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WORKING OF INDIAN COURTS IN CERTAIN ASPECTS OF RULE OF LAW

Introduction:

Rule of law is very important in a proper administration of the country. It basically protects the arbitrary action of the Administrative authorities. Different theories on Rule law was given by many people like Prof. Josepg Raz, Prof. Lon Fuller, John Rawl and A.V. Dicey. Out of which A.V. Dicey, a British Jurist concept was Accepted. 'Edward Coke' was the person who originated the work 'Rule of Law', for the very first time, the word was derived from French phrase '*la principe de legalite*' meaning '*the principle of legality*'. The Concept 'Equality before law' which is also an imbibed concept of Indian constitution is an element of 'Rule of Law', So, A.V. Dicey main features on rule of law is:

- i. ***Supremacy of the law:*** Law is the Supreme and everything will be governed in accordance with the respective laws.
- ii. ***Equality before law:*** No man is above the law. Everybody before the law will be treated equally without and discrimination.
- iii. ***Predominance of Legal Sprit:*** Rule of law should not only be mentioned in the law but should also be guaranteed by the State.

India has also adopted the concept of rule of law in its Constitution from US. Since, the constitution being supreme the Legislative and the executive derives its power from the constitution. Any law which is made by the legislature should be in conformity with the constitution, basically complementing the constitution. If not so, then such law would be declared invalid as per the Art.13 (1) of Indian Constitution. Indian Constitution also provides additional support against the executive actions, stating that no person shall be deprived of his life or liberty except in accordance with the procedure established by law.¹

¹ Article 21, The Constitution of India, 1949

We also have a Corresponding Article, which is Article 14 of Indian Constitution, talks on there should not be any kind of discrimination irrespective of their sex, religion, race or place of birth. These are the possible means on fulfilling the requirements of A.V. Dicey's Rule of Law on the basis of theoretical application. To further strengthen the system there are lot of landmark Judgment on Rule of Law, few of them are: *Kesavananda Bharathi v. State of Kerala*², where the court held that 'Rule of Law' is also one of the Basic Structure and in *Satvant Singh Sawhney v. D. Ramarathanana*³, the Supreme Court has held that every executive action, if it operates to the prejudice of any person, must be supported by some legislative authority.

However, when this comes to a practical application, we get posted up with lot of problems faced due to corruption in the lawmaking and with judiciary in passing biased judgements. There are also problems caused of existing old laws which haven't been subjected to any kind of alteration. It is a need of the hour that we need to understand that the India did not adopt any 'Sunset' Clause of law. Sunset clause in law is something like a particular Statue or Section or part of a section being used temporarily, but it had given a way for the laws formulated by the Britishers to continue till the Parliament revokes it officially. It is all now in the hands of the Law Commission to look into the outdated legislation and make the necessary suggestions for amendments.



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AMBIT OF CONSTITUTIONALISM:

We have, a thread like difference between the constitution and constitutionalism where constitution is a written document, talking about the structure and working of the Government whereas on the other hand, constitutionalism is an ideology explaining about the values, beliefs and ideals of the people of the nation. For a better understanding, we can say constitutionalism is more like a goal or a Target. Where constitution provides a means or way for achieving the goals.

Constitutionalism in India is a reality than a Myth. Because it satisfies most of the Constitutionalism features like: having a written constitution, parliamentary form of democracy, well established Rule of law, Fundamental Rights for the citizens protection, separation of power between the Legislative, Executive & Judiciary, checks and balance

² AIR 1973 SC 1461

³ AIR 1967 SC 1836

between the three tiers of the Government, a federal form of government (indeed India is having a Quasi Federal Form), Independent Judiciary and Judicial review.

When we look at the courts contribution to constitutionalism, we need to look at the recent case pronounced by Justice Deepak Mishra in *Government of NCT Delhi v. Union of India*⁴ at one place he stated,

*“The constitutional functionaries owe a greater degree of responsibility towards this eloquent instrument for it is from this document that they derive their power and authority and, as a natural corollary, they must ensure that they cultivate and develop a spirit of constitutionalism where every action taken by them is governed by and is in strict conformity with the basic tenets of the Constitution.”*⁵

A Significant connect can also be made with the case regarding the constitutionalism in: *RC Poudyal v. Union of India*⁶, which says that: *“Mere existence of a Constitution, by itself, does not ensure constitutionalism or a constitutional culture. It is the political maturity and traditions of a people that import meaning to a Constitution which otherwise merely embodies political hopes and ideals.”*⁷

PREVENTIVE DETENTION V. PUNITIVE DETENTION:

This concept comes under the ambit of Article 22 of Indian Constitution, which talks about the protection against ‘Arrest’ and ‘Detention’. However, the word ‘Arrest’ in the article does not cover offense of civil nature. The primary classification of detention is of 2 types:

- Preventive Detention
- Punitive Detention

Punitive detention is a punishment; this comes into play once the individual has committed the crime. The detention happens after allegations is been proved by a fair/proper trail. This is considered to be lawful detention as the accused himself as well the 3rd person linked would know the reason for such detention. Here, the accused is been given the right to defend himself to prove his innocence & given a chance to go for an appeal if he wishes to do so. According to Art.22(2) of Indian Constitution, If the accused is under a Punitive Detention he

⁴ Government of NCT Delhi v. Union of India, (2018) 8 SCC 501

⁵ (2018) 8 SCC 501

⁶ AIR 1993 SC 1804

⁷ (2018) 8 SCC 501

cannot be under the police Custody for more than 24 hours because he needs to be produced before the Judicial Magistrate.

In Preventive detention, as the name itself is self explanatory, this is in order to prevent the person from committing a particular crime. No trial will be held in such a case. Accused is not given the opportunity to defend himself unlike Punitive Detention. The idea running behind the Preventive Detention law is that a person can be detained if there is a suspicion that he might commit a socio-economic crime in the name of Money laundering, Terrorism activity, Drug Trafficking. Another important thing is Preventive detention is under the Concurrent list [7th schedule – list - III] as well as union list [7th schedule – list - I] which pertains to say that both the government, central and state can make laws on Preventive detention, To be precise, center can make laws on Defence, Foreign Affairs & security of India and state has the power to make laws on Maintenance of public order, security of state, Maintenance of essential services. However, as per Art.22 (4) of Indian Constitution, the accused can be kept in police custody for a period of only 3 months and not more than that. Exception to the same is that: Advisory Board consisting of High court Judges - consent is necessary for extending the detention period, and if the Parliament passes a law extending the period then the need for going to Advisory board is not there. Most of the Preventive detention laws are temporary in nature to deal with the extra ordinary situation. It is also called a sunset legislation as it expires after a certain period of time.

One of the famous case, making detention unconstitutional is *Ahmed Noormohmad Bhatti V. State of Gujarat*,⁸ “When the Police acting under section 151 of Criminal Procedure Code 1973 to arrest and detention of a person, without a warrant, to prevent commission of a Cognizable offence, ruled that a provision could not be held to be unreasonable as arbitrary and therefore unconstitutional merely because the Police official might abuse his authority”.

Some of the best examples is TADA (Terrorist and Disruptive Activities (Prevention) Act, 1987) has provided a person can be detained for 1 year without any filing of charge sheet. Similarly, in POTA (The Prevention of Terrorism Act, 2002) - has provided that detention of a person would not be more than 3 years but can be detained without formal process i.e filing of charge sheet for 180 days.

FIRM WORKING OF INDEPENDENT JUDICIARY:

⁸ AIR 2005 SC 2115

This is a basic Fundamental Concept that three ties of the Government, namely the – Legislative, Executive and Judiciary should act independently in order to serve the Justice and to ensure that there is no concentration and over lapping of power. In other words, it is simply that there should not be any kind of influence of the Legislature and the Executive on the Judiciary.

In the words of a Shri M. Ananthasayanam Ayyangar (Madras) member of the Constituent Assembly⁹. *“This is the institution which will preserve those fundamental rights and secure to every citizen, the rights that have been given to him under the Constitution. Hence, it must naturally be above all interference by the Executive. The Supreme Court is the watchdog of democracy.”*¹⁰

Nothing holds as good as being written and legally enforceable. As such, we have Indian Constitution which talks about Independent Functioning of Judiciary in various Provisions.

i. Security of Tenure:

The power to appoint the Supreme Court Judges is laid down in the hands of the President. In the same way, the Termination of the Judges can also be done only by the president by way of passing an impeachment motion with two third majorities in the parliament, only when the charged allegation against the accused Judge is been proved the motion can be passed.

ii. Jurisdiction:

Constitution guarantees a wide power with respect to the Supreme Court jurisdiction. However, the point here is that the Parliament can extend the Jurisdiction but not curtail the prevailing/ existing one.

iii. Salary:

Salaries and allowances are duly paid to them except in case of Financial Emergencies.

iv. No Discussion in the House:

Article 105 & Article 194 of Indian Constitution, gives a privilege to the members of the Legislative Houses to discuss any matter without the fear of defamation

⁹ Volume VIII, Constituent Assembly Debates On 24 May, 1949.

¹⁰ Vishnoo Bhagwan, Ram Lal Bhatia, *Constitutional History of India and National Movement* , Published by Atma Ram (1977), page:480

proceedings. But they are subjected to certain limitation, as there are restricted from voicing out their opinion about the conduct of the Judges in the House.

v. Contempt of Court:

Supreme Court & High Courts has the power to punish for the Contempt of the Court Proceedings under Art.129 & Art. 125 of the Indian constitution. This is very important to maintain an independent judiciary, as no one goes without obeying the courts order.

vi. Separation of Judiciary from Executive: Article 50 of the Indian Constitution directs the state to take necessary actions if the Judiciary interferes with the Executive in public service of state.

vii. No Practice after Retirement:

In case of All the Supreme Court Judges, the tenure of 65 years and once it gets over; he cannot get back to practice in any of the courts in India. If a High Court Judge Retires, he can only Practice in Supreme Court.

viii. No interest of holding a Political Officer before or after his retirement:

This is because more than focusing on the Justice he might be tempted on how to become a political leader.

What can be analysed from the above points is that, there is a serious genuine efforts made by the Constitutional Drafters to make the Judiciary Independent and Impartial. There are certain inevitable occasion that happens that leads to a shift in the goal.

LAWS OF TRANSFER AND APPOINTMENT OF JUDGES JUSTIFIABLY:

The appointments of the judges are done by the president as per Article 124 (2) of the Indian constitution for the Supreme Court and under Article 217 (1) of the Indian Constitution for the High Courts. Additionally, Art 124 (2) of the Indian constitution requires the President to consult with of the Judges of the Supreme Court and of the High Courts of the State for the purpose of appointment of the judges. Similarly under Art 217 (1) of the Indian constitution requires the President to consult with the Chief Justice of India, the Governor of the State, and in case of appointment of a Judge other than the Chief Justice, the Chief Justice of the High Court. Article 128 and Article 224-A of the Indian constitution allows retired judges to be appointed as sitting judges in Supreme Court and the High Court's respectively. The Indian constitution also allows for transfer of Judges between the High Courts by the President in consultations with the CJI under Article 222 (1) of the Indian Constitution.

By the time the Constitution came in to force, the number of judge was seven excluding Chief Justice of India. With the increase in the population, litigation and crime rate, the number of judges of Supreme Court was increased to twenty five vide Supreme Court Amendment Act, 1986 and the number further enhanced to thirty vide the Supreme Court Amendment Act, 2008. Now, the Supreme Court comprises of the Chief Justice of India and thirty other judges.

Before 1990, 'consultation' under Article 124(2) and Article 217 (1) of the Indian constitution, did not strictly mean 'concurrence'. In the *S.P. Gupta V. Union of India*,¹¹ it was held that the opinion of CJI did not bind in matters of appointment of the judges, and that the final decision is to be made by the Central Government only. However, this was revised in the *Second (II) Judges Case*,¹² which held that the opinion of the CJI was binding and was essential to safeguard the independence of the judiciary. Further it held that the CJI must consult two senior most Judges of the Supreme Court for the appointment of SC judges and must elicit the views of fellow judges High Court in case of appointment of HC judges and in case of transfer of Judges of High Courts the opinion of the CJI was held to be determinative.

Later the Supreme Court gave its Advisory Opinion when asked to clarify the "Presidential reference" under Article 143 with respect to the scope of 'consultation' under Article 124 of the Indian Constitution in *Third (III) Judges Case*,¹³ where the scope and framework of the Collegium was clearly determined and the CJI was required to form Collegium of senior most Judges for the appointment and transfer of Chief Justice and Judge of High Court, where the opinion of the CJI is to hold higher weight age. This resulted in the system of Collegium which is presently being followed.

The parliament in order to ensure transparency in the appointments of judges proposed "the Indian Constitution (Ninety-ninth Amendment) Act, 2014", to set up the National Judicial Appointments Commission (NJAC) on 13th April, 2015. However, the Constitutional validity of the same was challenged before the Supreme Court to which the Supreme Court held it to be unconstitutional. Furthermore, it revised the 'Collegium System' and ordered the Government to amend the Memorandum of Procedure in such a way that the factors like eligibility, transparency in the appointment process, establishment of Secretariat and

¹¹ 1981 (Supp) SCC 87

¹² 1993) 4 SCC 441

¹³ 1998) 7 SCC 739

Complaint mechanism in consultation with Supreme Court Collegium/CJI are to be taken in to account for the purpose of appointment of Judges of the Supreme Court and the High Courts.

TRANSPARENCY AND ACCOUNTABILITY IS CHALLENGE TO INDIAN JUDICIARY

The word 'accountable' as per the Oxford Dictionary¹⁴ of English Language defines it as '*responsible for your own decisions or actions and expected to explain them when you are asked*'. In general accountability is the key feature of democracy and transparency is the one that facilitates it. India being a democratic county makes sure that the principle of accountability not only applies to the bureaucrats but also to anyone holding power and is obliged with the duty to protect the sovereignty of the state, thereby making judiciary also accountable.

The term judicial accountability actually means accountability of the judges as they form the essential element in the process of administration of justice. In our country from time immemorial judges have been held in high esteem and revered but due to various reasons people have slowly losing their faith in judiciary¹⁵ and judicial accountability is relatively a newer concept.

Out of all the courts of various nations from around the world the Indian courts is the only court which enjoys absolute power. Therefore it becomes important to make them accountable for their action and conduct. Neither the Indian Constitution, nor any other statute in India has been enacted to review their actions or to exercise complaints and take actions against them. Furthermore, the only tool provided under the Constitution is the impeachment process of the judges under Article 124(4). This process in order to be initiated requires a motion containing charges of serious misconduct to be submitted before the speaker containing signatures of one hundred in case of Rajya Sabha or fifty members in case of Lok Sabha. Upon admission by the speaker of the House of People or the Chairperson of the Council of States, an Inquiry Committee consisting of three judges will be established to hold a trial for the judge. If found guilty, the motion comes before the Legislative Houses of the Parliament where it has to be passed with a 2/3 majority in order to be impeached.

¹⁴ John Andrew Simpson, The Oxford English Dictionary: Vol. 1- Clarendon Press, 2008 (2nd Edition)

¹⁵ Vol. 2, Rama Reddy Padala, "Advocates Practice", (2009) Asia Law House, Hyderabad

This lack of judicial accountability in our country has been solved by the parliament through the introduction of Judicial Standards and Accountability Bill in the Parliament in 2010 replacing the Judges (Inquiry) Act, 1968 and its objective being:

- Determine enforceable standards of conduct for judges
- Create new investigative mechanism
- Bring changes to the impeachment process
- Requiring judges to account for his assets.

The Judicial Standards and Accountability Bill, 2010 part from mandating judicial standards, it establishes three investigation bodies to investigate complaints against the judges: the National Judicial Oversight Committee, The Complaints Scrutiny Panel and Investigation committee. Here the National Judicial Oversight Committee comprises of one retired CJI as its Chairperson, one judge of the Supreme Court, one Chief Justice of the High Court, the Attorney General for India, and an eminent person appointed by the President of India and supervises the investigative process. Judicial Standards and Accountability Bill, 2010 provides that a Scrutiny Panel must be established in every High Court and the Apex Court. This panel conduct the initial investigation and ascertaining the merits of a complaint. It also takes action against any such person who makes any frivolous or vexatious complaints by penalising them with a rigorous imprisonment of up to five years and fine of up to five lakh rupees. Lastly, the Investigation Committee will be established upon the recommendations of the Scrutiny Panel to investigate a complaint. The qualifications of members of the investigation committee are to be determined by the Oversight Committee.¹⁶

This above mentioned bill also confirms to full confidentiality and exempts itself from Right to Information Act of 2005 i.e., it exempts the investigative body from revealing any information pertaining to the investigation or the complaint without the written consent or direction of the Oversight Committee and anyone violating the same will be imprisoned for one month, and also be fined. The bill also requires the judges to declare their assets and

¹⁶ I.L. Prasanthi, Judicial Accountability as proposed under Judges Inquiry Bill 2006, Judiciary in India - Constitutional Perspectives, page. 88.

liabilities, and also that of their spouse and dependent children within 30 days of taking oath.¹⁷

The Modi government in 2014 passed the bill in the name of National Judicial Appointments Commission Act in 2014 by including procedure for appointment of judges to the above discussed bill. Even if an Act has been struck down as unconstitutional by the Supreme court, it still takes lot of time for the parliament to amend and pass the bill in order to uphold the rule of law.

CONCLUSION:

At foremost we can say, law is the supreme of all. The best tool that could be possibly carved out would be Rule of Law. This is a best tool because it tries its maximum to link with the Citizens and to create a sense of protection to them. when u analyze the concept in depth, we would know the strategy behind the rule of law, the smart play over here is that, it makes the government to create laws, but those Legislators who create the law itself is subjected to a Supreme law. Hence, this would put a limitation to their arbitrariness; sometimes this might also give a taste of political favouritisms. To have a check on the misuse, we have an Independent Judiciary which is not influenced by any aspect. But the same would lead to a downfall once when the independence is lost. In the contemporary Indian Society, the practical appliance rule of law did not achieve the intended results. One thing that has to be clearly understood is that 'Rule of Law is not an end to itself'. It is a means to reserve the justice to the citizens and be in consonance with the beliefs of the people.

To wind up with the conclusion, the rule of law is very important for a prosperous functioning of society as a whole. Though roots of this principle is been developed in ancient Greece and Rome it has a great relevance in today's society. So the actions of the government should be in such a way that it should not disturb the constitution and also make sure that the principles of the natural Justice is been imbibed and finally, the temptations to unfair political gains need to be avoided. The whole motive of this is that the Justice to the Democracy has to be served.

¹⁷ Aruna Roy, Jean Dreze and Nikhil Dey, Writings on human rights, law, and society in India: a Combat law anthology: selections from Combat law, 2002-2010, Human Rights Law Network publication, (2011).