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Constitutional Law-III (173)

Q.No. 1: Every democratic constitution provides constitutional remedies for safeguarding the fundamental rights. Critically assess whether the Supreme Court of Nepal has been enforcing the fundamental rights in Nepal effectively under its extra-ordinary jurisdiction.

Answer:

Of Course, Every democratic Constitution provide constitutional remedies for the safeguarding the fundamental rights. B.R. Ambedkar has called the Right to Constitutional Remedy as the heart and soul of the constitution. Let us examine some of the democratic constitution of the world. The constitution of India has provided right to constitutional remedy in Article 32 of its constitution. Article 32 can be used only to get a remedy for fundamental rights enshrined in Article 12-35. Similarly, Article 46 of Constitution of Nepal provides the Right to Constitutional Remedy as a fundamental rights which states as follows:

46. Right to Constitutional Remedies: There shall be a right to obtain constitutional remedies in the manner set forth in Article 133 or 144 for the enforcement of the rights conferred by this Part.

Lubi jus ibi remedium- Latin maxim, if get paraphrased- simply, resembles the meaning 'where there is a right, there is a remedy. In order to ensure that Fundamental Rights are not only paper based, most of the democratic countries in the world provide the Constitutional Remedies in their Constitution. Right to Constitutional remedy is an independent right. This right has been provided for safeguarding the fundamental rights.

USA Constitution does not explicitly mention about the constitutional remedy whereas the constitution of India and Nepal provide right to constitutional remedy in case of breach of Fundamental Right. Fundamental rights are enforceable from the court in case if they are breached.

In the context of Nepal, SC is the court of last resort. The Court is provided with the both ordinary and extraordinary power. The decisions of the court is binding to all the subordinate courts as per Article 128(4). Constitution of Nepal provides fundamental rights from Art.16 to Art. 46.

As the question concerned, whether the Supreme Court of Nepal has been enforcing the fundamental rights in Nepal effectively under its extra-ordinary jurisdiction, undoubtedly my thump for yes, as the Supreme Court is credited the guardian of the Constitution since its

beginning, and has long rooted distinct legacy since the time of Justice Hari prasad pradhan for protecting the people's fundamental rights. It has been upholding and uplifting the rule of law ensuring and protecting citizens' rights and liberties as given in the Constitution. Supreme court, along with its very start point, via writ jurisdiction, a remedial right for enforcement of substantive right, exercising its extraordinary jurisdiction so as to restore the fundamental rights of the people. Furthermore, Writ, prerogative orders, these days too, are being issued frequently for the violation of fundamental rights of any individual which in another way, signifies the constitutional remedies as well.

The Right to Constitutional Remedies is considered to be the most important fundamental right because it ensures the protection of other each and every fundamental rights indeed. It helps the citizens in moving court in case of violation of their fundamental rights, primarily. Therefore, every democratic state not only guarantees fundamental rights in its constitution but also provide protection as well by the creation of competent and independent judiciary. Hence, at its core, every democratic constitution needs constitutional remedies for safeguarding the fundamental rights. And this safeguarding is done by the issuing following types of writs;

1. Writ of Habeas Corpus: The writ is issued to release the person who has been detained unlawfully whether in prison or in private custody.
2. Mandamus: Mandamus writ is issued to secure the performance of public duties.
3. Certiorari: This order is issued to quash the order already passed by an inferior court or authority.
4. Prohibition: This writ is issued to prohibit the proceedings in a particular case which it may lead to gross injustice or miscarriage of justice.
5. QuoWarranto: This writ is issued to restrain person form holding a public office which hi is not entitled.

Some of the landmark cases of SC to safeguard the fundamental rights are explained below:

1.Yagya Murti Banjade Vs. Bagmati Special Court: The SC held that to deprive one from its life and personal liberty, both the substantive and procedural acts must be followed and it must be observed very carefully and consciously.

Sanu Shrestha Case (D.No. 9986)-In this case Supremc Court protected the Right to Property issuing an order to pay reasonable compensation for the victim of road expansion.

Annapurna Rana case- virginity test case- where right to privacy of a women as fundamental rights is recognized.

Meera Dhungana case- Marital rape (dignified life) and partition to women (equality) as equal to son is recognized by the supreme court.

Santana Subedi case (D.No.10102)- using the private property of an individual for the expansion of road purpose by the state is invalid- principle of eminent domain in property is explained
Man bahadur B.K case- Right against un touch-ability- Muluki Ain Adal ko mahal 10 gha is inconsistent to the spirit of constitution as it creates discrimination among the people in the society.0

Rajeev parajuli case- CIAA type of royal body formulation by the king- supreme court nullify the validity of the institution.

Resma thapa case- Witch allegation against women- supreme court ordered to the parliament for bringing new law in the field of this sorts of social mal practices.

Godawari Marvel case- PIL is issued for the protection of environment

Narayan Devkota case- Doctrine of public trust in environment has been recognized and while preparing any developmental activities environment Impact Analysis is to be done compulsorily.

Manish kumar pandey case- either in any pretention, government would not remain aloof from its duty to provide the health service to its people during covid pandemic.

Ritesh Lama case- During the time of lockdown too, make hearing of 73 no. Request -along with this order supreme court ensured the right to justice of the people as fundamental right.

Critical Analysis:

In recent days due the Strike in Supreme Court by the Judges themselves and the Bar, the Right to Constitutional Remedy of the people has been endangered severely. Similarly, due to Covid Pandemic, the court denied to hear the writ cases even on the serious violation of fundamental rights of the people. It is similar to saying: “ जो रक्षक उहि भक्षक”. Such activities must not be repeated in the future. We must search for appropriate alternative instead of refusing to hear the cases. Let such history be not repeated in future.

Conclusion:

Supreme Court, via its extra-ordinary jurisdiction, has been playing very progressive and pro active role in order to ensure and protect the fundamental rights of the people in the country. However, the effort are not sufficient. It must be sensitive to people's right of Constitutional

Remedy and should avoid the activities such as strikes.

The End