

## **“A Critique on the Concept of Rule of Law and its Application in the Indian Polity”**

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### **INTRODUCTION**

#### Origin and Concept of Rule of Law

The Rule of Law concept means, that the state is governed by the law and not by the ruler or the representatives of the people. A country that preserves the Rule of Law would be in the Grundnorm<sup>1</sup> of that nation, or the essential and core law from which all other laws derive its authority and becomes the supreme authority of that region. If a representative is governed by the laws arising from the Grundnorm then his powers would be limited by law. The law is king but the king is not the law<sup>2</sup>. No individual, whether rich or poor or even a ruler is above the law. Rule of Law is supreme and no individual is above the law and should thus obey it. Rule of law is a necessity in order to have a disciplined and organized community. The laws adopted through an established procedure implied that the government authorities would be exercised only under those written laws. The rule of law principle protects the individuals from the arbitrary actions of the government's authorities.

It is said that the one who originated the concept of Rule of Law was Edward Coke. According to him, the king must be working under the God and law and corrected the supremacy of the law and said that the Law is supreme over the executive.

‘La principe de Legalite’ is a French phrase from which the concept of Rule of Law was derived. It means the principle of legality. The theory of Rule of Law has been traced back to the Ancient Romans and this concept has been supported by many medieval philosophers in Europe like Locke, Hobbs and Rousseau<sup>3</sup>.

In India also, Rule of Law can be traced back to the Upanishads. It states that the law is the king of the kings. No one is higher than the law. Not even the king. Rule of law is much higher as well as powerful than the kings. Many Indian philosophers have supported this Rule of Law

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<sup>1</sup> Mridushri Swarup, ‘Kelsen’s Theory of Grundnorm’, November 16, 2014  
<<http://manupatra.com/roundup/330/Articles/Article%201.pdf>>

<sup>2</sup> Thomas Paine, “Common Sense”, September, 09, 2014  
< <http://www.gutenberg.org/files/147/147-h/147-h.htm>>

<sup>3</sup> "Origin and Concept of Rule of Law." LawTeacher, November, 2013  
<<https://www.lawteacher.net/free-law-essays/administrative-law/origin-and-concept-of-rule-of-law-administrative-law-essay.php?vref=1>>.

concept have interpreted it in their own way. The Indian philosopher Chanakya was of the opinion that the King must be governed by the law.

But the entire credit for the development of the concept of Rule of Law goes to Professor A.V Dicey who in his book, “Introduction to the study of law of the Constitution” which was published in the year 1885. He tried developing the Rule of Law concept. Administrative law is mainly based on this concept. Thus the concept of Rule of Law is one of the most important aspects of modern legal systems and it purely says that ‘howsoever high you maybe, the law is above you’. No human being is above or higher than the supremacy of law.

### **DICEY’S PERCEPTION TO RULE OF LAW:**

Rule of law is a very important principle which is regulated in the common law countries. But these common law derived countries modern laws have denied few of the important parts of the rule of law. This was stated by Dicey at the beginning of the 19<sup>th</sup> century. Dicey stated Rule of Law as, “absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power and excludes the existence of prerogative or even wide discretionary power on the part of government”.<sup>4</sup> According to Dicey he stated that whenever there occurs a discretion, there would be room for arbitrariness which would lead to the insecurity of legal freedom of the citizens.

A.V. Dicey proposed in his theory the three important pillars based on the concept of Rule of Law, that a government must be governed by the principles of the law and not of the men. The three pillars are:

#### **1) SUPREMACY OF LAW:**

The basic understanding of rule of law is that the law rules over the people including those people who are involved in the administering of law. Reasons must be given by the law makers that are justified under the law while exercising the power to make and administer the law.

#### **2) EQUALITY BEFORE THE LAW:**

The principle of equality of law is to make sure that the law is not only administered but is also enforced in the same manner. To only have a fair law is not enough. That fair law must be applied in a just manner as well. The Supremacy of law checks over the government and its administering and making of the law. People of different sex, religion, caste, etc. cannot be discriminated under the law. The law must be equal to all and this has been given under Article

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<sup>4</sup> The Law of Constitution, pg. 198 (8<sup>th</sup> ed.)

14 of the Constitution of India. It has also been codified in the Universal Declaration of Human Rights under the preamble<sup>5</sup>.

### 3) PREDOMINANCE OF LEGAL SPIRIT:

Dicey believed that just by including the above two principles would not be insufficient to be included in the Constitution of the country or even the other laws for the state which are being followed. According to Dicey there must be some kind of enforcing authority that could enforce the rule of law. Dicey believed that such enforcing authority would be found in the courts. The courts would be able to enforce the rule of law and make impartial decisions that are free from any external influence. Thus it becomes one of the important pillars of rule of law.

Dicey's concept of Rule of Law has had its advantages and disadvantages. It has not only set the base for all common law countries but has also provided a base for Administrative law principles. The power of rule of law has given to the countries of common law system, a philosophy to control the government's power and to keep it within limits, so it does not misuse the power vested in them. It eradicates the bias, unreasoned discretion and arbitrariness from the wide power vested in the executive. The Courts have supremacy over all other officials of the State.

Dicey's theory had a tremendous impact on the growth of Administrative Law in Britain. In 1885, Dicey was factually wrong in his analysis as he ignored the privileges and immunities enjoyed by the Crown, under the constitutional maxim, that the king can do no wrong. Also, Dicey miscomprehended and misunderstood the real nature of the French *droit administratif*. He thought that the system was designed to protect the officials from liability of their acts, and was inferior to the British system of ordinary courts that decided the disputes between the citizen and state.

Therefore, one can say that, on one hand the concept of rule of law helped in safeguarding and preventing the traditions of basic freedoms of the people, and the independence of the judiciary and on the other hand, it generated an irrational attitude insofar as people did not want to face the realities of the situation and find correctives to the problems in the area of Administrative Law if that involved a departure from the Dicey tradition.

### **RULE OF LAW IN INDIA:**

#### Judiciary and Rule of Law

The concept of Rule of Law was often brought up to convey to the Administration that it should function according to what the law says and must not exercise any arbitrary powers<sup>6</sup>. The Indian

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<sup>5</sup> Hariharan, 'Rule of Law in India', November 16, 2014  
<https://www.lawctopus.com/academike/rule-of-law-in-india/>

<sup>6</sup> Monica Kasturi, 'Concept of Rule of Law', January 5, 2015

Judiciary has played an important role in determining Rule of Law in India. By interpreting the constitutional provisions and taking a positive approach, the courts ensure that Rule of Law would not only be spoken about on paper but would be executed too.

As stated in the case of *Bachan Singh v. State of Punjab*, rule of law forms one of the basic features of the Constitution and an essential element of this concept is that the law must not be irrational or arbitrary and it must satisfy the test of reason.<sup>7</sup>

In *A.D.M. Jabalpur v. Shiv Kant Shukla*<sup>8</sup>, KHANNA, J. has stated that Rule of law is the opposite of arbitrariness. Rule of Law is an accepted norm of all civilized societies. It is identified everywhere with the liberty of the individual.

The case which first encouraged Rule of Law was *Shankari Prasad v. Union of India*<sup>9</sup>. A question to amend the fundamental rights arose in this case. The issue in this case was settled by the decision laid down in the case of *Keshavananda Bharti v. State of Kerala*<sup>10</sup>. The Hon'ble Supreme Court in this case held that Rule of Law is the "basic structure" of our Constitution. The decision in the case of *Golak Nath v. State of Punjab*<sup>11</sup> was overruled by the Hon'ble Supreme Court and held that the Parliament has wide powers of amending the constitution and it extends to all Articles, but does not include the power to destroy the framework or basic structure of the Constitution.

The implied limitations to amend the Constitution under Article 368 are imposed by Rule of Law. The parliament can amend the Constitution under these limitations.

The federal structure of Indian Constitution is founded on certain fundamental principles. Rule of Law being one of them that includes judicial review of arbitrary executive action<sup>12</sup>.

In the case of *S.G. Jaisinghani v. Union of India* it was laid down that the absence of arbitrary power is the first essential of Rule of Law upon which our whole constitutional system is based<sup>13</sup>.

The Supreme Court put a stamp of approval on the observations made by DOUGALAS J, in the case of *United States v. Wunderlich*, "law has reached its finest moments when it has freed man from unlimited discretion of some ruler...where discretion is absolute, and man has always suffered."<sup>14</sup>

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<sup>7</sup> *Bachan Singh v. State of Punjab*, AIR 1982 SC 1325

<sup>8</sup> *A.D.M. Jabalpur v. Shiv Kant Shukla*, AIR 1976 SC 1283

<sup>9</sup> *Shankari Prasad v. Union of India* AIR 1951 SC 455

<sup>10</sup> *Keshavananda Bharti v. State of Kerala* AIR 1973 SC 1461.

<sup>11</sup> *Golak Nath v. State of Punjab* 1967 SCR (2) 762.

<sup>12</sup> *State of Madhya Pradesh v. Thakur Bharat Singh*, AIR 1967 SC 1170

<sup>13</sup> *S.G. Jaisinghani v. Union of India* AIR 1967 SC 1427

<sup>14</sup> *United States v. Wunderlich*, (1951) 342 98

In *Indira Gandhi v. Raj Narayan*<sup>15</sup>, the Supreme Court held that Article 14 under which Rule of Law is embodied is the basic feature of the Indian Constitution and cannot be destroyed even by an amendment under Article 368. It was laid down that the law of the land is supreme and must succeed over the will of a person.

In *Maneka Gandhi v. Union of India*, the Hon'ble Supreme Court held that under Article 21, no person can be deprived of his life and personal liberty, except by procedure established by law.<sup>16</sup> Thus the following requirements under Article 21 must be fulfilled before a person is deprived of his life and liberty:

1. That there must be a valid law.
2. The law must provide procedure.
3. The procedure must be just, fair and reasonable.
4. The law must satisfy the requirements of Article 14 and 19.

The primary postulate of Rule of Law is the absence of arbitrary power on which the Constitution is dependent upon. Any decision being made without any rule is a concept totally opposite to the Rule of Law concept. This was held in the case of *Som Raj v. State of Haryana*.<sup>17</sup>

Rule of Law has another face which includes power to judicial review and independence of judiciary. In the case of *Union of India v. Raghbir Singh*<sup>18</sup>, it was stated that any provision which takes away the right of judicial review goes against the Rule of Law.

Also, in the case of *S.P. Sampath Kumar v. Union of India*<sup>19</sup>, the courts have repeated that judicial review is a part of the basic structure of the Constitution. It was stated in *Daryao v. State of Uttar Pradesh*<sup>20</sup> that binding character of judgments pronounced by courts of competent jurisdiction is an essential part of Rule of Law. Rule of Law is obviously such basis of the administration of justice at which constitution lays so much emphasis. In all circumstances the Constitution is considered as supreme. Any law made by the legislature must be within the test of reasonableness and objectives of the Constitution. If any structure of the Government crosses the limits or intrudes the power of other structures or even exceeds its jurisdiction, then the act shall be considered as an invalid act which is abusive of the law and would be declared as void ab initio. Thus, the concept of Rule of Law in India is recognized by the Constitution and is firmly established by judicial pronouncements.

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<sup>15</sup> *Indira Gandhi v. Raj Narayan*, 1975 SCC (2) 159

<sup>16</sup> *Maneka Gandhi v. Union of India*, AIR 1978 SC 597

<sup>17</sup> *Som Raj v. State of Haryana*, 1990 SCR (1) 535

<sup>18</sup> *Union of India v. Raghbir Singh*, 1989 SCR (3) 316

<sup>19</sup> *S.P. Sampath Kumar v. Union of India*, 1987 SCR (3) 233

<sup>20</sup> *Daryao v. State of Uttar Pradesh*, AIR 1961 SC 1457

**CONCLUSION:**

The rule of law is central theme to all democratic and civilized society of this world. The Constitution must in all circumstances be considered supreme, and the laws made by the legislature should pass the test of reasonableness and the objectives of the Constitution. Matters such as the protection of the rights of the people, equal treatment before the law, protection against excessive arbitrariness, the Constitution of India has provided enough mechanisms to ensure that the Rule of Law is followed. Through its decisions the Courts have strived to reinforce these mechanisms and ensure smooth justice delivery to all citizens.

The judges are not to act upon the laws which are against humanity or based on unreasonable classification or are arbitrary in nature or are against the moral principles, even if such laws are passed by the Parliament. Similarly, Parliament is to keep in mind that the laws made by it are not against the rule of law, or against the Constitution or public moral and humanity. It should also from time to time keep an eye on the social changes and scientific advancement so that the laws meet the demands from time to time.