

Discussion: Political Economy Analysis of the Role of the Judiciary in Land Dispossession Litigation in Bangladesh

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There is a general consensus that the judiciary plays a key role in relation to social, political, and economic development. In particular, an effective judicial system is expected to prevent government abuse, protect property rights, and guarantee the proper enforcement of contracts. These functions should not only be performed in an impartial, independent, and consistent manner but also expeditiously enough to avoid creating costly uncertainties for claimants and defendants alike. How these objectives can be best achieved and what are the social costs of ill-performance are therefore critical development issues. Answering these questions involves the thorny question of whether and to what extent a well-functioning judiciary is a precondition of economic growth and development. To put it in another way, is it not the case that the judiciary is an institution that evolves gradually and whose effectiveness improves in the course of development? Finally, there is the important concern that arises from the presence of informal judicial authorities in most developing countries. This raises the question as to how to allocate judicial functions between the informal and the formal spheres, and how this allocation should evolve as development proceeds.

This chapter provides answers to some of the aforementioned questions and is a welcome addition to a scarce literature. It is comprised of two parts. In the first part, the authors examine the effectiveness of the formal sector of the judiciary in Bangladesh, and they use three different criteria to guide their diagnosis: the fairness of this sector, its expeditiousness, and its independence from the executive. As for the second part, it is devoted to a case study of land litigation in the same sector. Let us now look in turn at these different sections of this chapter. To begin with, the authors' assessment of *judicial fairness* is based on three indicators extracted from the Rule of Law Index of the World Justice Project (2019). All of these indicators are subjective as they reflect the perceptions and opinions of the sampled individuals. While the first two measure the extent of inequality in access to the courts and in the treatment of

cases, respectively, the third one tries to capture the degree of corruption and bribery of the judges. Essentially, they converge to show that Bangladesh does not fare very well along the three dimensions considered. Where it performs especially poorly (with a rank of 115 among 126 countries) is in regard to the second indicator (measuring the degree of discrimination in case treatment), for which Bangladesh nevertheless does slightly better than its two big South Asian neighbours, India (ranked 117) and Pakistan (ranked 118).

To assess *the expeditiousness of the judicial procedures*, the authors look at an objective measure, the backlog of pending cases. The picture that emerges here is not encouraging, as shown by the following statistics. The proportion of civil court cases resolved during the year 2018 represented less than 80% (77.3%) of the total number of cases received and filed during that year. This implies that the backlog of pending cases increased during that year. This is clearly not a new or transient phenomenon since at the end of the year 2018, about 26.5% of the total backlog of civil cases consisted of cases that had been pending for more than five years. The rise in the backlog of pending cases is confirmed if attention is paid to the total number of civil and criminal cases: apart from a short pause in 2008–2010, this statistic has increased exponentially since the early 2000s. Among the chief reasons behind this worrying situation, the authors mention the shortage of judges but also the ineffectiveness of the judicial procedures, which continue to be based on manual paperwork and even require the judges to write out by hand the statements of witnesses. Finally, it is noteworthy that case backlogs are especially large in the three administrative divisions that are economically the most prosperous.

In contrast to the above two dimensions of judicial dysfunction, no systematic data are proposed by the authors to assess the *lack of independence of the judiciary from the executive*. The mode of appointment of the judges, which is critical for their independence, has apparently improved since this prerogative was taken away from the Public Service Commission and actual implementation of the new mode seems to have occurred in 2007. Yet there is lingering doubt about the extent to which in actual practice the judges are appointed based on their competence and experience, rather than due to their political loyalty. In addition, the Supreme Court remains under the control of the Government since its judges are nominated by the Ministry of Law, Justice and Parliamentary Affairs, thus making them vulnerable to political manoeuvring. In a recent study on Pakistan, Mehmood and Seror (2019) argue that meddling by the executive in judicial matters does not mean that all types of judgements are biased. Decisions most liable to be influenced by such interference concern cases where resources valuable to politicians are directly or indirectly at stake (think of expropriation of private property by government agencies, for example). They thus show that the rise of religious landowning elites in Bangladesh, taken as a proxy of democratic regression, has increased the incidence of court rulings in favour of the Government for cases involving land disputes with the Government, and for cases involving violation of human rights. By contrast, no

effect is detected for ordinary criminal cases, such as thefts. Moreover, democratic regression has reduced the quality of judicial decisions as measured by case delay (the difference between the year of the case decision and the filing year) and by merit, as proxied by a dummy indicating whether the decision was based on evidence rather than technical or procedural grounds.

Unfortunately, Mehmood and Seror (2019) do not have the data required to explore the influence of politicians on judicial decisions for civil cases. In a logic of patronage, one would expect civil judgements to be biased towards the clients of local politicians. Thus, Lyon (2019) argues that one important reason why a Pakistani landlord may decide to engage in politics is to get a serious land conflict settled in his favour with the help of powerful politicians at the district level.

In the second part of this chapter, the authors address the issue of land litigation and the possible dysfunction of the competent courts. To this end, they use case study material rather than systematic but hard-to-obtain data. It bears emphasis that this material contains few instances of land expropriation or contested appropriation by the Government. Instead, most cases relate to conflicts between private parties.

That land conflicts are pervasive in Bangladesh is the result of two major characteristics of the country: strong population pressure on land resources and huge migration outflows. These two factors tend to go hand in hand: in the absence of significant land-saving innovations in agriculture, population pressure causes labour productivity and income to be low, thereby inducing members of farming families to seek better employment opportunities outside of the village of origin. In the case of Bangladesh, migration does not only take the form of temporary rural–urban migration inside the country but also of permanent migration to foreign countries (e.g. India, the Gulf countries). When migration is permanent, a landholder is absent for long spells of time, and this creates opportunities for local land-hungry relatives or neighbours to occupy his/her land and lay claim to it. Evidence provided in this chapter points to the importance of land disputes of this type. Inheritance supplies another frequent occasion for conflicts in contexts of acute land scarcity.

The above two types of land conflicts are quite common in countries exhibiting small land–labour ratios. Conflicts around land bequests are inherently difficult to resolve because they are very sensitive and cannot be easily governed by indisputable allocation rules, especially when the land available is short (see André and Platteau, 1998 for an account of land conflicts in pre-genocide Rwanda). But conflicts over land ownership, including fraudulent sales without the owner's consent, are more amenable to settlement if land tenure rights have been well demarcated and certified. The question therefore arises as to why in Bangladesh many of these conflicts arise and frequently end up in formal courts. This chapter provides at least a partial answer to that question by highlighting serious shortcomings not only in the judiciary but also in the land registration system of the country. A critical flaw of the latter thus appears to consist of inadequate surveying and recording of land rights, as well as poor

updating of land records. Ambiguous and even contradictory land rights are the unfortunate outcome of this situation, which is also observed in neighbouring India. At the root of it are weak coordination between different public agencies or departments, inappropriate methods of registration, a shortage of skilled personnel, and a lack of financial resources.

From the case study material used in this chapter, yet another reason emerges to explain judicial dysfunction in Bangladesh, namely the corruptibility of the judges and their susceptibility to pressures exerted by powerful claimants or defendants acting through influential politicians. Such unlawful interference in the judicial system harms growth and development not only because it causes uncertainty and inequity but also because it causes delays in obtaining a final decision after all appeal possibilities have been exhausted.

Although the policy implications of the foregoing diagnosis seem rather obvious, they are not necessarily easy to implement. This is not only because hard choices must be made by the Government but also because changes in the country's political economy are required. Regarding the former aspect, the Government's budget priorities must be redefined with a view to earmarking more money for both the Department of Justice and the land administration. Urgent attention must also be paid to the need to streamline both administrations so as to avoid overlapping competencies and to modernise the methods used for recording, processing, and safeguarding data (digitalisation must play an important role here). It is especially important to reduce the backlog of pending cases in the courts, whether civilian or criminal.

The latter aspect (political economy aspect) is even more delicate since it touches on the way politics interacts, or interferes, with various spheres of social and economic life. At the highest level is the desire of the executive to exert control over the highest branches of the judiciary – the Supreme Court in particular. This control aims at keeping political rivals at bay and buttressing the ruling political regime. At lower levels, as numerous examples presented in this chapter testify, judicial dysfunction assumes the form of undue interventions in judicial decisions that favour people with money and strong political connections. Being essentially exploratory, this chapter does not provide enough details for the reader to identify how precisely the mechanism of interferences operates at the level of local and district courts. But if we can go by the experience of Pakistan (see Martin, 2016; Mohmand, 2019), a patronage system anchored at the village level prevails that enables landowners connected to a political machine to secure the recognition of their perceived rights, involving bribing or intimidating judges if needed. Clearly, these institutional realities are hard to change since their transformation would involve attacking vested interests and opening up the political system. A ray of hope may nevertheless come from Pakistan: there, an important reform consisting of the appointment of judges by peers rather than the executive seems to have produced significant effects in the form of more expeditious and less skewed decisions (Mehmood and Seror, 2019).

The question, raised at the start of this discussion, as to whether the effectiveness of the judiciary is mainly an endogenous outcome of development or a precondition for it must therefore receive a nuanced answer. Because a well-functioning judicial system is an important pillar of a modernising country, bold steps must be taken as early as possible to reduce its most blatant failures (think, for example, of budget increases and changes in the mode of appointing judges). This said, it must also be reckoned that some measure of dysfunction will persist until growth spillovers have reached a large number of people. Only then will people feel empowered enough to demand strong accountability of the judiciary and to publicly question the secretive patronage networks that work hard to keep judges under their control.

Finally, there is the question of the informal conflict-settlement mechanisms operating in all of the developing world, particularly in rural areas. This is a critical aspect of any diagnosis of a country's institutional system. Given that this chapter does not contain information about these mechanisms, we are unable to address the issue of the respective roles of the informal and formal sectors of the judiciary in Bangladesh. What we can say, however, with all the necessary caution, is that acute population pressure on land resources and huge outmigration on the scale observed in Bangladesh will generally tend to erode informal land tenure arrangements and dispute settlement mechanisms. As a result, state failures in the domain of land and justice administrations are bound to cause great harm to a country confronted with these conditions (Platteau, 1992, 2000).