

## **2. Rule of Law in India: A Critical Analysis**

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### **i. Abstract**

The following research article seeks to discuss the very existence and definition of the term “Rule of Law” and how it has been treated as a misnomer in India. There have been several instances wherein Rule of Law has been ignored and in turn giving allegiance to the Rule of Men. This article endeavors to discuss a constitutional provision, two Supreme Court Judgments, and two statutory provisions that cover most of the Rule of Law that is followed in India. The protection and the immunity that is provided to the president, prime ministers, governors, and other officials is a major point of contention that is discussed, as they are provided with some facilities that directly violates “Equality of Men” a concept that is underlined directly under Article 14 of the Constitution of India as well the Rule of Law.

Looking at a relatively recent development of the Sabarimala Temple Judgment, the Apex Court judgment that has the supreme standing in the country is being overturned by the authorities and the officials who have responsibility for the temple, and therefore there is a gross violation of “Supremacy of Law”.

This article also seeks to discuss one of the controversial cases in the Indian legal history, that is, the ADM Jabalpur Case that describes how Rule of Law wasn’t being followed in the major part of the judgment and how Rule of Law has been an integral and vital aspect of Justice H.R. Khanna’s dissent in this judgment. This judgment goes further to talk about how cigarette smoking is prohibited in public areas and how in particular, the statutes with regards to this matter have been overlooked by the general public at large, and thus they have subsequently lost the value of enforceability.

The article lastly, seeks to discuss a provision under which any organization that is authorized by the Central Government could keep a check and collect information and data from any form of internet source, in a way practicing internet censorship, and thus create a way around the landmark judgment of Right to Privacy.

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## 1. Introduction

“Rule of Law” is considered to be the grund norm and is a fundamental building block on which most of the modern societies in the world have based their governments on. The term “Rule of Law” saw its development from the French phrase “La Principle de Legality”, which translates to “the principle of legality”. Expanding it into a broader sense, “Rule of Law” means that Law is supreme and no individual is above the law. In a niche sense, “Rule of Law” insinuates that all the government authorities must exercise all the powers that they are vested with should be something that has been adopted through an established procedure.

Rule of Law essentially underlines and is the flag bearer of the slogan “a government of laws, no men”. “Rule of Law” does not necessarily provide for anything specific or particular like Fundamental Rights, Directive Principles of State Policy, Principles of Equity, etc. But Rule of Law does provide two very basic and fundamental concepts, that is:

1. The law should be and must be obeyed by the people.
2. Law must be able to guide the behaviors of other people.

## 2. Origin of Rule of Law

The origin of the Rule of law is a bit hazy because it goes back seven centuries prior, back to the thirteenth century when Judge Barton during the rule of King Henry III had expressed his opinion, “The King himself ought to be subject to God and the law because the law makes him the King”<sup>13</sup>.

Sir Edward Coke, who is generally known as the founder of the theory of “Rule of Law”, was opinionated with the belief that the king who is considered the supreme, should be under God and therefore under law as well.<sup>14</sup>

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<sup>13</sup> Ryan, Kevin (2005). "Lex et Ratio: Coke, the Rule of Law and Executive Power". Vermont Bar Journal. 2005 (Spring). ISSN 0748-4925.

<sup>14</sup> Avaibale at: <https://www.lawteacher.net/free-law-essays/administrative-law/origin-and-concept-of-rule-of-lawadministrative-law-essay.php#ftn4> (last viewed on May 29, 2020)

In India, the novel concept of “Rule of Law” can be traced back to the Vedas and the Upanishads which propagate the propaganda that Law is the King os Kings.

However, the credit for the development of the modern “Rule of Law” and its implementation into the society has been majorly due to the efforts of the renowned jurist Prof. A.V.Dicey who in his book, “Introduction to the Study of the Law of the Constitution” that was published in the year 1885, strived to develop the modern concept of “Rule of Law”.

### **3. Dicey’s Theory of the Rule of Law**

Dicey’s theory of “Rule of Law” had encapsulated three major principles-<sup>15</sup>

- **Supremacy of Law**

As per Dicey’s theory of Rule of Law, in any society, the law must be absolute supremacy and therefore no man should be made or could be lawfully made to suffer by way of body or goods except when there is a very distinct breach of law that has been established with sufficient material evidence in an ordinary legal manner in the Court of law. According to Dicey, the government, as well as the people, should abide by the laws of the land.<sup>16</sup>

- **Equality before Law**

Dicey’s concept of equality before the law came before the Napolean System of administration where the Courts dealt with the matters related to Government officials that were different from

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<sup>15</sup> A. V. Dicey, Introduction to the study of Law.

<sup>16</sup> Ibid.

the normal courts. According to this system, whether if it's a government official who holds authority or any normal citizen, everyone should be treated with equality.<sup>17</sup>

- **Predominance of Legal Spirit**

Dicey propounded the third principle of Rule of Law and compared England with the other countries, wherein the rules, rights and the duties of the citizens are written down in a Constitution which serves as the grund norm for that society, but England has no such written Constitution and the rights which the people are vested with are due to the Judicial Decisions.<sup>18</sup>

#### **4. Critical Analysis of Dicey's Theories**

Although Dicey has been primarily responsible for the propounding of the three main principles of "Rule of Law" there has been a lot of criticisms of Dicey's theory. Some of them have been enlisted below:<sup>19</sup>

1. When Dicey developed the principle of "Equality before the law", his main focus and intent was directed towards the Judicial System in the Napolean Courts where there were two different types of courts- one for the normal citizens and the other type of court was to settle disputes against administrative authorities. This kind of a facet was violative of "Rule of Law" according to Dicey as there is a very probable situation wherein there would be certain kind of bias that would be reflected in the Courts. Dicey, however, had failed to recognize there existed another appeal authority that was preceded by judges who did not have any connection with administrative authorities.
2. According to the theory that was propounded by Dicey, England followed the principle of "Rule of Law", but the main issue that existed with Dicey's theory was that the

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<sup>17</sup> A. V. Dicey, Introduction to the study of Law.

<sup>18</sup> Ibid.

<sup>19</sup> Ibid.

parliament in the United Kingdom was formed based on Magna Carta in the year 1215 which was given to the general public by the then king, King John. The fact that this was not given by the people to themselves and was attributed to the general public by themselves is a sheer violation of equality of law.

3. Dicey had propounded the principle of “Supremacy of Law” he found the law to be very clear and fixed, but he was mistaken as the condition in England was not he thought it was because there had been no codification of law.
4. Dicey’s propagation of the theory of “Rule of Law” does not seek to distinguish between the regimes that are considered to be democratic with those that are violative of basic human rights.

Bringing in an example to explain the above statement, in Germany during the Second World War, when the country was undergoing the dictatorship regime of Hitler if the theory propounded by Dicey is used, then one should be upholding the supremacy of law and should be supportive enough to entail the predominance of legal spirit without the acknowledgment of the fact that the law in force is nothing but against the very spirit of natural justice.

Although Dicey is responsible for framing the principles of “Rule of Law”, still it has proved to be very difficult to come to the grass-root level of what exactly does “Rule of Law” mean, as the term itself is very subjective. Every person has their notion as to what “Rule of Law” actually stands for, some might reckon that it only entails supremacy of law but there are others who think that it is a combination of principles like clarity, equality, and so forth. Some very common ingredients that the concept of ‘Rule of Law’ actually encapsulates have been enlisted below:

1. A government that is bound and is ruled by law;
2. Equality before law;
3. Establishment of law and order;
4. Effective and efficient application of justice; and
5. Effective protection of human rights.

“Rule of Law” in the books of Dicey wasn’t exactly applicable to the situation in India because we do have a written constitution which owes its formation as per the rule of the social contract theory.<sup>20</sup>

In India, the situation is considered to be quite complex. There exist situations wherein the principles of Rule of Law are very well visible but there are certain grim situations wherein Rule of Law is completely given the second track.

The Hon’ble Supreme Court of India ruled that the law of equality is a basic and an essential feature that is to be followed in the case of public employment and this feature is also entailed in the basic structure of the constitution and therefore, Rule of Law becomes the core of the constitution.<sup>21</sup> The High Court of Jammu and Kashmir has also reiterated the above-mentioned principle of the Supreme Court wherein it was said that the rule of law is the basic structure of the Constitution.<sup>22</sup>

## **5. Case Studies on The Rule of Law in India**

There have been several instances highlighted in the Indian legal history wherein the Rule of Law is predominantly not followed:

- **Protection given to the President and Governors**

India has been a blind advocate in following the maxim “*Rex Non-Postest Peccare*” which means that King can never do any wrong. The Indian Constitution also entails the same through Article 361. According to this Article:

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<sup>20</sup> Where people of the nation come together and give their powers to an entity in whose return, they get rights and have to fulfil some obligation in the form of rights. The Preamble of the Constitution of India is the best example of Social contract theory as it states “We the people do hereby adopt, enact, and give to ourselves this constitution.”.

<sup>21</sup> The State of Bihar and Ors. vs. Kirti Narayan Prasad, 2018 (15) SCALE 352.

<sup>22</sup> Niva Sinha & Ors. vs. State of J&K and Ors., 2018 SCC OnLine J&K 1000.

*“The President, or the Governor or Rajpramukh of a State, shall not be answerable to any Court for the exercise and performance of the powers and duties of his office or for any act done or purporting to be done by him in the exercise and performance of those powers and duties”<sup>23</sup>, “No criminal proceedings whatsoever shall be instituted or continued against the President, or the Governor of a State, in any Court during his term of office”<sup>24</sup>, “No process for the arrest or imprisonment of the President, or the Governor of a State, shall issue from any Court during his term of office”<sup>25</sup>.*

These provisions have always provided a clear exception to the Rule of Law in India and have always extended some unequal immunity to the president, governors, or rajpramukh of a state.<sup>26</sup> If we follow an ideal Rule of Law in a modern Indian society, then such forms of exceptions should be encouraged and therefore there is a clear violation of the theory of Rule of Law that has been propounded by A.V. Dicey.

- **The Sabarimala Temple Issue<sup>27</sup>**

The above-mentioned case pertains to the Sabarimala Sree Dharmashastra Temple that is located in the Pathanamthitta district of Kerala. At Sabarimala, the deity that was previously worshipped was Ayyappan. Lord Ayyappan was believed to be “sanyasi” and to pay due respect to the deity, women aged 10-50 should be restricted from entering the premises of the Temple.

This particular practice was in consonance with Rule 3(b)<sup>28</sup>. Finding this to be a violation of human rights, a Public Interest Litigation (PIL) was filed in the High Court of Kerala against the Devasom Board that had been previously entrusted with the responsibility of the

<sup>23</sup> Article 361(1) of The Constitution of India.

<sup>24</sup> Article 361(2) of The Constitution of India

<sup>25</sup> Article 361(3) of The Constitution of India.

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<sup>27</sup> Indian Young Lawyers Association and Ors. vs. The state of Kerala and Ors., 2018 (8) SCJ 609.

<sup>28</sup> The Kerala Hindu Places of Public Worship (Authorization of Entry) Rules, 1965.

maintenance of the temple. The High Court had upheld the views of the Devasom Board thus giving in allegiance to Rule 3(b)<sup>29</sup>.

This judgment of the High Court of Kerala was subsequently challenged in the Supreme Court of India. The Hon'ble Supreme Court recognized that for a particular clause, rule or a provision to be held good, it should conform with the various statutes that are in force and secondly, the authority that makes the rules should have the power to frame these very rules and if anyone of these essentials is not fulfilled then the rule that is disputed is said to be void.<sup>30</sup> The Supreme Court of India had ruled out that this disputed judgment was in violation of Article 25<sup>31</sup> of the Constitution and thereby struck it down.

According to Article 141 of the Constitution of India, any judgment of the Supreme Court of India is binding on every other court and is entitled to take the shape of the law. This statute underlines the Doctrine of Precedent in India. The effect of this Supreme Court judgment has almost been nil, therefore, there seems to be a clear and gross violation of Supremacy of Law in this scenario. When it came to the purview of the general public that two girls belonging to the menstruating age, Bindu and Kanakadurga, had entered the temple there had been outright violent protests that spread across the states with the protestors pelting stones and blocking the national highways. Various rallies were conducted by the different political parties in protest of women having entered the temple premises. These incidents, on the other hand, point out there is still a predominance of “Rule of men” rather than that of “Rule of Law”.

- **ADM Jabalpur Case**<sup>32</sup>

This case is with regard to the presidential order that was passed on the 27<sup>th</sup> of June 1975 when India had been going through the period of Emergency. This order had proved to be curtailing the rights of the people under Article 226<sup>33</sup> of the Indian Constitution to file a writ of Habeas Corpus as a writ petition. The Supreme Court held the view in the ADM Jabalpur case that

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<sup>29</sup> Indian Young Lawyers Association and Ors. vs. The state of Kerala and Ors., 2018 (8) SCJ 609.

<sup>30</sup> General Officer Commanding-in-Chief vs. Dr. Subhas Chandra Yadav, AIR 1988 SC 876.

<sup>31</sup> Freedom of conscience and free profession, practice and propagation of religion

<sup>32</sup> Additional District Magistrate, Jabalpur vs. Shivakant Shukla, AIR 1967 SC 1207.

<sup>33</sup> Power of the High Courts to issue certain writs.

liberty is something that is confined and is controlled by the law, whether it is under common law or if it is under statutes, and thus the court states that the persons involved in the case do not have the locus standi to file a case under the writ of Habeas Corpus in any of the High Courts as it was not ruled illegal and it was based on some extraneous considerations.

Justice H.R.Khanna, however, gave a dissenting judgment and stated that Article 21<sup>34</sup> of the Constitution of India stating that this article gave a very basic assumption of Rule of Law. In this judgment, he specifically stated that, “Without such sanctity of life and liberty, the distinction between a society that is lawless and the one governed by laws would cease to have any kind of meaning.”<sup>35</sup>

Followed by this, in the judgment of Keshavnanda Bharti<sup>36</sup>, the Hon’ble Supreme Court ruled that the parliament cannot amend or make changes to the basic structure of the Indian Constitution, and Article 21 of the Indian Constitution is also considered under the basic structure of the Constitution of India.

The case of the ADM Jabalpur case was consequently overruled by the Justice Dr. D.Y. Chandrachud in the Right to Privacy case<sup>37</sup>, where Justice Chandrachud had explicitly stated that “*The judgment rendered by all the four judges constituting the majority in ADM Jabalpur are seriously flawed. Life and personal liberty are inalienable to human existence. These rights are, as recognized in Kesavananda Bharati, primordial rights. They constitute rights under natural law. The human element in the life of the individual founded on the sanctity of life.*”

Thus, the Right to Privacy judgment showed that how the rule of law could be bypassed and could be given importance to the Rule of Men which would be reflective due to the political, economic, social, etc. conditions in the nation.

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<sup>34</sup> Right to life and personal liberty

<sup>35</sup> Freedom of conscience and free profession, practice and propagation of religion

<sup>36</sup> His Holiness Kesavananda Bharti Sripadagalvaru and Ors. vs. State of Kerala and Anr., AIR 1973 SC 1461.

<sup>37</sup> Justice K. S. Puttaswamy and Ors. vs. Union of India and Ors., AIR 2017 SC 4161.

- **Prohibition of Cigarette Smoking at Various Public Spaces**

The High Court of Kerala on the 12<sup>th</sup> of July, 1999 upheld a judgment where it was stated that the health of the public is endangered by smoking that is passive and therefore it is violative of Article 21<sup>38</sup> of the Constitution of India, if the smoking in public places is something that is exercised.<sup>39</sup>

The Hon'ble Supreme Court on the 2<sup>nd</sup> of November, 2001 had passed a judgment that stated the adverse effects of smoking in places that are public and also stated some of the adverse effects of smoking in public places and also stated that people should abstain from smoking in any public areas as passive smoking is something that couldn't be allowed at any cost and mentioned in this particular judgment to hold good and valid till the parliament comes up with legislation on this particular topic.<sup>40</sup>

In the year 2003, the parliament had passed the Cigarettes and other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003.

The above-mentioned legislation was the one that had replaced the 2001 judgment, Section 4<sup>41</sup> of this act stated that “No person should ever smoke in a public place”, and if anyone ever goes against the provisions of Section 4 then he would be liable with a punishment of Rs. 200 under Section 21 of the above-mentioned act. The State of Gujarat has taken one step forward in the year 2017 when they had banned ‘Hookah’ and had imposed a fine of about Rs. 50,000 and a minimum of Rs. 20,000 that was coupled with imprisonment that could be extended to a period of three years but not less than that of a year.<sup>42</sup>

If the attention of this issue is shifted to the ground reality then it can be noticed that the laws of smoking in any public place are something that is cared about trivially. People are almost

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<sup>38</sup> Power of the High Courts to issue certain writs

<sup>39</sup> K. Ramakrishnan and Anr. vs. State of Kerala and Ors., AIR 1999 Ker 385.

<sup>40</sup> Murli S. Deora vs. Union of India and Ors., AIR 2002 SC 40.

<sup>41</sup> Cigarettes and other Tobacco Products (Prohibition of advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003

<sup>42</sup> Cigarettes and Other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) (Gujarat Amendment) Act, 2017.

often seen smoking in public places which shows that “Rule of Law” is prevalent to this day, as there is a violation of Supremacy of Law.

- **Section 69 of The Information Technology Act, 2000**

“Right to Privacy” is one of the fundamental aspects of Article 21<sup>43</sup> of the Indian Constitution by the Supreme Court of India.<sup>44</sup> This judgment was passed in the year 2017 on the 24<sup>th</sup> of August, but this judgment did not consider Section 69<sup>45</sup> of the Information Technology Act, 2000 and the clause b<sup>46</sup> of the same provision.

The Supreme Court has tried to vest the power of privacy via a judicial judgment, but its effect has been nullified by the existence of these two sections. These sections have in a way given rights to the central government an immunity to breach into the citizens’ right to their privacy and collect their information. The law that is declared by the Supreme Court should be able to take the shape of law in the jurisdiction that it can call its own.<sup>47</sup> This should explicitly mean that the Right to Privacy judgment should be followed as an established law in India and it should be considered supreme. But considering the fact that these two sections have still not been declared ultra vires by the Supreme Court<sup>48</sup> is in itself a violation of Rule of Law.

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<sup>43</sup> Fundamental Right regarding Right to life and personal liberty.

<sup>44</sup> Justice K. S. Puttaswamy and Ors. vs. Union of India and Ors., AIR 2017 SC 4161

<sup>45</sup> Power to issue directions for interception or monitoring or decryption of any information through any computer resource

<sup>46</sup> Power to authorize to monitor and collect traffic data or information through any computer resource for cyber security

<sup>47</sup> Article 141 of the Constitution of India: Law declared by Supreme Court to be binding on all courts The law declared by the Supreme Court shall be binding on all courts within the territory of India.

<sup>48</sup> Article 13 of the Constitution of India: The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void

## 6. Conclusion

Looking at all the above-mentioned circumstances, it is still very difficult to conclude that India follows Rule of Law, because in some cases the Rule of Men is so prevalent. Even if Rule of Law is considered as a separate and an abstract entity in itself, then too, we get to see that it is, in the end, a man who frames laws that other men have to follow and thus Rule of Men acts as a veil over Rule of Law.<sup>49</sup> Though Rule of Law seems to be the best theory that could be inculcated into the Indian society, it still acts as a far-fetched concept in the Indian context and situation.

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<sup>49</sup> Contra: An Introduction to the study of law of Constitution, by A. V. Dicey