

Golden Research Thoughts



Abstract:-

The term 'rule of law' is derived from the French maxim "La Principe de Legalite" which means the principles of legality which refers to a government based on principles of law and not of men. In this sense the concept of rule of law is opposed to arbitrary powers. It is a state of affairs in which there are legal barriers to government arbitrariness and there are available legal safeguards for the protection of the individuals.



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DICEY'S CONCEPT OF RULE OF LAW: A CRITICALLY STUDY

INTRODUCTION

In simple words, it is the reverse of tyranny, the antithesis of the rule of anarchy and fear. It is one of the basic principles of the English Constitution. This doctrine has been enshrined in the constitution of the U.S.A and in the Constitution of India as well. The main originator of this doctrine is Sir Edward Coke. According to him the king must be under the god and the law. Thus he maintained supremacy of law against the executive action. Then Dicey developed this doctrine of Coke in his classical book, 'The Law and the Constitution' published in the year 1885. According to him, the rule of law is one of the cardinal principles of the English legal system. He attributed the following three meanings of the doctrine:

1. Supremacy of law
2. Equality of law
3. Predominance of legal spirit

1. Supremacy of Law – According to Dicey the rule of law means absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power or wide discretionary power. It excludes the existence of arbitrariness of prerogative power or even wide discretionary power or even wide discretionary authority on the part of government. According to him the Englishmen were ruled by the law and law alone and denied the wide arbitrary or discretionary power of the government because “Whenever there is discretion, there is room for arbitrariness” which led to the insecurity of legal protection of the citizens. It implies that justice should be done only according to the established principles of law and not according to the discretion vested with the government officials.

2. Equality before the law – It means that there must be equality before law or the equal subjection of all classes to the ordinary law of land administered by the ordinary law courts. In England, Dicey maintained that all persons were subject to one and the same law and there were no extraordinary tribunals or special courts for officers of the government and other authorities.

3. Predominance of the legal spirit – According to Dicey the predominance of the legal spirit flows from the customs, traditions and general principle of law recognized by the courts in the administration of justice. In countries, where is written constitution the fundamental rights is basic principle of the constitution cannot be abrogated even by amending the constitution. In this way rule of law postulates judicial supremacy.

Evaluation of Dicey's concept of Rule of law – Dicey's concept of rule of law has its own advantages and disadvantages. The advantages are that it gives preference to the supremacy of regular law over administrative discretion, so that citizens may be given equality before law. The main advantages are as follows:

1. The rule of law is an expression of an endeavor to give reality to something which is not readily expressible, due to identification of the rule of law with the concept of rights of man. It has a real and positive content which must be secured principally by the ordinary courts.
2. It proved to be a powerful instrument in controlling the administrative authorities within their limits.
3. It worked as a kind of touchstone to judge and test the validity of administrative actions.
4. It is bound upon the liberty of individuals and harmonizing the opposite notions of individuals' liberty and public order.
5. It saves the citizens from arbitrary exercise of power.

LOOPHOLES IN DICEY'S CONCEPT OF RULE OF LAW

1. Exclusion of discretionary powers - In his concept Dicey totally excluded discretionary power and also insisted that the administrative authorities should not be given wide discretionary powers because according to him “whenever there is discretion there is room for arbitrariness.”
2. Difference between arbitrary powers and discretionary powers – Dicey failed to distinguish arbitrary powers from discretionary powers. While arbitrary power is anti-thesis of the concept of Rule of Law but discretionary powers would not be if it is exercised in fair, proper and positive manner. In modern time, no intensive government can perform its function without the granting of discretionary powers. But Dicey proved unsuccessful in his explanation.
3. Misconception regarding discretionary powers – According to American writer K.C Davis, it was impossible to find a Government of laws alone and not of men, in the sense of eliminating all discretionary powers. In *Indira Nehru Gandhi v. Raj Narain Case*, the Hon'ble Justice Mathew of the Supreme court of India said that, “If it is contrary to rule of law that discretionary authority should not be given to government departments or public officers, then there is no rule of law in any modern state.” What “rule of law” requires is that “the courts should prevent the abuse of discretionary powers.”
4. Ignored the growth of Administrative Tribunal – Dicey was against the establishment of administrative tribunal. According to him all the cases should be decided by ordinary courts and all persons should be given equal protection of law. There should not be special courts which deal with special peoples.

5. Distrust towards Administrative Law – Dicey showed the distrust towards the existence of administrative law because he thought that the French system is administrative law, when administrative law is more than that. In fact Dicey was concerned not with the whole body of law relating to administration, but with a single aspect of it, namely, administrative adjudication. According to Dicey, there is no administrative law in England.

MODERN CONCEPT OF RULE OF LAW

With the changing needs of society, the concept of Rule of Law also changed. The modern concept is fairly wide and sets up an ideal for any government to achieve. In 1959, the modern concept of Rule of Law was developed by the International Commission of Jurists, which was later on confirmed at Lagos in 1961. The jurist proclaimed:

The rule of law is a dynamic concept which should be employed not only to safeguard and advance the civil and political rights of the individual in a free society but also to establish certain social, economic, educational and Cultural conditions, under which his legitimate aspirations and dignity may be realized.

From this report, it is clear that rule of law depended not only on the existence of adequate safeguards against the abuse of power by the executive but also on the existence of effective Government capable of maintaining law and order and ensuring social and economic conditions of life for society.

RECENT SCENARIO OF RULE OF LAW IN INDIA

In India, the concept of “the Rule of Law” is not well defined in any statute. Like many other concept, it is a viable and dynamic concept which is not capable of any exact definition. It is considered as a basic and fundamental necessity for a disciplined and organized community. In Constitutional point of view, it permeates the entire fabric of the Constitution and indeed forms one of its basic features. The necessary element of rule of Law is that the law must not be arbitrary or irrational and it must satisfy the test of reason and the democratic form of the polity seeks to ensure this element by making the framer of law accountable to the people.

In *A. K. Kraipak v. Union of India*, the Supreme Court said that under our Constitution “the Rule of Law pervades over the entire field of administration and every organ of the State is regulated by the Rule of Law”. Again in *Daryao v. State of U.P.*, asserted that “Rule of Law” was obviously such basis of the administration of justice at which “Constitution lays so much emphasis.”

In the sphere of Administrative law, a significant derivative from Rule of Law is judicial review of administrative action to ensure that the Administration acts according to law. Generally it is invoked so that administrative authorities cannot misuse discretionary powers and exercise its power in lawful manner. It also requires that any abuse of power by public authorities should be subject to control of courts.

In *Som Raj v. State of Haryana*, it was held by the Supreme Court that normally, the order of appointment would be in order of merit of candidates from the select list. Even when the discretion is conferred on an executive authority, it must be exercised in a reasonable manner and should not be exercised arbitrarily. The absence of arbitrary power is first postulates of the rule of law upon which our whole constitutional edifice is based.

In *State Financial Corporation v. Jagadamba Oil Mills*, the Supreme Court emphasized the obligation to act fairly on the part of the administrative authorities was involved to ensure the rule of law and to prevent failure of justice. This doctrine is complimentary to the principles of natural justice which the quasi-judicial authorities are bound to observe.

Again in *V.C. Mohan v. Union of India*, the Apex Court held that the draconian concept of law has had its departure quite some time back and rule of law is the order of the day. It is this rule of law which should prompt the law Courts to act in a manner fair and reasonable having due regards to the nature of the offences and vis-à-vis the liberty of the citizens. In this case, detention of the petitioner made under the COFEPOSA Act, 1974, without placing the relevant material before the detaining authority, by the sponsoring authority, within time prescribed, was quashed by the Apex Court as unlawful and illegal.

In *T.N. Godavarman Thirumulpad v. Ashok Knot*, the Supreme Court while explaining the rule of law observed that Any Country or society professing rule of law as its basic feature or characteristic does not distinguish between high or low, weak or mighty. Only monarchies and even some democracies have adopted the age old principle that the King cannot be sued in his own Courts.

From the study of all Case Law, it is clear that our Indian Constitution aims at rule of law and not a rule of men. The entire person, whether he is high or low, come under the law and the Constitution. All the Constitutional or Administrative authorities must, therefore, function within the Constitutional limits. In a rule of law system, there is nothing like absolute or unbridled power exercisable at the whims or fancies of repository power. Though for the performance of functions, authorities has been given wide discretionary power but such discretionary power has to be exercised only according to well organized and sound juristic principles with a view to promoting fairness, transparency and equity. In the present scenario, the main object of rule of law is to fulfill the basic needs or welfare of citizens to bring equality amongst the men in the society.

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1. Ex-Attorney General Mr. Mannigham Buller, quoted in S. Rajagopalan, Administrative Law, 1970, 57.
 2. Sir Edward Coke was the Chief Justice in the courts of James I. He was credited with being the originator of the concept of "rule of law".
 3. The Law and the Constitution; VIII, 198.
 4. Ibid.
 5. K.C. Davis, Administrative Law, 1984, 19.
 6. AIR 1975 SC 2299.
 7. Wade and Forsyth, Administrative Law, 2007, 23.
 8. It is known as Delhi Declaration, 1959.
 9. Report, International Commission of Jurists, 1959.
 10. Bachan Singh v. State of Punjab, AIR 1982 SC 1325, para 10 : (1982) 3 SCC 24.
 11. AIR 1970 SC 150.
 12. AIR 1961 SC 1457.
 13. A.D.M. Jabalpur v. S. Shukla, AIR 1976 SC 1207, para 154 : (1976) 2 SCC 521.
 14. State of Punjab v. Khanchand, AIR 1974 SC 543, para 37 : (1974) 2 SCR 768.
 15. (1990) 2 SCC 653.
 16. AIR 2002 SC 834; K. S. R. T. Corpn. V. Ashrafulla Khan, AIR 2002 SC 629.
 17. AIR 2002 SC 1205.
 18. Prof. Narender Kumar, Nature and Concept of Administrative Law, Allahabad Law Agency, Faridabad, Haryana, 2011, 43.
 19. AIR 2006 SC 2007.
 20. Pancham Chand v. State of H.P., (2008) 7 SCC 117, 123-24 (para 18).
 21. Maya Devi v. Raj Kumar Batra, (2010) 9 SCC 486, 495 (para 28).