

# THE HISTORY AND PRESENT STATUS OF THE RULE OF LAW IN INDIA

by

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## I. THE PAST

More than 2500 years ago Manu, the great Hindu Law giver, laid down that 'law is the king of Kings', and that 'law being destroyed, will destroy; being preserved will preserve'.<sup>1</sup> Medhatithi, the commentator on Manu's code, roundly declared that a king cannot make a new law overriding 'Dharma'.<sup>2</sup> The evidence of history does not disclose any exercise of the alleged regal power of independent legislation.<sup>3</sup> The king was neither the source nor the repository of law. The law was what had come down from past ages, which was in the special knowledge of the sages who had specialized in its study. The duty of the king to maintain and uphold the law was itself imposed upon him by that law.<sup>4</sup> When Manu gives power to the king to legislate, such power again is subject to the express condition that the royal decrees be in accordance with 'Dharma' or sacred law, and not opposed to it.<sup>5</sup> When the king is authorized to administer justice, constitutional limitations are imposed on his power by strict injunctions as to where he should find the law.<sup>6</sup> Justice was to be administered by the king with the help of a 'Sabha', or group of learned persons, strictly according to the law laid down in the scriptures, or found in the customs and usages of countries or communities or of professional classes, conforming to the sacred texts.<sup>7</sup>

<sup>1</sup> Manu, viii - 15.

<sup>2</sup> Rangaswami Aiyanger, *Rajdharmā*, p. 43.

<sup>3</sup> *Ibid.*

<sup>4</sup> Sen-Gupta, N. C., *Evolution of Ancient Indian Law*, p. 39.

<sup>5</sup> and <sup>6</sup>. *Ibid.*

<sup>7</sup> See Sen-Gupta, *op. cit.*, p. 43.

Through the centuries, the one supreme guiding principle of the Hindu system was that the conduct of the authority, as of the subject, must conform to law or 'Dharma'. 'Dharma', a word difficult to translate into English, includes the concepts of justice, law, right and duty, and acting according to Dharma means the duty of acting in a way, in the sphere of one's activity, that would best lead the individual to his self-realization - Moksha or Nirwana. The one immutable source of Dharma was the Veda and next came the Smritis or the codes of law, the conduct and customs of the virtuous and one's own conscience or self-satisfaction.

Even under Muslim rulers, rule of law, in the sense of supremacy of scriptural law, was maintained in India. Hindu law continued to be applied to Hindus in their personal matters, while Muslim law governed the Mohammedans. Criminal law was administered according to 'Sharia' or Koranic law. Occasional arbitrary decrees were not unknown but the power to transgress scriptural law or the right to independent legislation was never expressly claimed. The dominant note was that the conduct of the rulers as of the ruled must conform to the law in the scriptures - Muslim or Hindu. The king's sole function was to preserve law and order and run the administration according to law.

Under British rule, for the first time, the area of "personal laws" (Hindu Law for Hindus and Mohammedan Law for Muslims) was confined to certain specific matters like marriage and divorce, maintenance, adoption and family relations; inheritance and succession; gifts, wills and wakfs. In the rest of human affairs, the rules of Common Law or the law laid down by the British Parliament or enacted under its authority, were made applicable to all. The concept of rule of law obtained a new meaning. Outside the limited sphere of personal laws, human relations were not to be governed by any concepts of Dharma or Koranic law, but by law laid down or developed by human agencies. Rule of law was no longer a rule of a higher scriptural law but a government according to laws, predetermined and ascertainable. The British ideal of justice and

the notion of the rights of the individual were introduced. But with the rapid growth of democracy in the world, and under the influence of democratic ideals, the question was early posed as to how far the concept of rule of law could be reconciled with a government not responsible to the governed. Democracy at home could not be reconciled with autocracy abroad. It was maintained by Mahatma Gandhi that it was not a rule of law that prevailed under foreign domination but only an organized anarchy.

After the country gained independence, our ideal of the rule of law found expression in the Constitution adopted in 1949. An elaborate document, consisting of 395 Articles and 8 Schedules, it is an expression of the desire of the people to lay down a detailed scheme for the achievement of certain objectives and ideals. In the changed context of life it was not possible to stick to all the notions of the immutable law, but the ideal still remains the creation of a social order in which the individual can best attain his self-realization. The Constitution embodies a statement of the necessary postulates. The social and legal order must be that of a 'Sovereign Democratic Republic' and must secure to all its citizens : Justice, social, economic and political; liberty of thought, belief, faith and worship; equality of status and of opportunity; and assure the dignity of the individual. (Preamble to the Constitution). In order to provide for the achievement of these objectives, which we consider essential for an effective rule of law, we have not hesitated to borrow ideas and provisions from any constitution of the world, western or eastern, oriental or occidental.

In part III of our Constitution there are stated certain basic human rights, called Fundamental Rights. They constitute our Bill of Rights and have been inspired by the first eight amendments of the American Constitution that embody the western ideals and state the basic requirements of Rule of Law. The next part, entitled 'Directive Principles of State Policy', contains certain provisions which, though not enforceable by the law courts, yet to be fundamental in the governance of the country and to be of constant guidance to the legislator.

This is based on the realization that the Fundamental Rights, which make life worth living, do not have much significance in actual practice unless the individual is assured of an adequate means of livelihood, has a sufficient knowledge and realization of his rights and has the means to give effect to them; and that it is the positive duty of the State to strive to promote the welfare of the people by educating them, by raising their level of nutrition and standard of living and to improve their means to make their liberty effective. Since international peace and security is essential to achieve these objectives, the State is directed to endeavour to maintain just and honourable relations between nations; and foster respect for international law and treaty obligations in the dealings of organized people with one another.

## **II. The Present : Survey of Protective Norms and Institutions.**

(1). **Fundamental Rights** : - The ideal of constituting the country into a Democratic Republic necessarily implies the guaranteeing of certain basic rights. Our Constitution assures freedom of speech and expression; of assembly and association; freedom to move freely and settle anywhere in the country; and to practice any profession, trade or calling. The practice of untouchability, due to which the dignity of man has suffered in my country for some time, has been abolished and made a punishable offence. Every citizen is assured that the State (which term includes the Government and Parliament of India, Government and legislature of any State or any other local authority) shall not discriminate against him on any ground of religion, race, caste, sex, or place of birth; nor shall he suffer or be subjected to any disability, liability, restriction or condition to be excluded from any office of employment under the State, on any such ground. These rights are guaranteed by the Constitution and any law inconsistent with these rights is declared to be void to the extent of inconsistency, and the State is expressly forbidden from making any law which takes away or abridges any of these rights. But since the rights of one are to be reconciled with the rights of another,

her, the exercise of these rights in a form that would infringe the like freedom of another or would thwart the objective of the community to provide for the welfare of all, could not be permitted. Hence necessary restrictions on these rights have been embodied in the Constitution, and provision has been made for the imposition of 'reasonable restrictions' in the interests of the public. What is reasonable? This is not defined in the Constitution, and has been left to the good sense of the community as interpreted by Parliament and ultimately controlled by the Supreme Court. Whether the restrictions are reasonable or not, in their substantive as well as procedural aspects, will be judged by independent courts, and they will set aside statutory provisions if they impose unreasonable restrictions on the freedom of an individual, even though for a limited period. \*

No mere enumeration of fundamental rights will be effective unless there is an independent body to interpret and enforce these rights. By Article 32 of the Constitution our Supreme Court has been made the chief guardian of the Fundamental Rights. The right to move that court for the enforcement of these rights has itself been guaranteed as a Fundamental Right. Full authority has been vested in the court to issue directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo-warranto, and certiorari, whichever may be appropriate, for the enforcement of the rights conferred. In addition to the Supreme Court, power has also been vested in the State High Courts to entertain petitions for the enforcement of Fundamental Rights, but the rejection of a petition by any of these courts is no bar to move the Supreme Court. An appeal can also be made to that court against the orders of a High Court, with the latter's permission.

(2). **Equality before the law** : - Every person in our country has been guaranteed 'equality before the law or the equal

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\* *Tozammal V. Govt. of W. Bengal*, A. I. R. (38) 1951 Calcutta 322. This point will be elaborated by additional illustrations to be cited *infra* under the heading "Scope of Judicial Review".

protection of the laws'. The protection afforded is both against legislative as well as executive acts,<sup>9</sup> and extends to both substantive and procedural matters.<sup>10</sup> All litigants similarly situated are entitled to avail themselves of the same procedural rights for relief and for defence, without discrimination. Where two procedures of criminal prosecution could be applicable to the same individual and the legislature laid down no standard to guide the Magistrate's choice of one of the two and no standard could have been imagined by the Court, the legislation was held to be violative of equal protection of laws.<sup>11</sup> For the same reason, two substantially different laws of tax procedure, one being more prejudicial to an income - tax assessee, cannot be allowed to operate in the same field.<sup>12</sup>

Our Constitution does not guarantee a trial by jury in civil cases or even in criminal cases; but governmental action would be void and inoperative if it denied to certain individuals the right to be tried by jury while retaining that right in the case of other individuals who had committed the same or similar offence.<sup>13</sup> If there is a classification of offences, it must be based on some real and substantial distinction.<sup>14</sup> Quite generally, the legislator may not use arbitrary classifications. Where it is not possible to make a precise and complete classification it is not a violation of 'equal protection' to leave it to an administrative authority to make a selective application of the law to persons and things within the defined group, after laying down the standards or indicating in clear terms the underlying policy and purpose.<sup>15</sup> In such a case it would make no difference in principle whether the discretion which is en-

<sup>9</sup> *Kedar Nath V. State of W. Bengal*, A. I. R. (40) 1953 Sup. Court 404.

<sup>10</sup> *Shree Menakshi Mills Ltd. V. Shri Vishwanath Sastri*, (1955) S. C. R. 787

<sup>11</sup> *Deodat Rai V. State*, A. I. R. (38) 1951 Allhabad 718.

<sup>12</sup> Note 2, *supra*.

<sup>13</sup> *Dhirendra Kumar Mandal V. The Superintendent and Remembrancer of Legal Affairs to the Govt, of W. Bengal*, (1955) 1 S. C. R. 224.

<sup>14</sup> *Ibid.*

<sup>15</sup> *Kedar Nath V. State of W. Bengal*, A. I. R. (40) 1953 S. C. 404.

trusted to the executive government is to make a selection of individual cases or of offences, classes of cases or classes of offences, for, in either case, the discretion to make selection is a guided and controlled discretion and not an unfettered or an absolute one. Any abuse of such discretion could be challenged and annulled as violative of equal protection.

'Equality before the law or equal protection of the laws' does not guarantee any particular procedure in criminal or civil matters. It is quite in keeping with the rule to provide by law for the establishment of special tribunals for the trial of certain types of criminal cases or to take jurisdiction of certain classes of civil matters. The procedure followed by them need not necessarily be the same as followed by the traditional law courts. " But there are certain basic requirements which must be satisfied, as in any court. The special tribunals must not exceed the jurisdiction vested in them by law; nor usurp jurisdiction that does not belong to them. " They must not refuse to exercise jurisdiction; nor in its exercise act mala fide or on irrelevant or extraneous considerations. " They must not act in an arbitrary, high-handed, illegal or irregular manner and must observe the rules of natural justice in the procedure followed by them. " The rules of natural justice do not necessarily imply an oral hearing or representation through a lawyer; " but every litigant must be given a fair and proper opportunity of being heard and must be given fair notice and a substantial opportunity and proper latitude to meet every thing which is likely to be considered against him. " The basic principle of jurisprudence that no one is allowed to be a judge in his cause applies not only to courts of law but to administrative tribunals as well. Our courts have claimed a residuary

<sup>10</sup> Ghose V. Utkal University, A. I. R. (39) 1952 Orissa 1.

<sup>11</sup> Bharat Bank V. Employees of Bharat Bank, A. I. R. (37) 1950 S. C. 188.

<sup>12</sup> Ibid.

<sup>13</sup> Mahabir Motor Co. V. State of Bihar, A. I. R. 1956 Patna 437.

<sup>14</sup> Mahabir Motor Co. V. State of Bihar, A. I. R. 1956 Patna 437.

<sup>15</sup> S. T. Company V. Appellate Authority, A. I. R. 1956 Nagpur 235.

and ultimate power of supervision over all tribunals to enforce the observance of the rules of natural justice. <sup>22</sup> In practice, this requirement, though imposed on special tribunals (equally administrative tribunals) on the basis of "equality", often leads to results which in the United States would be reached under the label of "due process".

(3). **Protection to an accused person** : - Our Constitution guarantees as a Fundamental Right that no person shall be convicted of any offence except for an act charged as an offence at the time of its commission, nor be subjected to a penalty greater than was provided by law at that time. Nor shall a person be prosecuted and punished for the same offence more than once. A second prosecution for the same act by different authorities, be they central or State, is not permitted.

A person accused of an offence cannot be compelled to be a witness against himself; nor can he be denied the right to be defended by a pleader of his choice, if he is once arrested unless the arrest be under the Preventive Detention Act. The right to be defended by a lawyer in a criminal prosecution does not oblige the State to provide such legal aid in every case. <sup>23</sup> The rules of High Courts lay down that in capital cases where an accused has no means to defend himself a counsel should be provided. But since this is not a statutory requirement a violation of the rule will not vitiate a conviction, though a court of appeal or revision is not powerless to interfere if it is found that the accused was so handicapped for want of legal aid that the proceedings against him may be said to amount to a negation of fair trial.

An arrested person, other than under preventive detention, must be informed, as soon as may be, of the grounds of his arrest and must be produced within 24 hours of his arrest before a Magistrate and his authority obtained for any detention beyond that.

(4). **Due Process and Preventive Detention** : - Article 21 of our Constitution provides that no person shall be deprived

<sup>22</sup> S. K. Ghosh V. Utkal University, A. I. R. 1952 Orissa 1.

<sup>23</sup> Tara Singh V. The State, (1951) S. C. R. 729.



of his life or personal liberty except according to procedure established by law. This was interpreted by our Supreme Court to mean that a person can be deprived of his life or personal liberty in accordance with law validly enacted by Parliament within its authority. It was held that the Article does not import the "due process" clause of the American Constitution. "Rule of Law does not necessarily depend upon the existence of a judicial body with powers to pronounce upon the validity of all laws passed by Parliament. Our view is that the Rule of Law can be maintained as well by vesting authority in the representatives of the people to frame laws and prescribe a procedure in accordance with which a person may be deprived of his life or personal liberty. In this respect, India has followed English rather than American ideas.

An essential prerequisite to the enjoyment of any rights by the citizens of any state is the prevalence of peace and order within its boundaries. Where there is no established government free from a constant threat of violent overthrow, no enjoyment of rights is possible. The forces of lawlessness released by the partition of India, at the time of transference of power from British hands, forced a realization on the framers of our Constitution that the security of the infant State from the forces of anarchy and lawlessness must be kept above everything else. Thus, in Article 22 of the Constitution there were embodied drastic provisions with regard to preventive detention. Soon thereafter Parliament passed, under the authority of Article 22, Act IV of 1950, providing for Preventive Detention and replacing several similar provincial Security Acts.

"The term 'preventive' is used in contra-distinction to the word 'punitive'. The object is not to punish a man for having done something but to intercept him before he does it and to prevent him from doing it. No offence is proved, nor any charge formulated and the justification of such detention is suspicion or reasonable probability and not criminal convec-

<sup>29</sup> A. K. Gopalan V. The State of Madras, A. I. R. (37) 1950 S. C. 27.

tion which can be warranted by legal evidence".<sup>26</sup>

The Preventive Detention Act has its parallel only in the wartime Defence of the Realm Act in Britain, and has its roots in the method devised by alien rulers in India, as early as 1795,<sup>27</sup> to keep peace and order in their factories and possessions, and kept alive till the end of their rule, in the form of certain Security Regulations. It is considered to be an evil of necessity and has been passed by Parliament as a temporary measure. Its life expires on 31st December of this year.

The Act, as it stands today, authorises the Central and State governments (the authority can be exercised by certain named officers not below the rank of a District Magistrate) to order the detention of any person, if satisfied that such detention is necessary to prevent the person from acting in any manner prejudicial to: - (i) the defence, foreign relations or the security of India; (ii) the security of the State or the maintenance of internal order; (iii) the maintenance of supplies and services essential to the community; (iv) in the case of a foreigner, to regulate his continued presence or expulsion from the State. The officer making the order of detention is required to report the fact forthwith to the State government, to which he is subordinate, together with the grounds of such detention and other relevant particulars. No such order shall remain in force for more than twelve days unless in the meantime it has been approved by the State government. Any such order made or approved by the State government is to be reported, as soon as may be, to the Central government, together with the grounds of detention and other relevant particulars. The person detained is to be communicated by the detaining authority, as soon as may be, but not later than five days from the date of arrest, the grounds of his detention and afforded earliest opportunity, of making a representation against the order to the appropriate government. The government shall within thirty days of the detention place before an Advisory Board, consisting of three persons who are, or have

<sup>25</sup> Justice Mukherjea in Gopalan's case.

<sup>26</sup> Ramchandran, V. G., *The Law of P. D.*, Supreme Court Jr., p. 181.

been, or are qualified to be, appointed as judges of a High Court, the grounds of such detention together with any representation made by the detenu. And the Advisory Board shall, after a consideration of the grounds or any other information that it may call from the government, and after hearing the detenu in person, if so desired by him or considered essential by the Board, report within ten weeks from the date of detention to the appropriate government, whether or not, in its majority opinion, there is sufficient cause for detention. In case of report of sufficient cause for detention, the government may confirm the detention order and continue the detention for such period, not exceeding one year, as it thinks fit. If the report of the Board is to the contrary, the appropriate government shall revoke the detention order and cause the person to be released forthwith. No person can be detained for more than three months unless the Advisory Board has reported that there is sufficient cause for such detention.

It will be seen that though there is a fair consideration of the case of the detenu, yet the fact remains that a person is arrested on mere suspicion and is denied the important right of representation through a lawyer and all other safeguards of a criminal prosecution. Undoubtedly, the device of preventive detention in peace time is most odious and contrary to our notions of rule of law. But certain facts must be noted in this connection. A perusal of the amendments made from time to time to the original Act of 1950 will clearly demonstrate the improvements made to safeguard the interests of the detained person, in the light of experience or criticism of the Act made inside and outside the law courts. They show the concern of the authorities to reconcile the liberty of the individual with the security of the State. By and large, the device has not been used for political purposes as has been demonstrated by our recent elections and the coming into power of the Communist party in one of our States. Our courts have always shown a great concern for the liberty of the individual and even in the face of the Act they have never felt powerless to check any arbitrary and capricious exercise of power by the executive authorities.

True, preventive detention may be ordered if its conditions exist to the subjective "satisfaction" of the executive authorities, and the courts will not introduce any objective standards,<sup>27</sup> nor substitute their own satisfaction for that of the authorities.<sup>28</sup> Yet the courts will not hesitate to set aside detention orders when the detaining authority does not have the necessary state of satisfaction,<sup>29</sup> or the satisfaction is not an honest satisfaction.<sup>30</sup> The courts have always insisted that the grounds and particulars furnished to the retenu must be clear, precise and accurate.<sup>31</sup> The detenu must know what he is charged with, and what reasons and considerations have persuaded the government to deprive him of his liberty.<sup>32</sup> Detention will be set aside if the order is based on vague or indefinite grounds,<sup>33</sup> or irrelevant or non-existent ground,<sup>34</sup> or if the order though based on two grounds was confirmed by the government only on one ground,<sup>35</sup> or if all the grounds were not disclosed to the detenu; or if they were not sufficient to enable him to make an effective representation. In **Indra Prakash Kohl V. The State**, the court rejected the plea of the Advocate General that where grounds supplied are found insufficient, government be asked to supply further grounds, because "it may serve as an encouragement to the authorities to supply only vague grounds of detention in the first instance, and then go on grudgingly supplying further detailed particulars as required by the court, with the result that a detenu would be kept in detention, whether lawfully or unlawfully, for quite a long period before the validity of the order for his detention

<sup>27</sup> *The State of Bombay V. Atma Ram Shridhar*, A. I. R. (38) 1951 S. C. 157.

<sup>28</sup> *Bhim Sen and others V. State of Punjab*, A. I. R. (38) 1951 S. C. 481.

<sup>29</sup> *Kashi Nath Gupta V. The State*, A. I. R. (38) 1951 M. B. 56.

<sup>30</sup> *S. S. Yusuf V. Rex.*, A. I. R. (37) 1950 All. 69.

<sup>31</sup> *M. R. S. Mani V. District Magistrate*, A. I. R. (37) 1950 Mad. 162.

<sup>32</sup> *Ibid.*

<sup>33</sup> *State of Bombay V. Atma Ram* (1951) S. C. R. 167.

<sup>34</sup> *Dwarka Das Bhatia V. The State of J. and K.*, A. I. R. 1957 S. C. 164.

<sup>35</sup> *Shibban Lal Sakesena V. The State of Uttar Pradesh*, (1954) S. C. R. 164.

would be decided, though obviously a question of this kind ought to be decided as speedily as possible" <sup>26</sup>

The Act is only for preventive purposes and its use as punitive will not be permitted; nor even to prevent anti-social activities, like smuggling by a habitual smuggler, with which the maintenance of public order and safety of the State are only remotely connected. <sup>27</sup>

It is incumbent on the authority directing the detention to apply all possible care and attention to the material placed before it, before making the order of detention, and the courts would set aside the detention even on slight evidence of carelessness that would tend to show that the necessary amount of care and attention had not been bestowed. In **Makhan Singh V. State of Punjab**, <sup>28</sup> a unanimous Supreme Court set aside the detention of the petitioner because there was some possibility, however slight, of the Advisory Board being prejudiced against the detenu by the mention in the reference made to the Board, of the period for which the authorities intended to detain him. The court observed that "it cannot be too often emphasized that before a person is deprived of his personal liberty the procedure established by law must be strictly followed and must not be departed from to the disadvantage of the person affected". Moreover, the courts have always warned the authorities "to see that no instances occur which savour of injustice or oppression through misuse of those extraordinary powers which the Parliament has vested in the executive in the interests of the State itself". <sup>29</sup>

(5). **Independent Judiciary** : - Undoubtedly the judiciary in our country has proved to be a great bulwark of the liberty of the individual and has amply demonstrated that the Fundamental Rights stated in the Constitution are not 'a mere enumeration of personal rights in the form of general proposi-

<sup>26</sup> A. I. R. (38) 1951 Punjab 8.

<sup>27</sup> Bakhtawar Singh V. The State, A. I. R. (38) 1951 Punjab 157.

<sup>28</sup> A. I. R. (39) 1952 S. C. 27.

<sup>29</sup> Justice Mukherjea in Ashutosh Lahiry V. State of Delhi, A. I. R. 1953 C. 451, 453.

tions'. This has been possible because of the independence of the judiciary and the traditions it has inherited. By independence is meant the following of a judicial process in the settlement of disputes and freedom from the interference of the executive or the influence of temporary passions of public opinion; it means following a rational rule rather than any temporary expediency. The independence of the judiciary emanates from the security of tenure of the judges. Once appointed by the President, a judge of the Supreme Court or of High Court, cannot be removed from office till the age of retirement, except for a proved misbehaviour or incapacity and on presentation of an address, supported by a special majority of the two houses of Parliament. His salary and conditions of service, while holding office, cannot be varied to his disadvantage. Nor is the salary of the judges subject to annual vote of Parliament. But that does not mean that the judiciary is absolutely independent of the Parliament. Not only can Parliament by law prescribe a larger number of judges for the Supreme Court but even the power of the Court to frame rules for its practice or its power to secure attendance of witnesses, the discovery or production of any document is subject to the provisions of law made by Parliament. Our Supreme Court was never intended to be a super-legislature and has disclaimed to be a policy-determining body.

(6). **Political System** : - The quasi-federal form of our political system is not based on any rigid separation of powers. A certain measure of separation in the functioning of the three branches of government - the legislature, the executive and the judiciary, has been provided for; yet the whole system presupposes interdependence and a close cooperation between the various departments of government. Not only is the President a constituent part of Parliament, possessing certain independent legislative powers; his Council of Ministers is to be from amongst the members of Parliament and responsible to that body. Provision has been made, also, for the consultation of the judiciary by the executive. "If at any time it appears to the President that a question of law or fact has arisen, or is

likely to arise, which is of such a nature and of such public importance that it is expedient to obtain the opinion of the Supreme Court upon it, he may refer the question to that Court for consideration and the Court may, after such hearing as it thinks fit, report to the President its opinion thereon".<sup>40</sup> This may be inconsistent with Montesquieu's theories, but it is expressive of the desire to rule according to law and not to do any thing or make any law that may be in violation of the Constitution.

The parliamentary system of government that we have adopted differs from the British model in so far as our Parliament, unlike the British Parliament, is not supreme. The law-making power is not only shared with the State legislatures but is defined and limited by a written Constitution. The system differs from that of the U. S., apart from being parliamentary, for the reason already mentioned that we do not have in our Constitution the celebrated "due process" clause. The function of our Supreme Court is to interpret and enforce the Constitution and the law made by Parliament, and as was observed by Chief Justice Kania, "it is only in express constitutional provisions limiting legislative power and controlling the temporary will of a majority by a permanent and paramount law settled by the deliberate wisdom of the nation that one can find a safe and solid ground for the authority of Courts of Justice to declare void any legislative enactment. Any assumption of authority beyond would be to place in the hands of the judiciary powers too great and too indefinite either for its own security or the protection of private rights".<sup>41</sup>

(7). **Scope of Judicial Control** : - The rule that our courts will abide by the law passed by Parliament, within its authority, does not mean that there can be free play of the legislative tyranny of a temporary majority, or that the courts will feel helpless in the face of it. The basic human freedoms of speech, assembly and movement are subject only to "reasonable" res-

<sup>40</sup> Article 143 (I).

<sup>41</sup> A. K. Gopalan V. State of Madras, A. I. R. (37) 1950 S. C. 27, 42.

trictions and what are "reasonable" restrictions is not to be decided according to the whims of a parliamentary majority but would ultimately be determined by our Supreme Court. " It would hold void an authority vested in the executive officers by an Act of Parliament, to remove a person from the country on reasonable suspicion, without issuing notice to the person concerned and without affording him an opportunity to clear himself of the suspicion, being an unreasonable restriction on the citizen's right to reside and settle in any part of the territory of India. " It would, likewise, hold unreasonable and hence void, a law or order which confers arbitrary and controlled power upon the executive in the matter of regulating trade or business. "

The Constitution does not invest the Parliament with unlimited powers. All attempts by Parliament to be the final arbiter of its powers have been successfully resisted by the Supreme Court. All the judges of that Court in Gopalan's case unanimously declared *ultra vires* Section 14 of the Preventive Detention Act 1950, which sought to prevent the detenu from disclosing to the Court the grounds communicated to him for his detention under the Act. The Court stated that its power to issue a writ of habeas corpus will become meaningless if it could not inquire into the reasons for depriving a person of his personal liberty.

Article 136 of our Constitution has vested a jurisdiction in the Supreme Court to grant special leave to appeal from any judgment, decree, determination, sentence or order in any cause or matter passed or made by any court or tribunal, in the territory of India. An attempted legislative interpretation to the effect that 'tribunal' meant only judicial tribunal and excluded administrative tribunals, has been rejected " by the Court, thus preserving the supremacy of judicial control over all manners of determinations affecting the rights of citizens.

<sup>41</sup> Chintamanrao V. State of M. P., A. I. R. (38) 1951 S. C. 118.

<sup>42</sup> Ebrahim Vazir Mavani V. The State of Bombay, (1954) S. C. R. 933.

<sup>43</sup> Dwarka Prasad V. The State of Uttar Pradesh, (1954) S. C. R. 803.

<sup>44</sup> See *Bharat Bank V. Employees of Bharat Bank*, A. I. R. (37) 1950 S. C. 188.



(8). **Indian Traditions** : - Apart from the express constitutional guarantees and the role of the law courts, there are certain traditions in our system which are conducive to the rule of law. One such tradition is that of Satyagrah or non-violent resistance, developed by Mahatma Gandhi and translated into political action. Since the individual in our philosophy is the ultimate judge of 'Dharma', he has the right to resist non-violently all unjust government and all unjust laws-laws contrary to 'Dharma'. Of course, living under a democratic system, where a political minority can convert itself into a majority, implies that the minority must abide by the decisions of the majority unless the minority is deprived of the full scope of free action to convert itself into a majority. The rule is subject to the further condition that the majority rule not be perverted into a tyranny of the majority. The right of the individual to resist tyranny is inherent in man and does not need any express recognition in the Constitution. Our recent struggle for independence is a warning to all tyrants-external or internal, representing minority or majority, that the weapon of nonviolent resistance is not altogether ineffective.

Mention may also be made of another tradition of Hinduism. Hinduism was never a rigid religion. It was a way of life in which there was ample scope for different approaches to achieve the objective. It is this tradition which is responsible for our advocating peaceful coexistence in the international field and which induces the overwhelming majority in the country to tolerate the rule of the Communist party, within the framework of the Constitution, in one of our States. There is no inconsistency involved in tolerating, on the one hand, the rule of the Communist party which has come to power through Constitutional means and swears by the Constitution, while on the other, detaining Communists, in other States, who are not yet able to rid themselves of the cult of force. Of course, the inherent condition of our tolerance is that there be no imposition by force of any views or form of government. The rule of force is directly antithetical to the rule of law.

### III. Dangers to the Rule of Law

When I make mention of our traditions or the guaranteeing of human freedoms by our Constitution, I do not mean to imply that rule of law has been fully achieved in our country; I am only pointing out certain factors which seem helpful for the achievement of the objective. In the midst of great hunger, poverty, disease and ignorance an effective rule of law is only an ideal for which we must constantly work. There are some real dangers to the rule of law in the situation that obtains in India today. Traditions of an autocratic bureaucracy, more than a hundred years old, have not been shaken off completely, and great efforts are needed to root them out. The urgency of solving the tremendous problems of hunger and disease necessitates the vesting of great powers in the executive, and the impatience of some to solve them at any cost may result in the vesting of uncontrolled powers. There is a further danger that in the name of the welfare of the people the State may become totalitarian, engulfing the whole life of the individual, leaving him little area for the attainment of his self-realization. There is some possibility, too, that material prosperity may become an end in itself rather than a mere means to enable the individual to attain his objective, and this may find us involved in a labyrinth of laws, without a real rule of law.

An effective answer to these dangers may be provided by the movement of 'Sarvodaya', started by Mahatma Gandhi. 'Sarvodaya', of which the Bhoodan movement forms a part, aims at an all-round development of all human beings, without any distinction of caste, colour, creed, race or nationality; it emphasizes the need for striking a balance between the material and spiritual needs of the individual; and teaches him to rely more and more on his own self-help rather than depend upon the power of the State. It draws pointed attention to the need for eliminating violence from the social order, for, so long as there is reliance on force or violence, the germs of tyranny and injustice will continue to exist.

#### IV. Conclusions.

In shaping the development of the rule of law in our system, the traditions of the English system, acquired during the British rule, the influence of the American Constitutional system, with its "due process,, , our own ancient traditions and the economic and social conditions in the country, have all played an important role. The Constitutional system, adopted in 1950, was in effect largely a compromise between the English and American systems, but has since tended to move more in the direction of the latter. This mainly for the reason that the courts have established themselves, in keeping with indigenous traditions and under the influence of American views, as the ultimate arbiters of the "reasonableness" of restrictions on Fundamental Rights. By this and other methods which I have mentioned, a "due process,, notion has been brought into the Constitution, even though indirectly and not in terms. The Constitutional and political system seems to provide, for present practical purposes, a proper balancing of the rights of the individual and the needs of our particular kind of society.

In an ideal sense, rule of law implies a social order in which the individual can best attain his self-realization. It is the duty of the State to enable the individual to attain this objective by helping him to obtain satisfaction of certain basic minimum material and intellectual needs, while assuring him the rights to life and personal liberty and preserving for him that freedom of faith and belief, expression and movement, which is the very basis of life, and without which the ultimate objective cannot be attained. So long as there is poverty and ignorance, hunger and disease, and so long as there is crime and coercion, force and violence and the denial of basic freedoms, the rule of law is not fully established. Rule of Law is an ideal to be constantly struggled for. In its pure form, it can only exist in a society based on truth and non-violence.

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