

## Criminal Law and Rule of Law Syndrome in India

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### Abstract

In recent phenomena, the position of rule of law and criminal law are deemed as a tremendous instrument to keep and maintain the peace and security in the social dilemma and to bring the change in to society. Since, the inception of British rule in India, rule of law played their crucial roles which supportively assert the philosophy of equality, supremacy of Law and pre dominance of Law of Land. Rule of law is the concept, which prevents the arbitrariness in society and maintains the rules and norms through substantive law. Rule of Law and criminal law are seem to be same in the sense that, both works with the same objectivity and goal. Even though, both find in some sort of efforts to prevent the arbitrariness of powers and to keep justice on proper places ,but both concepts produce several the fluctuating symptoms in the sense that, both Law create their separate area to work and to follow. While, on the basis of several enormous points, the present article very minutely try to find out the similarity and dissimilarity between these two concepts along with the other general findings. Giving due respects to the above two different angles of Law, the efforts cause a movement and tern in to present Article. Hence, produce Rule of Law and Criminal Law syndrome in India.

**KEYWORDS:** Rule of law, Criminal Law, Indian perspective, Rule of Dicey, Postulates, exceptions, Equality before law, Indian Constitution, due process, peace and security.

### 1. Introduction:

It may sometime a part of cocktail to combine these two concepts. But as both these concepts is part and parcel of governmental approval and pioneers expectations. What exactly administrative law if ask by someone then it no longer expect something other rather than the rule of Law. On the other hand if someone asks what criminal law is then its obvious answer to award penalties that breach the rule of Law? Even Prof. Dicey had also never thought on the line of widening the concept of rule of law in the preview of criminal law. In the present paper researchers tries to bring together these two concepts in order to form new claims in the field of legal happenings. Criminal law is the body of law that relates to crime. It regulates social conduct and proscribes threatening, harming, or otherwise endangering the health, safety, and moral welfare of people. It includes the punishment of people who violate these laws. Criminal law differs from civil law, whose emphasis is more on dispute resolution and victim compensation than on punishment<sup>1</sup>.as the same way the concept of rule of Law. Just societies enact laws to promote the general welfare. Some people, invariably, refuse to comply with those laws, and they face sanctions in accordance with them<sup>2</sup>.

Crime and criminal law is almost the issue of state and its inhabitants. It's no longer an issue that, society doesn't exist without crime. It's a one of the interesting characteristic of Human society that, society follow the crime or offence and Law

follow the crimes in society<sup>3</sup>. What exactly wants to say is reasonableness. As said earlier that, no society remains crimeless even though in any form, hence, very nearly countries create their own criminal laws in order to prevent or punish the crimes in society. As in India, there are several laws has been created and creating in order to overcome on the problems of social evil. The major law that what Indians created are the Indian Penal Code, Indian Evidence Act and the code of criminal procedure, 1973. Beside these, there are several other criminal laws are there, which are specially created in order to cover the special kinds of stigma in the society. These all criminal law works on Crime Control and favour the Due Process Model as the same way to protect the Rights of Arrested Persons. Procedural law make space available to proper investigation, legal arrest, assuring on rights relating to Bail drawing some presumptions in the eye of law and shifting a burden of proof according to the mechanism in particular country adopt. The whole segments as discuss earlier moved toward the assurance of fair trial and reassurance of justice.

## **2. Widening Scope of Rule of Law Trough Criminal Law in United Nation:**

In the United States, however, they have institutionalized a right of non-compliance to the law, to the detriment of society as a whole. Its latest outrageous expression is the attempt by Roman Catholic businesses to avoid contraceptive coverage as part of the Affordable Care Act.<sup>4</sup>The Supreme Court's decision met a massive backlash by religious believers, who, unsurprisingly, welcomed the special exemptions to general laws that applied only to them. Congress, the federal courts, and state courts and legislatures all bent over backward to make clear that those with sectarian religious beliefs did not have to comply with the laws that apply to other citizens. Congress passed the Religious Freedom Restoration Act (RFRA), which required that any laws (including, for example, laws that make certain drugs illegal) that burden the free exercise of religion must serve a "compelling" government purpose and employ the least burdensome means available — a demanding standard of constitutional review that usually results in the laws being invalidated, at least as applied to the religious believers burdened. Although the U.S. Supreme Court subsequently held RFRA unconstitutional as applied to the states, many states responded by enacting their own RFRA, which again exempted religious believers from any unduly burdensome state law. (Congress passed an additional law in 2000 to restrict any regulations that burdened religion, if those regulations affected activities receiving federal money. This had a significant impact on zoning regulations, from which religious institutions regularly seek exemptions.). Emboldened by the dramatic reaction to the Supreme Court's modest attempt to impose the rule of law, religious believers have lobbied aggressively and successfully for a proliferation of rules, mostly at the state level, that exempt religious believers from the law. For instance, mandatory vaccination schemes have collapsed in many parts of the country in the wake of "religious" objections, resulting in the return of whooping cough and measles as threats to public health. Pharmacists decline to dispense legal medicines that supposedly conflict with their religious beliefs, and state laws, including in my home state of Illinois, now excuse them from their dereliction of duty. The latest attempt by religious believers to evade the law is now front-page news: Employers are challenging the Affordable Care Act requirement that they provide insurance covering

contraceptives, on the grounds that the owners of the company, in some cases, allegedly have a religious objection to contraception<sup>5</sup>

### **3. Rule of Law and Criminal Law Origin and Foundation:**

The incorporation of the rule of law and the separation of powers in British and U.S. law had a great influence over the next two centuries, first as a result of the expansion of the British Empire, and second as a result of the growing influence of the United States as a world power. Rule of law principles came to symbolize the expansion of rights and liberties around the globe. Rule of law recognise more significant, natural law arguments in favour of due process, human rights, and self- governance<sup>6</sup>.

The answer is suggested by a word which the Elizabethans borrowed from the Greeks but which has since gone out of use." "Isonomia" was imported into England from Italy at the end of the sixteenth century as a word meaning "equality of laws to all manner of persons"; shortly afterward it was freely used by the translator of Livy in the English form "Isonomy" to describe a state of equal laws for all and responsibility of the magistrates." It continued in use during the seventeenth century" until "equality before the law," "government of law," or "rule of law" gradually displaced it<sup>7</sup>. In fact the rule of law is the supreme manifestation of human civilisation and culture and is a new 'lingua franca' of global moral thought. It is an internal value of constitutionalism and inherent attribute of Democracy and good governs<sup>8</sup>.

#### **a. Origin of rule of Law:**

The term rule of law is derived from the French phrase 'la principle de legalite (the principle of legality)' which refers to a Government based on principle of law and not of men.in this sense, the concept of la principle de legalite was opposed to arbitrary powers. It was an old origin. Edward Cock is said to be the originator of this concept. Prof. A.V.Dicey later developed on the concept of rule of law. He analysed the rule of law by his writing in such era, where police state turned in to welfare state through "laissez faire." That was the reason due to which Diceys concept of rule of law contemplated the absence of wide powers in the hands of government officials. According to Prof.Dicey wherever there is desecration, there is a room for arbitrariness<sup>9</sup>.

#### **b. Criminal Law Origin and Foundation:**

Criminal law in its earlier stages was largely dominated by the idea of retribution. This was in accordance with human nature. When a child falls on a grounds and hurt itself you offend kick the ground to console it. The sentiments of vegans are thereby satisfied. The responsibility for crime was attached not only to human beings but to animals and event to inanimate of judge. The English law as to 'deodands'was relic of this prehistoric notion. The deodands was any inanimate instrument by which, killing had been effected in the Anglo-Saxon period, it was called 'brana', this slayer and it was handed over to the family of the man killed in order the might take vegans upon it. And old couplet ran 'whatever mode to do they

deed is dead and forfeited. 'Historically, one can trace three states in the development of ideas regarding penal liabilities. First is, strict liability<sup>10</sup>.next to it is men's rea<sup>11</sup> and third one is foresight of consequences.

In purely mommedian countries in which the mohmmadan law is strictly followed even now a homicide may be purged by payment of "Blood money" to the relation of the deceased, provided they agreed. The idea that all crimes are wrongs against the state of aggregate community, and that it's a proper function of the state to perceive crime without reference to the person wronged, is a conception of comparatively modern growth. In our criminal procedure code the proportion of compoundable offences is very small and the right of compounding is limited to comparatively minor offences in which individual injury is more largely involved.

#### **4. Rule of law and criminal law postulates or presumption:**

The use of law is viable and dynamic concept and, like many other such concepts is not capable of any exact definition. The term used in contrary to 'rule of man'. Even in the most autocratic forms of government, there is some law, according to which the powers of the government are exercised but it does not mean that there is a rule of law. Therefore rule of law means that the law rules which is based on the principles of freedom, equality, non-discrimination fraternity, accountability and non-arbitrariness and is certain, regular and predictable using the word 'Law' in the sense of 'jus' and 'lex' both. In this sense the rule of law is an ideal. It is a modern name for natural law. In history, man has always appealed to something higher than that which is has own creation. In Jurisprudence, Roman called it 'jus naturale<sup>12</sup>'. Medievalist called it as a 'Law of God'. But modernist converts it in to obviously non rather than 'Rule of Law'<sup>13</sup>. Which again become a part of constitutionalism and which believe on written Constitution? From the jurisprudence point of view, Kelson also supported to the concept of Pure Law and suggested some normative functions of law may be sometime based on rule of Law proposed by Prof. Dicey in 18th century in England but fortunate or unfortunate no one knows, where no written constitution been found except the common law but most of the common Law rules are in set of right found in any other constitution of the other countries.<sup>14</sup>

Gradually, two crucial conceptions emerged as to how these basic ideals should be safeguarded: the idea of a written constitution, and the principle of the separation of powers. When in January, 1660, just before the Restoration, a last attempt was made in the "Declaration of Parliament Assembled at Westminster" to state in a formal document the essential principles of a constitution, this striking passage was included: "There being nothing more essential to the freedom of a state, than that the people should be governed by the laws, and that justice be administered by such only as are accountable for maladministration, it is hereby further declared that all proceedings touching the lives, liberties and estates of all the free people of this commonwealth, shall be according to the laws of the land, and that the Parliament will not meddle with ordinary administration, or the executive part of the law: it being the principle [sic] part of this, as it hath been of all former Parliaments, to

provide for the freedom of the people against arbitrariness in government." If thereafter the principle of the separation of powers was perhaps not quite "an accepted principle of constitutional law," it at least remained part of the governing political doctrine.<sup>15</sup>

### **5. Indian Rule of Law and Scope Thereof:**

In fact like herein above found that the concept of rule of law is on widening extension granted to it in country like U.S. but what is the situation of rule of law in India is a current issue of discussion. And it has been find out by Indian Supreme Court in famous case known as Habeas corpus case. It is all the more important to remember this day since we the people of India have grown accustomed to being ruled by preventive detention laws where thousands are being jailed without trial. Over and above this, Government after Government is attempting to bring in laws which put to shame both MISA<sup>16</sup> and TADA<sup>17</sup> combined. The Judiciary has failed us once. If we, the people of India, forget this, we will be condemning ourselves sooner or later to history repeating itself. So let us always remember *A.D.M. Jabalpur*. Where it has been decided by Apex court of the country that, rule of law is the basic feature of Indian constitution. And can be used as a legal concept.<sup>18</sup> Furthermore again Supreme Court took a chance to widen the concept of rule of Law in *Keshwanand Bharati Vs state of Kerala*<sup>19</sup> where court remarked that, the rule of Law is an aspect of the doctrine of basic structure of the constitution which even the plenary power of parliament and cannot reach to amend.<sup>20</sup> Supplementary to it, the supreme court never loss an opportunity of assuring to give pervasiveness of the spirit of throughout the whole range of Government in the sense of excluding arbitrary official action in any sphere.<sup>21</sup> It simply indicates that, no one is permitted to violate the rule of law even including the state. Failure of it, ultimately leads the action toward failure of justice and obviously to the sense and spirit of Constitution. In *SomrajVs. State of Haryana*<sup>22</sup> also Supreme Court rightly observed that, the absence of arbitrary power is the first postulates of rule of Law upon which whole constitution edifies is based. If the desecration is exercise without any principle or without any rule, it is a situation amounting to the antithesis of rule of law.<sup>23</sup>

### **6. Contribution of Rule of Law and Criminal Law to Maintain the Peace in Society:**

Generally all laws are for keeping peace and order in society. But the mechanism to controlling is found somewhat different. The rule of law speaks about to maintain a peace in civil manner and criminal law imposes some punitive measures in order to overcoming the criminal activities of individuals. The both laws are same on the points that, both of them contribute on common point and this point is known to be the maintenance of peace and order in society. One can easily find out the basic

readings of postulate of criminal law and rule of law that for what they constitute and how far they contribute on the issue of maintenance of peace in society.

<b>Rule of law</b>	<b>Criminal Law</b>
<b>Nature:</b> Rule of law is the basic feature of Indian constitution.	Criminal law must follow the constitution and is based on constitutional assurances.
<b>Originator and Foundation:</b> It is originated basically through the concept of "Isonomic" was imported into England from Italy at the end of the sixteenth century. It further enumerated by work of Edward Coke which developed by Prof. A.V.Dicey.	Criminal law is a develop branch of law of torts which mostly derived from the three principle known as strict liability, men's rea (Guilty intention and) foresight of crime. Historically speaking, in country like India it developed in Mohammaden era and systematically took face of criminal law in British Regime
<b>Principle of Origination:</b> The term rule of law is derived from the French phrase 'la principle de legalite (the principle of legality)' which refers to a Government based on principle of law and not of men.	The criminal law mostly based on the following principles. 1. Actus non facet ream nisi means sit rea. 2. Res ipsa locator 3. Presumption of innocence until guilt is proved beyond doubt. 4. Burden of proof generally lies on prosecution. 5. Burden of proof to prove innocence lies on accused.
<b>Scope:</b> In administrative Law, there are three concept involves in to rule of law these are- 1. Equality before law 2. Supremacy of law 3. Predominance of law of land	In criminal law, three things are requires to constitute an act as an offence. 1. Some act which is forbidden by any for the time being in force. 2. Intention to commit such crime except the crime involved shifted an absolute liability. 3. There must be some sort of punishment for such offences mention under a law for the time being in force.
<b>Exceptions:</b> The exception of rule of law are- 1. Equality does not mean the powers of private citizens are the same as the public officials. (a police officer has the power to arrest while no private person has this power.) 2. It does not prevent certain classes of person being a subject to special rules.	There are some exceptions provided under the criminal law are as follow. 1. Mistake of fact which is bound by law. <sup>24</sup> 2. Mistake of Law which is justified by law. <sup>25</sup> 3. Act of Necessity and accident <sup>26</sup> . 4. Dolly Incapax. <sup>27</sup> 5. intoxication <sup>28</sup>

<p>(Armed Forces controlled by Military Laws).</p> <p>3. Ministers and ambassadors have wide discretionary powers provided by statute. (powers allow to use by Governor, president )</p> <p>4. Certain members of society are governed by special rules in their professions.(Lawyers, military officer, doctors, police )</p>	<p>6. act done with consent</p> <p>7. Act done even without consent but in good faith.</p> <p>8. Act causing slight Harms</p> <p>9. Act which defend the harm to body of himself even including body of another person.</p> <p>10. Act which defend the injury to any property of himself or property of others.</p> <p>11. The defences are universal in nature and could be making.</p>
<p><b>Result:</b> Any disciplinary action may ne cause against the person who is in default. Even some punitive liability may be charged against the person who is in default.</p>	<p>If any person found guilty then he must have to face the consequences of his act in the form of punishment prescribe for such offence what he actually committed. Punishment means any mode which is prescribed under section 53 of Indian Penal Code. 1860</p>

### 7. Conclusion:

Rule of law is a part of Constitutional as well as Administrative Law which had been developed in the half of 18th century. The criminal law is one of the branch of criminology like penology and victimology. The combining effort of administrative Law with criminal law is with the confirmation of some basic principles over which these themes are based. Rule of law plays a very key role to gathers the normative functions of justice with conformity of administrative law whereas criminal law tried to administer substantive functions of law. These both laws, has to mandate the constitutional law since one is recognising as a branch of constitutional law whereas, later came to introduced as a branch of criminal Law. In the process of administration of justice, administrative law gives more space to using of discretion either in any way while law making or breaking or functioning, whereas in criminal law, hardly the discretion be allow to use and has to follow some like a strait jacket formula, except some cases provided by Law itself. Like an administrative Law, criminal Law has also have some kinds of exceptions involves in to it. In the process of administration of justice, Rule of law is nothing but the rule made by law and not rule made by the man.

Hence on this account one can easily recognise that, Rule of law is predominance of land, and each and every person has to follow it like criminal law. If any person acting beyond that, then he is held answerable, and doesn't matter this precise person is general person or important person. Same principle is applicable to criminal law, but if anyone is allow to functioning on any particular point even found unjust but if permitted by Law till the person could not be held liable for some criminal charge. For instance, the judges are permitted to give a punishment according to law, but in case any wrong decision been passed by such judge, he will not criminally prosecuted but some disciplinary action may be initiate against him. So, one can easily understand that, in criminal law rule of law is applicable whereas , in

rule of law criminal law need not be applicable always.. The principle of rule of law involves the supremacy of law, equality before law and predominance of the law of land. On the other hand, criminal law also followed the rule of law and in rule of law enshrined the principle of natural justice which may again include “Audi alterum partem” i.e no one should be punished unheard and rule against bias i.e. No one can be a judge in his own case and so on. In all democratic nation both are important for maintaining peace and order in society but having separate entities.

## 8. References:

1. Research scholar and working as faculty in MATS Law School, MATS University, Raipur (C.G). Any suggestion, comment or criticism is welcomed at mohod.priyanka@gmail.com. Thoughts expressed and analysis made in this article is only for academic purposes and for research and does not intended to influence or impose upon any thought process or ideology. For any references ‘usual caveat of author will apply. Expression in this article is based on the personal perception of the Authors of and shall not be construed, or attribution to any ideology or agenda

2. For more details see [www.lawisgreek.com](http://www.lawisgreek.com) visited on 21/11/2013.

3. For more details see [worldjusticeproject.org](http://worldjusticeproject.org) what-rule-law

4. For more details see [www.studylecturenotes.com/.../287-characteristics-of-crime-criminal-law](http://www.studylecturenotes.com/.../287-characteristics-of-crime-criminal-law)

5. The rule of law applies to all, even religious believers by Brian Leiter published on <http://america.aljazeera.com/opinions/2013/11/religious-exemptionsaffordablecareactlaw.html> visited on 21/11/2013.

6. <http://america.aljazeera.com/opinions/2013/11/religious-exemptionsaffordablecareactlaw.html> visited on 21/11/2013.

7. For more details see <http://www.democracyweb.org/rule/history.php>

8. Ibid

9. Massey I.P, Administrative Law, Eastern Book company, 7th Ed, P21 para 2nd.

10. Dicey A. V. Law of the Constitution, 8th Ed, P 198.

11. A person was held strictly accountable for any harmful result traceable to his active conduct. A court can rightly convict the man only if there was moral wickedness or mens rea or guilty intention in him. This concept was supplemented by the test of foresight of consequences according to which a man should not be punished unless he had been aware that what he had doing might lead to mischiefs result, he must have had foresight of consequences of his conduct.

12. Ius in ancient Roman law had two principal meanings, which are still reflected in French droit, German Recht, English right and Spanish derecho. Ferdinand Mackeldy, 19th-century jurist, analysed them into two principles: jus is the law, a set of compulsory rules (Jus est norma agendi, "law is a rule of conduct"), which he called objective or positive law, and a set of possibilities to act (Jus est facultas agendi, "law is a license to act"), which he called subjective law, or duties for more details see <http://en.wikipedia.org/wiki/Ius>.

13. Supra foot note 7

14. For more details see <http://farehamdiary.co.uk/diaries/democratic-diary/national-scene/why-doesn't-the-uk-have-a-written-constitution/> visited on 21/11/2013

15. For more details see <http://lamar.colostate.edu/~grjan/hayekrulelaw.html> visited on 21/11/2013.

16. MISA refers to Maintenance of Internal Security Act. This was a law passed by the Indian parliament in 1973 giving the administration of the then PM Indira Gandhi and Indian law enforcement agencies super powers - indefinite "preventive" detention of individuals, search and seizure of property without warrants and wiretapping - in the quelling of civil and political disorder in India, as well as countering foreign-inspired sabotage, terrorism, subterfuge and threats to national security.

17. For more details see [http://articles.timesofindia.indiatimes.com/2009-07-21/Jaipur/28205855\\_1\\_freedom-fighters-misa-pension-scheme](http://articles.timesofindia.indiatimes.com/2009-07-21/Jaipur/28205855_1_freedom-fighters-misa-pension-scheme) visited in 21/11/2013.

18. TADA refers to Terrorist and Disruptive Activities (Prevention) Act, commonly known as TADA, was an anti-terrorism law which was in force between 1985 and 1995 (modified in 1987) under the background of Punjab insurgency and was applied to whole of India. It came into effect on 23 May 1985. It was renewed in 1989, 1991 and 1993 before being allowed to lapse in 1995 due to increasing unpopularity due to widespread allegations of abuse. It was the first anti-terrorism law legislated by the government to define and counter terrorist activities for more details see [http://en.wikipedia.org/wiki/Terrorist\\_and\\_Disruptive\\_Activities\\_\(Prevention\)\\_Act](http://en.wikipedia.org/wiki/Terrorist_and_Disruptive_Activities_(Prevention)_Act) visited on 21/11/2013.

19. BakshiUpendra, Developments in Indian Administrative Law, in Public Law in India, A.G. Noorani 1982 P 135.

20. (1973) 4 SSC 225 para 133

21. Indira Neharu Gandhi Vs Raj Narayan AIR 1975 SC 2299.

22. (1990) 2 SCC 653, 658-59

23. Supra note 7 and 10.

24. For more details refer section 76 and 79 of Indian Penal Code.

25. For more details refer sections 77 and 78 of Indian Penal Code.

26. For more details refer sections 80 and 81 of Indian Penal Code

27. For more details refer sections, 82 to 84 of Indian penal code.

28. For more details refer section 85 and 86. Even thereafter, the scope of these exceptions are of wide in nature. It includes act by consent, act done in good faith, act causing slight harm under section 95 and form section 96 to 106 of Indian penal code deals with defences with reference to offences against body and offences against property of him including the property of others. These all exceptions are universal and are applicable to all laws of the country subject to some exceptions, such as and more particularly offences against the state. Even for more details see the result in bare Act of Indian Penal Code 1860.