

POWER AND IDEOLOGY OF PROFESSIONS: A CRITICAL ANALYSIS OF THE ROLE OF JUDICIARY AND LAWS DELAYS IN SRI LANKA

SM Anuruddika G Senevirathne

Post Graduate Institute of Management, University of Sri Jayawardenepura, Sri Lanka
anuruddika_s@hotmail.com

Abstract - Contrary to the orthodox traditional approaches, systematic study of underlie ideologies can be used as a powerful method of examination and understanding of individual as well as collective professional conduct and organizational behaviours as well as the reasons for their performance impediments. Purpose of this study is to examine how ideology of judges affects the functioning of Sri Lankan judiciary as a professional State institution. Study further focused on the most compelling and contentious pragmatic issue of laws delays in the Sri Lankan context through the theoretical lenses on ideology and power relationship of judges and litigants through critical analysis. Systematic ideological analysis warrant critical insights and understanding how modern professional structures such as judiciary were able to survive amid the dissatisfaction of the litigants and society. Moreover why litigants do not directly resist and voluntarily submitted themselves for such exploitation with passive reactions.

Keywords - ideology, judges, laws delays, judiciary

I. INTRODUCTION

This study initiated from the confusion, inquiry and reflection of author's own thoughts which originated in the author's mind over the years of observing how Sri Lankan judiciary function and its overall performance including present laws delays of approximately 700,000 backlog of cases. As the actual performance of judiciary deviated from the expected performance, Author kept puzzling over the question of role of judiciary, more precisely; the performance gap between what is expected and actual when it comes to domestic laws delays. Hence fundamentally, this study is an attempt to understand and explore how power and ideology of professions can lead to individual, collective and organizational performance impediments' through the critical analysis of Sri Lankan judiciary and domestic laws delays .

While many stakeholders acknowledge the severity of the problem of domestic laws delays little has done to overcome it, especially in the domestic context. It is manifestly unfair for a litigant to wait for years for a decision. Intention of this study is to examine and understand whether ideology of judiciary acts as impediment for expeditious case disposal and if so how such a judicial ideology was formed and why such exploitation exists and why litigants submit themselves for such exploitation over commonly debated causes for such laws delays like poor judges litigants ratio, lack of infrastructure and resources, complexity of cases, vitality of delivering substantive justice etc. The laws delays and human dissatisfaction associated with it is evident world over in different magnitudes moving from a problem in to a crisis but the solution is still unidentified. Even though the issue of laws delays is old as the law itself, all modern judiciaries encounter this greatest challenge how to overcome these laws delays. This chronic issue already affected enormously to the present judicial systems and demands effective and speedy solutions to averse the collapse of entire judicial structure. (Kumar, 2012). Some laws delays are lawyers, some laws delays are judges and some are due to litigants. Hence in the centralized adversarial court hierarchy, as an expert of law as well as the head of case and court management, whole efficiency of the court system lies in the hands of a judge. Therefore judge can act as one of the prime cause or cure for such laws delays. Statistics revealed by the Ministry of Justice, Sri Lanka shows dramatic case backlogs over the past years. As at 31st December 2016 there were total of 725,944 court cases pending in Sri Lankan judicial system. Supreme Court had 3,566 pending cases while 4,837 cases were congested in the Court of Appeal according to the annual performance report of the Ministry of Justice. Also another 5,973 cases were backlogged in the Civil Appellate High Courts and 3,758 cases were pending in High Courts. District Courts had 142,749 cases while 535,644 cases were pending in Magistrate's Courts. Adding to the same, another 5,031 cases were stagnated in the Labour

Tribunals and 188 in the Board of Quazis. Quazi Courts had another 7,832 cases at the end of year 2016. According to the recordings, this total backlog of 725,944 cases was accumulated through 699,784 cases which were brought forward from the last year (Perera, 2017). This domestic issue gained international attention with the report of the Special Rapporteur on the Independence of Judges and Lawyers in Sri Lanka on Her Mission to Sri Lanka to UN General Assembly Human Rights Council. The said report informed the UN General Assembly Human Rights Council that judicial delays in Sri Lanka are 'nothing short of dramatic'. According to the submitted report even a politically neutral criminal case take ten to fifteen years for its proceedings. Similarly trail for a rape case taken fifteen years to conclude. Further there are civil cases pending before the courts for more than thirty years. Further it takes more than eight years for a divorce case to resolve. Special Rapporteur connoted such laws delays are evidently deprive the justice for the litigants especially victims and their families and further deny the liberty of those affected persons.

II. METHODOLOGY

This is a qualitative research based on critical analysis. Ontology of the study considered that socially constructed entities were seen as the realities and those realities were also under continuous change. Accordingly epistemology is that, both reality as well as knowledge are socially constructed and subject to the power relations within society. Althusser Theory of Ideological State Apparatus was used as the theoretical lens for the study. Methodologies intend to adopt are Ideology Critique, Critical Analysis and Action Research. Methods to be employed are Ideological Review, Open-ended Interviews, Open - ended Observations and Narratives. Population for the study will be approximately 200 Magistrates and District Judges, 75 High Court judges, 12 Court of Appeal Judges and 11 Supreme Court Judges. Sample will be selected up to saturation level to cover standard 40% of the population.

III. RESULTS

Key Research question

What is the ideology of judges on the profession of judiciary in the modern Sri Lanka? And how does ideology of judges on the profession of judiciary affect the judicial performance including laws delays in modern Sri Lanka?

Proposition 1

As per author's understanding Sri Lanka is a class based society especially on powers and privileges and there is a dominant class. Therefore author's first argument / hypothesis is that the judges are members of the dominant class in Sri Lanka. Only few got the membership by birth while the majority became members later in to that dominant class.

Proposition 2

According to Marx, State is a committee of bourgeois class and judges as State officers and guardians of State become members of the State dominant ideology and acquire the role and power to execute law in the legal system. Ideological function of the law is a well researched area. (Twining & Uglow, 1981; Hunt, 1985) In a society legal system is not the sole basis of ideology. Moreover it might not be the most important. But what is important is that legal system does function as one of the major ideology to bestow legitimacy on present social and economic relations. Further it is vital to understand that modern legal systems perform more than an ideological purpose. Thus modern legal systems will advance the maintenance of the dominance of a particular class. (Martin, 1988). Further all judges being legal professionals they assume the ideology of the legal profession. Hence judges gains superior power due to this dual ideological sources comparative other professions. Also this ideological duality pave the way to legitimize their professional ideology as the State ideology or even likely to suppress the State ideology. Therefore it can be argue that judges of the Sri Lankan judiciary primarily contribute to the professional class dominance through their ideology. Therefore, author's second argument/hypothesis is that the Sri Lankan judges play a Professional Judicial ideology.

Proposition 3

The law commonly defined and acknowledged as neutral and impartial, also symbolizes equality. Therefore law does not grant any preference or more importance for any individual or social class as well as should not have any special social interest. Thus it is obvious that the law should not subjective or objective in any sense. Therefore law should to be neutral and impartial to treat everyone and everything including different social classes. Consequently principles of neutrality and impartiality become mandatory bases for the administration of justice. Hence Judges should apply law, nothing but law. Law

demands judges to disregard their beliefs, ideas, interest etc and all together any ideology. Thus, author's third argument/hypothesis is that Judges mandate to adhere to legal ideology as per required by law.

Proposition 4

When examine the overall performance of Sri Lankan judiciary as a professional State institute over the years it is evident that there is a serious performance gap between expected and actual outcomes specially relates to laws delays. With that author would like to put forward the fourth argument/ hypothesis, the difference/gap between Ideal Legal Ideology and Actual Professional Judicial Ideology creates the individual and organizational performance deficiency including laws delays.

IV.DISCUSSION

Power relationships in civil society featured in diverse shapes and forms in different eras such as feudalism, capitalism and in the modern society as professional colonization. In the contemporary society all professions commonly bears the power of knowledge which leads to individual discretion and particular professions such as doctors were able to gain power of collective will of their members which form dominant hegemonies even to an extend to threaten the ruling class. When refers to legal domain, even though Montesquieu states theoretical separation of power as legislature, executive and judiciary in reality formation and functioning of Sri Lankan judiciary system to date it was not able to get over its shackles from other two power sources and to fully functioned as an independent power source. Due to this unique nature, professionals attached to domestic judiciary system comparatively becomes more powerful than other professions who are purely depend on the power of knowledge. In lay sense there is a common misnomer that judiciary and law are the same. Based on the given false equation litigants and public anticipates pure justice and nothing but justice and due process of law without any exploitation or prejudice from the judiciary. Is Judiciary presents only law or is it fusion of power and law? According to Gramsci the term judiciary describes an arrangement and a representation of power rather than the law. Therefore it is questionable whether judicial power only presents the pure law. Law admit as a creation of the State on the assumption of democracy or will of majority. Therefore law is a representation of power of majority and ignorance of minority where absence of totality. When the law applied by individual judges it

does not operate in the same way and even in the same structures due to the different individual ideologies of judges which can clearly exemplify using dicta and obita dicta of a given case either to acquit or convict a litigant or reaching the same verdict based on differing grounds. Judges may have equal knowledge but different ideologies. Antoine Destutt de Tracy defined ideology in his writing *Mémoire sur la faculté de penser* (Vol. 1, 1796-1798) and *Éléments d'idéologie* (1801) 'as a system of ideas', which becomes the fundamental belief of a group and its members (Monika, 2012). Ideologies are defined as shared representation of social group and the group's image, their identity, their position in the society, aims, values, actions, norms, their relationships to other groups and resources. Ideologies are reproduces for its existence and survival in the society in material and immaterial forms using their group members. Commonly it is believed that main function of ideology is to legitimization of domination and exploitation by ruling class, institution or by an elite group. Ideological polarization between diverse groups is a unique characteristic of structure of ideology. Ideology since from its inception acquired multifarious definitions, interpretations and connotations swinging between the simply descriptive to paradoxical explanations. Marxists defined ideology as 'production of ideas, conceptions, consciousness (Marks and Engels 1970) within class struggle and domination. According to Marxist main function of ideology is to legitimize the social and economic order. This was further extended and branched in and out by different proponents with concepts of false consciousness (Engels 1893), ideological state apparatus (Althusser 1971), and the manufacture of consent and hegemony (Gramsci 1971) who envisaged ideology as a decisive factor within the society-power nexus, through the advancement of the ruling class. Habermas (1979 -1987), extended the concept of false consciousness through destruction of consciousness (1987),and formulate that it was a form of systematically distorted communication operating in line with the strategic interests of powerful communicators and constituting part of internal colonization (Habermas 1987). Ideology, in his view, was linked to mediatization, the circumstances where money and power decide the core processes of symbolic reproduction, viz. socialization, social integration and cultural transmission. (Monika, 2012). Even though for Marxists ideology was a negative false consciousness for Gramsci ideology was positive and it's with power. Gramscian hegemony means the ideological predominance of bourgeois values and norms over the subordinate classes which accept them as "normal". Althusser based ideology on social formations

and the dissemination of the particular bourgeois ideology on the Ideological State Apparatuses. He explained the “materialization” of ideology based on reproduction of ideological relationships. Foucault categorized relationships in three folds: struggle against exploitation, domination, and subjection. These three struggles can be observed in any professional relationship in modern society in ranging momentums either direct or subtle ways including judiciary.

Profession is defined as a paid occupation, especially one that involves prolonged training and a formal qualification (Oxford Dictionary, professional Standard Council). Basic traits of professionals are prestige, power and income (Goode, 1960). Professional gets unique powers due to the subject expertise. This is similar for legal profession. Judges were conferred with greater powers that affect the other people lives. A judge can cease a person’s liberty, property, family, or even, life in some jurisdictions. Thus judge is a person who can greatly and deeply affects a life of another individual. (Mautner, 2007). Talcott Parsons characterized professions as “collectively-oriented” and as having norms that are not based on the market and professions have become the most important single component in the structure of modern societies. Parsons also recognized that professions serve socially useful roles as well as sensitive and potentially threatening roles (Parson, 1954).

At the same time judge and litigant relationship is based on the fiduciary duty of a judge towards the litigants. In a fiduciary relationship the beneficiary is vulnerable to the fiduciary’s predatory or self-dealing actions yet must still repose her trust in the fiduciary. Three indicia mark the fiduciary relationship: discretion, vulnerability and trust. Discretion and vulnerability are, arguably, flip sides of the same coin. Discretionary power vested in the fiduciary means the beneficiary is always vulnerable to potential abuse through predation or self-dealing. Trust functions to economize on monitoring costs: fiduciary specialization makes it difficult and costly for beneficiaries to monitor their fiduciaries. And because the performance of a fiduciary’s responsibilities cannot always be measured objectively, beneficiaries might harm the relationship by constantly looking over the fiduciary’s shoulder.

For any profession there are ideologies formed and sustained over the period with respects to its own social

status, public and clients expectations from the profession. Similarly professionals themselves pursue and engaged in the give profession have their own expectations and ideologies. Therefore, when it comes to judiciary litigants and public developed their own social expectations and ideologies about what they expect from profession of judiciary and how profession should deliver it service. On the other hand, judiciary officers themselves have their own expectation and ideology about the profession of judiciary. When one of these two ideologies is dominant, one over the other, there will be suppression and exploitation of the weaker ideologies and stronger one will prevail. Ultimately, dominant group’s expectation will be delivered while suppressed group’s expectation may disregard.

V.CONCLUSION

First, ideologies are socially and mentally shared belief of the group. Ideologies are social because they are functional and embedded to practices and ideological practices transformed in to social practices. Secondly structure of ideology will be reproduced in three forms by reproduction of the institution, individuals and relationships. Thirdly existence and survive of ideology takes place in the form of ideological polarization between groups: judiciary and litigants. This study attempted to study and understand some of the relations between ideologies and discourse with respects to Sri Lankan judiciary and litigants. Ideologies as the foundation of group beliefs, attitudes and actions it controls the physical and mental model of members of judiciary that underlie the ideological reproduction and discourse. Discourse plays a fundamental role for ideological material existence by daily expression and reproduction of ideologies. This study also tried to illustrate how ideology relates and interacts with knowledge and how collective groups or professionals can form as a critical dominator in the society with the power duality due to their ideology and knowledge. Hence ideological polarization between in-group and out-groups and its discourse is examined using judges and litigants. This analysis shows how ideologies are institutionally and individually reproduced using powerful institutions such as judiciary. Thus structural ideological discourse becomes collective group’s discourses and their ideological dominance, attitudes and interests will reflect in many indirect and subtle ways in consciously or unconsciously.

References

- L. Althusser (1971). *Lenin and Philosophy*. London: New Left Books
- F. Engels(1893). Engels to F. Mehring, July 14, 1893. Translated from German and reprinted in K. Marx and F. Engels (1968). *Selected Works In One Volume*. London: Lawrence and Wishart
- Gary Alan Fine & Kent Sandstrom,(1993)*Ideology in Action: A Pragmatic Approach to a Contested Concept*, Sage Publications
- A. Gramsci (1971). *Selections from the Prison Notebooks of Antonio Gramsci*. New York: International Publishers.
- W.J. Goode (1957) *Community Within a Community: The Professions*, *American Sociological Review*
- J. Habermas,(1979). *Communication and the Evolution of Society*. Boston: Beacon.
- J. Habermas (1987). *The Philosophical Discourse of Modernity: Twelve Lectures*. Cambridge, MA: MIT.
- Joshua B. Fischman & David S. Law (2009) *What Is Judicial Ideology, and How Should We Measure It?*, *Washington University Journal of Law & Policy*
- Monika Kopytowska,(2012) *Editorial: Critical Perspectives on Ideology, Identity, and Interaction, Critical Approaches to Discourse Analysis across Disciplines*, Accessed on 12.02.2018, http://www.lancaster.ac.uk/fass/journals/cadaad/wp-content/uploads/2015/01/Volume-5_Kopytowska.pdf
- Melvin M. Belli (1981) *The Law's Delays: Reforming Unnecessary Delay in Civil Litigation*, *Journal of Legislation*
Report of the Special Rapporteur on the Independence of Judges and Lawyers on Her Mission to Sri Lanka to UN General Assembly Human Rights Council, 35th Session, June 2017
- Talcott Parsons (1954), *The Professions and Social Structure*, in *Essays in Sociological Theory* (1954).
- Teun A. van Dijk (2000) *Ideology and discourse A Multidisciplinary Introduction*, Pompeu Fabra University, Barcelona
- Teun A. van Dijk (2006) *Ideology and discourse Analysis*, *Journal of Political Ideologies*, Routledge Publication.
- Vandana Ajay Kumar(2012) *Judicial Delays in India: Causes & Remedies*, *Journal of Law, Policy and Globalization*
- Y. Perera, '725,944 cases pending in courts: Ministry of Justice' (*Daily Mirror*, 2017) <http://www.dailymirror.lk/130511/-cases-pending-in-courts-Ministry-of-Justice>, Accessed on 29.11.2017.
- W. Twining & J. Uglow, (1981) "Ideological Functions of Legal Literature in East Africa" *Legal Literature in Small Jurisdictions* , London: Commonwealth Secretariat, p.69
- Alan Hunt, (1985), "The Ideology of Law: Advances and Problems in Recent Applications of the Concept of Ideology to the Analysis of Law,Vol.9,*Law & Society Review*,p.11
- Robert Martin (1988), "Ideology and Judging in the Supreme Court of Canada", Vol. 6, *Osgoode Hall Law Journal*, p.800
- Michael Mandel (1986) "Marxism and the Rule of Law", Vol. 35, *UNB Law Journal*
- Gabriel Eidelwein Silveira (2012) "Judicial Marxism: a remarkable political ideology in Brazilian Labor Justice", 44th Annual Conference of The Southwest Council of Latin American Studies SCOLAS,Miami