CHAPTER 3

RULE OF LAW UNDER THE INDIAN CONSTITUTION

3.1 Introduction

The state is submitted to the law which implies that all actions of the state or its authority to obey the law which implies that all actions of the state or its authorities and officials must be carried out subject to the constitution and within the limit set by the law, i.e., constitutionalism. In other words, the state is to obey the law.\textsuperscript{269}

The more the administrative law action in our welfare state expands widely touching the individuals, the more is the scope of judicial review of administrative action is, therefore, an essential part of the Rule of Law. The judicial control on administrative action, thus, affords the courts to determine not only the constitutionality of the law but also the procedural part of administrative action as a part of judicial review. The constitution has devised permanent bureaucracy as part of the political execution\textsuperscript{270}. Although, complete absence of Discretionary Powers, or absence of inequality are not possible in this administrative age, yet the concept of Rule of Law has been developed and is prevalent in common law countries such as India. The Rule of Law has provided a sort of touchstone to Judge and test the Administrative Law prevailing in the country at a given time\textsuperscript{271}.

Rule of Law, traditionally denotes the absence of arbitrary powers, and hence one can denounce the increase of arbitrary or discretionary powers of the administration and advocate controlling it through procedures and other means.

\textsuperscript{270} Ibid.
Rule of law for that matter is also associated with Supremacy of Courts. Therefore, in the ultimate analysis, courts should have the power to control the Administrative Arbitrary action and any overt diminution of that power is to be criticized. The principle implicit in the Rule of Law that the executive must act under the law and not by its own fiat is still a cardinal principle of the common law system, which is being followed by India. In the common law system the executive is regarded as not having any inherent powers of its own, but all its powers flow and emanate from the law. It is one of the vital principles playing an important role in Democratic countries like India. There is a thin line between judicial review and judicial activism[^272].

In the English version the paragraph reads, based on Article 6(1)^[^273]:

> [T]he Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States[^274].

In the UK, the principle of rule of law has never been linked to the idea of state, but rather has been seen as one of the three overarching principles of British constitutionalism, apart from the doctrines of separation of powers and legislative supremacy, the third meaning, in Dicey’s words, was that Parliament has “the right to make or unmake any law whatsoever”. Under the second meaning, the three types (legislative, executive and judicial) of political power should be separated from each other so that no one person or institution should exercise more than one type of power. Rule of law is the most difficult to define: in simple terms the doctrine requires that the subject is entitled to be ruled according to law, and that the law should be predictable[^275].

[^273]: Ibid.
[^274]: Ibid.
[^275]: Ibid.
The rule was first propounded in 1885 by Dicey and as noted by Lord Bingham in his aforementioned lecture, had attracted considerable controversy over the years which had elapsed since then\textsuperscript{276}. Nevertheless, reference was made to the doctrine in Section 1 of the Constitutional Reform Act 2005 which provides that this Act does not adversely affect the existing constitutional principle of law\textsuperscript{277}.

Whence Lord Bingham’s tentative in his lecture to define the concept and break it down in eight sub-rules. He defined rule of law as:

\textit{[T]}he core of the existing principle is that all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly and prospectively promulgated and publicly administered in the courts.\textsuperscript{278}

As Dicey’s theory of rule of law has been adopted and incorporated in the Indian Constitution, the three arms judiciary, legislature and executive work in accordance with each other. The public can approach the high courts as well as the Supreme Court in case of violation of their fundamental rights. If the power with the executive or the legislature is abused in any sorts, its \textit{mala-fide} action can be quashed by the ordinary courts of law. This can be said so since it becomes an opposition to the due process of law\textsuperscript{279}.

Rule of law also implies a certain procedure of law to be followed. Anything out of the purview of the relevant law can be termed as \textit{ultra vires} \textsuperscript{280}.

No person shall be deprived of his life or personal liberties except according to procedure established by law or of his property save by authority of law. The government officials and the government itself is not above the law. In India the concept is that of equality before the law and equal protection of laws. Any legal wrong committed by any person would be punished in a similar pattern. The law adjudicated in the ordinary courts of law applies to all the people with equal force.

\textsuperscript{276} \textit{Ibid.}
\textsuperscript{277} \textit{Supra} note 272.
\textsuperscript{278} \textit{Ibid.}
\textsuperscript{279} \textit{Supra} note 271.
\textsuperscript{280} \textit{Ibid.}
and binding ness. In public service also the doctrine of equality is accepted. The suits for breach of contract etc. against the state government officials, public servants can be filed in the ordinary courts of law by the public.  

3.1.1 Rule of Law, Basic Meaning

In the most basic sense, the rule of law means that all power in a community should be subject to general rule and both government and governed should keep to these rules. The rule of law has been widely proclaimed as a pillar of constitutional thought.

The rule of law means the rule of ‘good’ or ‘fair’ or ‘democratic’ laws, the concept seems to have little meaning for example, the rule of law is asserted without definition in section 1 of the constitution reforms Act, 2005.

“Rule of Law”, said Dicey in 1885, means:

[T]he absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power and excludes the existence of arbitrariness of prerogative, or even wide discretionary authority on the part of the government.

Idea denoted by the term “rule, supremacy, or predominance of Law,” there must first determine precisely what here mean by such expression when these terms apply to the British constitution. The supremacy or rule of law is a characteristic of the English constitution, generally it include under one expression at least three distinct though kindred conceptions.

There it is widespread disagreement as to what the rule of law means and its value. Underlying this is a polarized search for absolute answer rather than an acceptance that the rule of law contains valuable ideas provided they are not to extreme. At one extreme, it has been claimed that the rule of law is a universal human good irrespective of the content of any particular law since it favours,

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281 Ibid.
283 Ibid.
reason, Certainty and equality, acts as a restrain on a despot and prevents officials from picking on individual\textsuperscript{286}. At the other extreme, the rule of law could be regarded as mechanical and divisive, separating the rulers from the people and ignoring sentiments such as compassion and common sense in favour of ruthless logic or misleading rhetoric\textsuperscript{287}.

In the middle are grandiose claims associating the rule of law with liberal beliefs such as individualism, freedom and democracy, for example in relation to the European convention on human rights in the proposed European Union constitution, which extols ‘democracy, equality, freedom and the Rule of law’\textsuperscript{288}.

Thus behind the bare idea of the rule of law are implicit assumptions about what is good law and that laws should be made in an acceptable way by the right kind of people. The rule of law is closely connected with the ‘equality’ in its formal sense (formal meaning shape or appearance). Thus every one falls within a given rule is treated the same under it. However, this is procedural and has nothing to do with the substantive equality of law. As J.S. Mill remarked\textsuperscript{289}:

The justice of giving equal publication to the rights of all is maintained by those who support the most outrageous inequality in the rights themselves.

One of the basic features of the English constitutional system, according to Dicey, is rule of law and one of the ingredient of this rule of law is\textsuperscript{290} –

Absence of arbitrary power on the part of the Government, which means that the Administration possesses no are of Law according arbitrary powers apart from those conferred by law. According to Dicey From this follows the corollary that no man is punishable or can be made to suffer in body or goods, except for a

\begin{itemize}
  \item \textsuperscript{286} Supra note 282.
  \item \textsuperscript{287} Ibid.
  \item \textsuperscript{288} Ibid.
  \item \textsuperscript{289} Id., at 150.
  \item \textsuperscript{290} D.D Basu, Administrative Law, 7 (2010).
\end{itemize}
distinct breach of law established in the ordinary legal manner before the ordinary courts of the land\textsuperscript{291}.

The rule of law is claimed to be a necessary foundation of democracy. For example, by ensuring that officials keep within the powers given to them by the people, the rule of law is both the servant and policeman of democracy. It can also protect values on which democracy depends such as freedom of speech. However, this can equally be said of any form of and historically the idea of the rule of law long predated democracy. In other sense the rule of law seems to be at odds with democracy in that it usually depends on decision being made by elite of unelected judges\textsuperscript{292}.

The main versions of the Rule of law in the context of the UK are now given. A broad distinction can be made between the rule of Law as government by Law and the rule of Law as government under Law\textsuperscript{293}:

The core rule of law (often called the ‘thin’ rule of law): This has been outlined above. It means government by law in the form of general rules as opposed to the discretion of the ruler. It also implies ‘equality’ in the sense that everyone who falls within a given rule must be treated the same in accordance with it. Unlike the other version of the rule of law, the core rule of law is absolute and should not be compromised on the other hand all it requires is that there be rules\textsuperscript{294}.

The amplified rule of law (‘thick’ rule of law): this claims that certain ideas relating to fairness and justice are inherent in the notion of law as guiding conduct and that these at least moderate bad laws. It is not claimed that these are absolute values which cannot be overridden by other factors. It is primarily procedural\textsuperscript{295}.

\begin{footnotes}
\item[291] Id., at 8
\item[292] Supra note 282 at 151.
\item[293] Id., at 152.
\item[294] Ibid.
\item[295] Ibid.
\end{footnotes}
The ‘extended’ rule of law: this is the most ambitious version and introduces *substantive* values. It claims that law encapsulates the overarching values of the community – in our case assumed to be liberal values – in the care of impartial judges (see Allan, 2001). It claims also to link with republican ideas of equal citizenship. In as much as this version of the rule of law relies upon vague and contestable concepts, it conflicts with the core rule of law.\textsuperscript{296}

### 3.1.2 Dicey’s Version

Dicey proposed a similar version of the rule of law to that of Hayek. Although dating from 1875, this has been of great influence among English lawyers. However although containing valuable ideas, it has limited application to contemporary circumstances.\textsuperscript{297}

The guarantee of equality before the law is an aspect of what Dicey calls the rule of law in England. It means that no man is above the law and that every person whatever be his rank or condition is subject to the jurisdiction of ordinary courts. Rule of law require that no person shall be subjected to harsh, uncivilized or discriminatory treatment even when the object is the securing of the paramount exigencies of law and order.\textsuperscript{298}

Professor Dicey gave three meanings of the Rule of law: \textsuperscript{299}

1. Absence of Arbitrary Power or Supremacy of the Law: It means the absolute supremacy of law as opposed to the arbitrary power of the Government. In other words—a man may be punished for a breach of law, but he can’t be punish for anything else.\textsuperscript{300}

\begin{flushleft}
\textsuperscript{296} Supra note 282 at 153.
\textsuperscript{297} Ibid.
\textsuperscript{299} Ibid.
\textsuperscript{300} Ibid.
\end{flushleft}
No man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts\textsuperscript{301}.

Like U.S.A but unlike great Britian, there is supremacy of the constitution in India. The constitution of India is the supreme law of the country. An act of any organ of the government which is against the constitution of India is invalid and of no force. The legislature, executive or judiciary cannot violate the constitution. The administrative authorities are not above the constitution and their acts which are contrary to the constitution are invalid and no force. Thus every authority of the government is bound to follow the provisions of the constitution\textsuperscript{302}.

2. Equality before Law: It means subjection of all classes to the ordinary law of land administrated by ordinary law courts. This means that no one is above law all are equal in eyes of law.

3. Absence of Individual Liberty: There are various constitution that provide individual liberty but not provide method It means that the source of the right of individuals is not the written constitution. U.K. don’t have provision for individual liberty\textsuperscript{303}.

3.1.3 Equality before the law and Rule of law.

Equality of all persons in the eye of law, which involves the equal subjection of all persons to the “ordinary law of the land administered by the ordinary law Courts”\textsuperscript{304}.

In India, the meaning of rule of law has been much expanded. It is regarded as a part of the basic structure of the Constitution and, therefore, it cannot be abrogated or destroyed even by Parliament. The ideals of constitution; liberty, equality and fraternity have been enshrined in the preamble. Constitution

\textsuperscript{301} Supra note 282.
\textsuperscript{302} Ibid.
\textsuperscript{303} Ibid.
\textsuperscript{304} D.D Basu, Administrative Law, 8 (2008).
makes the supreme law of the land and every law enacted should be in conformity to it. Any violation makes the law ultra vires.305

In *Kesahavanda Bharti v. State of Kerala* 306, the Supreme Court enunciated the rule of law as one of the most important aspects of the doctrine of basic structure.307

The doctrine of Rule of Law is ascribed to Dicey whose writing in 1885 on the British Constitution included the following three distinct though kindred ideas in Rule of Law:

1. Absence of Arbitrary Power: No man is above law. No man is punishable except for a distinct breach of law established in an ordinary legal manner before ordinary courts. The government cannot punish any one merely by its own fiat. Persons in authority in Britain do not enjoy wide, arbitrary or discretionary powers. Dicey asserted that wherever there is discretion there is room for arbitrariness.309
2. Equality before law: Every man whatever his rank or condition, is subject to the ordinary law and jurisdiction of the ordinary courts. No man is above law.310
3. Individual Liberties: The general principles of the British Constitution and especially the liberties of the individual are judge-made, *i.e.*, these are the result of judicial decisions determining the rights of private persons in particular cases brought before the courts from time to time.311

Dicey asserted that the above mentioned features existed in the British Constitution\textsuperscript{312}.

The British Constitution is judge-made and the rights of the individual form part of, and pervade, the Constitution. The rights of the individuals are part of the Constitution because these are secured by the courts. The British Constitutional Law is not the source, but the consequence, of the rights of the individuals as defined by the courts\textsuperscript{313}.

Referring in particular to the Habeas Corpus Act, Dicey said that it was “worth a hundred Constitutional articles guaranteeing individual liberty. Dicey however accepted that there was rule of law in the U.S.A., because there the rights declared in the Constitution could be enforced, and the Constitution gave legal security to the rights declared\textsuperscript{314}.

The third principle is peculiar to Britain. In many modern written Constitutions, the basic rights of the people are guaranteed in the Constitution itself. This is regarded as a better guarantee for these rights and even in Britain there exists at present strong opinion that basic rights should be guaranteed\textsuperscript{315}.

Dicey’s thesis has been criticised by many from various angles but, the basic tenet expressed by him is that power is derived from, and is to be exercised according to law. In substance, Dicey’s emphasis, on the whole, in his enunciation of Rule of Law is on the absence of arbitrary power, and discretionary power, equality before Law, and legal protection to certain basic human rights, and these ideas remain relevant and significant in every democratic country even to-day\textsuperscript{316}.

It is also true that dictated by the needs of practical government, a number of exceptions have been engrafted on these ideas in modern democratic countries,
e.g., there is a universal growth of broad discretionary powers of the administration; administrative tribunals grown\textsuperscript{317}.

Rule of Law has no fixed or articulation connotation though the Indian courts refer to this sphere time and again. The broad emphasis of Rule of Law is on absence of any centre of unlimited or arbitrary power in the country, on proper structuration and control of power, absence of arbitrariness in the government. Government intervention in many daily activities of the citizens is on the increase creating a possibility of arbitrariness in State action. Rule of law is useful as a counter to this situation, because the basic emphasis of the rule of Law is on exclusion of arbitrariness. Lawlessness and unreasonableness on the part of the government\textsuperscript{318}.

Dicey was not concerned with equality in a general sense. He was concerned with limiting the power of officials in favour of individual legal rights. According to Dicey, this is best achieved if everyone is subject to the same law administrated by ordinary courts. He did not mean that no official has special powers. This would have been obviously untrue. Dicey had two specific ideas in mind:\textsuperscript{319}

First idea, he meant only that officials as such enjoy no special protection, so that if an official abuses his power, he is personally liable to anyone whose property rights or personal freedom he violates just as if he were a private citizen.\textsuperscript{320}

Public bodies are sometimes protected legal against legal liability in the interest of efficiency particularly in cases involving discretionary decisions.\textsuperscript{321}

Dicey’s principle is therefore a presumption that can be overcome by showing some justification for an inequality.\textsuperscript{322}

\begin{itemize}
\item\textsuperscript{317} Id., at 8.
\item\textsuperscript{318} Ibid.
\item\textsuperscript{319} Supra note 304.
\item\textsuperscript{320} Ibid.
\item\textsuperscript{321} Ibid.
\item\textsuperscript{322} Ibid.
\end{itemize}
Second idea, Dicey meant that dispute between government and citizen are settled in the ordinary courts according to the ordinary law rather than in a special governmental court\textsuperscript{323}.

In this respect Dicey compared English Law favorably with French law, where there is a special system of law dealing with the powers of government (Droit administrative enforced by the Conseil d'Etat). Dicey thought that special administrative courts would give the government special privileges and shield the individual wrongdoer behind the cloak of the state. However, dicey later come to believe that, in view of the increasing power of the executive, he may have been too optimistic about the ordinary courts’ ability to protect the individual and began to cast around for other solutions. Nevertheless, this aspect of Dicey’s teaching has been influential\textsuperscript{324}.

Indeed, Dicey did not rule out all discretionary power but only ‘wide arbitrary or discretionary power of constraint’. He insisted on limits to and controls over the exercise of discretion. These include guidelines based on the purposes for which the power is given and standards of reasonableness and fairness. In other words, the rule of law is a broad guide to the values that should underpin the law\textsuperscript{325}.

3.2 Indian Constitution

3.2.1 Constitutional background

The word ‘Constitution’ is developed from the word ‘Constitute’, which means ‘to frame or to establish or to compose’. It defines the relationship between the rulers and the ruled and how rulers are created in the country. It may be written, or unwritten as in the case of Great Britain. It explains the powers belonging to the government, the fundamental rights of the citizens and the relationship between the citizens and the government. It upholds the principle that all citizens

\textsuperscript{322}Ibid.  
\textsuperscript{323}Ibid.  
\textsuperscript{324}Ibid.  
\textsuperscript{325}Ibid.
are equal before the law. Any law which is not in accordance with the Constitution becomes invalid\textsuperscript{326}.

Constitution is an important instrument which confers powers, rights, functions, principles, restrictions and obligations on the part of individuals, states and everybody who are the citizens of India. The purpose of the Constitution is to maintain harmonious relations between the individuals and the states on the one hand and between the different organs of the government on the other. The Constitution reflects the will and wish of the people\textsuperscript{327}.

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The constitution of India is the supreme law of land, having flown from “we, the people of India”, i.e Bharat, having solemnly resolved to constitute India into sovereign, socialist, secular democratic republic\textsuperscript{329}.

The sovereign power is distributed among legislature, the executive and the judiciary with check and balance but not in watertight rigid container. In our democracy governed by the rule of law, the judiciary has expressly been entrusted with the power of judicial review a sentinel on the \textit{qui vive}\textsuperscript{330}.

Basically judicial review of administrative action as also of legislation is exercised against the action of the state. Since the state or public authorities act in exercise of their executive or legislative power, they are amenable to the judicial

\textsuperscript{326}M. Raja Ram, \textit{Indian Constitution}, 2 (2009)
\textsuperscript{327}Ibid.
\textsuperscript{328}Ibid.
\textsuperscript{330}Ibid.
review. The state, therefore, is subject to *etat de droit*, i.e., the state is submitted to the law which implies that all action of the state or its authorities and officials must be carried out subject to the constitution and within the limits set by the law, i.e., constitutionalism.\(^{331}\)

In England, Constitutional Law has no special impact on Administrative Law, because the English Constitution is unwritten and, as Dicey explained it, the rules which in other countries form part of a constitutional code are, in England, the result of the ordinary law of the land. In the result. Whatever control the administrative authorities can be subjected to must be deduce; from the ordinary law, as contained in statutes and judicial decisions but, in countries having Written Constitutions, there is three tier of control over administrative action, and that is the in limitations upon all organs of the body politic. As will appear on Judicial Review, in countries like the U.S.A. or India.\(^{332}\)

3.2.1.1 The constitution is the 'result' of the ordinary law

This derives from the common law tradition. Dicey believed that the UK constitution, not being imposed from above as a written constitution, was the result of decisions by the courts in particular cases, and was therefore embedded in the very fabric of the law and backed by practical remedies. According to Dicey this strengthens the constitution since a written constitution can more easily be overturned. Moreover; because the common law developed primarily through the medium of private disputes, it biases against governmental interests by treating private law with US individual rights, as the basic perspective. Perhaps Dicey's version of the rule of law shows mainly that he trusted judges and feared democracy.\(^{333}\)

\(^{331}\) *Ibid.*
\(^{332}\) Supra note 304.
\(^{333}\) *Id.*, at 161.
3.2.2 Rule of Law and equality before law in India

In India, rule of law exists in this form:\footnote{Supra note 298.}

3.2.2.1. Supremacy of Law:

The First meaning of the Rule of Law is that 'no man is punishable or can lawfully be made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land. It implies that a man may be punished for a breach of law but cannot be punished for anything else. No man can be punished except for a breach of law. An alleged offence is required to be proved before the ordinary courts in accordance with the ordinary procedure.\footnote{Ibid.}

3.2.2.2. Equality before Law:

The Second meaning of the Rule of Law is that no man is above law. Every man whatever be his rank or condition is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals. Everybody under Article 14 is equal before law and have equal protection.\footnote{Ibid.}

3.2.2.3. Individual Liberty

The courts in India protect individuals’ liberties while enforcing fundamental right to life and personal liberty and fundamental freedoms mentioned under Article 21 and Article 19 of the Indian Constitution respectively.\footnote{Ibid.}

The first and second aspect apply to Indian system but the third aspect of the dicey’s rule of law does not apply to Indian system as the source of right of individuals is the constitution of India.\footnote{Ibid.}
The Constitution is the supreme law of the land and all laws passed by the legislature must be consistent with provisions of the constitution. The rule of law imposes a duty upon state to take special measure to prevent and punish brutality by police methodology. The rule of law embodied in article 14 is the basic feature of the Indian constitution and hence it can’t be destroyed even by an amendment of the constitution under article 368 of the constitution.

Several justification have been urged for the need to give reason for administrative decisions. In the first place, a duty to give reasons entails a duty to rationalize the decision. Reasons therefore help to structure the exercise of discretion, and the necessity of explaining why a decision is reached requires one to address one’s mind to the relevant factors which ought to be taken into account. Further reasons satisfy an important desire on the part of the affected individuals to know why a decision was reached.

*C B Gautam v. Union of India*, the Supreme Court again emphasized that

[T]he obligation to record reasons and convey the same to the party concerned operates as a deterrent against possible arbitrary action by the Quasi-judicial or the executive authority invested with Judicial review.

### 3.2.3 Rule of Law under Article 14 of the Constitution of India

The expression equality before law has been derived from the English common law, and the equal protection of the law has been taken from the constitution of United State of America.

It is to be considerable here that law made by British Parliament cannot be struck down by the courts even if the law is blatantly discriminatory. Under the

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338 Ibid.
339 Ibid.
341 SCC (1) 78 (1993).
342 Supra note 282.
Constitution of India, however the sovereignty does not lie exclusively with the parliament, and hence, the laws enacted by the parliament should not violate the provisions of the constitution of India. The Indian Constitution is based on the principle of supremacy of the constitution\textsuperscript{344}.

3.2.3.1 Equality before Law: Article I4

Over the last several years, the courts have been unfolding the vast potentialities of Art. I4 as a restraint on the legislative power of the Legislature as well as administrative power of the Administration.

Art. I4 bars discrimination and prohibits discriminatory laws. Art. I4 is now proving as a bulwark against any arbitrary or discriminatory state action. The horizons of equality as embodied in Art. I4 have been expanding as a result of the judicial pronouncements. Art. I4 has revealed its many facets in course of time as discussed below\textsuperscript{345}.

Art. I4 runs as follows:

[T]he State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

This provision corresponds to the equal protection clause of the 14th Amendment of the U.S. Constitution which declares: “No State shall deny to any person within its jurisdiction the equal protection of the laws.\textsuperscript{346}

3.2.3.1.1 Equality: justice as for Rule of Law

Before rediscovering their constitutional Independence, the state courts adhered to the federal model of equality. In the federal model of equality. In the federal system, an elaborate structure had evolved to effectuate the equal protection clause. Developed over the years by the United States Supreme Court in cases

\textsuperscript{344} Ibid.
\textsuperscript{346} Ibid
involving a variety of constitutional provisions, but most prominently the equal protection clause, this structure now consists of three distinct levels or tier of Judicial review, referred to as strict, intermediate and minimal scrutiny.\footnote{Jeffery M. Shaman, \textit{Equality and Liberty In the Golden Age of State Constitutional Law}, 9 (2008)}

3.2.3.1.2 Origin of Equal protection of Laws

Enacted in 1868, following the civil war, the equal protection clause of the 14\textsuperscript{th} Amendment to the federal constitution proclaims that: \textit{“no state shall …deny to any person within its jurisdiction the equal protection of the laws.”}\footnote{Id., at 38-39.}

For many years after its enactment, the equal protection clause lay relatively dormant, rarely used to strike down legislation or other governmental action.” In 1927, Justice Holmes could accurately describe the equal protection clause as \textit{“the usual last resort of constitutional arguments.”}\footnote{Ibid.}

3.2.3.2 Two concepts are involved in Art. l4, viz., \textit{‘equality before law’} and \textit{‘equal protection of laws’}.

The first is a negative concept which ensures that there is no special privilege in favour of any one, that all are equally subject to the ordinary law of the land and that no person, whatever be his rank or condition, is above the law. This is equivalent to the second corollary of the Dicean concept of the Rule of Law in Britain. This, however is not an absolute rule and there are a number of exceptions to it, e.g., foreign diplomats enjoy immunity from the country's judicial process; An. 361 extends immunity to the President of India and the State Governors public officers and judges also enjoy some protection, and some special groups and interests, like the trade unions, have been accorded special privileges by law.\footnote{Supra note 347.}

The second concept, \textit{‘equal protection of laws’}, is positive in content. It does not mean that identically the same law should apply to all persons, or that every law
must have a universal application within the country irrespective of differences of circumstances. Equal Protection of the laws does not postulate equal treatment of all persons without distinction. What it postulates is the application of the same laws alike and without discrimination to all persons similarly situated. It denotes equality of treatment in equal circumstances. It implies that among equals the law should be equal and equally administered, that the like should be treated alike without distinction of race, religion, wealth, social status or political influence

3.2.3.3 Discrimination by the State in its Own Favour

Article 14 does not outlaw discrimination between the state and a private individual because the two are not placed on the same footing. Thus, creation of a monopoly by the state in its favour will not be bad under Article 14

3.2.3.4 When two laws existing together:

If there are two laws covering a situation, one more drastic than the other, there is the danger of discrimination if the Administration has a discretion to apply any of these laws in a given case. If the two persons placed in similar situation, one may be dealt with under the drastic law and the other under the softer law

To minimize any chance of such discrimination, the courts insist that the drastic law should lay down some rational and reasonable principle or policy to regulate administrative discretion as to its application. If the drastic law fails to do so, then it will be void under art. 14

This proposition was applied by the Supreme Court before 1974. To evict a person from unauthorized occupation of public premises, a Punjab Act provided for it summary procedure. The collector had not two choices; he could either himself order eviction under the special law, or could file an ordinary suit in a

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351 Id., at1001
352 Ibid.
353 Ibid.
354 Ibid.
court for eviction under the general law. The Punjab law was declared void under Art. 14 because being a drastic law it laid down no policy to guide the collector's choice as to which law to follow in what cases; the matter was left to his unguided discretion and so there could discrimination within the same class inter se, viz.,...
Unauthorized occupants of public premises\textsuperscript{355}.

A logical consequence of this ruling was the amendment of the general law to provide that no court would have jurisdiction to entertain any suit in respect of eviction of unauthorized occupants of public premises. With this amendment the law became valid for now only one procedure was available to evict unauthorized occupants. The procedure by way of suit was no longer available, and therefore the vice of discrimination disappeared\textsuperscript{356}.

3.2.3.5 Constitution of India, Art. 14 and its Validity by judiciary.

The true meaning and scope of Article 14 have been explained in a number of cases by the Supreme Court. In view of this the propositions laid down in \textit{Ramkrishna Dalmia v. Justice Tendolkar}\textsuperscript{357} still hold good governing a valid classification and are as follows.

1. A law may be constitutional even though it relates to a single individual if on account of some special circumstances or reasons applicable to him and not applicable to others, that single individual may be treated as a class by itself\textsuperscript{358}
2. There is always presumption in favour of the constitutionality of a statute and the burden is upon him who attacks it to show that there has been a clear transgression of constitutional principles\textsuperscript{359}.
3. It must be assumed that Legislature correctly understand and appreciates the need of its own people that its law are directed to problem made manifest by experience and that its discrimination are based on adequate grounds\textsuperscript{360}

\textsuperscript{355} \textit{Ibid.}
\textsuperscript{356} \textit{Ibid.}
\textsuperscript{357} AIR 1958 SC 538.
\textsuperscript{358} \textit{Ibid.}
\textsuperscript{359} \textit{Ibid.}
\textsuperscript{360}
4. In order to sustain the presumption of constitutionality the court may take into consideration matters of common knowledge, matters of report, the history of the times and may assume every state of facts which can be conceived existing at the time of the legislation\textsuperscript{361}.

5. Thus the legislation is free to recognize degrees of harm and may confine its restriction to those cases where the need is deemed to be the clearest\textsuperscript{362}.

6. The presumption of constitutionality cannot be carried to extent always that there must be some undisclosed and unknown reason for subjecting certain individuals or corporation to be hostile or discriminating legislation.

7. Equality before the law does not require mathematical equality of all persons in all circumstances. Equal treatment does not mean identical treatment. Similarly not identity of treatment is enough\textsuperscript{363}.

8. There can be discrimination both in the substantive as well as the procedural law. Article 14 applies to both.

If the classification satisfies the test laid down in the above propositions, the law will be declared constitutional. The question whether a classification is reasonable and proper and not must however, be judged more on commonsense than on legal subtitles\textsuperscript{364}.

In \textit{State v. V.C Shukla},\textsuperscript{365} here, Supreme Court given the classical tests laid down for the application of Article 14 are the follow\textsuperscript{366} -

1. The classification must be founded intelligible differentia which distinguishes persons who are placed in a group from others who are left out of the group\textsuperscript{367}.

2. Such differentiation must have a rational relation to the object sought to be achieved by the Act\textsuperscript{368},

\textsuperscript{360} \textit{Ibid.}
\textsuperscript{361} \textit{Ibid.}
\textsuperscript{362} \textit{Ibid.}
\textsuperscript{363} \textit{Ibid.}
\textsuperscript{364} \textit{Ibid.}
\textsuperscript{365} \textit{AIR 1980 SC 1382.}
\textsuperscript{366} \textit{Id.}, at 1383.
\textsuperscript{367} \textit{Ibid.}
\textsuperscript{368} \textit{Ibid.}
3. There must be a nexus between the differentiation which is the basis of the
classification and the object of the Act.\textsuperscript{369}

The word ‘high’ is indication of a top position and enabling the holder
thereof to take major policy decisions. Thus, the term ‘high public or political
office’ used in the Special Courts Act contemplates only a special class of officers
or politicians who may be categorized as follow\textsuperscript{370}:

1. Officials wielding extraordinary powers entitling them to take major policy
decisions and holding positions of trust and answerable and accountable for their
wrongs.\textsuperscript{371}

2. Persons responsible for giving to the state a clean, stable and honest
administration.\textsuperscript{372}

3. Persons occupying a very elevated status in whose hands lies the destiny of the
nation.\textsuperscript{373}

The rationale behind the classification of persons possessing the aforesaid
characteristics is that they wield wide powers which, if exercised improperly by
reason of corruption, nepotism or breach of trust, may adversely mould the future
of the country and tarnish its image.\textsuperscript{374}

It is imperative for the efficient functioning of parliamentary democracy and the
institutions created by or under the Constitution of India that the commission of
offences referred to in the recitals aforesaid should be judicially determined with
the utmost dispatch. That this is so, is clear from the observations ‘made’ by
Chandra chud, C. J., and Krishna Iyer, J., the former observed:\textsuperscript{375}

\[\text{P]arliamentary democracy will see it halcyon days in India when law will provide for a speedy trial of all offenders who misuse the public offices held by them. Purity in public is a desired goal at all times and in all situations, emergency or no emergency. But, we cannot}\]
sit as a super legislature and strike down the instant classification on the
ground of under-inclusion on the score that those others are left
untouched, so long as there is no violation constitutional restraints\textsuperscript{376}.

3.2.3.6 Article 14 Permits Classification but Prohibits Class Legislation
The equal protection of laws guaranteed by Article 14 does not mean that all laws
must be general in character. It does not mean that the same laws should apply to
all persons. It does not attainment or circumstances in the same position. The
varying needs of different classes of persons often requires separate treatment. In
fact identical treatment in unequal circumstances would amount to inequality. So
a reasonable classification is only not permitted but is necessary if society is to
progress\textsuperscript{377}.

Article 14 forbids class-legislation but it does not forbid reasonable
classification. The classification however must not be “arbitrary, artificial or
evasive” but must be based on some real and substantial bearing a just and
reasonable relation to the object sought to be achieved by the legislation\textsuperscript{378}.

Article 14 applies where equals are treated differently without any
reasonable basis. But where equals and unequals are treated differently, Article 14
does not apply\textsuperscript{379}.

Class legislation makes an improper discrimination by conferring particular
privileges upon a class of persons arbitrarily selected from a large number of
persons all of whom stand in the same relation to the privilege granted that
between whom and the persons not so favored no reasonable distinction or
substantial difference can be found justifying the inclusion of one and the
exclusion of the other from such privilege\textsuperscript{380}.

\textsuperscript{376} \textit{Ibid.}
\textsuperscript{377} \textit{Supra} note 298.
\textsuperscript{378} \textit{Ibid.}
\textsuperscript{379} \textit{Ibid.}
\textsuperscript{380} \textit{Ibid.}
3.2.3.7 Test of Reasonable Classification

While Article 14 forbids class legislation it does not forbid reasonable classification of persons. Classification to be reasonable must fulfil the following two conditions.\(^{381}\)

1. The classification must be founded on the intelligible differentia which distinguishes persons or thing that are grouped together from others left out of the group.\(^{382}\)
2. The differentia must have a rational relation to the object sought to be achieved by the act.\(^{383}\)

The differentia which is the basis of the classification and the object of the act are two distinct things. What is necessary is that there must be nexus between the basis of classification and the object of the act which makes the classification. It is only when there is no reasonable basis for a classification that legislation making such classification may be declared discriminatory.\(^{384}\)

3.2.3.8 Modes of Judicial control to maintain equality under Indian Constitution.

Unlike the U.S.A. the Constitution of India explicitly establishes the modes of judicial review in several Articles, such as, 13, 32, 131-136, 143, 226 and 246. The doctrine of judicial review is thus finally rooted in India and has the explicit sanction of the Constitution.\(^{385}\)

Article 13(2) even goes to the extent of stating that:

[T]he State Shall not make any law which takes away or abridges the rights conferred by this Part [part III containing Fundamental Rights] and any law made in contravention of this clause shall: to the extent of the

\(^{381}\)Ibid.
\(^{382}\)Ibid.
\(^{383}\)Ibid.
\(^{384}\)Ibid.
contravention be void. The courts in India are thus under a constitutional
duty to interpret the Constitution and declare the law as unconstitutional
if found to be contrary to any constitutional provision. The courts act as
sentinel on the *qui vive* so far as the Constitution is concerned.\(^{386}\)

Underlining this aspect of the matter, the Supreme Court stated in *State of Madras v. Row*\(^{387}\),

[T]hat the Constitution contains express provisions for judicial review of
legislation as to its conformity with the Constitution and that the courts
"face up to such important and none too easy task" not out of any desire
“to tilt at legislative authority win a crusader’s spirit, but in discharge of a
duty plainly laid upon them by the Constitution.

The Court observed further:

[W]hile the Court naturally attaches great weight to the legislative
judgment, it cannot desert its own duty to determine finally the
constitutionality of an impugned statute.”\(^{388}\)

As the Supreme Court emphasized in *A.K Gopalan v. Union of India*\(^{389}\):

[I]n India it is the Constitution that is supreme and that a statute law to
be valid, must in all cases be in conformity with the constitutional
requirements and it is for the judiciary to decide whether any enactment
is constitutional or not, and if a legislature transgresses any constitutional
limits, the Court has to declare the law unconstitutional for the Court is
bound by its oath to uphold the Constitution.\(^{390}\)

\(^{386}\) *Ibid.*  
\(^{387}\) AIR 1952 SC 196.  
\(^{388}\) *Ibid.*  
\(^{389}\) AIR 1950 SC 27.  
The doctrines of supremacy of the constitution and judicial review has been expounded very lucidly but forcefully by Bhagwati. J., as follows in *Rajasthan v. Union of India* 391

[I]t is necessary to assert in the clearest terms particularly in the context of recent history, that the constitution is *Supreme lex*, the permanent law of the land, and there is no department or branch of government above or beyond it. Every government, be it the executive or the legislature or the judiciary, derives his authority from the constitution and it has to act within the limits of its authority no one however highly placed and no authority howsoever lofty can claim that it shall be the sole Judge of the extent of its power under the constitution or whether its action is within the confines of such power laid down by the constitution. This court is the ultimate interpreter of the constitution and to this Court is assigned the delicate task of determining what is the power conferred on each branch of government, whether it is limited, and if so, what the limits are and whether any action of that branch transgresses such limits 392.

In *Union of India v E.G Nambudiri* 393, the court again stressed that:

Right to reason is an indispensable part of a sound system of judicial review. Under our constitution an administrative decision is subject to judicial review if it affects the right of a citizen… 394

In *Glaxo laboratories v A V Venkateswaran* 395, held that when a law confers a right of appeal, the legislature intends that right should be an effective right and that right can only be an effective right if the officer or authority from whose order an appeal lies gives reasons for his decision. It is only then that the appellate

391 AIR 1977 SC 1361.  
392 Id., 1703.  
393 AIR 1991 SC 1216.  
394 Supra note 357.  
395 AIR 1959 Bom 372.
court can properly discharge its function. It is only that the appellate court could consider whether the decision of the lower authority was correct or not.\textsuperscript{396}

3.2.3.8.1 Enforcement and preservation of Rule of Law under Indian constitution

The constitution of India does not only establish the Rule of law, but also provides for its enforcement and protection. The judiciary has been made the guardian and protector of the constitution.\textsuperscript{397}

Article 141 provides that the law declared by the Supreme Court shall be binding on all courts except the Supreme Court within the territory of India.\textsuperscript{398}

Article 142 provides that the Supreme Court, in the exercise of its jurisdiction may pass such decrees and make such orders as it necessary for doing complete justice in any cause or matter pending before it. Any decree so passed or order so made shall be enforceable throughout the territory of India in such manner as may be prescribed by or under any law made by parliament or until provision in that behalf is so made, in such manner as the president may be order prescribed. Subject to the provision of any law made in this behalf by parliament.\textsuperscript{399}

The Supreme Court shall as respect the whole of the territory of India, have all or every power to make any order for the purpose of securing the attendance of any person, the discovery or production of any document or the investigation or punishment of any contempt of itself.\textsuperscript{400}

Article 144 makes it clear that all authorities in the territory of India, shall act in aid of the supreme court. The authorities which do not comply with its direction shall be liable for contempt of court. For the enforcement of the supremacy of

\begin{itemize}
\item \textsuperscript{396} Supra note 304.
\item \textsuperscript{397} Kailash Rai, Administrative Law, 41 (2011).
\item \textsuperscript{398} Ibid.
\item \textsuperscript{399} Ibid.
\item \textsuperscript{400} Ibid.
\end{itemize}
supreme law of the country, the high court and the Supreme Court have been conferred the power of judicial review.\footnote{Id., at 42.}

### 3.3 Exceptions of rule of law

Here given below the exceptions of rule of law.\footnote{Supra note 298.}

1. Equality of Law does not mean the power of the private citizens are the same as the power of the public officials. Thus a police officer has the power to arrest you while no other private person has this power. This is not violation of rule of law. But rule of law does require that these powers should be clearly defined by law and that abuse of authority by public officers must be punished by ordinary courts.\footnote{Ibid.}

2. The rule of law does not prevent certain class of persons being subject to special rules. Thus members of armed forces are controlled by military rules. Similarly medical practitioners are controlled by medical council of India.\footnote{Ibid.}

3. Certain members of society are governed by special rules in their profession i.e. lawyers, doctors, nurses, members of armed forces and police. Such classes of people are treated differently from ordinary citizens.\footnote{Ibid.}

The opposite of rule of law is rule of person. The rule of law is necessarily rule by men, for the law is inert. Men are necessary to enforce the law, but all men are prone to interpret the law through their own knowledge, interpretation, and ethical sense. Justice Ramaswamy observed:\footnote{Supra note 271.}

> [T]here is a large amount of discretion involved in the administrative work. Even the simplest thing like discriminate payment of employees can be termed as inequality, as opposed to rule of law.

Total equality is possible to prevail in general conditions, not only in India but in any country for that matter. For example:\footnote{Ibid note 271.}

1. No case can be filed against the Bureaucrats and Diplomats in India.\footnote{Ibid}
2. 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. 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.\textsuperscript{409}

3. The privileges enjoyed by the members of parliament with respect to legal actions against them.\textsuperscript{410}

Thus, on the basis of these points one can say that equality in India is not prevalent in its concrete sense.\textsuperscript{411}

The Dicey’s concept of rule of law has also been criticized. Law changes with time. As the society evolves, even the law of the country should develop. Some view the rule of law as nothing other than a tool of the powerful to maintain the status quo in the legal system. The general consensus is that the status quo, far from being neutral, serves to protect the powerful at the expense of the disempowered. This lack of neutrality in the rule of law runs contrary to the ideal, traced to Aristotle, that in light of the law every person should be equal; that it is one's humanity, not one's status in society that requires that laws be justly applied. More extreme critics claim that: \textsuperscript{412}

[T]he liberal paradigm has destroyed the rule of law.\textsuperscript{413}

The rationale behind this statement is that, considering the real state of the world, many equate the rule of law with legality. However, this is a flawed equation as: \textsuperscript{414}

[L]egality simply means that there are laws and says nothing about the quality of those laws.

Hence, there are many lacunas in the concept of rule of law which servers the reason of non-implementation of the concept properly.\textsuperscript{415}

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\textsuperscript{408} Ibid.
\textsuperscript{409} Ibid.
\textsuperscript{410} Ibid.
\textsuperscript{411} Supra note 298.
\textsuperscript{412} Ibid.
\textsuperscript{413} Ibid.
\textsuperscript{414} Ibid.
\textsuperscript{415} Ibid.
3.4 Rule of Law under Article 14 of the Indian Constitution Strikes at Arbitrariness

Another relevant judgment to cite here is Government of Andhara Pradesh v. P. Laxmi Devi.\footnote{416 (2008) 4 SCC 720.}

It was observed by Supreme Court:

> [T]here is always likelihood of abuse of discretionary power conferred under statute, reiterated, does not render the statutory provision unconstitutional. There is always a difference between a statute and the action taken under a statute. The statute may be valid and constitutional, but the action taken under it may not be valid\footnote{417 Ibid.}.

On the other hand, democracy is not hurt but strengthened whenever courts protected the individual freedoms which alone make the democratic process meaningful and valid. Free speech may best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, even stirs people to anger\footnote{418 Ibid., at 722.}.

The onus is upon the individual who challenges it to show that it is discriminatory. These few propositions lead to the result that it is only in a rare case that a court would be persuaded to hold a law to be discriminatory. This can be illustrated by the following few cases\footnote{419 Supra note 298.}.

In Food Corpn of India v. Kamdhenu Cattle Feed Industries\footnote{420 (1956) 2 ALL ER 145,160.}, it was observed by Court:

> In contractual sphere as in all other state actions, the state and all its instrumentalities have to conform to Article 14 of the constitution of which Non-arbitrariness is a significant facet. There is no unfettered discretion in public law: a public authority possesses powers only to use
them for public good. This imposes the duty to act fairly and to adopt a procedure which is fair play in action\textsuperscript{421}.

During the course of the debate in the House of Lords, Lord Salmon said\textsuperscript{422}:

To my mind equality before law is one of the pillars of freedom. To say that immunity from criminal proceedings against anyone who tries to bribe a Member of Parliament and any member of parliament who accepts the bribe, stems from the Bill of Rights is possibly a serious mistake.

After quoting the Bill of Rights, Lord Salmon said:

Now this is a charter for freedom of speech in the House it is not a charter for corruption. To my mind, the bill of rights, for which no one has more respect than I have, has no more to do with the topic which we are discussing than the merchandise mark Act. The crime of corruption is complete when the bribe is offered or given or solicited or taken.\textsuperscript{423}

No doubt arbitrary actions ordinarily violate equality; but it is simply not true that whatever violates equality must be arbitrary. The large number of decided cases before and after \textit{E.P Royappa v. State of Tamil Nadu}\textsuperscript{424} make obvious that man laws and executive actions have been struck as violating equality without their being arbitrary. Further, it will be submitted that in a liberal democratic Constitution like ours, it would be inappropriate to characterize laws as arbitrary\textsuperscript{425}.

\begin{flushleft}
\textsuperscript{421} \textit{Tata cellular v. Union of India}, (1994) 6 SCC 686
\textsuperscript{422} \textit{P.V Narasimha rao v. state}, (1998) 4 SCC 653.
\textsuperscript{423} \textit{Ibid}
\textsuperscript{424} \textit{AIR} 1974 SC 555.
\end{flushleft}
The new doctrine on arbitrary actions based on the following premises:

“All arbitrary actions violate equality some laws violate equality”

Since the new doctrine involves logical fallacies that would be enough to show that the doctrine is untenable. But this conclusion is reinforced by analyzing certain concepts like “arbitrary”, "law", “Executive action” and discretionary power”. First, it is necessary to define arbitrary.

‘Arbitrary’ is defined in the Shorter Oxford Dictionary (3rd ed.) as follows:

Law relating; to or dependent on the discretion of an arbiter, discretionary, not fixed. Based on mere opinion involves the voluntary action of a person on whom the arbitrary power conferred.

Under a constitution such as ours we do not speak of “arbitrary laws”. The phrase “arbitrary laws" is appropriate to describe laws made by absolute Monarchs or dictators, because they can make laws in the “unrestrained exercise of their will". Thirdly. The definitions show the close connection between arbitrary power and discretionary power.

Bhagwati J. and his brother judges did not consider the close relation between arbitrary and discretionary power. The conferment of wide discretionary power is, broadly speaking, an admission that it is not possible to lay down rules for the exercise of that power.

Rule of Law does not mean rule according to statutory law pure and simple, because such a law may itself be harsh, inequitable, discriminatory or unjust. Rule of law connotes some higher kind of law which is reasonable just and
non-discriminatory. Rule of Law to-day envisages not arbitrary power but controlled power. Constitutional values, such as constitutionalism, absence of arbitrary power in the government, liberty of the people, an independent judiciary etc. are imbibed in the concept of Rule of Law\textsuperscript{432}.

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. The Supreme Court has characterized judicial review as a “basic feature of the situation”. Art.14 of the constitution guarantees right to equality before law. This constitutional provisions has now assumed great significance as it is used to control administrative powers lest they should become arbitrary\textsuperscript{433}.

The Supreme Court has invoked the rule of law several times in its pronouncements to emphasis upon certain constitutional values and principles. For example, in \textit{Bachan Singh v. state of Punjab}\textsuperscript{434} Justice Bhagwati has emphasized that Rule of Law excludes arbitrariness and unreasonableness\textsuperscript{435}.

In \textit{P. Sambamurthy v State of Andhra Pardesh}\textsuperscript{436} the Supreme Court has declared a provision authorizing the executive to interfere with tribunal Justice as unconstitutional characterizing it as violative of the rule of law which is clearly a basic and essential feature of the constitution\textsuperscript{437}.

The two great values which emanate from the concept of Rule of law in modern times are\textsuperscript{438}:

\textsuperscript{432} \textit{Ibid}
\textsuperscript{433} \textit{Supra note} 308.
\textsuperscript{434} \textit{AIR} 1982 SC 1325.
\textsuperscript{435} \textit{Supra note} 308.
\textsuperscript{436} \textit{AIR} 1987 SC 663.
\textsuperscript{437} \textit{Supra note} 308.
\textsuperscript{438} \textit{Id.,} at 9.
1) No arbitrary government; and
2) Upholding individual liberty.

Emphasizing upon these values, observed in *A.D.M. Jabulpur v. S. Shukla*.  

Rule of law is the antithesis of arbitrariness. Rule of law is now the accepted norm of all civilised 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.  

A significant derivative from ‘Rule of Law” is judicial review. Judicial review is an essential part of Rule of Law. Judicial review involves determination not only of the constitutionality of the law but also of the validity of administrative action. The actions of the state public authorities and bureaucracy are all subject to judicial review; they are thus all accountable to the courts for the legality of their actions. In India, so much importance is given to review that it has been characterized as the ‘basic feature’ of the Constitution which cannot be done away with even by the exercise of the constituent power.  

### 3.4.1 Administrative Discretion and Rule of Law under Article 14 of the Indian Constitution

A common tendency in modern democracies is to confer discretionary power on the government or administrative officers. The power is usually couched in very broad phraseology and gives a large area of choice to the actual factual situations. In order to insure that discretion is properly exercised. It is necessary that the

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440 *Supra* note 345.
441 *Supra* note 308 at 9.
statute in question lays down some norms or principles according to which the administrator has to exercise discretion. Many a time the statutes do not do this and leave the administrator free to exercise his power according to his judgment. This creates the danger of official arbitrariness which is subversive of the doctrine of equality. To mitigate this danger, the court have invoked Art. 14. In course of time, Art. 14 has evolved into a very meaningful guarantee against any action of the Administration which may be arbitrary, discriminatory or unequal.  

This Principle manifests itself in the form of the following propositions:  

1. A law conferring unguided and unrestricted power on an authority is bad for arbitrary power is discriminatory.  
2. Art.14 illegalizes discrimination in the actual exercise of any discretionary power.  

Proposition (1), stated above, envisages that a law conferring absolute or uncontrolled discrimination on an authority negates equal protection of law because such power can be exercised arbitrarily so as to discriminate between persons and things similarly Situated without reason. As Bhagwati, J., has observed: “The law always frowns on uncanalised and unfettered discretion conferred on any in instrumentally of the state.” Where power granted is open to disproportionate to purpose to be achieved is invalid in the absence of guidelines or principles which are essential for exercise of such power.

The Supreme Court has laid down the applicable principle in the following words in Naraindas v. State of Madya Pardesh.

\[\text{\textsuperscript{442} Supra note 345 at 963.}\]
\[\text{\textsuperscript{443} Ibid.}\]
\[\text{\textsuperscript{444} Ibid.}\]
\[\text{\textsuperscript{445} AIR 1992 SC 929.}\]
Article 14 ensures equality before law and strikes at arbitrary and discriminatory state action. If power conferred by statute on any authority of the State is vagrant and unconfined and no standards or principles are laid down by the statute to guide and control the exercise of such power, the statute would be violative of equality clause, because it would permit arbitrary and capricious exercise of power, which is the antithesis of equality before law.\footnote{Supra note 345.}

In \textit{Sudhir Chandra v. Tata Iron & steel co. Ltd.}\footnote{AIR 1984 SC 1064} the Supreme Court has observed:

\begin{quote}
[O]ur Constitution envisages a society governed by rule of law. Absolute discretion uncontrolled by guidelines which may permit denial of equality before law is the antithesis of rule of law. Absolute discretion not judicially reviewable inheres the pernicious tendency to be arbitrary and is therefore violation of Art. 14, equality before law and absolute discretion to grant or deny benefit of the law are diametrically opposed to each other and cannot co-exist.\footnote{Ibid.}
\end{quote}

The rationale underlying this proposition is that unbridled power may degenerate into arbitrariness, or may result in discrimination and, thus, contravenes Art. 14 which bars discrimination.\footnote{Ibid.}

In Practice, however, courts show a good deal of tolerance and deference towards conferment of discretion, and it is only in an extreme situation that a statutory provision is declared invalid on the ground of conferring excessive administrative discretion. There are a number of cases in which conferment of broad discretion has been upheld on such grounds as: the statutory provision conferring power has sufficient guidelines, principles or policies to regulate the exercise of power; the power has been conferred on a high official who is not
expected to exercise the power reasonably and rationally” there are procedural safeguards subject to which the power is to be exercised, such as, natural justice, recording of reasons for the decision, provision of appeal to higher authority, etc.\textsuperscript{450}

In \textit{Govt. of Andhra Pradesh v. P. Laxmi Devi}\textsuperscript{451} the court has reiterated the principle that likelihood of abuse of discretionary power conferred under statute would not render the statutory provision unconstitutional. There is always a difference between a statute and the action taken under a statute like, the statute may be valid and Constitutional but the action taken under it is invalid. Thus while considering the validity of section 47 A of the Stamp Act the court held that an arbitrary market value whether or not based on extraneous considerations can always be challenged in judicial review proceedings\textsuperscript{452}.

As regards laying down of principles or guiding norms, it has been held, for insurance, that it is not essential that the very section in the statute which confers the power should also lay down the rules of guidance, or the policy for the administrator to follow. If the same can be gathered from the preamble, or the long title of the statute and other provisions therein, the discretion would not be regarded as uncontrolled or unguided and the statute in question will not be invalid. At times, even vague policy statements to guide administrative discretion have been held by the courts as complying with Art. 14\textsuperscript{453}.

On the whole, while the basic principle stands, viz., uncontrolled discretion ought not to be conferred on the administration, the general judicial tendency is to apply this principle in a very flexible manner. The courts tend to uphold the law rather than declare it invalid on this ground which is done only in rare cases\textsuperscript{454}.

\textsuperscript{450} Id., at 966.
\textsuperscript{451} (2008) 4 SCC 720.
\textsuperscript{452} Ibid.
\textsuperscript{453} Ibid.
\textsuperscript{454} Ibid.
In case of selection for services, a somewhat higher percentage of marks is permissible for viva voce than in case of admission to a course for, in the latter case, the personality traits of the students are not fully developed and are still in the formative stage and, therefore, in case of students, greater importance is to be accorded to the written test than to the viva voce to which importance attached ought to be minimal. In case of students, viva voce should not be relied upon as an exclusive test but should be resorted to only as an additional or supplementary test; it must be conducted by persons of high integrity, caliber and qualification; very high marks (such as 33 per cent of the total marks) should not be allocated to the interview test. For admission to colleges, not more than 15 per cent of the total marks should be fixed for interview.\footnote{455}

However, for appointment to public services, a higher relative value may be given (say 25 per cent) to the viva voce test, the reason being that candidates have mature personality. The Court pointed out that the written test assesses the man's intellect and the interview test the man himself and “the twain shall meet" for a proper selection. In case of services where selection is made out of mature persons, a higher weightage may be given to the viva voce test. If, however, selection is to be made out of younger persons whose personalities are still in the process of development, a lower weightage is to be given to viva voce. “It must vary from service to service according to the requirement…”\footnote{456}

There have been several cases in which the validity of selections made on the basis of viva-voce test have been challenged. In \textit{Chitralekha v. Stare of Mysore}\footnote{457} a system of selection of candidates for admission to the State medical colleges by viva voce examination was challenged on the ground that it enabled the interviewers to act arbitrarily and manipulate the results. The Supreme Court rejected the contention holding that not only had the government laid down a clear policy and prescribed defined criteria in the matter of giving marks at the

\footnote{455} \textit{Ibid.}\footnote{456} \textit{Ibid.}\footnote{457} \textit{AIR 1964 SC 1823.}
interview, but it had also appointed competent men to make the selection on the basis.\textsuperscript{458}

In case of viva voce test for services, even between one service and another. Depending upon the significance and relevance of the personality factor, maximum marks for interview may vary, as for example, higher marks for \textit{viva voce} test may be prescribed for the Provincial Civil Service than in case of any other service. The Supreme Court expressed the view that in Civil Service (Executive), not more than 12.2\% of the total marks be allotted to the \textit{viva voce} test. Commenting upon the prescription of 33.3\% marks for recruitment to administrative services of the State, the Court said that with this enormously large spread of marks for viva voce, this test "tended to become a determining factor in the selection process", and this "Opens the door wide for arbitrariness, and in order to diminish, if not eliminate the risk of arbitrariness, this percentage needs to be changed."\textsuperscript{459}

In \textit{Ashok Yadav v. State of Haryana}, the Court ruled that the allocation of 33\% marks for the Provincial Civil Service was excessive and would suffer from the vice of arbitrariness and quashed it. But in later cases, the Court has changed its opinion and has accepted allocation of high percentage of marks for \textit{viva voce} test for recruitment to Senior State Administrative Services\textsuperscript{460}.

\subsection*{3.4.2 Administrative discretion is permissible}

\subsubsection*{3.4.2.1 Discretionary Power}

In the modern administrative state, discretionary power is omnipresent. It is wielded by government officials at local and national level; by representatives of government agencies and other public bodies, and in myriad other contexts.\textsuperscript{461}

\begin{thebibliography}{9}
\bibitem{458} \textit{Ibid.}
\bibitem{459} \textit{Id.}, at 975.
\bibitem{460} \textit{Ibid.}
\bibitem{461} Matthews Beatson, et. al. \textit{Administrative Law}, 110 (2007)
\end{thebibliography}
It is true the discretion must be exercised reasonably. If authority does not obey those rules, then must said, to be acting "unreasonably." Similarly, there may be something so that no sensible person could ever dream that it lays within the powers of the authority\textsuperscript{462}.

One definition of discretion states that ‘a Public officer has discretion whenever the effective limits of his power live him free to make a choice among possible courses of action and in action’ the discretion may arise. Discretion allows for the shaping of the official’s powers to the particular circumstances of the case\textsuperscript{463}.

Another form of discretion consists of a power to give consent subject to condition. This discretionary power benefits both the applicant and the planning authority by providing a means whereby unsatisfactory proposal can be made acceptable to the authority by the granting of a conditional consent\textsuperscript{464}.

While discretion can be helpful to administrator it can also cause problems. Officials may be unhappy with wide discretion as it can make decision making difficult\textsuperscript{465}.

There is an essential distinction between arbitrariness and the exercise of discretion. An arbitrary power is one which is open-ended, not subject to identifiable limits and, therefore, not capable of being controlled by the courts. By comparison, the essence of discretion is that it is limited and, therefore, its exercise is subject to control, i.e. ensuring that the discretion is exercised within the legal parameters set for its exercise\textsuperscript{466}.

\textsuperscript{462} Id., at 245.
\textsuperscript{463} Brain Thompson, Constitutional & Administrative Law, 304 (1995).
\textsuperscript{464} Ibid.
\textsuperscript{465} Ibid.
\textsuperscript{466} Id., at 25
3.4.2.2 Definition of Administrative Discretion

According to Lord Halsbury\(^ {467}\):

It includes the case in which the ascertainment of fact is legitimately left to the administration determination.

Legislature is often compelled to confer vast discretionar powers because it is not always possible to lay down standards or norms for the exercise of administrative powers\(^ {468}\).

3.4.2.3 Any action of state per se arbitrary is denial of equality of protection by law\(^ {469}\)

There is case laws to explain this concept:

\textit{A.L Kalra v. Project and equipment corporation}\(^ {470}\) Supreme Court observed that:

\begin{quote}
[A]rticle 14 strikes at Arbitrariness in executive or administrative actions because any action that is arbitrary must necessary involve the negation of equality .one need not confine the denial of equality to a comparative evaluation between two persons to arrive at conclusion of discriminatory treatment. An action per se arbitrary itself denies equality of protection of law.
\end{quote}

3.4.2.4 Administrative discretion or Wednesbury Test

There may be a situation, when an Act or statute, instead of making the classification, confers power on the executive in that regard. In such case , if the Act confers unregulated discretion on the executive , the Act itself would be void under Article -14, but  if the Act or Statute laid down some principles or policies

\begin{footnotes}
\item[468] \textit{Ibid}.
\item[469] \textit{Id.}, at 122
\item[470] AIR1984 SC 1361.
\end{footnotes}
or guidance to the Act then the discretion would not be void as offering article 14\textsuperscript{471}.

Supreme Court in a case, \textit{A.N Bharti v. State of Gujrat}\textsuperscript{472} observed that:

A Provision can’t be held unconstitutional merely because the authority vested with the power may abuse his authority.

In another case, \textit{Narayan Sharma v. Pankaj Kr. Lehkar}\textsuperscript{473}, observed that:

[W]here executive action taken by administrative authority acting arbitrarily, would be struck down. Statutory discretion must be based upon reasonable grounds can’t extend to Arbitrariness, which is violation of Rule of Law or envisaged in article 14. Although Discretionary power not beyond the “Judicial Review”.

\textbf{3.4.2.5 To regulate arbitrary government actions, Courts has to stand out four principles\textsuperscript{474}:-}

1. There must be rational relation between Government Aims and the means it choose to reach those Aims.
2. Clear standards must exist so that individuals are able to confirm their conduct according to predictable system.
3. Rules and standards that do exist must be equally and fairly applied.
4. Government and public authority must be accountable, and courts must be able to preview government actions to determine its legality

\textbf{3.4.2.6 Origin of Principle Non- arbitrariness in India -}

It is a Concept that government shall not act arbitrarily. This Principle of Non- Arbitrariness even though not expressly in Indian Constitution, but are deeply rooted in the historical development of our current of justice. There are following principles which give implied place to this Principle.

\textsuperscript{471} Supra note 467 at 133.
\textsuperscript{472} AIR 2005 SC 2115.
\textsuperscript{473} AIR 2000 SC 72.
(1) **Principle of Natural Justice**

It is difficult to define precisely what is nature justice, such principles are inherent and backbone of judicial system as well as administrative, quasi-judicial or disciplinary action. Traditionally, the principle of natural justice has been divided into two parts-

1. *Audi alteram partem* (hear the other side)
2. *Nemo judex in causa sua debet esse* (the rule against Bias)

(2) **The Rule against Bias** -

In Case of *Kane v. Board of governor of university of British Columbia* \(^{475}\) observed by the court that In order to have a decision by public officer, it is not necessary to prove without doubt that prejudice or bias was present. The existence of circumstances likely to give rise to apprehension of bias need only exist\(^ {476}\).

This “*nemo judex in causa sua debet esse*”, based on two principles-

a) No man shall be judge in his own cause
b) Justice should not be done but undoubtedly be seen to be done

Provision relating to natural justice by way of affording an opportunity of being heard, are inserted to save from arbitrariness. The concept of “due process of law” is sought to be brought under the purview of Article 21 of our Constitution\(^ {477}\).

The idea that administrative or executive authority actions should be transparent is nothing new. A range of factors some of them contradictory has pushed it to the debates. For instance, the concern with transparency is a reaction against both the arbitrary decision making found in state\(^ {478}\).

The link between transparency and the cognate concept of accountability is to reduce corruption. Transparency does not automatically result in accountability. Transparency is often conceived of in terms of making procedures clear and

\(^{475}\) (1980) ISRC 1105

\(^{476}\) Supra note 467.


\(^{478}\) Supra note 467.
removing arbitrary control, but without a corresponding elaboration of the preconditions necessary for making clarity produce the desired results.

3.4.2.7 The General Right to Equality

The counterpart to a general right to liberty is a general right to equality. This too is an accepted part of German constitutional rights jurisprudence. In practice, the Court has expanded the scope of Article 14 beyond the narrow confines of each specific right. Thus article 14 prevents discrimination in the statutory limitation of rights and within the broader ‘ambit’ of a right. But at least the arbitrariness of the current application of article 14 will be avoided.

Thus Alexy’s two rules of general equality can be recast in more familiar language as follows:

1. Prohibition of direct discrimination.
2. Right to positive discrimination.

3.5 Rule of Law serves as the basis of Judicial Review of administrative action.

The constitutional courts exercise their power of judicial review with constraint to ensure that the authorities on whom the power is entrusted under the rule of Law or codified, is discharged truly, objectively, expeditiously for the purpose for which substantive acts/results are intended.

When the officer is to take steps as per the decisions, some delay may occasion and generally the courts would be reluctant to impose costs personally against the officers. But the officers are required to go to the court, give the appropriate explanation and satisfy the court that they were prevented by circumstances for non-compliance within the time specified by the court.

480 Ibid.
481 Ibid.
482 Supra note 340.
483 Ibid.
It is equally salutary to note that if the high court feels it necessary to impose costs equally salutary to note that if the high court is required to enquire after giving notice and reasonable opportunity to the officer who could not be impleaded earlier or was not on record, to explain the reasons for non-compliance of the order or decision\(^{484}\).

The Supreme Court has been made the guardian and protector of the constitution. The constitution has assigned it the role to ensure rule of law including the supremacy of law in the country. For this purpose it has been conferred wide power of judicial review. The activism may be taken to mean the movements of the judiciary to probe into the inner functioning of the other organs of the government\(^{485}\).

**Comparison in judicial review between India and USA**

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<tr>
<th>Judicial review in USA</th>
<th>Judicial review in India.</th>
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<tr>
<td>1. In USA scope of judicial review is wider.</td>
<td>1. In India scope of judicial review is narrow than USA.</td>
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<tr>
<td>2. In USA Judges exercise judicial review in very aggressive manner, if the judges think particular law and philosophy of it not liked by judges, then they may reject the law.</td>
<td>In India judges reject the law, only on the basis of unconstitutionality.</td>
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The Judiciary sees to it that the executive keeps itself within the limits of law and does not overstep the same. Thus, Judicial Activism is kept into check. However

\(^{484}\) *Ibid.*  
there are instances in India where Judiciary has tried to infringe upon the territory of the executive and the legislature\textsuperscript{486}.

A recent example of this would be the present reservation scenario for the other backward classes. As mentioned before Dicey’s theory of rule of law has been adopted and incorporated in the Indian Constitution. The three arms Judiciary, Legislature and Executive work in accordance with each other\textsuperscript{487}.

The Public can approach the High Court as well as the Supreme Court in case of violation of their fundamental rights. If the power with the executive or the legislature is abused in any sorts, its mala-fide action can be quashed by the ordinary courts of law. This can be said so since it becomes an opposition to the due process of law\textsuperscript{488}.

Rule of Law also implies a certain procedure of law to be followed. Anything out of the purview of the relevant law can be termed as ultra-vires. No person shall be deprived of his life or personal liberties except according to procedure established by law or of his property save by authority of law. The government officials and the government itself is not above the law\textsuperscript{489}.

In India the concept is that of Equality before the Law and Equal Protection of Laws. Any legal wrong committed by any person would be punished in a similar pattern. The law adjudicated in the ordinary courts of law applies to all the people with equal force and binding. In public service also the Doctrine of Equality is accepted. The suits for Breach of contract etc. against the state government

\textsuperscript{486}Supra note 33.
\textsuperscript{487}Ibid.
\textsuperscript{488}Ibid.
\textsuperscript{489}Ibid.
officials, public servants can be filed in the ordinary courts of law by the public\textsuperscript{490}.

Lord Hail sham lays down that:\textsuperscript{491}

\begin{quote}
[T]he rule of law, the enemy alike of dictatorship and anarchy, the friend by whose good offices authority and liberty can alone be reconciled.\textsuperscript{492}
\end{quote}

The Supreme Court following padfield has formulated the grounds for interference with regard to executive decision in \textit{Hochtief Germany v. State of Orissa}\textsuperscript{493} as follows:

The executive have to reach their decisions by taking into account relevant considerations. They should not refuse to consider relevant matter nor should take into account wholly irrelevant or extraneous consideration.\textsuperscript{494}

In everyday life, the normal reaction of refusal to give any reason for an unfavorable decision is viewed as unreasonable and felt as unfair. Being told why, we know from childhood, is an important element in the fairness of a decision and it helps to inspire confidence in the decision\textsuperscript{495}.

The constitution has devised permanent bureaucracy as part of the political executive. The normal principle that the permanent bureaucracy is accountable to the political executive is subject to judicial review. The doctrine of “full faith and credit” applied to the acts done by the officers and presumptive evidence of regularity of official acts done or performed, is apposite in faithful discharge of

\begin{flushleft}
\textsuperscript{490}Ibid.
\textsuperscript{491}Ibid.
\textsuperscript{492}Ibid.
\textsuperscript{493}2 SCC 649 (1979).
\textsuperscript{495}Supra note 340.
\end{flushleft}
duties to elongate public purpose and to be in accordance with the procedure prescribed\textsuperscript{496}.

3.5.1 Concept of Judicial Independence

Judges around the world are expected to do just that, whatever the legal or political systems under which they function, and howsoever they are appointed. But the modern concept of judicial Independence cannot be limited to individual judges or to their substantive and personal independence, it must also address the collective independence of the judiciary as an institution. Courts are organs of the state, with relative autonomy and a degree of independence and it is in that autonomy and in its continual expression that many of the hopes of the citizen against the state rest\textsuperscript{497}.

3.6 Conclusion -

In recent years, there has been a drive in many Western democracies to strengthen existing Accountability arrangements and to design and add new ones. Not only has there been considerable growth in the number and scope of Accountability arrangements, but also accumulation of these arrangements. The ideas and impulses for increased Control and Accountability mechanisms have come partly from outside the realm of National Government. Each forces them to describe and Justify what they do, and how and why they do it, and each induces them to maintain proper standards of conduct\textsuperscript{498}.

Such problems of accountability are generally deeper in the countries considered here\textsuperscript{499}.

In recent years, there has been a drive to strengthen existing public Accountability arrangements and to design new ones. What causes corruption is non-implementation of the Rule of Law and consequently little chance of getting caught by the Law enforcement agencies. This lack of Accountability comes primarily from the lack of transparency, for example, when public official do not inform or explain what they are doing, corruption thrives in secret places and evades public places\textsuperscript{500}.

The system of secrecy is less for safeguarding public or national interest and move safeguarding government’s Reputation, its maximize arbitrary practices and manipulating the citizens. Accountability is the key requirement of good governance. Accountability cannot be enforced without transparency and rule of law\textsuperscript{501}.

Both transparency and accountability are based on the right to information provision. Although the democracy system provides for accountability of government to those they governed, it is indirect through the election. But right to information makes the government accountable to the people directly\textsuperscript{502}.

Transparency seems to be the RTI has been legislated in 70 countries of the world and another 30 countries are in process of doing so. It was in this backdrop that the RTI was enacted in India in 2005. It marks a paradigm shift in Indian democracy. The experience of four years shows that, the response to this Act has been very positive. It has been widely welcomed by the people. They


\textsuperscript{500} Ibid.

\textsuperscript{501} Ibid.

\textsuperscript{502} Ibid.
have been seeking various types of information from different authorities. Therefore, an attempt has been made to discuss the various dimensions of its evolution in India along with its silent features and grey areas\textsuperscript{503}.

Several justification have been urged for the need to give reason for administrative decisions. In the first place, a duty to give reasons entails a duty to rationalize the decision. Reasons therefore help to structure the exercise of discretion, and the necessity of explaining why a decision is reached requires one to address one’s mind to the relevant factors which ought to be taken into account. Further reasons satisfy an important desire on the part of the affected individuals to know why a decision was reached\textsuperscript{504}.

\textsuperscript{503} Rajvir S. Dhaka, \textit{Right to Information and Good Governance}, 8 (2010).
\textsuperscript{504} \textit{Supra} note 340.