

LAWS' DELAYS AND NEED FOR REVOLUTIONARY CHANGES

Nihal Jayamanne
President's Counsel



The age old adage “*Justice delayed is Justice denied*” is in fact a contradiction in terms. It is not a correct statement in as much as it is inherent in the statement that Justice is done, though delayed. On the other hand “*Justice hurried is Justice buried*” may very well be the more accurate and real statement.

The process of Justice should be according to the provisions of Law which regulate it. If these provisions of law are inadequate and ineffective to streamline and expedite the process of justice, then what is required is amendment of these laws or the introduction of new laws to deal with it. The quality of justice should not in any way be compromised. We shouldn't sacrifice justice on the altar of expeditious disposal. We must as Lawyers recognize that the expiration of time heals and resolves many controversies and may be an aid to Justice.

“A court which functioned instantly, mechanically, and abstractly, would be unpopular. There is a conflict, as old as time, between those who wish prompt, even speedy, justice in the abstract, and seek delay in the concrete. Oftentimes lawyers who speak most vociferously for elimination of the law's delays in general are the most adroit and persistent in seeking delays for their own clients in particular. Business men who sneer at the courts and the laws for any lack of celerity are often the most insistent upon the use of every device for delay, when they find themselves named



as defendants in suits brought in court. In almost every case, there are factors operative for delay the fancied convenience of witnesses or counsel, the disposition of the debtors to defer the day of judgment, the disinclination of some judges to work industriously during an adequate number of hours each day, and many other."

-The above is from a view expressed by William L Ransom a former Judge of the City Court of New York

The administration of justice or more correctly the regulation of civil proceedings is still governed mainly by the Civil Procedure Code which was enacted in 1889.

Civil Procedure Code was introduced by Ordinance No. 2 of 1889 and came into operation in 1890. There had been 16 amendments to the Ordinance up to 1945. There were 11 amending Acts from 1949 to 1969 (period of 20 years) after independence. There were amending laws from 1973 to 1977 and 9 Amendments from 1980 to 1996. The most important amendments which in effect changed the whole structure of the old Civil Procedure Code and of the Judicial structure was the Administration of Justice Law No. 44 of 1973. The Administration of Justice Amendment Law No. 25 of 1975 in effect brought in a new Civil Procedure Code, by Chapter 5 of the Law. The most innovative and essential provisions which were brought in by this law was to address laws delays by the introduction of provisions for a preliminary investigation which is better known as pre trial proceedings.

Unfortunately these amendments were unceremoniously repealed and discarded no sooner the Government changed in 1977. The Administration of Justice Law (AJL) was repealed and the Old Civil Procedure Code of 1889 was again brought back thus going back almost 100 years.

I must mention that most of the innovative and enlightened provisions of the Administration of Justice Law in respect of Civil Proceedings were suggested and recommended first by a Committee headed by Justice Nagalingam in the early 1950's.

Unfortunately it was never implemented as the lawyers opposed it. Till it was revived in 1975 by the AJL as stated that too was thrown out as is the general practice in this country when governments change. It is not one political party that is guilty of this stupidity but all political parties. They continue to throw the baby with the bath water. It is justice that suffers and as a result the people.

In the late 1990s as a member of the Law Commission headed by late Justice Dr. A.R.B. Amarasinghe, I submitted proposals to reintroduce several amendments to the Civil Procedure Code including provisions for pre-trial proceedings which were much wider than the provisions contained in the Administration of Justice Law. Those amendments were open for public comments and also open to discussion by the Bar Association. Several seminars were held and comprehensive recommendation along with a draft Bill approved by the Law Commission was forwarded to the Ministry of Justice. Well as far as I know they are languishing in some unknown corner of some unknown cupboard in some mysterious department in the Ministry of Justice.

When I assumed duties as the Chairman of the Law Commission in 2009, I tried my best to have the former commission's proposals adopted but I did not succeed, I know that there was another Committee which had been appointed to review the Civil Procedure Code by the Government after 2016 and that Committee had in fact adopted all most all the suggestions made by the Commission but had changed certain provisions of the Commission's draft which in my opinion dilutes the Law Commission proposals.

Tinkering with the well considered proposals without consultation with the drafters of the original proposals as to why the proposals were incorporated resulted in negating some salient features of the original draft.

My view is that we must repeal the Civil Procedure Code without tinkering with it and bring in a new code, to remedy the problems that now exist. We must have a Civil Procedure Code which is home baked.

The declared policy of the Government in making Sri Lanka a financial and commercial hub, can never be achieved unless there is a judicial infrastructure which is efficient credible and expeditious to meet with its aspirations and its ambitions policy. The serious foreign investors will not invest here unless there is a proper judicial infrastructure set in place through which all legal issues are expeditiously and credibly addressed. Dispute resolution must not be an uncertain, long drawn out process. It must be clear and predictable according to clearly stated laws.

Can this be achieved by pre-trial vehicles?

My view is that the introduction of pre trial proceedings alone will not solve the problems that exists and the problems that will arise in the future. It is not a satisfactory remedy to the entire problem. What is required is to look at the entire judicial process in the light of the future journey of our country. It is essential to put in place a judicial process which will be in line with the developed economies at least in the Asian region if not in the rest of the world. Without such an ambitious plan no solution to the problem can be found. Sri Lanka will be regarded as a country not geared for the present and also for the future. Therefore what is required is a holistic approach which requires completely different mindsets in judges, in lawyers, and in litigants. We need innovative legal remedies for dispute resolution. Innovation is the key. For this we must consciously discard the age old concepts

archaic procedure and ideas which hinder progress. A new system for administration of justice is a *sine quo non*. We must rid ourselves of procedural technicalities which are now regarded as sacrosanct and make way for a system which genuinely address is the real issues and dispense Justice, which is JUST in the true sense of the word.

How are we going to do this?

est facile dictu sed difficile factu (it is easy to say but difficult to do..)

But we have to do it. We should have done it 50 years ago, it is not too late to do it now.. *nunc pro tunc* (now for then).

But it will definitely be too late 5 years hence.

The Current situation and the way forward

Today, litigation instead of being people-friendly and a means of efficacious dispute resolving mechanism stands as a disguised source of tyranny and horror. The appalling figures of cases pending adjudication in court rooms, the exasperating wait for the finality of adjudication are a shocking revelation of the gravity of the matter triggering off an apprehension of the Judiciary losing its credibility and the additional danger of forfeiting its claim of nobility.

The ground realities can neither be ignored nor dumped in cold storage. The ever-escalating figure of pending cases is an authoritative indicator of how acute the crisis is. The causative factors responsible for such degeneration of the Judicial System including the credibility, faith, trust and tradition associated therewith are multifarious and to particularize any one of those as the implicit cause would indeed be foolish. Yet, one cannot be remiss of the fact that an overwhelming majority are inclined to attribute the primal cause to the ideological and psychological over-dependence upon the



procedural Legal System and precedents of English Law Courts. We have not still come to terms with the fact that a long time has passed since the British left our shores and we became a sovereign state. The State, the Judiciary, and the Legal Profession continues to be overawed by the British legal system. To be effective, the legal system in Sri Lanka needs to be overhauled and liberated from its British bondage and rejuvenated through a comprehensive national scheme and look for innovative measures attuned to the socio-economic and cultural fabric prevailing in the country. At the same time the case flow management to usher in speedy justice is also required to be modernized with introduction of new technology and resort to wonders of the electronic revolution.

There possibly can be no denial that for the,

(1) realization of the cherished goal of rejuvenation and transformation of the judiciary and the judicial system wholesale, liberty thereof from the outrageous vice of the CPC is essential

(2) re-kindling of self-confidence in the Judicial fraternity and providing for swiftness in the decision making process several jurisprudential innovations, policies, safeguards and reformatory parameters need to be legislated for and enforced.

It must however be conceded that new enactments aligned to prevailing socio-economic changes have found their way in to the statute books, many of the obsolete laws of British vintage and pre-independence period have either been repealed or modified in conformity with the prevalent era. But there is a need to simplify procedural and substantive principles of law, and provisions incorporated to curtail disputes through preliminary hearings and offering scope for reasonable settlement, new vistas of jurisdiction and jurisprudence must be put in place. So also Fast Track Courts to try old

pending cases, Tribunals and Courts for trial of cases under special statutes. Provisions must be made for providing free effective legal aid through the establishment of Legal Services Authorities. Also, suggestions for substantial increase in strength of judges coupled with consequential increase of court-staff is a must. Improvements are also reflected in the infrastructural paraphernalia with introduction of new technology and reliance on electronic equipment.

Even though a substantial effort has been made to streamline the judicial process, the performance of the Judicial process, in general, continues to remain unchanged.

There is no argument that transformation of the judiciary and the judicial system is an on-going process and reformatory parameters and policies by way of suggestions have evolved but unfortunately only some of these find acceptance. The Law Commission of Sri Lanka must play a positive role and the Ministry of Justice must work in tandem with the Commission. The change of the mind set of the lawyers and the Judges is perhaps the key.

A revolutionary idea

I came across an innovative suggestion that would, I believe will solve many issues that exist in the Dispute Resolution Process which presently contribute to Law delays. *Sri T.V.S.K Kanaka Raju, a Senior Advocate in Vishakhapatnam, propounded this innovative concept of "Advance Decree"* as one of the possible means of resolving the persisting problem of pending cases escalating day by day.

What is an "Advanced Decree" and How does it work

An Advanced Decree is a process whereby two parties to a contract agree to set out there agreement in writing incorporating the rights and duties of both parties and the

consequences of breach of any condition of the agreement. On a breach of a condition of the agreement the parties specifically agree that they will not proceed to litigation but will instead file the agreement in the relevant Court which has jurisdiction over the matter requesting the Court to enter a decree in advance incorporating the agreement and the terms and conditions of the agreement and to implement them as a decree entered by Court. This will be akin to terms of settlement entered in to by parties to an action in Court. Therefore in a sense this concept can also be described as preventive litigation as is practiced presently in accordance with the Civil Procedure Code. In this system a Decree will be entered without a trial on the agreement of parties.

If the concept of "Advance Decree" can be introduced in to Civil Procedure proceedings as much as a large percent of the cases could be settled once for all without a trial. On a trial basis, this concept can be applied to breach of agreement to buy and sell, Eviction Suits, Money Recovery Suits and all other Summary Suits which consume at least about fifty percent of the trial court work. An Eviction Suit takes not less than 3 to 4 years and even Money Recovery Suit consumes about three years of precious time of the Court. Precious time cannot be wasted over such non-serious matters.

It would be convenient to examine the type of cases that are filed in the trial courts:-

- (i) Suits based on documents;
 - (a) Suits arising out of Promissory Notes;
 - (b) Suits for specific performance entitlement whereof happens to be based on registered written agreement;

- (c) Suits for recovery of money arising out of registered mortgage deeds or other documents;

- (ii) Suits for eviction based on registered written agreement;

- (iii) Declaratory Suits; and

- (iv) Torts cases.

Except for Declaratory Suits and Tort Cases, the remaining litigations filed can straight away be settled by adopting the scheme of "Advance Decree". The conclusive undertakings prepared with the consent of parties become operative after expiry of the period of the contract or its termination on a breach is the form of an "Advance Decree" which becomes executable without any further proceedings had.

I. SOME ILLUSTRATIONS WHERE "ADVANCE DECREE" PERMISSIBLE

1. Money Cases:- 'A' wants to lend money to 'B'. At the same time 'A' wants to be sure that he gets back the money he proposes to lend together with interest without going through a trial process. Therefore 'A' will insist that he would lend money only to someone, who is willing to suffer an "Advance Decree". 'B' the borrower should be willing to follow that procedure that 'A' would adopt. Both 'A' and 'B' can opt for an "Advance Decree" which works out thus:—

- (i) 'A' and 'B' will execute a written document evidencing the loan and necessary conditions that govern the repayment.

- (ii) Immediately 'A' files a suit seeking an "Advance Decree" on the strength of the said written instrument. 'B' admits the suit claim and agrees to suffer a decree. Where 'A' will have the right to execute the decree in case for example 'B' fails to return the money within the stipulated time. A conditional decree would be passed and the enforceability of



the decree will be deferred till such time the condition is complied with. In other words, the decree becomes enforceable and begins to operate upon contravention of the condition imposed. Necessary legal fiction can be introduced by amending the relevant statute deeming that the decree is passed only on the date when it becomes enforceable.

Therefore here is the case where at or around the time of borrowing money itself a decree is passed conditionally. If the parties feel that there should be some security for repayment, the same thing can be incorporated in the terms of the decree. If there is security given even in the form of a Mortgage of property the parties can agree to incorporate a Mortgage Decree as an Advanced Decree.

2. Eviction Cases:— In case of an eviction suit, at the time of giving the property on lease or while entering into written lease agreement or may be during the pendency of a lease, the lessor and lessee can together seek an “Advance Decree”. Where ‘O’, the owner wants to lease his property to ‘L’, the lessee, both of them will enter into a lease deed complying with legal requirements and incorporating terms as to rentals and payments thereof and date of termination. Thereafter, ‘O’ files a suit seeking “Advance Decree” of eviction.

3. Other situations:—

a. Whenever two parties enter into written agreements either for purchase or sale of property, this concept can be made use of profitably. What one needs is a fertile imagination to make best use of this concept.

b. Similarly, this concept can also be used by bankers and other financial institutions disbursing loans on a large scale.

A new section or provisions by way of “Civil procedure Code Special provisions Act”

may have to be enacted to implement and give effect to this concept:

Thus an “Advance Decree” means formal expression of the parties in writing which determines the conclusive rights of the parties without adjudication for its direct implementation between/amongst the parties and is in the form of registered document.”

Relief of Advance Decree must necessarily be mentioned in every such agreement for which requisite changes are necessary, the Arbitration and Conciliation Act and the Mediation Act will be redundant as much as the dreaded trial.

It can be enacted that both the parties should be represented by their separate lawyers at the execution of the contract or agreement incorporating an advanced decree. It should be the same as entering terms of settlement in Court.

As observed earlier, the Judiciary and the Judicial System are in the throes of a crisis of sorts. Revolutionary transformation is the supreme necessity of the hour. The scheme of “Advance Decree” as has been envisaged in the foregoing paragraphs, when implemented, would positively diffuse the chaotic situation to a conveniently large extent for it would act as a monitoring tool to appease the anguish and the frustration of the disillusioned litigants. It is manifest from the proposed scheme that the disadvantages in adopting the proposed concept of “Advance Decree” is absolutely nil or at the best negligible. To the contrary the advantages thereof are manifold, rewarding and hassle-free. Many of the tedious and technical requirements associated with the trial such as framing of issues, prolonged examination and cross-examination of witnesses, moving in revision or miscellaneous appeals before a superior forum, costly waste of precious time in leisurely hearing of long-drawn arguments

and the indefinite wait for the Judgment can conveniently be avoided.

This innovation can also be described as preventive litigation. Preventive litigation or preventive law is a very important subject. In view of the fact that a law suit is presently viewed as long drawn-out and traumatic, preventive law or preventive litigation assumes a great degree of significance. The concept of "Advance Decree" provides a win-win situation to both parties. It is an exception to the adversarial system. There is no loser in the court room! All are gainers, including the lawyer. No emotional traumas. No loss of time and on the other hand there is certainty and definiteness in this system. The revenue generation from courts will increase by leaps and bounds. The rigours created by the hierarchy of appeals, first appeal, second appeal, special leave, etc. are conveniently avoided. In resorting to the concept of "Advance Decree" it is possible and practicable to see the hitherto elusive finished product at the very inception when the parties enter into an agreement. Lawyers will have great contentment as there will be a finality and closing of litigation. In fact, lawyers transform themselves into judges while drafting the "Advance Decree" and they can by using all their skills draft the decrees in the best possible manner. Inartistic drafting of such a decree, inability to visualize future contingencies would give rise to serious problems to clientele and the system will ensure that clients elect only the skilled lawyer for this purpose.

The fees of the lawyers are also assured. In fact, clients will be willing to pay the fee with satisfaction. There can be no scope for malpractice, no scope for fabrication of documents, no scope for false or frivolous defense no grumblings about inadequate hearings. Dishonesty in any quarter will have no room in a fool proof system like this. Admittedly, this system is not a substitute for the existing system. In fact, this system

will supplement but not replace the existing system. It will run parallel. As a matter of fact the litigation ends even before it starts. Rather, it starts with a view to end quickly and finally by preliminary negotiations and adjusting issues by narrowing the controversy to the accepted claims in the agreement between the parties to the litigation. The right to avoid laws delays becomes an enforceable right. Under this system, the plaintiff will have the right to pick and choose only a law-abiding person as the defendant. It is only when the defendant consents to suffer a decree the implementation of this procedure would be possible. Once the concept is implemented over a period of time, each and every plaintiff will naturally insist for an "Advance Decree" and the defendant will then have no option except to become law-abiding and suffer a decree. Hopefully, upon continuous use and application of this concept, all landlords and land owners and all money lenders will definitely choose this system and consequently all lessees and all borrowers will transform themselves into law abiding persons by consenting to such decrees.

In view of the humanitarian, people-friendly methodology reflected in the recipes of the concept of "Advance Decree" with its attendant consequential hassle-free litigation is the best remedy to curtail the uncontrollable case load as also the infuriating wait for litigation to reach finality. Now expediency and Justice go hand in hand.

In the Sri Lankan context there are many financial institutions as well as people who by way of their business acumen have the propensity to advance huge amounts to the needy entrepreneurs but they are not willing to come forward on account of the failure of the Justice Delivery System in the matter of recoveries. This concept can very well bridge the gap and restore the confidence of such financial institutions and people. This will liberate substantial capital to the financial market, thus benefitting the needy



entrepreneurs. This will be a welcome boost to the economy.

This article is adopted from a speech I made at a seminar on Laws Delays, at the Organization of Professional Associations of Sri Lanka, on 7th December 2016. The other speakers at this seminar were Justice Saleem Marsoof PC and late Mr. Hemantha Warnakulasuriya PC. At the said speech I quoted from and made references to an article published by T.V.S.K Kanaka Raju on legaleraonline.com. Those matters are also embodied in this article.

*Author can be contacted at email:
nihaljpc@gmail.com*