Journal of Governance and Innovation
Vol. I No. I, January-June 2015
ISSN- 2312-5551

Judicial Reform in Bangladesh: What to Achieve and How to Achieve

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Introduction

Bangladesh is a fortunate country. Despite having to achieve its birth as a nation through violent conflict, resulting in huge loss of human lives and property, it inherited a fairly stable and vibrant judicial system and a set of ready-to-use laws. It was not until much later that cracks began to appear in the delivery of justice as the courts were unable to dispose of cases within reasonable time-frames. After its return to democracy, the economy took an upward trajectory which continues till now, making the courts increasingly burdened to the point that they are starting to lose their selling-point as the primary guardians of justice.

This paper about judicial reform in Bangladesh is, nevertheless, not about why and how we can make courts faster and more efficient. Rather, it questions this very approach towards judicial reform that has been the obsession of policy-makers and their interventions, both homegrown and from abroad. This paper argues for a move away from the focus on delay-reduction and efficiency through judicial reform to looking at judicial reform taking justice as a key deliverable of development.

This author draws on his experience as a lawyer practicing in the courts of Bangladesh, but more importantly the invaluable experience of working with a number of donor-funded judicial and legal reform projects. The paper asks and aims to answer two different but closely

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interlinked questions – what to achieve through judicial reform and how to achieve it.

What to achieve?

The existence of a need for reform in the judicial system of Bangladesh has national and international consensus. The surge of donor-funded judicial reform projects, most notably from the World Bank and the United Nations Development, are evidence of international opinion while the government acknowledgements in its five-year strategic plans show national interest. Pursuing the need for reform, initially the World Bank, through its Legal and Judicial Capacity Building Project and subsequently, the UNDP through currently ongoing projects under its Democracy and Governance Cluster, have injected funds and technical expertise in the judicial system. The government has undertaken ad-hoc, but more regular, reform, albeit often spurred by advocacy by the donors. But the question then arises, what purpose do these efforts aim to serve?

To answer this question, it is useful to look into the reform efforts in Bangladesh and the purposes they have pursued so far. The World Bank funded and administered the biggest reform project in the judiciary from 2001-2008, having at the core of its objectives, the Bank's 2000 Country Assistance Strategy (CAS) to reform institutions to support the enabling environment for private-sector led growth and for better delivery of core public services.[1] This objective was in line with the then government's "Fifth Five Year Plan" (FY1997-2002) which acknowledged that "the judicial process is…cumbersome and time-consuming" and the legal framework is sometimes inadequate.[2] The Plan also pointed out that legal and judicial reforms are "essential for the creation of an enabling environment for the private sector to flourish and maximize its contribution to a sustained growth."[3] The Government's request for funds was met by the World Bank through the project.[4]

The World Bank project was built upon the ideal that judicial reform is required for investment and economic growth. This approach of looking at judicial reform as a catalyst to attracting investment resulting in growth is not uncommon. Often, in many parts of the world, judicial reform has been seen as a way to resolve court disputes quickly and efficiently to therefore foster an investment climate. This has been considered a legitimate objective in implementation of other judicial reform projects too, most notably, ADB's Access to Justice Project in

1 The World Bank (2010), *Implementation Completion and Results Report* (Report No: ICR00001200), Dhaka: The World Bank.
2 ibid
3 ibid
4 ibid

Pakistan, which to date remains the biggest externally funded judicial reform project (valued at USD 350 million).[5]

Although the World Bank project is largely considered to be an unsuccessful endeavour (its own evaluation terming the project's performance as "unsatisfactory"), the focus of this section is on the objective it started with.[6] The project design assumed that the judiciary was in need of greater efficiency, and training to that effect, in order to solve the various causes of delay and backlog identified by previous studies. Although the objective of promoting "accountability" was mentioned casually in the project's documents, the lion's share of its USD 30.6 million budget was devoted towards "efficiency" outputs. The central assumption was that if service could be streamlined and provided quickly, the judiciary could be said to be doing its job.

This type of approach based on "efficiency" has an inherent problem which can be unearthed with a simple analogy. If the litigant is given an option between resolution of her case in six months albeit with no guarantee of fairness and resolution of her case in two years but with an assurance of fairness, which one will she choose? Will she choose the more "efficient" resolution, or the more "fair" but less "efficient" resolution?

When the issue of fairness, or lack of, is brought into the fold, the question that also begs to be asked is whether a reform agenda excluding "fairness" can promote justice for all. It can be argued that in a judiciary where fairness does not exist, there is no level playing field - the rules of the game vary from player to player. The already disadvantaged stand a lesser chance of obtaining justice from a court than the advantaged. Such a situation, no matter how efficient it may be, certainly cannot be "just".

An improvement from the World Bank objective is found in the more recent ongoing UNDP projects in the justice sector. The Judicial Strengthening Project of the UNDP, jointly implemented with the Supreme Court, in its Project Document, maintains that it "aims to improve access to justice, especially for disadvantaged and vulnerable groups" and further identifies "external interference in the administration of justice" as a problem.[7] However, when determining the route to take to achieve such goals, the document cites – "supporting the judiciary to

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[5] Siddique, O. (2013). *Pakistan's Experience with Formal Law: An Alien Justice*. New Delhi: Cambridge University Press

[6] The World Bank (2010), *Implementation Completion and Results Report* (Report No: ICR00001200), Dhaka: The World Bank.

[7] United Nations Development Programme (2012), *Project Document: Judicial Strengthening Project*. Retrieved from http://www.bd.undp.org/content/dam/bangladesh/docs/Projects/JUST/Final%20JUST% 20Prodoc.pdf

improve case management and reduce case backlogs" as its chosen method.[8] The main indicators of the project measure its success through its percentage reduction of backlogs in its pilot courts instead of how the project would empower the "disadvantaged and vulnerable groups". The focus again, unfortunately, was on efficiency and the usual suspects – delay and backlogs.

The apparent obsession with efficiency is not without context. One could argue that this narrow definition of justice protects the status quo in the institutions which require reform. Broader notions of justice would require changing of ways and could disrupt existing incentive and power structures. As the Government takes on the role of the primary stakeholder, as has happened in the case of all World Bank and UNDP interventions, it pushes an agenda of reform based on the problem of delay as it can be attributed to lack of resources, lack of technological prowess and so on. On the other hand, flagging up problems regarding impartiality and independence bring with them obvious political disadvantages and they themselves put themselves at risk of being viewed as part of the problem. In this context, while the problem of "delay" and the solution of "efficiency" have taken the front seat in Bangladesh judicial reform agenda, arguably "justice" and "fairness" have taken the back seat.

Osama Siddique, writing on Pakistan's experiments with the efficiency-centric approach (which he calls the "efficiency-plus approach") with World Bank, very aptly asked "whether delays in court were the only or even the most crucial problems facing the Pakistani litigant public".[9] The same question is now already being asked with regard to justice-seekers in Bangladesh and being answered in the negative. Livingston Armytage, a leading academic in the field of judicial reform, and incidentally a former adviser to UNDP's justice sector projects in Bangladesh, opines in one of his unpublished reports on the Bangladeshi reform efforts that delay is rather a symptom of a *bigger* problem. In his book, *Reforming Justice*, he describes reforms aiming to improve efficiency as *thin* or procedural notions of justice only, thus only scratching the surface of what justice should be.[10]

What is then a *thick* notion of justice? Armytage defines justice as "the notion of rightness built on law, ethics and values of fairness and equity

[8] ibid

[9] Siddique, O. (2013). *Pakistan's Experience with Formal Law: An Alien Justice*. New Delhi: Cambridge University Press

[10] Armytage, L. (2012). Reforming Justice: A Journey to Fairness in Asia. New York: Cambridge University Press

which are foundational to civic well-being".[11] This definition of justice apparently resonates well with modern philosophers John Rawls and Amartya Sen. Rawls in his book *The Theory of Justice* propagates the *difference principle* from which it can be derived that an action can only be termed as "just" only as long as it is of greatest benefit to the least-advantaged members of society.[12] Sen takes Rawls's notion of justice one step further to argue that justice lies in expanding people's *real* freedoms and rights.[13] Sen through his *capability approach* argues not only for "public goods" to be made available to the least-advantaged, but also advocates for their capabilities for enjoying those "goods" (in this case, justice) to be enhanced through empowerment.

As things stand now, judicial reform efforts in Bangladesh fall short of promoting or achieving justice in any but a *thin* sense of the word. While "pro-poor" rhetoric has been casually inserted into project designs, especially by the UNDP, proposed outputs of the project have mostly failed to reflect issues relating to vulnerable groups. If Sen's standard is used as the benchmark, the gap between what reform projects are aiming to do and what will actually constitute justice is even wider. Not only are the disadvantaged groups not directly benefited, there is little effort to empower them to reap any benefits of reform either. Delay reduction and efficiency only tackle a single problem in the greater array of problems in delivery of justice.

As an alternative to the current approach, it may be argued that for judicial reform to be "just" and for it to really work, it must be part of a broader agenda of development. The judiciary cannot be reformed in a vacuum away from all the economic, social and political problems that it works within as it strives to deliver justice. Amartya Sen, speaking on the role of judicial reform in development, quoted Benjamin Franklin (albeit out of context) to have said: "Yes, we must all hang together, or most assuredly, we shall all hang separately".[14] Sen's core message, and now increasingly, the view in the international donor community, is that judicial problems come with a context and cannot be solved without an integrated and coordinated approach that addresses the core problems of a society.

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[11] ibid

[12] See Rawls, J.A. (1971). A Theory of Justice. Cambridge, MA: Harvard University Press

[13] See Sen, Amartya (1999). Development as freedom (1st ed.). New York: Oxford University Press.

[14] Sen, Amartya (2000). Lecture delivered at the World Bank Legal Conference: *Role of Legal and Judicial Reform in Development.* Washington, DC: The World Bank

It has so far been assumed that simply by ensuring better "access" through a more "efficient" court system, a bridge can be built to the idea of equal protection of all under the law. The assumption that an efficient system is also "competent" and equitable" is fast coming to light as a wrong one. Osama Siddique, again writing about a similar phenomenon in Pakistan, wrote "this conveniently unnuanced visualization of the judge as a monolithic, homogenous, and predictable machine-like instrumentality is of course highly problematic."[15]

It is arguable that creating the linkage of judicial reform with a broader agenda of development will fill the ideological lacuna that judicial reform in Bangladesh now experiences. The question of *why* judicial reform is needed then will not be as difficult a question to answer. Judicial reform can be brought out of the small box of "efficiency", which at best has a trickle-down effect on the disadvantaged groups of society, and be placed in Bangladesh's already strong and ideologically-backed development agenda.

The development approach is far simpler to grasp. The goal of judicial reform must be to provide a "just" system where the benefits of a judicial system are made available even to the least advantaged of a society, and as Sen would argue, the least advantaged must be then empowered to *really* enjoy the fruits of reform.

For such a system to exist, besides being quick, other factors must be present in a judicial system. This paper argues that the system must also be firstly, fair. Ensuring fairness is no mean feat; it involves ensuring equal opportunities for all sides to be heard with the same regard and justice to be done in accordance with fair and just laws. This is difficult for a number of reasons. The quality or veracity with which a case is argued on behalf of a side is most often determined by the resources available to them, which creates an imbalance. The judge, himself, cannot be looked at as living in a vacuum. His birth, upbringing, education and views about society inevitably dictate his reasoning. Most significantly, the professional integrity especially in the lower tiers of the judiciary is now under a giant threat. An ideologically backed judicial reform agenda must address these inherent biases that impede the fairness of the justice delivery system.

Secondly, the system must be *independent.* The Project Document of UNDP's Judicial Strengthening Project, implemented in partnership with the Supreme Court of Bangladesh, had identified "external interference in the administration of justice" as one of the problems it sought to resolve,

[15] Siddique, O. (2013). *Pakistan's Experience with Formal Law: An Alien Justice*. New Delhi: Cambridge University Press

although ultimately, it was not reflected in its proposed outputs.[16] It is extremely important that a decision-maker, while delivering justice, be independent of systemic and institutional constraints.

UNDP's agenda of supporting the creation of a "Judicial Secretariat" has kept the conversation of administrative independence alive despite soft resistance from the Government. However, such a problem will not simply be solved by a technical separation of the judiciary from the executive, as has been realised through implementation of the Masdar Hossain judgment.[17] But a *real* independence is required both for the institution (from the executive) and for individual judges within the institution (from pressures within the institution).

Thirdly, the system must be *understandable* to those using it. The justice-seeker must be enabled to understand the basic complexities of the procedural and substantive laws and more importantly her rights under the system. Without knowing her rights, she cannot be expected to be benefitting from them. A judicial system which is understandable to every member of a society is one which has empowered each of them to truly assert their rights. Reform efforts have not directly targeted this area so court rules, procedures and practical processes remain extremely user-unfriendly and full of jargon. However, UNDP supported efforts have some notable achievements like creating an updated online database of all laws and piloting online cause-lists with result updates in some districts and the Supreme Court.

Fourthly, the justice system must be *affordable* and *inexpensive*. Even if all the previous conditions are fulfilled, the least-advantaged of society will still be prohibited from accessing the fruits of justice if the costs of access are beyond their means. The state-funded National Legal Aid and Services Organisation has a growing base but is still underutilized due to problems of awareness and poor service, but NGO-led legal aid has better service albeit in limited geographical scale. Donor interventions in providing support, to the NLASO and NGOs, are a step in the right direction. But such demand-side action must also be coupled with supply-side interventions in making the system cheaper as not all will be able to access legal aid.

Conclusion

In conclusion to this section, it may be reiterated that Bangladesh's judicial reform agenda, as things stand, is obsessed with an efficiency-

[16] United Nations Development Programme (2012), *Project Document: Judicial Strengthening Project*. Retrieved from http://www.bd.undp.org/content/dam/bangladesh/docs/Projects/JUST/Final%20JUST% 20Prodoc.pdf

[17] Secretary, Ministry of Finance v Masdar Hossain (1999) 52 DLR (AD) 82

centric approach. This approach has neither been able to deliver results, as it appears from the unsuccessful World Bank endeavour, nor does it have the ideological backing to achieve a meaningful result which can be called "just". This paper has argued for an alternative approach grounded in the idea of judicial reform as part of the broader development process and having the ultimate goal of empowering the least-advantaged of society and creating a level-playing field where the litigant-public can *really* enjoy the benefits of reform.

How to achieve?

Upendra Baxi writing about judicial reform in India describes it as something almost always emanating from the "governing elites".[18] Things are not very different from the Bangladesh perspective. The evaluation of the World Bank project reveals that the project was designed and funded upon a request of the Government. It neither acknowledged any civil society calls for reform nor any public opinion for it. Although subsequent UNDP projects at the designing phase engaged in long consultations with stakeholders, the higher tiers of the judiciary and government dominated the consultations. More worryingly, the UNDP projects directly working with the judiciary, which are still ongoing, only rarely engage with civil society, and public perception surveys have only been mere formalities.

The World Bank project, as has been mentioned repeatedly, was an unsuccessful endeavour as revealed by its own evaluation. However, the subsequent UNDP-funded projects do not seem to have learned from its mistakes, and although they have not yet ended or been evaluated, demonstrable and sustainable impacts are difficult to show. The Government's own initiative of reform of the Civil Procedure Code in 2003, notably limiting number of adjournments, and a much more lobbied reform in 2012, notably attempting to introduce mandatory mediation, have also seen little success so far.

Arguably, judicial reform efforts in Bangladesh have suffered from two fundamental problems. The first problem has been the lack of an inclusive and participatory approach and secondly, an unaddressed institutional incentive structure.

Inclusive and participatory approach

Within the first problem of lack of participation, two groups can be identified as potentially having important roles in the reform process but have been left out – the implementers of reform at the ground level and civil society. Judicial reform is primarily implemented by judges, and

[18] Siddique, O. (2013). *Pakistan's Experience with Formal Law: An Alien Justice*. New Delhi: Cambridge University Press

secondarily by court staff, police, lawyers, and prisons, among others. The World Bank evaluation unearthed dissatisfaction among court staff, lawyers and even judges in the pilot courts of the project regarding the reforms. The report noted lawyers describing a newly installed Central Filing System (CFS) as having created just another table where money had to be paid.[19] In the ongoing UNDP projects, interviews with judges revealed the dissatisfaction with the number of hours they had to work beyond regular hours without overtime in order to fill-up an online cause list in addition to the mandatory paper cause list everyday.

It has been found from the author's experience that during implementation of the UNDP projects, inputs from junior judges are rarely sought let alone be considered. The projects took the direction the the top tier of judiciary and Government wanted it to take.

The problem is even more grievous when it comes to participation of civil society. Reform in the judiciary, in comparison to other state institutions, has been an extremely secretive affair as the judiciary has long considered it beneficial to appear to be above criticism. This has led to very negligible civil society participation at design, implementation and evaluation stages of judicial reform efforts. Addressing specific issues through judicial reform, notably violence against women, have been campaigned for by the civil society but it has kept mostly silent in areas of substantive reform. Most unfortunate is the lack of participation of the Bar, which is arguably the single most vital civil society actor in any judicial reform process. The Bar's lack of participation is arguably caused by its strong divide along partisan lines coupled with the judiciary's general closed-door attitude to reform.

The lack of participation of civil society and the key stakeholders have created two major weaknesses in the reform projects so far. The first and simpler weakness is to do with quality and effectiveness. No one is more versed in the problems of a judicial system than the ones who implement them on the ground. These very important voices found little audience in the design phases of the reform agenda as outputs and targets were determined by, as Baxi puts it, the "governing elites", making the reforms inherently technocratic. More often than not, governing elites are also likely to protect the status quo which they benefit from, instead of turning a system upside down even if that is the correct thing to do.

Effectiveness of reform was also compromised as implementers demonstrably felt no ownership over them. The prevailing impression carried by junior judges, as expressed to this author, is that the people in

[19] The World Bank (2010), *Implementation Completion and Results Report* (Report No: ICR00001200), Dhaka: The World Bank.

charge of setting the reform agenda know little about the constraints they have to face to make it work.

The second and deeper weakness of non-participative reform efforts is the voicelessness of the people. Often, in the conversation of judicial reform, it is forgotten that the ultimate beneficiaries of a "just" judicial system are the people. Since judicial reform is an indivisible part of the political, social and economic alleviation of a society, the litigant public is the biggest stakeholder in the reform process. But yet, it is also the most ignored. The non-participation of civil society means that the fruits of reform are often run dry by the institution itself before they can trickle down to the people. The lack of external oversight creates a lacuna which is often taken advantage of by the national implementing agencies.

Some attempt to promote participation at the implementation stage has been made through "Case Management Committees" in the district level which involve representatives of all justice sector institutions including the Bar. However, the litigant-public is unrepresented except indirectly through the Bar leaders who primarily attend to represent interests of the Bar as opposed to the people. Furthermore, sustainability of these committees, which are supported by UNDP, is yet to be tested. At the Supreme Court level, similar committees exist albeit without any external participation, thus evidencing the problems stated in this section.

Incentives for reform

The reform projects have often jumped into ambitious ideas without considering existing incentive structures existing in the judicial institutions. This can partly be attributed to the Government and Judiciary alike who have kept reforms of the incentive structure off-limits to external donor-funded projects. One of the first rules of the game this author learned was that projects "must not talk about salaries". Yet, the financial incentive structure for implementers is perhaps the most important variable in the effectiveness of a reform project. As salaries cannot be enhanced, projects have historically tried to compensate with ad-hoc trips, honorariums and so on, but inadequately and sometimes inappropriately so.

Furthermore, the incentives issue does not end at financial incentives. Arguably, a judge joins the profession knowing fully well that she will not earn as much as a lawyer, but does so for the honour, respect and appreciation the job carries. The practical manifestations of this appreciation are promotions and awards based on merit and hard-work. As things stand in the judicial system, merit-based promotions are uncommon and ad-hoc appreciation in the form of awards are non-existent. In fact, one could argue that the opposite is true. A judge

interviewed by this author expressed fear to this author that he would be transferred to a remote area if he was strict in court with politically-connected members of the Bar. It is arguable that promotions and transfers are less based on merit and more on other considerations. While such an incentive structure exists, reforms become extremely difficult to implement as the implementers have little incentive to see the reforms succeed, especially when the reforms never aim to protect or save them from the existing power-plays.

Conclusion

In conclusion to this section, it may be argued that reform efforts need to embrace a participatory-approach involving key stakeholders to see success. The problems of attempting reform in a "command-and-control" environment are already manifested in lack of ownership of reforms and a serious lack of effectiveness in current and concluded reform projects. The reform efforts in Bangladesh have erred in their designs because of this and again erred in implementation without the participation of external observers. This can only be solved with an inclusive participatory approach to reform which is accountable to its primary beneficiaries – the people.

Another major drawback in reform efforts has been the unaddressed incentive structure which is far from being conducive to reform. With the apparent inexistence of merit-based appreciation of judges and other implementers, there is little incentive for them to carry out the necessary reforms in the ground-level. Any reform effort, to be successful, needs to address this and create positive and appropriate incentives at all levels.