

# Separation Of Power And Rule Of Law In India, Unswerving Deepening Of Democracy

Neerav Khare

Assistant Professor, Galgotias University, Greater Noida

**Abstract:** *Where law does not rule, there is no democracy.*<sup>1</sup> Democracy is the only social arrangement that fully respects the richness of human personality and by respecting it helps to unfold it. All the devices of political machinery- parties, platforms and votes- are merely instruments for enabling men to live together under conditions that bring forth the maximum gifts of each for the fullest enjoyment of all.

**Keywords:** Democracy, Power And Rule Of Law

## I. INTRODUCTION

Democracy furnishes the political framework within which reason can thrive most generously and imaginatively on the widest scale, least hampered by the accident of personal antecedents and most regardful of the intrinsic qualities of men.

Aristotle postulated a state based on law as the only practicable means of achieving the 'good life' which, according to him, was the chief goal of political organization. 'Man' he exclaimed, "when perfected is the best of animals, but if he be isolated from law and justice he is the worst of all."<sup>2</sup> Aristotle held, "the rule of law is preferable... to that of a single citizen." In order to safeguard the rule of law, a system of checks and controls must be introduced into the system of government, so as to make it advantageous even for bad men to act for the public good. The legislative power should not only be separated from the executive power, but it should be divided in itself, by institution two branches of the legislature. If one of them should depart, or attempt to depart, from the principle of the constitution, it would probably be drawn back by the other. If however the legislature as a whole should do violence to the commands of the constitution, it should be curbed by the judicial branch of the government, to which falls the duty of declaring void all statutes which are repugnant to the supreme law of the land.

## II. WHAT DOES THE 'RULE OF LAW' SIGNIFY?

The rule of law is an aspect of ancient and modern natural law thought. Aristotle stated in 'The Politics' that the rule of law is preferable to that of any individual. The appeal to law as a control over naked power has been apparent throughout history. To the ancient Greeks, man was under the governance of the laws of nature- the natural forces which controlled the universe although this view is more closely aligned to the law of nature than natural law as it came to be understood in later times.

The rule of law represents one of the most challenging concepts of the constitution. Of all constitutional concepts, the rule of law is also the most subjective and value laden. The rule

of law may be interpreted either as a philosophy or political theory which lays down fundamental requirements for law, or as a procedural device by which those with power rule under the law. The essence of the rule of law is that of the sovereignty or supremacy of law over man. The rule of law insists that every person – irrespective of rank and stature in society- be subject to the law. For the citizen, the rule of law is both prescriptive- dictating the conduct required by law – and protective of citizens – demanding that government acts according to law.

According to Fuller the rule of law is the subjection of human conduct to the governance of legal norms through the operations of a legal system. The absence of anarchy and the need for an orderly society highlights the importance of the rule of law. Law represents a code of conduct and self-discipline which a nation speaking through its representatives adopts for itself and enforces through the machinery of courts. Law is no more than formal expression of the tolerable compromise that we call justice without which the rule of law and claw must prevail. Democracy ensures the most favorable conditions for the supremacy of the rule of law. Man's capacity for justice, it has been said, makes democracy possible, but man's inclination to injustice makes democracy necessary. The rule of law incorporates a dual dimension, one formal and the other material. In formal terms, the State is based on a legal order. In concrete terms this institutionalized submission to the law implies the inviolable respect for the sacred rights of the human person and man's unfailing dignity, as much in the singular as in the plural. As such, the Rule of Law remains a dual notion: a legal concept and a democratic value. From one single, intangible construction based on doctrine and positive law, there remains, in its pluralistic practices a sort of common heritage of all humanity.

The construction of Rule of law is achieved which it is embodied in an adequate constitution, sustained by substantial civic backing. Thus, republican support institutes guarantee popular demands by means which include an effective legal apparatus to ensure full protection of recognized rights. Learned author Jeffrey Jowell pointing out the contemporary dimension of the Rule of Law said, The Rule of Law has meant

<sup>1</sup> Aristotle, *The Politics*, Bk iv, para 1292a31

<sup>2</sup> Edgar Bodenheimer, *Jurisprudence the Philosophy and Method of the Law*, revised edition, 2006, Universal Law Publication p10

many things to many people. To A.V. Dicey it meant the virtual exclusion of official discretion, which he equated with arbitrary power... the Rule of Law is seen as a principle of institutional morality.

It should be taken into consideration that the rule of law is not ruling force which is universally accepted. In differing societies, subscribing to very different political philosophies, the insistence on the rule of law- in the western liberal sense- has little application. In traditional Oriental society the Western preference for law is an alien notion. In relation to traditional Chinese society laws, abstract in nature, could not take into account the infinite variety of possible situations. Their strict application was apt to affect mans innate sense of justice. To enact law was considered a bad policy by traditional Chinese doctrine the idea of rights an inevitable development of the laws themselves, ran counter to the natural order. Once individuals think of their rights there is it was thought, some form of social illness; the only true matter of concern is ones duty to society and ones fellow men. The enactment of laws is an evil, since individuals, once familiar with them, will conclude that they have rights and will then be inclined to assert them, thereby abandoning the traditional rules of propriety and morality which should be the only guides to conduct.

### III. WHAT IS MEANT BY SEPARATION OF POWERS?

The identification of three elements of power is derives from Aristotle. In the Politics, Aristotle proclaimed that:

“There are three elements in each constitution in respect of which every serious lawgiver must tool for what is advantageous to it; if these are well arranged, the constitution is bound to be well arranged, and the differences between each of these elements. The three are, first, the deliberative, which discusses everything of common importance; second, the officials; and third, the judicial element.”

So we find that even in those early periods also the institution of state where separated so as the power does not concentrate within one institution. If we compare it with today’s power separation we find that these three organs are legislative which discusses and deliberates the law, the second is the executive who are the officials and the third is the judiciary the judicial element which he talked about.

The separation of power and the rule of law are just like the thread which runs through and holds the different beads of the organizations of the state. This concept has played a major role in the formation of the Constitution of many countries including ours. The extent to which powers can be, and should be, separate and distinct was a central feature in formulating, for example the American, French revolutionary constitutions as well as Indian Constitution. The essence of this doctrine is that there must be clear demarcation in function between the legislature, executive and judiciary in order that none should have excessive power and that there should be in place a system of checks and balances between the institutions.

Baron Montesquieu stressed the importance of the separation of power saying that:

<sup>3</sup> De Smith, et al : *Judicial Review of Administrative Action*, 5<sup>th</sup> ed. p14

“When the legislature and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty... Again, there is no liberty if the power of judging is not separated from the legislative and executive. If it were joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would then be the legislator. If it were joined to the executive power, the judge might behave with violence and oppression. There would be an end to everything, if the same men, or the same body, whether of the nobles or the people, were to exercise those three powers that of enacting laws, that of executing public affairs, and that of trying crimes or individual causes.” Here there is clearest expression of the demand for a separation of functions.

### IV. DEEPENING (STRENGTHENING) OF THE INDIAN DEMOCRACY BY THESE TWO PRINCIPLES.

The machinery of justice in India, amidst all the din and camour of democracy, has been greatly influenced by Rule of Law as a transcendental and paramount value, over-seeing the exercise of all powers. The concept of Rule of law shares the common English inheritance and, apart from the statement of generalities, it embraces a body of specific detail. It is this detail that furnishes the foundation for a pragmatic system of governance. Prof. De-Smith explain its contents: “that laws as enacted by Parliament be faithfully executed by officials; that orders of courts should be obeyed; that individuals wishing to enforce the law should have reasonable access to the courts; that no person should be condemned unheard, and that power should not be arbitrarily exercised.”<sup>3</sup>

The Indian constitution by and large seeks to promote rule of law through many of its provisions. For example, Parliament and State Legislatures are democratically elected on the basis of adult suffrage. The Constitution makes adequate provisions guaranteeing independence of the judiciary. Judicial review has been guaranteed through several constitutional provisions. Art.14 of the Constitution guarantees right to equality before law. The Supreme Court of India has invoked rule of law several times in its pronouncements to emphasize upon certain constitutional values and principles<sup>4</sup>.

Indian court emphasized this content when they said that Rule of law is an ‘expression to give reality to something which is into readily expressible but which postulates the pervasiveness of the spirit of law throughout the whole range of governmental action’. That is where “Law has reached its finest moments when it has freed man from the unlimited discretion of some ruler”. True enough that “where discretion is absolute, man has always suffered”. It was suggested in the majority opinion in *Keshvananda Bharati v. State of Kerala*<sup>5</sup> that Rule of Law and democracy were amongst the basic structures of the Indian constitution not amenable to the amending process under Article 368 of the Constitution. In *Chief Settlement*

<sup>4</sup> M.P. Jain, *Indian Constitutional Law* 5<sup>th</sup> Edt 2003 volII Wadhwa and Company Nagpur p8

<sup>5</sup> AIR 1973 SC 1461

*Commissioner, Punjab v. Om Prakash*<sup>6</sup> the Supreme Court observed,:

“In our constitutional system, the central and most characteristic feature is the concept of the rule of law which means, in the present context, the authority of the law courts to test all administrative action by the standard of legality. The administrative or executive action that does not meet the standard will be set aside if the aggrieved person brings the appropriate action in the competent court.”

It was held that Rule of law is an essential feature of the Constitution of India, and absolute discretion in matters affecting the rights of the citizens is repugnant to Rule of Law. The court has also said<sup>7</sup> :

“...We are a country governed by the Rule of Law. Our constitution confers certain rights... on citizens. Every person is entitled to equality before the law and equal protection of the laws. So also, no person can be deprived of his life or personal liberty except according to procedure established by law. Thus the State is bound to protect the life and liberty of every human-being, be he a citizen or otherwise, and it cannot permit anybody or group of persons, e.g., the AAPSU, to threaten the Chakmas to leave the State...”

In *Jaisinghani v. Union of India*<sup>8</sup> the Supreme Court quoting from Dicey's “Law of the Constitution (10 edition)” had held, “...The rule of law from this point of view means that decisions should be made by the application of known principles and rules and, in general, such decisions should be predictable and the citizen should know where he is.” The Indian experience of freedom under Rule of Law would be incomplete without reference to the recent experience of judicial Activism. Access to justice has been ensued to everyone by liberalization of the rule of ‘*locus standi*’. The procedure of ‘continuing mandamus’ was devised by the Supreme Court to direct investigation and monitor its progress till its completion with the filing of the charge sheet in the competent court to commence the trial according to the prescribed procedure<sup>9</sup>. The guarantee of ‘equality’, a facet of Rule of Law has thereby been realized.<sup>10</sup>

In *Bachan Singh*<sup>11</sup>, Justice Bhagwati has emphasized that rule of law excludes arbitrariness and unreasonableness. In *D.C. Wadhwa v. State of Bihar*<sup>12</sup>, the Supreme Court has again invoked the rule of law concept to decry too frequent use by a State Government of its power to issue ordinances as a substitute for legislation by the Legislature. The two great values which emanate from the concept of rule of law in modern times are no arbitrary government and upholding individual liberty. Emphasizing upon these values, Khanna, J., observed in *A.D.M. Jabalpur v. S. Shukla*<sup>13</sup>: “rule of law is the antithesis of arbitrariness...Rule of law is now the accepted norm of all civilized societies... Everywhere it is identified with the liberty of the individual. It seeks to maintain a balance between the opposing notions of individual liberty and public order. In every state the problem arises of

reconciling human rights with the requirements of public interest. Such harmonizing can only be attained by the existence of independent courts which can hold the balance between citizen and the state and compel governments to conform to the law”.

If we examine the concept of separation of power in its practicality we find that there is a lot of departure. The rapid expansion of the sphere of officinarality and the expert nature of much of it, have transformed both the machinery of the law and the problems of reconciling governmental stability with political progress. The last fifty years had seen the breakdown of the rigid doctrine of separation of power even in states where the separation is constitutionally sanctified<sup>14</sup>. The legislature, administrative and judicial function overlap at a hundred vital points in the field of modern law. In Indian scenario we find that there is lot of interdependence in between the legislative and the executive, the real separation is very small, but the separation between the legislative and the judiciary and the judiciary and executive do exist in greater degree. Indian constitution has not recognized the doctrine of separation of powers in its absolute form but the functions of the different parts or branches of government have been sufficiently differentiated and consequently it can very well be said that our constitution does not contemplate assumption, by one organ or part of the State, of functions that essentially belong to another. The executive indeed can exercise the power of departmental or subordinate legislation when such powers are delegated to it by the legislature. It can also, when so empowered, exercise judicial functions in a limited way.<sup>15</sup> In context of the judiciary the Court has held that separation of powers is the basic feature of the Constitution.<sup>16</sup>

In the case of *Delhi laws*<sup>17</sup> the Indian Supreme Court noted the absence of specific provisions in the Constitutional document exclusively vesting legislative powers in the legislature and judicial powers in the judiciary. Did the constitution, then, incorporated doctrine of separation of powers at all? The majority opinion, however, imported the “essence” of the doctrine of separation of powers and the doctrine of constitutional limitation and trust implicit in the constitutional scheme.

In the famous case of *Indira Gandhi v. Raj Narain*<sup>18</sup>, the separation of powers was elevated to the position of a basic feature. In *Ram Jawaya case*<sup>19</sup> the Supreme Court said that it does not follow that under our constitution any organ of the Government can encroach upon the Constitutional power of any other organ or delegate its constitutional function to any other organ or authority.

## V. CONCLUSION

The struggle for respect for the law is endless, since the authorities are never, in any country, inclined to abide by any restrictions, whether imposed by an individual or by all. As with all of civilizations other conquests, the supremacy of law

<sup>6</sup> AIR 1969 SC 33 at 36

<sup>7</sup> *N.H.R.C. v. State of Arunachal Pradesh*, AIR 1996 SC 1234 at 1239

<sup>8</sup> 1965 (2) SCR 703 at 718

<sup>9</sup> *Vineet Narain & Ors. v. Union of India & Anr.*, AIR 1996 SC 3386

<sup>10</sup> Justice J.S. Verma, 50 years of freedom under rule of law: Indian experience, *law and justice* vol 4-7 p83

<sup>11</sup> *Bachan Singh v. State of Punjab*, AIR 1982 SC 1325

<sup>12</sup> AIR 1987 SC 579

<sup>13</sup> AIR 1976 SC 1207 at 1254

<sup>14</sup> Julius stone, *the Province and Functions of law* p590

<sup>15</sup> *Ram Jawaya v. State of Punjab*, AIR 1955 SC 549

<sup>16</sup> *State of Bihar v. Bal Mukund Shah*, (2000) 4 SCC 640

<sup>17</sup> 1951 S.C.R. 747

<sup>18</sup> AIR 1975 SC 2299

<sup>19</sup> *Ram Jawaya v. State of Punjab*, AIR 1955 549

is forever under threat. We can draw the comparison with medieval fortified towns with their walls, moats, towers and drawbridges, which guaranteed the security required by any social organization to the people living within their boundaries. Jurist must take up their position at the ramparts and watch over the town to defend it against any threat. Indian democracy is a living and vibrant democracy. The judiciary has striven to unite its people in common bonds of justice.

Indian Constitution is peculiar in many of its nature. We find no where mention of the separation of power but we still see that there is underlying principle which is inbuilt in it. This beauty of our Constitution. We have adopted the rule of law and separation of powers in our own ways and left it to “We the People” to develop them and let it grow in its own organic way. Rule of law was always there in our ancient system of governance. The ‘Dharma’ was always above the king, howsoever high he may be. This is what the rule of law. Even we find in everybody’s life the concept of rule of laws (law of dharma) which is predominant and guiding force. We Indians live by principles.

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