Defects Of Procedural Laws Cause Delay In Civil Litigation In Bangladesh

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Abstract:
Still in Bangladeshi civil courts run trials and other activities according to old laws and due to these, delay in civil litigation is so common here. Actually, those laws were framed considering the social economic condition and intention of the people of that period, which is just irrelevant these days. By misusing these old laws delaying the disposal of suits is easily possible because in most cases, detailed procedure is not mentioned. Apart from that, all the steps in trial are still completed manually which is extremely time-consuming but it's the provision of prevailing procedural law. So, if these procedural laws can be amended properly considering current challenges then there will be no delay in civil litigation and people will be able to enjoy rights declared by sustainable laws, in time.

1. Introduction:
A state is not only for declaring people's rights but also for enforcing the same, and states declare people's rights through substantive law, while states enforce those rights through procedural law. If there are defects in procedural law then people will not be able to enjoy rights declared by substantive law, because in that case the procedure for enforcing rights will not be smooth. Actually, it has been happening in Bangladesh for a long time, where substantive law declares people's rights but people cannot enjoy rights declared by those laws because procedures contain some defects. And by misusing these defects, a party who is in fear of losing the suit, tries to delay the final disposal and most often they become successful. If these cannot be checked immediately the future of the legal system of Bangladesh will go from bad to worse.

2. Literature review
2.1 Substantive and procedural laws - what do they do?
Law is a set of rules enacted by legislative bodies like parliament, and courts or other organisations are bound to follow those rules. As law is man-made sometimes it may be perfect or sometimes not, but in both cases what the legislative body enacted, is law. "Law is law, regardless of whether it is just or unjust. Most legal rules are designed to achieve the ends of justice. As with morality, lawmakers seeking to enact laws to regulate human conduct usually justify their enactment on the basis of justice." (Lovemore Madhuku, 2010, PP. 4-5)

Law may be substantive or procedural - substantive laws declare the rights of parties on the other hand procedural laws set the procedures of litigation. "Procedural law consists of the rules and regulations that govern the manner in which litigation is conducted. These rules and regulations may be statutory, they may be the product of some process of subordinate legislation." (Walter H., 2022, P. 35) When procedural laws define the procedures for civil litigation then those are called civil procedural law. But in both cases if substantive or procedural law contain any defect or loopholes, litigating parties will suffer, even petty defects may have serious impact.
2.2 Strong link is a must
It is true that substantive and procedural laws are two different things but procedural laws should be effective enough to ensure what the substantive laws declare. “Procedural law must have a strong link to the substantive law. The procedural law is not an end in itself but a means to the ends and principles of the proceedings as well as the substantive law to the matter.” (Torsten Stirner, 2021, P. 13) The link as told by Torsten Stirner (2021), is almost absent in countries like Bangladesh where delay is a common phenomenon in the case of civil litigations. It is easily assumed that, if substantive laws declare a right but procedural laws don’t show the way in which parties can easily enjoy the right then the right declared by substantive laws will be just valueless. In case of delay in civil litigation, people usually enjoy their rights after a long time, in other words, these litigating parties cannot enjoy what the substantive law declares for a long time due to this delay.

2.3 A number of lawyers are liable, but law is silent
Needless to say, a number of lawyers are liable for delay in civil litigation, because they benefited from the delay. “The aim of legal professional ethics is to educate the students to be seekers of justice, and make a right choice between discovering the truth and preserving the clients’ interests, thereby, avoiding the decline of the legal profession into a mere business venture” (M. Deguchi & M. Storme, 2008, P. 55) But, the way by which governing body of lawyers in Bangladesh - Bar council disposes of the cases of misconduct of lawyers is governed by The Bangladesh Legal, Practitioners and Bar Council Rules, 1972. But in nowhere of the rules, how Bar council will check the misconduct of lawyers of seeking unnecessary adjournments by raising false plea, is shown, rules is silent in this regard. This is one of the important examples of incompleteness of relevant laws which has a significant impact on delay in civil litigation.

2.4 Old fashioned trial: time-consuming but in the light of law
“In a system of paper-based civil procedure, the exchange of information established by the rules of procedure is enabled by composite elements such as court rules, local practices, and tools like dockets, folders, forms with specific and shared formal and technical features.” (Francesco Contini, 2015, P. 5) In a word, paper-based civil trial creates a lengthy process where everything is hand written, but the civil rules and order (CRO) provides for such a lengthy procedure. Many countries have started using modern technology in the courtroom, but countries like Bangladesh are still an exception in this regard.

2.5 Judges should play the greatest role, but they can’t
It is true that judicial orders which are liable for the delay in civil litigation come from a judge, not a lawyer, law teacher, or others. But actually a judge has very little to do in this regard, because in an adversarial system the duty of a judge is to declare who wins the legal battle. “Judges within adversarial civil procedural jurisdictions are known for their role as passive and neutral entities in litigation.” (Anlu Renette Coetsee, 2019, P. 10) In this system, winning or losing mostly depends on the performance of the lawyer, not on the actual state of parties. “The adversarial system is a legal battle where the winner party has to prove that he or she has stronger laws, facts, and points to win the case.” (Md. Maimul Ahsan Khan, 2012, P. 2) This is applicable not only to the final decision of a suit, but on every stage of a suit. If a party can’t submit properly the judge will just give an order against that party, no matter what the actual legal status of that party was. So, even if a judge knows very well that his order will cause delay in the final disposal of a suit he has nothing to do because procedural law gives parties a remedy and his duties to implement what the law says.

3. Aim of the study
The aim of this study was to look into relevant civil procedural laws and find out how these laws are liable for delay in civil litigation. Besides that, showing effective solutions for all these defects was also the aim of this study.

4. Methodology
4.1 Methods of collection of data
For this study, different procedural laws relating to the trial of civil litigation, especially which determine the time frame for a certain action in civil suits, have been examined. Writings of
different researchers on defects in procedural laws and similar issues have been taken into consideration for this study.

4.2 Laws governing procedures for civil litigation and recent attempts to amendment

Actually different laws are relevant in case of civil litigation - from filing suit to passing judgment. The code of civil procedure (CPC), 1908 (Act no. 5 of 1908) determines various issues relating to civil suits like system of filing suit, issuing summons, system of seeking adjustments, etc. There are so many defects in many provisions of CPC, but recently parliament has amended some provisions of these laws but such amendment is not sufficient at all. Suppose, in 2003 parliament inserted mediation provision by adding section 89A in CPC, but still mediation is unpopular in Bangladesh, so, at least now, it cannot be treated as a method for reducing the backlog of civil suits.

Conduct of lawyers or moral values to be borne in mind by lawyers are the subject of the Bangladesh legal practitioners and bar council order, 1972 (President's order no. 46 of 1972) and The Bangladesh legal practitioners and bar council rules, 1972 (No. 428-5, R. O. dated the 22nd May, 1972) determines the way of dealing with misconduct of lawyers through complaint and vigilance committee.

Time frame for institution of suit from cause of action, Time frame for filing relevant applications, or for appeal or review, etc are determined by the limitation act, 1908 (Act 9 of 1908).

Civil Rules and Orders (CRO), comprehensively framed in 1935, determines how evidence of a party is recorded, how judgment is given, or something like that. These are the laws which govern issues liable for delay in civil litigation, and one thing is interesting - all these laws (except Bar council rules) are of British period.

4.3 Defects in civil procedural laws

It goes without saying that unnecessary adjournments are importantly liable for delay in civil litigation and this issue is determined by the CPC. According to order 17, rule 1 of CPC, before the peremptory hearing court may grant 9 (of which 6 without cost) adjournment, and at peremptory hearing court may grant 3 adjournments with cost. Even 3 adjournments without cost and unlimited adjournments with cost may be granted in appeal as per order 41 rule 12A, and the cost for adjournments is only 200 to 1000 tk. But there is no mention of the time frame of adjournments- what will be the time-frame of each adjournment? So, if a party wants to misuse this provision by seeking unnecessary adjournments, causing delay will be easily possible. These adjournments provisions of 200-1000 tk. cost in order 17, rule 1 was inserted in 2003, and in order 41, rule 12A in 2006. Even in CPC, there are many scope of delay, which any party may misuse if they are in fear that they will lose the suit. Suppose, according to order 14, rule 8, after framing the issue court has to fix a date for final hearing within 120 days, this is an illogically long time. And further 120 days are allotted for completing the hearing from the date fixed for final hearing, under order 18, rule 19(1) of CPC. To reduce backlog of cases, in 2003, mediation provision had been added in CPC, but mediation provision is not comprehensive, as there's no mention of many important things like acceptable grounds for quitting mediation, changing mediator in case of possibility of failure, etc.

As per rule 75B(VI) of The Bangladesh Legal, Practitioners and Bar Council Rules, 1972, the complaint and vigilance committee shall receive complaint and keep vigilance, but there's nothing about how it will deter the lawyers from common misconducts like seeking unnecessary adjournment on false plea. So, usually the committee acts if anyone files a complaint against a lawyer, and by this way seeking unnecessary adjournments or wrongly delaying the procedure cannot be prevented.

The time frame for appeal, review and applications in a suit are determined by the limitation act 1908 and it is well-known that appeal is the continuation of trial. Section 5 of this Act provides for the condonation of delay, on being satisfied by court. Any party may take advantage of this section by filing an application or appeal after a long delay just by showing some convincing grounds, because the detailed procedure for being satisfied or how a court will be satisfied in
this regard, is not mentioned there. All these things are liable for delay in civil litigation, and judges have almost nothing to do in such cases as following the law is their only duty.

Rule 133 of Civil Rules and Orders (CRO) provides for handwritten recording of evidence, and rule 136 & 137 provides for preparing judgments manually, all these things are extremely time-consuming.

4.4 Analysis of current situation
Actually most of the civil procedural laws are outdated, though parliament amended several provisions but those amendments are not sufficient. 200-1000 tk for seeking adjournments of trial was fixed in 2003, considering the then economic standard of people, economic standard is different now, but the same provision remains in CPC. If a party is in fear of losing his wrongly held valuable property, then it is easily assumed that he will seek adjournments by just paying 200-1000 tk. As no time frame for adjournments is fixed, passing years after years by seeking all the 9 (allowable) adjournments is easily possible. But if the parliament determines the cost for seeking adjournments depending on the value of property, and makes seeking unnecessary adjournments difficult, then reducing delay becomes possible. The same thing is applicable on the limitation Act, 1908, which was framed in the British period when communication system was so difficult, but it is still in operation in Bangladesh, and a number of opportunity-seeking lawyers are taking advantage of this non-comprehensive Act. For these things, substantive laws declare rights of people, but procedures deter people from peacefully enjoying the rights declared by substantive law. Usually, through court procedure, they can enjoy their substantive law declared rights after a long legal battle.

Many researchers make lawyers liable for delay in civil litigation as they are directly benefited from such delay. Bar council is tasked with overseeing the conduct of lawyers, but there is no clear cut and comprehensive provision in the bar council rules for the way of checking the conduct of lawyers. If, in the rules, there are plain and simple ways for checking conduct of lawyers then the situation would be different.

Civil Rules and Orders (CRO) was framed in the British period, when technology was almost unknown in this subcontinent. But the way of recording evidence, writing judgment is still running according to the Civil Rules and Orders (CRO), no attempt has been made to introduce modern technology like voice typing there, so delay is still common.

5. Major findings:
Most of the laws which determine the time-frame of different steps of civil suits are archaic, and don't go with the socio economic condition of today's people in Bangladesh. Almost all the relevant provisions in civil procedural laws are non-comprehensive as detailed procedures are not shown there.

A strong link between substantive and procedural law in Bangladesh is absent, so people can't properly enjoy the rights declared by substantive law, in time. If some common issues like seeking unnecessary adjournments or old fashioned evidence recording can be checked through amending procedural laws, reducing delay in civil litigation will surely be possible.

6. Conclusion with recommendations:
One may argue that only amending procedural laws will not be enough for reducing delay in civil litigation, because the practice of avoiding legal provisions is seen in some cases. Actually such practice becomes possible if detailed procedure is not mentioned, because anyone cannot take unfair advantage from a court of law going beyond explicit provision of law. Following recommendations might be helpful in this regard and if these can be implemented properly then amending procedural laws will be enough to reduce delay in civil litigation.

i. All archaic provisions in procedural laws, which are incompatible with the social economic condition of today's Bangladeshi people, should be amended immediately.

ii. Legislature should take into consideration all the ways by which a number of lawyers take unfair advantage and make delay, while amending these provisions.
iii. The complaint and vigilance committee of the Bangladesh Bar council has to be active in deterring the lawyers from seeking unnecessary adjournments by making exaggerated or false pleas.

iv. Inserting provisions for using modern technologies in court in the Civil Rules and Order is a must, and this provision should be made mandatory for all civil courts.

v. On amending relevant civil procedural provisions, a committee (headed by a retired Supreme Court Judge) has to be formed, to look into whether amended provisions are properly followed.

References


