CRITIQUE ON THE CONCEPT OF RULE OF LAW AND ITS APPLICATION IN THE INDIAN POLITY

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INTRODUCTION

Rule of law means that law is supreme and is above every individual. No individual whether if he is rich or poor or of any background is above law; it is a protection that is been offered from the arbitrary power of Government authorities. The meaning of rule of law has always been contested. Hence, before beginning to study the Supreme Court's approach to rule of law, it would be useful to adopt a working framework of rule of law for the purpose of the present analysis and look at its various theoretical formulations that fit within the framework. The researcher, therefore, adopts the model developed by Brian Tamanaha in the book, On the Rule of Law: History, Politics, and Theory. Such a model is appropriate for the purpose of this paper since it captures all the competing formulations of rule of law existing in academic discourse and judicial pronouncements. Thus, the various formulations of rule of law can be summarized to two basic categories, known by theorists as “thin version” (formal) and “thick version” (substantive), each coming in three different forms. It has been rightly argued by Brian Tamanaha that it is a standard within the legal theory to separate rule of law conceptions into formal and substantive branches. Randall Peerenboom too, maintains this distinction by elaborating further. In contrast to thin versions of rule of law, thick or substantive conceptions, begin with the basic elements of a thin conception but then incorporate elements of political morality such as particular economic arrangements, forms of Government or conception of human rights etc.

1 Justice V. Dhanapalan, Basic Structure of the Indian Constitution – An analysis, (2014) 8 SCC J-1
2 Shailendra Kishore Singh, Rhetoric and the”rule of law” vis-à-vis The Supreme Court of India, CNLU LJ (2012) 82
5 Randall Peerenboom, Varieties of Rule of Law in Randall, Asian Discourses of Rule of Law, (2004),
Dicey’s theory has given 3 principles that objectifies on the concept “a government should be based on principles of law and not of men” which include –

1. Supremacy of law
2. Equity before the law
3. Predominance of legal spirit

1. Supremacy of law – It means that the constitution should be binding on the federal and the state governments. Neither of the two governments should be in position to override the provisions of the constitution relating to the power and status which each is to enjoy. This requirement is satisfied if the supremacy or overriding authority accorded only to the provision relating to the division of power. Other provisions of the constitution, which do not relate to the relationship between the centre and the units, need not be Supreme Court. In case of T.N. Godavarman Thirumulpad (102) V. Ashok Khot,6 Disobedience of the Supreme Court’s order strikes at the very root of the rule of law on which the judicial system rests. The Rule of Law is the foundation of a democratic society. Judiciary is the guardian of the rule of law. Hence, it is not only the third pillar but also the central pillar of the democratic state.

2. Equity before law – Doctrine of supremacy of law make cheques on the functioning of government on making and administering law, the principle of equality before law makes sure that law has to be administered properly and just manner. Law cannot prohibit the right that one has in it with respect to Fundamental Rights. Equity before law is codified in the Indian Constitution making sure that everyone is equal before law7 and also makes sure that Human rights are not to be exploited.8

3. Predominance of Legal Spirit – Dicey’s in order to make sure that above two principles in the constitution of the country in accordance with Rule of Law and it is being followed. There shall be presence of an enforcing authority and the presence of authority can be seen

6 (2006) 5 SCC 1
7 Article 14, Constitution of India, 1949
8 Article 7, Constitution of India, 1949
in courts. The court is expected to be free from frauds and corruption and must be have enforcers of rule of law; providing justice to the one who needs it the most.

APPLICATION OF RULE OF LAW IN INDIA

The concept of law is not defined under Indian legal concept. First attempt was made to challenge the administrative order during emergency on the grounds that it violates the principles of Rule of Law, and the court held that the rule of law as enriched in Article 21 does not exist as a distinct and separate principle conferring independently and in result contention did not succeed but consequently when the enforcement of the right to personal liberty conferred under Article 21 is suspended by the presidential order, the detenu cannot curtail the presidential order and this contention made it clear to be considered in rule of law and can also be used as a legal concept.

The court held that—

“The emergency provisions in Part XVIII are by themselves the rule of law during the times of emergency. There cannot be any rule of law other than the constitutional rule of law. There cannot be pre-constitutional or post-constitutional rule of law which can run counter to the rule of law embodied in the Constitution, nor there any invocation to the rule of law to nullify the constitutional provisions during the times of emergency.”

The rule of law apart from gaining legal concept in court of law also considered to be as a basic structure of Indian Constitution. In case of Indra Nehru Gandi constitutionality validity of the 39th amendment act, 1975 which was challenged to have violated the basic structure of the constitution and subsequently argued that the act conferring article 14 would violate the concept of rule of law which is the basic structure of the constitution and held that Article 329A violates the concept of Rule of Law.

The court held that—

“There is a genuine concept of rule of law and that concept implies equality before law or equal subjection to all classes to the ordinary law. But if the rule of law is to be the basic structure of the Constitution, one must find specific provisions in the constitution embodying the constituents of the element of the concept... The provisions of the Constitution were enacted with a view to

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9 A.D.M. Jabalpur v Shivkant Shukla, (1976) 2 SCC 521
10 Supra note 9
11 Kesavananda Bharti v. State of Kerala, (1973) 4 SCC 225
12 Indira Nehru Gandhi v. Raj Narain, AIR 1975 SC 2299
ensure the rule of law. Even if I assume that the rule of law is a basic structure, it seems to me that the meaning and the constituent elements of the concept must be gathered from the enacting provisions of the Constitution.“

The rule of law is regarded as part of the basic structure of the Constitution. Consequently the rule of law cannot be abolished even by a constitutional amendment. This manifests the high status accorded to the rule of law in Indian constitutional jurisprudence. And, mind you, that is not merely in theory. In practice our Supreme Court has vigorously enforced the rule of law.

The Supreme Court in various cases explicitly considered recognition of rule of law as a essential part of basic structure of the constitution and held democracy is a part of basic structure of our constitution and rule of law and free and fair election is democracy’s basic structure. The Supreme Court also observed that there is a absence of arbitrary power in the first section of rule of law.

In Supreme Court case of Satwant Singh Sawhney v. D. Ramarathnam; the Supreme Court held that “according to Indian constitution under Article 14 says that the State shall not deny to any person equality before the law. This doctrine of equality before the law is a necessary corollary to the high concept of the rule of law accepted by our Constitution. One of the aspects of rule of law is that every executive action, if it is to operate to the prejudice of any person, must be supported by some legislative authority. Secondly, such a law would be void, if it discriminates or enables an authority to discriminate between persons without just classification.” Similarly, the Supreme Court chose to interpret pardoning power of president and the governor under Article 72 and 161 of the constitution with the integration of concept of Rule of Law. In our constitutional system, the central and most important feature is the concept of law which means that the authority of the law courts leads to all administrative action by the standard of legality; administrative or

13 Supra note 12
14 I.R Coelho v state of T.N (2007) 2 SCC 1
17 AIR 1967 SC 1836
18 Article 14, Constitution of India, 1949
19 Epuru Sudhakaw v Govt. of AP (2006) 8 SC 1427
executive action that does not meet the standard will be set aside if the aggrieved brings the matter to the notice.  

The role of Judiciary is to constantly evaluate and work on maintain the balance between the rights of the citizens and the action that government take. The Judiciary has evolved the method of Judicial Review by the constitutional courts which has three dimensions –

1. Ensuring fairness in administrative action;
2. Protecting the fundamental rights; and
3. Ruling on the question of legislative competence.

The power of the Supreme Court guaranteed to the citizens under the constitution is derived from Article 32 and the writ jurisdiction under Article 226 with the High Courts. With the advent of public interest litigation, Articles 32 and 226 have been invoked to shape innovative remedies.

Many a times, it is criticized that the concept of judicial review is opposed to the democratic setup on the ground that judiciary is not an elected body and therefore, it is not accountable to the people. But by and large, people in our country are satisfied with the Constitutional Courts invoking the process of judicial review. Only caveat to be added is that, the Judges should not use their personal discretion to direct action in areas in which they have no expertise or experience. The concept of judicial review designates the higher judiciary as the protector of the Constitution and this scheme works smoothly as long as the demands and aspirations of the majority of the population correspond with the constitutional prescriptions. Application of judicial review avoids erosion of the rule of law. According to the broader concept of Rule of law it has been observed that people claim their rights under rule of law and make the India’s Court system ineffective and inconsistent.

20 Chief settlement commr; Punjab v Om Prakkash, (1969) A.I.R S.C 33
21 Justice K.G.Balakrishnan, How To Check The Erosion of The Rule of Law, (2011) 1 SCC (J) p.3
22 Karina T. Hwang, The Procedural Aspect of the Rule of Law: India as a case study for distinguishing concept from conception, (July 16, 2018, 12:00 PM), Available at http://scholarship.claremont.edu/cgi/viewcontent.cgi?article=2156&context=cmc_theses (last accessed on 26/07/2018)
Rule of law has been an evolving idea, origin being traceable to ancient times. Justinian Code, which happens to be one of the earliest Codes and was written in the 6th century, had one provision that provided: “It is a statement worthy of the majesty of a ruler for the prince to profess himself to be bound by the laws the expression used was “laws of the Empire” and not laws of the emperor. It is one of the earliest assertions, though in a very rudimentary form, of an idea of rule of law as against rule by man. By this time, it had come to be generally accepted that there should be some “legal restraint” to bind even the sovereign, and “it came to be an accepted measure of legitimacy that the sovereign, nobles and government officials operate within legal restraints”, the word “legitimacy” signifying an “external legal rule or principle by reference to which authority is constituted, identified and controlled”. With the passage of time, the idea of rule of law began to gain wide acceptance and slowly became deeply entrenched in legal process as is reflected by the famous Somerset case in seventeen sixties, where in response to the query, where was the law prohibiting slavery, Lord Mansfield famously said that the law was in the “air” of England, i.e. it was in the legal and political climate of England, in which the institution of slavery could just not survive for a moment. One of the foremost English Legal scholars Albert Venn Dicey in his monumental work An Introduction to the Study of the Law of the Constitution (1885) defined Rule of Law thus:

CONCLUSION
The Preamble of the Constitution of India, the fundamental rights and the directive principles, constituting a trinity, assure to every person in a welfare State, social and economic democracy with equality of status and dignity of persons. Political democracy without social and economic democracy would always remain unstable. Social democracy must become a way of life in an egalitarian social order. Economic democracy aids consolidation of social stability and smooth working of political democracy. The Preamble emphatically declares that we have given to ourselves the Constitution with a firm resolve to constitute a sovereign, socialist, secular, democratic, republic, with equality of status and of opportunity to all its citizens. “Rule of law” being our constitutional faith, it is imperative that every governmental institution must observe it,
irrespective of any obstacles or odds on its path. Hence it is submitted in the paper, particularly about the Supreme Court, resorts to invoking the concept of rule of law in the constitutionality adjudication. The foregoing analysis indicates that while the rule of law does not have the status of positive law under the Indian Constitution, it can usefully be invoked to influence the interpretation of positive law. This has been the approach of the Supreme Court in some of the earlier decisions such as Satwant Singh Sawhney case. However, a majority of the Supreme Court decisions in the last three decades indicate that the Court has yielded to the temptation of using the concept in a much more extravagant manner. The most disturbing feature of the analysis is the judicial trend of using the rule of law to rewrite the text of the Constitution so as give to itself more rights and privileges. The researcher views such an approach to be extremely problematic as it not only makes rule of law a much more contested concept, but also decreases its legitimacy.