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Constitutional Governance and Rule of Law

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ABSTRACT

The purpose of the present study is to contribute to an understanding of the actual and potential impacts on the good governance system in reference to the Rule of Law by the Constitution of India. The supremacy of the law of the land was not a novel doctrine in nineteenth century where A.V. Dicey invented the “Rule of Law” according to which the recognition of certain fundamental obligations which are binding upon states in their own dealings with one another. He described the principle of the Rule of law. As per A.V. Dicey throughout all civilized societies and no State can repudiate this perception. The connotation made by Dicey is that individuals ought not to be subjected to the power of officials wielding wide discretionary powers. Fundamental to Rule of Law is the notion that all powers need to be authorized. Dicey’s concept was that no person should be condemned unheard, there should no punishment without a trial. The ambit of the Rule of Law diversified in A.K. Gopalan’s case where the judiciary as per the constituent assembly dropped the use of the expression “procedures established by law” and instead adopted the expression “due process of law” in Article 21 of the Constitution of India, thus the concept of “due process of law” could not be imported, an ipso facto violation to the Rule of Law. Constitution of India is separating the three great powers seems to be a good workable instrument under which the Rule of Law can flourish that are Legislature, Executive and Judiciary. Sir Ivor Jennings, the famous constitutional historian characterizes Rule of Law as “an unruly horse”. A law court acquires the decisive function of an authoritative interpreter of the meaning of the rule of law, within the framework of the constitution. Judicial interference has got very little importance, because in Indian Constitution Rule of Law is a dominant factor and it is judiciary who has given a special power to look after it. Rule of Law should establish a uniform pattern for harmonious existence in a society where every individual should exercise his own rights to his best advantage to achieve excellence, subject to the protective discrimination.

Keywords: Rule of Law, Judicial Activism, Discrimination, Constitution.

Dedication: The Author has dedicated this paper to his father Adv. Shailender Chaudhary.

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I. INTRODUCTION

Supremacy of law prevailed in the 19th century when A.V. Dicey invented the principle of "rule of law." This implies recognition of certain fundamental obligations that States bind when they do business with one another. He questions the principles of the rule of law followed by all civilized societies, and no nation can deny this recognition. Dicey's implication is that individuals should not submit to the power of officials who exercise broad discretionary powers. Fundamental to the rule of law is the idea that all powers must be recognized. Dicey's concept was that no one should be sentenced unjustly and that no one should be punished without trial. The scope of the rule of law was, according to the Constituent Assembly, when the judiciary abandoned the use of the expression "procedure established by law" and instead adopted the expression "due process" in Article 21² of the Constitution. This concept was recognized in the case of *A.K. Gopalan*³. Therefore, the concept of "due legal process" cannot be put into salvation. This is, in effect, a violation of the rule of law. The rule of law is the signal virtue of a civilized society. The rule of law is a possible condition. It should be achieved under human government. There is, by law, the people of the community greatly enriched, and the constitutional rule is the result of a simple land law.

(A) The facets of the rule of law

The rule of law is the beacon virtue of a civilized society, a state that can be attained under human government, thereby greatly enriching the people of the community. Some were created by legislatures, others by judges to adjudicate specific cases and set precedents for the future. Professor Dworkin, in *Political Judges and the Rule of Law*, writes that "a government of wise and just officials cannot exercise their rights without a process in which citizens as individuals debate what their rights are." We will take the initiative to protect our rights." The general idea of the rule of law is given by Professor Dworkin of *Rose Empire*, "While the law maintains that force, however beneficial, should not be used or restrained, it is The Framework's architects attempted to derive it from the broader principle of "rule of law," but this is an expression not known in the text of the Indian Constitution. The framers of Indian Constitution was framed by taking into account of the experience of procedure laid down by the "law of the land" dating from Magna Carta, which had been adopted in the various Government of India Acts. Universal Declarations of Human Rights

² Article 21 of Constitution of India

³ *A.K. Gopalan v. State of Madras*, 1950 A.I.R. 27

states in its preamble, it is widely thought to be “essential, if a man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law.

II. NATURE, MEANING AND SCOPE & HISTORICAL DEVELOPMENT

(A) Constitutional governance: the sieges within

The new vista of Judicial activism and Rule of Law, the Supreme Court of India had adjudicated in the case of *Ram Jethmalani v. Union of India*⁴ where the Union and State Government were directed to facilitate the conduct of the investigations, in their fullest measure, by the Special Investigation Team, which shall constitute and function by extending all the necessary financial, material, legal, diplomatic and intelligence resources. These investigations or portions of such investigations may occur inside the country or abroad. The petitioner’s appeal contends that a special investigation team is to be formed to monitor the investigation and there should triumph over the Rule of Law, which will help to decide the matter on merits and provide justice devoid of arbitrariness and unreasonableness. The claim was made to save India from a global crusade against black money and corruption involving several government departments. The petitioners appealed not only to stop the money illegally kept outside India, but also to stop the illegal money transfer out of India. This government action violates the rule of law and disrupts the functioning of governance. They don't care about people's money. Therefore, the applicant's prayer was that the court should follow the rule of law. No one is the ruler of law, and even law is subject to justice, so the appropriate authorities must decide the case impartially and impartially. India's Supreme Court has upheld a new dimension for C.V.C. Case⁵. The petition concerns an important legal issue of public concern, namely the legality of the appointment of members of the Central Supervisory Authority of India. The objection relates to aspects of the Central Supervisory Board Act 2003, stating that the Indian government is not accountable to the courts for policy decisions, seemingly an obstacle to the rule of law. Petitioner's petition was to determine the case on its merits and the merits of the law. As courts are authoritative bodies that uphold the rule of law, they have the right to know and judicially review each case. The appointed commissioner has been accused of a pending corruption case, which itself covers major issues surrounding his appointment. The threat of corruption should not hide under the rug in legal proceedings. Such laws therefore hinder the flourishing

⁴ *Ram Jethmalani v. Union of India*, 2011 (10) SCALE 753.

⁵ *Centre for PIL and Anr. v. Union of India and Anr*, AIR 1987 SC 2386

of the rule of law and should be declared arbitrary, unreasonable and void, and the relevant administrative authorities are agents of justice and fairness. You have to be held accountable in some court. Vigilance is an integral part of all national institutions. Anti-corruption measures are the responsibility of the central government of India.

(B) Varieties of rule of law

In the A.K. Gopalan⁶ case, the role of the judiciary with the rule of law is stated as: a complex system of controls and restrictions on legislative, executive and judicial powers that functions in favor of liberty and justice. These controls and limitations are a great many safeguards centered around individual rights and interests. Those who are protected from injury are free. The majority vote, led by Gajendragadkar, C.J., reaffirmed the previous position at Shankari Prasad⁷ that the parliament's power to amend the constitution is unlimited. In the case of Sajjan Singh⁸, Hidayatullah and Mudholkar questioned Parliament's ability to amend the constitution to eliminate or limit fundamental rights. In the Golaknath case⁹, Subba Rao, C.J. overturned an earlier court decision and held that government did not have the power to amend the Constitution to remove fundamental rights. Seervai, Tripathi and M.P. Jain argued that the function of the Court is to state what the Constitution provides, not what it ought to provide. The Supreme Court survived and struggled to maintain the trust of the people. In the Indira Gandhi v. Raj Narain¹⁰ case, the court decided to strengthen his powers without calling for an immediate confrontation with the government. The timing of this decision was therefore described by Seervai as the finest hour in the Supreme Court's life. But what was saved against Raj Narain in the Indira Gandhi case was lost in A.D.M. In the case of A.D.M. Jabalpur v Shiv Kant Shukla¹¹, the court gave up and stopped the judicial review. However, Khanna, J., in a minority opinion, stated: This is the essential tenet and premise of the rule of law, he also said, "The rule of law is the opposite of arbitrariness. The rule of law is now accepted in all civilized societies. In this case, "The Constitution is the rule of law. No one can transcend the Constitution's rule of law."

Justice Bhagwati ruled in *Minerva Mills v. Union of India*¹²: This is the essence of the rule of law, which requires, among other things, that "the exercise of powers by governments, whether legislative, executive or otherwise, shall be subject to the constitution and the law."

⁶ Supra.

⁷ Shankari Prasad v. U.O.I., 1951 AIR 458

⁸ Sajjan Singh v. State of Rajasthan, 1965 AIR 845

⁹ Golaknath v. State of Punjab, 1967 AIR 1643

¹⁰ Indira Gandhi v. Raj Narain, 1975 AIR 2299

¹¹ A.D.M. Jabalpur v. Shiv Kant Shukla, 1976 SCC (2) 521

¹² *Minerva Mills v. Union of India*, 1980 SCC(3) 625

The power of judicial review is an integral part of our constitutional system, without which there would be no rule of law, and the rule of law would be a mocking illusion and an unreal promise. In this case, the Supreme Court claimed the power to review constitutional amendments. Shah pursuant to Article 19(5)¹³. J. pointed out that "...the rule of law, including judicial review of arbitrary enforcement actions". "The pervasive humanitarian thread of prison law is that prison authorities do not enjoy unconstitutional amnesty." The Constitutional Court, speaking through S.K. Das, J., held that the State had violated Article 31(1)¹⁴ by depriving petitioners of their property rights. Action. In the case of Jaysinghani¹⁵, the rule of law was mentioned by Ramaswami, J. A feature of the rule of law is that our rule of law underpins the entire constitutional system. In the rule of law system, where discretion is given to the executive branch, that discretion must be limited within clearly defined limits."

In order to support the rule of law in this regard, decisions should be made using known principles and rules, and in general such decisions should be predictable and citizens should know where they are. If a decision is made without principles or rules, it is unpredictable and such a decision is the opposite of a rule of law decision. Where discretion is absolute, humans have always suffered." In this sense, the rule of law is the sworn enemy of arbitrariness. Discretion, as Lord Mansfield classically put it in the case of John Wilkes, means discretion governed by law. It must be governed by rules, not humor. And it should not be vague or imaginative.

The Supreme Court also stated: State judicial review is authorized by the Constitution to ensure that the law is being followed and that law enforcement and other agencies are complying with legal requirements.

It is through the power of judicial review conferred on an independent institutional authority such as the High Court that the rule of law is maintained and every organ of the State is kept within the limits of the law. If the exercise of the power of judicial review can be set at naught by the State Government by over-riding the decision given against it, it would sound like the death knell on the rule of law. The landmark judgment in a recent case stated various propositions relating to the discussed principle were of "Equality, rule of law, judicial review and separation of powers form parts of the basic structure of the Constitution. Each of these concepts is intimately connected. There can be no rule of law, if there is no equality before

¹³ Article 19(5) of Constitution of India

¹⁴ Article 31(1) of Constitution of India

¹⁵ (2004) 8 SCC 1

the law. These would be meaningless if the violation was not subject to judicial review. All these would be redundant if the legislative, executive and judicial powers are vested in one organ. Therefore, the duty to decide whether the limits have been transgressed has been placed on the judiciary.”

III. LEGISLATIVE BACKGROUND

(A) Constitution and the rule of law

A written constitution separating the three great powers appears to be a well-functioning means for the rule of law to flourish with special powers to take care of it. Sir Ivor Jennings, the famous constitutional historian characterizes the Rule of Law as “an unruly horse”. A Court acquires the decisive function of an authoritative interpreter of the meaning of the rule of law, within the framework of the Constitution. Judicial interference has got very little importance, because in the Indian Constitution Rule of Law is a dominant factor and it is the judiciary that has given special power to look after it. The Constitution, which pervades the body of constitutional decisions in the United States, was duly crafted by Chief Justice Marshall in the Marbury case¹⁶.

“...because the authority they emanate is the highest. They are built to last.” As Sutherland, J. noted, the Higher Law also stated:

Because the law is thus unconditionally declared. This superiority is absolute. The supremacy of the laws enacted by Parliament is not absolute, but subject to being enacted in accordance with the Constitution...which shall...be the supreme law of the country.” Stephen Sedley retorts, “Ministers are no more elected than judges are”; an important role for the courts is thus to safeguard the rule of law in the face of the otherwise unaccountable abuses of ministerial power. The position of the judges values on the rest of us amounts to rule by an unelected elite in defiance of the most basic principles in a democracy. Judicial activism has got a huge relevance in the Constitution of India, where the Rule of Law is a dominant factor and it is the judiciary that has been given a special power to observe through several cases.

In the case of Indira Gandhi¹⁷, it was contended that if Article 14¹⁸ itself was not a basic feature “the principle of equality”, which was the core of Article 14 was a basic feature. This argument was appealed to Chandrachud, J.; it was however, rightly rejected by Matthew and

¹⁶ *Marbury v. Madison* (1801) 1 Cr 137 (175).

¹⁷ *Supra*.

¹⁸ Article 14 of Constitution of India

Beg., JJ. On the ground that all could be said about “equality” was embodied in Articles 14-16 and that there was no principle of equality outside these specific provisions. In fact, Article 14 itself by assuming equality before the law and equal protection of the laws, had provided both the shell and the kernel, the skin and the core of the principle of equality, and any attempt to import “equality” as a basic structure would involve judicial jugglery to bring in Article 14 “through the back door of the basic structure”, in the face of the unanimous rejection of the fundamental rights as a whole in *Keshavananda*, as a constitutional limitation upon the constituent power. Some Judges have supposed this “core” of Article 14 to be “not formal equality” but the absence of “inequalities arising on account of vast social and economic differentials”, or what is called “the principle of egalitarianism”, others have put it as the absence of arbitrariness and again, it has been put as another way of affirming the “rule of law”, that is “be you ever so high, the law is above you”. Related to the issues, Subba Rao, C.J., considered that Article 14 has been described “as a necessary corollary to the high concept of the rule of law.”

IV. JUDICIAL TENDS

(A) Preserving the rule of law

The Supreme Court of India in *Gopalan’s* case through Das, J. “...the written Constitution of the United States is the supreme of all three branches of government, and therefore any law enacted by Congress must comply with the provisions of the Constitution in order to be valid. If not, the Supreme Court will step in and declare this law unconstitutional and void...and determine whether such limits have been exceeded, and if so, the Court will Courts boldly declare laws unconstitutional because they are bound by an oath to uphold the Constitution. It is argued that the rule of law functions like a common thread in the case of *Bashesar Nath*¹⁹ in the Indian Constitution, respecting the principles that were essential elements in guaranteeing equality. The rule of law concerns individual freedom and is based on the recognition of essential humanrights, including the right to life.

Shastri, C.J., in one case, said of the rule of law: The democratic process in this country will not work that way. ”

Figures in the Irish Constitution state in Article 40(4)(a) that "no citizen shall be deprived of his personal liberty except in accordance with the law". It had been approved by an Act of Parliament binding Ireland as an existing law."

¹⁹ *Jaysinghani v. Union OF India* AIR 1967 SC 1427

(B) Reframing the web: the keshavananda bharati case

Nani Palkhivala argued in the Keshavananda Bharti²⁰ case: It destroys the human rights and fundamental freedoms that the people secured for themselves when the Constitution was enacted.” When resorting to rebellion against tyranny and oppression as a last resort, this human right is protected by the rule of law. H.M. Seervai also recognized in his writings that the Indian constitution has basic features such as the rule of law and judicial review. In this judgment, an extraordinary event occurred on the bench. When it came to discussing Article 21 of the Indian Constitution, he codified an important part of the Dichian statute that no one should be arrested or imprisoned except in violation of the laws established in ordinary courts. The Supreme Court has upheld the rule of law in several decisions. In the case of Bharat Singh, the court said that no act of harming or adversely affecting a person would be done without the authorization or authority of law. Rule of law in the sense of the primacy of constitution and law, as opposed to arbitrariness. It is in fact a protection against the risk of arbitrary use of political power, against arbitrary interference in people's lives. The rule of law was ensured by judicial review.

V. CONCLUSION

The rule of law is a unified pattern for harmonious existence in a society in which each individual exercises his or her rights in the best interest to achieve excellence, subject to protective discrimination. One greatest advantage can become another's greatest disadvantage. Law has stepped into eliminating such wrinkles, ensuring that individuals and groups of liberties are equally protected. Therefore, the law is the foundation underpinning the possibilities of society. Therefore, it should be understood that when the rule of law prevails, there is nothing beyond absolute discretion or irresponsible action. Justice has advanced the cause of justice by realizing people's hopes and aspirations and strengthening the rule of law on which it is based.

In the words of N.A. Palkhiwala:

“The danger to our democracy is that the noise created by a few politicians is misunderstood as the voice of masses and the well-thought out advice tendered by experts and persons of maturity are ignored as the voice of reactionaries”.

These words of sages and jurists should not be ignored. May the sacrifices made by the great leaders of past generations inspire new generations to uphold the rule of law implied in the

²⁰ Keshavananda Bharti v. State of Kerala, (1973) 4 SCC 225

Indian Constitution.

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