

## COMPARATIVE ANALYSIS OF THE RULE OF LAW IN INDIA AND UK

*Raghav Mittal\* and Shubham Singh\*\**

### ABSTRACT

The research paper traces the development of the doctrine of "Rule of Law" in India and UK and attempts to distinguish its applicability in these two nationalities on the basis of various judicial interpretations and enacted statutory provisions.

Finally the paper shall on the basis of the comparison, conclude and suggest reforms that may be carried for better administration of law, using this theory.

### INTRODUCTION

#### ORIGIN AND CONCEPT OF THE RULE OF LAW

Rule of Law postulates that decisions should be made by the application of known principles and rules and such decisions should be predicable. The concept implies equality before the law or equal subjection of all classes to the ordinary law.<sup>1</sup>

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.

A government based on principles of law and not of men. It is a legal principle of general application which is sanctioned by the recognition of authorities, and is usually expressed in the form of a maxim or logical proposition called a "Rule," because in doubtful or unforeseen cases it is a guide or norm for their decision.<sup>2</sup>

The deliberations on the rule of law theory can be traced back to Aristotle, Plato and Roman Jurists at around 350 BC. Medieval natural thinkers such as Hobbes, Locke, Rosseau, and Montesquieu; a

---

\* Student, III Year, B.B.A.,LL.B (Hons), Symbiosis Law School, Pune

\*\* Student, III Year, B.B.A.,LL.B (Hons), Symbiosis Law School, Pune

<sup>1</sup> *Indira Nehru Gandhi v. RajNarain*. AIR 1975 SCC 2299

<sup>2</sup>*Ibid*

number of German and American philosophers like Kant, Hegel, and diverse figures like Hayek, Rawls and Lee Kuan Yew have also time and again debated in this theory.<sup>3</sup>

## DIVERGING INTERPRETATIONS AND DIFFERENCES IN THE APPLICATION OF THE RULE OF LAW

Despite its frequent use over the centuries, there is no precise definition of the rule of law. The concept is restricted to as a means of protection from arbitrariness of the 'Rule of man', meaning that the government is bound by rules fixed and announced beforehand.<sup>4</sup> The International Commission of Jurists has given material to the content of the rule of law in the universal declaration of Human Rights.<sup>5</sup>

The principle derives its definition and application on the basis of individual product of any state or society and cannot be said to be of a general nature.

## EVOLUTION OF THE RULE OF LAW IN UK

### THE GREAT CHARTER: MAGNA CARTA

The greater charter was the first significant written instrument limiting the power of a king wherein promises were made between the king and feudal lords, dictated by force of arms.

### CHIEF JUSTICE COKE

In the beginning of the 17<sup>th</sup> Century, the Courts had started interfering in the matters of prerogative powers, seizures and detentions and were issuing writs to review the decisions of local feudal and ecclesiastical courts. Chief Justice Coke during that period questions the authority of King James.

## PRINCIPLES ENUNCIATED UNDER THE DICEY'S THEORY OF THE RULE OF LAW

Dicey defined the Rule of law as:

---

<sup>3</sup> Richard Fallon, "The Rule of Law" as a Concept in Constitutional Discourse, 97 COLUM. L. REV. 1 (1997); Peerenboom Randall, UCLA School of Law, *Human Rights and the Rule of Law: What's the relationship*, 36 Georgetown Journal of International Law (2005), Page 1-2,

<sup>4</sup>Varsha, Rajora, *Research Paper on Comparative Analysis of Rule of Law in UK & India*, <http://ssrn.com/abstract=1533265> (Accessed on 23-07-2016 at 13:57)

<sup>5</sup> Mani, Rama, 'Exploring the rule of law in theory and practice', *Civil War and Rule of Law*, Page 21-45, (2009)

“...with us every official, from Prime Minister down to constable or collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen.....”<sup>6</sup>

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:

1. SUPREMACY OF LAW

The law makers need to justify the powers granted while making laws and give reasons while exercising their powers to make and administer law.

2. EQUALITY BEFORE THE LAW

The law should be enforced and administered in a just manner without discrimination on the basis of sex, religion, race etc. Article 14 of the Indian Constitution imbibes this rule. The law implies:

- a) Absence of special privileges for a government official or any other person.
- b) All persons irrespective of status must be subjected to the ordinary courts of law.
- c) Everyone should be governed by the law passed by the ordinary legislative organs of the state.

3. PREDOMINANCE OF LEGAL SPIRIT

There should be an authority in the form of courts to enforce the two legal principles mentioned before. This authority should be free from external influences. Therefore, judicial freedom becomes an important pillar of the rule of law. <sup>7</sup>

ENFORCEMENT OF RIGHTS THROUGH STATUTES AND INTERNATIONAL CONVENTIONS

The enforcement of the doctrine of habeas corpus was achieved in the 17<sup>th</sup> Century. The Bill of rights 1689 and the Acts of Settlement (1701 and 1703) also imposed constraints on the monarch. The Slave Trade Act of 1807 and Slavery Abolition Act 1833 established equality of all before law.

---

<sup>6</sup> Sachar, Rajinder, ‘Indian Democracy and the rule of law’, *Citizen’s Rights and Rule of Law, Problems and prospects*, Essays in Memory of Justice J C Shah. Page 111-120 (2008)

<sup>7</sup> Justice GP Singh, MP Jain and SN Jain, *Principles of Administrative Law*, (6<sup>th</sup> Ed., 2011), page 13-15; Massey, I P, *Administrative law*, Lucknow, Eastern Book Company (2008).

In the 18<sup>th</sup> Century, some decision making power was delegated to the Prime Minister in a cabinet system. Later on the concept of judicial review of executive decisions was considered to be a part of the system,<sup>8</sup> often based on the Human Rights Act 1998.<sup>9</sup>

In 1947, the parliament enacted the Crown Proceedings Act to liberalise the law relating to civil proceedings against the crown. In 1967, the Ombudsman system was adopted as a need for supplementing the administrative powers with institutional arrangements, was considered.

The rule of law has now been recognised, although not defined by the statute, under the Constitutional Reform Act, 2005 which requires the Lord Chancellor to take the following oath,

*“I, , do swear that in the office of Lord High Chancellor of Great **Britain I will respect the rule of law**, defend the independence of the judiciary and discharge my duty to ensure the provision of resources for the efficient and effective support of the courts for which I am responsible. So help me God.”<sup>10</sup>*

The Court is also required to take into account the principles evolved by the European Court of Human Rights.

### JUDICIAL INTERPRETATION

The first of its kind was the decision in *Entick v. Nathan Carrington*,<sup>11</sup> which established the civil liberties of the people and limited the scope of executive power. In *(Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)*<sup>12</sup>, the order given by the council of British government was found to have no basis in law by minority judges. It has been stated that court can grant a final and or an interim injunction against the Crown, and the Crown and its ministers, are not immune to contempt proceedings for breach of an injunction.<sup>13</sup>

---

<sup>8</sup>*Regina (Alconbury Developments Ltd and Others) v Secretary of State for the Environment, Transport and the Regions*, [2003] 2 AC 295, paragraph 73; *Regina v Secretary of State for the Home Department, Ex parte Pierson* [1998] AC 539; Amy Street, *Judicial Review and the Rule of Law, Who is in Control?*, The Constitution Society Report, Page 12-15

<sup>9</sup> Section 6 and 8, *Human Rights Act*, 1998; (International Conventions which England is a signatory to such as *Universal Declaration of Human Rights* have also established this principle.)

<sup>10</sup> Amy Street, *Judicial Review and the Rule of Law, Who is in Control?*, The Constitution Society Report, Page 12-15

<sup>11</sup>*Entick v. Nathan Carrington*, [1765] EWHC KB J98

<sup>12</sup>*(Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)*, [2008] UKHL 61

<sup>13</sup> *M. v. Home Office and Another*, [1993] 3 All ER 537

## NON- APPLICATION OF THE PRINCIPLE AND CRITICISM

The queen, prime Minister and other Ministers, as based on the royal prerogative are not subject to judicial oversight, thereby, the principle of equality of all before law is not applicable here.<sup>14</sup>

The public prosecution body chief was deemed to allow national security considerations to over a thorough investigation of the alleged bribery in arms deals, which is contrary to equal application of the law in order to protect life may result in a perceived breach of the modern-day rule of law.<sup>15</sup> It is felt that there has been an unsystematic growth in the Administrative Law and therefore, there is a need to hold inquiry to make the law more comprehensive.<sup>16</sup>

## ORIGIN OF THE RULE OF LAW IN INDIA AND CONSTITUTIONAL PROVISIONS

The Upanishads provided that the law is the king of kings and nothing is higher than the law, thereby, preventing arbitrary exercise of powers by the monarch. India adopted the common law system which owes its origin to the British system of governance.

The Constitution of India intended for India to be a country governed by the rule of law, providing for the constitution to be the supreme power in the land and the legislative and the executive deriving their authority from the constitution. Any law that is made by the legislative has to be in conformity with the Constitution failing which it will be declared invalid, this is provided for under Article 13 (1). Article 21 provides a further check against arbitrary executive action by stating that no person shall be deprived of his life or liberty except in accordance with the procedure established by law.

Article 14 ensures separation of power between the three wings of government, the executive, the judiciary and the legislature.

## JUDICIAL INTERPRETATION

Rule of Law is considered to be a part of the basic structure of the constitution which cannot be amended by an act of the parliament.<sup>17</sup> It prevents arbitrary or irrational administrative action.<sup>18</sup> In the

---

<sup>14</sup> Parliamentary Privileges also exist in India and UK, therefore the members of parliament are also exempted from judicial review.

<sup>15</sup> *Corner House Research and Others, Regina v. The Serious Fraud Office*, [2008] UKHL 60

<sup>16</sup> Law Commission, *Working Paper 20* (1969); (1967) Pub Law 185

<sup>17</sup> *Kesavananda Bharati v. State of Kerala*, AIR 1973 SC 1461

<sup>18</sup> *Bachan Singh v. State of Punjab*, AIR 1982 SC 1325

domain of administrative law, it is seen as the instrument to ensure the judicial review of administrative action so that it is in consonance with the law.<sup>19</sup>

Judicial review of arbitrary action is one of the main elements of our constitution.<sup>20</sup> Absence of arbitrary power is the first essential of the rule of law that has been approved by the Apex Court,<sup>21</sup> in the words of Lord Mansfield being quoted in the decision,

*“Discretion means sound discretion guided by law. It must be governed rule, not humour, it must not be arbitrary, vague or fanciful.”*<sup>22</sup>

Doctrine of equality, a necessary element of the rule of law has been accepted by our constitution.<sup>23</sup> Any abuse of public power is subject to the control of the courts and the Court has authority to test all the administrative actions by the standard of legality.<sup>24</sup>

The Supreme Court held that the opinion of the Chief Justice of India has primacy in the matter of appointment of High Court and the Supreme Court Judges. The reason being that this would ensure independence of the judiciary which is necessary for the maintenance of rule of law.<sup>25</sup> The parliament has no power to amend Part III of the Constitution which takes away the fundamental rights.<sup>26</sup>

Therefore, it is evident that all the pillars of Dicey’s theory have been satisfied under the rule of law, as practised and applied in India.

---

<sup>19</sup>*A.D.M. Jabalpur v. S. Shukla*, AIR 1976 SC 1207

<sup>20</sup>*State of M.P. v. Thakur Bharat Singh*, AIR 1967 SC 1170

<sup>21</sup>*S.G. Jaisinghani v. Union of India*, AIR 1967 SC 1427; *T.N. Godavarman Thirumulpad v. Ashok Khot*, (2006) 5 SCC 1

<sup>22</sup>*John Wilkes, in Re*, (1770) 4 Burr 2528 (The following was the decision given by Lord Mansfield in this case, which has been quoted by the Indian judiciary)

<sup>23</sup> Article 14, Constitution of India, 1949

<sup>24</sup>*State of Punjab v. Khanchand*, AIR 1974 SC 543; *Chief settlement Commr; Punjab v. Om Prakash*, AIR 1969 SC 33

<sup>25</sup>*Supreme Court Advocates-on-Record Assn. v. Union of India*, AIR 1994 SC 268

<sup>26</sup>*Golak Nath v. State of Punjab*, AIR 1971 SC 1643

## IMPAIRED IMPLEMENTATION MACHINERY

### Human Rights Abuse

The principles of Rule of Law are closely linked with Human Rights protection. The apex court has held that the failure to accord a fair hearing is violative of the due process of law.<sup>27</sup> Despite the constitutional safeguards, In India there exists several human rights abuses.<sup>28</sup>

### Maladministration

The inefficiency in the administration by the public bodies affects negatively the rule of law. This theory fails when politics is not treated as an instrument for public welfare but as an instrument for private gain.

### DROIT ADMINISTRATIF AND THE RULE OF LAW

Droit Administratif is the form of Administrative law prevailing in France which means that there should be separation between the Courts and the Administration. Under this system the ordinary courts exercise no control over the administration which is supervised by administrative tribunals.<sup>29</sup>

Dicey criticised this principle on the ground that it established a separate set of rules and privileges for the government servants, and held that it was not applicable in UK.

The principle to some extent, but not completely, is applicable in India and UK, as can be seen from the increasing tribunalisation of the decision making process.<sup>30</sup>

---

<sup>27</sup>ZahiraHabibullah H. Sheikh v. State of Gujarat, AIR 2004 SC 3114

<sup>28</sup>Varsha, Rajora, Research Paper on Comparative Analysis of Rule of Law in UK & India, <http://ssrn.com/abstract=1533265>

<sup>29</sup> Justice GP Singh, MP Jain and SN Jain, *Principles of Administrative Law*, (6<sup>th</sup> Ed., 2011), page 27

<sup>30</sup> Justice GP Singh, MP Jain and SN Jain, *Principles of Administrative Law*, (6<sup>th</sup> Ed., 2011), page 27; VivekRanjan, *Rule of law and Modern Administrative Law, An Analysis*, Page 2-5, (11-12-2010), Electronic copy available at: <http://ssrn.com/abstract=1761506>

## CONCLUSIONS AND SUGGESTIONS

The theory of the Rule of Law is idealist in nature and cannot be implemented completely, either in India or UK.

The rule of law has been, explicitly, made a part of the UK Constitution by the Amendment Act of 2005. In India, although the rule of law is not contained specifically in the form of statutory or constitutional provisions, it is considered to be a part of the basic structure of the constitution, as is evident from the judicial interpretations given by the Hon'ble Supreme Court.

Exceptions to the rule of law exist in both countries, and there have been instances wherein both have not followed this theory, in situations where there is threat to the security of the country. Both the systems have yet to improve and provide for a proper implementation of the rule of Law. The countries have tried to follow the system of *droit administratif* in some places, where it makes the due process of law more convenient and quick.

However, on a comparison of India with UK, it has been found that the problem in India belies not in the development of law using this doctrine but their effective implementation. The police and the prosecutors in India have not lived up to their duties. The rule of law that exists on paper does not always exist in practice and India fares poorly when it comes to procedural effectiveness. Therefore, policies for ensuring effective implementation of the rule of law should be set in place in India.

The best possible solution, for both countries, seems to be to implement a homogenised system of rule of law and *Droit Administratif*, for efficient dispute resolution.

A functional legal system, with a reasonably independent judiciary, is no doubt useful and most likely necessary if human rights are to be fully implemented. Rule of law is necessary if not sufficient for sustained economic growth, which in turn accounts for much of the variation in rights performance and quality of life.

In both nationalities, the approach should be to implement the rule of law for human rights, with less arrogance and more modesty, but not abandon the general commitment to what is after all, on the whole, a noble ideal and not deviate from the principles of rule of law. The theory also needs to be developed independently in both states as the conditions prevailing thereunder are also different.



## **REFERENCE LIST**

### **PRIMARY SOURCES**

#### **INDIAN CASE LAWS**

<i>Chief settlement Commr; Punjab v. Om Prakash</i> , AIR 1969 SC 33.....	6
<i>A.D.M. Jabalpur v. S. Shukla</i> , AIR 1976 SC 1207 .....	6
<i>Bachan Singh v. State of Punjab</i> , AIR 1982 SC 1325 .....	6
<i>Golak Nath v. State of Punjab</i> , AIR 1971 SC 1643.....	7
<i>Indira Nehru Gandhi v. Raj Narain</i> . AIR 1975 SCC 2299 .....	1
<i>Kesavananda Bharati v. State of Kerala</i> , AIR 1973 SC 1461 .....	6
<i>S.G. Jaisinghani v. Union of India</i> , AIR 1967 SC 1427 .....	6
<i>State of M.P. v. Thakur Bharat Singh</i> , AIR 1967 SC 1170.....	6
<i>State of Punjab v. Khanchand</i> , AIR 1974 SC 543.....	6
<i>Supreme Court Advocates-on-Record Assn. v. Union of India</i> , AIR 1994 SC 268 .....	7
<i>T.N. Godavarman Thirumulpad v. Ashok Khot</i> , (2006) 5 SCC 1.....	6
<i>Zahira Habibullah H. Sheikh v. State of Gujarat</i> , AIR 2004 SC 3114.....	7

#### **U.K. CASE LAWS**

<i>(Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)</i> , [2008] UKHL 61.....	4
<i>Corner House Research and Others, Regina v. The Serious Fraud Office</i> , [2008] UKHL 60 .....	5
<i>Entick v. Nathan Carrington</i> , [1765] EWHC KB J98.....	4
<i>John Wilkes, in Re</i> , (1770) 4 Burr 2528 .....	6
<i>M. v. Home Office and Another</i> , [1993] 3 All ER 537.....	4

*Regina (Alconbury Developments Ltd and Others) v Secretary of State for the Environment, Transport and the Regions*, [2003] 2 AC 295 ..... 3

*Regina v Secretary of State for the Home Department, Ex parte Pierson* [1998] AC 539 ..... 3

### **BOOKS**

Justice GP Singh, MP Jain and SN Jain, *Principles of Administrative Law*, (6<sup>th</sup> Ed., 2011), page 13-15. 3

Mani, Rama, 'Exploring the rule of law in theory and practice', *Civil War and Rule of Law*, Page 21- ..... 1

Massey, I P, *Administrative law*, Lucknow, Eastern Book Company (2008). ..... 3

Sachar, Rajinder, 'Indian Democracy and the rule of law', *Citizen's Rights and Rule of Law, Problems and prospects, Essays in Memory of Justice J C Shah*. Page 111-120 (2008) ..... 2

Vivek Ranjan, *Rule of law and Modern Administrative Law, An Analysis*, Page 2-5, (11-12-2010),  
Electronic copy available at: <http://ssrn.com/abstract=1761506> ..... 6

### **SECONDARY SOURCES**

#### **RESEARCH PAPERS**

Amy Street, *Judicial Review and the Rule of Law, Who is in Control?*, The Constitution Society Report,  
Page 12-15..... 3

Peerenboom Randall P, UCLA School of Law, *Human Rights and the Rule of Law: What's the relationship*, 36 *Georgetown Journal of International Law* (2005), Page 1-2, 10-01-2005..... 1

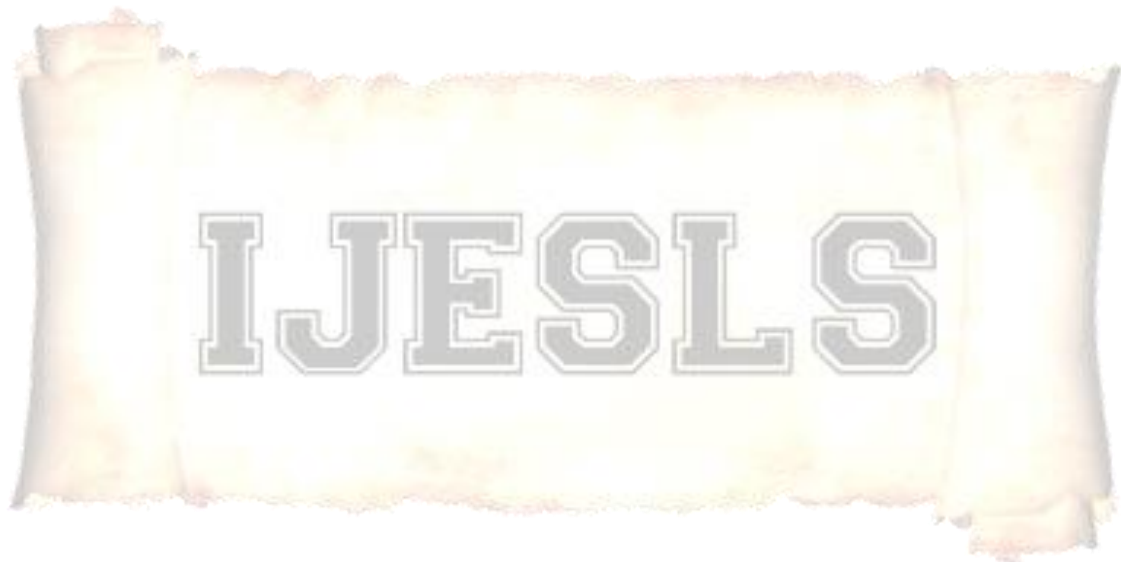
Richard Fallon, "The Rule of Law" as a Concept in Constitutional Discourse, 97 *COLUM. L. REV.* 1  
(1997) ..... 1

Varsha, Rajora, *Research Paper on Comparative Analysis of Rule of Law in UK & India*,  
<http://ssrn.com/abstract=1533265> ..... 7

Varsha, Rajora, *Research Paper on Comparative Analysis of Rule of Law in UK & India*,  
<http://ssrn.com/abstract=1533265> (Accessed on 23-07-2016 at 13:57) ..... 1

**REPORTS**

Law Commission, *Working Paper 20* (1969) .....5



## **ADDITIONAL BIBLIOGRAPHY<sup>31</sup>**

### **WEBSITES**

www.Scconline.com

www.manupatra.com

### **WEB ARTICLES**

The justice system and the constitution, *Courts and Tribunals Judiciary*, The judiciary, the government and the Constitution, <https://www.judiciary.gov.uk/about-the-judiciary/the-judiciary-the-government-and-the-constitution/jud-acc-ind/justice-sys-and-constitution/> (Accessed on 23-07-2016 at 14:22)

Paul Craig, *Select Committee on Constitution Sixth Report*, The Rule of Law, <http://www.publications.parliament.uk/pa/ld200607/ldselect/ldconst/151/15115.htm> (Accessed on 23-07-2016 at 14:22)

DeveshKapur, *Strengthening India's Rule of Law*, Live Mint E-Paper, <http://www.livemint.com/Opinion/N3pY337INutBRtXQs7GO3O/Strengthening-Indias-rule-of-law.html> (Accessed on 23-07-2016 at 14:22)

---

<sup>31</sup> The bibliography is in addition to the references as provided in the footnotes and provides for other external sources of information not cited in the paper.