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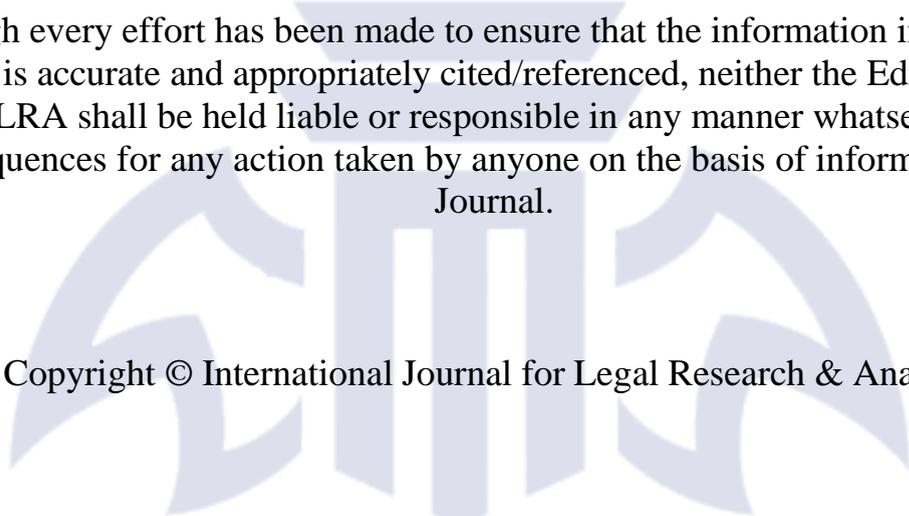
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Megha Middha, is working as an Assistant Professor of Law in Mody University of Science and Technology, Lakshmangarh, Sikar (Rajasthan). She has an experience in the teaching of almost 3 years. She has completed her graduation in BBA LL.B (H) from Amity University, Rajasthan (Gold Medalist) and did her post-graduation (LL.M in Business Laws) from NLSIU, Bengaluru. Currently, she is enrolled in a Ph.D. course in the Department of Law at Mohanlal Sukhadia University, Udaipur (Rajasthan). She wishes to excel in academics and research and contribute as much as she can to society. Through her interactions with the students, she tries to inculcate a sense of deep thinking power in her students and enlighten and guide them to the fact how they can bring a change to the society

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Assistant professor of Law

Mrs.S.Kalpana, presently Assistant professor of Law, VelTech Rangarajan Dr. Sagunthala R & D Institute of Science and Technology, Avadi. Formerly Assistant professor of Law, Vels University in the year 2019 to 2020, Worked as Guest Faculty, Chennai Dr. Ambedkar Law College, Pudupakkam. Published one book. Published 8 Articles in various reputed Law Journals. Conducted 1 Moot court competition and participated in nearly 80 National and International seminars and webinars conducted on various subjects of Law. Did ML in Criminal Law and Criminal Justice Administration. 10 paper presentations in various National and International seminars. Attended more than 10 FDP programs. Ph.D. in Law pursuing.



Avinash Kumar



Avinash Kumar has completed his Ph.D. in International Investment Law from the Dept. of Law & Governance, Central University of South Bihar. His research work is on "International Investment Agreement and State's right to regulate Foreign Investment." He qualified UGC-NET and has been selected for the prestigious ICSSR Doctoral Fellowship. He is an alumnus of the Faculty of Law, University of Delhi. Formerly he has been elected as Students Union President of Law Centre-1, University of Delhi. Moreover, he completed his LL.M. from the University of Delhi (2014-16), dissertation on "Cross-border Merger & Acquisition"; LL.B. from the University of Delhi (2011-14), and B.A. (Hons.) from Maharaja Agrasen College, University of Delhi. He has also obtained P.G. Diploma in IPR from the Indian Society of International Law, New Delhi. He has qualified UGC - NET examination and has been awarded ICSSR - Doctoral Fellowship. He has published six-plus articles and presented 9 plus papers in national and international seminars/conferences. He participated in several workshops on research methodology and teaching and learning.

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“Comparative Analysis of Application of Rule of Law in India & UK”

Authored By- Ritvik Joshi

Modern Law College, Ganeshkhind Pune LL.M

Administrative Law: Development, Growth, Nature And Scope

The development of Administrative law started in the twentieth century. That doesn't mean there was no Administrative law before the twentieth Century. Administrative law governs, and its application is done by the executive branch of the government. This logically would mean that the law is as old as the executive branch of the government. It won't be wrong to say that the law is as old as administration itself.

However, in accordance with the opening statement, the development of administrative law was rapid in the twentieth century. It became more articulate, accurate and definitive. It became the cornerstone of administration in the developing countries.

The state, in order to improve the physical, moral and economic life of its subjects, assumed more and more powers to regulate the society. The truth is that the state, in a modern democratic state has acquired an immense accession of power and has come to discharge functions which are varied and malfunctions in scope, nature and ambit.¹

Dicey has defined Administrative Law as denoting that portion of a nation's legal system which determines the legal status and the liabilities of all the state officials, which defines the rights and liabilities private individuals in their dealings with the public officials, and which specifies the procedure by which those rights and liabilities are enforced.²

In Administrative Law, procedure has great significance. This is because procedure is necessary for discharge of duty. Evolution of procedure is necessary to curb the abuse of administrative power.

The British Administrative Law doesn't lay so much emphasis on procedure of administrative bodies. In a democracy, the procedure has to be democratic and in the interest of the people.

Thus administrative law deals with the structure, functions and powers of the organs of the

¹ MP Jain & SN Jain, Principles of Administrative Law

² Law of the Constitution, 329-333 (8th Edition)

administration; limits to the powers and procedure to be followed.

Rule Of Law

The concept of Rule of Law is derived from the derived from the French phrase 'la principe de legalite'. The govt. based on the principles of law.

The purpose of Rule of Law is :

- Protect against anarchy
- Plan the affairs of the state with reasonable confidence
- Against official arbitration

The principle of Rule of Law has many meanings and interpretations. Rule of Law embodies the doctrine of supremacy of law and it a fundamental and basic necessity for an organized and disciplined community.

The work of Aristotle on this principle is influential in understanding the development of its concept. Aristotle preferred administration by the law compared to a regime though both of them were subject to the type. He was of the opinion that laws are brought in after long discussions and considerations and shouldn't be over-ruled by a single person sitting in a courtroom.

The contribution of AV Dicey is paramount on this principle. Dicey said "Rule of Law is the 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 discretion authority on the part of the government."³

Its primary meaning is that everything must be done according to law.⁴

Taken in its broadest sense this means that people should obey the law and be ruled by it⁵. But in political and legal theory it has come to be read in a narrower sense, that the government shall be ruled by the law and subject to it. The ideal of the rule of law in this sense is often expressed by the phrase 'government by law and not by men'.⁶ According to Dicey, law alone rules over Englishmen. In many countries, the executive held wide and discretionary powers and in Britain, subjects were ruled by law. According to Dicey, wherever there was discretion, there is a room for arbitrariness which led to insecurity of legal freedom of the citizens.

Another concept attributed to Dicey's Rule of Law was "equality before law or equal

³ The Law of Constitution 198 (8th Edition)

⁴ MP Jain, Administrative Law, Volume 1 , 6th Edition , pg 18

⁵ Jennings, The Law and the Constitution (London, 1933), pp. 42–5

⁶http://fs2.american.edu/dfagel/www/Philosophers/Raz/Rule%20of%20Law%20and%20its%20Virtue_%20%20Joseph%20Raz.pdf

subjection of all classes to the ordinary law of the land administered by the ordinary law courts.”⁷

The third aspect of Dicey’s principle of Rule of Law is for common law protection of rights and freedoms. Dicey believed that people’s rights are best protected under Common Law rather than a formal Bill of Rights.⁸

So, according to Dicey, the foremost principle of rule of law is that administration or the executive does not enjoy any power outside law. Supremacy of rule of law is another aspect of rule of law. Dicey was in favour of Judicial Control as he thought it was the basis of Rule of Law. He was of the opinion that Judicial review of administrative actions helps the administration to remain within the ambit of law. The distinction should be drawn between discretionary powers and arbitrary powers.⁹ The administration should be granted discretionary powers and not arbitrary powers, however, such discretionary powers should be limited and subject to safeguards in order to avoid miscarriage of justice and order.

Every act of the Parliament, every act passed, every right upheld or curtailed must have a strict legal pedigree.

According to Joseph Raz, the nature of the law and its offices is complex. In his widely referenced article *The Rule of Law and Its Virtue* (1977) published in *The Law Quarterly Review*, he stated ..

If the rule of law is the rule of the good law then to explain its nature is to propound a complete social philosophy. But if so the term lacks any useful function. We have no need to be converted to the rule of law just in order to discover that to believe in it is to believe that good should triumph. The rule of law is a political ideal which a legal system may lack or possess to a greater or lesser degree. That much is common ground. It is also to be insisted that the rule of law is just one of the virtues by which a legal system may be judged and by which it is to be judged....¹⁰

The core of Raz’s idea is that the law should be capable of providing effective guidance. Raz agrees that the government, that is the executive need some discretionary powers but he also is of the opinion that they should be subject to clear and stable rule to govern these decisions and should be subject to judicial review.

Rule of law has given the common law countries a definite, articulate philosophy to restrict the government powers and keep the administration within bounds.

⁷ The Law of Constitution 198(8th Edition)

⁸ MP Jain, Administrative Law, Volume 1, 6th Edition, pg 19

⁹ MP Jain, Administrative Law, 6th Edition, lexis Nexis pg 22

¹⁰ Referred the Article- *The Rule of Law and Its Virtue* (1977) published in *The Law Quarterly Review*

Rule Of Law In England

King John and his rebellious barons agreed to the great charter known as Magna Carta. The great charter was the first significant written instrument limiting the power of the king and confining him to what the barons regarded as good governance.¹¹

Dicey, earlier denied the existence of administrative law in England. While his contemporary Maitland, thought Administrative law was emerging in England in the same period. Dicey thus reluctantly accepted and recognized Administrative Law after the famous **Rice**¹² and **Arlidge**¹³ cases.

Lord Hewart, in his book **The New Despotism**¹⁴, claimed that the true rulers of the country were bureaucrats. He was alarmed by the large-scale assumption of power by the executive and newly expanded powers of legislation and adjudication. He warned in his book the misuse of these powers by the officials.¹⁵

This criticism led to formation of the **Committee of Minister's Power** also known as **The Donoughmore Committee** was appointed in 1929. The object of the committee was to consider the powers of the ministers and the crown. The objective of the committee was also to secure sovereignty of Parliament and the supremacy of law.

In the submission of its report in 1932, the committee highlighted, the opportunities misuse of power by the executive and the crown and laid down certain suggestions. The report brought into the highlight three main defects in the system of Administration.

- 1) The inadequate provision made for publication and control of subordinate legislation
- 2) Lacuna caused by the inability to sue the Crown for tort¹⁶
- 3) The extent to which the control and supervision of administrative decisions were passing out of the hands of the courts and were being entrusted by Parliament to specialist tribunals and enquiries.¹⁷

As a result, The House of Commons formed a committee on Statutory Investments 1944 to tidy up matters regarding subordinate legislation.

The Parliament enacted **Crown Proceeding Act, 1947** to liberalize the law relating civil proceeding against the Crown.¹⁸

¹¹ <http://www.legalserviceindia.com/article/I457-Rule-of-Law-in-India-&-UK.html>

¹² Board of Education vs Rice, 1911 AC 179 *infra*

¹³ Local Government Board vs Arlidge, 1915 AC 129 *infra*

¹⁴ By Lord Hewart, 1929

¹⁵ MP Jain & SN Jain, Principles of Administrative Law, 6th Edition, pg 15

¹⁶ Report & Suggestions of the Committee on Minister's Power

¹⁷ MP Jain & SN Jain, Principles of Administrative Law, 6th Edition, pg 16

¹⁸ MP Jain & SN Jain, Principles of Administrative Law, 6th Edition, pg 16

The occurrence of the Crichton Down Affair¹⁹ in 1954 brought into the picture many lacunas in the administration. This led to the formation of the **Frank's Committee**.

The Frank's Committee (1955) was officially known as the Committee on Administrative Tribunals and Enquiries. The suggestions (1957) of this committee led to the appointment of Council of Tribunals which was responsible for improving the procedure and improvement in the tribunals and enquiries in the country.

The Franks Committee concluded that in general that the appropriate appeal structure is a general appeal structure is a general appeal from a tribunal of first instance to an appellate tribunal, followed by an appeal to the courts on points of law.²⁰

Till 1958, the areas of delegated legislation and administrative adjudication had been investigated and some reforms introduced therein, but the area of the other administrative powers had not been touched so far.²¹

The International Commission of Jurists, published a report in 1961 suggesting the government of appointment of an ombudsman. The report was later called as the Wyhatt report. Even the appointment of an ombudsman was not adequate it was supplemented with other institutional arrangements.

These recommendations did not make the Administration full-proof. The developments were not full-proof. The development was not systematic the need to further amend the law was felt. The need for coherent and comprehensive law was felt. In 1969, the Law Commission recommended a full-fledged inquiry into Administrative Law. Even the suggestions did not materialize, a single enquiry was held on legal remedies.

On the report of the Commission, a single procedure, known as "application for judicial review" has now been introduced for applying to the High Court for securing one or more of the following remedies: mandamus, certiorari, prohibition, declaration and injunction.

Rule Of Law In India

The concept of rule of law has been invoked in India from time to time not in a Dicean sense but as a means to discipline the administration and to infuse some constitutional values therein.²²

Our constitution creates or forms the rule of law and not rule of men. Our constitution recognizes that all men are under law and all constitutional functionaries must work within the constitutional limits. Our constitution doesn't permit absolute power without any limitations. It is against power without restraints or unbridled power.

Rule of law in India has been concretized in the constitution by the Article 14. Article 14 guarantees every individual "equal protection of law" and "equality before law". Thus, the principle is not vague and abstract but articulate and definitive. The Principle of rule of law is one of the pillars of the constitution. The Courts through Article 14 have achieved a very

¹⁹ Crichton Down Enquiry, Cmd. 917 (1954)

²⁰ MP Jain & SN Jain, Principles of Administrative Law, 6th Edition, pg 17

²¹ MP Jain & SN Jain, Principles of Administrative Law, 6th Edition, pg 17

²² MP Jain, Administrative Law, Volume 1, 6th Edition, pg 23

activist dimension and has laid down decisions invalidating unreasonable, arbitrary decisions.²³ Under Indian legal system, Article 21 guarantees life and personal liberty which cannot be taken except by the procedure established by law. But it is not the sole depository of Rule of law under the constitution. The whole constitution enumerates the principles of rule of law.

The concept of rule of law has been invoked to convey the sense that the administration cannot exercise arbitrary powers and should function according to law.²⁴ The decisions based upon discretion must satisfy the test of reasonability and equity. The whole principle of rule of law in India is that law should not be arbitrary, irrational.

In **ADM Jabalpur vs Shivkant Shukla**, Justice Khanna in the dissenting judgment said that rule of law is anti-thesis of arbitrariness. It helps maintain a balance between individual liberty and public order. Justice Khanna said “rule of law means government under the law, supremacy of law over government as distinct from government by law. It also means supremacy of law over society even in totalitarian state.”²⁵

The judgment of this case is widely regarded as an error, but the judgment hasn't been overruled yet. Justice Khanna's dissenting judgment holds much relevance today and explaining the concept of rule of law.

Thus, in today's context, the theoretical formulation of Dicey on the Rule of Law, as explained by Justice H.R. Khanna, would hold much greater force than in 1976.

He further went and stated that rule of law was then the accepted norm of civilized societies. The concept of independent judiciary, which enumerated from rule of law is important to maintain the problem arising out of conflict between human rights and public order²⁶.

He further added, ““Even in the absence of Article 21 in the Constitution, the State has got no power to deprive a person of his life or liberty without the authority of law. The principle that no one shall be deprived of his life or liberty without the authority of law is rooted in the consideration that life, and liberty are priceless possessions which cannot be made the plaything of individual whim and caprice and that any act which has the effect of tampering with life and liberty must receive sustenance from and sanction of the laws of the land²⁷”.

He brought into the light the difference between rule of law and mere illusion of rule of law. He said, “ A state of negation of rule of law would not cease to be such a state because of the fact that such a state of negation of rule of law has been brought about by a statute.²⁸”

In **Golaknath vs State of Punjab**²⁹, the court held that rule of law under the constitution serves the needs of the people without undoubtedly infringing their rights. It is capable of recognizing the social reality and tries to adjust itself from time to time avoiding authoritarian path.³⁰

Under the Indian legal system every statutory body and organ is regulated by Rule of Law. In **Zahira Habibulla Sheikh vs State of Gujrat**, the court said “ Principles of Rule of Law and due process are closely related with human rights protection. Such rights can be protected effectively when a citizen has resource to the court of law.”³¹

The concept of Basic Structure of the constitution was laid down in **Indira Gandhi Nehru vs Raj Narain**.³² Along with five other principles, rule of law was regarded in the basic structure

²³ EP Ropayya v Tamil Nadu AIR 1974 SC 555

²⁴ MP Jain, Administrative Law, Volume 1, 6th Edition, pg 24

²⁵ AIR 1976 SC 1207 at 1254

²⁶ MP Jain, Administrative Law, Volume 1, 6th Edition, pg 23

²⁷ AIR 1976 SC 1643

²⁸ <https://dhrvudahiya.wordpress.com/2013/03/12/nature-of-the-rule-of-law-in-india-insights-from-adm-jabalpur-vs-shivkant-shukla-air-1976/>

²⁹ AIR 1976 SC 1643 , para 98

³⁰ Golaknath vs State of Punjab AIR 1976 SC 1643 , para 98

³¹ AIR 2004 SC 3114

³² AIR 1975 SC 229 , 2384, 2470

of the constitution making it immune to amendment.

Comparative Analysis: Differences And The Similarities **Between The Two Legal Systems**

1) Sources of the Rule of Law :

The principle of Rule of Law was coined and established by AV Dicey in 1885 in United Kingdom. United Kingdom has its source of Rule of Law from AV Dicey the various , committee's appointed by the Government to improve the administration, the various acts of parliaments such as amendments and the judicial pronouncements.

The Sources of Rule of Law in India include the Dicean philosophy, the Preamble of the constitution which talks about justice, equality and fraternity. Article 14 of the constitution gives all the citizens equality before the law and equal protection of the law. The most important source of rule of law in India are the Judicial pronouncements which have made the ambit of rule of law flexible and inclusive.

2) Conceptualization of Rule of Law

In the United Kingdom, the rule of law has been developed in the Dicean sense to ensure that,

- No one is above law
- Equality before law
- Law is always applied'
- Independence of Judges
- To put curb on the vast administrative powers

In the United Kingdom, there is no bill of rights to protect the fundamental rights and the Bill of Human Rights can be set aside by the Parliament. Thus, the Parliament is the supreme and above the law in the United Kingdom. The development of rule of law in United Kingdom is limited to check the behavior of the public officials and eradication of arbitrary decision of the administration.

In India, the Rule of Law has been developed not in a Dicean sense;

- To discipline the vast administrative powers & curb arbitrariness
- To infuse some values in the administration
- To serve the needs of the people and protection of fundamental human rights
- Independence of judiciary
- Uphold the concept of equality envisaged in Article 14 of the constitution

In India, the law is supreme. No one is above law. Not even the Parliament. The Court can strike down the changes and bills passed in the parliament if it violates the Fundamental rights or hampers the Basic Structure of the constitution.³³

Rule of Law has no definitive connotation in India and thus can be used against any source of arbitrariness in the country. The Judicial review is the basic structure of the constitution thus cannot be abrogated or amended³⁴.

³³ Indira Gandhi Nehru vs Raj Narain

³⁴ Minerva Mills Ltd. Vs Union Of India AIR 1980 SC 1789

3) Concept of Equality

The principle of equality in United Kingdom and India is similar. AV Dicey's concept of Rule of Law is equality before law and equal subjection towards law is similar to the contents of Article 14 of the Indian Constitution which provides for equality before law and equal protection of the law. Principle of equality is of paramount importance and form the cornerstone of the two legal systems.

Both the countries maintain the principle that no man is above the law. Irrespective of his position and rank he was amenable to the jurisdiction of the court.

However, AV Dicey was criticized for omitting the perks given to the crown, state officials and bureaucrats in 1885.

Vague or Definitive

United Kingdom has an unwritten constitution, so the principle of rule of law is not codified but is base in thesis, committee reports and legislations. This makes the principle indefinite and vague. The concept of Rule of Law is abstract in England. The Indian Constitution has not defined the principle of rule of law. Justice Khanna, said “ The article 21 is not sole repository of rule of law but the whole constitution.³⁵” Inference can be drawn the preamble of the constitution which contains the principle of equality , justice , fraternity and secularism. These principles are corner-stone of modern administration and rule of law.



³⁵ ADM Jabalpur vs Shivkant Shukla

Conclusion

The development of Rule of Law started as a brake to arbitrary rule of the administration. Dicey explained Rule of Law which was very idealistic in nature. A developing country needs Rule of Law in its administration to avoid discretion and arbitrariness. Each country needs to develop their concept and version of rule of law according to the prevalent situation. Dicey was of the opinion that justice should be achieved by rules by law and not by principles of men. However, the situation adopted in India is different than Dicean philosophy.

Justice Khanna upheld the principles of justices, equity, good conscience in a dissenting Judgment. He gave a judgment against the illusion of rule of law. In India, rule of doesn't mean blindly following the law. It means enforcement of democratic order. Rule of Law is needed to punish those who deviate from the established order or constitutional morality.

The researcher is of the opinion that the development of Rule of law should develop in all the countries at the nations own pace and social situation. The law governs the people of the state and all the laws should be focused on overall development of an individual. The Rule of Law plays an important role in the development of an individual as he has the chance to progress without facing arbitrariness of the administration.

The researcher suggests that, in India, were rule of law is hampered and there is miscarriage of justice, efforts should be made to improve such maladministration. In such situations, the common subjects are stake holders. The Administration and the judiciary should try and win back their faith in the system. The Supreme Court in **Indra Sawney II vs Union of India**³⁶, criticized the government for violating rule of law for political convenience. Such incidents should not be taken lightly and strict action should be taken against them.

AUTHOR

RITVIK JOSHI

MODERN LAW COLLEGE, LL.M (II)

GANESHKHIND PUNE

EMAIL: ritvikjoshi96@gmail.com

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³⁶ AIR 2000 SC 1789