



## THE RULE OF LAW IN INDIAN POLITY

By *Anand Prakash*

From *Symbiosis Law School, Pune*

"Be you never so high, the Law is above you."<sup>1</sup>

### INTRODUCTION – RULE OF LAW

The dictionary meaning accorded to rule of law is the principle that all people and institution are subject to and accountable to law that is fairly applied and enforced i.e the principle of government by law. The first impression casted by the term rule of law is that a system which is governed by Law.

Law being an instrument plays an inseparable role in forming of legislature, its implementation and also in keeping a check on powers and functions of every organ of state in the whole process. Thus on that note any system of government following rule of Law would function according to law and avoid rule at individuals discretion. The same is seen as operating principle for rule of law where it envisages Law as supreme and avoids room for arbitrariness. The evolution of rule of Law finds its roots from various literary sources all around the globe. In India the evolution can even be traced from the Upanishads.

### EVOLUTION OF RULE OF LAW

Professor A.V Dicey in "Introduction to the study of the law of the constitution", published in year 1885 gave a comparative

analysis of droit administrative prevailing in France and the system of law in Britain to establish that there was rule of law in Britain. The principle grounds of comparison were supremacy of law, equality before law and predominance of legal spirit. The set up of Dual courts under the napoleon code was criticised as it offering chances of personal as well official biases to the public servants in the administrative courts.

1. Supremacy of law – Dicey claimed that in Britain people were ruled by law. He said that rule of law is opposed to the influence of arbitrary and wide discretionary powers. If there is wide discretionary powers and arbitrariness there is no supremacy of law.
2. Equality before Law – this principle subjects all classes to the ordinary law of land administered by the ordinary courts of Law. He criticised the system of droit administratif in France which gives a set up for separate administrative tribunals for deciding cases involving government and public servants.
3. Predominance to legal spirit – Dicey criticised the restricted scope of judiciary in France which restricts it in the process of delivering complete justice as opposed to rule of law. He laid down that the spirit to deliver justice shall be predominate in minds of judges even if they need to go beyond by way of interpreting laws or even forming new laws.

### RULE OF LAW IN INDIAN POLITY

The Indian constitution imbibes the concept of rule of law through many of its provisions. The most valuable fundamental rights in Part

<sup>1</sup> J.w. Bridge, "Be You Never So High, the Law is above You": Recent Developments in English Public Law with Some American Comparisons, 8 Anglo-American Law Review 331–362 (1979).



III ensures equality and liberty. The dicey principle of absence of arbitrariness is aided by provisions such as Art 245-248, which makes legislature to act under law of the land. India has an independent judiciary to keep check and balance on the acts of legislature and executive.

**Supremacy of law** – The constitution is the supreme law of land. As per Kelson's pure theory of law the constitution is the Grundnorm from which every other law derives its authority<sup>2</sup>. Every Law need to be evaluated on the touchstone of Constitution to be declared as valid<sup>3</sup>. In *Keshavanand Bharti case*<sup>4</sup> the supreme court stated that our constitution postulates Rule of Law in sense of supremacy of constitution and laws as opposed to arbitrariness. For example, the legislative powers of parliament and state are clearly embarked under Art 245. Apart from it Art 246 mentions the subject matter of legislation beyond which the parliament and the state legislature cannot legislate. It implies the constitution is supreme as against legislature from where it derives its authority. Also it embarks the absence of arbitrariness as far as legislature

is concerned. On the same line the Supreme Court has observed in that absence of arbitrary power is the primary postulate of rule law<sup>5</sup>.

Article 13 – Any law which is inconsistent with the provisions of part III shall be void to that extent. Part III enshrines the

fundamental rights and any law which abridges such rights, the courts are empowered to declare it unconstitutional.

### **Powerful and Independent judiciary –**

Both the Government and individual person are subject to the ordinary courts of law. In *Union of India v. President, Madras Bar Association*<sup>6</sup>, the Supreme Court held that “Rule of Law has several facets, one of which is that disputes of citizens will be decided by Judges who are independent and impartial; and that disputes as to legality of acts of the Government will be decided by Judges who are independent of the

The judiciary is the basic structure of the Indian constitution as held in *Minerva mills*<sup>7</sup> and *L Chandra kumar case*<sup>8</sup>. The primary purpose of judiciary can be seen as to deliver justice and protect individuals against arbitrary use of power. In *Raman Dayaram Shetty v. International Airport Authority of India*<sup>9</sup>, the Supreme Court held that the great purpose of rule of law is the protection of individual against arbitrary exercise of power.

The constitutional provisions such Art 32 and 226 empowers courts to keep a check over the abridgment of fundamental as well as prevent arbitrary actions of other actions of government.

<sup>2</sup> Hans Kelson, General Theory of Law and State 115 (1945).

<sup>3</sup> Keshavanand Bharti Sripadagalvaru and ors. V. State of Kerala and Anr., (1973) 4 SCC 225

<sup>4</sup> Keshavanand Bharti Sripadagalvaru and ors. V. State of Kerala and Anr., (1973) 4 SCC 225

<sup>5</sup> Som Raj And Ors. Etc V. State of Haryana And Ors. Etc, 1990 SCR (1) 535.

<sup>6</sup> Union of India v. President, Madras Bar Association, Writ Petition (C) NO. 1072 of 2013

<sup>7</sup> Minerva mills v. union of India, AIR 1980 SC 1789

<sup>8</sup> L Chandra Kumar v. union of India and others, Appeal (civil) 481 of 1980

<sup>9</sup> Raman Dayaram Shetty v. International Airport Authority of India, 1979 AIR 1628



**The Predominance to legal spirit** in Indian context can be seen by referring to Art 142 and Sec 482 of the Code of Criminal Procedure, under which supreme court and high courts respectively has inherent power to do justice. This complies with the 3<sup>rd</sup> principle of dicey which talks about predominance to legal spirit. Another aspect in predominance to legal spirit can be referred from *Vishakha and others V. State of Rajasthan*<sup>10</sup>, where the supreme court went beyond from the legislature made laws to the International conventions and norms in order to do complete Justice which implies the legal spirit to be predominate in minds of judges.

**Rule of law as the Basic structure and its Amenability** – The constitution lays down provisions for amending its provisions under Art 368. The scope of amendment has been a issue of interpretation by the courts as in *Shankari prasad*<sup>11</sup>, *Sajjan singh*<sup>12</sup> and *Golaknath*<sup>13</sup> cases. But the landmark decision on this issue came by the majority decision in *Keshavanand Bharti*<sup>14</sup> case, where the court held that the amending powers of parliament is not unlimited, although it extends to all the Articles (overruling *Golaknath*<sup>15</sup> case), but it do not includes power to abrogate or destroy the basic

structure. The rule of Law has been declared as the basic structure of the constitution<sup>16</sup>.

The Rule of Law as defined in the **International congress of Jurists**, held in New Delhi in 1959 where it was defined in context of individuals rights in a free society. It goes on to say that the function of legislature in a free society under rule of law is to create and maintain the conditions to uphold dignity of man as an individual. Further it laid down that legislature shall establish such social, economic, educational and cultural conditions for full development of individuals.

As far as it talks about dignity of man under the purview of rule of law, the following provisions relate to it :-

1. **Preamble** – The constitution used the term “dignity” in its preamble where it reads as “assuring the dignity of the individual and the unity and integrity of the nation”. It says “we the people”, as the highest source of constitution which complies it with the social contract theory of law.
2. **Article 21** – Under this head the state ensures that no one shall be deprived of life and personal liberty except under procedure established by law. It is widely recognised as highest fundamental right.<sup>17</sup> Rights under this article have very wide scope as interpreted by the courts. As interpreted by the courts in *Olga tellis V. Bombay Municipal Corporation*

<sup>10</sup> *Vishakha and others V. State of Rajasthan*, AIR 2013 SC 324

<sup>11</sup> *Shankari Prasad V. Union Of India*, AIR 1951 SC 455

<sup>12</sup> *Sajjan Singh V. State Of Punjab*, AIR 1964 SC 464

<sup>13</sup> *L. C. Golaknath And Others V State of Punjab And Others*, 1967 AIR 1643

<sup>14</sup> *Keshavanand Bharti sripadagalvaru and ors. V. State of kerala and Anr.*, (1973) 4 SCC 225

<sup>15</sup> *L. C. Golaknath And Others V State of Punjab And Others*, 1967 AIR 1643

<sup>16</sup> *Indira Nehru Gandhi V. Raj Narain*, AIR (civil) 887 of 1975

<sup>17</sup> *Indian Journal of International Law* Vol. 51, No. 03, July/Sept. 2011, P. 408



and others<sup>18</sup> and in *Corlie Mullin V. Administrator and Union territory of Delhi*<sup>19</sup>, right to life under Art 21 includes a dignified life.

3. **Article 14** – The constitution grants equality and equal protection of laws to everyone as a fundamental right. As per dicey 2<sup>nd</sup> principle of rule of law equality is inseparable part of rule of law. The preamble of the constitution itself lays down that there is equality among all citizens.

### CRITICAL ANALYSIS

As we have seen the basic principles upon which rule of law is based. On the note of Analysis it can be specifically made that when we analyse the Indian context with the different principles of rule of law when can conclude that India is governed by rule of Law. As we have already related the Indian context with Dicey principle or the definition of rule of Law in Delhi Conference (1959), it also goes on to match the requirement put up by Joseph Raz in his literary work, “*The Rule of Law and its virtue*”<sup>20</sup>. Indian government being bound by fixed rules which is announced or published and has fair certainty (not ambiguous). For example, Sec 66 of Information Technology Act, 2000 was ambiguous and hence held unconstitutional.

But the matter of concern is whether these principles exist in strict sense to comply with the requirement of a society governed under rule of law. At the outset the dicey principles which are credited to a great

extent for evolution of rule of law has also been subject to criticism on several grounds. The major points of criticism by Wade and Forsyth<sup>21</sup> suggested that dicey failed to distinguish arbitrary powers from discretionary powers. Also he failed to underline the *Counseild’Etat*, where appeals could be made as suggesting that French administration was not totally immune from the Judicial scrutiny. Also the principle that “The king can do no wrong”, negatives the presence of Equality and absence of arbitrariness in strict sense.

Dicey’s doctrine reflected that discretionary power could be incompatible with rule of Law<sup>22</sup>, but this dogma cannot be considered in totally today. Rule of Law in present scenario do not asks for complete absence of discretionary powers but rather that the law should control its exercise.

Now, getting to the scenario of rule of law in India, it ranks at 59<sup>th</sup> in the **Rule of law index, 2015** released by the World Justice Project (WLP). The principles of Rule of law underlines the absence of discretionary powers in administration. It is said that where there is discretion there is room for arbitrariness. In India, there is a large amount of discretion involved in the administrative work in some cases. For e.g.: for the purpose of national planning the executive is armed with vast powers in respect of land ceiling, control of basic industries, taxation, mobilization of labour etc. Even Parliament passes acts which are opposed to personal liberty such as

<sup>18</sup>Oligatellis V. Bombay Municipal Corporation and others, AIR 1986 SC 180

<sup>19</sup>Corlie Mullin V. Administrator and Union territory of Delhi ,AIR 1981 SC 746

<sup>20</sup> Joseph Raz, “The rule of law and its virtue”, 1977

<sup>21</sup> Christopher Forsyth and William wade, Administrative Law, 1961

<sup>22</sup>A.V Dicey, Law of the constitution, 9th edition, p.202





preventive detention act or maintenance of Internal Security act 1971, national security act 1980. Even the simplest thing like discriminate payment of employees can be termed as inequality, as opposed to rule of law. The case Frank Anthony Employees' Union v. Union of India<sup>23</sup> is concerned with discrimination in payment to employees, which was held to violate the person's right to equality and unreasonable classification of pensioners was held to be arbitrary in the case *Nakara v. Union of India*<sup>24</sup>.

Rule of law implies fairness and Non Arbitrariness in governance. India ranks on 83 out of 133 Countries in the **Corruption perception index**<sup>25</sup> as per the report of Transparency International in year 2003. Corruption at every level, in every section of society defeats the very spirit of a democratic nation and thus it kills the rule of law in a free society.

The major principle under Rule of Law is of Equality. The Constitution has Art 14 for the same but, in realistic note there are few provisions which creates inequality. Although it is maintained under the head of it being a positive discrimination but in context of Rule of Law it can be treated as inequality. For example :-

1. Immunity to the Beurocrats and diplomats in India.
2. 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. No process

<sup>23</sup> Frank Anthony Employees' Union v. Union of India, 1989 SCR (1) 238.

<sup>24</sup> D. S. Nakara V. Union of India, 1959 SCR 279

<sup>25</sup> Transparency international, berlin 2003 report

for the arrest or imprisonment of the President, or the Governor of a state, shall issue from any court during his term of office.

3. The privileges granted to the members of parliament in respect of legal actions against them.

4. There are separate tribunals for administrative cases called administrative tribunals which are not bound by the Rule of Evidence<sup>26</sup>.

On basis of these points one can conclude that equality is not observed in stricter sense and so rule of law. But it can be justified as the principles of rule of law which originated long back cannot be applied in stricter sense in present scenario. Legal theories need to evolve with time and requirement. Constitution in practical is said to be organic or living constitution which means the provision shall be subject to evolution as per the changing needs except for the portions which constructs the very Basic structure.

The Judiciary has a vital role to play in a democracy while interpreting the statutes or Judging the validity of the acts of legislature and executive. One such occasion was before courts in Adm Jabalpur<sup>27</sup> case, which is popularly known as habeas corpus case. The primary issue concerned in the case was whether there is any rule of law when fundamental rights like Art 21, 14, 19 etc. are suspended. Only jus. Khanna in his discenting opinion could give a way to the

<sup>26</sup> Durga das basu , administrative law.

<sup>27</sup> A. D. M Jabalpur V. Shiv Kant Shukla, AIR 1976 SC 1207



existence of rule of law even though the fundamental rights are suspended. In my view, at this point this opinion stands upto the requirement of rule of law as internal morality<sup>28</sup> as propose by Joseph Raz. The majority of the bench which restricted itself from going into the validity of the MISA Act<sup>29</sup>, which provided a large room for arbitrariness is against the rule of law. And for this reason this judgement is called as the darkest hour of Indian Judiciary.

### CONCLUSION

The primary question concerning this literary work – What is Rule of Law and how far it is administered in Indian polity based on its principles. After taking note of several principles pronounced across the globe it can be said that Rule of Law is the basic to good governance. what distinguishes a civilized society from an uncivilized one is rule of law. The concept of rule of law has seen its evolution from many literary sources but the core of the principle which remains common among all is that it requires Law to be supreme and absence of arbitrary powers in administration of these laws. M.C. Chagla, in his autobiography “Roses in December”, mentioned that: If there are three prime requisites for the rule of law, they are a strong Bar, an independent judiciary and an enlightened public opinion<sup>30</sup>.

As far as administration of Rule of Law in Indian polity is concerned, Principles of the rule of law is seen to be embodied in our constitution, which establishes an independent Judiciary and guarantees

fundamental rights and defines roles for the legislature and the executive separately. The distinctiveness of Indian rule of law lies in providing space for a interaction between among four notions: “rights”, “development”, “Governance” and “Justice”. The concept of rule of law has been in question in courts many a times and It is a matter of pride that Indian judiciary has succeeded in keeping alive the spirit of rule of law. The landmark judgment by supreme court declaring rule of law as basic structure underlines the importance of rule of law in Indian governance<sup>31</sup>.

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<sup>28</sup>Joseph Raz, “The rule of law and its virtue”, 1977

<sup>29</sup>Maintainance of Internal securities Act, 1975

<sup>30</sup>M. C Chagla, Roses in December, 1994

<sup>31</sup> Indira Nehru Gandhi V. Raj Narain, AIR 1975 SC 2299