

# CONCEPT OF RULE OF LAW

The concept of Rule of Law is that the State is governed, not by the ruler or the nominated representatives of the people but by the law. A country that enshrines the Rule of Law would be one where in the grundnorm 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 monarch or the representatives of the republic are governed by the laws derived from of the grundnorm and their powers are limited by the law. The King is not the law but the law is king.

The origins of the Rule of Law theory can be traced back to the Ancient Romans during the formation of the first republic; it has since been championed by several medieval thinkers in Europe such as Hobbs, Locke and Rousseau through the social contract theory. Indian philosophers such as Chanakya have also espoused the Rule of Law theory in their own way, by maintaining that the King should be governed by the word of law. The formal origin of the word is attributed to Sir. Edward Coke, and is derived from French phrase '*la principe de legalite*' which means the principle of legality. The firm basis for the Rule of Law theory



was expounded by Dicey and his theory remains the most popular. Dicey's theory has three pillars based on the concept that "a government should be based on principles of law and not of men", these are:

## **LAW IS SUPREME**

This has always been the basic understanding of Rule of Law that propounds that the law rules over all people including the persons administering the law. The lawmakers need to give reasons that can be justified under the law while exercising their powers to make and administer law.

## **EQUALITY BEFORE THE LAW**

While the principle of supremacy of law sets in place the checks and balances over the government in making and administering law, the principle of equality before the 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 etc. This concept of the Rule of Law has been codified in the Indian Constitution under Article 14 and the Universal Declaration of Human Rights under its preamble and Article 7.

## **PREDOMINANCE OF LEGAL SPIRIT**

In including this as a requirement for the Rule of Law, Dicey's belief was that it was insufficient to simply include the above two principles in the constitution of the country or in its other laws for the State to be one in which the principles of Rule of Law are being followed. There must be an enforcing authority and Dicey believed that this authority could be found in the courts. The courts are the enforcers of the Rule of Law and they must be both impartial and free from all external influences. Thus the freedom of the judiciary becomes an indispensable pillar to the Rule of Law.



In India, the concept of Rule of Law can be traced back to the Upanishads. In modern day as well, the scheme of the Indian Constitution is based upon the concept of Rule of Law. The framers of the Constitution were well familiar with the postulates of Rule of Law as propounded by Dicey and as modified in its application to British India. It was therefore, in the fitness of things that the founding fathers of the Constitution gave due recognition to the concept of Rule of Law.

The doctrine of Rule of Law as enunciated by Dicey has been adopted and very succinctly incorporated in the Indian Constitution. The ideals of the Constitution viz; justice, liberty and equality are enshrined in the Preamble itself (which is part of the Constitution).

The Constitution of India has been made the supreme law of the country and other laws are required to be in conformity with it. Any law which is found violating any provision of the Constitution, particularly, the fundamental rights, is declared void. The Indian Constitution also incorporates the principle of equality before law and equal protection of laws enumerated by Dicey.

The very basic human right to life and personal liberty has also been enshrined under Article 21. Article 19(1) (a) of the Indian Constitution guarantees the third principle of the Rule of Law (Freedom of Speech and Expression). No person can be convicted of any offence except for violation of a law in force at the time of the commission of the Act charged as an offence is also very well recognized in the Indian Constitution. The principles of double jeopardy and self-incrimination also found its rightful place in the Constitution. Articles 14, 19 and 21 are so



basic that they are also called the golden rule of the Indian Constitution.

The Constitution also ensures an independent impartial Judiciary to settle disputes and grievances for violation of fundamental rights by virtue of Articles 32 and 226. In **Union of India v. President, Madras Bar Association**, 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; and that disputes as to legality of Acts of the Government will 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 any legitimate power which is arbitrary in character and travels beyond the bounds of reason."

## **RULE OF LAW-Part of the Basic Structure of Indian Constitution**

The Constitution (First Amendment) Act, 1951, shocked the status of Rule of Law in India. The question which came up for consideration in **Shankari Prasad v. Union of India** was whether the fundamental rights can be amended under Article 368. The Supreme Court held that Parliament has the power to amend Part III of the Constitution under Article 368 as under Article 13 'law' means any legislative Action and not a constitutional amendment. Therefore, a constitutional amendment would be valid if abridges any of the fundamental rights.

The question again came up for consideration in **Sajjan Singh v. State of Rajasthan** in which the Supreme Court approved the majority judgment in **Shankari Prasad** case and held that amendment of the Constitution means amendment of all provisions of the Constitution. Hon'ble Chief Justice Gajendragadkar held that if the framers of the constitution intended

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to exclude fundamental rights from the scope of the amending power they would have made a clear provision in that behalf.

However, both these cases were overruled by the Apex Court in **Golaknath v. State of Punjab** and it held that Parliament has no power to amend the Part III of the Constitution so as to take away or abridges the fundamental rights and thus, at the end the Rule of Law was sub-served by the Judiciary from abridging away. However, the Rule of Law was crumpled down with the Constitution (Twenty-Fourth Amendment) Act, 1971. Parliament by the way of this Amendment inserted a new clause (4) in Article 13 which provided that 'nothing in this Article shall apply to any amendment of this constitution made under Art 368'. It substituted the heading of Article 368 from 'Procedure for amendment of Constitution' to 'Power of Parliament to amend Constitution and Procedure thereof'. The Amendment not only restored the amending power of the Parliament but also extended its scope by adding the words "to amend by way of the addition or variation or repeal any provision of this constitution in accordance with the procedure laid down in the Article".

This was challenged in the case of **Kesavananda Bharti v. State of Kerala**, known as Fundamental Rights case. The Supreme Court by majority overruled the decision given in Golaknath's case and held that Parliament has wide powers of amending the Constitution and it extends to all the Articles, but the amending power is not unlimited and does not include the power to destroy or abrogate the basic feature or framework of the Constitution. There are implied limitations on the power of amendment under Article 368. Within these limits Parliament can amend every Article of the Constitution including article can tang Fundamental Rights. Thus, Rule of Law prevailed.

In **Kesavananda Bharti v. State of Kerala**, the Supreme Court States that "Our Constitution postulates Rule of Law in the sense of supremacy of the Constitution and the laws as opposed to arbitrariness." The thirteen Judges Bench also laid down that the Rule of Law is an "aspect of the basic structure of the



Constitution, which is even beyond the powers of parliament".

Rule of Law has been much expanded since Kesavananda case, and applied differently in different cases. In **Indira Nehru Gandhi v. Raj Narain**, the Supreme Court invalidated Clause (4) of Article 329-A inserted by the Constitution (39th Amendment) Act, 1975 to immunise the election dispute to the office of the Prime Minister from any kind of judicial review. The Court said that this violated the concept of Rule of Law which cannot be abrogated or destroyed even by the Parliament.

The **S.K. Shukla v. Jabalpur** known as Habeas Corpus case, Habeas Corpus case according to many scholars, is a black mark on the Rule of Law. The case entails Dicey's third principle of Rule of Law. The legal question in this case was whether there is any Rule of Law over and above the Constitutional Rule of Law and whether there was any Rule of Law in India apart from Article 21 of the Constitution regarding Right to life and personal liberty.

The majority Judges held that the Constitution is the mandate of the Rule of Law. They held that there can not be any Rule of Law other than the constitutional Rule of Law. Excluding moral conscience, they held that there cannot be any pre-/ post-Constitution Rule of Law which can run counter to the Rule of Law embodied in the Constitution, nor can there be any Rule of Law to nullify the constitutional provisions during the time of Emergency.

The majority Judges held that Article 21 is our Rule of Law regarding life and liberty. No other Rule of Law can have separate existence as a distinct right. The Rule of Law is not merely a catchword or incantation. It is not a law of nature consistent and invariable at all times and in all circumstances.

In a powerful dissent, Justice H.R. Khanna observed that "Rule of Law is antithesis to arbitrariness...Rule of Law is now the accepted form of all civilized societies...Everywhere it is identified