

## DOCTRINE OF RULE OF LAW - ANALYZING THE THEORY OF JOSEPH RAZ

Written by *Manan Soni*

*Semester 1 LLM Student, Lovely Professional University, Jalandhar, India*

---

### ABSTRACT

“Rule of Law” is regarded as the basic structure of the Constitution of India. The paper reviews that to what extent the principles of “Rule of Law” as stated by Joseph Raz are applied in India. Many principles are laid down by Joseph Raz that signifies whether a country follows the rule of law or not. In the first section of the text, the author describes what is the meaning of the “doctrine of rule of law”. According to A.V. Dicey three principles are very important for the rule of law to be applicable i.e. the supremacy of law, equality before law, and the predominance of legal spirit. The text also examines how the theory of Rule of Law as stated by Joseph Raz is applied in India and to what extent. The author applies various case laws and articles of the Constitution of India to prove his point as to the applicability of the Doctrine of Rule of India in India as laid down by various courts of the country.

The paper seeks to answer the question: Whether the principles of rule of law as stated by Joseph Raz are applicable in India and to what extent do they apply in India?

## INTRODUCTION

*“The rule of law is better than that of any individual”*

– Aristotle

Rule of Law means a government that is based on the principles of law. The author starts by mentioning the meaning of the Doctrine of Rule of Law as developed by Prof. A.V. Dicey. Prof. Dicey stated that there are three main principles of this doctrine i.e. supremacy of law, equality before law, and the predominance of legal spirit. The author further mentions about Joseph Raz and his interpretation of the Rule of Law. The author mentions the principles of rule of law, as per Joseph Raz i.e. law should be prospective, independence of judiciary, accessibility of courts. The author in his critical analysis refers to various case laws and articles of the Constitution of India to explain how various principles of the Doctrine of Rule of Law as laid down by Joseph Raz are followed in India.

The author mentions that how in the case of *Kesavananda Bharti vs. State of Kerala*, it was stated that Rule of Law is regarded as a part of the basic structure of the Constitution and therefore, it cannot be abrogated or destroyed even by the Parliament. The author then mentions individual principles of Joseph Raz and apply it to the Indian context like how according to article 20 (1) of the Constitution of India, criminal laws cannot be retrospective thus stating that a person cannot be punished which for the time being in force is not a crime. The laws in India are stable and are not amended often thus not leading to any confusion in the minds of the people as to what law is currently applicable in country. There is independence of the judiciary which can be observed by the way the judiciary system of India works so as to protect the judiciary from any political bias. Lastly, the author mentions how the courts in India are made accessible to each to every citizen of the country by making the courts affordable and by setting up of Lok Adalats to give speedy justice to the people. Therefore, it is argued by the author that most of the principles of the ‘*Doctrine of Rule of Law*’ as mentioned by Joseph Raz are applied in India showing that Rule of Law is followed in India to a great extent.

## **RULE OF LAW**

The expression '*Rule of Law*' has been derived from the phrase '*la principe de legalite*' which means a government based on the principles of law. According to this concept, the state is ruled not by a ruler or a nominated representative of the state but by law. According to the Doctrine of Rule of Law, law is the guiding force in the society rather than any individual. This doctrine was explained by Sir Edward Coke and developed by Prof. A.V. Dicey. Prof. A.V. Dicey in his book titled '*The law of the Constitution*', published in 1885 explained this doctrine by stating that rule of law contains three principles i.e. supremacy of law, equality before law, and the predominance of legal spirit. Prof. Dicey explained that no man is punishable except for a breach of law, no man is above law and that the general principles of the constitution are based on the decisions of the courts. According to Prof. Dicey, one must be held accountable for the breach of law, at the same time he cannot be held accountable for something else.

## **JOSEPH RAZ AND HIS RULE OF LAW**

Joseph Raz, born on March 21, 1939, was an Israeli legal, political and moral philosopher who identified Rule of Law as "*the law must be capable of guiding the behaviour of its subjects*"<sup>i</sup>. According to Joseph Raz, law should be general, clear, prospective, public and relatively stable and believes that following rules should be followed i.e. an independent judiciary as well as open and fair hearings by the courts without prejudice. Some of the principles of Joseph Raz are<sup>ii</sup> –

1. Laws should be prospective and not retrospective.
2. Laws should be relatively stable because if the laws are changed frequently it will become very hard for people to obey them due to the lack of awareness.
3. Rules and procedures laid down for law making should be very clear.
4. Independence of judiciary is very important and should be guaranteed.
5. Courts should be accessible to everyone so that no one is denied justice.
6. Principles of natural justice are very important for any society and should be observed.

According to Joseph Raz, law must be prospective as then only people will be aware about what is legal and what is not, beforehand. He also mentions that Rule of Law cannot extinguish the participation of man in making decisions hence it will be a combined decision of men as well as the rule of law. Some of the principles of Joseph Raz are discussed in detail –

1. Joseph Raz argues that law must be prospective, open and clear. He argues that people cannot be guided if the law is retrospective thus believing that one cannot be punished for something which is not recognized by law. Law should also be clear so that it can be understood by the people and subsequently followed by them. If the law is vague, ambiguous or imprecise it will mislead people and thus result in their unintentional breach of law.
2. Raz believes that law should be relatively stable. If the law is unstable or changes too often then it will lead to confusion and will also make it harder to educate people about the new law. Raz argues that if the law is changed continuously, it will become hard for people to remember that at the given time what law is applicable in the society. Thus, laws need to be stable so that people can memorize law and adhere to them and not be in a dilemma due to frequently changing laws.
3. Raz believes that making of particular laws (particular legal orders) should be guided by open, stable, clear and general rules.<sup>iii</sup> He states that clear and general rules need to be in place for law making so that the law is coherent and easy for the law makers to establish new laws or to change the existing laws.
4. Raz also states that independence of judiciary is very important and must be guaranteed. As court's judgement establishes what is law and interprets law, it is very important that there is independence of the judiciary to give proper justice to the litigants. The independence of judiciary includes method of appointment of judges, fixing salaries, tenure and other conditions so as to save them from external pressures.
5. Raz also believes that open and fair hearing and the lack of bias is very important in the administration of justice thus stating that the principles of natural justice must be observed.
6. Raz also believes that courts should be easily accessible and accessible to all. He believes that if the courts are not accessible to one section of the society then it will not

result in justice to that section leading to a biased distribution of justice. Therefore, the courts should be affordable to each and every person of the society and there should not be long delays in administration of justice.

## CRITICAL ANALYSIS

This section talks about whether the approach of Rule of Law as stated by Joseph Raz is followed in India. This section will also mention that to what extent the principles of Rule of Law as stated by Joseph Raz are followed in India, referring to various case laws and articles of the Constitution of India.

### *Whether the approach of Joseph Raz is followed in India?*

Many principles of Joseph Raz on the Rule of Law are followed in India including the independence of judiciary, nature of law being prospective and not retrospective, stable laws as well as the observation of principle of natural justice. The Doctrine of Rule of Law has been adopted with the ideals of equality, justice, and liberty and is embodied in the preamble of India. Article 13 (1) of the Constitution of India states that any law made by the legislature has to be in conformity with the Constitution failing which it shall be declared void, showing the supremacy of the Constitution which further emphasises the Doctrine of Rule of Law.<sup>iv</sup> In the case of *Kesavananda Bharti vs. State of Kerala*, it was held that Rule of Law is regarded as a part of the basic structure of the Constitution and, therefore, it cannot be abrogated or destroyed even by the Parliament.<sup>v</sup> In the case of *Shankari Prasad vs. UOI*, the question as to whether the fundamental rights can be amended under article 368 was discussed by the Hon'ble Supreme Court.<sup>vi</sup> It was held that the Parliament has power to amend Part III of the Constitution under article 368 as 'law' under article 13 does not include a constitutional amendment. The majority decision in the case of *Shankari Prasad* was reaffirmed in the case of *Sajjan Singh vs. State of Rajasthan*.<sup>vii</sup> Moreover, in the case of *I.C. Golaknath vs. State of Punjab*, it was held by the Hon'ble Supreme Court that the Parliament has no power to amend Part III of the Constitution so as to abridge or take away the fundamental rights of the citizens.<sup>viii</sup>

The 24<sup>th</sup> amendment of the Constitution added the clause to the Constitution restoring the amending power of the Parliament. The Hon'ble Supreme Court in *Keshavananda Bharti* case, by majority, overruled the decision given in the case of *Golaknath* and held that the Parliament has wide powers of amending the Constitution. It was also held that the amending power of the Parliament extends to all the articles but this power is not unlimited and does not include the power to destroy or abrogate the basic framework of the Constitution.<sup>ix</sup> Therefore, the Supreme Court in this case held that the Rule of Law is an essential part of the basic structure of the Constitution of India and thus cannot be amended by any act of the Parliament, showing that law is superior to all other authority of men. In the case of *Indira Nehru Gandhi vs. Raj Narain* the Supreme Court invalidated article 329A which granted immunity to election to the office of the Prime Minister from the scope of judicial review.<sup>x</sup> The Hon'ble Supreme Court stated that this violated the concept of Rule of Law which cannot be destroyed or abrogated even by the Parliament. In the Habeas Corpus case of *ADM Jabalpur vs. Shivakant Shukla*, the question as to whether there was any rule of law in India apart from article 21.<sup>xi</sup> The Hon'ble Supreme Court held that there is no rule of law other than the constitutional rule of law and that article 21 is our rule of law and if it is suspended then there will be no rule of law. Hon'ble Justice Khanna in his dissenting opinion observed that “*Even in the absence of article 21 in the Constitution, the state has got no power to deprive a person of his life and liberty without the authority of law*”.

Therefore, the Doctrine of Rule of Law has been followed in India as mentioned by Joseph Raz. As mentioned by Joseph Raz, there are rules and procedures in place for making various laws in India. The Election Commission of India, which is a constitutional body undertakes the task of ensuring free and fair elections with some degree of efficiency. Also, the role of the Central Vigilance Commission and the Comptroller and Auditor General in the exposure of scams related discrepancies shows that the laws have provided for its own protection by putting in place multiple levels of safeguards.

## **LAWS PROSPECTIVE AND NOT RETROSPECTIVE**

In India, it is observed that criminal laws are prospective in nature and civil laws can be either prospective or retrospective. Article 20(1) of the Constitution of India, imposes a limitation on the law-making powers of the Constitution as it prohibits the legislature from making retrospective criminal laws. Article 20(1) reads as, “*no person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence*”.<sup>xii</sup> This clearly shows that the Constitution of India is framed in a way to give criminal laws a prospective approach rather than a retrospective approach. In the case of *Kedarnath vs. State of West Bengal*, the accused committed a crime punishable by imprisonment and fine under the Prevention of Corruption Act.<sup>xiii</sup> The Act was amended in 1949 and additional fine was imposed on the accused. It was held by the Supreme Court that the enhancement of punishment could not be applied as the crime was committed in 1947 whereas the act came in force in 1949, thus there cannot be a retrospective effect to law.

## **STABILITY OF LAWS**

In India, the laws are relatively stable and can be observed as the laws do not change very often. The amendments that take place in various acts or the Constitution of India are very minimal leading to almost no confusion of laws. The framing of laws in India are such that laws especially the penal laws have hardly observed any major amendments since its inscription. Thus, there is stability of laws in India which results in almost no confusion in understanding and memorising laws.

## **INDEPENDENCE OF JUDICIARY**

Independence of Judiciary is observed in India by various methods like high qualifications of the judges of the High Courts and the Supreme Court, security of tenure, no practise after retirement, power to make rules to regulate their own procedure, various immunities. The judiciary has the power to make rules to regulate their procedure thus giving them

independence. Moreover, the qualifications required to be a judge of the High Court or the Supreme Court are very high thus leading to very minimal chances for any political intervention. The tenure of the judges is mentioned and thus they have a secured tenure.

## **ACCESSIBILITY OF COURTS**

The main function of the judiciary and of Rule of Law is to provide justice to people. In order to provide equal justice for everyone, the courts in India are accessible to each and every citizen without bias. The court fee is very minimal which makes it possible for the poor people of the society to obtain justice. The Government of India has also established Lok Adalats to provide speedy justice to the poor at very minimal costs. Thus, the principle of accessibility of courts is followed in India as mentioned by Joseph Raz.

Therefore, various principles as mentioned by Joseph Raz are followed in India including the independence of judiciary, laws being prospective, stability of laws, accessibility of courts as well as to obey the principles of natural justice.

## **CONCLUSION**

Therefore, the principles of Doctrine of Rule of Law as stated by Joseph Raz are followed in India which can be observed through the independence of judiciary, stability of laws, prospective nature of laws as well as the accessibility of courts. Rule of Law has been considered a vital part of the Constitution of India by the Hon'ble Supreme Court in the case of *Kesavananda Bharti vs. State of Kerala*, showing the importance of this doctrine. Moreover, the role of the judiciary in India is such to provide justice to each and every citizen of the country and to observe and follow the principles of natural justice. Therefore, replying to the affirmative that yes, the principles of rule of law as stated by Joseph Raz are applicable in India and that too to a great extent.



## REFERENCES

### *Statutes*

- art 13, 13(1), 20(1), 21, 329A, 368, The Constitution of India, 1950.

### *Articles*

- Joseph Raz, *THE RULE OF LAW AND ITS VIRTUE*, 210-229 at 214, in *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* (J. Raz) (1979)

### *Cases*

- Kesavananda Bharti vs. State of Kerala (1973) 4 SCC 225
- Shankari Prasad vs. UOI AIR 1951 SC 455
- Sajjan Singh vs. State of Rajasthan 1965 AIR 845
- I.C. Golaknath vs. State of Punjab AIR 1967 SC 1643
- Indira Nehru Gandhi vs. Raj Narain AIR 1975 SC 2299
- ADM Jabalpur vs. Shivakant Shukla 1976 AIR SC 1207
- Kedarnath vs. State of West Bengal AIR 1954 SC 660

### *Online Resources*

- Teacher, *The Rule of Law as Political Theory*, LAWTEACHER (Feb. 02, 2018), <https://www.lawteacher.net/free-law-essays/constitutional-law/the-rule-of-law-as-political-theory-law-essay.php>

## ENDNOTES

---

<sup>i</sup> J. Raz, *THE RULE OF LAW AND ITS VIRTUE*, 210-229 at 214, in *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* (J. Raz) (1979)

<sup>ii</sup> Teacher, *The Rule of Law as Political Theory*, LAWTEACHER (Feb. 02, 2018), <https://www.lawteacher.net/free-law-essays/constitutional-law/the-rule-of-law-as-political-theory-law-essay.php>

<sup>iii</sup> Joseph Raz, *THE RULE OF LAW AND ITS VIRTUE*, 210-229 at 214, in *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* (J. Raz) (1979)

<sup>iv</sup> Art. 13, 13(1), 20(1), 21, 329A, 368. *The Constitution of India*, 1950.

<sup>v</sup> *Kesavananda Bharti vs. State of Kerala* (1973) 4 SCC 225

<sup>vi</sup> *Shankari Prasad vs. UOI* AIR 1951 SC 455

<sup>vii</sup> *Sajjan Singh vs. State of Rajasthan* 1965 AIR 845

<sup>viii</sup> *I.C. Golaknath vs. State of Punjab* AIR 1967 SC 1643

<sup>ix</sup> *Kesavananda Bharti vs. State of Kerala* (1973) 4 SCC 225

<sup>x</sup> *Indira Nehru Gandhi vs. Raj Narain* AIR 1975 SC 2299

<sup>xi</sup> *ADM Jabalpur vs. Shivakant Shukla* 1976 AIR SC 1207

<sup>xii</sup> Art 20, cl. 1, *The Constitution of India*, 1950.

<sup>xiii</sup> *Kedarnath vs. State of West Bengal* AIR 1954 SC 660