RULE OF LAW A COMPARATIVE STUDY

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ABSTRACT
This article offers a comparative study of rule of law measures. The concept of rule of law has had an adding impact on evolution of Administrative law in the common law world. It is one of the fundamental and basic principles of the English Constitution. DICEY expounded the concept of rule of law in relation to the British Constitutional law. The modern concept of rule of law is fairly wide and, therefore, sets up an ideal for any government to achieve. This paper first asserts that the rule of law can be accurately described as a “common principle”.

Keywords: Rule of Law; Constitution; Democracy; Equality; Arbitrary Power; Transparency; Supremacy; Law; Bye Law; Government

INTRODUCTION
The rule of law has a number of different meaning and corollaries. Its primary meaning is that everything must be done according to law. Applied to the powers of government this require that every government authority which does some act which would otherwise be a wrong, or which infringes man’s liberty, must be able to justify its action as authorised by law and in nearly every case this will mean authorised directly or indirectly by the act of parliament. The term rule of law is derived from the French phrase “la principale de legalite” which means “the principal of legality”. It refers to a government based principle of law and not of men. In the different sense, the concept of “la principale de legalite” is opposed to arbitrary powers. The Rule of Law, is also called as “the supremacy of law”, provides that decisions should be made by the application of known principles or laws without the intervention of discretion in their application.

The concept of rule of law has had an adding impact on evolution of Administrative law in the common law world. Sir Edward Coke, the Chief Justice in James I’s reign was the originator of this concept. In a battle against the King, he maintained successfully that the King should be under god and the law; he established the supremacy of law against the executive. DICEY developed this theory of Coke in his classic book “The Law and the Constitution.” DICEY also expounded the concept of rule of law in relation to the British Constitutional law in the year 1885. According to him Rule of Law means “the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power and excludes the existence of arbitrariness of prerogative, or even without the existence of arbitrariness”. In the book he explained the following three meanings to the doctrine 1) Supremacy of law 2) Equality before the law; and 3) Predominance of legal spirit.

The Rule of law is one of the fundamental and basic principles of the English Constitution. This doctrine is accepted in the constitution of U.S.A. and also in the constitution of India. The Entire basis of administrative law is the doctrine of rule of law. Respect for human rights and rule of law is among most important indicators of good governance. Dicey’s concept of rule of law was not accepted fully even in 1885 when he formulated it.
HISTORY

Historically, the phrase was, perhaps, first used with reference to a belief in existence of law possessing higher authority—whether divine or natural—than that of the law promulgated by human rules which imposed limits on their powers.

The earliest legal code for a governmental in black and white was the code of Hammurabi for Babylon, dating from 1750 B.C. In comparison with contemporary standards, much of the code is serve: many crimes were punishable with death or corporal punishment; nevertheless, it was remarkable for introducing the ideas that government should be subject of law; that law should be based on public rules, not secret or divine ones; and that law should be efficiently and fairly applied by judges.

The most important idea in the rule as a concept of Governance was signing of the Magna Carta in England in 1215. The third panel features the signing of the Magna Carta by King John at Runnymede. A great deal of tension and hostility is expressed in this scene. King John was coerced by the land owners to sign the original document, known as the “Articles of the Barons,” against his will. He had no motivation to enforce the document, as it was sealed under coercion by the land barons. King John’s demise in 1216 initiated the first in a series of reissues of the charter.

English bill of rights accepted and acknowledged the importance of positive rights. Positive rights signify a moral obligation that is owed to someone, as opposed to negative rights, which require only the absence of interference. According to many enlightened philosophers, these positive rights were natural rights, meaning that all human were entitled to them and that the State should violate them.

In the US Constitution, these standards of rule of law encompassed within the phrase ‘due processes are considered the main embankment against any treaty of tyranny by the government. Owing to the expression of the British Empire and due to the growing influence of the United States as a world power, the incorporation of the rule of law in the British and the US legal system had a great influence upon the legal system of other countries. Natural law arguments in favour of due process, human rights, and self-governance become the instrument for many independence and democratic movements worldwide. The world witnessed this development through international instruments, such as the Universal Declaration of Human Rights (1948), the Convention on the Prevention and punishment of the Crime Genocide (1948), the Covenant on Civil and Political Rights (1966) and the convention against torture (1984). In the international Criminal Court (ICC) was established to prosecute genocide, war crimes and crimes against humanity, and applies to abuses occurring after July 1, 2002, in situations where national judicial systems do or cannot assume the case.

Dicey’s Doctrine of Rule of Law

Dicey was an individualistic; at the end of the golden Victorian era of laissez faire in England, he wrote about the concept of rule of law. According to him, wherever there is discretion, there is room for arbitrariness. According to dicey the rule of law is one of the fundamental principles of the English legal system. He explained that it involved three distinct proposition or kindred conception as follows:

1. The absence of arbitrary power and the absolute supremacy or predominance of regular law
2. Equality before the law
3. Individual liberties/ the constitution judge made

1. The absence of arbitrary power and absolute supremacy or predominance of regular law: The absolute supremacy or predominance of regular law — As opposed to the influence of arbitrary power. It excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government.

2. Equality before the law: No man is above the law. It means equality before the law or the equal subjection of all classes to the ordinary law courts. In other words the second principle of Dicey’s rule
of law also enunciates a democratic principle of equal subjection of all persons to the ordinary law of the land as administered by the ordinary courts.

3. Individual liberties/ the constitution judge made: The Third meaning of the rule of law is that the general principles of the constitution are the result of juridical decisions determining file rights of private persons in particular cases brought before the Court. 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 judicial decision.

Rule of Law and the Constitution of India

Rule of law does not mean rule according to a statutory law, pure and simple, for such a statutory law itself be harsh, inequitable, discriminatory or unjust. The rule of law, in effect, connotes some higher degree of law which is just, reasonable and non-discriminatory. Constitutional values, such as constitutionalism, absence of arbitrary power in the Government, liberty of the people, an independent and impartial judiciary, etc are imbedded in the concept of the rule of law.

India has a superlative tradition of the principle of Dharma governing all activities of all persons in community life- individually and collectively. The concept of dharma has been well understood and accepted as a code of conduct to be observed by all for the very survival of society.

In Shanti Parva of the Mahabhart, it is declared: Truthfulness, being free from anger, sharing one’s wealth with others, forgiveness, fidelity to one’s wife, purity, absence of enmity, straight forwardness, and maintaining persons dependent on one self are nine dharmas of persons belonging to all the varunas.

The doctrine of rule of law that has been governing different states, kingdoms, empires since ancient times, has been adopted in the Indian constitution, and has been given a much expanded connotation and significance.

The ideal of justice, liberty and equality are enshrined in the preamble itself. The constitution of India, on the whole seeks to promote the rule of law through many of its provisions. The rule of law is regarded as basic structure of the constitution and, therefore, it cannot be abrogated or destroyed even by parliament. It is also regarded as a part of natural justice.

In chapter III of the constitution these concepts are enshrined as fundamental rights made enforceable. The constitution is supreme and all three organs of the government viz. Legislature, executive and judiciary are subordinate to and have to act in accordance with it.

In Indian constitution, Parliament and the state legislature in India have the power to make laws within their respective jurisdictions. This power is, however not unqualified in nature. The legislative power of parliament and the state legislature has been subjected to following limitations:

1. The law must be within the legislative competency;

2. The law must be subjected to the provision of the constitution and must not take away or abridge the rights guaranteed under part III.

The courts in India are empowered to decide if either of the limitations has been transgressed by any state Legislature or Parliament. The power derived from articles 245 and 246 to make law has to be exercised keeping in view the limitations outlined under article 13 of the constitution.

Article 14 Equality before law:

The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India. It is applicable to both substantive and procedural laws, provides for
equality before the law and equal protection of the laws. Article 14 combines the English doctrine Rule of law with equal protection of law clause of the 14th Amendment to the US constitution. Equality before the law is, therefore an important constituent of the rule of law. Equality before the law is the expression taken from English common law, and is a negative concept, which implies the absence of any special privilege in favour of any individual. It warrants that all are equal before the law and no one is above the law this aspect of article 14 is similar to the second meaning of dicey’s concept of rule of law. In India, the equality before the law is wider significance; it is guaranteed not only with reference to enforcement of a law, but also in relation to the enactment of any law by legislation. Certain exception to the rule of equality before the law. Under article 361, the president, or the governor of the state enjoy the immunities.

Equal protection of the laws is an expression that has been taken from the American constitution, and it signifies the right of all persons to have the same access to the law and the courts and to be treated equally by law and courts, both in procedures and in substance of law.

Article 19 (1) (a) guarantees the third principle of rule of law (freedom of such and expression).Article 19 guarantees six Fundamental Freedom s to the citizens of India -- freedom of speech and expression, freedom of assembly, freedom to form associations or unions, freedom to live in any part of the territory of India and freedom of profession, occupation, trade or business. The right to these freedoms is not absolute, but subject to the reasonable restrictions which may be imposed by the State.

Article 20(1) provides that no person shall he 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 not be subject to a penalty greater than that which might have been inflicted tinder the law in force at the time of the commission of the offence. According to Article 20(2), no person shall be prosecuted and punished for the same offence more than once. Article 20(3) makes it clear that no person accused of the offence shall be compelled to be witness against himself. In India, Constitution is supreme and the three organs of the Government viz. Legislature, Executive and judiciary are subordinate to it.

Article 21 guarantees right to life and personal liberty to all persons citizens and non citizens alike. It is the fundamental right which makes possible for a man to chalk out his own life in the way he likes best. All other rights append quality to the life in question and depend on the pre existence of life itself for their operation. In general, the constitution of India itself prescribes the legal system of the country to guarantee and promote fundamental rights and freedoms of the citizens, and the respect for the principles of democratic state based on the rule of law.

In Kesavananda Bharti v s. State of Kerala- The Supreme Court enunciated the rule of law as one of the most important aspects of the doctrine of basic structure.

In Menaka Gandhi v s. Union of India- The Supreme Court declared that Article 14 strikes against arbitrariness.

In Indira Gandhi Nehru v s. Raj Narayan - 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.

**Comparative study with UK and GERMANY constitution**

The English concept of rule of law might have inspired the framers of the American constitution, they transformed that concept into a totally different one, namely, the supremacy of the higher law embodied in the constitution, instead of the law laid down by the Legislature, and it is by means of this transformed concept that the Legislature under the American constitution came to be treated as non sovereign and their laws likened by the courts to by laws, so that they could be pronounced void in the same manner as an English court would strike down a bylaw which was ultra virus the statute under which it had been made. In the United States, thus, it is the constitution which constitutes the ‘law of the land’ referred to the Magna Carta.
The West German Constitution was drawn up under American constitution influence and may be described as a constitution appertaining to the American family; nevertheless, its constitutional Court has struck new notes in its actual working. The preamble of the constitution describes itself basic law enacted by the people “by virtue of their constitutional power” Article 21 (2), 93 and 100 then give the power of judicial review, to the federal Constitutional court i.e. the power to determine the unconstitutionality of federal and state laws which violate the provision of the Basic Law.

In the West German case, the question before the constitution court was whether the reorganisation statutes, enacted by federal Legislature shortly after the commencement of the constitution, transgressed the traditional provisions of Article 118(2) of the basic law. The court implied limitations upon power conferred by article 118(2), by reading into its basic principles underlying the Basic law such as democracy, self determination, rule of law, and federalism, which are mentioned in Article 20 and 28, to describe the constitutional order of Federal Democratic Rights in general terms.

CONCLUSION

The rule of law is the underlying framework of rules and rights that make prosperous and fair societies possible. The rule of law is a system in which no one, including government, is above the law; where laws protect fundamental rights; and where justice is accessible to all. Under the rule of law, fundamental rights must be effectively guaranteed. A system of positive law that fails to respect core human rights established under international law is at best “rule by law”. Rule of law abiding societies should guarantee the rights embodied in the Universal Declaration of Human Rights including the right to equal treatment and the absence of discrimination; the right to life and security of the person; the right to the due process of the law; the freedom of opinion and expression; the freedom of belief and religion; the absence of any arbitrary interference of privacy; the freedom of assembly and association; and the protection of fundamental labour right.

The conception and notion of law, has been existence in India since time immemorial. With the passage of time, as the society advanced, the need for development of law to meet challenges of changing time to regulate the social conduct has been increasingly felt. Since its establishment, the Supreme Court has, the successfully played a moment nous role in upholding the Constitution, and significantly contributed in upholding the rule of law and dispensing justice. One silent development which has taken place during the last few years in the proliferation of the tribunal system to adjudicate upon some types disputes.

In rule by law, legal statutes are understood as simply the devices of the ruler, who is free to alter their substance if necessary. For Constitutional law to function, by contrast, even the administrators of the law must be subject to its provisions. Modern legal theory distinguishes between substantive, formal and functional approaches to defining the rule of law. A substantive reading of the rule of law makes judgments about the rights of the rights it grants or takes away. Such a school can allow for it to be quickly determined, for instance, that a society does not truly allow Constitutional law to operate, but is in practice authoritarian or totalitarian, as was found in various governmental systems in the 20th Century. Formal theory, as the name suggests, does not discriminate between various legal systems according to how palatable the observer finds them. Rather than examining the specific provisions of law, it examines the general ways in which those laws are implemented, looking for some basic qualities. Functional rule of law theory relies upon the traditional dichotomy between rules of and by law and finds the former to be present in societies in which government is heavily restricted by its own rules, which some societies may dislike as a cause of inefficiency.

REFERENCES


3. C.K. Takwani, lectures on administrative law, edn. 3rd, eastern publication pg.no. 27
5. Dicey, law of the constitution
8. Rule of Law and Human Rights in India, Essay in honour and memory of Justice HR Khanna, Articles Mr. Ravindra Kumar Singh, universal law publishing, pg.no.135
9. State of West Bengal v. Anwer ali sarkar, AIR 1952 SC 75