

The Operation of the Law Related to Human Rights in Reality

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Abstract: Simply the human rights are the space given to a person by the society to live a free life. A person is not an isolated creature in the society. They have to always interact with the others protecting their own human rights and rights of the others. When these rights conflict with each other, problems arise. Therefore, normal routine of the society is been disturbed. To overcome these problems people have made laws and made regulations to enforce them. But with the development of the society, sometimes there are situations that are very complicated and even the judges face problems with the applicability of laws. New issues arise due to the advancement of the society and sometimes, no laws to be applied in those situations or even if there are laws, they are not enough, and they should be amended.

Keywords: Human Rights, Laws, Regulations, Law school

I. INTRODUCTION

At ancient times all these problems were solved using religions. But later with the developments of the society and due to globalization, all the ethnic groups were mixed and due to that issue, that was hard to use the rules under one religion. Religions have their conflicting rules. For an Example Buddhism doesn't accept killing any living organism. However, according to Islamic Shariya Law they have the eye to eye, tooth to tooth concept. Therefore, people tend to regulate laws and there can be conflicts with certain religions. For an Example death penalty is against Buddhism, but that is in our legal system and can be enforced whenever the relevant authorities need to enforce that.

II. DISCUSSION

Different law school philosophers have made their own contributions to the concept of Human Rights. Natural Law School, Sociological Law School, American Realism and Feminism law school are important law schools in this regard.

The Natural law school states that there is a close connection between the natural rights and the human rights.¹ And according to natural law school fundamental rights are inherited by the birth itself.²

In the Greek era, philosophers like Socrates, Plaeto, Aristotle, Cicero and also the philosophers in the Rome Era philosophers like Justinian, St. Augustin and Thomas Aquinas said that the human rights can be proved by the natural law. As Hugo Grotius shows as the natural law cannot be changed, the human rights also remain unchanged. There, it was

mentioned that all the human beings can live an equal better life and for that naturally, the qualities are given and that is defined as the law in the society. This decision is given by Socrates, Kent, Plaeto and by other philosophers.

The social Contract Theory which is considered as an important concept under the natural law school defines this theory as the power of the ruler is under the conditions in between the ruler and the people under him. If the ruler goes against this concept the conditions under the theory is breached. John Locke in his work Two Treaties of Government states that the ruler should protect the life, freedom, health, property of the people in the country. The ruler has no right to breach any of these rights. Therefore, through these concepts the human rights have become a universal right.

This theory has been applied in a recent case South West Africa³. There the Mancata J stated that the parliament can't make laws defining human rights. The only thing that they can do is to make laws to enforce the human rights of the people. In India Bhagawathie J stated that human rights don't change according to the time, place and situation. And he further stated that, they are not made to satisfy the political interests or to satisfy the philosophical views. Those rights cannot be given away to other bodies. Just by having human rights in the constitution that is not considered as the origin of human rights. It is considered that with the origin of the human being to the world, naturally these rights have been originated.⁴ This clearly shows that to develop human rights, the natural Law school has helped a lot. Human has inherited many human rights by the nature but out of those only few of the rights have been enforced as fundamental rights.

Lon Fuller in his work "Morality of laws" book basically says that law should change with the time to satisfy the motives of the people. He further says that there should be no conflicts with the positive law and the real law. And he said that the legislature and the judiciary should work with morality and if not the whole society will get destroyed. And according to this, to minimize the basic weaknesses in the FR area, there should be new amendments and new regulations, because the judges always can't make the laws. These natural law concepts are still in force in the areas such as misuse of force, Genocide, FR etc.

³ Liberia v SA, Ethiopia v SA No.20 May 1961 (JCI)

⁴ Justice Bhagawathi P.N, Developing Human Rights Jurisprudence, 24-26/February/1988-Bangalore, India

¹ Noel Dias, International comparative and Human Right Law, p.600

² Ibid

Naturally these rights are with the people. That is common sense to respect others and to protect each other's rights because everyone has their own rights from their birth itself. Everyone has a duty to protect the dignity of others and not to protect their FRs on any ground.

The next most important thing is that we must consider whether the enforcement of these fundamental rights is practical under the current situations and developments. In the Sociological Law School if a law is not practical that should be changed according to the practical situations. Ehrlich in his work "Fundamental principles of Sociology of Law" stated that in a country there is a gap between the real law and the positive Law. Roscoe Pound has introduced a social Engineering theory and that is to implement laws according to the current situation of the society. If we apply this principle in our country, we can see many instances where that shows gaps between real Law and positive law in Fundamental Rights.

First we will consider Article 11. The torture has been called "like the pirate and slave trader before him-hostis humanis generis, an enemy of all mankind"⁵ When we consider Sri Lanka, especially by the police and army people's rights are been violated under Article 11.⁶ Therefore, most of the people are scared to file cases against them or they don't know the procedure. The innocent victims will never go against them due to ignorance. And no one will come to give evidence, because they are scared. Sometimes, if those people can't prove their mental and physical damage by proper medical evidence the courts won't accept their complaints. Strong evidence should be there to support the case. There should be new amendments to the Evidence ordinance to require court to presume, until the contrary is proved, that a bodily injury caused to a person in custody or at the police station has been caused by the officer during the relevant period.

We have 1994 No.22 Torture Act enacted in Sri Lanka but due to Emergency Regulations and due to Anti-Terrorism Act Amendments, that is not properly activated. In *Nalika Kumudini, attorney at law, (on behalf of malsha kumari) v. Nihal Mahinda, O.I.C. Hungama police and others*⁷ case a small girl at the age of 14 has been arrested by the police and they have beaten her with a horse pipe and trampled her. The courts considered that as torture and held that in such situations it is very hard to prove that she has breached her fundamental rights with evidence. Specially in the cases of children and with the uneducated people, if they are victims that is difficult because they can't explain all the situations as it really occurred. In *Gunerathna v A.G* court has mentioned that even pointing the body parts of a little girl and asking to explain amounts to torture.

When considering equal protection under law the U.S Supreme Court first developed a "two-tier" approach and later they have developed "three-tier" approach. In new equal protection areas, classifications are strictly scrutinized. In Sri Lanka, equal protection area should be developed considering all these factors.⁸

Articles 15 and 16 can be applied when the fundamental rights are been limited by the Prevention of Terrorism Act and by emergency regulations etc. That is again another problem, and some will say that even having limitations under special circumstances are wrong. But in a way, some can argue that the limitations are there to keep a balance between individual right and the interest of the society. Therefore, these areas should be implemented.

However, there are some situations where whatever available in the Anti-terrorism Act and in Emergency regulations, if a clear violation of FR occurred; the people who have done that act are liable. That is a good point where our law regulates in a correct practical manner according to the Sociological Law School. In *Konesalingam v Major Mutalif case*⁹, under the Act the person has been arrested but later, the courts held that there is a clear infringement of Article 13(2). In *Weerawansa v A. G*¹⁰ case Mark Fernando J has followed the same. The courts have tried several instances to minimize limitations of fundamental rights.

When victims need to file Fundamental rights cases, under Article 17 and 126 they must file the case in the Supreme Court. The Supreme Court is situated in Colombo. Therefore, there are many victims who do not file cases due to distance. Further, the very high amount that the lawyers will charge is another reason for not filing actions.

A research has shown that the people from other areas outside Colombo have a very low number in filing cases against violation of Fundamental Rights. That is as follows;¹¹

South Less than 30 miles from Colombo	-23
South more than 30 miles from Colombo	-08
North/East but Transferred	- 7
North/East	-1

And the other reasons for not filing cases are not having proper knowledge about violation of their own fundamental rights. Some don't know what the Fundamental rights are and when they are breached what actions to be taken. And most people don't know that there are many options such as legal aid commissions, Home for Human Rights (HHR), Centre for Human Rights and Development (CHRD), Institute for Human Rights (IHR), Janasansadaya and many other places to

⁵Filartiga v Pena-Irala, 630 F.2d 876 (2d Cir.1980)

⁶Lalith Rajapaksa's Torture case, Attorney Basi Fernando, Asian Human Rights Committee

⁷S.C. APPLICATION (F.R.) NO. 615/95

⁸ Fundamental Rights in Sri Lanka, Second Edition, Jayampathy Wickramaratna, p. 892

⁹ SC(FR) No 555/2001

¹⁰ (2000) 1 SLR 387

¹¹ Pinto, Jayawardena, SL-The right not to be tortured, A Critical Analysis of the Judicial Response op cit at p.12

help the victims free of charge, especially for the victims who have low income.

Further, when our Fundamental Rights are been violated, we can go to several places such as Supreme Court, The National Human Rights Commission, The National Police Commission, Ombudsman, ICRC and UN. Most of the people are ignorant about these institutions. Even though there are legal aid commissions they are not that active to file cases and to give the proper remedies to the victims. The aid is given specially for the people who are having very low income and that is also unfair because even the middle-class people can't afford that much on FR cases.

According to Dicey, Rule of Law is also important to protect the fundamental rights of the people. The meaning of that is, everyone is equal in front of law, no one is above the law and even the ruler is under the law.

The other main concept that we must discuss is the Monism and Dualism concept. Sri Lanka being a Dualism country has signed and ratified many international treaties and Acts on Fundamental Rights, but they cannot be enforced in Sri Lanka directly because these laws should be included in the constitution, Acts or to any other form of legal source. Then only we can use those directly in our country. For an Example 1997 ICCPR 1st optional protocol has been signed by Sri Lanka and according to that, a victim who has breached any civil and political right, after taking all the national remedies under the Sri Lankan law, if he didn't get his expected remedy he can produce an appeal to the Geneva Human Rights Commission and any recommendation given by the commission should be followed by the state.

In *Nallarathnam Singarasa v A.G case*¹² the victim has produced an appeal to the Geneva Human Rights Commission, but the recommendation of it was not accepted by the Sri Lanka Supreme Court. But the Jurists of the human rights say that it's a weakness of our legal system because the international human rights under international treaties and Acts are not enforced in Sri Lanka. Therefore, the critics say that by the 2007 No.56 ICCPR Act these shortcomings are solved up to some extent. Even after this, Sri Lanka didn't accept and followed any of the recommendations given by the Geneva Human Rights Commission. Therefore, these situations should be changed. Still the most suitable thing to do is when there is a breach of fundamental rights we must file a case in the Supreme Court. Supreme Court is the sole guardian of the fundamental rights in Sri Lanka.

Therefore, the victims can't prove that their rights have been violated. The fundamental rights should be changed because there is a gap between the real law and the positive law. The reason is that certain human rights are not protected under the regulations of law in Sri Lanka.

The government should take necessary steps to enforce certain necessary rights, not included to our legal system which can be seen in international conventions and Acts such as ICCPR etc. Those actions will develop and protect the FRs in Sri Lanka. The world has taken several steps to educate and pay more concern on FR such as introducing December 10th as the World Human Rights Day. The people should be taught about these violations and the government should make proper methods for the people to win their own FRs. Here the "Theory of Responsibility" is important. The media has the main responsibility in making the minds of the people and educating them in proper manner in this area.¹³

Article 126(1) says that after the violation of a person's fundamental rights, within one-month time that person must file a case in front of the Supreme Court. This one-month time is a very limited time but that is not practical. The person who wants to file a case may be in the jail, may be under custody¹⁴, due to violation of his/her rights may be hospitalized¹⁵. Considering these facts, the courts have given permission for them to file cases even after one month but that is also a very rare chance given by courts. If the petitioner has complained to the Human Rights Commission and if the petitioner gives justifiable reasons for the delay, there also 1-month period is not considered¹⁶. These can be taken as exceptions to the law given under Article 126(1).

This time (1 month) will discourage the people to file FR cases in front of the Supreme Court. Many critics say that due to practical reasons this "1 month" time period should be changed to "reasonable time period".

Article 126(2) of the constitution states that the person who has infringed his own rights he himself or an attorney has the "locus standi" to file the case on behalf of him as in *Somawathie v Weerasinghe case*¹⁷. However, in the later cases such as *Sriyani v Iddamaloda* and *Lamahewage Lal v Seeduwa MO*¹⁸ has given a close relation to file cases on behalf of the victim. Even though this special situation was not there in our constitution, this is a special occasion where the courts have used their interpreting power for the development of the fundamental rights of our country. In India *Locus Standi* is very much developed and widened with the practice of the public interest litigation. In the case *S.P Gupta v Republic of India*¹⁹ states that due to written law the rights should not be vanished and on behalf of the victims who have violated their fundamental rights, anyone can file a case in front of the courts. Bhagawathi J stated that this Locus Standi should be widened up to any person. In Sri Lanka this

¹³ Justice without Frontiers, Furthering Human Rights, C.GWeeramanthri, Sarvodaya publishers, p. 290

¹⁴ *Sasana Thissa Thero v A.G* (1989) 2 SLR 356

¹⁵ *Saman v Leeladasa* (1989) 1 SLR 1

¹⁶ *Tenison Edirisooriya v Navarathnam* (1985) 1 SLR 100

¹⁷ (1990) 2 SLR 121, S. C. APPLICATION, No. 227/88.

¹⁸ SC(FR) 700/2002

¹⁹ AIR 1982 SC 149.

¹² S.C.SPL(LA)No 182/99

concept has been applied in *Eppawala case*²⁰, *P.B Jayasundara case*²¹ and in *Water's Edge case*²² etc.

Article 126(5) of our constitution says that within 2 months the final judgment of a FR case should be given. However, there is a huge gap between the real Law and the law in action. In the case *Siliona v Dayalal Silva*²³ the court has mentioned that Article 126(5) gives just guidance and practically they can't follow it. There are major issues in the law in action.

The Supreme Court doesn't deal only with the Fundamental Rights cases. Further we have one Supreme Court with a limited number of judges. Due to all these issues delays are natural. There is always the delay of the Attorneys as well. In India this problem is not that severe because they have many Supreme Courts to handle FR cases.

As well as the victim of the breach of fundamental rights, there may be others who get effected due to that. However, courts don't consider on those parties. In the case *Sarma v Sri Lanka*²⁴ the courts have considered that fact.

Right of life is not considered as a Fundamental right in Sri Lanka directly by our constitution. However, in Indian Constitution Article 21, South African constitutions Article 9 directly give the right of life as a Fundamental Right. However, in *Sriyani Silva v Iddamalgoda* the right of life been discussed in courts and the courts have accepted that right is indirectly included in the Article 13(4).

There are other problems such as to find the witnesses, protection of witnesses, documentation issues, corruption of police, technological issues in investigation processes etc. The police officer is or ought to be a law enforcer and disciplinarian.²⁵ The police should be educated properly on these areas and educated people should be recruited to police for the betterment of the country as well as to protect the rights of people. Every police recruit should be given a manual of human rights as applicable to the work of a police man or police woman.²⁶ The government can take these actions by making new amended regulations and that will solve many of the problems that prevail with the service of the police.

Article 17 states that only when the Fundamental rights are been violated by an executive and administrative action the victim can file a FR case. However, in America it says as "State Action" that takes a wider view than just executive and administrative actions. Article 17 should be amended as state action to give more wider protection to those who breach their

rights and that will minimize the gap between the real law and the positive law.

The SC is considered as the protector and the guarantor of FR. As Indian SC our SC also should do an inquisitorial and activist role in the area of FR. The court must assist persons who come in front of the courts in gathering evidence and seeking relief. SC is considered as an important organ of the state and that should not only respect and secure FRs of the people but also it should improve them according to the needs of the people. That can be an active guardian of Fundamental Rights.

When it comes to American Realism Law School, the decision of the case depends on the judges. Jurists under this law school not only study the judgments given by the judges but also the human factor in the judges and lawyers. They study the forces which influence judges in reaching their decisions.²⁷ They put too much emphasis on judges and to them; law is what judges decide. That is partly due to the fact that judges have played a very important role in the growth of the American Constitution and Law.²⁸ Judges can have their own weaknesses and sometimes their limitations on their judgements. C.G Weeramantri in one of his works states that "judges are compassionate men."²⁹

According to the Article 126(4), the victim can be given a remedy, or the judges can declare that no fundamental right is infringed in the given situation. Supreme court judges have the sole discretionary power to take those decisions and the power is given through the constitution. The judges sometimes react to the same situations in different manners. That depends on their family background, their attitudes, their knowledge and the way they think with their experience. And even if they have accepted that there has been a violation of FR, the amounts of compensation that they order the defendants to pay, most of the times differ in a vast manner.³⁰ To decide the amount of compensation the attitudes of the judges, the gravity of the damage and the condition of the petitioner etc. matters. Sometimes only the hospital and funeral charges and other charges are given³¹ when the person is died but for the family, he is the bread winner.³²

These compensations should be paid by the government but there are some instances where the respondents must pay them on their own. And sometimes the petitioner's occupation, the status and the profession are also considered when they decide the amount of compensation. According to a research the average compensation based on professional status states that

²⁰ S.C. Application No 884/99 (F.R)

²¹ S.C (FR) 209/2007

²² SC(FR) 352/2007

²³ (1992) 1 SLR 195

²⁴ case No.950/2000,view adopted on 31/07/03

²⁵ Justice without Frontiers, Furthering Human Rights, C.G Weeramantri, Sarvodaya Publishers, Chapter 1, p. 30

²⁶ Justice without Frontiers, Furthering Human Rights, C.G Weeramantri, Sarvodaya Publishers, Chapter 1, p. 30

²⁷ V.D Mahajans, Jurisprudence and Legal theory, 5th Edition, chapter 27, p. 563

²⁸ ibid

²⁹ Justice without Frontiers, Furthering Human Rights, C.G Weeramantri, Sarvodaya Publishers, p. 95

³⁰ *Saman v Leeladasa* (1989) 1 SLR 1, *Sirisena v Perera* (1991) 2 SLR 97

³¹ *Sanjeewa v Suraweera* (Gerald Perera case) 2003 1 SLR 317 other than the main compensation for the hospital charges Rs.80,000 given.

³² Pinto Jayawardena, Kishali "Judicial Protection of Human Rights in State of Human Rights report 2005" Law and Society Trust 2006 p.19

a lawyer gets the highest compensation level.³³ Therefore, this clearly shows that according to the profession how the compensation value changes.

For an example in the *Wagaachige Dayaratne v Anandaraja case*³⁴ the petitioner was an attorney and respondent has breached the lawyers FR under Article 13(1) by arbitrarily arresting him. For that the compensation he had to pay was Rs.5,00,000. But in the case *Subasha Fernando v Silva*³⁵ all the facts of the case were similar, but the petitioner was not a lawyer and the compensation that had to pay was Rs.25,000. The decisions were different due to the attitudes of the judges. This is again a weakness in our system. At least if the relevant authorities can introduce a minimum value to the compensation that will be fair. This shows clearly how the American Realism practically works on the FR judgments in Sri Lanka.

The amount of compensation depends on the judges too. Eg. Edirissuriya J- Rs.25, 714/=, Mark Fernando J-Rs.1,56,250 Sarath N Silva CJ- Rs.20,000 etc.³⁶ This clearly shows the law is enforced in different manners by the judges according to their own concepts. In such situations, judges should consider the gravity of the offence when they recommend the values of compensation.

Especially as the American Realism Law school says the judges have to consider the mutual relationships in-between the police and the people. But nowadays there is a huge gap in between both the parties. The police service is normally considered as a welfare service. But when the police enforce their power, this concept sometimes vanishes due to the ways that they behave. Further, there is no other institution as the police, where there are many effects on our day today life.

In “Critical Legal Studies” Holms J states that, at all possible times judges should make laws which suits the prevailing society. But the courts can’t do this alone. So, there should be new laws, amendments and regulations according to the changes of the environment.

Feminism Legal approach specially discusses about women and their rights, equality with men etc. F Engels has introduced the equality in modern idea as “...a claim to equal political and social status for all human beings, or at least for all citizens of a state or all members of a society”³⁷ And also it says that “Men should not regard women as ‘weaker’ and

‘helpless’”.³⁸ And this has been followed in the cases such as *C.B Mutthamma v Union of India*³⁹. There the court upheld that the principle of equality before law and held the denial of right to employment to married was discrimination on the ground of sex.⁴⁰ When we compare women with men as Justice Brewer says in writing for the court “A woman is not an equal competitor with her brother...” That means by considering special sensitive things on women the laws should be implemented.⁴¹

In Sri Lanka there are some special concerns on women such as in labor law, but especially in police stations no special rules to be followed on women. There are special rules such as a woman should be arrested by a lady police officer etc but still there are some gaps to be filled by the side of police treatments on women. As Mackinnon says “..... Women can have access to whatever men as a gender have access to, is the promise of liberal equality”⁴²

III. CONCLUSIONS

Especially in countries like Sri Lanka and India such ill treatments to women by the police can be seen. Raping and sexual harassments, making unnecessary comments on women who come to the police station can be seen in higher scales in our country and in other countries too. Therefore, for that special regulations should be brought forward to give equal treatments to them. In other countries there are special enactments to give equal place to women, such as Inter-American Convention on the prevention, punishment and Eradication of violence against women (Convention on Belem do Para), Inter-American Convention on the Granting of Civil Rights to women, Inter American Convention on the Granting of Political Rights of Women and also some other international enactments such as Declaration on the Elimination of Discrimination against women, UNGA Resolution 2263(XXII) of 7 November 1981 etc.

According to the interpretation of all the human rights, directly people are obliged to respect those. Because as **Blackstone** says the constitution is the “best birth right and the noblest inheritance of the mankind”⁴³

³³ Source:-Pinto Jayawardena, Sri Lanka-A critical Analysis of the Judicial Response’ opcit at p.18

Average Compensation based on professional Status

Lawyer- Rs.2,50,000, Military or police-Rs.76,666, Small business and Trade-Rs.58,000, Unspecified-Rs.52,777, Casual and semi skilled labour-Rs.29,375, Skilled Employee-Rs.16,500

³⁴ SC (FR) 337/2003

³⁵ SC (FR) 7/89

³⁶ Pinto Jayawardena, Sri Lanka-A critical Analysis of the Judicial Response’ opcit at p.23

³⁷ F-Engels Anti –Duhring (Foreign Language Press Peking 1976) 130

³⁸ Women and the law, Anjani Kant, A.P.H Publishing Corporation, 1st Edition, p.321

³⁹ AIR 1979 SC 1868

⁴⁰ Women and the law, Anjani Kant, A.P.H Publishing Corporation, 1st Edition, p.321

⁴¹ Sex Discrimination, Claire Sherman Thomas, 5th Edition, West Publishing Company, Chapter 5, p.5

⁴² Jurisprudence and Legal Theory, Stephen Guest and others, chapter 15, p. 250

⁴³ Law of Fundamental Rights, Chaudhari & Chaturvedi’s, 4th Edition, Preface to Second Edition, p. viii