LAW VISION

The role of civil justice in achieving SDGs

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SUSTAINABLE Development Goals (SDGs) came into force by a historic UN Summit with a view to mobilising efforts to end all forms of poverty, inequalities and tackle climate change, while ensuring that no one is left behind. The goals are interconnected and often the key to success on one will involve tackling issues more commonly associated with another. Issues related with civil justice like equal rights to economic resources, ownership and control over land and other forms of property, inheritance etc. (goals 1, 5), equal access to land, other productive resources and inputs for agro-based and small-scale business (goal 2), protection for labour rights, provision for foreign direct investment (goals 10 and 17) got some attention as targets to be achieved. In short, SDGs are a compilation of targets for economic solvency, social stability and environmental sustainability of the globe. This article focuses on the economic aspects of SDGs while discussing the importance of civil justice in its achievement.

Civil justice has a catalytic role in economic growth. An effective civil justice sustains social stability and economic growth which are necessary elements to achieve the SDGs. In Bangladesh, civil cases involve disputes relating to land ownership, land use, inheritance, performance of contracts and business transactions. In an empirical research, Professor Abul Barkat and Proshanto K Roy discovered that 76.58% of civil cases are land litigations. They found that the annual total amount of land affected by litigation was 2.35 million acres or 25% of the total arable land. They further discovered that lawsuits run for years together even as long as 50 years and each lawsuit, on an average, runs for 9.5 years. The economic consequences of such lengthy litigation are very severe. It is a key factor for downward mobility and vulnerability and it creates an environment for exploitation and pauperisation of the parties. Lengthy litigation accentuates distress and destitution among the parties, acts as a powerful disincentive against human capital formation, and causes a colossal wastage for the whole national economy.

There are many options suggested to remove backlog of cases, such as - increasing the number of judges, removing procedural complexities of civil cases, introducing digitisation, concentrating on ADR etc. Following a Working paper of OECD, I will use here the economics' theory of supply and demand to discuss whether the present workforce in subordinate civil court is sufficient to reduce the case backlog. On the supply side, I will pose the number of resolved cases, on the demand side the number of incoming cases while the trial length will be considered as the price. As the price at which the demand and supply are the same is known as the equilibrium price, I will examine whether the number of filing and disposal are same at a given period to show whether there is an equilibrium trial length.

Apart from appointing judges on a regular basis, some innovative measures can be undertaken. For example, digitisation of the court system can be introduced.

Case statistics of Bangladesh Supreme Court show that in the 2nd quarter of 2018, the number of case filing was 60,322 whereas the number of disposals was 55,911. So, there was a deficiency of 4,411. If the workforce could supply this deficient number within that quarter, it could be said that they were sufficient to establish an equilibrium price (trial length). However, if we consider this little supply deficiency lightly, we can say that the workforce was sufficient to satisfy the (demand) flow of case-filing. But the problem lies with the number of previously pending cases which ultimately constitute the total demand. In that quarter, the previously pending cases were 12,84,331 which made the actual demand (12,84,331+60,322) = 13,44,653 out of which the workforce disposed of 55,911 cases (only 4% of total demand). Since demand is far greater than the supply, the trial length (price) will definitely rise further and it will cross the above mentioned 9.5 years.

As most of the civil suits in Bangladesh are related with land disputes, the targets of SDGs mentioned in the first paragraph might not be implemented by 2030. In this backdrop, if the Judiciary of the country wants to establish an equilibrium trial length by only recruiting judges, it has to appoint 24 times more judges than the present number by 2030 - which is an unfeasible goal.

Therefore, apart from appointing judges on a regular basis, some innovative measures can be undertaken. For example, digitisation of the court system can be introduced. In a meeting with the honourable Justice Madan B. Lokur, head of e-committee of Indian Supreme Court, I learned that two-thirds of the trial length can be reduced by establishing e-court system. Furthermore, reducing high litigation rates through appropriate policies and effective ADR, reducing appeal rates, ensuring predictability of court decisions, introducing finality of judicial decisions etc. are essential for a significant reduction of trial length and thereby achieving the SDGs by 2030.

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PEOPLE'S VOICE

Rethinking investor state dispute settlement mechanisms

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INVESTOR State dispute settlement (ISDS) is the mechanism of settling investment disputes transpired between host States (States where investments are made by foreign investors) and investors by ad hoc investment tribunals. ISDS mechanism allows foreign investors to approach international tribunals directly without exhausting local remedies available in the host States. Recently, ISDS has been facing massive backlash because of multiple reasons raising a pertinent question regarding the legitimacy of the system.

Although 2932 bilateral investment agreements (BITs) and 387 treaties with investment provisions (TIPs) have been signed till now, there is no global investment agreement and global investment court for negotiation and settlement of investment disputes. As a result, BITs permit foreign investors to access the ad hoc arbitral tribunals e.g. International Centre for the Settlement of Investment Disputes (ICSID), International Chamber of Commerce, London Court of International arbitration, Stockholm Chamber of Commerce, etc. for disputes which cannot be resolved amicably by negotiation and consultation.

However, many States, academicians and civil society groups oppose the BIT and TIP based ISDS mechanism and argue for ISDS reformation. They have raised concerns about the lack of transparency, impartiality and independence of arbitrators; predictability and consistency of interpretation; high fees of arbitrations and absence of appeal mechanisms in the existing ISDS system. Countries like South Africa, India, Indonesia, Venezuela, Bolivia, Ecuador have already terminated many BITs and announced the termination of the rest of the BITs. These countries allege that the current ISDS mechanism is biased towards foreign investors because of its very constitutive nature.

The three investment cases namely *Saipem* v *Bangladesh*, *Chevron* v *Bangladesh*, and *Niko* v *Bangladesh* that were brought against Bangladesh to the International Centre for Settlement of Investment Disputes (ICSID) by foreign investors largely curved the regulatory powers of Bangladesh for public purposes. The *Saipem* v *Bangladesh* case which was settled against Bangladesh and the other two are in progress to be settled in favour of foreign investors despite the regulatory powers applied by Bangladesh as a host State.

ISDS mechanism is like a sinking boat and in a massive legitimacy crisis. As a result, many global north countries are shifting from bilateral ad hoc ISDS mechanism and forming permanent regional multilateral investment courts with appeal mechanisms under the European Union (EU)–Canada Comprehensive Economic and Trade Agreement (CETA), the EU–US Transatlantic Trade and Investment Partnership (TTIP) and the Trans-Pacific Partnership (TPP) etc.

International investment law is in existential crisis due to the absence of global investment treaty and standing global investment court. So, all the countries of the world should sit together to find out the plausible solution to its shortcomings and work towards adopting a global investment treaty and permanent global investment court for the smooth advancement of foreign investment law.

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GLOBAL LAW UPDATE

On the controversial extradition bill of Hong Kong

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THE whole of Hong Kong is shaken by the thousands of protesters who have blocked the streets to raise their voice against the recent controversial extradition bill of the country. This protest is believed to be the largest since the 'umbrella movement' in 2014. The protesters fear that the newly proposed law would further weaken the 'already fragile' semi-autonomy of Hong Kong from China. Despite the suspension of the bill on Saturday, the masses are still out there on the street.

So, why are the people of Hong Kong opposing this new extradition law? As of now, Hong Kong has agreements for extradition with 20 countries, and the proposed amendment of the extradition law will include China and Taiwan in the list. This amendment would create a legal mechanism by which individuals could be rendered from Hong Kong back to mainland China. Human rights activists view this law as a tool of 'legalised kidnapping' by China - which already has a notoriety of state-sponsored kidnap of both the Chinese and foreign citizens. The incident of Gui Minhuy, a Hong Kong based publisher is a perfect example - he was arrested from his home in Thailand in 2015 and held without any trial and denied access to an attorney for the whole detention period. The protesters, critics, and rights activists fear that if enacted, this law would be used against the liberal society critiquing the activities of the government. And Hong Kong would no longer be a safe harbor for freedom of expression and top rights advocacy groups.

The most worrying aspect of this draft bill is that the legislative council of Hong Kong does not have any role of overseeing the extradition process with a non-treaty state and only the chief executive of Hong Kong has the power of handling any extradition requests from non-treaty countries. There is an absence of reviewing the due process of law and human rights condition in the receiving country, i.e., right to a fair trial in the draft bill. The Beijing-backed government of Hong Kong proposing the change said that the amendment is essential to prevent Hong Kong from becoming a shelter for criminals. The government is trying to convince that the law will only affect the people accused of serious crimes, not be used against anything related to freedom of expression and other political crimes. But, it is quite certain that this argument can not convince the protesters as the dominance of China in the political climate of Hong Kong is only accelerating. And this law would give China another means to interfere as a 'big brother' and install its system of arbitration, persecution, and repression in Hong Kong.

Many of the States with extradition law follow international human rights laws to handle extradition obligations. And after the landmark pronouncement of Soering verdict, States have been more cautious about core human rights laws and the due process of law while handling extradition requests. And regarding the extradition treaty with China, almost all the countries debar themselves from entering into any extradition agreements with China as the country is known for the violation of those core rights. Given this situation, the step of the Hong Kong government is undoubtedly an appalling one.

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FACT FILE

20th June: The World Refugee Day

THE World Refugee Day is observed every year on 20th June, dedicated to raising awareness about the plights of the millions of refugees and displaced people around the world. The UN General Assembly passed a resolution declaring 20 June as World Refugee Day as an observance of the 50th anniversary of the 1951 Convention relating to the Status of Refugees (hereinafter, the Convention). The 2019 theme is "Step with Refugees: Take a Step on World Refugee Day".

According to the Convention, a refugee is someone who fled his or her home and country owing to "a well-founded fear of persecution because of his/her race, religion, nationality, membership in a particular social group, or political opinion" whereas asylum seekers are those whose refugee status has not been definitively evaluated. According to the 2018 statistics of United Nations Refugee Agency, there are about 68.5 million forcibly displaced people around the world, among which 25.4 million are refugees, 3.1 million are asylum seekers and 40 million people are internally displaced people. Moreover, there are an estimated 10 million stateless people who have been denied a nationality and access to basic rights such as education, healthcare, employment and freedom of movement. The report identified Iran, Lebanon, Pakistan and Uganda among the countries hosting the highest number of refugees. The highest number of refugees came from Syria, Afghanistan and South Sudan, comprising of 57% of the global figure.

The cornerstone of international refugee protection is the principle of non-refoulement. This principle is enshrined in Article 33(1) of the Convention. The principle of non-refoulement prohibits a host State from sending back refugee to a country where there is a serious threat to his or her life or freedom. However, the protection under the principle of non-refoulement may not be claimed by those who pose a reasonable threat to the security of the country. The principle does not only apply to recognised refugees but also to those who have not been declared as refugees by the respective states of concern. This has now attained a status beyond convention and has emerged as a norm of customary international law. Exception to the principle has been enunciated in Article 33.2 to the effect that when there are reasonable grounds for regarding an asylum seeker as a danger to the security of the country or where he or she, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country.

Non-refoulement obligations complementing those appearing in the Convention, have also been established under international human rights regime. An explicit non-refoulement provision appears in Article 3 of the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment which prohibits the removal of a person to a country where there are substantial grounds for believing that he or she would be in danger of being subjected to torture. In pursuance of different decisions made by international and regional bodies and tribunals, prohibition against torture on its own standing has been considered as an inviolable norm of international human rights law.

Bangladesh is not a party to the 1951 Convention, but it has taken in a huge influx of Rohingyas, a stateless minority group who fled the persecution in Myanmar. The recent exodus began in 2017, and the numbers have steadily grown. Bangladesh is currently hosting over 1.2 million Rohingyas. On March 2019, the Government of Bangladesh declared that they would not be accepting any more Rohingyas into its territory. A case has been raised before the Pre-Trial Chamber of the International Criminal Court on whether Myanmar can be prosecuted for genocide and forced deportation, which has been decided in the affirmative. Repatriation of the Rohingya refugees was scheduled to begin in 2018. However, there has not been any co-operation from Myanmar to facilitate the repatriation procedure. Bangladesh has shared its concerns with the UN.

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