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N.D.R. Chandra
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17. Rule of Law

Anil Kumar Shrivastava*

Abstract : Rule of law in a plain language can be defined as a situation in which the law of the land is superior than the government ruling the land. the rule of law implies that every person is subject to the law including persons who are lawmakers, law enforcement official and judges. In this sense it stands in contrast to tyranny or oligarchy, where or the rulers are held above the law the rule of law is more apt to decay if a government has insufficient corrective mechanisms for restoring it additionally this will allow for the breeding of corruption making it even more difficult to restore it as time goes on and corruption embeds itself deeper in to the governmental systems. It is to ensure that the government does not resort to arbitrary power or abuse its power in order to rule over the people of the land. As stated by several political and legal philosophers, Democracy can not sustain in a country without establishment of rule of law. It requires the principles of supremacy of law, Equality before the law, accountability to the law, fairness in the application of law, separation of powers, participation in decision-making, legal certainty avoidance of arbitrariness and procedural and legal transparency. The entire basis of administrative law is the Rule of law and delegated legislation is the backbone of administrative law.

Keywords : Rule of Law, Democracy, Government, Separation of Powers,

Introduction

The term 'Rule of law' is a phrase that is very commonly used whenever law is being studied. It is derived from the French phrase 'la principe de legalite' which means the 'principal of legality'. It refers to 'a government based on principles of law and not of men'. In other words, the concept of 'la Principe de legalite' is opposed to arbitrary powers. 'Rule of Law' as defined by Dicey, means "the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power and excludes the existence of arbitrariness, of prerogative, or even wide discretionary

authority on the part of the government.

The concept of rule of law is a very dynamic concept, capable of interpretations to enable the successful working of a democracy. In simple terms, Rule of Law is the restriction on the arbitrary exercise of power by subordinating it to well-defined and established laws. Law should govern the nation and not the arbitrary decisions by individuals. Thus, Rule of Law embodies the doctrine of supremacy of law.

Origin of Rule of Law

Rule of Law is as old as civilization. Times and society have changed the perception of various authors resulting in different and varied definitions and approaches to Rule of Law. Many accounts of the rule of law identify its origins to classical Greek thought, quoting passages from Plato and Aristotle. Greek ideas with respect to the rule of law are therefore best understood in the form of exemplary models, providing inspiration and authority for later periods. The Roman contribution to the rule of law tradition was negative as well as positive, with the negative tradition being of much greater consequence.

The Germanic customary law proposition that the king is under the law has been widely identified as an independent source of the rule of law in the medieval period. The Magna Carta, 1215 although it stands on its own as a historical event with reverberating consequences in the rule of law tradition, epitomized a third Medieval root of the rule of the law- the effort of nobles to use law to restrain kings. Then come the liberalist and Federalist approaches to Rule of Law. Locke's design involved a limited delegation of power, for some purposes, from individuals to the government, revocable by them if the government failed to meet its obligations. He specified a separation of powers between legislature and executive - though not a separate judiciary - to assure that the government acts according to duly enacted standing laws. And he argued that absolute monarchy is inconsistent with civil society because such a monarch would judge his own cases, continuing in state of nature in relation to the people. Finally, consistent with the consensual nature of the civil society, Locke held that legislation should be established by majority vote.

In this backdrop, following Montesquieu's approach, in the year 1885, A.V. Dicey on observing the UK model laid down three principles to be arising out of Rule of Law.

- Supremacy of Law;
- Equality before the law;
- Predominance of legal Spirit.

In France, Dicey observed that the government officials exercised wide discretionary power and if there was any dispute between a government official and a private individual, it was tried not by an ordinary court but by a special administrative court. The law applicable in that case was not ordinary law but a special law developed by the administrative court. From this, Dicey concluded that this system spelt the negation of the concept of rule of law. He felt that this was against the principle of equality before the law. He also stated that all English laws are bound by the rule of Law and there is no external mechanism required to regulate them. Therefore; he concluded that there was no administrative law in England.

Dicey's concept of Rule of Law had its advantages and disadvantages. Rule of Law imposed and helped in imbibing a sense of restraint on administration. The government was bound to work within the legal framework. Further, by stating that the law is supreme, he made every law made by the legislature supreme, thus, promoting parliamentary supremacy. There cannot be self-conferment of power as even an ordinary law is supreme. All laws, public or private, are being administered by the same set of independent and impartial judiciary. This ensures adequate check on the other two organs. Nonetheless, on the other hand, Dicey completely misunderstood the real nature of the french *droit administratif*. He thought that this system was designed to protect officials, but the later studies revealed that in certain respects it was more effective in controlling the administration than the common law system. The reality is that French *conseil d'Etat* is widely admired and has served as model for other countries as well as for court of justice for European communities. He also did not realize the need for codification of laws which could lead to more discretion, thus hampering of Rule of Law.

Rule of Law Under the Indian Constitution

In India, the concept of rule of law can be traced back to the *Upanishads*. In modern day as well. the scheme of the Indian constitution is based upon the concept of rule of law. the framers of the Constitution were well familiar with the postulates of rule of law as propounded by Dicey and as modified in its application to British India. It was therefore, in the fitness of things that the founding fathers of the constitution gave due recognition to the concept of rule of law.

The Constitution of India has been made the supreme law of the country and other laws are required to be in conformity with it. Any law which is found in violation of and provision of the constitution, particularly, the fundamental rights, is declared void. The Indian constitution also incorporates the principle of equality before law and equal protection of laws enumerated

by Dicey under Article 14.

The very basis human right to life and personal liberty has also been enshrined under Article 21. Article 19 (1) (a) of the *Indian Constitution* guarantees the third principle of the Rule of law (Freedom of Speech and Expression). No. person can be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence is also very well recognized in the *Indian Constitution*. The principles of double jeopardy and self-incrimination also found its rightful place in the constitution. Articles 14, 19 and 21 are so basic that they are also called the golden triangle Articles of the Indian Constitution.

The Constitution also ensures an independent and impartial Judiciary to settle disputes and grievances for violation of fundamental right by virtue of Articles 32 and 226. In *Union of India v. President, Madras Bar Association*, the Supreme Court held that "Rule of Law has several facets, one of which is that disputes of citizens will be decided by judges who are independent and impartial and that disputes of citizens will be decided by judges who are independent and impartial and that disputes and to legality of acts of the government will be decided by judges who are independent of the Executive. Justice R.S. Pathak of the Hon'ble Supreme Court has observed that "It must be remembered that our entire constitutional system is founded on the rule of law, and in any system so designed it is impossible to conceive of legitimate power which is arbitrary in character and travels beyond the bounds of reason."

Judiciary and Rule of Law

The Indian judiciary has played an instrumental role in shaping Rule of Law in India. By adopting a positive approach and dynamically interpreting the constitutional provisions, the courts have ensured that the Rule of Law and respect for citizens' rights do not remain only on paper but are incorporated in spirit too. In the case of *A.D.M. Jabalpur. V. Shri Kanti Shukla, KHANNA, J.* Observed:

Rule of Law is the antithesis of arbitrariness Rule of Law is now the accepted norm of all civilized societies... Everywhere it is identified with the liberty of the individual. It seeks to maintain a balance between the opposing notions of individual liberty and public order. In *Bachhan singh v. state of Punjab*, it was held that the Rule of law has three basic and fundamental assumptions-they are

1) Law making must be essentially in the hands of a democratically elected legislature

2) Even in the hands of the democratically elected legislature, there should not be unfettered legislative power and

3) there must be independent judiciary to protect the citizens against excesses of executive and legislative power.

The first case which stirred a debate about Rule of Law was *Shankari Prasad v. Union of India* where the question of amenability of fundamental rights arose. The question lingered and after witnessing the game play between the government and the judiciary, the issue was finally settled in the case of *Kesavananda Bharti v. State of Kerala*. In this case, the Hon'ble Supreme Court held that Rule of Law is the "basic structure" of the Constitution. 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, which are imposed by Rule of Law. Within these limits parliament can amend every Article of the constitution. Justice H R Khanna played a vital role in preserving the Rule of law although he concurred with the majority decision.

In the case of *Indira Nehru Gandhi v. Raj Narayan*, the Apex Court held that Rule of Law embodied in Article 14 of the Constitution is the "basic feature" of the *Indian Constitution* and hence it cannot be destroyed even by an amendment of the constitution under Article 368 of the *Constitution*. Article 329-A was inserted in the constitution under 39th amendment, which provided certain immunities to the election of office of prime Minister from judicial review. The Supreme Court declared Article 329-A as invalid, since it was clearly applicable only to the then current prime minister and was an amendment to benefit only one individual. It was decided that the law of the land is supreme and must prevail over the will of one person.

In the case of *Meneka Gandhi v. Union of India*, the Hon'ble Supreme Court established the Rule of Law that no person can be deprived of his life and personal liberty except procedure established by law under Article 21 of the Constitution. Thus, Article 21 requires the following conditions to be fulfilled before a person is deprived to his life and liberty:

- There must be a valid Law
- The Law must provide procedure
- The procedure must be just, fair and reasonable.
- The Law must satisfy the requirement of art.14 and 19

The Supreme Court Observed in *Som Raj v. State of Haryana*, That the

absence of arbitrary power is the primary postulate of Rule of Law upon which the whole constitutional edifice is dependant. Discretion being exercised without any rule is a concept which is antithesis of the concept.

Another facet of Rule of Law in India is the independence of Judiciary and power to judicial review. The Supreme Court in the case *Union of India v. Raghbir Singh* that it is not a matter of doubt that and considerable degree of principles that govern the lives of the people and regulate the State functions flow from the decision of the superior courts. Rule of Law as has been discussed postulates control on power. judicial review is an effective mechanism to ensure checks and balances in the system. Thus, any provision which takes away the right to judicial review is seen to go against the very fibre of Rule of Law. In the case of *S.P Sampath Kumar v. Union of India*, the Court have reiterated the judicial review is part of the basic structure of the constitution .

In India, the meaning of rule of law has been expanded. It is regarded as a part of the basic Structure of the constitution and therefore, it cannot be abrogated or destroyed even by parliament. The ideals of the constitution—liberty, equality and fraternity have been enshrined in the preamble. Constitution makes the supreme law of the land and every law enacted should be in conformity to it. Any violation makes the law ultra vires. Rule of law is also reflected in the independence of the judiciary.

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*Assistant Professor, (Selection Grade), Govt. R.B.R. N.E.S P.G. College, Jashpur Nagar (C.G.) Email: anilshrivastava367@gmail.com, Cell-9425251707