UNIT 2 - Basic Concepts of Administrative Law

— Rule of Law — Interpretation of Dicey's Principle of Rule of Law — Modern trends
- Theory of Separation of Powers — Position in India, UK and USA

RULE OF LAW

The expression “Rule of Law” plays an important role in the administrative law. It provides protection to the people against the arbitrary action of the administrative authorities. The expression ‘rule of law’ has been derived from the French phrase ‘la Principle de legality’, i.e. a government based on the principles of law. In simple words, the term ‘rule of law’, indicates the state of affairs in a country where, in main, the law rules. Law may be taken to mean mainly a rule or principle which governs the external actions of the human beings and which is recognized and applied by the State in the administration of justice.

Rule of Law is a dynamic concept.

It does not admit of being readily expressed. Hence, it is difficult to define it. Simply speaking, it means supremacy of law or predominance of law and essentially, it consists of values. The concept of the rule of Law is of old origin. Edward Coke is said to be the originator of this concept, when he said that the King must be under God and Law and thus vindicated the supremacy of law.
over the pretensions of the executives. Prof. A.V. Dicey later developed on this concept in the course of his lectures at the Oxford University. Dicey was an individualist; he wrote about the concept of the Rule of law at the end of the golden Victorian era of laissez-faire in England. That was the reason why Dicey’s concept of the Rule of law contemplated the absence of wide powers in the hands of government officials. According to him, wherever there is discretion there is room for arbitrariness. Further he attributed three meanings to Rule of Law.

(1) 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. (The view of Dicey, quoted by Garner in his Book on ‘Administrative Law’.)

(2) 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 (Ibid).

(3) The Third meaning of the rule of law is that the general principle of the constitution are the result of judicial decisions determining the rights of private persons in particular cases brought before the court.

The view of Dicey as to the meaning of the Rule of Law has been subject of much criticism. The whole criticism may be summed up as follows. Dicey has opposed
the system of providing the discretionary power to the administration. In his opinion providing the discretionary power means creating the room for arbitrariness, which may create as serious threat to individual freedom. Now a days it has been clear that providing the discretion to the administration is inevitable. The opinion of the Dicey, thus, appears to be outdated as it restricts the Government action and fails to take note of the changed conception of the Government of the State.

Dicey has failed to distinguish discretionary powers from the arbitrary powers. Arbitrary power may be taken as against the concept of Rule of Law. In modern times in all the countries including England, America and India, the discretionary powers are conferred on the Government. The present trend is that discretionary power is given to the Government or administrative authorities, but the statute which provides it to the Government or the administrative officers lays down some guidelines or principles according to which the discretionary power is to be exercised. The administrative law is much concerned with the control of the discretionary power of the administration. It is engaged in finding out the new ways and means of the control of the administrative discretion.

According to Dicey the Rule of Law requires equal subjection of all persons to the ordinary law of the country and absence of special privileges for person
including the administrative authority. This proportion of Dicey does not appear to be correct even in England. Several persons enjoy some privileges and immunities. For example, judges enjoy immunities from suit in respect of their acts done in discharge of their official function. Besides, Public Authorities Protection Act, 1893, has provided special protection to the official. Foreign diplomats enjoy immunity before the Court. Further, the rules of ‘public interest privilege may afford officials some protection against orders for discovery of documents in litigation.’ Thus, the meaning of rule of law taken by Dicey cannot be taken to be completely satisfactory.

Third meaning given to the rule of law by Dicey that the constitution is the result of judicial decisions determining the rights of private persons in particular cases brought before the Courts is based on the peculiar character of the Constitution of Great Britain.

In spite of the above shortcomings in the definition of rule of law by Dicey, he must be praised for drawing the attention of the scholars and authorities towards the need of controlling the discretionary powers of the administration. He developed a philosophy to control the Government and Officers and to keep them within their powers. The rule of law established by him requires that every action of the administration must be backed by law or must have
been done in accordance with law. The role of Dicey in the development and establishment of the concept of fair justice cannot be denied. The concept of rule of law, in modern age, does not oppose the practice of conferring discretionary powers upon the government but on the other hand emphasizing on spelling out the manner of their exercise. It also ensures that every man is bound by the ordinary laws of the land whether he be private citizens or a public officer; that private rights are safeguarded by the ordinary laws of the land (See Journal of the Indian law Institute, 1958-59, pp. 31-32).

Thus the rule of law signifies that nobody is deprived of his rights and liberties by an administrative action; that the administrative authorities perform their functions according to law and not arbitrarily; that the law of the land are not unconstitutional and oppressive; that the supremacy of courts is upheld and judicial control of administrative action is fully secured.

**Basic Principles of the Rule of Law**

- = Law is Supreme, above everything and every one. No body is the above law.

- = All things should be done according to law and not according to whim

- = No person should be made to suffer except for a distinct breach of law.

- = Absence of arbitrary power being heart and sole of rule of law

- = Equality before law and equal protection of law
Discretionary should be exercised within reasonable limits set by law

- Adequate safeguard against executive abuse of powers
- Independent and impartial Judiciary
- Fair and Justice procedure
- Speedy Trial

<table>
<thead>
<tr>
<th>Rule</th>
<th>of</th>
<th>Law</th>
<th>and</th>
<th>Indian</th>
<th>Constitution</th>
</tr>
</thead>
</table>

In India the Constitution is supreme. The preamble of our Constitution clearly sets out the principle of rule of law. It is sometimes said that planning and welfare schemes essentially strike at rule of law because they affect the individual freedoms and liberty in many ways. But rule of law plays an effective role by emphasizing upon fair play and greater accountability of the administration. It lays greater emphasis upon the principles of natural justice and the rule of speaking order in administrative process in order to eliminate administrative arbitrariness.

**Rule of Law and Case law**

In an early case [S.G. Jaisinghani V. Union of India and others, (AIR 1967 SC 1427)](http://example.com) the Supreme Court portrayed the essentials of rule of law in a very lucid manner. It observed: “The absence of arbitrary power is the first essential of the rule of law upon which our whole constitutional system is based. In a system governed by rule of law, discretion when conferred upon executive authorities must be continued within clearly defined limits. The rule of law from this points
of view means that decisions should be made by the application of known principles and rules and, in general such decision should be predictable and the citizen should know where he is. If a decision is taken without any principle or without any rule it is unpredictable and such a decision is antithesis of a decision taken in accordance with the rule of law”.

The Supreme Court in a case, namely, Supreme Court Advocates on Record Association V. Union of India, (AIR 1994 SC 268 at p.298) reiterated that absence of arbitrariness is one of the essentials of rule of law. The Court observed. “For the rule of law to be realistic there has to be rooms for discretionary authority within the operation of rule of law even though it has to be reduced to the minimum extent necessary for proper, governance, and within the area of discretionary authority, the existence of proper guidelines or norms of general application excludes any arbitrary exercise of discretionary authority. In such a situation, the exercise of discretionary authority in its application to individuals, according to proper guidelines and norms, further reduces the area of discretion, but to that extent discretionary authority has to be given to make the system workable.

The recent expansion of rule of law in every field of administrative functioning has assigned it is a place of special significance in the Indian administrative law.

The Supreme Court, in the process of interpretation of rule of law vis-à-vis operation of administrative power, in several cases, emphasized upon the
need of fair and just procedure, adequate safeguards against any executive encroachment on personal liberty, free legal aid to the poor and speedy trail in criminal cases as necessary adjuncts to rule of law. Giving his dissenting opinion in the Death penalty case, Mr. Justice Bhagwati explains fully the significance of rule of law in the following words: The rule of law permeates the entire fabric of the Constitution and indeed forms one of its basic features. The rule of law excludes arbitrariness, its postulate is ‘intelligence without passion’ and reason free from desire. Wherever we find arbitrariness or unreasonableness there is denial of the rule of law. Law in the context of rule of law does not mean any law enacted by legislative authority, howsoever arbitrary, despotic it may be, otherwise even in dictatorship it would be possible to say that there is rule of law because every law made by the dictator, however arbitrary and unreasonable, has to be obeyed and every action has to be taken in conformity with such law. In such a case too even where the political set-up is dictatorial it is the law that governs the relationship between men

The modern concept of the Rule of Law is fairly wide and, therefore, sets up an idea for government to achieve. This concept was developed by the International Commission of Jurists, known as Delhi Declaration, 1959, which was later on confirmed at Lagos in 1961.
According to this formulation, the Rule of Law implies that the functions of the government in a free society should be so exercised as to create conditions in which the dignity of man as an individual is upheld.

During the last few years the Supreme Court in India has developed some fine principles of Third World jurisprudence. Developing the same new constitutionalism further, the Apex Court in Veena Seth v. State (AIR 1983 SC 339) of Bihar extended the reach of the Rule of Law to the poor and the downtrodden, the ignorant and the illiterate, who constitute the bulk of humanity in India, when it ruled that the Rule of Law does not exist merely for those who have the means to fight for their rights and very often do so for the perpetuation of the status quo, which protects and preserves their dominance and permits them to exploit a large section of the community. The opportunity for this ruling was provided by a letter written by the Free Legal Aid Committee, Hazaribagh, Bihar drawing its attention to unjustified and illegal detention of certain prisoners in jail for almost two or three decades. Recent aggressive judicial activism can only be seen as a part of the efforts of the Constitutional Courts in India to establish rule-of-law society, which implies that no matter how high a person, may be the law is always above him. Court is also trying to identify the concept of rule of law with human rights of the people. The Court is developing techniques by which it can force
the government not only to submit to the law but also to create conditions where people can develop capacities to exercise their rights properly and meaningfully. The public administration is responsible for effective implementation of rule of law and constitutional commands, which effectuate fairly the objective standards laid down by law. Every public servant is a trustee of the society and is accountable for due effectuation of constitutional goals. This makes the concept of rule of law highly relevant to our context.

Doctrine of Separation of Power

The doctrine of Separation of Powers is of ancient origin. The history of the origin of the doctrine is traceable to Aristotle. In the 16th and 17th Centuries, French philosopher John Boding and British Politician Locke respectively had expounded the doctrine of separation of powers. But it was Montesquieu, French jurist, who for the first time gave it a systematic and scientific formulation in his book ‘Esprit des Lois’ (The spirit of the laws). **Montesquieu’s view** Montesquieu said that if the Executive and the Legislature are the same person or body of persons, there would be a danger of the Legislature enacting oppressive laws which the executive will administer to attain its own ends, for laws to be enforced by the same body that enacts them result in arbitrary rule and makes the judge a legislator rather than an interpreter of law. If one person or body of persons could
exercise both the executive and judicial powers in the same matter, there would be arbitrary powers, which would amount to complete tyranny, if the legislative power would be added to the power of that person. The value of the doctrine lies in the fact that it seeks to preserve human liberty by avoiding the concentration of powers in one person or body of persons. The different organs of government should thus be prevented from encroaching on the province of the other organ.

This theory has had different application in France, USA and England. In France, it resulted in the rejection of the power of the courts to review acts of the legislature or the executive. The existence of separate administrative courts to adjudicate disputes between the citizen and the administration owes its origin to the theory of separating of powers. The principle was categorically adopted in the making of the Constitution of the United States of America. There, the executive power is vested in the president. Article the legislative power in congress and the judicial power in the Supreme Court and the courts subordinates thereto. The President is not a member of the Congress. He appoints his secretaries on the basis not of their party loyalty but loyalty to himself. His tenure does not depend upon the confidence of the Congress in him. He cannot be removed except by impeachment, However, the United States constitution makes departure from the theory of strict separation of
powers in this that there is provision for judicial review and the supremacy of the ordinary courts over the administrative courts or tribunals. In the **British Constitution/ UK** the Parliament is the Supreme legislative authority. At the same time, it has full control over the Executive. The harmony between the Legislator and the (Executive) is secured through the Cabinet. The Cabinet is collectively responsible to the Parliament. The Prime Minister is the head of the party in majority and is the Chief Executive authority. He forms the Cabinet. The Legislature and the Executive are not quite separate and independent in England, so far as the Judiciary is concerned its independence has been secured by the Act for Settlement of 1701 which provides that the judges hold their office during good behaviour, and are liable to be removed on a presentation of addresses by both the Houses of Parliament. They enjoy complete immunity in regard to judicial acts.

**In India**, the executive is part of the legislature. The President is the head of the executive and acts on the advice of the Council of Ministers. Article 53 and 74 (1) He can be impeached by Parliament. Article 56 (1) (b) read with Art 61, Constitution. The Council of Ministers is collectively responsible to the Lok Sabha Article 75 (3) and each minister works during the pleasure of the President. Article 75 (2) If the Council of Ministers lose the confidence of the House, it has to resign. Functionally, the President’s or the Governor’s assent is required for all
legislations. (Articles 111, 200 and Art 368). The President or the Governor has power of making ordinances when both Houses of the legislature are not in session. (Articles 123 and 212). This is legislative power, and an ordinance has the same status as that of a law of the legislature. *(AK Roy v Union of India AIR1982 SC 710)* "The President or the Governor has the power to grant pardon (Articles 72 and 161)" The legislature performs judicial function while committing for contempt those who defy its orders or commit breach of privilege. (Articles 105 (3) 194 (3) Thus, the executive is dependent on the Legislature and while it performs some legislative functions such as subordinate it, also performs some executive functions such as those required for maintaining order in the house. There is, however, considerable institutional separation between the judiciary and the other organs of the government. *(See Art 50)*

**Constitutional Status of Separation of Power in USA**

**Doctrine in USA**

The doctrine of Separation of Powers forms the foundation on which the whole structure of the Constitution is based. It has been accepted and strictly adopted in U.S.A. Article I; Section 1 vests all legislative powers in the Congress. Article II; Section 1 vest all executive powers in the President and Article III; Section 1 vests all judicial powers in the Supreme Court."
Jefferson quoted, “The concentration of legislative, executive and judicial powers in the same hands in precisely the definition of despotic Government.”

On the basis of this theory, the Supreme Courts was not given power to decide political questions so that there was not interference in the exercise of power of the executive branch of government. Also overriding power of judicial review is not given to the Supreme Court. The President interferes with the exercise of powers by the Congress through his veto power. He also exercises the law-making power in exercise of his treaty-making power. He also interferes in the functioning of the Supreme Court by appointing judges.

The judiciary interferes with the powers of the Congress and the President through the exercise of its power of judicial review. It can be said that the Supreme Court has made more amendments to the American Constitution than the Congress. To prevent one branch from becoming supreme, protect the "opulent minority" from the majority, and to induce the branches to cooperate, governance systems that employ a separation of powers need a way to balance each of the branches. Typically this was accomplished through a system of "checks and balances", the origin of which, like separation of powers itself, is specifically credited to Montesquieu. Checks and balances allow for a system
based regulation that allows one branch to limit another, such as the power of Congress to alter the composition and jurisdiction of the federal courts.

Legislative power

Congress has the sole power to legislate for the United States. Under the non-delegation doctrine, Congress may not delegate its lawmaking responsibilities to any other agency. In this vein, the Supreme Court held in the 1998 case Clinton v. City of New York that Congress could not delegate a "line-item veto" to the President, by which he was empowered to selectively nullify certain provisions of a bill before signing it. The Constitution Article I, Section 8; says to give all the power to Congress. Congress has the exclusive power to legislate, to make laws and in addition to the enumerated powers it has all other powers vested in the government by the Constitution. Where Congress does not make great and sweeping delegations of its authority, the Supreme Court has been less stringent.

One of the earliest cases involving the exact limits of non-delegation was Wayman v. Southard (1825). Congress had delegated to the courts the power to prescribe judicial procedure; it was contended that Congress had thereby unconstitutionally clothed the judiciary with legislative powers.
Executive Power

Executive power is vested, with exceptions and qualifications, in the president by Article II, Section 1, of the Constitution. By law the president becomes the Commander in Chief of the Army and Navy, Militia of several states when called into service, has power to make treaties and appointments to office -- "...with the Advice and Consent of the Senate"-- receive Ambassadors and Public Ministers, and "...take care that the laws be faithfully executed" (Section 3.) By using these words, the Constitution does not require the president to personally enforce the law; rather, officers subordinate to the president may perform such duties. The Constitution empowers the president to ensure the faithful execution of the laws made by Congress. Congress may itself terminate such appointments, by impeachment, and restrict the president. The president's responsibility is to execute whatever instructions he is given by the Congress.

Congress often writes legislation to restrain executive officials to the performance of their duties, as authorized by the laws Congress passes. In INS v. Chadha (1983), the Supreme Court decided (a) The prescription for legislative action in Article I, Section 1—requiring all legislative powers to be vested in a Congress consisting of a Senate and a House of Representatives—and Section 7—requiring every bill passed by the House and Senate, before becoming law, to be presented to the president, and, if he disapproves, to be repassed by two-thirds of the Senate and House—represents the Framers' decision that the legislative power of the
Federal Government be exercised in accord with a single, finely wrought and exhaustively considered procedure. This procedure is an integral part of the constitutional design for the separation of powers. Further rulings clarified the case; even both Houses acting together cannot override Executive veto’s without a 2/3 majority. Legislation may always prescribe regulations governing executive officers.

Judicial power

Judicial power — the power to decide cases and controversies — is vested in the Supreme Court and inferior courts established by Congress. The judges must be appointed by the president with the advice and consent of the Senate, hold office for life and receive compensations that may not be diminished during their continuance in office. If a court's judges do not have such attributes, the court may not exercise the judicial power of the United States. Courts exercising the judicial power are called "constitutional courts." Congress may establish "legislative courts," which do not take the form of judicial agencies or commissions, whose members do not have the same security of tenure or compensation as the constitutional court judges. Legislative courts may not exercise the judicial power of the United States. In Murray's Lessee v. Hoboken Land & Improvement Co.(1856), the Supreme Court held that a legislative court
may not decide "a suit at the common law, or in equity, or admiralty," as such a suit is inherently judicial. Legislative courts may only adjudicate "public rights.

Even though of above all, Separation of Powers is not accepted in America in its strict sense, only it has attracted the makers of most modern Constitution, specially during 19th Century.

In a leading case: Marbury v. Madison,

Marbury v. Madison is a landmark case in United States law. It formed the basis for the exercise of judicial review in the United States under Article III of the Constitution.

This case resulted from a petition to the Supreme Court by William Marbury, who had been appointed by President John Adams as Justice of the Peace in the District of Columbia but whose commission was not subsequently delivered. Marbury petitioned the Supreme Court to force Secretary of State James Madison to deliver the documents, but the court, with John Marshall as Chief Justice, denied Marbury's petition, holding that the part of the statute upon which he based his claim, the Judiciary Act of 1789, was unconstitutional.
Marbury v. Madison was the first time the Supreme Court declared something "unconstitutional", and established the concept of judicial review in the U.S. (the idea that courts may oversee and nullify the actions of another branch of government). The landmark decision helped define the "checks and balances" of the American form of government.

Separation of powers has again become a current issue of some controversy concerning debates about judicial independence and political efforts to increase the accountability of judges for the quality of their work, avoiding conflicts of interest, and charges that some judges allegedly disregard procedural rules, statutes, and higher court precedents.

It is said on one side of this debate that separation of powers means that powers are shared among different branches; no one branch may act unilaterally on issues, but must obtain some form of agreement across branches. That is, it is argued that "checks and balances" apply to the Judicial branch as well as to the other branches.

It is said on the other side of this debate that separation of powers means that the Judiciary is independent and untouchable within the Judiciaries' sphere. In this
view, separation of powers means that the Judiciary alone holds all powers relative to the Judicial function, and that the Legislative and Executive branches may not interfere in any aspect of the judicial branch.

Constitutional Status of Separation of Power in India

Doctrine in India

On a casual glance at the provisions of the Constitution of India, one may be inclined to say that the doctrine of Separation of Powers is accepted in India. Under the Indian Constitution, executive powers are with the President, legislative powers with Parliament and judicial powers with Judiciary (Supreme Court, High Courts and Subordinate Courts).

The President’s function and powers are enumerated in the Constitution itself. Parliament is competent to make any law subject to the provisions of the Constitution and there is no other limitation on it legislative power. The Judiciary is independent in its field and there can be no interference with its judicial functions either by the Executive or by the Legislature. The Supreme Court and High Courts are given the power of judicial review and they can declare any law passed by the Parliament or the Legislature unconstitutional. Taking into account
these factors, some jurists are of the opinion that the doctrine of Separation of Powers has been accepted in the Indian Constitution.

In I.C.Golak Nath v. State of Punjab, it was observed: “The Constitution brings into existence different constitutional entities, namely, the Union, the States and the Union Territories. It creates three major instruments of power, namely, the Legislature, the Executive and the Judiciary. It demarcates their jurisdiction minutely and expects them to exercise their respective powers without overstepping their limits. They should function within the spheres allotted to them.

If we study the constitutional provisions carefully, it is clear that the doctrine of Separation of Powers has not been accepted in India in its strict sense. In India, not only there is functional overlapping but there is personnel overlapping also. The Supreme Court has power to declare void the laws passed by the legislature and the actions taken by the executive if they violate any provision of the Constitution or the law passed by the legislature in case of executive actions. The executive can affect the functioning of the judiciary by making appointments to the office of Chief Justice and other judges. One can go on listing such examples yet the list would not be exhaustive.
In Indira Nehru Gandhi v. Raj Narain, it was observed: “That in the Indian Constitution there is separation of powers in a broad sense only. A rigid separation of powers as under the American Constitution or under the Australian Constitution does not apply to India. Chandrachud J. also observed that the political usefulness of doctrine of Separation of Power is not widely recognized. No constitution can survive without a conscious adherence to its fine check and balance. The principle of Separation of Power is a principle of restraint which has in it the precept, innate in the prudence of self preservation, that discretion is the better part of valour.”

Thus doctrine of separation of powers is not fully accepted in the Indian Constitution. It can be said with the observation of Mukherjee, J. in Ram Jawaya v. State of Punjab: “The Indian Constitution has not indeed recognized the doctrine of separation of powers in its absolute rigidity but the functions of the different parts or branches of the Government have been sufficiently differentiated and consequently it can very well be said that our Constitution does not contemplate assumption, by one organ or part of the State, of functions that essentially belong to another.”
Thus referring to the above content it proves that Separation of Power is practiced in India but not that rigidly. It is not embodied in the constitution though practiced. The three main powers do cross their limit and interfere in each other’s task whenever necessary.

Importance of the Doctrine

The doctrine of separation of power in its true sense is very rigid and this is one of the reasons of why it is not accepted by a large number of countries in the world. The main object as per Montesquieu in the Doctrine of separation of power is that there should be government of law rather than having will and whims of the official. Also another most important feature of the above said doctrine is that there should be independence of judiciary i.e. it should be free from the other organs of the state and if it is so then justice would be delivered properly. The judiciary is the scale through which one can measure the actual development of the state if the judiciary is not independent then it is the first step towards a tyrannical form of government i.e. power is concentrated in a single hand and if it is so then there is a cent percent chance of misuse of power. Hence the Doctrine of separation of power do plays a vital role in the creation of a fair government and also fair and proper justice is dispensed by the judiciary as there is independence of judiciary. Also the importance of the above said doctrine can be traced back to as early as 1789 where the constituent Assembly Of France in 1789
was of the view that “there would be nothing like a Constitution in the country where the doctrine of separation of power is not accepted”.