

A REVIEW OF JOSEPH RAZ'S RULE OF LAW WITH RESPECT TO INDIA¹

INTRODUCTION

The term 'Rule of Law' is derived from the French phrase *la principe de legalite* which refers to a government based on principles of law and not of men. In this sense the concept of *la principe de legalite* was opposed to arbitrary powers. It is an essential value of constitutionalism and is very much an inherent feature of democracy and good governance. In the famous case of *Kesavananda Bharati v. State of Kerala*², Rule of Law was considered as an aspect of the doctrine of basic structure.

The concept of rule of law is ever-evolving and dynamic in nature and thus is devoid of a precise definition. But the basic connotation of this doctrine lies in holding that the law reigns supreme. It refers to a principle of governance which refuses to discriminate and holds all the people equally accountable with no room for arbitrariness. John Locke, Thomas Hobbes and Jean-Jacques Rousseau expounded the social contract theory which led to the rise of school of natural law. This served as the basis for the doctrine of Rule of Law which was popularised by A.V. Dicey. In his book, *Law of the Constitution*, Dicey famously observed that wherever there is discretion there is room for arbitrariness³.

One of the most influential minds on the Doctrine of Rule of Law has been Joseph Raz. In his renowned book, *The Authority of Law*, Raz elucidates his positivist point of view regarding rule of law and its virtue. He regards rule of law as a precondition of individual liberty. According to him, the primary function of rule of law is to prevent the arbitrary exercise of discretionary power. This article aims to critically analyse Raz's doctrine of rule of law with a view to study its application in India.

APPLICATION OF JOSEPH RAZ'S PRINCIPLES OF RULE OF LAW IN INDIA

Joseph Raz provided two aspects to his interpretation of rule of law. The first aspect stated that people should be ruled by law and must obey it. The second aspect specified that the law should

¹ Aditya Sharma, Symbiosis Law School, Pune.

² *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225.

³ Dicey, *Law of the Constitution*, 8th Edn, p. 198.

be of such virtue that people must be able to be guided by it. Thus, Raz deduced that if the law is to be obeyed it must be capable of guiding the behaviour of its subjects.⁴

Raz also enumerated a number of important principles which can be derived from the basic principle of rule of law. The important principles and their application in India are as follows:

All laws should be prospective, open, and clear.

In explaining the doctrine of rule of law, Joseph Raz attached great importance to the prospective nature of law. Article 20(1)⁵ of the Constitution of India prohibits the legislature from making retrospective criminal laws. In the case of *Kedarnath v. State of West Bengal*⁶, it was held by the court that enhanced punishment and conviction under a law passed after the commission of the crime is prohibited by virtue of Article 20(1)⁷. However, if such a law lessens the rigour faced by the guilty party, then the prohibition on retrospective laws does not apply. This is known as the doctrine of beneficial construction and was held valid in the landmark case of *Ratanlal v. State of Punjab*⁸.

Another important quality that Raz attached to the doctrine of rule of law was the open and adequate publicization of law. In India, an Act passed by the legislature has to be notified to the public by its publication in the Gazette of India. This is widely recognised as the official way of informing the public about a new law. In the case of *State of Maharashtra v. Mayer Hans George*⁹, Justice Subba Rao held that the mode employed by the Gazette of India is adequate enough for people interested to make themselves acquainted with the law.

Joseph Raz also emphasised on the importance of law being clear and specific as ambiguity in law is likely to mislead people. And even if there exists a little ambiguity, an interpretation of the law which defeats the intent and purpose for which the statute was enacted should be avoided. This was held in the case of *State of Kerala & Ors v. Dr SG Sarvothama Prabhu*¹⁰. The recent arrests of two activists under the Unlawful Activities (Prevention) Act, 1967¹¹ also

⁴ Joseph Raz, THE RULE OF LAW AND ITS VIRTUE -THE AUTHORITY OF LAW, 1979.

⁵ Article 20(1), Constitution of India.

⁶ *Kedarnath v. State of West Bengal*, AIR 1953 SC 404.

⁷ Article 20(1), Constitution of India.

⁸ *Ratanlal v. State of Punjab*, AIR 1965 SC 444.

⁹ *State Of Maharashtra v. Mayer Hans George*, 1965 AIR 722.

¹⁰ *State of Kerala & Ors v. Dr SG Sarvothama Prabhu*, (2001) 9 SCC 673.

¹¹ Unlawful Activities (Prevention) Act, 1967, Act 37 of 1967.

led to a debate regarding the ambiguous definition of unlawful activity¹² which enabled the arrests¹³.

Laws should be relatively stable.

Stability of laws was held to be a very vital aspect by Raz when considering the applicability of rule of law. His emphasis on stable laws was to viably help people make long term decisions.

Over the course of the last 70 years, the Constitution of India has been amended more than 100 times¹⁴. But to ensure consistency with the objectives of the constitution, there have been a slew of judicial pronouncements. The Indian Judicial system has come up with the doctrine of Basic Structure which safeguards the most essential and vital parts of the constitution from being amended to the detriment of the public in contravention with the spirit of the constitution. This doctrine was expounded in the landmark cases of *Kesavananda Bharati v. State of Kerala*¹⁵ and *Minerva Mills v. Union of India*¹⁶ which effectively limited the power of the parliament to amend the constitution, thus decreasing the scope for arbitrariness and ensuring stability.

The making of particular laws (particular legal orders) should be guided by open, stable, clear, and general rules.

Joseph Raz was of the opinion that laws and the process by which they are made must be regulated and controlled in a manner which was transparent and stable. The judicial precedents which evolved through the cases of *Shankari Prasad*¹⁷, *Sajjan Singh*¹⁸, *Golaknath*¹⁹ and *Kesavananda Bharati*²⁰ with regards to amendment of the constitution are an example of how

¹² Section 2(o), Unlawful Activities (Prevention) Act, 1967, Act 37 of 1967.

¹³ Ajay Kumar, *Unlawful Activities Act: India's anti-terrorism law's ambiguous nature gives unreasonable power to authorities*, FIRSTPOST (August 29, 2018).

¹⁴ Samir Chopra, *How flexible should constitutions be? A contrasting study between the US and India*, QUARTZ INDIA (March 25, 2019).

¹⁵ *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225.

¹⁶ *Minerva Mills v. Union of India*, AIR 1980 SC 1789.

¹⁷ *Shankari Prasad Singh Deo v. Union of India*, AIR. 1951 SC 458.

¹⁸ *Sajjan Singh v. State of Rajasthan*, 1965 AIR 845.

¹⁹ *Golaknath v. State of Punjab*, 1967 AIR 1643.

²⁰ *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225.

a framework has to be established while making laws as the culmination of these led to the evolution of the basic structure doctrine.

The Supreme Court rightly observed in *Som Raj v. State of Haryana*²¹ that the absence of arbitrary power is the basis of Rule of Law upon which whole constitutional edifice is based. If the discretion is exercised without any principle or without any rule, it is a situation amounting to the antithesis of Rule of Law.

The independence of the judiciary must be guaranteed.

The constitution of India has provided extensively for the independence of judiciary to promote the rule of law and secure the interests of justice. In the case of *L Chandrakumar v. Union of India*²², independence of judiciary was held as part of basic structure of the constitution.

The appointment of judges to the Supreme Court is done by the President but only after consultation with the Chief Justice²³. After a slew of judicial precedents in the *Four Judges case*²⁴, it has been observed that the choice of the Chief Justice of India prevails over that of the President.

Article 124(4) also provides for a very systematic procedure for the impeachment of judges. It lays down that a Judge of the Supreme Court shall not be removed by the President except on a joint address by both Houses of Parliament on ground of proved misbehaviour and incapacity of the judge in question. This procedure was initiated against Justice Ramaswamy²⁵ but the motion in the parliament could not be passed as the Congress Party abstained from voting.

The tenure and qualification for a judge have also been provided²⁶. The constitution provides further protection to Judges by fixing their salaries and establishing that the salaries could not be varied to the disadvantage of the judges²⁷ and mandating that the expenses of the Supreme Court and the Judges shall be charged upon the Consolidated Fund of India²⁸. The discussion

²¹ *Som Raj v. State of Haryana*, (1990) 2 SCC 653.

²² *L. Chandrakumar v. Union of India*, (1997) 3 SCC 261.

²³ Article 124, Constitution of India.

²⁴ *SP Gupta v. Union of India*, AIR 1982 SC 149; *Supreme Court Advocates on Record Association v. Union of India*, (1993) Supp 2 SCR 659; *In re Special Reference 1 of 1998*, AIR 1999 SC 1; *Supreme Court Advocates on Record Association v. Union of India* (2016) 5 SCC 1.

²⁵ *Sarojini Ramaswami v. Union of India*, (1992) 4 SCC 506.

²⁶ Article 124, Constitution of India.

²⁷ Article 124, Constitution of India.

²⁸ Article 146(3), Constitution of India.

of the conduct of a Judge of the Supreme Court and High Court is also forbidden in Parliament except upon a motion for and address to the President for removal of the judge²⁹.

However, there have been a few blemishes to the independence of judiciary in India. For example, Justice AN Ray was appointed the Chief Justice of India, after superseding three senior judges, solely because of their judgement in the *Kesavananda Bharati*³⁰ case. Similarly, Justice MU Beg was appointed the Chief Justice, superseding Justice HR Khanna, due to Justice Khanna's widely acclaimed dissenting judgement in the case of *ADM Jabalpur v. Shivkant Shukla*³¹.

The principles of natural justice must be observed.

There has been immense stress on the basic principles of natural justice to be followed. The landmark case of *Maneka Gandhi v. Union of India*³² held that Articles 14, 19 and 21 are by large cornerstones of the Indian constitution and safeguards for enforcing the principles of natural justice.

In the case of *Justice P.D. Dinakaran v. Judges Inquiry Committee*³³, the court was of the opinion that an unreasonable pre-conceived notion was against the principles of natural justice. This was in consonance with the maxim *nemo iudex in causa sua* which translates to the established principle that no man must be a judge in his own case. In the case of *Gullapalli Nageshwar Rao v. APSRTC*³⁴, it was held that one who decides the case must also hear the case thus adding legal strength to the maxim *audi alteram partem*.

The courts should have review powers over the implementation of the other principles.

In the landmark case of *L Chandrakumar v. Union of India*³⁵, the power of the courts of judicial review was held to be a part of the basic structure of the constitution along with Articles 32, 226 and 227. Further, in the case of *P. Sambamurthy v. State of AP*³⁶, the court held that it is a

²⁹ Article 121, Constitution of India.

³⁰ *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225.

³¹ *ADM Jabalpur v. Shivkant Shukla*, AIR 1976 SC 1207.

³² *Maneka Gandhi v. Union of India*, 1978 AIR 597.

³³ *Justice P.D. Dinakaran vs Judges Inquiry Committee*, AIR 2011 SC 3711.

³⁴ *Gullapalli Nageshwar Rao v. APSRTC*, AIR 1959 SC 308.

³⁵ *L. Chandrakumar v. Union of India*, (1997) 3 SCC 261.

³⁶ *P. Sambamurthy v. State of AP*, (1987) 1 SCC 362.

basic principle of Rule of Law that the exercise of power by the executive must not only be conditioned by the Constitution but must also be in accordance with law and the power of judicial review.

These powers are conferred by the Constitution with a view to ensure that the law is observed and there is compliance with the requirement of law on the part of executive and other authorities. This is also in harmony with Joseph Raz's principles as it is through the power of judicial review that the Rule of Law is maintained and every organ of the State is kept within the limits of law.

The courts should be easily accessible.

Joseph Raz recognised that the guarantee of equality of law and equal protection of law lies at the heart of the judicial set up. Thus he stressed on the accessibility and approachability of courts. It has been universally recognized and iterated repeatedly by the Supreme Court, that timely justice and speedy trial is a facet of the right to life under our Constitution³⁷. In the landmark case of *Sunil Batra v. Delhi Administration*³⁸, the court recognised a letter as a Public Interest Litigation to further the cause of Justice. In the famous cases of *Hussainara Khatoon v. State of Bihar*³⁹ and *Khatri v. State of Bihar*⁴⁰, the court stressed heavily on legal aid and equitable access to courts as a basic fundamental right. In the case of *SP Gupta v. Union of India*⁴¹, it was famously held that every citizen shall have a right and interest in protecting the constitutional mechanism.

In the recent case of *Anita Kushwaha v. Pushap Sudan*⁴², the court identified four aspects that constitute the essence of access to justice. The four aspects are:

- (i) the State must provide an effective adjudicatory mechanism;
- (ii) the mechanism so provided must be reasonably accessible in terms of distance;
- (iii) the process of adjudication must be speedy; and
- (iv) the litigant's access to the process must be affordable.

³⁷ Article 39 A, Constitution of India.

³⁸ *Sunil Batra v. Delhi Administration*, 1980 AIR 1579.

³⁹ *Hussainara Khatoon v. State of Bihar*, 1979 AIR 1369.

⁴⁰ *Khatri v. State of Bihar*, 1981 SCR (2) 408.

⁴¹ *SP Gupta v. Union of India*, AIR 1982 SC 149.

⁴² *Anita Kushwaha v. Pushap Sudan*, AIR 2016 SC 3506.

The discretion of the crime-preventing agencies should not be allowed to pervert the law.

Joseph Raz was of the opinion that the crime prevention mechanism is equally essential as the crime redressal mechanism of a state. He propounded that excess discretion given to crime preventing agencies like the police in absence of limits and safeguards would result in arbitrariness. Thus, emphasis on the doctrine of ultra vires was stressed upon to ensure that the authorities and people in power don't cross the threshold of their power.

In the case of *Ram Jawaya Kapur v. State of Punjab*⁴³, the court held that the executives of the Government are bound to conform not only to the law of the land but also to the provisions of the Constitution. Therefore, even if the acts of the executive are sanctioned by the legislature, they can be declared to be void and inoperative if they infringe upon any of the fundamental rights guaranteed by Part III of the Indian Constitution. Various provisions of Indian Criminal Jurisprudence also require compliance of the law enforcement agencies with the statute. It is in consonance with these principles of Rule of Law that any confession or a statement made before a police officer is null and void in terms of its evidentiary value⁴⁴.

VALUE OF RULE OF LAW IN INDIA AND CONCLUSION

Upon evaluating the application of Joseph Raz's doctrine of rule of law in India, it can be observed that the modern concept of the rule of law is fairly wide and, therefore sets up an ideal framework for any government to achieve. Recent aggressive judicial activism can only be seen as a part of the efforts of the Constitutional Courts in India to establish rule-of-law society which implies that no matter how high a person may be, the law is always above him. Court is also trying to identify the concept of rule of law with human rights of the people.

The Court is developing techniques by which it can force the government not only to submit to the law but also to create conditions where people can develop capacities to exercise their rights properly and meaningfully. The public administration is responsible for effective implementation of rule of law and constitutional commands which effectuate fairly the objective standards laid down by law⁴⁵.

⁴³ *Ram Jawaya Kapur v. State of Punjab*, AIR 1955 SC 549.

⁴⁴ Section 164, Code of Criminal Procedure, 1973, Act 2 of 1974.

⁴⁵ *State of Punjab v. GS Gill*, (1997) 6 SCC 129.

The compliance with Raz's principles of rule of law reflect very well upon studying its application in India. However, the main challenge that we face is safeguarding the institutions that are entrusted with upholding the rule of law. The attempt by the executive and the legislature to encroach upon the judiciary during the passage of the *Four Judges case*⁴⁶, serve as a startling reminder for a need to maintain the rule of law. And this potential for threat to our institutions makes concept of Rule of Law highly relevant in the Indian context.



⁴⁶ SP Gupta v. Union of India, AIR 1982 SC 149; Supreme Court Advocates on Record Association v. Union of India, (1993) Supp 2 SCR 659; In re Special Reference 1 of 1998, AIR 1999 SC 1; Supreme Court Advocates on Record Association v. Union of India (2016) 5 SCC 1.