ISSN: 2582 - 2942

LEX FORTI

LEGAL JOURNAL

VOL- I ISSUE- V

JUNE 2020

ISSN: 2582 - 2942

DISCLAIMER

ISSN: 2582 - 2942

EDITORIAL BOARD

ISSN: 2582 - 2942

EDITORIAL BOARD

ISSN: 2582 - 2942

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RULE OF LAW IN ADMINISTRATIVE LAW

Anish Roy

INTRODUCTION

Rule of law is classical principle of administrative law. As a matter of fact this principle was one of the principles that acted as impediment development of Administrative Law principles. The irony further is that the rule of law is now an important part of modern Administrative Law. Whereas the rule of law is still the one of the very important principles regulating in common law countries and common law derived countries modern laws has denied some of the important parts of rule of law as proposed by Dicey at the start of 19th Century.

Dicey defined rule of Law as the "absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power and excludes the existence of prerogatives or even wide discretionary power on the part of government".[1] Dicey asserted that wherever there is discretion, there is room for arbitrariness which leads to legal insecurity of citizens.

Other aspect of Dicey's Rule of Law is equality before law or equal subjection of ordinary law to all class of people by ordinary court. Whereas he asserted that the French *Droit Administratif* is a bad law where there are separate tribunals for different matters, he further insisted that England hadn't any of similar or same system existed.[2]

The later view of Dicey about the equality and dominance of law over arbitrariness set standard of most civilized Constitutions of world. However, the later views on *droit administrative* impaired the development of Administrative law at very early stage where it required a support. The Administrative Law was, for almost all the time, including Dicey's dominion, was present, but, was never recognized as it should have been for a neat and satisfactory development in common law countries.

The presence of Administrative Law and its inevitable nature is clear by the recognition of some of the scholar's contemporary to Dicey. Maitland was one of those scholars who have recognized the presence of Administrative Law in England.[3] It is also evident that the presence of Administrative Law was substantial but was ignored by Dicey in his early era. The famous case of *Board of Education v. Rice*[4] and *Local Government Board v. Arlidge*[5] affirmed the practice of Administrative Law in England. It is evident that it is after this case that Dicey realized the presence

[1] The Law of Constitution, pg 198;
[2] M.P JAIN, S.N. JAIN, *Principles of Administrative Law*, Wadhwa Nagpur, 5th Ed.;
[3] *Maitland, Constitutional History of Britain*, 1908, pg .501;
[4] 1911 AC 179;
[5] 1915 AC 129;

of Administrative Law in a positive form. He however maintained that the presence of *Droit Administratif* in England is no body's case and that rule of law must be preserved.

The rule of law, as propounded by Dicey has its own advantages and disadvantages. Apart from setting the base for all common law country, it has also provided the base for Administrative law principles are set. It is a method by executive in general and government in particular is kept in control against the misuse of wide power vested in them. It also eliminates unreasoned discretion, bias and arbitrariness in governance that emanates from wide power of executive. Moreover, the rule of law gives supremacy of Courts over all other functionaries of State. This leads to the further curbing where government can't be judge in his own cause.

Dicey's submission of rule of law has its disadvantages as well. Where the Dicey's rule of law eliminated presence of arbitrary power in government, it also eliminated the "wide discretionary" power from the government. The protest of Dicey in presence of wide discretionary power in government would lead to the failure of policies and implementation of law as required apart from bad assessment before the formulation of policy. The biggest mistrust being the efficacy of judiciary in managing affairs of the state in the Dicey's Rule of Law.

DEVELOPMENT OF RULE OF LAW IN INDIA

Fundamental rights enshrined in part III of the constitution is a restriction on the law making power of the Indian Parliament. It includes freedom of speech, expression, association, movement, residence, property, profession and personal liberty. In its broader sense the Constitution itself prescribes the basic legal system of the country. To guarantee and promote fundamental rights and freedoms of the citizens and the respect for the principles of the democratic State based on rule of law. The popular habeas corpus case, **ADM Jabalpur v. Shivakant Shukla**[6] is one of the most important cases when it comes to rule of law. In this case, the question before the court was 'whether there was any rule of law in India apart from Article 21'. This was in context of suspension of enforcement of Articles 14, 21 and 22 during the proclamation of an emergency. The answer of the majority of the bench was in negative for the question of law. However Justice H.R. Khanna dissented from the majority opinion and observed that "Even in absence of Article 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…"

[6] AIR 1976 SC 1207

The secondary meaning of rule of law is that the government should be conducted within a framework of recognized rules and principles which restrict discretionary powers. The Supreme Court observed in **Som Raj v. State of Haryana**[7] 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. The third meaning of rule of law highlights the independence of the judiciary and the supremacy of courts. It is rightly reiterated by the Supreme Court in the case **Union of India v. Raghubir Singh**[8] that it is not a matter of doubt that a considerable degree that governs the lives of the people and regulates the State functions flows from the decision of the superior courts.

Although, complete absence of discretionary powers, or absence of inequality are not possible in this administrative age, yet the concept of rule of law has been developed and is prevalent in common law countries such as India. The rule of law has provided a sort of touchstone to judge and test the administrative law prevailing in the country at a given time. Rule of law, traditionally denotes the absence of arbitrary powers, and hence one can denounce the increase of arbitrary or discretionary powers of the administration and advocate controlling it through procedures and other means. Rule of law for that matter is also associated with supremacy of courts. Therefore, in the ultimate analysis, courts should have the power to control the administrative action and any overt diminution of that power is to be criticized. The principle implicit in the rule of law that the executive must act under the law and not by its own fiat is still a cardinal principle of the common law system, which is being followed by India.

In the common law system the executive is regarded as not having any inherent powers of its own, but all its powers flow and emanate from the law. It is one of the vital principles playing an important role in democratic countries like India. There is a thin line between judicial review and judicial activism. Rule of law serves as the basis of judicial review of administrative action. The judiciary sees to it that the executive keeps itself within the limits of law and does not overstep the same. Thus, judicial activism is kept into check. However there are instances in India where judiciary has tried to infringe upon the territory of the executive and the legislature. A recent example of this would be the present reservation scenario for the other backward classes. The judiciary propagated that the creamy layer should be excluded from the benefits of the reservation policy, whereas the legislature and the executive were against it.

[7] 1990, 2, SCC 653
[8] 1989,2, SCC 754; 1989 SCR(3) 316

As mentioned before Dicey's theory of rule of law has been adopted and incorporated in the Indian Constitution. The three arms judiciary, legislature and executive work in accordance with each other. The public can approach the high court's as well as the Supreme Court in case of violation of their fundamental rights. If the power with the executive or the legislature is abused in any sorts, its malafide action can be quashed by the ordinary courts of law. This can be said so since it becomes an opposition to the due process of law. Rule of law also implies a certain procedure of law to be followed. Anything out of the purview of the relevant law can be termed as ultra vires.

No person shall be deprived of his life or personal liberties except according to procedure established by law or of his property save by authority of law. The government officials and the government itself is not above the law. In India the concept is that of equality before the law and equal protection of laws. Any legal wrong committed by any person would be punished in a similar pattern. The law adjudicated in the ordinary courts of law applies to all the people with equal force and bidingness. In public service also the doctrine of equality is accepted. The suits for breach of contract etc against the state government officials, public servants can be filed in the ordinary courts of law by the public.

In Chief settlement **Commr Punjab v. Om Prakash**[9], it was observed by the supreme court that, "In our constitutional system, the central and most characteristic feature is the concept of rule of law which means, in the present context, the authority of law courts to test all administrative action by the standard of legality. The administrative or executive action that does not meet the standard will be set aside if the aggrieved person brings the matter into notice."

In India, the meaning of rule of law has been much 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 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. In **Kesavanda Bharti vs. State of Kerala**[10] the Supreme Court enunciated the rule of law as one of the most important aspects of the doctrine of basic structure.

[9] 1961 AIR PUJ 1782
[10] 1973,4 SCC 225

In **Menaka Gandhi vs. Union of India**[11] The Supreme Court declared that Article 14 strikes against arbitrariness. In **Indira Gandhi Nehru vs. Raj Narain**[12] 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 abridges the basic structure of the Constitution.

In Secretary, **State of Karnataka and Ors. vs. Umadevi and Ors**[13] a Constitution Bench of this Court has laid down the law in the following terms "Thus, it is clear that adherence to the rule of equality in public employment is a basic feature of our Constitution and since the rule of law is the core of our Constitution, a court would certainly be disabled from passing an order upholding a violation of Article 14 or in ordering the overlooking of the need to comply with the requirements of Article 14 read with Article 16 of the Constitution."

Moreover, In the case of **Bachan Singh vs. state of punjab**[14] Singh Justice Bhagwati has emphasized that rule of law excludes arbitrariness and unreasonableness. To ensure this, he has suggested that it is necessary to have a democratic legislature to make laws, but its power should not be unfettered, and that there should be an independent judiciary to protect the citizens against the excesses of executive and legislative power.

CRITICISM

Dicey's first principle (supremacy of regular law as opposed to the influence of arbitrary power) has been seriously challenged, due to the proposition that the rule of law excludes even wide discretionary authority by the government. The modern government depends on many discretionary powers granted to the executive by the large numbers of statutes annually passed by parliament or other legislature. It seems that Dicey's theory may be interpreted to reject the thousands of rules in our society made through the discretion of delegated authorities. This first principle also cancel out the fact that, as a matter of essential competence, many present day statutes allow police the power to detain people for a short period of time due only to a reasonable suspicion. Ivor Jennings has also indicated that arbitrary power may be increased in national

[11] 1978 AIR KAL 597
[12] 1975 AIR UP 685; 1975 SCR(3) 333
[13] 1990, 1 SCR 544
[14] 1980,2 SCC 684

emergencies, such as war. This was reflected in the drastic powers given to the English government by the Defense of the Realm Act in 1914.

Dicey's second meaning stresses the equal subjection of all persons to the ordinary law.[15] What a constitutional guarantee of equality before law may achieve is to enable legislation to be invalidated which discriminates between citizens on grounds that are considered irrelevant, unacceptable or offensive. These views of Dicey long impeded the proper understanding of administrative law, but today the need for such law in a democracy cannot be denied. Administrative courts as they may exist protect the individual against unlawful acts by public bodies.[16]

Dicey's second principle (equality before the ordinary law of the land) may also be challenged in today's law. Although it is true that public officials who commit crimes or torts are liable before the ordinary courts (except for circumstances of non-justifiability, such as in The Church of Scientology v Woodward, it is not true that those public officials and private citizens have the same rights, and are thus equal. "A tax investigator, for example, has powers which the taxpayer does not possess".[17] Furthermore, members of the police force may be able to exercise considerably more lawful power over members of society than the average citizen lawfully could.[18]

The principle of equality before the law has raised significant problems for the rule of law. It would be unjust if the law failed to account for social difference and disadvantage, and simply presumed that everyone was equal and should be treated equally. This led Hayek to attempt to adapt the rule of law in a manner that Joseph Raz thought created "exaggerated expectations" for it . Hayek stated: "The requirement that the rules of true law be general does not mean that sometimes special rules may not apply to different classes of people if they refer to properties that only some people possess... Such distinctions will not be arbitrary; will not subject one group to the will of others, if they are equally recognized as justified by those inside and those outside the group". This statement lead Raz to allege it was a guarantee of freedom and a "slippery slope leading to the identification of the rule of law with the rule of good law".[19]

Dicey's third meaning of the rule of law expressed a strong preference for the principles of common law declared by the judges as the basis of the citizens‟ rights and liberties. Dicey had in mind the fundamental political freedoms- freedom of the person, freedom of speech, freedom of association. Today it is difficult to share Dicey's faith in common law as the primary legal means

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[15] SAM KALEN, *The transformation of Modern Administrative Law: Changing Administrations and Environmental Guiodence Documents,* Regents of University of California, 2008

[16] M.P. JAIN AND S.P. JAIN, *Principles of Administrtive Law*, Wadhwa Nagpur, 5th Ed., 2007

[17] ARD A EPSTEIN, *Why the Modern Administrative Law is inconsistent with Rule of Law*, NYU Journal of Law and Liberty, 2008;

[18] PILAR DOMINGO*, Why Rule of Law Matters for Development*, Overseas Development Institute, May, 2009;

[19] PETER CANE, *An Introduction to Administrative law*, Clarendon Press, Oxford, 3rd Ed.

of protecting the citizen's liberties against the state. First, fundamental liberties at common law may be eroded by Parliament and thus acquire a residual character. Secondly, the common law does not assure the citizen's economic and social well-being. Third, while it remains essential that legal remedies are effective, there is value in a declaration of the individual's basic rights and in creating judicial procedures for protecting those rights. Diceyan theory may be further criticized due to his perception of the "sovereignty of Parliament and the supremacy of the rule of (ordinary) law". Keith Mason has pointed out that Australian parliaments may be supreme, but they are not sovereign. "The rule of law affirms parliament's supremacy while at the same time denying it sovereignty over the Constitution." Criticisms of Diceyan theory have lead to different formulations of the rule of law; but Dicey's formulation still reflects some of the fundamental principles of the rule of law. In following his formulation some commentators prefer the narrow term „government under law" rather than „rule of law". However some commentators prefer to formulate the rule of law, not as an actual rule of law in itself, but as a "statement of constitutional and juridical principle, a juristic reserve, an idea of a profound legality superior, and possibly anterior, to positive law. It is not easy to define with precision, because in part it manifests itself more as an absence than a presence, rather like those other great negatives, peace and freedom".

CONCLUSION

The rule of law is central theme to all democratic and civilized society of this world. The concept forms the basic framework of all legal system. It is one of the tools by which the unfettered power of executive is kept under control through supremacy of Courts. Though the rule derives from common law system, particularly from Dicey and it met terrible opposition due to other option of much efficient system of *Droit Administratif,* it still forms the backbone of all civilized legal system of world. The rule of law and supremacy therein, however, shouldn't be the only principle engraved in a legal system. This further becomes true when the legal system has large domain of implementation and further when there are expertise require in various domain for the several issues.

In conclusion, a fine system and a well homogenized solution of rule of law and *Droit Administratif* is the most optimum solution for the efficient dispute resolution system. The two systems shouldn't be staged inferior to one another and basic constitutional principles must be followed for the most optimum solution.