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Constitutional Challenges to the Rule of Law and Independence of Judiciary as Intrinsic to Rule of Law

DIPANWITA CHATTERJEE¹

ABSTRACT

This research paper deals with rule of law, its various dimensions, related concepts and how independence of judiciary is related to the rule of law. Reasoning behind the development of the rule of law as been elaborated upon in a simple language. Various jurists' views have been incorporated so as to expand the dimension of the research. This research paper also includes the major constitutional challenge the court faced while regarding the constitutional validity of Collegium system and related aspects. Special attention has been given to the infamous Habeas Corpus case and the Four Judges case.

I. INTRODUCTION

The existence of rule of law dates back to the times when the human civilization was still in its nascent stage. With humans settling into villages, towns and cities, the need for set of rules and regulations was felt so as to govern the communities being formed. Slowly and gradually, proper legal systems came to be formed. Various forms of governments came into existence with each having its own form and procedure of functioning. Monarchies came into existence where the ruler was considered the supreme of all. He was the creator of law and it was he who was responsible for taking all decisions and imparting justice. A monarch was considered to be above law; rather he was the law. The concept of "Sovereign Immunity" thus emerged over a period of time. This meant that monarchs had unprecedented power to take decisions. The natural implication of this set-up was abuse of power due to its concentration in hands of few. With the tyranny becoming a common phenomenon, people became to revolt against the monarchs. People began to demand their say in the government. Demand of the people was "Rule of law" and not "Rule by Law". With the changing times the concept of rule of law also evolved. It cannot be said that rule of law is a new concept though it is true to some extent that its application and worldwide acceptance is a relatively modern phenomenon.

¹ Author is a Student at KIIT School of Law, Bhubaneswar, India.

Rule of Law is the essence of democratic form of government. It is the building block of any democracy. No democracy is possible without rule of law. Rule of law is at once a dyke against anarchy and tyranny and a steering wheel to direct the course of a ship of a state towards that socialist shore reaching which redeems a nation's trust with destiny.² Indian Legal System has emphasized from time and again that rule of law is a part of the basic structure of the constitution even though it has not been mentioned explicitly in the Indian Constitution. The concept of rule of law has numerous facets to itself many of which have been discussed further.

II. ORIGIN OF THE IDEA AND CONCEPT OF RULE OF LAW

The concept first developed in depth during King James I's reign in the thirteenth century by the Chief Justice of his kingdom, Edward Coke. He was a critic of the theory that King is above law and that he receives commands of justice from God. He maintained the viewpoint that King was ought to be below the law. Predominance of law over all government, monarch and administrative authorities was favored by him. Great thinkers like Plato³ and Aristotle⁴ in their literary work did mention of the theory of rule of law without addressing it as such. Montesquieu viewpoint on rule of law was somewhat in contrast with that of Aristotle and Plato largely due to the fact that governmental a political scenarios prevalent during their times were radically different. In 1885, A.V Dicey in his famous work "Introduction to the law of Constitution" gave a concrete structure to the various facets of rule of law and formulated three principles on which the modern doctrine of rule of law stands.

With respect to the Indian scenario, rule of law existed in the ancient times in the form of Dharma. God or the creator of world was considered to be the ultimate source of law which formed Dharma. Religion or Dharma was the rule of law for the people. Elaborate references and mentions of the rule of law have been made in the ancient Indian texts. The famous epic Mahabharata elaborates best upon how rule of law was part of the Indian legal system and administration during the medieval times. The prevalence of rule of law as an extension of the widely spread principles of morality in that period of Indian history. Rather we can say that rule of law in ancient India was synonymous to morality and religion.

In the British era of Indian history, there had been wide spread violation of rule of law by the Britishers because of their oppressive schemes and steps for ruling the Indian subcontinent. After Independence, the founding fathers of our nation recognized the need for the modern form of rule of law in India and incorporated it within the framework of our constitution without

²(1976) 2 SCC Jour 1

³Plato, and Thomas L, Pangle, *The Laws of Plato*. New York: Basic Books, 1980.

⁴Aristotle. *Aristotle's Politics*, Oxford :Clarendon Press, 1905.

expressively mentioning it. Rule of Law is now recognized as the basic feature of the Indian Constitution.⁵

III. DEFINITION AND PRINCIPLES OF RULE OF LAW AS PER A.V. DICEY

The concept of rule of law was formulated by A.V. Dicey in his book “Introduction to the Law of Constitution”. Hereby, Dicey laid down three principles of rule of law. They are

- (a) Supremacy of Law
- (b) Equality before law
- (c) Predominance of Legal Spirit

Firstly; Supremacy of law means that irrespective of the standing of a person in a society, he or she is subjected to a general set of laws. Laws should not be made in respect of a particular person or people of a particular standing in the society. Supremacy of law is against the concentration of wide discretionary powers in hands of few so as to avoid arbitrary laws and decisions. This means that as per rule of law, every man should be governed by law and not that law shall be governed by people.

Secondly; Equality of law means that all people shall be subjected to the same set of laws. Equal subjection of the whole public of the country irrespective of different prejudices to the general law of the law is the essence of the principle of rule of law. The French system of Droit Administration was thus criticized by Dicey.

Thirdly; Predominance of legal spirit means that any action taken for administrative functions or judicial purposes shall not be vague and arbitrary. Rather such a decision should be made on the basis of the law prevalent in the country. This principle emphasized on the need of an independent judiciary so as to maintain a just and fair rule.

Rule of law evolved largely because it was able to keep a check on the arbitrary use of power by the government. It is the basis of existence of administrative law and all decisions taken by administrative authorities shall be governed by it. It is that principle of law which is the main line of demarcation between a dictatorship and a democracy.

Despite all its merits, it failed to gain acceptance entirely even during Dicey’s era. The main drawback of rule of law is that it makes no distinction between a discretionary power and an arbitrary power. Though Dicey was strongly against the droit system as prevalent in France, the truth was that this system actually was able to impart justice. The fact that it was as opposed

⁵ Keshvananda Bharti v. State of Kerala[AIR 1973 SC 1461]

to the rule of law didn't prove to be a deterrent in providing justice.

IV. INTERRELATION BETWEEN RULE OF LAW, CONSTITUTIONALISM AND DEMOCRACY

Rule of Law and Constitutionalism are two terms which often are considered interchangeable by a majority of people. In simple terms, Constitutionalism means all the procedures, methods and principles of the constitution which establish the fact that entire government owes its existence and authority to the fundamental law of the nation. Such procedures, methods and principles exist so as to keep a check on the totalitarian and arbitrary exercise of power. Rule of law also aims to keep a check on the exercise of arbitrary power by the government. This however does not indicate that these two terms are synonyms to each other.

In the case of *State of Bihar v Subhash Singh*⁶, the court held the view that the state is subject to *etate de droit* which implied the officials are bound to carry out their work and take actions in accordance with the limitations which the law imposed that is the constitutionalism. Also, in *I.R. Coelho v State of Tamil Nadu*⁷, the court held the viewpoint that constitutionalism is a principle of law which facilitated the control over exercise of governmental power such that it does not tear down the very essence of the democratic principles upon which it is based.

The rule of law lays down certain standards defining the virtues of a legal system as such while constitutionalism is the specific set of characteristics of a legal system which are responsible for maintaining rule of law in the country. Rule of law is thus a generic term and constitutionalism is a specific one. Constitutionalism is said to have an essential quality which is the limitations it imposes on the government.⁸ Rule of Law and constitutionalism have certain implications on a country's legal and governmental system like separation of powers, independent judiciary, etc. These characteristics are deemed necessary for upholding principles of rule of law and constitutionalism. In the case of *Kerala University v Principals Council & Others*⁹, the Court observed that the reasoning behind the doctrine of Separation of Powers was to uphold the rule of law in the country. It recognized the relation between concentration of power with one authority and tyranny. Thus for the purpose of upholding justice, separation of powers ought to be viewed through the prism of constitutionalism. In *Rajiv Mankotia v The Secretary to the President of India*¹⁰, the Court said that democracy is the basic feature of the

⁶Civil Writ Jurisdiction Case No. 486 of 1997

⁷AIR 2007 SC 861

⁸Chhachhar, Varun and Negi, Arun Singh, *Constitutionalism - A Perspective* (December 24, 2009).

⁹Civil Appeal Number 887 of 2009

¹⁰1997 AIR (SC) 2766

Indian Constitution. The Court in this case recognized constitutionalism, rule of law and democratic form of governance as the building blocks of the egalitarian order of society.

As said by Prof B.O. Nwabueze, success of the working of a constitution is depended on the democratic spirits¹¹. For the growth of the parliamentary form of government, it is necessary for such a government to have rule of law and constitutionalism as its functioning base.

Democracy is that form of government which exists due to the people and for the well being of the people. Due respect for the human rights and principles of natural justice exists in a democracy. The capacity of humans for justice makes the existence of democracy possible but the inclination to do injustice to others makes democracy and rule of law necessary¹². Dr Jawaharlal Nehru, the first prime minister of India had the viewpoint that rule of law and civilized societies are synonyms of each other. It is clear that rule of law and constitutionalism is building blocks of a democratic government. Without rule of law and constitutionalism, democracy cannot exist.

V. JUDICIAL DEVELOPMENT OF THE RULE OF LAW

The Republic of India is a democratic country whereby rule of law is a basic feature of its constitution though it is not present in the sense of “*Expression Facit Cessare Facitum*” Rule of law has been incorporated in the constitution indirectly through its various provisions. The principles of rule of law have been paramount in giving the direction to the legislators while forming laws. India follows the doctrine of separation of powers. It has an independent judiciary¹³. No separate courts exist for trying people of different classes. Fundamental Rights in the Indian Constitution ensure certain rights to all the Indian citizens so as to impart justice. Indian courts have arrived at the aforesaid position after dealing with the constitutional challenge of existence of rule of law in the Indian constitution in a number of cases. In *A.K.Kraipak v Union of India*¹⁴, the Supreme Court held the view that since India is a welfare state, it is bound to be governed by the principles of Rule of Law.

In *Smt Indira Nehru Gandhi v Raj Narain*¹⁵, the Apex Court said that rule of law is embedded in the Art14¹⁶ of the Indian Constitution. It is a part of the basic feature of the Indian Constitution which means that rule of Law as under Art14 of the constitution cannot be

¹¹Prof B.O. Nwabueze “Constitutionalism in the Emergent States”1973 Edition Pg 139

¹² (1990) 1 SCC (JOUR) 7

¹³No interference and influence of the legislature and executive on the judiciary in terms of its functioning,

¹⁴AIR 1970 SC 150

¹⁵AIR 1975 SC 2299

¹⁶The Indian Constitution, 1949

amended under Art368¹⁷ of the Indian Constitution. Also in case of *Keshvananda Bharti Sripadagalvuru v State of Kerala*¹⁸, rule of law was held to be a part of the Indian Constitution's basic structure. In *L Chandra Kumar v Union of India*¹⁹, the apex court declared the independence of judiciary as a part of the basic structure of the constitution and subsequently stroke off Art323A²⁰ of the Indian Constitution.

The most popular and controversial case regarding the rule of law in Indian Republic is *ADM Jabalpur v Shivkant Shukla*²¹ much popularly known as Habeas Corpus case. This case was dealt by a constitutional bench of 5 judges namely CJ A.N. Ray, J Khanna, J Beg, J Y. V. Chandrachud and J P.N. Bhagwati. This is one of those rare cases whereby the dissenting Judge's judgement is held at a much higher pedestal than the majority judgement. The majority judgment came to be severely criticized by the jurists and the dissenting judgement came to gain acceptance and appreciation everywhere. The Supreme Court gave the judgement in the ratio of 4 to 1 with J Khanna giving the dissenting Judgement.

The majority judgment outrightly denied the existence of rule of law outside the provisions of the constitution specially the fundamental rights. Their view point was that since fundamental rights are suspended during the enforcement of emergency no relief can be granted on grounds of their violation even if the order or action taken was not just and fair. Rule of law exists within the constitution but is not something which governs the constitution. The majority judgement emphasized on the view point that constitution was the supreme law in the country and thus no rule of law existed outside or as otherwise the constitution. They considered Art21²² as the sole repository of rights to life and personal liberty against a state. They laid down that Article 21 of the Indian Constitution is the only rule of Law existing in India.

However it was J Khanna's dissenting judgement which paved the way for the development of law in the nation. He laid down that life and liberty of the people cannot be at the absolute mercy of the executive even in case of emergency. In such a case it is the rule of law which comes at stake. J Khanna believed that "Salus populi est supreme le" was intrinsic in the structure of the Indian constitution. Art21 of the constitution granted to the citizens the right to life and personal liberty but that did not mean in case of its suspension a person loses this right. Such a right exists for a person by virtue of his birth as a human in a civilized society. A

¹⁷Supra 19

¹⁸(1973) 4 SCC 225

¹⁹ (1997) 3 SCC 261

²⁰Supra 19

²¹1976 AIR 1207

²²Supra 19

general climate of order and discipline is the need of the rule of law. Even in case of lack of express provisions, there exists an implicit assumption of all constitutions that liberties conferred on people ought not to be abused.

The heavily criticized judgment of *ADM Jabalpur v Shivkant Shukla*²³ was overruled by another landmark case of Justice K Puttaswamy (Retd) and Anr v Union of India²⁴. A constitutional bench of nine judges headed by CJI J.S. Khehar condemned officially the majority judgement of the Habeas Corpus case. The judgement²⁵ authored by D.Y. Chandrachud held that there existed serious flaws in the majority judgement and rule of law is synonymous to the existence of humans.

VI. INDEPENDENCE OF JUDICIARY: AN OVERVIEW

As said by Dr B.R. Ambedkar, “It is much more an evil for the people to loose faith in the judiciary than on the executive and the legislature.” This aptly describes the standing of the judicial system in a democratic set-up. Maintenance of rule of law requires Independence of Judiciary. Independence of judiciary pertains to non-interference in its matters by the executive and the legislature. Lesser the political influence on the judiciary, more is the independence of the judiciary. Independence of judiciary in matters of appointment and transfer of judges, determining salaries of judges, formulating rules regarding practicing of advocates, etc are to exist for its smooth functioning.

Various instances can be seen in the Indian history when a direct attack has been made on the Indian Judiciary by the political influences. Time and again, the executive has tried to increase its control over the judiciary. Justice Khanna in his autobiography²⁶ had said how he saw aware that his dissenting judgement in the Habeas Corpus case would cost him the post of the Chief Justice of India. Ironically this did happen when Justice M.H. Beg who was junior to him superseded him and became the Chief Justice of India nine months after the delivering of the judgement in the Habeas Corpus Case. There have been certain instances have certain judges have lost their chances at high judicial posts because some of their judgments had not been in accordance with the whims and fancies of the government. Judges towards their retirement period are often accused of giving such judgments so as to please the government and then secure for themselves a highly paid post retirement job.

Justice Lalit of Bombay High Court was refused re-appointment as additional judge of High

²³1976 AIR 1207

²⁴Writ Petition (Civil) No 494 of 2012

²⁵Supra 23

²⁶ J H.R. Khanna , *Neither Roses Nor Thorns* (1987)

Court of Bombay by Mrs. Indira Nehru Gandhi in spite of the fact that the then Chief Justice of Bombay High Court had recommended his name. The removal of Justice O.N. Vohra from his post of the Additional Judge of High Court as his judgement against Sanjay Gandhi, her son was not liked by her came to be heavily criticized. A much recent example of such a type was seen when Ex-Chief Justice of India Mr Rajan Gogoi was nominated by the President as a member of the Rajya Sabha. Many people and a large section of the media reported that this was a gift which he had received by the government for giving the judgement in favour of building of Ram Mandir in *M Siddiq (D) Thr Lrs v. Mahant Suresh Das and Others*²⁷ There have been certain instances when the Senior judges had resigned stating that it was not possible for them to sustain themselves in the salaries that were being given to them.

However, Judiciary while within the ambit of the constitution has largely held its integrity and remained independent in its working. Despite many such hindrances, the independence has been re-instated time and again.

VII. INDEPENDENCE OF JUDICIARY IN APPOINTMENT OF JUDGES TO HIGHER JUDICIARY

This aspect of judicial independence has been dealt with in a number of cases. The controversy was regarding whether the Collegium system of appointment of judges was a legally valid system of appointment of judges to the higher judiciary. There had developed a convention of appointing the senior most judge of the Supreme Court as the Chief Justice of India. This convention was however paid no heed to in 1973 when Justice A.N. Ray superseded three senior most judges and was appointed as the Chief Justice of India. This step caused huge hue and cry and much was said about the control of executive on the judiciary. This divergence was again observed when M.H Beg superseded J Khanna and became the CJI. Justice Y V Chandrachud who became the Chief Justice of India in 1978 through his tenure criticized such divergences from the convention and elaborated on various instruments which the government had to weaken the judicial independence in the nation.

As a result of such issues arising in the judiciary and consistent attack on the independence of the judiciary as such, came the case of *S.P. Gupta v Union of India and Ors*²⁸ much popularly known as the First Judges case. The Court in this case said that the use of the word may in Art 124(2) denoted that it was optional for the central government to consult judges of its choice in matters of appointment and not that it had the choice to consult or not consult at all. Hence

²⁷ Civil Appeal Number 10866-10867 of 2010

²⁸ AIR 1982 SC 149

the central government was bound to consult the judges but the ultimate decision was as that of the central government.

In 1993 the Supreme Court overruled its judgement of the First Judges case in Supreme Court Advocates on Records Association v Union of India,²⁹ much popularly known as the second judges' case. The second judges' case said that it was up to the CJI to make appointments of judges but there should be a Collegium consisting of CJI and two senior most Judges of the Supreme Court. However later it came to be seen that it was not the Collegium which made the final decisions but the CJI who had the final decision in cases. It came to be happening many a time how the recommendations of the other two senior judges were not even paid heed to by the CJI.

In 1999, the executive much fed up with the primacy of the CJI in matters of appointment of judges filed a reference in the name of the president under Art143³⁰ of the Indian constitution. This came to be known as the Third Judges Case³¹. This reference did not provide for anything new as from the second judges case except for the fact that the strength of Collegium was increased and then the Collegium came to comprise of CJI and four senior most judges of the Supreme Court.

The system of Collegium was followed without many hindrances for over a decade until the 99th Constitutional Amendment Act 2014 was passed by the parliament which inserted Art124A into the constitution. Art124A provided for the establishment of National Judicial Appointments Commission for appointment of judges. This commission increased the interference of the executive in the appointment process. In the Fourth Judges case that is Supreme Court Advocates on Record Association v. Union of India,³² the 99th Amendment act was struck down and the Collegium system was yet again restored thereby reinstating the no provision which hinders the judicial independence shall be part of the Indian Constitution.

VIII. CONCLUSION

Time and Again the judicial system has reinstated the faith the citizens of the country have in it. Various jurists over the centuries elaborated on the need of rule of law in a democratic set up. India is a democratic country and hence judiciary here holds a dignified position. Any type of political influence which hinders the judicial independence is a serious threat to the rule of law in country. Rule of law is intrinsic to the type of governmental structure India has and in no

²⁹(1993) 4 SCC 441

³⁰The Indian Constitution, 1949

³¹AIR 1999 SC 1

³²Civil Writ Petition no. 13 of 2015

case can it be suspended. Art 14 and Art 21 is not the sole repository of rule of law in India. Constitution can be said to be derived from the rule of law and not that the rule of law is derived from the constitution.

The third principle of rule of law speaks of legal spirit's predominance and emphasis is laid on need for an independent judiciary. Various constitutional challenges have been faced by the courts so as to maintain independence of judiciary. Appointment of judges to higher level judiciary has always been a matter of controversy but now the position seems to be largely settled with the acceptance of Collegium system. However one thing which needs to be brought to the notice is that Collegium system may be needed for maintaining an independent judiciary but it is not yet transparent in nature. The Collegium system needs to be evolved so as to include transparency in the process of selection. There is no doubt on the fact that rule of law is the need of a democratic society. Till India keeps on following the principles of natural justice, rule of law shall be the soul of the Indian Constitution.
