RULE OF LAW AND ITS APPLICATION IN INDIA

ABSTRACT:

The principle of rule of law is indispensable in any legal and political system. In a democracy, the concept has assumed different dimension and means that the holders of public powers must be able to justify publically that the exercise of power is legally valid and socially just. It invites the notions of fairness, equity and non -arbitrariness. It primarily refers to the influence and authority of law within the society, particularly as a constraint upon behaviour, including the behaviour of government officials. The origin of the principle can be traced back to Ancient Greece, where it was largely positive. It gradually developed in Rome to include negative traditions as well. This article begins by providing the introduction to the doctrine and its origin and also Dicey's three principles. It continues with the application of rule of law in India along with its darker side and drawbacks as a whole.

INTRODUCTION:

The basis of administrative is the rule of law. Rule of law is derived from natural law. Natural law is also the source of Fundamental rights. Rule of law is associated with the word "law" which means that man or a society must not govern by a man or ruler but rather than they must be governed by law. It is derived from the French phrase "la principe de legalite" which means the principle of legality. In simple terms, rule of law is the restriction on the arbitrary exercise of power by subordinating it to well defined and established law.

The rule of law implies supremacy or dominance of law over any rule or person in that state. A country that enshrines the rule of law would be one wherein the grundnorm[1] of the country or the basic and core law from which all other law derives its authority is the supreme authority of the state. The king is not the law, but the law is king[2]. It refers to "a government based on the principles of law and not of men".

The Magna Carta[3], 1215 epitomised a thread medieval root of the rule of law- the effort to use law to restrain kings[4].

ORIGIN OF THE DOCTRINE OF THE RULE OF LAW:

The concept of rule of law is of old origin and is an ancient ideals. It was discussed by ancient Greek philosophers such as Plato and Aristotle around 350 BC. Aristotle endorsed the concept of rule of law by writing that "law should govern and those in power should be servant of the laws. It has since been championed by several medieval thinkers in Europe such as Hobbs, Locke, Rousseau through the social contract theory. Indian philosophers such as Chanakya have also espoused the rule of law theory in their own way, by maintain that the king should be governed by the words of law. Locke stated that legislature should be established by majority vote[5].

Sir Edward Coke, the chief justice of king James I's reign was the originator of this concept. He maintained that the king should be under god and law. He established the supremacy of law against the executive and that there is nothing higher than law.

THE DOCTRINE OF RULE OF LAW:

The firm basis of the rule of law theory was expounded by Albert Venn Dicey (a British jurist and constitutional theorist). He developed the concept of rule of law in his book 'the law of the constitution' 1885. A.V. Dicey asserted on the fact that whenever there was discretion there was a room for arbitrariness which led to the insecurity of legal freedom of citizens. His theory has 3 pillars. Based on the concept that a government should be based on principles of law and not of men.

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[1] "Kelson's theory of grundnorm", Mridhusri Swarup <http://manupatra.com/roundup/330/article.

[2] 'common sense',Thomas Paine <http://ww.gutenberg.org/files/147/147-h.htm>

[3] Magna carta libertatum(medieval latin for "the great charter of the liberties") commonly called magna carta is a charter agreed to by King John of England at Runnymede, near Windsor, on 15 June 1215.

[4] William H.Dunham, "Magna Carta & British Constitutionalism, the Great Charter, Introduction by Erwin .N.Griswold (NY: Pantheon 1965).

[55] Locke, " Second Treatise of government, " p.47 (ss.88-89); p(65-66), *(p-123-124)

Supremacy of law:

In simple word, it says that no man is above law or can only be Punished for a breach of the law. Every person is governed by law including those who are administering it and also governs the law makers while exercising their powers to make and administer the law. They are bound to justify their act by proper reasoning otherwise the whole motive of the doctrine is hampered.

Equality before law:

The principle of equality before law seeks to ensure that the law is administered and enforced in a just manner. It is not enough to have a fair law but the law must be applied in a just manner as well. The law cannot discriminate between people in matters of sex, religion, race, caste etc. This concept of the rule of law has been codified in the Indian Constitution under Article 14 and Universal Declaration of Human Rights under the preamble and art7.Dicey criticised the French legal system because there were separate tribunals for deciding cases of citizens and government officials separately.

Predominance of legal spirit:

It means that the general principles of constitution are the result of the judicial decisions taken in the court of law while deciding the rights of the parties approached the court.

Dicey observed that in France the government officials are exercised wide discretionary powers and if there was any dispute between a government officials and a private individual, it was tried not by an ordinary court but by a special administrative court[6]. But in England, all 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[7].

RULE OF LAW IN INDIA:

The constitution of India intended for India to be to be a country governed by the rule of law. It provides that the constitution shall be the supreme power in the land and legislative and executive derive their authority from the constitution. Any law that is made by the legislative has to be on conformity with the constitution, failing which it will be declared invalid, this is provided for under art 13(1).

In ADM Jabalpur v. Shivkanth Shukla[8], the question before the court was whether there was any rule of law in India apart from art 21 in the context of suspension of enforcement of art 14, 21 and 22 during the proclamation of emergency. The answer of the majority of the bench was in negative for the question of law. However justice A R Khanna dissented from the majority opinion and observed that "even in absence of art 21 in the constitution, the state has got no power to deprive a person of his life and liberty without the authority of law. Without such sanctity of life and liberty, the distinction between a lawless society and one governed by laws would cease to have any meaning. Rule of law is now the accepted norm of all civilised societies".

The Hon'ble Supreme court expressed the rule of law as one of the most important aspects of the doctrine of basic structure. It also declared that art 14 stands against arbitrariness. The central and most characteristic features is the concept of rule of law which means, in the present context, the authority law courts to test all administrative action by the standard of legality. The executive or administrative action that does not meet the standard will be set aside if the aggrieved person brings the matter into notice.

The Supreme Court in the case Union of India v. Raghubir Singh[9], held that 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 Maneka Gandhi v. Union of India[10], the hon'ble supreme court held that art 21 requires the following conditions to be fulfilled before a person is deprived of his life and liberty.

- That there must be a valid law.

[6] Conseil d'etat also known as the council of state.
[7] Jain & Jain, "Principles of Administrative Law", 2013(6th ed).
[8] AIR 1976 SC 1207, 1976 SCR 172.
[9] 1989 AIR 1933, 1989 SCR (3) 316.
[10] 1978 AIR 597, 1978 SCR (2) 621.

- The law must provide procedure.
- The procedure must be just, fair and reasonable.
- The law must satisfy the requirements of art 14 and 19.

In the case of Indira Nehru Gandhi v. Raj Narain[11], the supreme court declared art 329A as invalid, since it was clearly applicable only to the then PM and was an amendment to benefit only individual. It was decided that the law of the land is supreme and must prevail over the will of one person.

In Bachan Singh v. State of Punjab[12], it was held that the rule of law has three basic and fundamental assumptions. They are:

- Law making must be essentially in the hands of a democratically elected legislature.
- Given in the hands of the democratically elected legislature, there should not be unfettered legislative power.
- There must be independent judiciary to protect the citizens against exercises of executive and legislative power.

The constitution also ensures an independent an impartial judiciary to settle disputes and grievances for violation of fundamental rights by virtue of articles 32 and 226. In the Union of India v. President, Madras Bar Association[13], 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; 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".

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. Rule of law is also reflected in the independence of the judiciary.

Exception:

It is to be noted that there are few exceptions to the rule of equality. According to art 361, the President or the Governor or Rajpramukh[14] of a state shall not be answerable to any court for the exercise and performance of the powers and duties of his office or any act done or purporting to be done by him in the exercise and performance of those powers and duties provided that the conduct of the President may be brought under review by any court, tribunal or body appointed or designated by either house of Parliament for the investigation of a charge under Article 61, provided that this shall not restrict right of any person to bring appropriate proceedings against the Government of a State.

The judges have also been allowed some special privileges and protection. A judge of the Supreme Court or the High Court cannot be removed from his office except by an order of the President passed after an address by each house of Parliament supported by a total majority of the total membership of that house and by a majority of not less than two-thirds of the members of the house present and voting has been presented to the President in the same session for such removal on the ground of proved misbehaviour or incapacity.

Besides, foreign diplomats are also allowed immunity from the jurisdiction of the courts. No discussion shall take place in Parliament with respect to the conduct of any judge of the Supreme Court or the High Court in discharge of his duties except upon a motion for presenting an address to the President praying for the removal of the judge.

Such exceptions have been created by the Constitution which is the supreme law of the country and, therefore, the persons enjoying such privileges cannot be said to be above the law.

[11] 1975 AIR 865, 1975 SCR (3) 333.
[12] 1980 SCC (2) 684.
[13] (2010) 11 SCC 1.
[14] They were the appointed governors of certain provinces and states from 1947 to 1956.

DARKER SIDE OF RULE OF LAW IN INDIA:

The principle of rule of law is embedded in India but "sadly the term is often used and over used in rhetoric and political arguments". The UN's UDHR[15] mentions in the preamble that "human rights should be protected by the rule of law", although this is the only mention of rule of law in UDHR. Practitioners of rule of law consider it primarily as a measure of democracy. They also look into the institutional aspects that are necessary to operate rule of law towards reform. This would imply rule of law as both solution and measure. The United Nation's and WLR's rule of law indicators are mainly associated with the absence of corruption, open Government, fundamental human rights, access to justice and clear regulatory framework.

India was ranked 59th[16] in the rule of law index, 2015, released by the world justice project (WJP). A total of 102 countries where reviewed, and Denmark was ranked first and Venezuela was ranked the last. India's immediate neighbours: Nepal, Sri Lanka, Bangladesh and Pakistan were ranked 48, 58, 93 and 98 respectively. But then, what is rule of law and how is it relevant to 21st century India?

The question of encroachment of the judicial over the other organs of the government in the name of activism always persists. The extent to which the courts can limit exercise of other organs is to be pondered upon. The principle of rule of law does not also allow the self -conferment of power by the judiciary. The court's interpretation and judgements are never solely adequate to ensure the observance of rule of law. Corruption, fake encounters, unfair policies all undermine rule of law. India is ranked 85 out of 179 countries in transparency international's corruption perceptions index[17], although it's core has improved consistently from 2.7 in 2002 to 3.4 in 2008. A recap of the news headlines of the past few months in India would show a callous approach to rule of law. Disregard and disrespect to law has somewhat become the norm in certain parts of the country. This incidents are not caused for concern but also reflect you of the country's condition.

DRAWBACKS OF RULE OF LAW:

Dicey was factually wrong in his analysis as he ignored the privileges and immunities enjoyed by the crown (and thus the whole government) under the cover of constitutional maxim the king can do no wrong and also ignored the many statutes which conferred discretionary powers on the executive which could not be called into the question in ordinary courts. He also ignore the growth of administrative tribunals.

Dicey misunderstood and miscomprehended the real nature of French Droit Administratiff[18]. He thought that this system designed to protect officials from liability for their acts, and as such, was inferior to the British system of ordinary courts deciding disputes between the citizen and the state. But, as later studies have revealed, Droit Administrative is in certain respects more effective in controlling the administration than the common law system. Dicey was denying the existence of administrative law in England.

A grave defect in Dicey's analysis is his insistence on the absence not only of "arbitrary" but even of "wide discretionary" powers. The needs of the modern government make wide discretionary power inescapable. Perhaps the greatest defect of the concept has been its misplaced trust in the efficacy of judicial control as a panacea for all evils, and somewhat irrational attitude generated towards the French system.

CONCLUSION:

Every concept has its own fames and flaws. Hence, the concept of Rule of Law has its own advantages and disadvantages. The concept of rule of law has been used in several propositions and deductions to restrain the undue increase in power or to constrain the arbitrary exercise of administrative powers and creates controls over such powers. The concept of rule of law also serves as a basis of Judicial Review of the administrative actions. The negative impact is that the need of modern government is a wide discretionary powers which is an incredible want of a modern administration as well. Hence, there needs to be an administrative system with essential discretionary along with sufficient prevention over such powers to regulate a modern welfare society.

[15] The universal declaration of human rights adopted on 10th December 1948.
[16] The World Justice Project: Rule of Law 2015.
[17] CPI ranks 176 countries from 100 (very clean) to 0(highly corrupt).
[18] French Administration Law.