

ISSN: 2582-6433



INTERNATIONAL JOURNAL FOR LEGAL RESEARCH AND ANALYSIS

Open Access, Refereed Journal Multi Disciplinary
Peer Reviewed 6th Edition

VOLUME 2 ISSUE 7

www.ijlra.com

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A NOTE ON THE RULE OF LAW

Authored By- Shalini¹

The concept of rule of law is age old but has still managed to find its way into the modern world. Before delving into the nooks and cranny of what rule of law exactly is, one must understand the basics of what is law. In simple terms, law is the system of rules that regulates the relationship among the organs of the government, between the government and the people and the conduct of its subjects. For the purpose of understanding, law here implies the law made by legislature. Rule of law, therefore, means to be governed by the law, and not man; that both the government and the citizens know the law and obey it. In this note, the concept of rule of law, its different versions and aspects along with the opposition to the application of the rule of law will be discussed.

I. Introduction

Rule of law is an ideal doctrine in the sea of values of political morality. To evaluate a society in terms of its political correctness, there are a multitude of factors, including the successful functional democracy, application of Human Rights principles, granting economic freedom and protection of individual liberty. The rule of law contests that the law should be superior and the powers of government and its various organ should derive their validity from that law, they must operate within the framework of limitations set up by the law and also must be accountable to such law for their actions and use of such powers. Rule of law is thus anti-thesis of arbitrariness. This is however only a part of the whole concept. Rule of law also requires the citizens to obey the law, to respect the law especially in case of a dispute or conflict; the citizens derive their rights and duties from the law.

The United Nation has also recognised the significance of the rule of law. It has defined rule of law as a principle of governance that governs all institutions- social or political, and the people, and makes everyone accountable to law- law which is consistent with the international norms and standards of human rights that have been set up by the United Nations. The United Nation has linked the concept of rule of law to establishing peace and security at international level, ensuring political stability of states, protecting fundamental rights of the people, curbing corruption and putting an end to arbitrary use of power.

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II. The Concept Of Rule Of Law

It is common knowledge that the first instance of the concept of rule of law appeared in the document of Magna Carta in 1215. There have been many thinkers with their own version and vision for the rule of law. Aristotle's concept of rule of law has been the most relevant and is used till day as reference by modern thinkers. Aristotle posed a realistic question- whether it is best to be governed by the laws or to be governed by the man? He called it rule of reason and rule by passion. After practically approaching the question, he concluded that it is best to be governed by rule of law that is the rule of reason and not rule of man since man is driven by passions such as greed and hunger. He coined the term *epieikeia*, which when loosely translated, means equity. Aristotle's version of the rule of law was broad compared to the thinkers that followed him.

Montsquieu connected the concept of rule of law with separation of powers; he opined that for rule of law to thrive, there must be separation of powers especially the separation of judicial powers from that of executive and legislature. He believed that in a society, there must be a set of institutional rules that govern each individual equally in order to fend off the oppression by using the shield of rule of law. His version of rule of law is thus narrower than that of Aristotle. Albert V. Dicey elaborated the theory of rule of law that we know today. He polished the monolith concept of rule of law and propounded three postulates for the Doctrine of rule of law in England:

- 1) Supremacy of Law- According to Dicey, no man is above the law in a state. Even those who make the law are not in a higher position than the law itself. It therefore nips the arbitrary use of power by the government in the bud, as it requires those who frame the law and administer it to be ruled over by the same law.
- 2) Equality before the Law- Every person, irrespective of their position in society, is equal in the eyes of the law and cannot be given a biased treatment. This postulate guarantees the just administration of law in a society by putting everyone on the same pedestal before the law notwithstanding their rank, power, religion or any other factor of discrimination.
- 3) Constitution as emanating from the ordinary law of land- In England, since there is no written constitution, the rights of the people are determined by the judiciary after settling the disputes and the constitution is a consequence of that.

Hence according to Dicey, rule of law is the absolute supremacy of the regular law which

in turn prevents the influence of arbitrary power or exhibiting of wide discretionary powers.

In India, the principle of rule of law was prevailing since the ancient era but has taken different forms since. Chanakya has espoused the core of rule of law theory by stating that the state is governed by the law and not the ruler king or the nominated representatives or the people. Thus this doctrine in India was construed as being ruled by the principles of law, where the government is also accountable for its actions.

Rule of Law and Rule by Law

Justice Ramana recently emphasised on the rule of law and to understand its difference with rule by law. In a lecture delivered by him on the memorial of Justice PD Desai, he advocated that we as a society have come far from where we began. The rule of law under British regime was essentially rule by law since they administered different laws to the British in India and the Indians were made subject to different law. However after the independence, we gave to ourselves the Constitution which upheld the principle of rule of law innately in its provisions.

Rule of law, as the term clearly states, is to be ruled by law and that the legal principles are supreme, thus limiting the arbitrary exercise of power by the authorities, which they derive from the law itself. Rule by law on the other hand puts emphasis on the law laid down by the supreme authority in a state. The problem with rule by law is that it leaves the law makers and administrators outside its purview; it leaves no scope of accountability of the government.

Rule of law is led by ideals of just society, such as equity and justice, for example Article 14 of Indian Constitution guarantees equality of law and equal protection of law to all; while rule by law has no such values, it can justify the making and implementation of unethical laws as well, for example the apartheid regime of South Africa was justified on basis of rule by law.

The two aspects of the principle of rule of law explain its various versions well. The formal and procedural aspects of rule of law (thin version) deal with the legal rules and principles and uphold the supremacy of enacted laws. It should not be confused with unethical and arbitrary law. Lon Fuller has espoused eight characteristics of law in rule of law- he maintains that law must be general, public, clear, congruent, prospective, consistent, intelligible and stable.

Joseph Raz is also the profounder of this theory and emphasizes that law must be open, clear, stable and general. Raz's rule of law is a negative concept as he believes that if the

law was made following the procedure of parliament then even if it is discriminatory, it should be upheld since rule of law is a means to scoop the damage to individual's liberty caused by law in pursuit of its end goals.

The generality principle of natural justice simply states that no one should be discriminated or preferred in the application of the law. This is embodied in the doctrine of rule of law. All these principles uphold the core notion of rule of law and they are called formal because they deal with the form of norms. This formal aspect is completed with a list of procedural norms which dictate the manner of procedure in consonance with the principles of rule of law.

The substantive aspect, commonly known as the thick version of rule of law, deals with the substantive justice and bakes the cake of rule of law with other ideals of a just society, especially the human rights of people. India follows thick version of rule of law, which in connection with transformative constitutionalism has led the concept of living constitution in India to a new front. It is because of such nature of our constitution which encompasses all these characteristics in its overwhelming structure that we as a society have kept up with the changing needs of the people and also maintained pace with the global leading states.

The substantive dimension completes the rule of law figure by complementing the formal and procedural aspects as it infuses the ideals such as human rights in the core notions of rule of law, which makes it a wholesome component of a democratic society.

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Elements and core principles of rule of law²

As explained in the wheel of rule of law above, the law must be clear and accessible, as people are supposed to obey the laws, for that purpose people must know what the laws are and why they have been enacted. It implants right to representation to people, that is people must be given right to participate in the making of laws in a democracy. The equality aspect of rule of law includes equal access to justice which ensures gender equality. The most important element of rule of law is independent judiciary; independence here is independence from the interference by the legislature and executive in the working of the judiciary. This principle does not render judiciary free from any accountability. The judiciary must always adhere to the philosophy of Constitution of India. The principle of judicial review of law as provided under Article 13 of the Constitution emanates from the independence of judiciary with respect to the check and balance doctrine.

All these elements form the concrete bedrock of the rule of law principle. Indian Constitution has all the elements of rule of law in a version which best suits the interests of people. The Supreme Court has declared rule of law as part of the basic structure doctrine in many

² Rule of Law Education Centre Australia: ruleoflaw.org.au

landmark verdicts.³ The Constitution guarantees independent judiciary and also contains provisions for separation of powers of the legislature, executive and the judiciary. Article 21 protects the individual from arbitrary action or unauthorised use of power by the state.

III. Opposition And Challenges

The principle of rule of law has faced opposition and many challenges in its implementation. The critics have found controversies in the application of this principle, for example while some thinkers argue that rule of law eradicates the discretionary power of the authority, others argue that it merely limits the authority from the use of discretionary power in order to constraint the arbitrariness and maintain uniformity. During the emergency, some thinkers argue that state must be given some space to be flexible and take spontaneous action to deal with the problem in the face of it, while some thinkers believe that the constitutional provisions must not be dismissed even during emergency, and another set of thinkers opine that there should be a set of rules and procedural standards in conformity of the rule of law to be followed during the period of emergency. Each state has its own version of rule of law. This brings us to the next controversy that there is no uniform rule of law in operation at the international level with states as its subjects; rule of law operates only within a state to protect the liberty of individuals but when states become its subject, the same theory cannot be applied. In the era of globalisation where the interconnectedness of the states at global platform is increasing, there ought to be a standard rule of law operating at the international level with states as its subject. The present international organisations do not subject themselves to the rules and principles they propound for the member states to follow, this is actively against the spirit of rule of law where the central component is to put the law makers along with the individuals in the operation of law so as to eradicate arbitrariness in the application of law. Despite being opposed, organisations like the World Justice Project in its Rule of Law Index, ranks the countries of the world according to the application of rule of law in their territory; Denmark is currently holding first rank, while India ranks 79th in the Rule of Law Index of the World Justice Project.

In India, the position is different, argues Dr DD Basu. He maintains that the higher law or the grund norm in India is the Constitution and each organ of the government derives their validity and powers from the Constitution only. There are no explicit provisions clearly stating rule of

³ Kesavananda Bharati vs Union of India; Secretary, State of Kerala & Ors. vs Umadevi; Maneka Gandhi vs Union of India

law in the Constitution but the principle of rule of law has been indirectly incorporated in the Constitution and has to be derived along the lines of such provisions only, as explained by Justice Bhagwati.⁴ Dr Basu argues that the judiciary has unnecessarily invoked the principles of rule of law in settling the disputes which could have been done with the Constitutional provisions only. He maintains that by doing so, the judiciary has alleviated the status of rule of law, which is a product of the common law, above the Constitution and it is therefore posing as a threat to the supremacy of Constitution. The dissenting opinion of Justice Khanna in ADM Jabalpur case⁵, which was appreciated by many, has been criticised by Dr Basu. He believes that Justice Khanna has considered rule of law as a separate concept outside of the Constitution and has invoked it to enforce the right to move to the court which could have been easily done by citing the constitutional provisions. Such intervention, argues Basu, is incarcerating the Constitution.

The rule of law as propounded by Dicey was for the United Kingdom which has unwritten constitution and as it has transformed from rule of law to rule of Constitution when applied in the USA, it should be read and understood along the same lines in case of India; the supremacy of Constitution cannot be challenged.

IV. Conclusion

India has adopted its unique version of rule of law which best suits the common interest. It is to be derived from the express provisions of the Constitution in resonance with the philosophy of our Constitution. Dicey's concept of rule of law was woven in a design where Parliament is supreme but in a country with written Constitution, the concept of rule of law has to be interpreted with respect to the provisions of Constitution and not otherwise. The founding fathers of the Indian Constitution have established a country which follows the letter of law while implementing the elements of rule of law. Indian version of rule of law has allowed the judiciary to uphold the transformative constitutionalism and thereby moving with the changing needs of the society; recognition of the LGBTQ+ community, decriminalising adultery, the Sabarimala judgment, etc. are evidence that India has a thick version of the rule of law which averts state domination but also at the same time allows the state to intervene in the life of individuals to grant social equality.

⁴ Bachan Singh vs State of Punjab AIR 1982

⁵ ADM Jabalpur vs Shivkant Shukla AIR 1976

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