

A Socio-legal Perspective on the Restrictions and Restrictive Interpretation of Fundamental Rights in Sri Lanka

Thilakarathna , K.A.A.N

*Institute of Human Resource Advancement, University of Colombo.
akalanka.thilakarathna@cinec.edu*

Abstract - The disclosure on fundamental rights from a socio-legal point of view has been a somewhat recent development. According to this school of thought rights are seen as a friction that exist among the members of a society where they are constantly making claims to enhance their respective rights. Socio-legal perspective looks at the sociological factors, such as gender, religion, economic status, culture, ethnography and the social interactions of the parties in general when they live in a community and how these interactions represents the virtues and values of a community. The Sri Lankan experience has shown that with its developments of the Constitutional Jurisprudence ‘Fundamental rights’ plays a very important role in the development of a society. For a long time, that is to say till 1978 none of the Sri Lankans enjoyed justiciable fundamental rights. Even the justiciable rights granted under the 1978 constitution was hampered severely with the restrictions and the restrictive interpretations that were given to them. The constitution and the judiciary has therefore, acted as a barrier at times against the wishes of society. However, these barriers that have been so created has at times urged the legislature and especially the judiciary to take a more liberal viewpoint with regard to these fundamental rights when people have tried to vindicate them. From a socio-legal background we can see that both the law shapes society and vice versa. Still due to the differences that exist among the institutions and those who are responsible for interpreting the law, people have been unable to enjoy the fundamental rights guaranteed under the constitution to the fullest. There for it is suggested that when implementing restrictions upon fundamental rights granted under a constitution, a through consultation must be made with the members of the society and then after one should decide on the scope and the ambit of the restrictions which are going to be placed upon the fundamental rights. Therefore, it becomes very important to look at the matter from a sociological perspective.

Keywords - Fundamental rights, Interpretation, Law, Proportionality, Sociology

I. INTRODUCTION AND RESEARCH PROBLEM

Socio-Legal study is now an established field. This has significance not only for the socio-legal scholars, but also for

the law and policy makers. Issues globalization, neoliberalism and technological advancement has warranted a new approach of socio-legal studies. The 1978 Constitution granted the citizens of Sri Lanka with a set of fundamental rights that were made justiciable for the first time in its history. This in itself was a new social dimension. These rights were somewhat restricted in their scope as it gave little emphasis to the second generation of rights, which includes much of the social, economic and cultural rights, which have not been given a due recognition in the Constitution. Rights so granted under the constitution has been restricted in number of ways. Firstly there is a time limitation of one month within which you have to petition to the Supreme Court. Secondly, only the Supreme Court has the jurisdiction to determine infringements. Thirdly, only fundamental rights that are violated by executive or administrative acts are covered and therefore, the judiciary and the legislature is excluded. Fourthly, either the person whose fundamental rights were violated or an Attorney-at-law in his behalf can make the petition. Fifthly, the fundamental rights litigation is very much an expensive business. Lastly, the Supreme Court itself has on occasions give a too narrower interpretation of these rights. Looking at all of these restrictions from a sociological perspective it seems clear that as the sociologist consider rights to be frictions that exist in a society where just claims made by the individuals are recognized in due course by a controlling authority, if such recognized rights are to be again restricted by other means it will not allow for the individuals to pursue a life where they are capable of realizing their full potential. These restrictions so imposed by the constitution affect the social functions that is expected of the ‘Fundamental Rights’. Fundamental Rights has the social function of smoothly transforming the society forward and making the environment a clear and better one for all the people in the society to attain the fullest standards of living which they are seeking to achieve. In view of this it becomes vital for any ruling authority to take a conscience view of the sociological impacts such restrictions may have upon a particular society. There for it is feasible to find out how to best manage the conflicting of interest that are generated where a set of recognized rights are put in to scrutiny by a different set of limitations that threatens individual ability of pursuing a life where such an individual is able to realize the utmost utilization of once liberty.

II. RESEARCH METHODOLOGY

A qualitative research is carried out regarding the interpretation of fundamental rights and its socio-legal. It primarily uses the decisions of the Supreme Court on the 'Fundamental Rights' of the Constitution and its respective limitations imposed by article 15. As this study is mainly focused on the judicial activity regarding the decision making of fundamental rights, it also uses the commentaries given by authors regarding particular judgements.

III. RESULTS AND FINDINGS

The world human rights movement has been an enormous and surprising success in putting forward high standards for states and societies to follow [5]. An adequate sociological theory of human rights must, indeed, take a social-constructionist point of view, that human rights is an institution that is specific to cultural and historical context just like any other, and that its very universality is itself a human construction [6]. Sociology of human rights is dedicated both to the study of social action related to the defense and promotion of human rights, and to the way social movements can help our understanding of variations in the implementation of legislation [3]. The contemporary debate on the restriction of individual rights has shown that individual rights are not to be restricted as a matter of course. Individual rights are political trumps held by individuals. Individuals have rights when, for some reason, a collective goal is not a sufficient justification for denying them what they wish, as individuals, to have or to do, or not a sufficient justification for imposing some loss or injury upon them [2]. For human rights practitioners and activists the feeling that human rights are distant from social reality is an anathema. Human rights are not seen as beyond social life, rather they are invoked and reproduced through struggles at the heart of social life. From a sociological perspective of a right holder, the severity of a law's impact has no necessary connection to whether the law directly or incidentally burdens the right's exercise. A law imposing a direct burden will be permitted to override a fundamental right only if the law is narrowly drawn to serve a compelling interest. In contrast, laws imposing incidental burdens trigger more deferential judicial scrutiny [1]. As to the interpretation of restrictions on fundamental rights a court is given a broad discretion it may lead to a situation where rights will be abrogated. The concept of proportionality, which simply means that you should not use a sledgehammer to crack a nut, is a good tool for proper balancing of conflicts regarding fundamental rights.

The use of proportionality in rights review has found a great deal of acceptance as one of the best mechanisms for settling rights disputes as it does not allow the rights to be unnecessarily affected where a compromise is made. The overwhelming nature of the restrictions imposed upon

fundamental rights of the Constitution has given a too wider discretion for decision makers and administrators when they implement certain proposals and plans as the wide language of the restrictions would be there to protect them in case of a breach [4]. The rights and the restrictions laid down under article necessarily invite a proportionality test when settling respective claims [7]. However, some have also shown a danger in allowing or entertaining too many rights or claims of individuals as it will hinder the progress of development and hence a proportionality analysis is to be avoided. Even with this view against a proportionality, with regard to analysis of rights, the majority of the view has remained that rights of the people and their limitations be proportionate to the cause that is to be achieved.

IV. CONCLUSION

It seems clear that the debate as to the relationship between sociology and fundamental rights is an essential one in a contemporary society. The socio-logical view as to the existence of fundamental rights shows that they exist to ease out the tension or the friction that exists among members of a society. If fundamental rights are to be restricted somehow or the other it will have its own repercussions on a society where the members of the society themselves will rise up for an upheaval. In the Sri Lankan context it is very much visible how these restrictions have made its adversarial impacts upon the members of the society where it has always been a struggle for those who have tried to vindicate their rights due to a number of constraints that ranges from black letter law to institutions administering justice. The debate over the issue of fundamental rights has always played a focal point in all most all the discussions relating to constitutional amendments. Even in the current debate surrounding fundamental rights on the proposed constitution, it is still unclear as to the scope of protection and the amount of restrictions that are going to be placed upon those rights. Therefore it becomes vital to look at these from a sociological point of view. And to appreciate the social realities when one is considering about the restrictions and restrictive interpretations of Fundamental rights.

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