

Constitutionalism: Pluralism & Federalism

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I. INTRODUCTION

“Law makes all society members in to agents of societies self-creating. Law makes all human action in to action whose potentiality is the public interest. Law makes all human desire in to desire whose object can be the survival and prospering of society.”

The above quote means that the Rule of Law is contrasted with the rule of men and the rule by law. It essentially means that the ‘law’ should rule, rather than ‘men’. While this description is generally accepted, the precise components of the Rule of Law are elusive.³ This has led to the concept being used to mean different things by different people, causing enormous confusion as to its meaning.

Rule of law as a concept is substantive yet dynamic, as modern philosophy yet ages old. One of the key assumption of Rule of law is that let no man, however high or any government be trusted with power but tie him or it down by the chains of law is of old origin: It is an ancient ideal and was incorporated in ancient India in Upanishad saying *“Law is the king of kings, for more rigid and powerful than they; there are nothing higher than law; by its prowess, as by that of highest monarch, the weak shall prevail over the strong”*.

The latest encounter of the gangster Vikas Dubey has sparked the debate regarding rule of law and has also raised questions on the exercise of violence by the institutions of the state. Criticisms have been coming from across the nation especially from the opposition that such an act is against the fundamentals of law, that is, against the rule of law. In the present day context where incidences like encounters and mob lynching have started to become obvious for people it gets necessary to indicate what importance the rule of law has in such situations and hence the main focus of this article is dedicated towards what does rule of law exactly means and how it has developed through time to meet with the present scenario.

Democracy is the social arrangement that fully respects the richness of human personality and by respecting it helps to unfold it.⁴ Democratic values is understanding the skills and attitudes of people which would be the primary responsibility of education. Education is not the only source for establishing a democratic culture; family, media and other institutions contribute to this process as well. Democracy values furnishes the political framework within which reason can thrive most generously and imaginatively on the widest scale, least hampered by the accident of personal antecedents and most regardful of the intrinsic qualities of men.

At the same time, democracy involves hardship - the hardship of the unceasing responsibility of every citizen.⁵ Where there is an attitude of apathy and indifference to the issue affecting the welfare of the society, where the entire people do not take a continuous and considered part in public life, there can be no democracy in any meaningful sense of the term.

Democratic Values is a beckoning goal and it cannot exist without freedom to dissent, without the right and opportunity to express a view different from the opposite to the view of those in power and thus make people aware of the pros and cons of vital issues affecting their welfare.⁶ Free trade in ideas and the absence of suppression of dissent which are so vital for the functioning of democracy, constitute basic traits of liberty.

Mere knowledge of democratic values is not deemed sufficient for ensuring that the people will grow up to become an active participant in the democratic processes. What is important is that the people understand the meaning of democratic values in terms of social justice and equality. It is also important that they understand the real-world issues to meaningfully participate in discussions and decision making. But most importantly the students should learn to respect democratic values.

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³ Rule of Law in India: A Quest for Reason by Harish Narasappa (May, 2018)

⁴ Rule of Law and Democracy- Friends or Foes by H.R. Khanna (1990)

⁵ <https://www.indiatoday.in/opinion/story/aap-arvind-kejriwal-jagdeep-s-chhokar-delhi-government-180161-2014-02-07> (Last accessed on 28-11-2020)

⁶ Rule of Law and Democracy- Friends or Foes by H.R. Khanna (1990)

II. ORIGIN/ EVOLUTION

The first proponents of the doctrine of the rule of law are believed to be Greek philosophers including Aristotle, Plato, Cicero. For instance Plato in his book known as 'Complete Works of Plato' is found to have written that the collapse of the state is not far where the law is made subjective to the authorities but the states where the law is considered as supreme all the blessings of the god falls on such state and it flourishes through all times.⁷

The rule of law is an ancient ideal first posited by Aristotle, a Greek scholar, as a system of rules inherent in the natural order. In England, Rule of law began sometimes around 1215 when King John of England signed the Magna Carta of 1215. The signing of Magna Carta indicated the consent of the Monarchy of England to be under the law and the law to be supreme. The doctrine of rule of law in England took a new look after the conflict between the parliament and monarchy or king aroused. In this conflict the parliament and the monarchy were struggling to be supreme authority.⁸ This conflict was resolved in favour of the parliament. After parliament became supreme over the monarchy it started making the laws which controlled and limited power of the monarchy. Hence executive organs in England became subjected to the law of the parliament and that was the beginning of the rule of law in England.

In the United States of America (U.S.A.) the doctrine of rule of law was first introduced in 1776 by the constitutional lawyers known as Paine. He is of the view that America being a free country considers Law as the king because in every country which is free law should be the king and no one else.

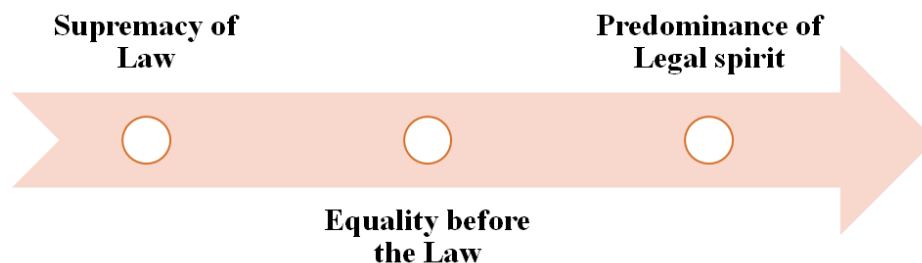
More ideas of Rule of law were further developed by the renowned English constitutional lawyer by the name of Dicey.⁹ In the modern sense, the most famous exposition of the concept of rule of law was given by Prof. Albert Venn Dicey in his book '*The Law of the Constitution*' in respect to the powers which the government must exercise in accordance to the law. Rule of law consists of several basic principles which law and policy makers, judges and law enforcement agencies should consider while exercising authority in a democratic society. This means all duties, power and functions of government, including its organs and authorities are done in accordance with the law.

Indian adopted the Common law system of justice delivery which owes its origins to British jurisprudence, the basis of which is the Rule of Law. Dicey famously maintained that the Englishman does not need Administrative law or any form of written law to keep checks on the government but that the Rule of Law and natural law would be enough to ensure the absence of executive arbitrariness. While India also accepts and follows the concept of natural law, there are formal and written laws to ensure compliance.

The Constitution of India intended for India to be a country governed by the rule of law. It provides that the constitution shall be the supreme power in the land and the legislative and the executive derive their authority from the constitution.

DICEY'S CONCEPT OF RULE OF LAW

It would be appropriate to discuss the views of Dicey, as he is known to be the main exponent of the concept of rule of law. However, the origin of his doctrine was attributed to Sir Edward Coke. He introduced for the first time that, 'King is under God and the Law.' The firm base of rule of law owes its exposition to Albert Venn Dicey. Dicey, in his book Law and Constitution in the year 1885 further developed this concept given by Coke. According to Dicey's theory, rule of law has three pillars based on the concept that "a government should be based on principles of law and not of men", these are-



i. Supremacy of Law

This is the first pillar of Dicey's concept of rule of law. It means that the law rules over all people including the persons administering the law. According to Dicey the absolute supremacy of the law as opposed

⁷ Rule of law and its relevance by Diganth Raj Sehgal (12th October, 2020)

⁸ <https://blog.ipleaders.in/rule-law-relevance/> (Last accessed on 28-11-2020)

⁹ Dicey and the Rule of Law, Law Essay, (7th June, 2019)

to the arbitrary power of the government is what constitutes the rule of law.¹⁰ In other words a man should only be punished for the distinct breach of law, and not for anything else. The person cannot be punished by the government merely by its own fiat but only according to the established law.

Further, Dicey asserted that discretion has no place where there is supremacy of law. According to him discretion is a link to arbitrariness. Dicey says that wherever there is discretion, there is room for arbitrariness and discretionary authority on the part of the government to jeopardize the legal freedom of the people.

ii. Equality before Law

The second important pillar of Dicey's concept of Rule of Law is Equality before Law. In other words, every man irrespective of his rank or position is subject to the ordinary law and jurisdiction of the ordinary court and not to any special court.¹¹ According to him special law and special courts is a threat to the principles of equality. Therefore, he is of the view that there should be the same set of laws for all the people and should be adjudicated by the same civil courts.

iii. Predominance of the legal spirit

The third pillar of Dicey's concept of Rule of Law is predominance of legal spirit. According to Dicey, for the prevalence of the rule of law there should be an enforcing authority and that authority he found in the courts. He believed that the courts are the enforcer of the rule of law and hence it should be free from impartiality and external influence. Independence of the judiciary is therefore an important pillar for the existence of rule of law.¹² He asserted that the courts of law and not the written constitution are the ultimate protector of an individual's fundamentals.

Dicey's theory has been criticised by many from various angles but the basic tenet expressed by him is that power is derived from, and is to be exercised according to law. In substance, Dicey's emphasis, on the whole, in his enunciation of rule of law is on the absence of arbitrary power, and discretionary power, equality before law, and legal protection to basic human rights and these ideals remain relevant and significant in every democratic country even today.

III. FEATURES OF RULE OF LAW

1. Those in the exercise of power are themselves constrained by law while making use of that power. There are restrictions placed on them with regard to the use of such power and they are not allowed to act according to their whims and fancies. This finally leads to the upholding of principle of rule of law.
2. No person can be punished or made to suffer unless and until the person has committed a breach of law.
3. Each and every individual is equal before the law, and by this, it means that the law cannot be based on a class of persons.
4. Rule of law is universal in its application; it has also been the part and parcel of most of the legal systems in the world. Hence, due of this characteristic of the rule of law, it becomes an important bedrock of most of the democracies.
5. If a person is alleged of committing a crime and is charged with wrong then such a charge should be proved by an independent tribunal like that of a court, and only then can the person be punished.

IV. EXCEPTIONS TO THE RULE OF LAW

The meaning of the rule of law made by Dicey's may be criticized on the basis of following grounds, as-

(a) Dicey has opposed the system of providing the discretionary power to the administration. In his opinion providing the discretionary power means creating the room for arbitrariness which may create a serious threat to individual freedom. Now-a-days, it has been clear that providing the discretion to the administration is inevitable. The present trend is the establishment of Welfare State which performs numerous functions including economic and social functions. The function of the State is not confined to maintenance of law and order and collection of taxes.

Dicey has failed to distinguish discretionary power from the arbitrary powers. Arbitrary power may be taken as against the concept of Rule of Law, but the discretionary power with proper guidelines is not against the concept of Rule of Law.¹³ In modern times in all the countries including England, America and India, the

¹⁰ Development of the Rule of Law by Preethi Ramanujam, (2016)

¹¹ <https://www.lawteacher.net/free-law-essays/constitutional-law/dicey-rule-of-law-8355.php> (Last accessed on 28-11-2020)

¹² Madras Bar Association v. Union of India (UOI), AIR 2015 SC 1571

¹³ <http://www.legalserviceindia.com/article/l459-Rule-of-law.html> (Last accessed on 29-11-2020)

discretionary powers are conferred on the Government. If providing the discretionary power to the administration or Government is taken against the concept of rule of law; the rule of law is not in existence in any country including England.

(b) According to Dicey the rule of law requires that every person should be subject to the ordinary courts of the Country. Every person, whether rich or poor, irrespective of status or rank, must be subject to the same body of law and the same court of the country. Dicey has claimed that there is no separate law and the separate court for the trial of the government servants in England.¹⁴ He criticized the system of droit administrative prevailing in France. In France there are two types of courts – Administrative courts and Ordinary Civil courts. The dispute between the citizens and administration are decided by the Administrative courts and the dispute between the citizens is decided by the Ordinary Civil courts. It is very critical to decide the separation for deciding the disputes between the administration and the citizens on the basis of Dicey's concept. Even England is also not free from the special courts and tribunals. As because in England, there have both the system and enforce special laws. Meant to say that offences against Military law or Naval law are tried by the Court Martial. Ecclesiastical law is enforced by the Ecclesiastical Courts or like that.

(c) According to Dicey the Rule of Law requires equal subjection of all persons to the ordinary law of the country and absence of special privileges to the ordinary law of the country and absence of special privileges for person including the administrative authority. In the opinion of Dicey the Rule of Law excludes the idea of any exemption to officials or others from the duty ordinance to the law which governs other citizens or from the jurisdiction of the ordinary courts. This proportion of Dicey does not appear to be correct even in England. As because several persons enjoys some special privileges and position etc.¹⁵

(d) Third meaning given to Rule of Law by Dicey is that, the constitution is the result of judicial decisions determining the rights of private persons in particular cases brought before the Courts is based on the peculiar character of the Constitution of Great Britain is the Written and contains the principles evolved through judicial decisions. The meaning of Rule of Law does not hold good in India, U.S.A, etc. as because the Constitution of India is not the result of the ordinary law of the land. Whereas, any law which is against the Constitution of India is declared void.

Dicey's thesis has its own advantage and merits. The doctrine of rule of law proved to be effective and powerful weapon in keeping administrative authorities within their limits. It served as a touchstone to test all administrative actions. The broad principle of rule of law was accepted by almost all legal systems as a constitutional safeguard.

V. ANALYSIS: DICEY'S PRINCIPLE OF RULE OF LAW

The first principle (Supremacy of law) recognizes a cardinal rule of democracy that every government must be subject to law and not law subject to the government. It rightly opposed arbitrary and unfettered discretion to the governmental authorities, which has tendency to interfere with rights of citizens.

The second principle (equality of law) is equally important in a system wedded to democratic polity. It is based on the well-known maxim "however high you may be, law is above you" and "all are equal before the law"

The third principle puts emphasis on the role of judiciary in enforcing individual rights and personal freedoms irrespective of their inclusion in a written constitution. Dicey feared that mere declaration of such rights in any statute would be futile if they could not be enforced. He was right when he said that a statute can be amended and fundamental rights can be abrogated. We have witnessed such a situation during emergency in 1975 and realized that in absence of strong and powerful judiciary, written constitution is meaningless.

Dicey never spoke of equality under the rule of law as rigid. He was not blind to inequalities glaring inequalities in the British legal system, not to the contradictions involved in the supremacy of the parliament and the guarantees of equality of all classes to the ordinary law administered by the courts. His dislike of the French system of administrative tribunals was the most vulnerable in his enunciation. Dicey's antagonism was based on his supposition that law meant fixed rules, and administration involved exercise of discretion not controlled or guided by rules. His dislike of exercise of discretionary authority, if literally understood, may appear illogical, for in every decision, judicial or administrative, there is vast field of discretion. Administration of justice is not a mechanical process inexorably leading to a set result from a given set of facts. It involves a large area of discretion. It would be a perversion of true quality of justice to attribute to the adjudicator or judge of a mechanical approach. There is again no reason to suppose that an administrative authority exercising power vested by law does not do justice merely because have has discretion in formulating his line of action.

Dicey contrasted law with administrative action and discretion, and asserted that Rule of law means absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, the existence

¹⁴ Administrative Law: Conceptual Analysis Issues and Prospects, (2017)

¹⁵ Administrative Law-An Overview by Sunita Zalpuri, (2013)

of arbitrariness, of prerogative or of wide discretionary authority of the government. Even in those days discretion as they exercised it now. But what Dicey probably criticized was exercise of discretionary powers not supported by law. He was not wrong in asserting that in Britain the court was not powerless to grant relief, in respect of affairs and disputes in which the government and its servants were concerned, but in France the administrative tribunal alone could grant relief.

MODERN PHILOSOPHY OF THE RULE OF LAW

The modern concept relating to Rule of Law has been well described by Wade and Phillips in his book, *Constitutional Law- The Rule of Law*, means -

- a. Absence of arbitrary power.¹⁶
- b. Effective control of and proper publicity for delegated legislation particularly when it empowers penalties.
- c. That when discretionary power is granted, the manner in which it is to be exercised should as far as is practicable be defined.
- d. That every man should be responsible to the ordinary law whether he be private citizen or public officer.
- e. That private rights should be determined by impartial and independent tribunals.
- f. That Fundamental Private Rights are safeguarded by the ordinary law of the land.¹⁷

However, it is to be noted that they have made it clear that this should not be taken to mean that it is a fixed principle of law from which there cannot be any departure. Since Parliament is Supreme in England, there is no legal sanction to prevent the enactment of a statute which violates the principles of the rule of law, likewise India have also the same situation.

VI. SCOPE- INDIAN DEMOCRACY AND RULE OF LAW

India is considered a well-established democracy. Looking back, it has been a momentous journey since Independence in 1947 and adoption of the Constitution on January 26, 1950. Yet, the Indian democracy has not fructified. Its constitutional goals and democratic aspirations remain unrealised.¹⁸

Even though the Indian democracy has withstood six decades of social, economic, political challenges, including an 18-month long State of Emergency, the challenge to its democratic governance persists. Simply put, “The rule of law” does not prevail in India. In fact, threats to the rule of law are relentlessly subverting Indian democracy and imperilling its system of governance in the country.

It has been proved beyond doubt that social and economic progress achieved by developed democratic societies is directly the result of their vigilant protection and enforcement of the rule of law.

The right to equality before the law, often phrased as ‘equal protection of the law’, is fundamental to any just and democratic society. Rich or poor, majority or minority, political ally of the State or its opponent all are entitled to equal protection before the law.

We may argue that life does not treat everyone equally and even in the same family each member has a different course of life. However, the State and its systems are the creation of man and not of fate and the State has the responsibility to treat all its citizens equally. According to the constitutional law expert John P. Frank, “*Under no circumstances should the State impose additional inequalities; it should be required to deal evenly and equally with all of its people.*”

In a democratic State, no one is above the law. Democracy is for the people, by the people and of the people.¹⁹ The laws in a democratic State are created in the name of the people by the elected representatives of the people. They are not supposed to be imposed upon them. There is a sound presumption that citizens of a democracy submit to their laws because they know that they are submitting to themselves, however indirectly, as makers of laws. Once the laws have been made and the people obey them, both law and democracy prevail.

The history of every society shows that the power-holders tend to get corrupt and tyrannical. In a democracy, those who administer the criminal justice system hold great power and the potential for its abuse is inevitably there. The State power is exercised to imprison, seize property, torture, exile and execute individuals without legal justification—and even without any formal charges being brought. A democratic society that tolerates such abuses faces the peril of curtailing its democracy and even losing it.

No State can exist without having the power to maintain order and punish criminal acts. Democratic States too must have the power to punish the wrong-doers but the rules and procedures by which the State

¹⁶ State of Punjab & Ors. v. Brijeshwar Singh Chahal & Ors., AIR 2016 SC 1629

¹⁷ <https://www.shareyouressays.com/essays/free-sample-essay-on-the-concept-of-rule-of-law/3869> (Last accessed on 29-11-2020)

¹⁸ <https://ambedkaractions.blogspot.com/2012/11/rule-of-law-absent-india-ranks-78th.html> (Last accessed on 29-11-2020)

¹⁹ Sri Komati Reddy Venkat Reddy v. The State of Telangana, 2018 (5) ALT 4

enforces its laws must be explicit, transparent and open to the public view. Yet, no democratic State is free from secret, arbitrary and manipulative power and political trickery.

There are essential requirements of due process of law in a democracy that may be briefly described as follows:

1. No one's home can be broken into and searched by the police without a court order showing that there is good cause for such a search. The midnight knock of the secret police is repugnant to democracy.²⁰
2. No person can be arrested without manifest, written charges that specify the alleged violation. The accused are entitled to know the exact nature of the charge against them and must be released at once under the doctrine known as habeas corpus, if the court finds the charge and arrest invalid.
3. Persons charged with offence should not be held for protracted periods in prison. They must have the right to a speedy public trial, and to cross-examine their accusers.
4. The authorities must grant bail, or conditional release, to the accused pending trial, if there is little likelihood of the suspect to flee or commit other crimes. "Cruel and unusual" punishment, as determined by the traditions and laws of the society, such as community panchayat's punishing members of their community for violation of their customs, must be prohibited.
5. Persons must not be compelled to be witnesses against themselves.²¹ This prohibition must be absolute and the police must not use torture or physical or psychological abuse against suspects. A legal system that bans forced confessions stops the police from using torture, threats, or other forms of abuse to obtain information because the court will not allow such information as evidence during trial.
6. No person shall be subject to double jeopardy; that is, no one be charged with the same offence twice.²²
7. The so-called ex post facto laws are also proscribed. These are laws made after the fact so that someone can be charged with an offence even though the act was not illegal at the time it was committed.
8. Defendants should have access to additional protections against coercive acts by the State. For example, in the United States the accused have a right to a lawyer who represents them at all stages of a criminal proceeding, even if the accused is not able to pay for such legal service. The police must inform suspects of their rights at the time of their arrest, including the right to have a lawyer and the right to remain silent for avoiding being witness against themselves.

VII. RULE OF LAW AND INDIAN CONSTITUTION

India has been hailed as the world's largest and most vibrant democracy. Various provisions have been incorporated in the Constitution of India for the establishment and maintenance of Rule of Law in India, though it is not directly incorporated. The Preamble of the Constitution of India seeks to secure economic, social and political justice, equality of status and opportunity, fraternity and dignity of the individual. To attain these objectives various provisions have been incorporated in the Indian Constitution, Part III of the Constitution of India guarantees the Fundamental Rights. Like,

ARTICLE 13

Article 13(1)²³ of the Constitution makes it clear that all laws in force in the territory of India immediately before the commencement of the Constitution, in so far as they are inconsistent with the provisions of Part III dealing the Fundamental Rights shall, to the extent of such inconsistency, be void. At the same time Article 13(2) provides that the State shall not make any law which takes away or abridges the fundamental Rights and any law made in contravention of this clause shall, to the extent of the contravention, be void.

ARTICLE 14

Under Article 14²⁴ of our constitution provides for equality before the law or the equal protection of law. In this Article it is clear that the State shall not deny to any person equality before law or equal protection of laws within the territory of India. 'Equality before Law' implies the absence of any special privilege in favour of any individual or irrational it would be treated as being against Article 14. An arbitrary act cannot be valid on the ground of reasonable classification. But the things is that classification should be depends on geographical basis, discrimination by the State in its own favour or by making Special Courts and Special Procedure or a single individual may constitute a class or for establishment of classification for educational development.

²⁰ Indian Democracy and Rule of Law by Harish Sati, (2017)

²¹ Subedar v. State, 1957 CriLJ 698

²² The State of Bombay v. S. L. Apte & Another, 1961 SCR (3) 107

²³ Article 13, The Constitution of India, 1949

²⁴ Article 14, The Constitution of India, 1949

ARTICLE 15

Under Article 15²⁵ of Constitution of India provides that there should no discrimination on the grounds of religion, race, caste etc. then it is said that if a law comes within the prohibition of Article 15 it cannot be validate by recourse to Article 14 by applying the principle of reasonable classification. As because reasonable classification is well tested under Article 14. But the thing is that Article 15 is available only to citizens not to others. But there may be reservation on the basis of classification but there should be few restrictions. We mean to say that there should not be any kind of un-reasonable classification. That is not against the rule of law, but should support the rule of law.

ARTICLE 16

Under Article 16²⁶ of Constitution of India guarantees given for equality of opportunity in public employment. That means everyone should get equal opportunity for all citizens, but it does not mean that without merit any person can hold any post. It may happen that few posts may be guaranteed for reserve categories, but all of that categories should get the equal opportunities on their class. Likewise, General has also the rights to compete in general categories with the all classes. At the same time, it is said that Article 16 includes equal pay for equal work, seniority may be a special merit for claiming any vacancy or promotion, which is reasonable or at the time of interview every candidate should be testify on the basis of merit. It may also happen that on the basis of compassionate ground or residence may be a ground for reservation of posts. In *Indira Sawhney v. Union of India*²⁷ i.e. the well known the Mandal Case the court examined the scope and extent of Article 16(4) in detail and clarified various aspects on which there were different of opinion in various earlier judgments. The majority opinion of the Supreme Court on various aspects of reservation provided in Article 16(4) may be summarized on following ways:-

- a) Backward class of citizen in Article 16(4) can be identified on the basis of caste and not only on economic basis;
- b) Article 16(4) is not an exception to Article 16(1). It is an instance of classification. Reservation can be made under Article 16(1).
- c) Backward classes in Article 16(4) are not similar to as socially and educationally backward in Article 15(4).
- d) Creamy layer must be excluded from backward classes.
- e) Article 16(4) permits classification of backward classes into backward and more backward classes.
- f) A backward class of citizens cannot be identified only and exclusively with reference to economic criteria.
- g) Reservation shall not exceed 50%.
- h) Reservation can be made by 'Executive Order'.
- i) No reservation in promotions.
- j) New criteria of any dispute can be raised only in the Supreme Court.

ARTICLE 17

Under Article 17²⁸ of the Constitution of India abolishes the thoughts of indiscrimination on that basis and announces that should be for bided though it is maintained in earlier Hindu religion. In this case also far the sack of people the rule of law maintained but not on specific way.

ARTICLE 18

Then under Article 18²⁹ of the Constitution of India abolishes the confer titles. But that shall not maintain in Military or academic distinction. Not only this a citizen cannot take title of foreign State etc. For the wellbeing of the people the rule of law is maintained though not on specific way.

VIII. JUDICIAL PRONOUNCEMENTS ON RULE OF LAW

The Hon'ble Supreme Court and the various High Courts through Judicial activism and public interest litigation, other bodies such as the National Human Rights Commission and State Human rights Commissions and various non-governmental organizations have made significant contributions towards protecting freedoms

²⁵ Article 15, The Constitution of India, 1949

²⁶ Article 16, The Constitution of India, 1949

²⁷ Indira Sawhney v. Union of India AIR 1993 SC 477

²⁸ Article 17, The Constitution of India, 1949

²⁹ Article 18, The Constitution of India, 1949

and preventing human rights violations and abuses, thereby ensuring that the Rule of Law and respect for citizens' rights do not remain only on paper but are incorporated in practice too.³⁰

With the Constitution 1st Amendment Act, 1951, the status of Rule of law in India was shocked. The question which came up for consideration in *Shankari Prasad v. Union of India*³¹ was whether the fundamental rights can be amended under Article 368³². The first Amendment Act, 1951 inserted Art 31 A and Art 31 B³³ in the Constitution of India and it was challenged on the ground that it violated or abridges the right conferred under Part III of the Constitution. The Hon'ble Supreme Court held that Parliament has the power to amend Part III of the Constitution under Art 368 as under Art 13 law means any legislative action and not a constitutional amendment. Therefore, a constitutional amendment would be valid if abridges any of the fundamental rights. Again, the question came up for consideration in *Sajjan Singh v. State of Rajasthan*³⁴ in which the Hon'ble Supreme Court approved the majority judgment in Shankari Prasad case and held that amendment of the Constitution means amendment of all provisions of the Constitution. Hon'ble Chief Justice Gajendragadkar held that if the framers of the constitution intended to exclude fundamental rights from the scope of the amending power, they would have made a clear provision in that behalf. Both these cases were overruled by the Hon'ble Supreme Court in *Golaknath v. State of Punjab*³⁵ and held that Parliament have no power to amend the Part III of the Constitution so as to take away or abridges the fundamental rights and thus, at the end the Rule of law was sub served by the Judiciary from abridging away. But this was not the end. The Rule of law was trampled down with the Constitution 24th Amendment Act, 1971. Parliament by the way of 24th Amendment inserted a new clause (4) in Art 13 which provides that 'nothing in this Article shall apply to any amendment of this constitution made under Art 368'. It substituted the heading of Art 368 from 'procedure for amendment of Constitution' to 'Power of Parliament to amend Constitution and Procedure thereof'. The 24th Amendment not only restored the amending power of the parliament but also extended its scope by adding the words "to amend by way of the addition or variation or repeal any provision of this constitution in accordance with the procedure laid down in the Article".

The Constitution 24th Amendment Act, 1971 was challenged in the popular & most controversial case of His Holiness *Keshavanand Bharti v. State of Kerala*³⁶. The Hon'ble Supreme Court by majority overruled the decision given in *Golak Nath's* case and held that parliament has wide powers of amending the constitution and it extends to all the Articles, but the amending power is not unlimited and does not include the power to destroy or abrogate the basic feature or framework of the constitution. There are implied limitations on the power of amendment under Art 368. Within these limits Parliament can amend every Article of the Constitution. Thus, Rule of law prevailed. Justice H R Khanna played a vital role in preserving the Rule of law although he concurred with the majority decision.

The rule of law in India has been a platform for all Administrative Action and judicial review. Supreme Court has propounded the idea in many cases like *Bachan Singh v. State of Punjab*³⁷ and *ADM Jabalpur v. Shivakant*³⁸. A significant derivative of Rule of Law in Administrative Law is Judicial Review. Judicial review is very important part of Indian Administrative system where it is considered as part of Basic Structure Doctrine. The process of judicial review keeps the unreasonable and arbitrariness under control. The absence of arbitrary power is first essential rule of law on which whole Constitutional structure is based.³⁹ In the case of *Golaknath v. State of Punjab*⁴⁰ it was held that rule of law under the constitution serves the needs of people without undoubtedly infringing their rights. It recognizes social reality and adjust to social requirement as required time to time. In *A.K. Kraipak v. Union of India*⁴¹ it was held that under our constitution the rule of law pervades over entire field of administration and every organ of the state is regulated by the rule of law accepted by our Constitution. In *State of Punjab v. Khanchand*⁴² it was held that rule of law require that any power of

³⁰ <http://www.legalserviceindia.com/article/1457-Rule-of-Law-in-India-&-UK.html> (Last accessed on 30-11-2020)

³¹ *Shankari Prasad v. Union of India*, AIR 1951 SC 455

³² Article 368, The Constitution of India, 1949

³³ Article 31, The Constitution of India, 1949

³⁴ *Sajjan Singh v. State of Rajasthan*, 1965 SCR (1) 933

³⁵ *Golaknath v. State of Punjab*, 1967 SCR (2) 762

³⁶ *Keshavanand Bharti v. State of Kerala*, AIR 1973 SC 1461

³⁷ *Bachan Singh v. State of Punjab*, AIR 1982 SC 1325,

³⁸ *ADM Jabalpur v. Shivakant*, AIR 1976 SC 1207,

³⁹ *Jaisinghani v. UOI*, AIR 1967 SC 1643

⁴⁰ *Golaknath v. State of Punjab*, 1967 SCR (2) 762

⁴¹ *A.K. Kraipak v. Union of India*, AIR 1970 SC 150

⁴² *State of Punjab v. Khanchand*, AIR 1974 SC 543

officer is subject to power of Court. In the case of *Zahira Habibullah v. State of Gujrat*⁴³ it was held that the rule of law win administration is closely related to human rights protection.

Justices asserted judicial review power over the constitutionality of legislative performances. Laws that transgressed fundamental rights or the federal principle and detail activated the “essence” of judicial review power. Whenever possible the Supreme Court sought to avoid invalidation of laws; it adopted the (standard repertoire of "reading down the statutory scope and intendments so as to avoid conflict and by recourse to the peculiar judicial doctrine of 'harmonious construction"). But when necessary, enacted laws were declared constitutionally null and void. And even when resuscitated by legislative reaffirmation, they were re-subjected to the judicial gauntlet of strict scrutiny.

In India, the Constitution is regarded as Supreme law of the land. No one is above the Constitution. It provides for three organs of the Government, viz., the Legislature, Executive and the Judiciary, as in accordance with the doctrine of separation of power so that each organ can function independently and the rule of law in the state could be upheld in the State.

Judicial independence and separation of powers is also one of the essential elements of modern rule of law. The judiciary should be independent of the legislative and executive, and every judge should be free to decide matters before him without any improper influences, inducements or pressures. The power of a government should be split and there shall be adequate checks and balances to minimize the possibility of the abuse of power. All state functionaries must at all times act in accordance with the law and no act of state should be autocratic, oppressive, capricious or against the law.

The role of separation of powers in India is simple. The three organs of the Government viz. the Legislature, the Executive and the Judiciary are not independently independent but inter-dependently independent.

On a glance at the provisions of the Constitution of India, it appears that the doctrine of Separation of Powers is accepted in India. Under the Indian Constitution, executive powers are with the President, legislative powers with the Parliament and judicial powers with the Judiciary - Supreme Court, High Courts and subordinate courts.

In India mainly in criminal cases there has been a pattern of shifting from criminology to victimology through way of compensatory jurisprudence in order to establish and promote rule of law in the country.⁴⁴

In the landmark case of *People's Union for Civil Liberties & Anr v. Union of India & Anr.*⁴⁵ Where in a petition was filed in the Supreme Court of India in the name of People's Union for Civil Liberties and Dr. Y. P. Chhibbar, and another making the Union of India and the Election Commission of India respondent. The petition sought to strengthen people's faith in their elected representatives. This petition, which has been filed in public interest, is seeking to strengthen peoples' faith in their elected representatives, which could ensure protection of their legal and fundamental rights in a democracy governed by the Rule of Law. The reason for filing this petition has arisen because of the corruption not only affecting the social fabric of the country but reflecting badly on the legal and Fundamental Rights of the people whose voice ultimately translate itself in law through their elected representative. In this case The court observed partly that "it has ample power to direct the Commission to fill the void, in absence of suitable legislation, covering the field and the voters are required to be well-informed and educated about contesting candidates so that they can elect proper candidate by their own assessment. It is the duty of the executive to fill the vacuum by executive orders because its field is coterminous with that of the legislature, and where there is inaction by the executive, for whatever reason, the judiciary must step in, in exercise of its constitutional obligations to provide a solution till such time the legislature acts to perform its role by enacting proper legislation to cover the fields. The adverse impact of lack of probity in public life leading to a high degree of corruption is manifold.

RULE OF LAW UNDER THE US CONSTITUTION

America inherited the rule of law from medieval England, which was expressed as ‘A government of Laws, not of men’. The federal constitution of 1787, changed the concept of constitutional government on a larger scale by way of introduction of “Principle of Constitutional Supremacy”. Article VI of the American Constitution declares that ‘Constitution shall be the supreme law of the land’.

In the renowned case of *Marbury v. Madison*⁴⁶, Justice John Marshall held that an act of Congress contrary to the constitution was not a law. It should be further noted that the American Constitution and the power of judicial review are the extensions of rule of law.

⁴³ *Zahira Habibullah v. State of Gujrat*, AIR 2004 SC 3114

⁴⁴ *Rudul Sah v. State of Bihar & Anr.* 1983 (3) SCR 508

⁴⁵ *People's Union for Civil Liberties & Anr v. Union of India & Anr.*, (2003) 2 S.C.R. 1136

⁴⁶ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803)

BASIC PRINCIPLES OF THE AMERICAN CONSTITUTION

Federalism, Separation of Powers and Rule of Law are the heart of the American Constitution. All of these collectively contribute to the achievement of liberty, equality, order and justice.

- 1.** The constitution is based on the belief that the legitimate constitution is the one which originates with people and controlled by the people. This principle has even been described in the preamble which proclaims that the Constitution is ordained and established not by the government but by the people.
- 2.** The UN constitution requires the government in all respects to be politically responsible both to the state and the people who are governed by it.
- 3.** The constitution is a legal and not just political restriction on the government. Political supremacy and identification of all laws with the legislature are thus hostile to the American Constitution as it declares that the constitution shall be the supreme law of law.

AUTHOR'S ANALYSIS

The framers of our constitution had embodied the Rule of Law in the conscience of our constitution. The three wings of the government work in coordination with each other for the establishment of Rule of Law through the system of checks and balances. The judiciary has worked efficiently towards the establishment of Rule of Law and has been equally supported by civilians and government by obeying the laws as laid down by the parliament and interpreted by the judiciary. Though there also have been several instances when the public has resorted to violence against an Act of Parliament or any Judicial pronouncement or doing acts contrary to law which according to their perception is not contrary to Law and Justice, resulting in situations where the principle of Rule of Law has just become a *de jure* concept while in *de facto* the Rule of Men has prevailed.

The malicious practice of honour killing is prevalent in the Indian society particularly in northern parts of the country. This practice includes the murder of a member of a family, due to the belief of the perpetrators that the victim has brought shame or dishonour upon the family, by violating the principles of a community or a religion, usually for reasons such as divorcing or separating from their spouse or for engaging in inter-caste marriage. The decision in this regard is taken by an extra-constitutional body by the nomenclature of Khap Panchayat which engage in feudalistic activities have no compunction to commit such crimes which are offences under the Indian Penal Code, 1860. No heed is paid to the basic human right of "Right to life and liberty" as evident by the actions of the panchayat. Choice of woman in choosing her partner in life is a legitimate constitutional right. It is founded on individual choice that is recognised in the Constitution under Article 19, and such a right is not expected to succumb to the concept of "class honour" or "group thinking". It is because the sense of class honour has no legitimacy even if it is practised by the collective under some kind of a notion.

Several guidelines have been laid down by the court to curb the practice but still there have been numerous instances of honour killing reported and the masses have largely turned a deaf ear to the decision of the Apex Court.

The Sabarimala case verdict throws light upon the discretion of men in abiding by the directions given by the Supreme Court only to the point if they are analogous to the belief they hold. The court had allowed women of menstruating age i.e. between 10-50 years to enter the temple premises for worship. The Lord Ayappa temple has traditionally barred all women of menstruating age from entering into the shrine. After the verdict massive protest were carried out, there were also occurrences of violence against women who tried to enter the temple. The women were denied their constitutional right to worship and the principles of equality were violated even after the practice was declared as unconstitutional by the Apex Court.

Another evil practice pertinent in the society is that of mob lynching. Lynching, a form of violence in which a mob, under the pretext of administering justice without trial, executes a presumed offender, often after inflicting torture and corporal mutilation. The term lynch law refers to a self-constituted court that imposes sentence on a person without due process of law. Supreme Court described it as horrendous acts of mobocracy and stated that "the law, is the mightiest sovereign in a civilized society". The majesty of law cannot be sullied simply because an individual or a group generate the attitude that they have been empowered by the principles set out in law to take its enforcement into their own hands and gradually become law unto themselves and punish the violator on their own assumption and in the manner in which they deem fit. Usually people belonging to religious and caste-based minorities become the victim of this wicked practice. This practice is a present-day example of a lawless society where there is denial of basic human rights as well as fundamental rights.

Besides these, there is a plethora of other instances that are indicative of the adulteration of the indigenous principle.

IX. CONCLUSION

The rule of law is central theme to all democratic and civilized society of this world. The concept forms the basic framework of all legal system. It is one of the tools by which the unfettered power of executive is kept under control through supremacy of Courts. It forms the backbone of all civilized legal system of world. It is reasonable to assume that even in a well-ordered society the coercive powers of government are to some degree necessary for the stability of social cooperation. Though efforts have been made to enforce and institutionalise the rule of law in India they have not achieved the intended results. We cannot say that the normative framework of constitutional governance does not exist in the country. This has been provided by India's Constitution and many institutions have also been established under it. However, no deep values have been ingrained, nor unassailable principles, as directed by the Constitution, are being practiced by India's institutions. As a result, the Indian society is bereft of the benefits of constitutionalism.

Six decades of governance should have been long enough for a country like India with a very long tradition of Satyamev Jayate to develop institutions whose working would reflect both inherited and acquired values of enlightenment and rational social and political conduct. All that our institutions have done is to rouse high social expectations with a modicum of their fulfilment. The abuse of power has, in fact, become a universal phenomenon.

The Indian judiciary enjoys good reputation both nationally and internationally for its progressive interpretation of various provisions of the Constitution that has helped promote the cause of social justice. Judicial interpretations have expanded the scope of our fundamental rights as enshrined in the Constitution. Higher Judiciary has also helped overcome restrictions on rules relating to locus standi and created new avenues for seeking remedies for violation of human rights. It has allowed public interest litigation petitions and genuinely intervened in the areas of child labour, bonded labour, clean and healthy environment, and women's rights, to cite a few instances of judicial intervention. Such judicial interventions on behalf of human rights have been successful in upholding the rule of law.

But, in view of the vast and unmitigated violations of justice, these judicial achievements simply pale into insignificance. The scale of prevailing inequalities and violations of human and fundamental rights have made the Indian democratic State look like a despotic dispensation. Enforcing the rule of law itself remains a fundamental challenge, leave aside other innumerable crises of the Indian legal system. We do have the laws, but no implementation of these laws; we have a vast body of rules that are followed more in their violation than in their observation.

The behaviour of those who govern is highly reprehensible. They have no respect for the laws of the land. Citizens too have ceased to care for the laws and be law-abiding. This lack of respect for laws by the government and the people at large is becoming a most serious threat to Indian democracy. The Indian people are fast losing trust and faith in the democratic institutions.

Passing more laws and establishing more institutions is causing what appears to be an organized confusion in the legal system of the country. Plethora of laws and increasing number of Tribunals, Rights Commissions and Forums are only increasing the role and size of the insensitive bureaucracy in the system of governance. They are creating and perpetuating an unjust society that the people now accept as a fact to live with. There is need for a fundamental re-examination of the approaches that have been adopted to enforce the rule of law and critically examine the effectiveness of Indian democracy. A report of the National Commission to Review the Working of the Constitution in India noted: "The paradox of India, however, is that in spite of a vigilant press and public opinion, the level of corruption is exceptionally high. This may be attributed to the utter insensitivity, lack of shame and the absence of any sense of public morality among the bribe-takers. Indeed, they wear their badge of corruption and shamelessness with equal élan and brazenness."

In the last decade there has been an expansion of legal education. Innumerable law schools and universities have come up but the ethical standards in the legal profession have sunk very low. Both judges and advocates now indulge in corrupt practices. The law itself favours the criminals; complainants and witnesses suffer the most in the crowded courts and through interminable trials. Adjournments have become a bane of almost every court, highest and lowest in the whole country. Neither the judges nor the successful lawyers now inspire the youth. They have created an unbridgeable gap between the law as it obtains in the books and the law as it is actually practiced in the courts of diverse description. Democracy and the rule of law are inextricably connected. Urgent steps are needed to establish a rule of law society in India or else our credibility as a democracy will get destroyed. It is clear that, other things equal, the dangers to liberty are less when the law is impartially and regularly administered in accordance with the principle of legality.

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