh is inaccessible and difficult to navigate for most laypeople, this leaves litigants wholly unaware of their case strength or weaknesses. Forced to consult practitioners eager to reap the financial benefits of a trial, this 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 are present at court. Six of the interviewee clients could not articulate the scheduled stage of their cases. This was attributed to the client's lack of awareness of his or her case.

Some clients use the litigation process not as a means to resolve a dispute, but instead as a means for harassment, profit-making, and maintaining political dominance.⁷⁶ These individuals typically view courtrooms as an arena to compete for social status and political and economic dominance, and see the litigation process as a means to gain prestige.⁷⁷ The most common tactic that clients use to delay court proceedings is submitting frequent adjournment petitions,⁷⁸ causing additional financial burden that forces economically inferior parties to drop matters or accept unfavourable settlements.⁷⁹ Generally, these more egoist and uncompromising clients who are unwilling to mediate with the other party are known as *mukadamabaz*,⁸⁰ or chronic litigants,⁸¹ and tend to view the process as a way to punish the opposing party.

⁷³ For example, a civil case is filed in the office under *serestadar* (court clerk) upon the judge's approval. When a case is ready for trial, then the record is sent to the *peshkar* (bench assistant), who presents the case before a judge.

⁷⁴ Most of the parent laws—such as the Code of Civil Procedure 1908 (Bangladesh); Code of Criminal Procedure 1898, *supra* note 26; Evidence Act 1872 (Bangladesh); Penal Code 1860 (Bangladesh); Specific Relief Act 1877 (Bangladesh); Family Courts Ordinance 1985 (Bangladesh); and so many others—were enacted by the British in English.

⁷⁵ Chodosh et al., *supra* note 2, p. 49.

⁷⁶ Cohn (1959), p. 90; Kidder (1973), p. 121.

⁷⁷ Moog (1991), p. 551; Kidder, *supra* note 76, p. 129; Morrison, *supra* note 63, p. 52.

⁷⁸ Moog, *supra* note 77, p. 551. See also Woolf (1997), p. 307; Economidies (2015), p. 414.

⁷⁹ See also Nims (1953), p. 455; Merry & Silbey (1984), p. 154.

⁸⁰ In Bengali, this refers to the person who finds the only solution to a dispute by filing a case.

⁸¹ Morrison, *supra* note 63, p. 59.

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 after 19 years since the introduction of alternative dispute resolution (ADR) methods in Bangladesh, the number of cases resolved through ADR is not satisfactory.⁸² Data collected from the Supreme Court of Bangladesh demonstrate that the rate of disposal through mediation is less than 5% of the total disposal. Empirical evidence also found that there is a tendency for 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 one generation to another, so the values these families hold and the relationships they have often result in their uncompromising attitudes to the cases,⁸³ which often results in unreasonably lengthy trials.

This study further discovers that legal expenses often exceed the disputed amount of money. Two out of four clients (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 had increased and how. Records show that case filings typically increase through counter-cases and become a never-ending process that causes a grievous social and economic loss for everyone involved. Based on the interviews conducted, these litigants often allow or even urge their lawyers to utilize 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.

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. The law is not specific regarding indemnifying the winner of the litigation. Though some scattered provisions⁸⁴ imposing costs for false or vexatious civil cases or delaying case proceedings exist in law, their application is rarely visible. In criminal cases, only nominal fines are available against the convicts that are realized in favour of the state. Victims are frequently denied from being compensated unless the law is particular on that. This results in case-filing curving upwards as people do not hesitate to file a case.

This paper finds a public perception that, if people do not spend (extra) money, they will not receive (extra) favours. Supporting this assertion are studies which show that litigants believe they will not get due justice without forfeiting additional expenses.⁸⁵ This research found that paying tips to court staff is not only typical in Bangladesh, but also expected in some cases. Conversely, four out of eight interviewee staff members claimed that, if they refuse to accept tips from clients, they will consider them to be biased towards the opposing party. Therefore, 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 members of the court staff. They claimed that they normally do not bribe staff directly, but instead rely on their lawyers to distribute money on their behalf. This study found clients spent 3% of their total expenses for tips. Both clients and staff shared that there is no fixed rate for tips and, generally, court staffs do not insist, although one client shared a negative experience, stating that the courtroom staff in his case refused to

⁸² The ADR system was introduced formally in Bangladesh in 2003; however, the family laws incorporated ADR in 1985. See the Family Courts Ordinance 1985 (Bangladesh), s. 10. Statistics collected from the Supreme Court of Bangladesh show that the overall disposal rate through ADR is around 5%.

⁸³ Mendelsohn, *supra* note 62, p. 823.

⁸⁴ The Code of Civil Procedure 1908, *supra* note 74, s. 35; O. XVII, r. 3; XX, r. 6.

⁸⁵ Kidder found that bribery was so commonplace in Bangladesh that most people believe that nothing can be achieved without financial intervention. See Kidder, *supra* note 76, p. 126.

proceed without a bribe. Other clients considered court members as decision-makers and, therefore, wanted 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. Therefore, they neither trust their lawyers entirely nor disclose all the relevant facts at the beginning of a case. Amending pleading several times in civil cases is the most common consequence of non-disclosure of facts. Often, it causes a case stage to move back from trial to the service of summons as new parties are required to be added. However, the “deep mutual mistrust”⁸⁶ between lawyers and clients was not completely one-sided. Some lawyers interviewed 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 that the non-compromising, complex family relationships and failure or resistance to commit to and co-operate with lawyers see litigants in Bangladesh—who also use the courts as a tool to harass the opposition—make litigation a lengthy and expensive process.

This section demonstrates the contributions to increasing litigation costs by the litigants. Absence of any indemnity rule or financial threat, lack of accountability to each other, and distrusted relations encourage them to file a number of cases that add to the pile of pending cases and hence the cost of litigation.

3.3 How judges contribute to increasing litigation costs

In Bangladesh, the judge-to-population ratio is among the lowest in the world, at one judge for every 100,000 people.⁸⁷ Due to overcrowded courts, it is difficult to hear and decide an average of 70 to 100 matters in a single day. Though the law officially limits the number of scheduled daily hearings,⁸⁸ this restriction is hardly ever maintained. Jacob described judges’ powers as bureaucratic in actuality, which is why rules are rarely enforced.⁸⁹ If the law were to limit the number of hearings, it would increase the gap between two scheduled dates for the same case to one year, which would cause frustration for all the parties involved. Therefore, bench assistants will schedule cases twice or three times more than the law permits, with the assumption that most will be postponed upon request.

As a result, most cases scheduled for hearing are adjourned. Interviewee judges and court staff estimate that the ratio would be 60%. As the chasing target is almost unreachable, one judge expressed that they treat a proportion of the listed matters so casually and grant time petitions easily, even without looking into the case records. This trend in adjournments became institutionalized by Bangladeshi judges on facetious grounds to increase litigation length and cost. A long waiting list for a case hearing also allows judges to spend an average of three to four minutes for each hearing. Given the short time period, it is very difficult for a party to convince a judge of a specific relief she or he needs—hence, an adjournment becomes the more convenient option. Each delay means not only

⁸⁶ Kidder, *supra* note 54, p. 21.

⁸⁷ The current population in Bangladesh is 159,453,001 (July 2018). For more, see Central Intelligence Agency, *supra* note 9. The number of judges at the subordinate courts in Bangladesh is less than 1,700 (March 2019). Data collected from the Supreme Court of Bangladesh. See also Hoque, *supra* note 13, p. 469.

⁸⁸ See the Civil Rules and Order, *supra* note 38, r. 12; and the Code of Civil Procedure 1908, *supra* note 74, O. XVIII, r. 20. There must not be a total of more than five cases in the list for peremptory hearings in each working day, and the total number of cases set for hearing (taking evidence) must not exceed 100 cases in total at any one time.

⁸⁹ Jacob (1983), pp. 414–7.

rescheduling appropriate court appearances for all parties to attend, but also consuming more time, energy, and costs.

That said, judges rarely exercise their judicial authority to speed up proceedings despite their legal ability to set the court calendar and consolidate segments of a trial. Indeed, judges are legally authorized to schedule several stages of proceedings (i.e. presentation of pleadings, the framing of issues, presentation of evidence, final arguments, and judgments) for one appearance, if practicable.⁹⁰ 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. Often, they schedule a number of dates for one stage granting adjournments. It was also spotted that one or two appearances every two months are typical for most cases. To make matters worse, Bangladeshi laws have stipulated a timeframe for each stage of the court process, but it is rarely complied with in actual practice.⁹¹

A judge's frustration with the job—spurred on 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 approach in proceedings. Apart from job-related frustration, empirical research found other factors encourage judicial passivity in regard to case management, including pressure from lawyers, the public's presence in a courtroom, undue political influence, unavailability of witnesses on a scheduled date, fear of being mid-year transferred, unskilled as well as underqualified office staff, excessive administrative commitments and lack of logistics and technical support, and the tradition of their promotion on a seniority basis disregarding performance. Indeed, non-local, temporarily appointed judges live mostly isolated from the locals and lawyers. Interacting solely with their colleagues and courtroom staff, this imposed isolation often makes them mysterious to the public. All the while, 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, judges will attempt to restrain their proactivity—which inevitably contributes to increased litigation expenses. Office heads (e.g. chief judicial magistrate, chief metropolitan magistrate, district judge and metropolitan session judge) 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 a case.

Briefly, note that judges' dependency on court staff sees a portion of courtroom staff members misappropriate this trust for personal gain. Overloaded daily hearing lists, non-local cases, and judges' preference to maintain social isolation are the main reasons why many will lean on court assistants to deal with litigants and the general public. However, some court staff misguide judges and schedule cases at their own choosing, and on account of bribery.

Many judges are equally unenthusiastic to make cost orders for intentional delays by parties. The Hon. Black AC⁹² found that judges are reluctant to enforce issues such as time limits because doing so often results in penalizing clients for their lawyers' actions. This study, perusing the four civil-case records, found that cost orders were made for less than 10% of the total adjournments, despite the law making 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.

⁹⁰ The Code of Civil Procedure 1908, *supra* note 74, O. XV, r. 1–3.

⁹¹ See the Code of Criminal Procedure 1898, *supra* note 26, s. 167(5), 339C(1); Tahura & Kelly, *supra* note 31.

⁹² Black AC (2009), p. 91.

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 save time, money, and energy for both the clients and the state. Yet, in order to do so, they also require some immunity or safeguard provided by the state, as proactive judges are often exploited. The absence of any protection or strong organizational 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 well organized 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. Truly, judges rarely enjoy constitutional immunity⁹³ in practice for their judicial work. Alternatively, lawyers possess strong political ties that often threaten a judge's promotion, posting, and transfer.

It could be deduced that workload compels the judges to allow adjournment petitions, depending on a court assistant who is tasked to schedule a case date. Disappointment with the job and the lack of 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 hiking up litigation expenses.

3.4 How the department of police contributes to increasing litigation costs

In Bangladesh, criminal cases are mostly dealt with by the police, which has been framed as the most highly corrupted department.⁹⁴ The involvement of the police in criminal cases can be discussed in three fragments: filing, investigation, and trial. Among three types of criminal cases, general registered (GR) and non-general registered (NGR) cases, as per offences categorized by the Code of Criminal Procedure 1898,⁹⁵ are filed in the police station, locally known as *thana*. The rest, comprising complaint-registered cases, are filed in the court if the concerned officer in charge (OC) refuses to register. In GR cases, the OC assigns an investigating officer (IO) for a given case. The IO can arrest any suspect during the investigation in such cases.⁹⁶ In NGR cases, however, prior permission from the concerned court is required before executing investigation or arrest. In either case, the person in the hold must be presented before a court within 24 hours of the arrest.⁹⁷ This study shows that every step by the police in criminal cases drains money from the complainant or accused in forms of forced payment or bribery, respectively, which escalates the litigation costs. Interviewee clients asserted that, if they refuse the forced payment, the OC denies recording their case, especially if it is a document-related offence that is civil in nature and not a human body, which is too visibly strong to avoid. Even if a case is recorded, the 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, and sometimes corrupt or brutish investigation of crimes. Contrary to civil-law systems, in which the prosecution department is held responsible for the investigation, the Bangladesh police exclusively performs this role.⁹⁸ Understandably, the public lacks confidence in its thoroughness and integrity. The common practice during the investigation is

⁹³ Constitution of the Peoples' Republic of Bangladesh 1972, *supra* note 16, Art. 116A.

⁹⁴ Kashem (2005), p. 237; Zafarullah & Siddiquee (2001), p. 467.

⁹⁵ Code of Criminal Procedure 1898, *supra* note 26, Sch. II.

⁹⁶ *Ibid.*, ss. 54, 157.

⁹⁷ *Ibid.*, s. 167.

⁹⁸ Kashem (2017), p. 274.

to apply “third-degree methods” to interrogate on remand.⁹⁹ Often, police obtain a confession by coercion and force.¹⁰⁰ The interviewees shared that the accused or suspect has to spend a huge amount to avoid the “third-degree methods” of the police during interrogation on remand. Although the law of Bangladesh limits the duration of investigation to 120 days,¹⁰¹ this is hardly ever maintained. The IO also frequently violates the time limits due to administrative workloads, political pressure, demanding bribes, and lack of proper equipment and training—hence delaying the process even further. Here, empirical research found that often the investigation reports prompting grounds for reinvestigation, either because the clients are not satisfied with the report or the concerned magistrate deems it faulty. One interviewee stated that the police department performs with a lack of logistics, including proper equipment, training, technical assistance, and officers trained in dealing with forensic evidence. Also, usage of global positioning systems, mobile-phone trackers, and CCTV footage is also not a common facility for the police department in each district. This is also a cause in developing weak investigation reports. Most accused get an acquittal at trial, which indicates either that many people—especially those who are innocent—are wrongly accused or due to the unavailability of proper evidence. This only elongates an already long and expensive investigation, mainly at 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 a case. Interviewee judges identified the non-appearance of witnesses, and expert witnesses in criminal cases are the most vital part. Here, the local police station is constituted to serve 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. The police are too busy with other work to comply with the court order. The study also found that the delayed appearance of IOs before court triggers a lengthier trial. This intentional 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.¹⁰² This study finds that there is no independent authority to control or monitor or review complaints against the police. Lack of accountability makes them free to corrupt and abuse power—all these factors raise both public and private expenditure.

3.5 How the law and institutions contribute to increasing litigation costs

In Bangladesh, 100-year-old British-era laws are still in operation, with a few amendments. These laws were legislated in a foreign language and thus remain complicated and difficult for most litigants to understand. 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, including today’s Bangladesh.¹⁰³ Throughout their rule, the British exclusively focused on collecting revenue and had experimented and changed the legal system to increase the possibilities for manipulation.¹⁰⁴ The current legal system in Bangladesh fails to resolve most disputes in the sense of providing a mutually acceptable settlement for both parties.¹⁰⁵ This is especially the case given that most Bangladeshi litigants possess an uncompromising attitude (see Section 3.2). Indeed, Mendelsohn agreed

⁹⁹ Vadackumchery (1998), p. 218.

¹⁰⁰ Kashem (2021), pp. 821–2.

¹⁰¹ Code of Criminal Procedure 1898, *supra* note 26, s. 167. However, other special laws also limit the investigation time, which varies.

¹⁰² Kashem, *supra* note 94, p. 244.

¹⁰³ Cohn, *supra* note 76, p. 90.

¹⁰⁴ Cohn (1965), p. 110.

¹⁰⁵ Merry (1979), p. 892.

that Western-style justice does not work well in Bangladesh,¹⁰⁶ and Kidder observed that the factual ambiguity common in land disputes (especially for complex succession laws) could produce unusual difficulties in litigation.¹⁰⁷

Surfeit stages and tiers of courts have further overcomplicated the legal system. Currently, the civil litigation process in Bangladesh involves a number of stages, from the submission of a complaint to the service of summons, submission of written statements, framing of issues, attempt at mediation, trial and presentation of arguments (this includes interlocutory hearings as well as hearings for appeals, reviews, and/or revisions if a decision aggrieves any party), and finally execution.¹⁰⁸ Conversely, the criminal case process includes filing, investigation, summons, warrant, proclamation and the attachment of property, paper publication, charge frame, trial, and presentation of arguments (including bail hearings as well as hearings for appeals, revisions, motions, and/or review if a decision aggrieves any party).¹⁰⁹ As evidence, there are too many segregated stages in the current court process—in turn contributing to the backlogging of cases.¹¹⁰ Interviewed clients also agreed that the legal process is overly burdensome to follow. Therefore, most wish not to deal with the complexities and instead follow judicial instructions, despite knowing or believing that their lawyers do not always guide them accurately.

As mentioned in Section 3.2, current laws in Bangladesh consider litigation as 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.” 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 the latter, 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. Here, American Bar Association President Janofsky (quoted in Hufstedler and Nejelski)¹¹¹ correctly stated that “[most] existing legal procedures, designed for complex cases with large amounts in controversy, may well be over-designed for smaller, less complex cases.”

The inadequate laws in Bangladesh hardly provide litigants with satisfactory relief. In particular, individuals need to file a number of cases for single incidents to ensure they receive all the relief they require (hence increasing the number of filings, in turn). For example, for a motor-vehicle-accident claim, litigants must file a case under the penal provisions *and* another case if they also wish to receive compensation. Another problem is that different parties for the same matter will often file a case each. Consequently, each party will have their own attorneys and will file separate pleadings, time schedules, procedural documents, and evidence, among other materials.¹¹² In turn, this complicates matters and makes for a time-consuming process. Newly enacted laws had attempted to address this issue but failed to synchronize with existing laws. They often contradicted each other and further contributed to an increase in the number of cases in court. For example, following inappropriate attempts to upgrade the land records in Bangladesh

¹⁰⁶ Mendelsohn, *supra* note 62, p. 863. Mendelsohn stated that, in India, disputes are mostly land-related. In Bangladesh, 77% of litigations are land-related. See Barkat & Roy, *supra* note 10, p. 291.

¹⁰⁷ Kidder, *supra* note 76, p. 122.

¹⁰⁸ See the Code of Civil Procedure 1908, *supra* note 74, O. I–XX.

¹⁰⁹ See the Code of Criminal Procedure 1898, *supra* note 26, Chap. XIV–XXVI.

¹¹⁰ Chodosh et al., *supra* note 2, p. 29; Woolf, *supra* note 2, Part II.

¹¹¹ Hufstedler & Nejelski (1980), p. 966.

¹¹² 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 Chodosh et al., *supra* note 2, p. 36.

(which have yet to be completed), 297,702 new cases had been filed as of 31 March 2019. Policy-makers cannot anticipate, before the enactment of any law, how a newly regulated act will affect the bulk of the population. Motor-vehicle cases, for example, must be filed on the spot by traffic police. However, traffic officers seldom check an offender's address, meaning that motor-vehicle cases can last for years due to the failure to provide accurate and up-to-date information to the courts. As a result, cases will remain pending and unprepared for trial even after the exhaustion of all the procedural requirements. Another example comes from the application of Suits Valuation Act 1887,¹¹³ which was enacted by the British as a means of collecting revenue. The rates of suit valuations are determined by the legislature arbitrarily, without ever considering the socioeconomic conditions of the majority and any public debate at all. In turn, the determined court fees end up increasing litigation costs and burdening litigants.

Existing laws also permit multiple interventions to occur. The discovery process and the way in which evidence is presented are both time-consuming and delay inducing. Lack of preparation sees lawyers adjourn the process for a number of reasons, including to amend pleadings. Evidence has shown that the trial stage is the lengthiest part in both civil and criminal cases, as the appearance of a witness is not under court control. In civil cases, the parties are responsible for witness appearances, while, in criminal cases, the respective police department is liable. Also, the process by which evidence is obtained is overly repetitive, effort-intensive, and rigid, which becomes tiresome for everyone involved.¹¹⁴ Chodosh found that the justification for in-court testimony is to allow judges to evaluate a witness's demeanour,¹¹⁵ as it is a significant element of the oral evidentiary process. It is found that almost 90% of interlocutory matters disposed of in trial courts are appealed at a higher court and, in most of those cases, the original judgment is upheld.

Unskilled court staff constitute another key institutional weakness that further delays the legal process. 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. 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 of Bangladesh.¹¹⁶ The underqualified staff members are slowing the case process by way of a low production rate in overly loaded courts—erroneous clerical jobs that demand review from the higher court. A number of interviewees stated that, due to political pressure, most heads of institutions refrain from appointing new staff members, resulting in vacancies in the subordinate courts. The shortage of workforce increases the load on the already overloaded court staff. Empirical research also found one court member of staff in a copying section¹¹⁷ expediently disposing of petitions for certified copies at special costs, terming it “special petitions” defying the law. This certainly increases litigation costs.

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 adequate budget and resources for a functional judiciary. However, the latest national budget (2019–20 financial year) shows just how neglected the judiciary is, allocating a mere 0.352% to the justice sector.¹¹⁸ This is vastly

¹¹³ Suits Valuation Act 1887 (Bangladesh).

¹¹⁴ 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.

¹¹⁵ Chodosh et al., *supra* note 2, p. 38.

¹¹⁶ Transparency International Bangladesh (2017), p. 7.

¹¹⁷ A copying section is responsible for providing a certified copy of the order or judgment of the court.

¹¹⁸ Khan (2019).

lower than the other executive departments receive. Given that administrative control over the subordinate judiciary in Bangladesh is divided between the executive and judiciary, this only further discourages people from taking any proactive steps to improve the justice system. Indeed, the lack of resources only aggravates the situation, particularly as (according to a number of interviewees in this study) the government does not allocate sufficient means to provide services to all people equally. Rather, they explained that the bribes that office staff receive actually provide more resources for litigants and that, although many recognize the corruption plaguing the sector, the courts will simply disregard unlawful activities to remain functional.

The current rate of service is now sufficiently outdated. Empirical evidence found that the rates charged for cost orders and for public legal services are exceedingly low and that the government has yet to upgrade the relevant legal provisions to reflect present living standards. 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 process fee is only BDT 3.00.¹¹⁹ This amount is unrealistically low and only further incentivizes the process server to demand additional money from clients.

To sum up Sections 3.1 to 3.5, the lawyers possess case control in an adversarial legal system. This scenario discourages judges from actively participating in the court process and from providing a case outline to all parties. This also 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 limited opportunities for settlement. The scattered cost rules rarely apply to control false or vexatious cases and unnecessary adjournment. Instead, parties are allowed to cause a delay, facing no financial threat, and exploit the flexibility of the system in suspending court proceedings. The institutional capacity relating to the justice sector should be reorganized and their 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.

4. Conclusion

As courts are commonly viewed as a last resort for resolving disputes, the justice system should be more open and easily accessible for all. Indeed, many will not pursue litigation due to the exorbitant costs and time involved, and failure to do so will only see fewer people inclined to seek justice in the future. The consequences will likely have a disrupting effect on society, particularly in more disadvantaged nations like Bangladesh. Some recent incidents that have been reported indicate that people in Bangladesh have lost their patience for justice and are taking action without obeying the law.¹²⁰ This must not be expected in the interest of the rule of law. On top of this, 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 clients, lawyers, judges, members of the courtroom staff, institutions involved in the legal process, and the law itself.

Among the total litigation costs, however, lawyers contribute to increasing the majority of expenses. That is to say that some delays and costs are not unavoidable. For example, there will always be a waiting period during the collection of evidence (which should have a considerable time limit). However, the lack of a ceiling for lawyers' fees means that many

¹¹⁹ Civil Rules and Order, *supra* note 38, r. 597.

¹²⁰ Several incidents occurred recently in which some people were killed brutally by public mobs for minor or no offence at all. See Star Report (2019).

will try to extend the litigation process for as long as possible. Some will intentionally refrain from participating in trials and will instead focus solely on the economic benefits of litigation, without considering the merit of a case or the client's benefits. At the administrative level, the absence of the regulation of fees endows lawyers with the power to repeatedly charge for the same issues. Part of this problem derives from the quality of lawyers admitted to the bar in Bangladesh each year. Likewise, deterrent punitive measures are not in place to set an example for breaches of professional ethics and/or regulations concerning legal practitioners.

Overall, this setting paves the way for people to hijack the litigation process in Bangladesh for purposes of harassment through the legal process. Not only does one's ignorance of a case permit lawyers to lengthen proceedings, but also 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 only further reduces the likelihood of settlement.

Neither can judges avoid their responsibility to confront the causes of delay due to the associated costs involved and ever-increasing backlogs. 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 and lack of infrastructural facilities and efficient administrative structures further retard them from working enthusiastically and imaginatively to attack the causes of delay and the unnecessary costs of a trial. Indeed, until the control of cases is shifted away from lawyers, judges will not be able to play an active role in the justice system.

What is equally lacking is a mandatory application of costing rules for unnecessary adjournments and compensation is inconsistent with the current-day socioeconomic conditions of the populous. 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 hike litigation costs and increase the delay). The legislative inconsistencies affect administering justice, increasing the unnecessary volume of cases. Other institutions such as police departments are also responsible for some of the cost increases.

That said, 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. Since no one particular group can be held responsible for increasing legal costs, co-ordinating the whole system would go a long way in controlling the hike in litigation costs.

References

- Abel-Smith, Brian, & Robert Stevens (1967) *Lawyers and the Courts: A Sociological Study of the English Legal System*, Cambridge, MA: Harvard University Press.
- Australian Law Reform Commission (1995) "Costs Shifting—Who Pays for Litigation," <http://www.alrc.gov.au/report-75> (accessed 17 July 2020).
- Bangladesh Judicial Service Commission (2019) "Bangladesh Judicial Service Examination," <http://www.bjsc.gov.bd/bjs-examination-syllabus/> (accessed 30 July 2020).
- Barkat, Abul, & Prosanta K. Roy (2004) "Political Economy of Land Litigation in Bangladesh: A Case of Colossal National Wastage." 4 *Bangladesh e-Journal of Sociology* 1–3.
- Black AC, Hon Michael (2009) "The Role of the Judge in Attacking Endemic Delays: Some Lessons from Fast Track." 19 *Journal of Judicial Administration* 88–99.
- Botero, Juan Carlos, et al. (2003) "Judicial Reform." 18 *The World Bank Research Observer* 61–88.
- Buscaglia, Edgardo, and Maria Dakolias (1999) "An Analysis of the Causes of Corruption in the Judiciary." 30 *Law and Policy in International Business* 95–116.

- Cappalli, Richard B. (1989) "Comparative South American Civil Procedure: A Children Perspective." 21 *University of Miami Inter-American Law Review* 239–310.
- Cappelletti, Mauro, James Gordley, and Earl Johnson Jr (1975) *Toward Equal Justice: A Comparative Study of Legal Aid in Modern Societies*, New York: Oceana Publications Inc.
- Central Intelligence Agency (2020) "The World Factbook: Bangladesh," <https://www.cia.gov/library/publications/the-world-factbook/geos/bg.html> (accessed 17 July 2020).
- Chase, Oscar G. (1988) "Civil Litigation Delay in Italy and the United States." 36 *American Journal of Comparative Law* 41–87.
- Chen, Marty (1986) "Poverty, Gender, and Work in Bangladesh." 21 *Economics and Political Weekly* 217–22.
- Chodosh, Hiram E, et al. (1997) "Indian Civil Justice System Reform: Limitation and Preservation on the Adversarial Process." 30 *New York University Journal of International Law and Politics* 1–78.
- Cohn, Bernard S. (1959) "Some Notes on Law and Change in North India." 8 *Economic Development and Cultural Change* 79–93.
- Cohn, Bernard S. (1965) "Anthropological Notes on Disputes and Law in India." 67 *American Anthropologist* 82–122.
- Cranston, Ross (2006) *How Law Works: The Machinery and Impact of Civil Justice*, Oxford: Oxford University Press.
- District Correspondence (2019) "The Lawyers Boycott Courts in Bagerhat," *The Bangla News* 24, 6 May.
- Economides, Kim (2015) "Alfred A. Haug and Joe Mcintyre, toward Timeliness in Civil Justice." 41 *Monash University Law Review* 414–44.
- Engler, Russell (2012) "Opportunities and Challenges: Non-Lawyer Forms of Assistance in Providing Access to Justice For Middle-Income Earners," in M. Trebilcock, A. Duggan, & L. Sossin, eds., *Middle Income Access to Justice*, Toronto: University of Toronto Press, 145–90.
- Galanter, Marc (1989) *Law and Society in Modern India*, Delhi: Oxford University Press.
- Genn, Hazel (1999) *Paths to Justice: What People Do and Think about Going to Law*, Oxford: Hart Publishing.
- Genn, Hazel, & Alan Paterson (2001) *Paths to Justice Scotland: What People in Scotland Do and Think About Going to Law*, Oxford: Hart Publishing.
- GFK Slovakia (2004) *Legal Needs in Slovakia II*, Bratislava: GFK Slovakia.
- Gramatikov, Martin (2009) "Framework for Measuring the Costs of Paths to Justice." 2 *Journal Jurisprudence* 111–48.
- Hadfield, Gillian K (2014) "The Cost of Law: Promoting Access to Justice through the (Un)corporate Practice of Law." 38 *International Review of Law and Economics* 43–63.
- Halim, Md Abdul (2017) *The Legal System of Bangladesh*, Dhaka: CCB foundation.
- Hoque, Ridwanul (2014) "Courts and the Adjudication System in Bangladesh: In Quest of Viable Reforms," in H. R. Yeh & W. C. Chang, eds., *Asian Courts in Context*, Cambridge: Cambridge University Press. 447–86.
- Houseman, Alan W (2007) "The Future of Legal Aid: A National Perspective." 10 *University of the District of Columbia Law Review* 35–68.
- Hufstедler, Seth, & Paul Nejelski (1980) "A.B.A. Action Commission Challenges Litigation Cost and Delay." 66 *American Bar Association Journal* 965–9.
- Islam, M. Rafiqul (2017) "The Judiciary of Bangladesh Its Independence and Accountability," in H. P. Lee & M. Pittard, eds., *Asia-Pacific Judiciaries: Independence, Impartiality and Integrity*, Cambridge: Cambridge University Press, 35–56.
- Ives, Eric W. (1968) "The Common Lawyer in Pre-Reformation England." 18 *Transactions of the Royal Historical Society* 145–73.
- Jacob, Herbert (1983) "Trial Courts in the United States: The Travails of Exploration." 17 *Law & Society Review* 407–24.
- Jain, B. S. (1970) *Administration of Justice in Seventeenth Century India*, Hyderabad: Metropolitan Book Co Private Ltd.
- Kashem, Mohammed Bin (2005) "The Social Organization of Police Corruption: The Case of Bangladesh," in R. Sarre, D. K. Das, & H. J. Albrecht, eds., *Policing Corruption International Perspective*, Lanham: Lexington Books, 237–46.
- Kashem, Mohammed Bin (2017) "Issues and Challenges of Police Investigative Practices in Bangladesh: An Empirical Study," in S. M. Shahidullah, ed., *Crime, Criminal and the Science of Criminology in South Asia: India Pakistan and Bangladesh*, London: Palgrave Macmillan, 273–98.
- Kashem, Mohammed Bin (2021) "The Reform of Evidence-Based Investigations in Bangladesh: A Rhetoric or Reality." 22 *Police Practice and Research* 817–34.
- Khan, Mizanur Rahman (2019) "Independence of Judiciary in the Independence of Budget," *The Prothom Alo*, 19 June.
- Kidder, Robert L. (1973) "Courts and Conflict in an Indian City: A Study in Legal Impact." 11 *Journal of Commonwealth and Comparative Politics* 121–39.
- Kidder, Robert L. (1974) "Formal Litigation and Professional Insecurity: Legal Entrepreneurship in South India." 9 *Law & Society Review* 11–7.
- Kojima, Takeshi (1990) "Civil Procedure Reform in Japan." 11 *Michigan Journal of International Law* 1218–34.

- Law Commission of India, The (1988) "Role of the Legal Profession in Administration of Justice," [-http://lawcommissionofindia.nic.in/101-169/Report131.pdf](http://lawcommissionofindia.nic.in/101-169/Report131.pdf) (accessed 18 July 2020).
- Legal Service Corporation (2007) *Documenting the Justice Gap in America: the Current Unmet Civil Legal Needs of Low-Income Americans*, Washington: Legal Services Corporation.
- Legal Services Agency (2006) "Report on the 2006 National Survey of Unmet Legal Needs and Access to Services," https://www.rchss.sinica.edu.tw/cibs/law/3.%20Survey/papers/Others/New_Zealand_survey_legal_needs_access_services.pdf (accessed 18 July 2020).
- Local Correspondence (2019a) "The Lawyers Boycott Courts in Jamalpur," *The Daily Prothom Alo*, 4 July.
- Local Correspondence (2019b) "The Lawyers Boycott Courts in Meherpur," *The BD News 24*, 6 May.
- Mahajan, R. K. (1989) "Boycott of Courts by Lawyers-Legitimacy and Alternatives." 1 *The Supreme Court Journal* 1-3.
- Mendelsohn, Oliver (1981) "The Pathology of the Indian Legal System." 15 *Modern Asian Studies* 823-63.
- Merry, Sally Engle (1979) "Going to Court: Strategies of Dispute Management in an American Urban Neighborhood." 13 *Law & Society Review* 891-925.
- Merry, Sally Engle, & Susan S. Silbey (1984) "What Do Plaintiffs Want to Do? Re-Examining the Concept of Dispute." 9 *Justice System Journal* 151-78.
- Moog, Robert (1992) "Delays in the Indian Courts: Why the Judges Don't take Control." 16 *The Justice System Journal* 19-36.
- Moog, Robert (1993) "Indian Litigiousness and the Litigation Explosion: Challenging the Legend." 33 *Asian Survey* 1136-50.
- Moog, Robert S. (1991) "Conflict and Compromise: The Politics of Lok Adalats in Varanasi District." 25 *Law & Society Review* 545-70.
- Morrison, Charles (1974) "Clerks and Clients: Paraprofessional Roles and Cultural Identities in Indian Litigation." 9 *Law & Society Review* 39-62.
- Murthy, R. V. Ramana, & Siddik Rubiyath (2010) "Disposal Rates, Pendency and Filing in Indian Courts: An Empirical Study of Two States of Andhra Pradesh and Kerala," in P. G. Babu, et al., eds., *Economic Analysis of Law in India: Theory and Application*, Oxford: Oxford University Press, 2-23.
- Newman, Jon O. (1985) "Rethinking Fairness: Perspectives on the Litigation Process." 94 *Yale Law Journal* 1643-59.
- Nims, Harry D. (1953) "The Cost of Justice: A New Approach." 39 *American Bar Association Journal* 455-527.
- Panday, Pranab Kumar, & Md. Awal Hossain Mollah (2011) "The Judicial System of Bangladesh: An Overview from Historical Point Viewpoint." 53 *International Journal of Law and Management* 6-31.
- Prothom Alo English Desk (2020) "Judge Withdrawn to Ease Volatile Situation: Law Minister," *The Daily Prothom Alo*, 5 March.
- Rhode, Deborah L. (2004) *Access to Justice*, Oxford: Oxford University Press.
- Rocher, Ludo (1968) "'Lawyers' in Classical Hindu Law." 3 *Law & Society Review* 383-402.
- Sato, I., et al. (2007) "Citizens Access to Legal Advice in Contemporary Japan: Lumpers, Self Helpers, and Third-Party Advice Seekers" Presented at the Joint Annual Meeting of the Law and Society Association and the Research Committee on the Sociology of Law, Humboldt University, 26 July 2007.
- Sample, Noel (2015) "The Cost of Seeking Civil Justice in Canada." 93 *Canadian Bar Review* 639-74.
- Sohaib, Ahmad, et al. (2019) "Cost of Justice and Exclusion." 15 *European Scientific Journal* 1-18.
- Staff Correspondence (2019) "The Lawyers Boycott Courts in Mymensingh," *The Daily Kalerkantho*, 28 February.
- Star Online Report (2017) "GDP Growth Record 7.24pc, Per Capita Income \$1,602," *The Daily Star*, 14 May.
- Star Report (2019) "Mobs Beat Five Dead for Kidnapping," *The Daily Star*, 21 July.
- Tahura, Ummei Sharaban, & Margaret R. L. Kelly (2015) "Procedural Experiences from the Civil Courts of Bangladesh: Case Management as a Potential Means of Reducing Backlogs." 16 *Australian Journal of Asian Law* 1-22.
- Talwas, Gaurav (2019) "Lawyers Strike and Boycott of Court Work Illegal, Could Amount to Contempt of Court: Uttarakhand High Court." *The Times of India*, 26 September.
- Transparency International Bangladesh (2017) "Subordinate Court System of Bangladesh: Governance Challenges and Ways Forward," <https://www.ti-bangladesh.org/beta3/index.php/en/highlights/5421-subordinate-court-system-of-bangladesh-governance-challenges-and-way-forward-presentation-bangla> (accessed 18 July 2020).
- Tripathi, Shishir (2016) "Huge Cost of Litigation Has Turned Justice into a Dream for the Weaker Sections in India," *Firstpost*, 17 August.
- Trubek, David M, et al. (1983) "The Costs of Ordinary Litigation." 31 *UCLA Law Review* 72-127.
- Vadackumchery, James (1998) *Policing the Largest Democracy: 50 Years and After*, New Delhi: APH Publishing Corporation.
- Williams, Philip L., & Ross A. Williams (1994) "The Cost of Civil Litigation: An Empirical Study." 14 *International Review of Law and Economics* 73-86.
- Woolf, Harry (1996) *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales*, Lanham: Bernan Assoc.

Woolf, Harry (1997) "Medics, Lawyers and the Courts." 16 *Civil Justice Quarterly* 302–17.

Worldbank.org (2018) "GDP Per Capita: Bangladesh," <https://data.worldbank.org/indicator/NY.GDP.PCAP.CD?locations=BD> (accessed 18 July 2020).

Zafarullah, Habib, & Noore Alam Siddiquee (2001) "Dissecting Public Sector Corruption in Bangladesh Issues and Problems of Control." 1 *Public Organization Review* 465–86.

Zorza, Richard (2010) "Courts in the 21st Century—The Access of Justice Transformation." 49 *Judges Journal* 14–36.

Cite this article: Tahura, Ummey (2022). Role of Clients, Lawyers, Judges, and Institutions in Hiking Litigation Costs in Bangladesh: An Empirical Study. *Asian Journal of Law and Society* 9, 59–80. <https://doi.org/10.1017/als.2020.26>