

# RULE OF LAW IN INDIA: A CRITICAL ANALYSIS

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## Abstract

The rule of law is principle of legality under which the state is governed not by the ruler or the nominated representatives of the people but by the law. The concept of the rule of law was firstly brought by Sir Edward Coke who was chief Justice of the England in Kings James 1<sup>st</sup> regime. According to him king should be under God and Law. He also established the supremacy of the law against the executive. According to A.V. Dicey there are three basic principles of rule of law in English legal system. They are Absence of Arbitrariness or supremacy of law, equality before law and predominance of legal system. According to him Law is supreme no one is above the law and government is subject to law not law is subject to government and everyone is equal in the eyes of law and there is no discrimination and there are no tribunals and special court in England to solve the matter of the government officials and law plays an important role in England for protecting rights of people and proving rights to the people. In India there is democratic government and rule of law is basic requirement of the democratic government. In India government works under ambit of constitution and rule of law is golden thread to the constitution. In India the constitution is supreme and all rights of people of India are given to them by constitution and also protected by the constitution.

**Keywords:** *Discretionary Power, Arbitrary Power, Judicial Review, Administrative Tribunal, Fundamental Rights, Legislative Power, Judicial Power*

## Introduction

The term rule of law means the principle of legality which refers to a government based on principles of law and not based on principle of men. Rule of law is the supreme manifestation of human civilization and culture and is a new “lingua franca” of global moral thought. Rule of law is to be understood neither as a rule nor as a law. It is generally understood as the doctrine of state political morality which concentrates on the rule of law in securing a correct balance between rights and powers between individuals and between individuals and the state

in any free and civil society. This balance can be drawn by law based on freedom, justice, equality, and accountability. Therefore, it infuses the law with moral qualities. Rule of law balances the needs of society and the individual<sup>1</sup>.

The rule of law was developed over the centuries as a brake on arbitrary power. The concept has come to acquire a number of different meanings, methods and facts. Every act of government and of its officers which affects the individual subject or citizen either *in personam* or in relation to his property or other rights must if challenged be supported by a law or by legal authority. If there is no legal authority the act would be considered as invalid by the common law courts. But this safeguard turned out to be inadequate as government functions increased and parliament and legislatures started delegating powers in large scale to the executive and its officers. This led to the development of an area of discretionary power<sup>2</sup>.

### **Historical Background**

- **King James 1<sup>st</sup> and chief Justice Coke**

The role of Sir Edward Coke, Chief Justice of England in King James 1<sup>st</sup> reign was very important in bringing this concept of the rule of law. It was a cold wintry morning at Westminster Hall on November 13, 1608. King James 1<sup>st</sup> was bent on establishing his absolute power claiming the Divine Right of the King but Parliament and Royal Courts of Justice were stopping him from establishing absolute power of the king. Under the leadership of Chief Justice Coke the courts had started interfering in the matter of prerogative powers, seizures and detentions and were issuing writs to review the decisions of local feudal courts. On that historic day King James claimed that since all the judges were his delegates so he could choose any case and remove that case from the jurisdiction of the courts and decide the case as he wants. Chief Justice Coke answered in the presence of the king and with the clear consent of all the judges that the king in his own right cannot adjudge any case but the cases should be adjudged according to the law and custom of England. Through this Sir Edward Coke, Chief Justice in James 1<sup>st</sup> regime brought the concept of rule of Law. In this battle against the King he maintained successfully that the King should be under God and the Law not God and Law under king, and he

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<sup>1</sup> J.J.R. Upadhaya, *Administrative Law*, 36 (10<sup>th</sup> ed., 2016).

<sup>2</sup> I.P. Massey, *Administrative law*, 28(7<sup>th</sup> ed., 2008).

established the supremacy of the law against the executive. Dicey developed this theory of law in his classic book 'The Law and Constitution' published in the year 1885<sup>3</sup>.

- **Rule of Law Under English Constitution**

According to A.V. Dicey rule of law is the basic principle of English legal system.

There are three postulates of the rule of law: -

- 1. Supremacy of Law**

According to A.V. Dicey in England the administration of government were governed in accordance with the rule of law. Dicey further explained it by saying that English man were administered not by the action taken by the public authority but by exercising its discretionary power or wide power without observing the guiding principle. They were administered by administrative authority by exercising its wide or discretionary power affect observing its guiding principle that is rule of law<sup>4</sup>.

- 2. Equality before Law**

According to A.V. Dicey there must be equality before the law or equal subjection of all classes to the ordinary law of the land administered by ordinary law courts. According to him in England all persons were subject to one and the same laws and there were no separate tribunals or special courts for officers of the government and other authorities.<sup>5</sup>

- 3. Predominance of legal spirit**

Dicey stated that in many countries' rights such as right to personal liberty, freedom from arrest, freedom to hold public meetings are guaranteed by written constitution but in England it is not so. Thus, Dicey emphasised the role of the courts of law as guarantors of liberty and suggested that rights would be secured more adequately if they were enforceable in the court of law than by mere declaration of those rights in a document. The British constitution though largely unwritten is firmly based on separation of powers. According to him more incorporation or inclusion of certain rights in the written constitution is of little value in the absence of effective remedies enforcement and protection.

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<sup>3</sup>Venkat Iyer (ed.), *Citizen's Rights and the rule of law problems and prospects* 7(Lexis Nexis, Nagpur, 2012).

<sup>4</sup> *Supra* note 1.

<sup>5</sup> *Supra* note 1 at p. 37.

### **Modern Concept of the Rule of Law**

The modern concept of the Rule of Law is fairly wide. Davis gives seven principal meanings of the term Rule of Law: -

- Law and Order
- Fixed Rules
- Elimination of discretion
- Due Process of Law or fairness
- Natural Law or observance of the principles of natural justice
- Preference for Judges and ordinary courts of law to executive authorities and administrative tribunals
- Judicial review of administrative action

### **Rule of Law under the Indian Constitution**

For a democratic government rule of law is a basic requirement. The rule of law runs like a golden thread through every provision of the constitution and indisputably constitutes one of the basic features which require that every organ of the state must act within the confines of powers conferred upon it by the constitution and the law.

#### ***Case- Bachan Singh v. State of Punjab<sup>6</sup>:-***

Supreme Court held that rule of law permeates the entire fabric of constitution of India and constitutes basic feature of the constitution. Further Supreme Court held that if any law which is enacted by legislative authority is not rule of law it may be arbitrary or despotic. Further the Supreme Court held that a Law made by the administrative authority should be tested on reasoning and democratic form in polity permits to make legislation accountable to the people.

Every organ of the administration is regulated by the rule of law. The Indian Constitution embodies the modern concept of the rule of law. The concept of the rule of law exists in this country by virtue of the following features: -

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<sup>6</sup> AIR 1982 SC 1336.

- **Supremacy of the constitution**

Dicey doctrine of the rule of law has been accepted and embodied in the Constitution of India. In the Preamble are enunciated the ideals of justice, liberty and equality. These concepts are enshrined in Part- 3 as fundamental rights and are made enforceable.

*Case- A.K. Gopalan v. State of Madras*<sup>7</sup>:-

In this case Supreme Court held that justice, equality and liberty these are ideals enshrined in the preamble of the constitution and these ideals are incorporated in Part-3 of Constitution of India as Fundamental Right.

- **Constitution requirement of equality**

Equality before law as a postulate of rule of law has been accepted and adopted under Article- 14 of the Constitution. The maxim 'the king can do no wrong' has no application in India. The government and public authorities are subject to the jurisdiction of ordinary courts of law and for similar wrong are to be tried and penalised similarly.

*Case- Somdev v. State of Haryana*<sup>8</sup>:-

In this case court held that in this case there is order of merit list for the selection of the candidate than candidate can be selected on the basis of merit but discretionary power is given to selection authority for the selection of the candidate under such circumstance the discretionary power can be exercised under any principal or rule otherwise that discretionary power would be amounting to arbitrary power.

- **Rule of Law as a feature of basic structure**

In the case of *keshavananda Bharti v. State of Kerala*<sup>9</sup> some of the judges constituting majority were of the opinion that the rule of law was an aspect of doctrine of basic structure of the constitution which even the plenary power of parliament cannot reach to amend.

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<sup>7</sup> AIR 1950 SC 27.

<sup>8</sup> (1990) 2 SCC 653.

<sup>9</sup> AIR 1973 SC 1461.

- **Fairness in action of Administrative authority**

In the case of *R.D. Shetty v. International Airport Authority*<sup>10</sup> Supreme Court held that administrative authority has to act fairly and the fairness of action of administrative authority must be restricted or limited by the provision of part- 3 of Constitution of India. In other words we can say by Part-3 that Fundamental rights not only in condition in action taken by administrative authority but also brings about fairness of action of administrative authority as in the case of *Menka Gandhi v. Union of India*<sup>11</sup> that means procedure should be just, fair and reasonable. The same view retreated in case of *Ajay Hasia v. Khalid Mujeeb Sehravardi*<sup>12</sup>.

- **National policy for reservation of backward classes and Constitutional viability of creamy layer**

In the case of *Indira Sawhney v. Union of India*<sup>13</sup>: - It is also known as *Mandal Commission Case*. In this case Supreme Court held that there should be reservation for socially and educationally backward classes of the society and also held that in Case of Other Backward Classes there should be identification of Creamy Layer so that it can be excluded.

- **Pervasiveness of the concept of rule of Law**

In the case of *A.K. Kripak v. Union of India*<sup>14</sup> the Supreme Court held that concept of Rule of Law pervades over the entire field of administration not only every organ of state should be regulated by the concept of Rule of Law and it is duty of Judiciary to play impartial role for upholding the concept of Rule of Law in a democratic shell.

### **Problems and Prospects of the concept of Rule of Law in India**

A question which arises in mind again and again is that where is rule of law when hardly any powerful politician or any bureaucrat has been jailed for corruption? How is it that, when they are prosecuted, they are invariably discharged or released? Is there any kind of rule of law which touches them? Does the maxim “Be you ever so high the law is above you” apply to them? Ha not the rule of law failed in India. These above questions are not so difficult to

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<sup>10</sup> AIR 1979 SC 1728.

<sup>11</sup> AIR 1978 SC 597.

<sup>12</sup> AIR 1981 SC 487.

<sup>13</sup> AIR 1992 SC 477.

<sup>14</sup> (1969) 2 SCC 262, 269.

answer. All these individuals are not touched by the law in so far for corruption and fiscal offences as are concerned. But the citizen of the country must not underestimate the impact on citizen's rights and liberties against the state and government. Our fundamental rights and their judicial enlargement have given a very strong and effective sword and shield to the citizen against very strong sword and protecting shield to the citizen against illegal, arbitrary, discriminatory, and wrong action of the government. The courts have reacted vigorously when citizen's rights and liberties are attacked<sup>15</sup>.

### **Conclusion**

Rule of law is mostly believed to be a modern concept which is a gift of democracy to all the people of world however it is something which is fundamental to the very basic idea of good governance.

Rule of Law is mostly adopted by the every country of the world but there are many loopholes and weaknesses in the concept of rule of Law so we need to focus on these weaknesses and loopholes and no one should criticise this concept of rule of law and it is not only the duty of three organs of government, legislative, executive and judiciary to protect the concept of rule of law but Other peoples like media, civil society and even the ordinary citizen cannot run from their duty and they are also having responsibility of not to criticise the concept of rule of law but work for the welfare of the rule of the law. Therefore, it is equally important for government, organs of government, departments of government, media, civil society and ordinary citizen to work for the maintenance of Rule of law.

### **Suggestions**

After a long research and writing on the topic of rule of law I found that the concept of rule of law is adopted in India but it is not fully adopted there are many loopholes in the concept of the rule of law. Under this concept of rule of law everyone is equal in the eyes of law whether he is Prime minister, President, Chief Justice or whether he is a clerk, peon working in a company they all are equal in the eyes of law but this things does not fully apply in India here in many cases we have seen that if a person of high post does the crime no strict action is taken against him and he is detained and released quickly but when a person is of lower post he is tortured even when there are only allegations on him. In India the crime is looked after

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<sup>15</sup> *Supra* note 4 at p. 21.

by the criminal laws but laws are not so much strict for the person who does crime. For e.g. Sec- 510 of the IPC deals with the misconduct in public by a drunken person. Under this section if a person is drunk and during that if he misbehaves with any person or he drives a car in drinking condition he will be given punishment of fine of 10 rupees or imprisonment of 24 hours. So, in my opinion this punishment is not sufficient. In my opinion the fine should be increased to 500 or 1000 rupees and time period of imprisonment should be also increased to 1 month to six months. Same kind of situation is during the when punishment is given to the murder the Sec- 302 of IPC deals with the punishment to murder in that section there is not properly given that what kind of punishment should be given to the person who have done murder it has been totally kept on court that whether they want to give life imprisonment to criminal or they want to give death sentence to him. So, in my opinion this thing is not correct there should be properly given that what kind of punishment is for murder whether it is life imprisonment or death sentence. The constitutional law also provides certain protection to the prisoners which are given in Article- 19(2) and Article- 19(3) of Indian constitution in form of Double jeopardy and Self-incrimination. Article- 19(2) states no person shall be prosecuted and punished for same offence more than once and Article- 19(3) states no person shall be accused of any offence shall be compelled to be a witness against himself. In my opinion this is not correct. There should be provision for prosecution and punishment of criminal for same offence more than once. There should be provision that a person can be used as witness against himself.