

SUPREMACY OF LAW IS THE AIM, RULE OF LAW IS THE BEST TOOL TO ACHIEVE THIS AIM: ANALYSIS AND CRITICALLY EXAMINE THE SCOPE OF RULE OF LAW IN INDIA

“Rule Must Be Law Not a Dictator” (Griffith)

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Abstract

The concept of Rule of Law is that the state is governed, not by the ruler or the nominated representatives of the people but by the law. 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. The King is not the law but the law is king. It means that the law rules over all people including the persons administering the law. The law makers need to give reasons that can be justified under the law while exercising their powers to make and administer law. Rule of Law plays an important role in the democratic countries. It provides protection to the people against the arbitrary action of the administrative authorities. The expression ‘rule of law’ has been derived from the French phrase ‘la Principe de legalite’ i.e. a government based on the principles of law. In simple words, the term ‘rule of law, indicates the state of affairs in a country where, in main, the law rules. Law may be taken to mean mainly a rule or principle which governs the external actions of the human beings and which is recognized and applied by the State in the administration of justice. It is impossible to get the supremacy of law without the rule of law.

Keywords: *Rule of Law, La Principe De Legalite, droit administrative, Ultra vires, Arbitrariness, Personal Liberty*

Introduction

Rule of law is an alive and dynamic concept. The concept of Rule of Law is that the state is governed, not by the ruler or the nominated representatives of the people but by the law. Rule of law means the principle of legality which refers to a government based on

principle of law and not of men. In this sense the concept of rule of law is opposed to arbitrary powers. The term of Rule of law is used in contradistinction to rule of man and rule according to law. Even in the most autocratic forms of government there is some law according to which the powers of the government are exercised but it does not mean that there is Rule of law. Therefore, the Rule of law means that the law rules, which is based on the principles of freedom, equality, non-discrimination, fraternity, accountability and non arbitrariness and is certain, regular and predictable, using the word law in the sense of 'Jus' and 'lex' both. In this sense, rule of law is an ideal. It is modern name for Natural law. In ancient times, man has always appealed to something higher than which is his own creation. . In Jurisprudence, Romans called it 'jus natural.' Mediaevalists called it the 'law of god'. Hobbes, Locke, Rousseau called it a 'social contract' or natural law and the modern man calls it 'Rule of law'.

Historical Background

The concept of rule of law is derived from a French maxim "LA PRINCIPE DE LEGALITE" .means government which must be based on the principal of law not of human. This rule was originated first time by Edward coke. He said, "The King should be under God and the Law" and he established the supremacy of the law against the executive and that there is nothing higher than law. Further Prof. Dicey developed it in his lecture which was delivered in Oxford University. He was a positivist and he wrote about the concept of rule of law at the end of the golden Victorian era of laissez-faire in England. He was in favor that minimum power should be given to the administrative officers. According to him, wherever there is discretion there is room for arbitrariness. Rule of law is one of the basic principles of the English Constitution and the doctrine is accepted in the Constitution of U.S.A and India as well. The concept of Rule of law is of old origin and is an ancient ideal. It was discussed by ancient Greek philosophers such as Plato and Aristotle around 350 BC. Plato wrote: "Where the law is subject to some other authority and has none of its own, the collapse of the state, in my view, is not far off; but if law is the master of the government and the government is its slave, then the situation is full of promise and men enjoy all the blessings that the gods shower on a state". Likewise, Aristotle also endorsed the concept of Rule of law by writing that "law should govern and those in powers should be servants of the laws." We know this concept as the child of 19th century. But it is not true because, we can get also this

concept in Roman law, Greek Law, Britain, Manu Code and Muslim law so we can say this concept is not a child of 19th century but it was in existence of ancient era. The entire basis of Administrative Law is the doctrine of the rule of law.

Analogous Provision

The principal of rule of law has been accepted by all countries in different manners. Rule of law is a method to control the administrative power, and determine norms for the Government to get reality, transparency and reasonability. In this sense rule of law form a moral code for the use of administrative powers in every nation. Subsidiary features of rule of law can be deferent at a time in various countries but main features are same. Main features of rule of law are universal e.g equality, accountability and freedom. In modern time it was known as universal law which was ruled all over the world. So we can say rule of law is applicable in all countries.

England

The principal of Rule of law has an important place because there is no written constitution. In England, Constitution is based on the conventions. If we look for the history of England we will get that there was a long controversy between Parliament and Executive. In 17th century Parliament acquired the supremacy on the executive. This supremacy was known as rule of law. In 1885 Dicey defined rule of law with a legal view. He dislikes administrative law. He established this principle against French droit administrative.

Dicey's concept of Rule of Law contains three principles:

1-Absence of discretionary powers and supremacy of Law: viz. no man is above law. No man is punishable except for a distinct breach of law established in an ordinary legal manner before ordinary courts. The government cannot punish anyone merely by its own fiat. Persons in authority do not enjoy wide, arbitrary or discretionary powers. Dicey asserted that wherever there is discretion there is room for arbitrariness.

2- Equality before law: Every man, whatever his rank or condition, is subject to the ordinary law and jurisdiction of the ordinary courts. No person should be made to suffer in body or deprived of his property except for a breach of law established in the ordinary legal manner before the ordinary courts of the land.

3- Predominance of legal spirit: The general principles of the British Constitution, especially the liberties and the rights of the people must come from traditions and customs of the people and be recognized by the courts in administration of justice from time to time.

Critical evolution of dicey's concept

- 1- In first principle he opposed the discretion and arbitrary powers of administration. And said English men are ruled by law and only law. But now these days it has become illogical. We cannot deny that it is relevant because it has a great importance in preventive detention laws.
- 2- In Second principle of rule of law is opposed a French concept droit administrative in which there were separate administrative tribunals also for deciding cases between the official of the state and the citizens. This system was existing in England also but Dicey denied it.
- 3- He said all court must be followed same procedure for the crown and subject but at that time crown has some privileges.
- 4- He was confused and explains both are arbitrariness and discretion is same. Although both are differ discretion means. Some potions are there but arbitrary means there is no option.
- 5- The general principles of the British Constitution, especially the liabilities and the rights of the people must come from traditions and customs of the people and be recognized by the courts in administration of justice from time to time. But there are so many countries where a constitution is the source of the rights and duties.

Rule of Law in Indian Perception

Rule of law has played a great role to develop Indian democracy. When Indian constitution was frame they had two options e.g. USA & England. They adopted some provisions from USA and some from England. Our constitutional founder fathers adopted the Rule of Law from England and incorporate so many provisions in Indian constitution. Indian Constitution is supreme no one is above Indian constitution. All three organs follow constitution if any organ does something in the violation of the constitution all such acts will be ultra vires. The preamble of The Constitution is also tells about Rule of Law. Part- III and all fundamental Rights come under the Rule of Law, which are enforceable by Law. If these

are violated we can go to the Supreme Court and High court under Article 32 & 226. The term 'Law' includes all orders, rules, regulations, bylaws, notice and customs. It expects that all these will be according to Constitutional provisions if they will against, under article-13 they will be declare unconstitutional and void. In the Constitution of India guaranteed certain rights which can be enforced by the courts. At this Juncture, we may consider the position prevailing in India as regards the third principle of Dicey's doctrine of Rule of Law, i.e., predominant of legal spirit. Until this principle was being considered in the context of interpreting the provisions of the Constitutions¹. In our Constitutional system, the central and most characteristic feature is the concept of the rule of law which means, in the present context, the authority of law courts to test all administrative action by the standard of legality. The administrative or executive action that does not meet the standard will be set aside if the aggrieved person brings the appropriate action in the competent court².

The executive and Legislative powers of the state and the union are required to be exercised according to the provisions of the constitution. The government and public officials are not above law. Equality before law as a postulate of Rule of Law has been accepted and adopted Under Article -14 of the Constitution. The maxim "King can do no wrong" is not applicable in India. The Government and Public Authorities are subject to the jurisdiction of the ordinary court of law and for similar wrongs are to be tried and penalized similarly. They are subject to ordinary legal process. The doctrine of equality is accepted in public service also. Suit for breach of contracts and torts committed by the public authorities can be filed in the ordinary courts and damages recovered from the state government or the union government for the Union Government for the Acts of their employees.

The basic concept of rule of law is not a define legal concept the courts would not declare any positive law to be invalid on the ground that it violet the content rule of law. Supreme Court observed in Habeas corpus case, and attempt was made to challenge the detention order's during emergency on the ground that were violated of the principal of the rule of law as the obligation to act in the accordance with rule of law is the central feature of the our constitutional system and is the basic feature of the constitution. The narrow issue before the Supreme Court was whether there was any rule of law in India apart from Art. 21 of the Constitution. The Majority of bench answered the issue in the negative. Justice Khanna

¹ A.K. Gopalan v. State of Madras, A.I.R.1950 S.C.27.

² Chief settlement Commissioner, Punjab v. Om Prakash, A.I.R.1969 S.C.33

however did not agree with the majority view and gave a powerful dissenting Judgment. He observed “rule of law is anti-aphesis of arbitrariness (it is accepted) in all civilized societies, it has come to be regarded as the mark of the free society. It seeks to maintain a balance between the opposite notions of individual liberty and public order. Even in absence of Art. 21 in the Constitution, the state have got no power to deprive a person of his life or personal liberty without the authority of law.

Rule of Law and Role of Indian Judiciary

Rule of law and judiciary review has a important place to develop a welfare state. Indian judiciary plays a good role to maintain both rule of law and judicial review. In the case *A.K.Kraipak V. Union of India*,³ Supreme Court held that the Constitution the India Embodies the modern concept of the rule with the establishment of a judicial system which should able to work in the impartially and free from all influence. The rule of law pervades over the entire field of the administration and every organ of the state is regulated by the rule of law. The concept of this rule of law would lose its vitality if the instrumentalities of the state are not charge with the duty of discharging there function in a fair and just manner. In case of *Keshvananda Bharti V. State of Kerla*⁴, the majority decision was, the rule of law is the part of the basic structure of Indian Constitution it cannot be amended by the parliament .In the case of *Indra Nehru Gandhi V. Raj Narayan*⁵ was a great discussion about rule of law. Justice Mathew observed that according to majority decision of Keshvananda Bharti rule of law is the part of basic feature of Indian Constitution apart from democracy. Rule of law prevent the arbitrariness of all government officer's. There were so many provisions incorporate in our Constitution to informant of the rule of law. Under Art. 14of our Constitution rule of law is explained. In the case of Supreme Court Advocates on Record on Association V. Union of India⁶, Supreme Court laid down that rule of law does not rule out existence of discretionary power completely. The Supreme Court held that vesting of absolute power in one individual is not warranted under the constitutional scheme. For the Rule of Law become realistic, there has to be room for discretionary authority within the

³ (1969) 2 scc 262, 269

⁴ Air 1973 S.C.1461

⁵ A.I.R.1975, S.C.2299

⁶ A.I.R.1994 S.C.268

operation of the Rule of Law, even though it has to be reduced to the minimum extent necessary for proper governance and within the areas of discretionary authority, the existence of proper guidelines or norms of general application excludes any arbitrary exercise of discretionary authority.

New inclination of Rule of Law and Judicial Activism

In the Last decades Supreme Court interpreted the Rule of Law in a wider sense in respect of our Constitution. The term personal liberty under Article-21 of our Constitution includes all liberties and the judiciary while interpretation declared it as a part of Rule of Law. Justice Bhagwati stated that Rule of Law is vested in the breath of our constitution and it is a basic principal of our Constitution⁷. In the Case of *Veena seth v. State of Bihar*⁸, held that the reach of the Rule of Law extended to the poor and the down trodden, the ignorant and illiterate who constitutes the large bulk of humanity in India. *D.K.Basu v. State of West Bangal*⁹, Supreme Court extended the meaning of Rule of Law to prisoners. The Doctrine of Rule of Law Protects Human Rights everywhere and every place whether it is for prisoner or a person under police custody. *Bhim Singh V. State of Jammu & Kashmir*¹⁰. Supreme Court held that the Right of personal liberty comes under the doctrine of Rule of Law and if it is violated by state, state must provide compensation for it. Justice Bhagwati stated in the case of *D. C. Badhwa V. State of Bihar*¹¹, the doctrine of Rule of Law is the basic and essential feature of our Constitution. It means whenever state authorities will perform their power they use these within the constitutional limits. If executive or any authority acts anything in the violation of our Constitution then any person can challenge such acts before the Hon'ble high court or Supreme Court and it will be the Constitutional duty of that Court to consider it and pronounce the judgment on the legality of such conducts. In the case of mandal commission¹² the Supreme Court has upheld that the national policy of reservation in favour of socially and educationally backward classes but at the same time also declared for the requirement, identification and exclusion of creamy layer for extension of the reach of Rule of Law to the

⁷ Bachan Singh V. State of Punjab, A.I.R.1982 S.C. 1325.

⁸ A.I.R.1983,S.C.339

⁹ A.I.R.1997 S.C. 610

¹⁰ A.I.R.1986,S.C.494.

¹¹ A.I.R.1987S.C.579

¹² Indra Sawhney V. Union of India,1992 S.C.C.(I & S.)Supp.1

disadvantaged section of people. Yusuf Khan v. Manohar Joshi¹³, The Supreme Court has laid down the proposition that it is the duty of the state to preserve and protect the law and the constitution and that it cannot permit any violent act which may negate the rule of law.

Therefore a new regime of Rule of law is created latest judicial decisions. By which they focused on fair, just and reasonability of administrative functions. Its effect that everyone has the Right of Compensation, protection of their rights and right against arbitrariness from administration. All these have become the part and parcel of Rule of Law. These rules are the means of social welfare for administration.

Conclusion & Suggestion

On a brief overview of the above discussion we can say that **Supremacy of Law Is the Aim, Rule of Law Is the Best Tool to Achieve This Aim.** The Court is also making efforts to link Rule of Law with Human Rights of the people. The court is evolving strategy by which it can force the government not only submit to law but also create conditions where people can develop capacities to enjoy their rights in proper and meaningful way. It is the responsibility of the public administration for effective implementation of Rule of Law on constitutional commands which effectuate fairly the objective standards laid down by law¹⁴. Every government servant holding public power as a trustee of the society and accountable for due effect national goals¹⁵. Although all the merits are unhurt in the concept of the Rule of Law, the only Negative aspects of the concept is that respect for law degenerates into rigidity of legalism which is injurious to the nation¹⁶.

The Hon'ble Supreme Court in number of cases through its decision established Judicial Authority and developed the Principle of Judicial Review which cannot be amended, curtailed or removed. Our Constitution adopted the three principle of Rule of Law i.e. Equality before Law, Exclusion of Arbitrariness & Supremacy of judiciary. In the modern era the discretionary powers is provided to the authorities for running the society but some time these power are misused by the authorities which effects and destroys the basic principles of the society. If some reasonable restriction, regulations and norms are created in

¹³ (1999) SCC (Cri) 577.

¹⁴ State of Punjab V. G.S.Gill, (1997)6SCC129.

¹⁵ Supdt. Engineer, Public Health U.T. Chandigarh V. Kuldeep Singh, (1997)9 SCC 199.

¹⁶ Dr. J.J.R.Upadhaya, Administrative Law, Page no. 36

exercise of such powers, these powers will efficiently and effectively regulates the society. The Dicey concept “Rule of Law” is adopted by our constitution, and this concept resulted into the success of our judicial system. In the modern era the use of Discretionary power by the authorities is a need. The discretionary power is against the Doctrine of Rule of Law. The balance between the two is to be made and this can be done when the judiciary controls the misuse of discretionary power by the Administration. The rule of harmonious Construction to remove the imbalance between “Rule of law” & “Discretionary Power” should be applied.

