

DE JURE NEXUS LAW JOURNAL

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2nd Year, BBA LL.B.**RULE OF LAW- IS THE PHILOSOPHY PRESERVED?****Abstract**

The concept that describes the supreme authority of law over the government's action or an individual citizen's behaviour is rule of law. It commensurate to a scenario where both the government and the individuals are bound by the law and they comply with it. The term rule of law derives its meaning from the French phrase 'la principe de legalite' which means the 'principal of legality'. In other words, we can say arbitrary powers or Tyrannical regime is just the anti-thesis of the Rule of Law. There exists a difference between rule of man and rule according to law. The extreme autocratic forms of government also follow and runs according to law but it does not mean there is Rule of Law. The basic principles of Rule of Law are freedom, equality, non-discrimination, fraternity, accountability and non-arbitrariness. Rule of Law can be considered as Ideal which every nation strives to achieve. Rule of Law can be said the modern name of 'Natural Law'. Romans call it 'Jus Naturale' where Mediaevalists on the other hand call it 'Law of God', Other philosophers like Hobbes, Locke, Rousseau prefer to called it a 'social contract'. Over the centuries the rule of law has gone through many historical developments and can be linked to the rise of present liberal democratic form of government. Though there is no one exact definition, it does not mean there is no agreement on the values of that Rule of Law represents.

Introduction

This research paper intends to discuss the philosophy of The Rule of Law. The philosophy behind the Rule of Law is not to just talk about the government but involve the citizen to respect and comply with those laws. Starting right from the evolution of meaning of the term, the article will next cover what are the formal, procedural, substantive aspects of the Rule of Law. Towards the end of the research paper, we will see what are the other criticisms against the rule of law.

Evolution of the Rule of Law

The philosophical discussions about the law and society played an important role in Greek and Roman empire. Aristotle's work *In Rule of law* is quite influential. His approach was a realistic one. He formulated the question whether it was better to be ruled by the best man or the best laws.

The rule of law for him not only dependant on the type of law one was considering but also the type of regime that enacted and administered the law.¹ According to his opinion law made after long considerations. he's still considered that certain cases could not be handled by general rules and need the insight of the judges. He used the term 'epieikeia' which translates to equity. Plato writes "Where the law is subject to some other authority and has none of its own, the collapse of the state, in my view, is not far off; but if law is the master of the government and the government is its slave, then the situation is full of promise and men enjoy all the blessings that the gods shower on a state". John Locke highlighted the importance of governance by "established standing Laws, promulgated and known to the People"². Montesquieu is best known for his work of creating a connection between the rule of law and separation of powers-between judiciary, executive, legislative authority. Montesquieu in 'The Spirit of Law' developed a theory of the values of legalism. He believed not legal and procedural complexity how to be associated with the respect for people's dignity. He writes "In monarchies, the administering of a justice that hands down decisions not only about life and goods, but also about honour, requires scrupulous inquiries. The fastidiousness of the judge grows as more issues are deposited with him, and as he pronounces upon greater interests." During the 19th century Albert Venn Dicey expresses discontentment of the fall of the Rule of Law in the England. He gave three principles of the rule of law. The first being supremacy of law. He believed that minimum discretionary power given today authority in order to reduce arbitrariness. The second being 'equality before law'. He stated that equal subjection of all the classes and individuals to the law land are an important attribute of "Rule of Law". That old under final one being 'predominance of legal spirit'. The general principles while governing are derived from judicial decisions on the private rights of an individual. All these three principles are regarded us the basic requirements of formal understanding of rule of law.

In England, the concept that king was bound by the law was actually a feature of the Magna Carta signed by King John in 1215. It sought to place constraints on the king's power and protect the nobles' privileges. The Magna Carta declared that a person should not be deprived of their liberty or property except there is lawful justification to it. In India the concept of rule of law is traced to Upanishad. It states that law is more powerful and rigid than the kings. One of the basic principles of English Constitution is Rule of Law. Indian Constitution as well as the constitution of USA follows the doctrine of Rule of Law.

¹ Politics(1282b)

² Two Treatises of Government (1689)

Formal, Procedural and Substantive Requirements:

Theorists of Rule of Law believe in Formal, Procedural and Substantive requirements. The principle under formal aspects is concerned with the form of the rule or norm that are applied. According to Lon Fuller's "inner morality of law" the eight formal principals are generality, publicity, prospectivity, intelligibility, consistency, practicability, stability and congruence. The character of law should be genral and not aimed at any particular class or individual. For an example making it the law for the dark-skinned person to sit at the back of bus, applies only to a targeted group. This is not the aim of Rule of Law.

Formal aspect is compliment with Procedural aspect. The principles under this aspect the judiciary, government or executive ought to follow procedures. The rights like access to impartial and independent tribunal, a right to representation by counsel and present evidence, a right to hear reasons for the decision etc are the procedural principles. It was this procedural aspect that people were concerned about in the American detention facility in Guantanamo Bay from 2003 when it presented a "black hole" for detainees. According to Amnesty International, the persons who were arrested did not have any channel to represent themselves and were kept in secret prisons. No one was allowed to enter the premises not even UN representatives. This was a major breach in terms of procedural aspects of rule of law.

The last aspect is substantive theories. Many jurists like Joseph Roz believed that the rule of law is purely formal/ procedural ideal on the other hand others believed that substantive dimension is important in rule of law. It is contended by the proponents of substantive theory that the rule of law should incorporates ideals of fairness and justice that can be used to address economic inequality. They are concerned whether law is a good law or a bad law. Substantive concept of rule of law forms the very basis of Human rights. For example, the apartheid government had very clear law. It was even publicised and upheld by law enforcement officials. But it was missing this substantive component of the rule of law.

The world justice project gives four principles of the rule of law³. These are 'Accountability'; The government along with private actors are to be held accountable under the law. The second one being 'Just law', Clarity, publication stabilisation of law is important in order to ensure just human rights as well as contract and property rights. The third one talks about 'Open Government'. The administration, adjudication and enforcement of Law must accessible, fair and efficient. The last principle is 'Accessible and Impartial Justice'. Justice delivered timely by competent and you clear authority Is an important aspect of Rule of Law.

Criticisms of rule of law

It is no doubt that rule of law forms a crucial part of the liberal form of democratic government. Plato criticised rule of law "like a stubborn, stupid person who refuses to allow the slightest deviation from or questioning of his own rules, even if the situation has in fact changed and it turns out to be better for someone to contravene these rules."

³ Available at: <https://worldjusticeproject.org/about-us/overview/what-rule-law> [Last accessed on 20th July, 2021].

Rule of law is not necessarily a politically neutral concept. Philosophers like Dicey and Hayek argue that the welfare state is not compatible with the rule of law. It is also criticised as serving as a justification for capitalist system of economic governance. Rule of law does not play a prominent role in the eastern societies the law is derived from the customs and traditions. Dicey's first principle has been criticised because it excludes the discretionary authority by the government. Though he mentions that law should be of equal subjection do all the persons but he does not talk about already existing discrimination. Though it is claimed that rule of law is not equivalent to rule by men but men are necessary to enforce the law. Each individual interprets the law through their own knowledge and ethical sense.

Conclusion

To sum up this research paper you can say that the meaning of the term Rule of Law is ever evolving. We can simply understand that rule of law is basically keeping the law that governs the society at the supreme position and not the people who are making those laws. The concept of law can be understood to embrace the fundamental elements of legality. In these modern times following the principles of Rule of Law is basically striving towards a form of good governance. There exists many criticisms and controversies attached today implementation of these principles. Answering to the title of the all the research paper, He can say that the philosophy it's not preserved in its original form but has evolved. various countries are trying to incorporate the principles into their constitution Like USA UK and India. But on the other hand, there are countries like North Korea whose regime is far from implementing these principles.

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