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## EVOLVING CONTOURS OF RULE OF LAW IN THE CONNECTED SOCIETY: AT A TURNING POINT?

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*“It should be the goal of Rule of law to see that ... multifarious and diverse encounters are fair, just and free from arbitrariness”*

— Justice P.N. Bhagwati

### ABSTRACT

The 12<sup>th</sup> of January, 2018, saw an unprecedented event in the history of the great Indian Democracy. The collegium judges of the Honorable Supreme court of India, apart from the Hon’ble CJI, brought forth the grave issues evident within the hallowed institution and the revered pillar of justice, into the common foray, to instill the thought of adjudging the justice delivered, and the real independence and quarantining of the judiciary to enforce the law of the land, the rule of law, in its true and absolute sense. This paper, under this scenario seems more crucial than ever, to help us understand the true application of rule of law in evidencing, though what takes place, has taken place, and what that must take place to ensure the primacy of the true spirit of the Grundnorm, the Constitution of India. Senior Advocate Rajeev Dhawan penned down his thoughts, writing, *“The four judges made public issues that go to the heart of the independence of the judiciary. If a CJI can't manage his colleagues and listen to their views, he fails in the constitutional task assigned to him”*<sup>1</sup>. This sheds a light to revisit the Diceyan view on the ‘Rule of law’ and to understand whether the independence of judiciary albeit the supremacy of the constitution is at a turning point so as to rethink on the true principles of rule of law as envisioned by Dicey or whether the interpretations of the Indian judiciary on the same, is healthy and supports the underlying meaning, in its true sense. The paper tries to understand the genesis and evolution of rule of law, and whether the interpretations gifted by the courts are sound and firmly established, so as to ignore this event as blip or whether they need to be re-concretized, by this event being a turning point, to go back to the true Diceyan understanding of ‘Rule of law’.

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<sup>1</sup> Rajeev Dhawan, ‘View: CJI must carry court with him’, The Economic Times, dt. 13 Jan, 2018.

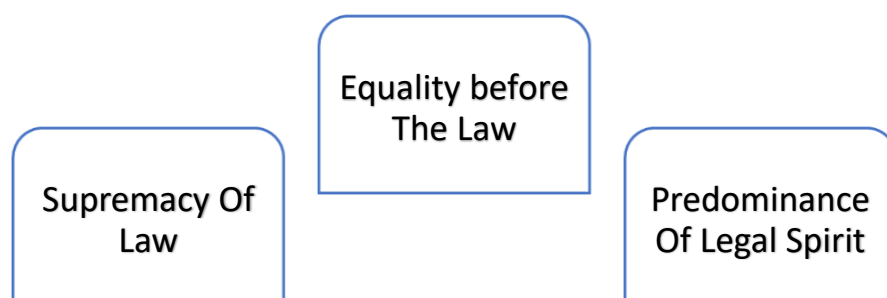
## INTRODUCTION: Understanding the concept of Rule of Law

Prof. A.V.Dicey, is a renowned jurist, known for his work on constitutional law. In the 19<sup>th</sup> Century he authored a seminal book, *'Introduction to the Study of the Law of the Constitution'*, where he outlined the principles of parliamentary sovereignty, which he is famous for. He called it an interplay between the Political sovereignty and social sovereignty.<sup>2</sup> This led him to propound the concept of 'Rule of law', which he believed to be essential for a sovereign for its functioning.

The expression 'Rule of Law' has been derived from the French phrase *'la principle de legalite'*, i.e. a Government based on the principles 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. The basis of Administrative Law is the 'Doctrine of the Rule of Law'. It was expounded for the first time by Sri Edward Coke, and was developed by Prof. A.V. Dicey.<sup>3</sup>

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"* <sup>4</sup>Dicey asserted that wherever there is discretion, there is room for arbitrariness which leads to legal insecurity of citizens. <sup>5</sup>

Dicey attributed three meanings to the doctrine of rule of law:



<sup>2</sup> V.D. Mahajan, "Jurisprudence & Legal Theory", 5<sup>th</sup> Edition, pg 104.

<sup>3</sup> Takwani C.K, "Lectures on Administrative Law" Third Edition Reprinted, 2004, pp17, Eastern Book Company, Lko

<sup>4</sup> The Law of Constitution, 1915, pg 198;

<sup>5</sup> Vivek Ranjan, 'Rule of Law and Modern Administrative law', (November 12, 2010). Available at SRN: <https://ssrn.com/abstract=1761506>

## **SUPREMACY OF LAW**

AV Dicey states that by rule of law, law should be void of arbitrariness or wide discretionary power. In other words every act will be controlled by law. According to Dicey, the English men were ruled by the law and law alone. The 'supremacy of law', also implies the absolute power of law, dominance and the supremacy of it. It is opposed to the influence of arbitrary power and wide discretionary power.

In Dicey's words, "wherever there is discretion, there is room for arbitrariness and that in a republic no less than under a monarchy discretionary authority on the part of the government must mean insecurity for legal freedom on the part of its subjects"<sup>6</sup>. Moreover, no man is punishable or can lawfully be made to suffer except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land.

## **EQUALITY BEFORE THE LAW**

The attribute of "Rule of Law" Dicey stated was "equality before the law and equal subjection of all classes to the ordinary law of the land administered by the ordinary law courts." The law administered should be the ordinary rule of law applicable to all the people equally irrespective of caste and creed or class.<sup>7</sup>

Dicey was of the view that, any encroachment on the jurisdiction of the courts and any restrictions on the subject's unimpeded access to them are bound to jeopardize his rights. The principle emphasizes everyone, including the government, irrespective of rank, shall be subject to the same law and courts.<sup>8</sup>

## **PREDOMINANCE OF LEGAL SPIRIT**

Dicey stated that, the Constitution is not the source but the consequence of the rights of the individuals. Here, Dicey emphasized on the role of the courts. Without an authority to protect and enforce the rights conferred upon citizen, their inclusion in a document etc. is of little value. Mere inclusion is not authoritative and its provisions might be abridged, trampled or overlooked.

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<sup>6</sup> The Law and the Constitution, 1915

<sup>7</sup> A.K. Yadav, 'Rule of law' International Journal of Law and Legal Jurisprudence Studies :ISSN:2348-8212:Volume 4 Issue 3,

<sup>8</sup> Supra.

Dicey states that many constitutions of the states (countries) guarantee their citizens certain rights (fundamental or human or basic rights) such as right to personal liberty, freedom from arrest etc. According to him documentary guarantee of such rights is not enough. Such rights can be made available to the citizens only when they are properly enforceable in the Courts of law, For Instance, in England there is no written constitution and such rights are the result of judicial decision<sup>9</sup> Prof Dicey suggested, the Constitution guarantee rights such as basic human rights or fundamental rights- it is not enough to have those rights in the book of law- they need to be effectively implemented in a court of law<sup>10</sup>

## ANALYSIS

### DEVELOPMENT OF RULE OF LAW IN INDIA

*(Note: The author would seek to analyse the objective in three parts, first, being the informative display of interpretations of the principle of 'rule of law', second, being its comparison with the Diceyan meaning and third being, using the comparison and applying to the scenario aforementioned in order to form a conclusion.)*

The first instance of the mention of 'rule of law', *ROL henceforth*, in the Indian context arises from the Upanishads, where *'the rex was the lex and lex was the rex'*, but The Indian legal jurisprudence has progressed by leaps and bounds from its origins as so has the contemporary world.

The Constitution was adopted on the 26<sup>th</sup> of January, 1950, whereby, as the preamble reads, 'we the people' have given ourselves the constitution. The preamble, as a keyhole to the Constitution lays down that envisioned ideals of Justice, Liberty and Equality. Further, Article 13(1) states that any law that is made by the legislative has to be in conformity with the Constitution failing which it will be declared invalid. The Constitution of India is the supreme law of the country, and any law which is found in violation of any provision of the Constitution is declared invalid, which is in furtherance of the first and third principle of ROL.

Prof. Upendra Baxi in his paper, 'The Rule of Law in India'<sup>11</sup>, writes, that The Indian ROL notions remain deeply bound to the ways in which fundamental rights stand conceived. Far

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<sup>9</sup> Supra

<sup>10</sup> Takwani C.K, "Lectures on Administrative Law" Third Edition Reprinted, 2004, pp17, Eastern Book Company, Lko

<sup>11</sup> Upendra Baxi, "The Rule of Law in India"; Sur vol.3 no.se São Paulo 2007

from reiterating either the liberal or libertarian theologies of rights as corpus of limitation on state sovereignty and governmental conduct, the Indian ROL conceptions also empower progressive state action. Thus, for example, the following constitutional rights enunciations authorize legislative and policy action manifestly violative of some liberal conceptions of rights:

- *Article 17 outlaws social practices of discrimination on the ground of “untouchability”*
- *Articles 23-24, enshrining “rights against exploitation”, outlaws the practices of agrestic serfdom (bonded and other forms of un-free labour) and related historic practices of violent social exclusion*
- *Articles 14-15 authorize, under the banner of fundamental rights, state combat against vicious forms of patriarchy*
- *Articles 25-26 so configure Indian constitutional secularism as to empower state to fully combat human rights offensive practices of the dominant “Hindu” religious tradition*
- *Articles 27-30 provide a panoply of fecund protection of the rights of religious, cultural, and linguistic minorities. (Baxi, 2007)*

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 first major case, and the most profound case in Constitutional jurisprudence is, ***Keshvananda Bhari v. State of Kerala***<sup>12</sup>, where the opinion of the majority judges was that, ROL is an “aspect of the doctrine of the basic structure of the Constitution, which even the plenary powers of the parliament cannot reach to amend.”<sup>13</sup>, meaning that ROL was a part of the basic structure of the Constitution and, therefore, it could not be abrogated or destroyed even by Parliament. Furthermore, in the case of ***I.C.Golaknath v. State of Punjab***<sup>14</sup> it was held

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<sup>12</sup> *Keshvananda Bhari v. State of Kerala*, (1973) 4 SCC 225;

<sup>13</sup> *Ibid*, at para 133.

<sup>14</sup> *I.C.Golaknath v. State of Punjab*; AIR 1967 SC 1836;

that rule of law under the constitution serves the needs of people without undoubtedly infringing their rights. It recognizes social reality and adjust to social requirement as required time to time.<sup>15</sup>

In *A.K. Kraipak v. Union of India*<sup>16</sup> it was held that under our constitution the rule of law pervades over entire field of administration and every organ of the state is regulated by the rule of law accepted by our Constitution.

The popular habeas corpus case, *ADM Jabalpur v. Shivakant Shukla*<sup>17</sup> 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...”

In *Justice Puttuswamy vs Union of India*<sup>18</sup>, J Chandrachud, reversed his father’s judgement in the above case, and reestablished the primacy of the dissenting opinion by J Khanna, by stating about restricting rights, that “...Such a construct is contrary to the basic foundation of the rule of law which imposes restraints upon the powers vested in the modern state when it deals with the liberties of the individual..”, while at the same time calling the judgement, ‘seriously flawed’.

In *Indira Neru Gandhi v. Raj Narain*<sup>19</sup>, in which the Supreme Court invalidated Art 329A, which immunized the election dispute to the office of the PM from any kind of judicial review, JJ Khanna and Chandrachud, held that, this violated the concept of the basic structure doctrine. J Mathew held that, Art 329A, offended the rule of law by subduing the principle of predominance of legal spirit, exuberating the sense of arbitrary official action.

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<sup>15</sup> Supra, note 8.

<sup>16</sup> A.K. Kraipak v. Union of India; AIR 1970 SC 150;

<sup>17</sup> ADM Jabalpur v. Shivakant Shukla, (1976) 2 SCC 521;

<sup>18</sup> Justice Puttaswamy vs Union of India, WP no 494 of 2012;

<sup>19</sup> Indira Neru Gandhi v. Raj Narain; AIR 1975 SC 2299

Applied to the powers of the government, this requires that every government authority which does some act which would otherwise be a wrong (such as taking a man's land), or which infringes a man's liberty (as by refusing him planning permission), must be able to justify its action as authorized by law -and in nearly every case this will mean authorized directly or indirectly by Act of Parliament. 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.<sup>20</sup>

In the case of *Gadakh Yashwantrao Kankarrao v. Balasaheb Vikhe Patil*<sup>21</sup> the ratio laid down was "If the rule of law has to be preserved as the essence of the democracy of which purity of elections is a necessary concomitant, it is the duty of the courts to appreciate the evidence and construe the law in a manner which would sub serve this higher purpose and not even imperceptibly facilitate acceptance, much less affirmance, of the falling electoral standards. For democracy to survive, rule of law must prevail, and it is necessary that the best available men should be chosen as people's representatives for proper governance of the country. This can be best achieved through men of high moral and ethical values who win the elections on a positive vote obtained on their own merit and not by the negative vote of process of elimination based on comparative demerits of the candidates."

### **Critical Analysis: Comparison with the Diceyan Principles**

Prof. Dr. IP Massey, candidly writes, "It has become a fashion to criticize Dicey"<sup>22</sup>. Going forward, the author would like to balance the criticisms to Dicey's theories and yet try to compare with the events, as mentioned.

The constitution in the preambles, state that what the social contract theory states, that the citizens have given themselves the constitution, which is what Dicey states, that, rights are not what is given by the constitution but rather, a consequence, establishes his theory.

The first instant to the profound application of ROL, was concretization of the ROL as basic structure as propounded in the *Keshvananda Bharti case*, but the court did not lay down the basic elements of the constituents of the ROL.

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<sup>20</sup> Ibid

<sup>21</sup> *Gadakh Yashwantrao Kankarrao v. Balasaheb Vikhe Patil*, 1994 AIR 678.

<sup>22</sup> Prof. IP Massey, "Administrative Law", 9<sup>th</sup> Edition, EBC, pg 31.

The two most important cases, were the *Indira Gandhi case* and *ADM Jabalpur case*, whereby both, reinforced the supremacy of ROI but did not lay down its precise elements.

Over a plethora of cases cited in the preceding section, the author would like to draw two broad conclusions. Firstly, the interpretation of ROL has been widely accepted and enshrined but not defined and secondly, the ROL has been segregated into three main concepts, i.e. equality before Law, independence of judiciary amounting to supremacy of law, and precedence of constitution over law.

Now, Dicey, when explaining the principle of equality, clearly states that there must be equality before law, and there must be equal access to courts, which when suspended amounts to abridgement of rights. The Principles of equality before law and equal protection by law are clearly established. But now, the interpretation of judiciary on the equal access to courts, by behest of the unfortunate *ADM Jabalpur case* precluded that one had limited rights especially during emergency. But in 2017 the *Puttaswamy judgement* has undone the damage caused and reestablished the Rule of law, as interpreted as Justice DY Chandrachud to conform to the Diceyan philosophy.

Dicey explained his meaning of the principle of predominance of legal spirit as the right of an individual to approach the court and enforce his rights. The judiciary in the case of *Indira Gandhi* upheld the meaning of ROL in the Diceyan meaning read with the Diceyan principle of equality, that any action of the state to prohibit an action of enforcement of right against an abridgement would not be permitted, it would certainly be violative of equality but much rather, will impede the predominance of legal spirit.

The most important application or diversion from the pure Diceyan meaning of the principle of Rule of law is the equation of the supremacy of law amounting to independence of judiciary.

In the *NJAC Case (The SCBA vs UOI, 2015)* was an important landmark case, whereby the 7 judge bench of the SC held that independence of judiciary amounted to the primacy of judiciary as an interpretation to the supremacy of law conforming as the basic structure, because the *Keshvananda bharti case* set forth that ROL meaning supremacy of law would amount to basic structure. Thus, the judiciary implied a bottom-up approach which suggested that independence of judiciary amounts to the supremacy of law, and therefore, is the basic structure doctrine.



Diceyan interpretation to the principle of supremacy of law is plain and lucid. It simply suggests that law will be final, and there can be nothing above law, but what the judiciary has interpreted this, is what Dicey firmly meant in the principle of predominance of legal spirit.

There are two outcomes to perspective, firstly, it is clearly established that the path of interpreting the Diceyan principle of ROL has a wide difference to the final understanding of the judiciary which implement it to the primacy of judges.

But secondly, it is necessary to also understand that the true meaning of Diceyan principle of supremacy of law has been interpreted in the manner of the judicial interpretation of predominance of legal spirit while at the same time judicial interpretation of the same coinciding with the Diceyan one.

This only begs us to pose a question, does the difference in the approach of understanding individual principles, affect the cumulative understanding to the Diceyan interpretation?

### **CONCLUSION: What does this society have for ROL?**

Prof AV Dicey propounded his theory in the 19<sup>th</sup> century, which finds its relevance even today. In the past 12 months, the Indian judiciary, has been consistent in reinforcing fundamental rights of the citizens. The judiciary made the Indian democracy be the first, to enshrine the right to privacy as a constitutional right, taking a step forward in the Diceyan vision of a utopian society, while also bringing equality in all walks of the society by doing away with the *triple talaq*. The current dream run of the judiciary is absolutely breathtaking. Given this, it begs to ask the question, is it the epitome of the Rule of Law? Have we achieved the Diceyan vision of the society?

The incident on the 12<sup>th</sup> January, 2018, is a blot in the history of the Democracy whereby in its simplistic view, poses the perspective of the nexus between the government and the highest echelon of justice, the CJI himself. This raises the question, whether, the judiciary is truly independent. In the following week, the Honorable constitution bench shall deal with important matters. It has decided the validity of sec 377 of the IPC, and adjudicated on the veracity on the validity of a shoddy document called that aadhar, and revisited the validity of sec 498A. These verdicts redefine or much rather, create a paradigm shift in fundamental rights as we know. Prof. Dicey envisioned a society without any encumbrances on fundamental rights, and crystalized the principle of supremacy of law. Thus, at the dawn of the new connected society

we just might be at the cross roads of Diceyan society propelled by the true Diceyan supremacy of law.

But this scenario seems to be juxtaposed, against the dark age we are on, where the independence of judiciary was in question. This situation is what the author would like to call 'A Diceyan Paradox'. Over the years the Honorable Supreme Court diverted from the Diceyan understanding of the supremacy of law and drew the parallel of supremacy of law with its independence. While this perspective is on one hand, Prof Dicey, aimed to establish ROL to create the utopian society by providing rights to all. The Diceyan Paradox that lies, is that, the court would like to achieve the Diceyan Supremacy of Law, but now it faces the issue of independence of judiciary, whose only solution lies with the judicial interpretation of the Supremacy of Law. And for all, but to achieve the Diceyan Society!

The question that the author posed in the previous section resounds with a blaring 'no', since the Judicial and Diceyan interpretations have come a full circle to be the solution for each other and creating what the citizens gave to themselves, Equality, liberty and fraternity, in its true and absolute sense.