APPLICATION OF A.V.DICEY'S RULE'S OF LAW IN INDIA

Jerin Abraham*

Albert Venn Dicey was a jurist and constitutional theorist. He wrote the famous piece of work in Constitutional Law called the Introduction to the Study of the Law of the Constitution (1885). Dicey is also known for popularising the term rule of law. He widened the term and was instrumental in making the term a vital concept in administrative law. The idea of rule of law when Dicey approached was a long time ago when the idea was in its infancy. It becomes more likely that it was not how the situation was at the time idea was conceived has changed and hence the idea created didn't perfectly fit. When Albert Venn Dicey wrote his book Introduction to the Study of the Law of Constitution in 1885 when India was not even a republic and still under the transition it faced in the aftermath of the First War of Independence in 1857. Britain was still amid their large empire that was dubbed known not to see the sunset. At the time Constitutional law was at its early stages and was to be developed and yet to be globally accepted.

In the middle of these socio-political forces is when A.V.dicey wrote his book where he expanded on the existing rule of law. Since then, the concept has been applied in multiple countries and in many different ways to make sure that it fits well in the social and political circumstances of each country. India too inherited it from the country that ruled it for several decades and applied it in their way. The research attempts to understand how far or close the application of rule of law in India was envisioned by A.V. Dicey.

OBJECTIVES OF THE STUDY

- To understand the factors that influenced A.V. Dicey's rule of law.
- To comprehend the defects in A.V. Dicey's Rule of Law.
- To recognise the application of rule of law in India.
- To differentiate between the ideals of A.V. Dicey's rule of law and the Indian Rule of Law.

*THIRD YEAR, BBA LLB, CHRIST ACADEMY INSTITUTE OF LAW, BENGALURU.

HYPOTHESIS

A.V. Dicey's political and social situation was different from that of India and therefore the Rule of Law stipulated in the Indian constitution is different from the one devised by him

RESEARCH QUESTIONS

A. What were the factors that helped A.V. Dicey propound his version of Rule of Law?
B. What are the characteristics of the Indian application of the Rule of Law?
C. What is the difference between the Indian Application of Rule of Law and A.V. Dicey's rule of law?

RESEARCH QUESTIONS

Research Question A: What were the factors that helped A.V. Dicey propound his version of Rule of Law?

DICEY'S UNDERSTANDING OF THE ENGLISH LEGAL SYSTEM

Dicey's vision of what Rule of Law was can be seen in his definition of Rule of Law. The definition was given in the following manner. "The absolute supremacy or predominance of regular law, as opposed to the influence of arbitrary power, excludes the existence of arbitrariness, of prerogative, or even wide discretionary authority on the part of the government."[1] The First and Foremost source for his idea of the Rule of Law was the English Legal system in his time and it operated. He believed that the Englishmen lived under the rule of law and no one else was considered to be above it. He assumed that no man in England can be punished by the whims and wishes of the Government. Punishment can only be dished out where there exists a provision of law that was violated and such an act is proved by all means after which he is provided with the punishment. The same procedure is conducted ordinarily for everyone in ordinary courts. He professed that in English governance there is the absence of arbitrariness and wide discretionary powers within the Government. He chided the systems that provided the respective Governments with such arbitrary and wide powers. Dicey

[1] 8th Edition PETER LEYLAND & GORDON ANTHONY, TEXTBOOK ON ADMINISTRATIVE LAW, 3 Oxford University Press 2016

asserted that in any system that gives place to discretion there is also room for arbitrariness. Arbitrariness then only leads to the threat to the legal freedom of the citizens.[2]

A.V. Dicey also advocated the need the "equality before the law or the equal subjection of all classes to the ordinary law of the land administered by the ordinary law courts".[3] He explained it by saying "the Courts have maintained the laws of the constitution have been the strict insistence upon the two principles, first of "equality before the law," which negatives exemption from the liabilities of ordinary citizens or the jurisdiction of the ordinary Courts."[4] Once again he maintained that in England such a situation existed and everything happened via ordinary Courts that didn't discriminate in any form or fashion.

DICEY'S UNDERSTANDING OF FRENCH DROIT ADMINISTRATIF

Droit Administratif was a French system that was implemented by Napoleon Bonaparte. It laid down obligations of the public administrative organisations. It also helped the sovereign to regulate relations of the public administration with that of the general public. The system envisioned Courts which were separate from that the ordinary courts and only looked after cases that involved the ordinary citizens and the Government. This meant that the officials employed by the Government to carry out the executive authority were exempt from that the jurisdiction of ordinary laws and the ordinary court that exercised them. Instead, they were subjected to the official's rules that applied to only such officials.

Dicey was a vehement critic of the system of Droit Administratif. Dicey felt that such a system was only for the protection of the officials who were guilty of misdeeds towards the citizens and to help the Government escape accountability of such officials. He claimed that there was not present in any method or manner an English equivalent to that of French administrative tribunals. Even the branch of administrative law he claimed was not present in the English legal system. He felt "Droit Administratif is by nature a law of inequalities, in which the private person, who represents purely private interests, cannot be put on the same footing as the administration charged with the task of conducting public services in the general interest."[5]

[2] 7th Edition M.P. JAIN, PRINCIPLES OF ADMINISTRATIVE LAW, 16 Lexis Nexis 2013
[3] Ibid
[4] A.V. DICEY, INTRODUCTION TO THE STUDY OF CONSTITUTIONAL LAW, 330 . Liberty Classics. Indianapolis 1915
[5] Ibid

CRITICISM OF DICEY'S RULE OF LAW

Many criticise the outlook of dicey on the rule that he suggested and felt he ignored a lot of the ground realities when he arrived at his thesis. The primary and leading example that can be taken to see the folly of their assumptions of Dicey is the Legal Maxim of King can do no wrong. The legal maxim allowed the crown and the royal family to escape the jurisdiction of ordinary courts. Thereby, negating the assumption by Dicey that in England there is an absolute rule of law in existence. It even disproves that there is equality of law or equal subjugation of law in England. In fact, at that time even the Government and the officials employed under it to carry out its sovereign functions were protected from appearing before the ordinary courts and escaped liability under ordinary law of the land due to the maxim. Further there in fact at the time Dicey had come up with his thesis, there was the presence of an administrative tribunal similar to that present in France.

Droit Administratif was grossly misunderstood by Dicey and he had not looked at the overall working of the system and made his presumptions. The view that dicey had that such courts set up in France were despotic was proved to wring by many scholars who did a substantial and comprehensive study of the system of Droit Administratif. It was found to be a fact that there was no protection for the officials that helped them to conduct illicit acts. Instead, the scholars who did such studies found that it was the English system that was flawed and needed help from the French system to improve upon. The French system provided constraints towards excess application of power and kept such misuse in power. It was much more effective than the common law system when it came to protecting the individual citizen from offences by Officials.

Research Question B: What are the characteristics of the Indian application of the Rule of Law?

Indian legal has borrowed the rule of law concept from the common law system for the justice delivery mechanism. Indian Constitution governs the country and no one and no other law is above it. Moreover, there are restrictions on various authorities in the Constitution so there are checks and balances. It makes sure that there is no arbitrary power present for the authority to misuse.

Art. 13 of the Indian Constitution can be called the expressive provision which implements the rule of law in the Constitution. It covers the laws that are inconsistent or in derogation of

fundamental rights. In clause (1) all laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void.[6] Clause (2) provides the State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void.[7]Clause (3) gives that in Article 13 unless the context otherwise requires law includes any Ordinance, order, bye-law, rule, regulation, notification, custom or usages having in the territory of India the force of law; laws in force include laws passed or made by Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that any such law or any part thereof may not be then in operation either at all or in particular areas.[8] Clause (4) says nothing in this article shall apply to any amendment of this Constitution made under Article 368 Right of Equality.[9] Constitution also provides that the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India with the prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.[10] Finally, Article 21 prescribes that no person shall be deprived of his life or personal liberty except according to the procedure established by law.[11]

The case of A.K Kraipak v. Union of India[12] is a critical case to understanding the usage of the Rule of Law. The facts were that in the State of Jammu and Kashmir, a person by the name of Naquishbund was appointed as the acting Chief Conservator of the forest. He had been appointed to the said post by overlooking the seniority of three officers – Basu, Baig, and Kaul. They had filed petitions against their supersession to the higher authorities. In the meantime, when the selection Board for recommending the names of officers for the All-India Forest Service was formed, Naquishbund came to be appointed as its ex-officio chairman. The Board recommended the names of the persons including Naquishbund but excluding the other three officers who had been superseded. Thereafter the selection board reviewed the cases of officers not selected earlier as a result of which a few more officers were selected. The selections as finally made by the board were accepted by the Commission.

[6] Article 13(1) of the Constitution of India, 1950
[7] Article 13(2) of the Constitution of India, 1950
[8] Article 13(3) of the Constitution of India, 1950
[9] Article 13(4) of the Constitution of India, 1950
[10] Article 14 of the Constitution of India, 1950
[11] Article 21 of the Constitution of India, 1950
[12] A. K. Kraipak & Ors. Etc. v. Union of India & Ors. AIR1970SC150, (1969)2SCC262, [1970]1SCR457

Based on the recommendations of the Commission, the impugned list was published. Even After review

Basu, Baig and Kaul were not selected. Another noteworthy point here is that Naquishbund's name was placed at the top of the list of selected officers. In his judgement, Hedge J held that "In a welfare State like ours it is inevitable that the organ of the State under our Constitution is regulated and controlled by the rule of law. In a welfare State like ours, the jurisdiction of the administrative bodies is inevitably increasing at a rapid rate. The concept of rule of law would lose its validity if the instrumentalities of the State are not".

In the case of ADM Jabalpur v. Shiv Kant Shukla[13], the memorable dissent by Khanna J read the following way "Rule of law is the antithesis of arbitrariness... Rule of Law is now the accepted norm of all civilized societies...Everywhere it is identified with the liberty of the individual. It seeks to maintain a balance between the opposing notions of individual liberty and public order. In every State, the problem arises of reconciling human rights with the requirements of public interest. Such harmonizing can only be attained by the existence of independent courts which can hold the balance between citizen and the State and compel governments to conform to the law."

KHANNA, J., went on to emphasize that Rule of Law means government under the law, the supremacy of law over the government as distinct from the government by law. It means the mere supremacy of law in society generally which would apply also in totalitarian States.4 The majority, on the other hand, took the view that the Rule of Law argument is "intractable" as the Rule of Law cannot override the emergency provisions.4 As RAY, C.J., said: "Constitution is the rule of law. No one can rise above the rule of law in the Constitution." The views expressed by the majority are the extremist positivist arguments. The majority of arguments in effect boil down to this: Rule of Law is not available when one needs it most as protection and shield against arbitrary administrative actions in the name of the emergency.4 Such extreme arguments do not have much validity in modern democratic societies. The concept of Rule of Law has also been discussed by the Supreme Court Judges in another context in another case, Indira Gandhi v. Raj Narain.15 In India, unlike in England, the Rule of Law is not a mere abstract concept. It is concretized in Article 14 of the Constitution.4 Over time, Article 14 has emerged as a very significant constitutional provision. It has assumed a very activist dimension. Article 14 guarantees "equality before the law" and "equal

[13] Additional District Magistrate v. S. S. Shukla. 1976 AIR 1207, 1976 SCR 172

protection of the law" to every person.4 The courts have derived the concept of Rule of Law from Art. 14 and have invoked it to invalidate any unreasonable, arbitrary or discriminatory administrative action on the premise that such action amounts to a denial of equality.[14]

Research Questions C: What are the differences between the Indian Application of Rule of Law and A.V. Dicey's rule of law?

SUPREMACY OF LAW

Dicey regarded that the law of the land is supreme and any person violating it will be punished accordingly. This denotes that no person can be made liable or punitively suffer in terms of his body or his goods unless there is enough evidence to prove a distinct breach of law established under the ordinary legal manner before the ordinary courts. Thus, no person must be punished or tormented according to the whims and fancies of administrative authorities but only in accordance with the established law and procedures.

In India, there is a similar concept that the Constitution is the supreme law of the land and the way the Indian polity shapes up is that every law and authority derives its powers from the Constitution itself. India also follows the principle that no person can be held punitively liable unless there is the required evidence to punish him. The criminal jurisdiction of India believes that the guilt must be proved beyond a reasonable doubt. Even though there is a curb on the wide discretionary powers of the executive there is still a presence of discretionary powers that are provided to the executive.[15] It is because there is a need for the executive in today's modern era where the state operates in a much more substantial sphere of influence and requests to perform multiple complicated tasks.

EQUALITY BEFORE LAW

It means the equal subjection of all classes of people to the law of the land administered by the ordinary courts. No man is above the law and would be treated equally in the eyes of law irrespective of their pedestal in life. While in India it is followed to a great extent under Article 14 and it provides for the doctrines there must be equality before the law and equal protection of laws. Still, it is not absolute and it has many exceptions. Article 361 of the Constitution says gives certain protection to President Governors and Rajpramukhs.

[14] See supra footnote 4
[15] Indira Nehru Gandhi vs Shri Raj Narain & Anr. 1975 AIR 2299

The President, or the Governor or Rajpramukh of a State, is not answerable to any court for the exercise and performance of the powers and duties of his office or for any act done or purporting to be done by him in the exercise and performance of those powers and duties. Provided that the conduct of the President may be brought under review by any court, tribunal or body appointed or designated by either House of Parliament for the investigation of a charge under Article 61 for impeachment. Further nothing in this clause restricts the right of any person to bring appropriate proceedings against the Governor of India or the Government of a State when it comes to the functioning of the Government and his duty as the representative of the Government. Clause (2) gives no criminal proceedings whatsoever shall be instituted or continued against the President, or the Governor of a State, in any court during his term of office. In clause (3) it is given no process for the arrest or imprisonment of the President, or the Governor of a State shall issue from any court during his term of office. Clause (4) is provided with any civil proceedings in which relief is claimed against the President, or the Governor of a State shall be instituted during his term of office in any court in respect of any act done or purporting to be done by him in his capacity, whether before or after he entered upon his office as President, or as Governor of such State, until the expiration of two months next after notice in writing has been delivered to the President or Governor, as the case may be, or left at his office stating the nature of the proceedings, the cause of action, therefore, the name, description and place of residence of the party by whom such proceedings are to be instituted and the relief which he claims. Article 361A Constitution provides for the protection of true reporting publication of proceedings of Parliament and State Legislatures. Article 105 provides that no member of Parliament will be liable for the vote cast by him in parliament. Article 194 protects a member from criminal or civil proceedings for statements made in parliament.

THE PREDOMINANCE OF LEGAL SPIRIT

The phrase legal spirit refers to the spirit of justice. This concept advocates the principle that law should be according to justice and not vice-versa. He was against providing rights such as the right to personal liberty, freedom, etc. in the written constitution of the country. The constitution is not the source but the consequence of the rights of the individuals.5 Thus these rights should be a result of the judicial decisions. Yet in India, we follow the schedule where the Constitution is a landmark for justice and the source of all laws in our country. Unlike Britain, Indian Constitution is written and hence a larger source of power which has the right

amount of flexibility and rigidity. We also provided for Article 21 which is expressly against the wills of A.V. Dicey. Article 21 states that "No person shall be deprived of his life or personal liberty except according to a procedure established by law." Thus, article 21 secures two rights. Thereby providing expressly the right to life and the right to personal liberty in the Constitution.

CONCLUSION

Albert Venn Dicey the constitutional theorist has influenced our polity quite a lot with his concept of rule of law. The book he wrote in Constitutional Law called the Introduction to the Study of the Law of the Constitution (1885) is been a source of Indian implementation of rule of law. The way Dicey popularised the term rule of law isn't viable. He widened the term and was instrumental in making the term a vital concept in administrative law yet he didn't believe in its existence as a branch of law. The idea of rule of law when Dicey approached was in a period which was a long time ago when the idea was in its infancy. Hence, he didn't prepare for how the affairs of the State involved in the times ahead, and hence the idea he created doesn't perfectly fit. When Albert Venn Dicey wrote his book Introduction to the Study of the Law of Constitution in 1885 when India was not even a republic and still under the transition it faced in the aftermath of the First War of Independence in 1857. Britain was still amid their large empire that was dubbed not known to see the sunset. At the time Constitutional law was at its early stages and was to be developed and yet to be globally accepted in its current form.

In the middle of these socio-political forces is when A.V.dicey wrote his book where he expanded on the existing rule of law. Since then, the concept has been applied in multiple countries and in many different ways to make sure that it fits well in the social and political circumstances of each country. India too inherited it from the country that ruled it for several decades and applied it in their way. The research attempts to understand how far or close the application of rule of law in India was envisioned by A.V. Dicey. Hence the Rule of law that was implemented in India is very different from the rule of law that was prescribed by A.V. Dicey.