

Right To Constitutional Remedies- A Study Of Constitutional Arrangements To Protect Fundamental Rights In Sri Lanka.

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ABSTRACT

Chapter III of the Constitution of the Democratic Socialist Republic of Sri Lanka 1978 guarantees fundamental rights from Article 10 to 14. Article 17 being a provision in the chapter entitled “ Fundamental Rights” the right to move the Supreme Court, when a fundamental right has been infringed or is about to be infringed by executive or administrative action, is in itself a fundamental right . Though Constitution provides enforcement mechanism, rights have not been protected and promoted in Sri Lanka. Article 126(2) of the Constitution provides a one month time period for a person to file an application of an infringement of right. One month is hardly sufficient to obtain legal advice and documents to present a prima facie case. Article 126(2) of the constitution provides that such an application may be made by such person himself or by an Attorney-at-law on his behalf. The public interest litigation is not seriously considered in Sri Lanka like in India. Article 17 speaks of infringement of fundamental rights by executive or administrative action and legislative and judicial actions have been purposely omitted from the scope of Article 17. The main objective of this study is to understand the present state of law relating to fundamental rights and to identify possible areas for widening the scope of rights both by constitutional amendment and judicial activism.

1. INTRODUCTION

‘Rights without remedies are no rights at all’ [1]. If rights are like guarantees and they are of no use if there is no one to honor them. The fundamental rights in the Constitution are important because they are enforceable. We have a right to seek the enforcement of the rights given by the Constitution.

Chapter III of the constitution of the Democratic Socialist Republic of Sri Lanka 1978 guarantees fundamental rights from Article 10 to Article 14. Article 17 of the Constitution declares the right to apply to

the Supreme Court [2], as provided by Article 126, in respect of the infringement or imminent infringement, by executive or administrative action, of a fundamental right to which such person is entitled under the provisions of the chapter. Article 17 being a provision in the chapter entitled “Fundamental Rights” the right to move the Supreme Court, when a fundamental right has been infringed or is about to be infringed by executive or administrative action, is in itself a fundamental right. The right to constitutional remedy makes other rights effective. That is why Dr. Ambedkar called the right to constitutional remedies, ‘the heart and soul’ of the constitution.

The rights are not well protected in Sri Lanka although there is a provision to protect fundamental rights which is Article 17. The construction of Article 126 leads to ambiguities as to the operation of the provision, ‘Where any person alleges that any such fundamental right or language right relating to such person has been infringed or is about to be infringed by executive or administrative action, he may himself or by an attorney-at-law on his behalf, within one month thereof, apply to the Supreme Court. The following factors have been identified as obstructing the peaceful enforcement of Article 17 read with Article 126. One month rule, locus standi, remedy only against administrative action, the standard of proof of alleged infringement etc.

The ambiguities can be eradicated by the judicial activism. As Lord Diplock stated for the Privy Council in *Attorney- General of the Gambia* the part of it which protects and entrenches fundamental rights and freedoms to which all persons in the state are to be entitled, is to be given a generous and purposive construction[3]

2. ONE MONTH RULE

Article 126(2) of the Constitution provides the one month time period for a person to file an application of an infringement of right. One month is hardly sufficient to obtain legal advice and then to obtain the necessary

affidavits, documents etc to present a prima facie case. In *Kanapathipillai Machchavallavan v Officer-in-charge, Army Camp, Plaintain Point*[4] Shirani Banadaranayake J held the time limit of one month does not apply to an application for a writ made to the Court of Appeal and subsequently referred to the Supreme Court under Article 126(3). In the case of an imminent infringement of a fundamental right, the one month period begins to run from the time the petitioner first had an apprehension that his fundamental right is likely to be infringed.[5]

Difficulties have arisen in the computation of the one month period in cases of allegations of unequal treatment. The general rule is that an application must be made to the court within one month of the petitioner becoming aware of the act of unequal treatment.[6]

It was held in *Namasivayam v Gunawardena*[7] that to make the remedy under Article 126 meaningful to the applicant, the one month period... Should be calculated from the time that he is under no restraint. If this liberal construction is not adopted the petitioner's right to his constitutional remedy under Article 126 can turn out to be illusory. It could be rendered nugatory or frustrated by continued detention. A literal interpretation of the period of limitation will defeat the petitioner's right to his constitutional remedy.

In *Saman V Leeladasa*[8] Mark Fernando J stated the period of time necessary would depend on the circumstances of each case so in this case the one month time period runs against the petitioner.

Our courts have taken different views depending on the circumstances of the case. This uncertainty is caused by the construction of Article 126(2). Comparatively in the Indian Constitution, no time limit is laid down for applications under Article 32. We can think of a change of the said provision of the constitution by adopting the Indian model or by repealing the word one month and replacing by any reasonable time.

3. ADMINISTRATIVE OR EXECUTIVE ACTION

Infringements of fundamental rights by legislative action[9] and judicial action [10] have been left out from the scope of Article 17 unlike the American and Indian Constitutions. The situation is different where a person is arrested for any offence committed under the then existing Emergency Regulation 64 where the judge was not exercising any discretionary power[11]. The following statement was stated by Lord Diplock in *Maharaj v Attorney-General of Trinidad and Tobago (No 2)*[12] 'in

the first place, no human right or fundamental freedom recognized by Chapter I of the Constitution is contravened by a judgment or order that is wrong and liable to be set aside on appeal for an error of fact or substantive law, even where the error has resulted in a person's serving a sentence of imprisonment. The remedy for errors of these kinds is to appeal to a higher court. When there is no higher court to appeal then none can say that there was error.....'. The statement reflects the ground situation.

The Supreme Court has consistently taken the view that violations of fundamental rights by a judge acting judicially or by someone executing his orders, will not attract the provisions of Article although the judge's decision be erroneous or constitutes a wrong exercise of judicial discretion even if such decision is based on false or misleading material furnished to him maliciously.

But there may be some acts of judicial officer which may be "administrative" in character and not in the exercise of judicial power. The ultimate decision must depend on whether the act is "executive or administrative" in character and not upon the status of the Institution or the official.

The Indian Constitution Article 32 differs from Article 17 of our Constitution. In India fundamental rights are guaranteed against the actions of the legislatures, the executive, and any other authorities instituted by the government. There can be no law or action that violated the fundamental rights of the citizens. If any action of the legislature or executive takes away or limits any of the fundamental rights it will be invalid. People can challenge such laws of the central and state governments, the policies and the actions of the government or the governmental organizations like the nationalized banks or the electricity boards. Indian courts also enforce fundamental rights against private individuals and bodies. The Supreme Court shall have the power to issue directions or order or writs including the writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, whichever may be appropriate for the enforcement of any of the rights conferred by "fundamental rights. The Indian judiciary is comparatively independent of the government and the Parliament. The Indian judiciary is very powerful and can do whatever is needed to protect the rights of the citizen.

4. LOCUS STANDI

The Constitution should explicitly grant locus standi to any interested person to file fundamental right action on behalf of third parties – including

members of an association, group or class of persons. It should have provisions to mitigate all the technical or prescriptive difficulties currently faced by the litigants in the fundamental right action. The Sri Lankan constitution provides [14] that such an application may be made by such person himself or by an attorney-at-law on his behalf. The locus standi rule was strictly administered by Sri Lankan courts. But in the *Rani Fernando case* [15] Supreme Court on a consideration of the previous judgement [16] read Articles 13(4) and 126(2) widely enabling the lawful heirs and/ or dependants to bring an action where death has occurred as a result of violation of Article 11.

The concept of public interest litigation originated in India and USA as litigation for the protection of public interest, and group rights. Litigation for Group Rights is rare in Sri Lanka, though in abundance in India, USA and the UK. It was Justice J.N. Bagwathie and V.R.Kshrina Ayer who initiated the trend in India which gave a ripple effect in Sri Lanka. India promoted the development of this concept and the strategy to help poor, needy downtrodden suppressed by power. Article 21 of the Indian Constitution speaks of the right to life. Environment without pollution, water as a right, are some other rights guaranteed under the constitution [17]. The concept in India is honourably and carefully implemented.

Whether it is used properly or misused in Sri Lanka is a moot question. Golden era on Public Interest Litigation in Sri Lanka was in the 1980s when the then Bar Association and Legal Aid Commission initiated activism when the late Neelan Thiruchelvam with the assistance of the former Chief Justice of India, Ford Foundation, professionals, in Sri Lanka mooted the concept with the help of the then legal professionals. Legal Aid Commission has been active on violation of fundamental rights and Public Interest litigation carefully selecting the genuine and cases of real public interest.

Currently Public Interest Litigation in Sri Lanka is implemented via Article 14 of the Constitution which defines fundamental rights and Article 126 which deals with fundamental rights jurisprudence and exercise. Supreme Court has enormous and unlimited powers which even the Executive or the citizen has no power to control or criticize freely. Judicial activism is the innovativeness and creativity of the court in expanding the mandate entrusted by the citizen via Parliament in matters considered to be of public interest.

The victims whose fundamental rights are violated need to be redressed and justice should be done. There

could be several cases where justice is denied to the victims because they failed to prove their cases due to some failures or technical defects. To mitigate this situation the victims should have at least another opportunity to appeal against the defeated case to the Superior Court. This could be done only if the fundamental rights action contains two tiers – (1) first reference/hearing and (2) Appellate jurisdiction. The Court of Appeal could be given the power to hear the case in the first instances, while the victim/applicant retains the right to appeal to the Supreme Court. This will serve as a deterrence and confidence factor. The deterrence to the potential violators and confidence to the people who could believe that their remedy seeking opportunity is further consolidated. This is not to suggest that the present system is ineffective but made as a suggestion to promote further and strengthen the enforcement process.

5. RELIEF

Article 126(4) of the Constitution gives the Supreme Court the power “to grant such relief or make such directions as it may deem just and equitable in the circumstances” in fundamental rights matters. The Indian Supreme Court has the power to issue directions or orders or writs by virtue of Article 32.

The protection under Articles 17 and 126 is one in public law. The liability is that of the state, but in some cases, awards have been made against officers who were held to have violated the petitioner’s rights [18]. In the *Shivaram fertilizer case* the Indian Supreme Court stated; the power of the court to grant remedial relief may include the power to award compensation in appropriate cases. The same approach was adopted by Sri Lankan Supreme Court in *Mohamed Faiz v Attorney-General* [19].

Also the Indian Supreme Court has forged new tools and devised new remedies for vindicating fundamental rights. Verma.J in *Smt. Nilabati Behera v State of Orissa* considered it a constitutional obligation to forge such new tools that may be necessary for doing complete justice and enforcing fundamental rights. It is understood that the power of the Court is not only injunctive in ambit but also remedial in scope.

6. CONCLUSION

Martin Luther King once said “injustice anywhere is a threat to Justice everywhere. How does one seek justice? It should be through courts established according to law and according to “Due process and Rule of Law” in a legal system accessible to everybody in the delivery of

Justice and administration of Justice. “Justice Delayed is Justice denied.” If the citizen is to wait for decades for the resolution of the dispute in a system of justice they lose confidence over the judiciary.

The mere declaration of fundamental rights in a Constitution does not ensure their enforcement and guarantee respect to them. In the third world countries like Sri Lanka the external environment is not conducive to the protection and advancement of rights. In some countries we see a constitutional authoritarianism behind a façade of democracy.

Sri Lanka has theoretically adopted with the concept of constitutionalism which is not seen in practice. The constitution [20] enable the judiciary with a domain which they can determine the scope of individual freedoms and rights and whether such restrictions are adhered to.

Article 83 of the Sri Lanka Constitution states that to amend or repeal Article 10 and 11 of Chapter III there has to be number of votes cast in favor thereof amounts to not less than two thirds of the whole number of members (including those not present), is approved by the people at a Referendum and a certificate is endorsed thereon by the president in accordance with Article 80. This entrenchment is against infringement of Article 10 and 11 by parliament by ordinary process of legislation as entrenched and the rest of the fundamental rights are at the mercy of legislative majorities. The fundamental rights of youth who were arrested under the Emergency Regulations[21] and Prevention of Terrorism Act [22] and not indicted with any charges are totally ignored in this country including by the judiciary.

Article 16 of the Constitution reads as follows (1) All existing written law and unwritten law shall be valid and operative notwithstanding any inconsistency with the preceding provisions of this Chapter (2) The subjection of any person on the order of a competent court to any form of punishment recognized by any existing written law shall not be a contravention of the provisions of this Chapter. This article interrupts the proper implementation of fundamental rights under chapter III by allowing inconsistent principles in to operation. This need to be amended.

“The absence of effective enforcement machinery will reduce fundamental rights to mere platitudes as observed by Justice S. *Sharvananda*, in his authoritative

work of fundamental rights in Sri Lanka. Thus, having an impartial Supreme Court to adjudicate on the matters of fundamental rights is important and court performs a very onerous task in this area.

How these fundamental rights are protected in the constitution by itself is of utmost importance. Rule of law demands interpretation of acts of parliament bearing in mind the intentions of parliament but the constitutional restrictions placed on the government power [23] also has to be observed as part of rule of law and to uphold the concept of constitutionalism.

It is a mistaken believe that the threats to strictly observing rule of law is pervasive in countries where the parliamentary supremacy is over emphasized and where written constitutions are not available, in those countries parliament at any given time can turnover a judicial decision. Such threats are possible even in a democracy which does not have ‘written-ness’ in the constitution. But, where there is a fundamental law of the country set in a constitution ‘written’ the plausibility of the idea of constitutionalism is very high. The constitution is the supreme law of all. When we practically speak, in UK where constitutional norms are unwritten, rule of law is much observed. Turnover of a judicial decision is practically difficult and judges make laws through judicial pronouncement. When we compare the UK position with Sri Lanka, though Sri Lanka has a written Constitution where independence of judiciary is guaranteed, judicial pronouncements are not executed[24].

The Supreme Court is a protector and guarantor of fundamental rights. As such it must take onto itself an inquisitorial and activist role in fundamental rights matters, as the Indian Supreme Court had done. The Court must assist persons who come before it in gathering evidence which such person cannot adduce without the intervention of the Court. As an organ of state, the Supreme Court is required by the Constitution not only to respect and secure fundamental rights, but also to advance them. The court must be an active guardian of fundamental rights not as a neutral umpire in adversarial litigation.

I believe that through the activism of the Sri Lankan Supreme Court and some amendments to be made to the Constitution to its articles regarding fundamental rights, the rights of the people will be safeguarded in future more effectively than in present.

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- [24] The decision of the Court of Appeal in CA Application 411/2012 and the determination of the Supreme Court in SC Ref, 3 of 2012 to Ref. 9 of 2012 were ignored and then Chief Justice was removed from office.