

The Rule of Law and the Readiness of India

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Abstract

The manner in which '**invisible hand**' describes the self regulating behavior of the economic world, the concept of the **Rule of Law** also appears to stand for the self regulating behavior of the world of legal systems. In this sense, rule of law is an idea that is abstract at conceptual level but actual at impact level. Over a long period of time, the rule of law has evolved to compete with the supremacy of status of human rights in the international law. Rather, it has been seen that the human rights too look up to the rule of law for their protection where legislated law has been found deficient to meet the aim. However, inalienable as are human rights, so is the rule of law inviolable. Succinctly, the rule of law is a principle of legality which refers to a government based on the principles of law and not of men.

Rule of law is a concept which evolved in the western world. Soon, it has spread its wings through colonial period to the other many countries including India. But the ecosystem for survival and growth of this species of law is composed of social customs, values, stage of civilization, economic status, educational attainment, political history and juxtaposition vis-a-vis surrounding countries. In this sense, we are uniquely situated and accordingly proffer unique environment to the rooting of the rule of law in this country. How far we have already gone ahead and how much we are further ready to let the rule of law to inform our institutions will be examined through the present research paper.

KEYWORDS: the rule of law, natural law, human rights, utilitarianism, Marxism, weberian ideal-types, liberal democracies, laissez faire, redistributive justice, equality, judicial review, basic features of Indian Constitution, democracy versus the rule of law debate.

INTRODUCTION

The most practical definition of the Rule of Law comes from the United Nations: " The Rule of Law refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision- making, legal certainty, avoidance of arbitrariness and procedural and legal transparency".¹

But due to evolutionary nature of organism of any law, the rule of law also does not have any absolute rigidity about itself. Rather, it has a natural flexibility with requisite resilience, as that of any living organism needed for survival purposes. Apparently, the rule of law has a backing of the natural law, a law which eternally exists notwithstanding existence of any man-made laws or legal systems.

But it should not be forgotten that an understanding of the rule of law is still very elusive. It is not as simple as it meets the eye. It is highly subjective and value laden. Rich and varied interpretations have been given to it. So, to recognize the true potential of 'the rule of law' for ensuring limited governmental power and the protection of individual rights, we have to consider it in the context of philosophy or political theory in which it operates. The insistence of rule of law that every person be subject to the law seems to be both prescriptive and protective of citizens. In return for obeisance to its commands, it holds out promise of protection. The rule of law underlies the entire constitutional scheme, and in one sense, all constitutional law is concerned with it.

Objective of the Research Work

To examine whether the concept of rule of law has been adopted and accepted in the Indian context. To understand various shades of meaning of the oft-used term of the rule of law. To further examine as to whether the rule of law and democracy have relation of antagonism or bonhomie. And, as to whether the rule of law has found its echo in the special conditions of India. And to suggest remedial measures wherever needed.

Research Methodology

The research methodology adopted for the present study is doctrinal in nature. Sources of information are essentially secondary. The researchers have placed heavy reliance upon library sources, reports, journals, web journals, articles from newspapers and magazines and legal databases. Methods of analysis are critical and comparative.

Historical Development

Rule of law is one of the basic principles of the English Constitution. Sir Edward Coke, The Chief Justice in James I's reign, is said to be the originator of this great principle. In a battle against the king, he succeeded in maintaining that **the King must be under the God and the law** and thus vindicated the supremacy of law against the executive.²

The concept of the 'Rule of Law' as a higher norm has always found place of pride in the writings of eminent scholars and thinkers. One of the greatest thinkers of the past, Aristotle is stated to have said that 'the rule of law is preferable to that of rule of men'. The rule of law is an aspect of ancient as well as modern natural law thought which insists that the authority of law derives not from the powers of any political rules, but from a higher source either theological or secular. So, requirements of good law have been stipulated over centuries. From the time of Socrates, Plato and Aristotle the quest for virtue or goodness or the justice under the law has been a recurrent theme.

Also, the political philosophy behind the American or French declarations is based upon a particular notion of the individual, of society and of their mutual relationships. Even the

writings of Jean- Jacques Rousseau and Thomas Paine are all infused with the doctrine of the inalienability of individual human rights- rights which transcend the law of the State, which cannot be overridden by the state, and which affirm the supremacy of the law of the State with the important proviso that the law of the State is in compliance with the Natural Law.

The essence of the strand of rule of law is, in particular, inspired by the special fact that Britain had remained under a largely unwritten constitution lacking a definitive document which prescribes the powers and functions of the respective organs of the State- executive, legislative and judicial. So, the concepts of the Rule of Law, Separation of Powers and Parliamentary Sovereignty provide the infrastructure of constitutional law. Rule of law has evolved through a long tradition of court decisions forming rich body of common law.

Professor A. V. Dicey's formulations³

Perhaps the best known articulation of the doctrine of rule of law is found in the writings of Professor A. V. Dicey who used it as a tool against the growth of administrative law.

Himself influenced by *laissez faire* policy of state, Dicey was, in fact, much worried about the incessant increase in the powers of administration and consequent exercise of wide administrative discretion in the name of maintenance of service in the welfare state. He observed that the rising trend of state powers was in favour of public officials. Even the rule-making and rule-adjudication functions were being shared by the executive which prompted his thinking to propose and emphasise the theory of the rule of law.

Apart from this, Dicey also compared the English system with the French system and pointed out that in England there were no special tribunals to determine the legality of acts of the administration as in France. Every individual, whether a private citizen or the official was ruled by the ordinary law and was subject to the ordinary courts. Accordingly, he maintained that the separate hierarchy of administrative courts provided by the French *droit administratif* resulted in the denial of **equality before the law**. So, the Diceyan thesis of the rule of law came into existence, mainly, in opposition to the *droit administratif* in France.

A V Dicey in his “The Law of the Constitution” offered a **prosaic description** of the rule of law.

He argued that the rule of law – in its practical manifestation – has three main aspects:

- i. No man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land. In this sense the rule of law is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary, or discretionary powers of constraint.
- ii. No man is above the law, every man and woman, whatever be his or her rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals.

- iii. The general principles of the constitution (as for example the right to personal liberty, or the right of public meeting) are the result of judicial decisions determining the rights of private persons in particular cases brought before the courts.

From these requirements we can discern that a law should **not** be **arbitrary** and **retrospective** in its application. A person can be punished only for a breach of a law. In past, this idea resonated with that of the social contract and the reciprocal relationship between the state and the individual. Laws which are arbitrary and secret are incapable of justification on the basis of the mandate of the people and accordingly often against the reciprocal relationship on which constitutional democracy depends.

As regards **retrospectivity** following words are illuminating:

Perhaps no rule of construction is more firmly established than this – that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation, otherwise than as regards matters of procedure, unless that effect cannot be avoided without doing violence to the language of the enactment. If the enactment is expressed in language which is fairly capable of either interpretation, it ought to be construed as prospective only.⁴

Evaluation of Dicey's Thesis

It has been well established by the critics of Dicey that he had thoroughly misunderstood the real implications of the French *droit administratif* and was misinformed about the facts in England. The French *droit administratif* had, in fact, been able to give expeditious and inexpensive relief to the citizen against the actions of the administration. Although the *conseil d'Etat*- the highest administrative court in France-technically speaking was a part of the administration. In practice it is very much like a court. In effect the actions of the administration were not immune from judicial control. It is true that during the early years, the *Conseil d'Etat* was in a large measure a servile instrument of the Emperor and, therefore, there was some basis for Dicey's criticism. But after 1872 when the *conseil d'Etat* become an independent court, his criticism no longer was valid. The actual working of the *Conseil d'Etat* shows that it provided no less protection to the citizen against the arbitrary actions of the administration than the ordinary courts in England did. Moreover special tribunals were not totally absent in England at the time Dicey propounded his thesis. The poor law Amendment Act, 1884, created the poor law board which had large powers of the rule making and adjudication of disputes.

Apart from having been based on a misunderstanding of the implications of the French system, Dicey's thesis was dominated by *laissez-faire* doctrine. He saw merit in the absence of discretionary power in the government according to him, 'whenever there is discretion there is room for arbitrariness, and in a republic no less than under a monarchy discretionary authority on the part of the government must mean insecurity for legal freedom on the part of the subjects. Dicey failed to distinguish between **arbitrary powers** and **discretionary powers**. The distinction between the two lies in the fact that arbitrary power is always repugnant to the notion of the rule of law. Whereas the latter is not inconsistent until it is exercised improperly.

The modern welfare state cannot function successfully without discretionary power. Discretionary power, therefore, in every sphere is inevitable to meet the needs of welfare measures of present day society. According to Wade and Phillips “if it is contrary to the rule of law that discretionary authority should be given to government departments or public officers, then the rule of law is inapplicable to any modern constitution.” **There has been no government or legal system in the world history which does not involve both rules and discretion.** It is impossible to find a government of laws alone and not of men in the sense of eliminating all discretionary powers. But discretion must be exercised properly and for this purpose law must evolve control mechanism to supervise over the exercise of administrative discretion. This function is fulfilled by administrative law. It provides the mechanism for controlling the actions of the administration with a view to harmonizing administrative discretion with the rule of law.

Dicey’s formulation of the rule of law is no longer acceptable, since it equates the rule of law with the absence not only of arbitrary but even of wide discretionary power. There is at present a widespread disenchantment in common law countries with the Diceyan concept of the rule of law. It is widely believed that mere court review cannot supply as effective control mechanism over the activities of the administration and that some principles of *droit administratif* should be incorporated within the common law systems to have an effective control mechanism over the administration.

Dicey’s emphasis on **equality before law** and a **government under the law** has been interpreted as requiring that there should be actual equality in terms of legal rights, powers and capacity. But, actual equality does not seem to be possible as many special rights and duties and immunities have to be given to various persons like President, Prime Minister, Ministers, Government Officials, and General Citizens as per the roles performed by them. However, Official accessibility to law is definitely one of the foundations of the rule of law.

Wade and Bradley – recognising the limited procedural approach Dicey adopted – assert that the discussion on the rule of law ‘should no longer be cast in the Diceyan mould.’⁵

To grasp a workable theme of the Rule of Law, we have to view it from various standpoints. Mainly, these views can be classified with reference to utilitarianism and idealism.

Utilitarian View

We can put the rule of law to the following uses as:

- 1. A standard to measure a legal system:** rule of law is taken as touchstone to know the quality of a legal system.
- 2. An analytical tool for a legal system:** to find out the existence of elements of rule of law we study a legal system with an eye on the relative importance of the constituent elements.
- 3. A device for stability and peace:** this is a law and order utility.

4. **A reason for enforcing obedience to laws:** the state can present its laws as worthy of obedience being based on the principles of rule of law for which there is a wider obligation.
5. **A basis for acceptance of laws:** an individual can get a valid excuse for following laws having roots in the rule of law.
6. **A concept for continuity while respecting change:** to ensure unity, integrity and identity of a legal system it must be saved from vicissitudes of pressures threatening its architect and structure. This is so, because a reasonable expectation from a system should not be belied. At the same time, it should be have flexibility for making necessary adjustments.

Ideal-Types view⁶

Though the rule of law appears to be an ideal for a legal system, but in practice this ideal cannot be achieved completely. We can just be as close as possible to this ideal. The limiting factors, which stop us from touching this ideal, are the necessary and the unavoidable human interventions in the form of individual interpretations, context of customs, conventions, mores and social norms. The political theory of a particular country or legal system is the final guiding light in case of grave doubts about the meaning of a particular law. In such a case, the rule of law is given that interpretational meaning which a political theory prescribes beforehand. Hence, instead of an ideal model of rule of law, ideal type model, on the pattern of Weberian ideal types, attempt to subsume this concept as completely as possible.

So, in the main, we may examine the concept of rule of law as if subsuming any or all of the following patterns in itself:

1. **Historical Ideal - Types:** in this conception, the rule of law concerns with the historicity of primary legal document i.e. Constitution of a country. The original understanding of the drafters and makers of the constitution is taken as a reference to make out a sense of law.
2. **Formalistic Ideal - Types:** this is a formulation where we take the meaning of a law in the forms as it exists in rules and regulations.
3. **Legal Process Ideal - Type:** this view lays emphasis on the reasoning, fairness of the operation of law.
4. **Substantive Ideal - Types:** invoked in rare cases, this perspective concerns with the guidance provided by the political philosophy of the time when the law of that time is put to interpretation.

Rule of law in the context of various thoughts and cultures:

Laissez faire context

Frederich von Hayek is firmly against the idea of a welfare state and the entailed notion of the distributive justice. In his treatise “The Road to Serfdom” he is opposed to state regulations other than a basic level necessary to guarantee freedom. He describes rule of law in the following manner:

Stripped of all technicalities this means that Government in all its action is bound by rules fixed and announced beforehand – rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstance and to plan one’s individual affairs on the basis of this knowledge.

Hayek’s ideas are supported by Robert Nozick when he calls a state to be just if it respects the principles of entitlement as under:

Things come into the world already attached to people having entitlements over them. From the point of view of the historical entitlement, conception of justice is in holdings. Those who start afresh to complete 'to each according his 'treat objects as if they appeared from nowhere, out of nothing.⁷

It clearly means that the justice lies in the recognition of the justice of holdings and any redistribution of wealth in the society is to defeat the right of an individual to his holdings. So, Robert Nozick is against distributive justice through taxes, land reforms, reservation, subsidies, disturbing property entitlement through interventions in the family laws.

Redistributive justice context

The rule of law is not only dependent upon the political foundation of the state, but also dependent on a nation’s economic resources. As a mere regulator, the rule of law can be feasible in an impoverished state but if we want to raise this concept to the level of a theory guaranteeing freedom from hunger and homelessness and entitlement to a basic decent standard of life then economic condition are of paramount importance to conformity with the rule of law.

Such an approach is adopted by the international Commission of Jurists, which in the New Delhi Declaration of 1959, included – alongside traditional civil and political rights – the realization of social, economic, cultural and educational standards under which the individual could enjoy a fuller life within the ambit of the rule of Law.

State intervention context

John Rawls, in his book “Theory of Justice”, advocates for an interventionist state committed to **distributive justice**. He says that a law should provide means for the fulfillment of legitimate expectation of the people. He says that rule of law must only command action which is possible. Law makers should make the laws in good faith. There should not be any offence in the absence of a law. Like cases must be treated alike.

But, as we know, no two cases are wholly alike in reality. The treatment of them by the rule of law to have same result may not sound morally appropriate. Every case is unique in itself. So, a straight jacket formula cannot be applied to all cases. Hence, rule of law

has to be alive to this fact and to be successful it must have practical flexible approach towards life within the ambit of the rule of Law.

Marxist context⁸

Marxian thinkers say that the rule of law is a **false idealization of law** designed to reinforce the prevailing political structure and the economic *status quo* in the society. The liberalism pays too little regard to true equality between persons and it pays a great attention to the protection of property interests. So, the liberal domain thus becomes one which, again, marks true social and economic inequality while at the same time proclaiming equality and justice under the rule of law.

Marxists also assail the rule of law as an ideological device engaged by those with powers to mask the reality of that power in society and the correlative power used to exploit the powerless. Accordingly, they call the welfare state as a cynical mask for maintenance of the status quo which defeats the revolutionary economic and social change. In other words, the steps taken in the name of redistributive justice like Food Security, MNREGA, RTI, RTE, Subsidies, Legal Aid programme and Social Security measures are simple palliatives or safety valves. Immediate results of these measures are traded for long term disabilities informing a dynamic working class movement.

Welfare legislation obscures the structure of class domination based on the relations of production and reduces the asperity of class antagonism. The path of reformism is thus self-defeating and Marxists are forced to doubt its claim to be the correct proto-revolutionary practice.

Hence, the Marxists dismiss the rule of law as a grand slogan under which is hidden the reality of expression and absence of liberty. They call it fetishism.

Oriental context

They treat all the western preference for law as **an alien notion**.

To quote David and Brierley:

For the Chinese, legislation was not the normal means of guaranteeing a harmonious and smooth-working society. Laws abstract in nature could not take into account the infinite variety of possible situations. Their strict application was apt to affect man's innate sense of justice. To enact laws was therefore considered a bad policy by traditional Chinese doctrine. The very exactitude which laws establish in social relations, and the way in which they fix the rights and obligations of each individual were considered evils according to the Chinese, not benefits. The idea of 'rights', an inevitable development of the laws themselves, ran counter to the nature order. Once individuals think of their 'rights' there is, it was thought, some form of social illness, the only true matter of concern is one's duty to society and one's fellow men.

The enactment of laws is an evil, since individuals, once familiar with them, will conclude that they have rights and will then be inclined to assert them, thereby

abandoning the traditional rules of propriety and morality which should be that only guides to conduct. Legal disputes become numerous, and a trial, by reason of its very existence, is a scandalous disturbance of the social order to the detriment of all society.⁹

Ironically, above oriental analytical comments point towards a disturbing possibility that the rule of law, depending upon the context in which it is applied, can become an instrument of ultimate instability, that too when it is otherwise supposed to provide stability in the society.

Formalistic context

For some writers such as Prof. Joseph Raz, it represents a purely procedural or formalistic device as it says nothing about how the law is to be made: by tyrants, democratic majorities, or any other way. It says nothing about fundamental rights, about equality, or justice.¹⁰

For others, like Hayek, it is meant to be a provider of a facilitating environment limiting the role of state to the minimal level. Herein, the focus would remain on releasing the individual initiatives for creating synergies. This is the theme of liberalisation, privatisation and globalisation.

But still, it can be proved that the rule of law has a much more lingering uncertainty in it as it is dependent on politics, culture and inspirational philosophy. So for different thinkers it has come to denote a different idea.

Given this, 'the rule of Law' has become confusing to the extent of being termed as meaningless all thanks to ideological abuse and general over-use.

The liberal democracy context

It presupposes that the rule of law will ensure the minimum rules in society to fulfill his life plan according to law but with the minimum interference of law.

But writers like Jennings criticize this approach for its conservative preference of certainty within law rather than for social justice which necessarily entails much discretionary powers in the application of broad rules.

For Jennings, the rule of law means:¹¹

1. That the State as a whole must be regulated by law,
2. That the separation of powers is implied within the doctrine in order to prevent dictatorship or absolutism.
3. Accordingly, there are incorporated certain basic requirements of the law:
4. Equality before the law,
5. Clearly defined police powers, clear general rules adjudicated upon by the courts,
6. Non - retrospectivity in penal statutes,
7. Strict construction of penal statutes.
8. Vagueness of the principle of equality is as that of the rule of law itself.
9. Most importantly, the rule of law implies the notion of liberty.

Value - Neutrality context

Prof. Joseph Raz says that rule of law is morally neutral concept. He draws an analogy between **the rule of law** and **a knife**.¹² One quality of a good knife is sharpness. However, the quality of sharpness says nothing as to the use to which the knife would be subjected to – 1) Beneficial Surgery, or 2) Murder –sharpness is morally neutral. However, Prof. Raz also maintains that the purpose of law is to enable citizens to live within the law. So, he concludes that for the rule of law to exist in society certain qualities must be present.

A law must be clear for being capable of being obeyed. Absence of clarity is destructive to the rule of law. Further, the courts must be accessible and adequately staffed to function as an independent judicial organs. Prof. Raz lays no claim for a legal system to be necessarily morally good for its existence.

A political ideal context

A legal system may lack or may possess a political ideal to a greater or lesser degree. That much is common ground. It is also to be insisted that the rule of law is just one of the virtues which a legal system may possess and by which it is to be judged. It is not to be confused with democracy, justice, equality (before the law or otherwise), human rights of any kind or respect for persons or for the dignity of man. A non-democratic legal system based on the denial of human rights, on extensive poverty, on racial segregation, sexual inequalities, and religious persecution may, in principal, conform to the requirements of the rule of law better than any of the legal systems of the more enlightened Western democracies.

Morality context

Prof. Lon Fuller¹³'s ideas on rule of law are based on moralities of duties and inner morality of law. To draw an ideology with building construction failure to lay foundations will result in the edifice resting on a insecure and fragile base. So, the rule of law must serve the needs of the people. Law does not exist in vacuum apart from the society it regulates. It is directed towards altruistic and beneficial ends. A valid legal system must comply with the morality of aspirations. So, as against Prof. Raz, who rejects the linkage between the rule of law and morality, Prof. Lon Fuller wants a governmental regime to meet the basic requirements of a good system of law to claim the status of a valid legal system. In other words, a legal system is required to have **legitimacy** offered by higher goodness.

Law and order context¹⁴

Some thinkers treat rule of law as a concept of law and order. These legal positivists regard the duty to obey validly created norms as absolute. So, the rule of law is there to be obeyed by one and all. This view emphasizes the peaceful settlement of disputes without recourse to violence – armed force or terrorism. But taken to its logical conclusion, the law and order view can also lead to the repression of freedom. The public

protest, for example, will often involve breach of rule against the obstruction of the highway, of the police in the execution of their duties, trespass, or criminal damage even though these laws are not the object of the protest.

Whether to obey or disobey law: a dilemma resolved¹⁵

So, we must consider the nature of obligation to obey a valid law by an individual, and the extent to which citizens should be coerced into obedience to unjust laws.

Any law derives its authority from the obedience of the people. So for more pragmatic reason of ensuring voluntary compliance with law, it should be directed to the good. **If one feels that the law is unjust then a right to disobey such law should be an inherent right of legitimate protest.** In many cases, like Mahatma Gandhi's Peaceful Civil Disobedience campaign and Martin Luther King's Civil Rights' movement people had to disobey the laws which forbade the realization of rights aspired for.

John Rawls also concedes a **right to disobedience** in pursuit of changing a society's sense of justice. But, he confines such rights of civil disobedience to a peaceful protest.

Prof. Ronald Dworkin also argues for **official tolerance** in the face of dissent and law breaking of which is undertaken in pursuits of rights – even where violence is employed.

Nobody should ever be punished unless punishing him will do some good on the whole in the long run, all things considered. So, principles of utilitarianism may be invoked in guiding the decision regarding preservation of law.

Some thinkers go to the extent that there is a **duty to disobey the unjust or guilty states** like Nazism in general. So, they imply that **moral obligations to disobey can outweigh the legal obligation to obey.**

Gap filling functionality context

The constitutional principle of rule of law serves to bridge the gap between the legal doctrine of parliamentary sovereignty and political doctrine of sovereignty of the people.

Modern Conception of the Rule of Law

The principle of the rule of law has since the end of the Second World War been a matter of universal discussion and endeavor to formulate the fundamental elements of the rule. The rule is now considered as a basic idea which may serve to unit lawyers of many differing systems, all of which aim at protecting the individuals from arbitrary government. In this sense the rule has come to be identified with the idea of the rights of man. Most countries, outside the communist world accept that the rule has a positive content, no matter how much that content may differ in various countries. If justice is to be done in the process of reconciling the opposite notions of individual liberty and public order, that is obtained ultimately, but not exclusively, by the ordinary courts. There are, however other methods of making a government submit to the law, such as adjudication by administrative tribunals and action even in the legislature at the instance of private

members, and even in the case of action by subordinate authority, by higher administrative control.

The acceptance of the rule of law has been secured through some international conventions like the European Convention on Human Rights. This convention has recognized that a citizen is entitled to redress against his own state if certain basic rights are violated.

The Delhi declaration, in short, puts three ideals of the rule of law as under:

1. The function of the legislature in a free society under the rule of law is to establish and maintain conditions which will uphold the dignity of man as an individual. The dignity requires not only recognition of his civil and political rights but also creation of social, economical, educational and cultural conditions under which the individual could realize his legitimate aspirations and dignity.
2. The rule of law depends not only on the existence of adequate safeguards against abuse of powers by the executive. But also on the existence of effective government capable of maintaining law and order and of ensuring social and economic conditions of life for the society.
3. An independent judiciary and an independent legal profession are indispensable for a free society under the rule of law.

So, the concept of the rule of law in modern times, does not oppose the practice of granting discretionary powers to the government: rather it seeks to endeavour that when discretionary power is granted to administrative authorities, the manner of its exercise should, as far as possible, be defined. It also ensures that every man is bound by the ordinary laws of the land whether he be a private citizen or a public officer: that private rights are safeguarded by the ordinary law of the land.

The notion of the rule of law, as it is understood in modern times, is **not a static concept**. **Nor even is it a limited concept**. Its dimensions increase with the progress of mankind, complexity of government and time. It is a **dynamic, progressive and responsive concept** and its great virtue lies in its **flexibility**. Totalitarianism and absolutism are the arch enemies of the rule of law.

In a modern constitutional democracy, the rule of law has fourfold implications, like:

1. Personal freedom,
2. Freedom of mind and conscience
3. Justice between man and man and between man and the State and
4. The powers of the executive and the legislature.

By now it must be clear that the concept of the rule of law today has great relevance both in the developing and under-developed countries. A mere constitutional guarantee of rights cannot yield good result unless **conditions** are created by the government for the fuller and proper enjoyment of these rights. A country that suffers from series

political instability and unwarranted encroachment on judicial process by the executive cannot realize the ideals and objectives of the rule of law. The concept of the rule of law would lose all its vitality if the instrumentalities of the State are not charged with the duty of discharging their functions in a fair and just manner. The rule of law in order to be truly effective must, therefore, be operated not only in the spheres of **substance** but also in the spheres of **procedure**. The ultimate efficacy of the rule of law lies in having **free access to the courts** not only for the redress of wrongs and breaches of law but also in respect of excessive, illegal and unauthorized use or non-use of the diverse powers that the new legislations and statutes of modern welfare states are creating.

For the rule of law to be respected in our life the legal process – Civil & Criminal – must exhibit certain features categorized as – 1) Accessibility or, 2) Procedural Fairness

Accessibility can be possible only when a system of courts exists staffed adequately and legal service and assistance must be provided at a cost affordable by all. As is well acknowledged, the cost of litigation is rising day by day in a prohibitive manner so statutory legal aid schemes as well as free legal advice are need of hour. Moreover, justice should not be delayed to the extent of denial. Further, the quality of justice can be ensured only when courts are fully resourced and manned by trained and efficient persons.

Procedural Fairness demands that the Judge should be impartial and should be a reasonable representative of the society he serves. Evidence should be admissible in nature and fairly presented. The proceedings should be conducted in such a manner as to be intelligible to the parties, witnesses and judges.

Even if and when the judges take a bold stand and assert the rights of individuals against the government, there is no guarantee that Parliament will not intervene to nullify that right.

The rule of law in international dimension:

The universal Declaration of Human Rights of the United Nations published in 1948 declares that:

It is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that **human rights should be protected by the rule of law.**¹⁶

The Declaration of Delhi, issued under the auspices of the International Commission of Jurists, affirms the rule of law and its value in promoting the protection of civil and political rights and linked such rights with the development and protection of social and economic rights to establish social, economic, educational and cultural conditions under which the legitimate aspirations and dignity may be realized.

Such aspirational statements recognize the need for the economic foundations to be such that dignity of man can be real in society. Such formulation requires the allocation of

resources within the society. The protection of economic and social action requires positive action at a high cost.

Thus, the rule of law – in its many forms – represents a challenge to State authority and power, demanding that powers both be granted legitimately and that their exercise is according to law.

‘According to law’ means both according to the legal rules and something over and above purely formal legality and imputes the concept of **legitimacy**. In its turn legitimacy implies rightness or morality of law.

The law is not autonomous but depends on the support of those it governs. The law is the servant of 'the sense of rightness in the community', and though we place the rule of law above every individual – irrespective of rank and station it remains – **paradoxically** – subject to the **ultimate judgment of the people**.

Now we can reasonably conclude that the notion of ‘the rule of law’ survives in a system in which the following four universal principles are upheld:

1. The government and its officials and agents as well as individuals and private entities are accountable under the law.
2. The laws are clear, publicized, stable and just, are applied evenly, and protect fundamental rights, including the security of persons and property.
3. The process by which the laws are enacted, administered and enforced is accessible, fair and efficient.
4. Justice is delivered timely by competent, ethical, and independent representatives and neutrals who are of sufficient number, have adequate resources, and reflect the makeup of the communities they serve.

Relevance of the Rule of Law to Everyone

The rule of law is the underlying framework of rules and rights that make prosperous and fair societies possible. The rule of law is a system in which no one, including government, is above the law; where laws protect fundamental rights; and where justice is accessible to all.

Different perceptible strands of the thought of Rule of Law

Limited Government Powers

In a society governed by the rule of law, the government and its officials and agents are subject to and held accountable under the law. Modern societies have developed systems of checks and balances, both constitutional and institutional, to limit the reach of excessive government power, and to subject the government power, or ruler, to legal restraints. These checks and balances take many forms in various countries around the world: they do not operate solely in systems marked by a formal separation of powers, nor are they necessarily codified in law. What is essential, however, is that authority is distributed in a manner that ensures that no single organ of government has the practical ability to exercise unchecked power.

Government powers are defined in the fundamental and are effectively limited by the legislature, the judiciary, independent auditing and review, sanctioning of officials for misconduct, non-governmental checks like civil society, NGOs etc., transition of power is subject to the law implemented through election commission.

Absence of Corruption

The absence of corruption - conventionally defined as the **use of public power for private gain** - is one of the hallmarks of a society governed by the rule of law, as corruption is a manifestation of the extent to which government officials in the executive branch, the judiciary, the legislature, and the police and the military abuse their power or fulfill their obligations under the law.

Order and Security

Human security is one of the defining aspects of any rule of law society. Protecting human security, mainly assuring the security of persons and property, is a fundamental function of the state. Not only does violence impose wounds on society, it also prevents the achievement of other aims, such as exercising fundamental human rights, and ensuring access to opportunities and justice. In extreme situations, violence might become the norm if legal rules are not enforced. Under the rule of law, the state must effectively prevent crime and violence of every sort, including political violence and vigilante justice. .

Fundamental Rights

Under the rule of law, fundamental rights must be effectively guaranteed. A system of positive law that fails to respect core human rights established under international law is at best “**rule by law**”. **Rule of law** abiding societies should guarantee the rights embodied in the Universal Declaration of Human Rights including the right to equal treatment and the absence of discrimination; the right to life and security of the person; the right to the due process of the law; the freedom of opinion and expression; the freedom of belief and religion; the absence of any arbitrary interference of privacy; the freedom of assembly and association; and the protection of fundamental labor rights.

Open Government

Open government is essential to the rule of law. It involves engagement, access, participation, and collaboration between the government and its citizens, and plays a crucial role in the promotion of accountability. Requesting information from public authorities is an important tool to empower citizens by giving them a way to voice their concerns and demand accountability from their governments. Open government is far more than transparency, and encompasses elements such as clear, publicized, and stable laws; administrative proceedings that are open for public participation; official drafts of laws and regulations that are available to the public; and the availability of official information.

Regulatory Enforcement

Public enforcement of government regulations is pervasive in modern societies as a method to induce conduct. A critical feature of the rule of law is that such rules are upheld and properly enforced by authorities, particularly because public enforcement might raise the scope for negligence and abuse by officials pursuing their own interest. Appropriate and effective enforcement does not only mean that it occurs without public or private meddling, but also that regulatory proceedings are conducted in a timely way that respects the due process of law.

Civil Justice

In a rule of law society, ordinary people should be able to resolve their grievances and obtain remedies in conformity with fundamental rights through formal institutions of justice in a peaceful and effective manner, rather than resorting to violence or self-help. Civil justice requires that the system be accessible, affordable, effective, impartial, and culturally competent. Accessibility includes general awareness of available remedies; availability and affordability of legal advice and representation; and absence of excessive or unreasonable fees and hurdles. Impartiality includes absence of arbitrary distinctions, such as social and economic status, as well as decisions that are free of improper influence by public officials or private interests. Effective civil justice also implies that court proceedings are conducted in a timely manner and judgments are enforced without unreasonable delay. Finally, in a rule of law society, it is essential that alternative dispute mechanisms provide effective access to justice, while refraining from binding persons who have not consented to be bound by the mechanism.

Criminal Justice

An effective criminal justice system is a key aspect of the rule of law, as it constitutes the natural mechanism to redress grievances and bring action against individuals for offenses against society. An effective criminal justice system is capable of investigating and adjudicating criminal offences effectively, impartially, and without improper influence, while ensuring that the rights of suspects and victims are protected.

Informal Justice

For many countries it is important to acknowledge the role played by traditional, or 'informal', systems of law — including traditional, tribal, and religious courts, as well as community-based systems — in resolving disputes. These systems often play a large role in cultures where formal legal institutions fail to provide effective remedies for large segments of the population or when formal institutions are perceived as foreign, corrupt, and ineffective. While recognizing the importance of these informal systems, a necessary element of the rule of law is that informal systems are effective, impartial, and protect fundamental rights, and are held to the same standards of fairness in resolving disputes as formal systems.

The practical issues of rule of law

Arts and Culture

Arts and culture are an inherent part of understanding and conveying what it means to be human and how we perceive the world we inhabit. Evidence that the arts are an intrinsic part of human nature goes back tens of thousands of years. In repressive regimes, freedom of expression through the arts is often one of the first targets for restriction, acknowledging how effectively the arts can convey and document the truth about political, social and human conditions. The establishment and enforcement of the rule of law is essential to assure artists of their individual free expression rights as well as to protect the intellectual property rights of artists.

Business

A dynamic private sector is necessary for sustaining economic growth and strength, but its ability to play this essential societal role is hampered when there is a lack of effective rule of law. Uneven enforcement of regulation, corruption, insecure property rights, unclear laws, and ineffective means to settle disputes undermine legitimate business and drive away both local and international investment. Meaningful and long-term development depends on upholding the rule of law.

Education

A key component of civic engagement, education improves opportunities for students, increasing social stability and economic competitiveness. Corruption and disregard for laws regulating learning standards lead to poorly functioning school systems which, ultimately, reduce learning outcomes for students. For education to fully achieve its potential, it is important to ensure that governments and educators, as well as leaders from business and civil society, uphold and promote the rule of law.

Environment

Without an effective system of regulations and enforcement – systems predicated on the rule of law – threats to the environment will remain unresolved and present ever-greater challenges to society. Weak environmental protection and environmental policies can lead to major environmental problems including pollution, deforestation, loss of biodiversity, natural disasters, and poor waste management among other issues. The laws on record and their effective enforcement, together with appropriate management, are useful tools in protecting the environment and public health without constraining economic development. Adherence to the rule of law is essential to hold the government, businesses, civil society organizations, and communities accountable to these safeguards.

Faith

Rule of law mandates that people's fundamental right to freedom of religion is respected. Further, in many contexts, an effective rule of law is one that balances mainstream beliefs with local tradition, promoting harmonious linkages between formal and traditional

structures of justice. This inclusion gives people greater access to justice, freedom of expression, and overall accessibility to public information and legal language. Additionally, faith leaders can and should play a constructive role in advancing the rule of law, whether through educational efforts or direct interventions to promote adherence to the rule of law.

Government

Government is the sector that is most responsible for promoting and upholding rule of law in a particular country. Good governance (the process by which rules and regulations are designed, legislated and amended), government decision-making, and the manner in which these decisions are implemented and enforced, is essential to ensuring rule of law. Effective governance results in a transparent public sector that is held accountable for its actions by an independent judiciary, is responsive in providing public services, and also ensures that an engaged citizenry is able to act as a further accountability mechanism.

Human Rights

Human rights form the backbone of a just society, and their protection enables individuals and collectives to pursue their desired ends. Yet human rights are too frequently disregarded or revoked when politically expedient or viewed as obstacles to political, environmental, and economic objectives. A just rule of law protects and enforces fundamental rights--the right to life and security of person; freedom of thought, religion, and expression; freedom of assembly and association; fundamental labor rights; the right to privacy; equal protection of the law; and due process of law.

Media

Weak access to information—in law or in practice—prevents citizens from being aware of the rights they are guaranteed, the mechanisms available to protect those rights, and the leverage necessary to hold their governments accountable. A free and responsible press and uncensored web access—free from restrictive laws, fear of harassment and violent persecution—serves in an important watchdog role, holding government, civil society, and the private sector accountable for their actions. Ultimately, media, as well as the internet, can support and advance the rule of law by providing accurate and informative content that educates the public about their rights, responsibilities, and the rule of law, while also providing information on developments that may impact those rights and responsibilities as well as a platform for responsible citizenship.

Military and Public Safety

Ineffective public safety is one of the most telling indicators of weak rule of law. It leaves societies vulnerable to risks posed by crime, conflict, and natural disasters, eroding individual safety, community harmony, and economic growth. Public safety can be undermined when any police, judicial, and military officials are unresponsive, criminally complicit, corrupt and poorly trained. It can also be harmed by ineffective crime

detection, investigation, and resolution mechanisms in communities and institutions. Furthermore, public safety can be destroyed or eroded if the fundamental human rights of citizens are evasive. Communities with low levels of public safety often lack trust between citizens and are less likely to generate sustainable, equitable and transparent economic development given the increased community security, corruption or judicial ineffectiveness risks posed to citizens and investors.

Physical Infrastructure

Safe and reliable physical structures are essential to a thriving economy and an efficient society. Yet corrupt practices in the construction process abound, and honest practitioners are discouraged from entering the market by prohibitive bribery and kickback costs. These increased costs divert revenue from using higher quality materials to build safe structures, while also hindering future projects. Corruption in the global construction industry is a huge economic burden, and has a major impact on least developed countries where money is diverted from projects that are intended to provide basic infrastructure such as roads, electricity, water supply, housing, hospitals etc. Clearly written, well-publicized and effectively enforced laws and safety codes will help curtail illegal practices like bribery and kickbacks, allowing the construction market to become a more open and competitive place and increasing reliability and security of physical infrastructures.

Public Health

Equitable access to comprehensive, effective health care systems, including primary health care and public health services is a fundamental human right and a public good. A healthy populace is essential for building and maintaining prosperous and stable societies and is only possible through proper prevention and intervention. However, without the rule of law, public health interventions and services are frequently rendered impotent. Unenforced or lacking health regulations counter prevention efforts. Safe, reliable and affordable medicines, medical treatment, and health care delivery systems—even drinking water—require effective regulation, monitoring, and enforcement. Absenteeism, mismanagement, bribes, and informal payments undermine health care delivery and waste already scarce resources. The rule of law is necessary to break cycles of poor health that stand in the way of prosperity and stability.

Science and Technology

A dynamic private sector is necessary for sustaining economic growth and strength, but its ability to play this essential societal role is hampered when there is a lack of effective rule of law. Uneven enforcement of regulation, corruption, insecure property rights, unclear laws, and ineffective means to settle disputes undermine legitimate business and drive away both local and international investment. Meaningful and long-term development depends on upholding the rule of law.

Women and Girls

In most countries, women and girls suffer disproportionately from weak rule of law and face multiple barriers to justice. Women earn less than men, have limited land and property rights, encounter discrimination in education and healthcare, face gender-based violence, and are underrepresented in governance and decision-making. Even where good laws exist, women are often unaware of their rights, the laws are not always enforced, or the laws may conflict with local customs and culture. Yet women and girls are also central to solutions to many of our world's toughest challenges. Putting the rule of law behind women's rights leads to better family nutrition and health; improved education for children; reduced vulnerability to HIV/AIDS; better access to assets and finance for families; and greater economic growth and security for communities and nations.

The Readiness of India¹⁷

India's claim of the largest functional democracy depends on the following premises:

1. Electoral democracy
2. Powerful Media
3. Activism reinforced by the Right to Information and
4. Judicial Custodianship of Justice and the rule of law.

Given the independence of Indian Judiciary, we can be rest assured about the custodianship of the rule of law. The track record of our apex court and the High Courts also show that they are not only innovative but formidable and intrepid also in delivering the framework for operation of rule of law in the country.

The term 'rule of law' is not used in the Indian Constitution anywhere, yet, it is used frequently by the Indian courts in their judgments. There is no doubt that the rule of law pervades the Constitution as an underlying principle. In fact, the Supreme Court has declared the rule of law to be one of the 'basic features' of the Constitution (*Indira Nehru Gandhi v Raj Narain, AIR 1975 SC 2295; SP Gupta v Union of India, AIR 1982 SC 149*), so this principle cannot be taken away even by a constitutional amendment. The Indian conception of the rule of law is both formal and substantive. It is also seen as an integral part of good governance.

Questions are though raised as to the extent to which the constitutional promise of the rule of law matches with actual situation in India. To elucidate it, we may consider three broad aspects of the rule of law.

First, the rule of law as a **check on governmental powers**, including by requiring that laws are clear, predictable, and prospective.

Second, the rule of law as an embodiment of protecting people's human rights. Among others, this will entail a guarantee for **equal treatment**.

Third, **judicial review** of legislative and executive actions by an independent judiciary.

In a way, the last two aspects complement the first aspect in that they limit the power of governmental agencies.

Checks on Governmental Powers

The Indian Constitution establishes a limited government. Being a federal country; both the central and state legislatures have the power to make laws, but only subject to express and implicit constitutional limitations:

First of all, the constitution specifies and demarcates the matters on which the central legislature and state legislatures could make law (*Constitution of India, 1950, arts 246, 248-254 read with Schedule IX*). Any law that breaches these limitations (e.g., a state law made on a matter within the exclusive competence of the central legislature) could be declared unconstitutional by courts (*Medical and Educational Charitable Trust v State of Tamil Nadu (1996) 3 SCC 15*).

Second, the power of executive to make laws by issuing Ordinances is limited - both in terms of duration and situations triggering the exercise of such power (*Arts 123 and 213*).

The executive, of course, cannot make a law on a matter on which the corresponding legislature lacks the competence to legislate (*Art 123(3) provides: 'If and so far as an Ordinance under this article makes any provision which Parliament would not under this Constitution be competent to enact, it shall be void.'*).

Third, although the Indian Constitution - having established a parliamentary form of government - does not follow any strict separation of powers (*Article 50 though mandates to separate the judiciary from the executive.*), a system of checks and balances has been put in place. For instance, all the Bills passed by the Parliament require the President's assent to become law (*Art 111*). The Parliament, on the other hand, has the power to impeach the President for violating the Constitution (*Art 61*).

Fourth, the courts have held that any executive action without the support of a valid law will be void, more so if it violated fundamental rights (*Kharak Singh v State of UP, AIR 1963 SC 1295; Bijoe Emmanuel v State of Kerala, AIR 1987 SC 748*).

Similar to the position in many other jurisdictions, laws cannot generally be retroactive, especially if they seek to impose any penalty or punishment (*Art 20(1); see also Singh 2008:177-81*). The judiciary also does not treat vague laws or administrative guidelines favourably.

Fifth, in a multi-party democracy, the presence of a free press and the requirement of periodic elections can be one of mechanisms against the abuse of governmental power. The Constitution expressly limits the term of legislatures (*Arts 83 and 172*), and the freedom of speech and expression under Article 19(1)(a) has been interpreted to include

the freedom of press (*Express Newspapers v Union of India*, AIR 1958 SC 58; *Bennett Coleman v Union of India*, AIR 1973 SC 106).

In addition to these checks, the fundamental rights provisions and the **power judicial review** provide effective means of checking the power of the legislature and executive. These two aspects are discussed below.

Equality Guarantee and the Protection of Human Rights

Establishing an egalitarian society was/is one of the main goals of the Indian Constitution. The fundamental rights and the directive principles of state policy were the primary tools adopted to achieve this goal. Part III of the Constitution entitled 'Fundamental Rights' comprises Articles 12 to 35 which lay down various rights, their limitations and remedies for their enforcement. The rights range from the equality before the law to the freedom of speech and expression, the protection against double jeopardy, the right to life and personal liberty, the freedom of religion, prohibition of discrimination, and the protection against arrest and unlawful detention.

It will be useful to analyze a few rights in some detail in order to appreciate the rule of law in operation.

Article 14

It prohibits the state from denying 'to any person equality before the law or the equal protection of the laws'. The guiding principle of equality being that like should be treated alike and that unlike should be treated differently, Article 14 permits reasonable classification. The court has invalidated several laws under Article 14 because the classification was without a difference (*K Kunhikoman v State of Kerala AIR 1962 SC 723*), or the basis of classification had no nexus to the object of the law (*P Rajendram v State of Madras AIR 1968 SC 1012*), or the law established special courts for trial of certain cases or types of cases without any reasonable classification or guidelines (*State of West Bengal v Anwar Ali Sarkar AIR 1952 SC 75*; *Northern India Caterers Ltd. v State of Punjab AIR 1967 SC 1581*), or the law singled out a person for giving a special or discriminatory treatment (*Ameernisa Begum v Mehboob Begum AIR 1952 SC 91*; *Ram Prasad v State of Bihar AIR 1953 SC 215*).

More important, however, has been the **judicial employment of Article 14 to develop a broad principle of reasonableness**. In *E P Royappa v State of Tamil Nadu* the Court said that 'Equality is a dynamic concept with many aspects and dimensions and it cannot be "cribbed, cabined and confined" within traditional and doctrinaire limits. From a positivistic point of view, equality is antithetic to arbitrariness' ((1974) 4 SCC 3, 38). Later on, the Supreme Court in *Maneka Gandhi v Union of India* observed that 'Article 14 strikes at arbitrariness in state action and ensures fairness and equality of treatment. The principle of reasonableness, which logically as well as philosophically, is an essential element of equality or non-arbitrariness pervades Article 14 like a brooding

omnipresence' ((1978) 1 SCC 248, 284. See also *R D Shetty v International Airport Authority AIR 1979 SC 1628*)

Therefore, allegation of discrimination vis-à-vis others is no longer sine qua non for attracting Article 14 (*A L Kalra v Project & Equipment Corporation* (1984) 3 SCC 316, 328) and the Court would strike down any arbitrary executive or legislative action unconstitutional as ipso facto violating Article 14 (*Mithu v State of Punjab AIR 1983 SC 473*)

Article 21

It lays down that 'no person shall be deprived of his life or personal liberty except according to the procedure established by law.' **This provision has proved to be a residuary repository of many fundamental rights.** 'Life' in this article has been interpreted by the courts to mean more than mere physical existence.

Ever-widening horizon of Article 21 is illustrated by the fact that the Court has, inter alia, read into it the right to

- Health (*Parmanand Kataria v Union of India AIR 1989 SC 2039*)
 - Free and compulsory education up to the age of 14 years (*Unni Krishnan v State of AP (1993) 1 SCC 645*),
 - Unpolluted environment (*M C Mehta v Union of India (1996) 6 SCC 750*),
 - Shelter (*Gauri Shankar v Union of India (1994) 6 SCC 349*),
 - Clean drinking water (*A P Pollution Control Board II v M V Nayudu (2001) 2 SCC 62*),
 - Privacy (*Kharak Singh v State of UP AIR 1963 SC 1295*),
 - Legal Aid (*Hussainara Khatoon v State of Bihar AIR 1979 SC 1369*),
 - Speedy Trial (*Hussainara Khatoon (I) to (VI) v Home Secretary, Bihar (1980) 1 SCC 81, 91, 93, 98, 108 and 115*), and
 - Various Rights of under-trials, convicts and prisoners (*Sunil Batra v Delhi Administration AIR 1978 SC 1675*).
 - Another innovative use of this provision has been in reaching violation of right to life and personal liberty by even private persons (see, for example, *M C Mehta v Union of India (1987) 1 SCC 395*; and
 - Grant compensation for violation of fundamental rights (*Rudul Sah v State of Bihar (1983) 4 SCC 141*).
 - The due process (*Maneka Gandhi v Union of India, AIR 1978 SC 97*)
 - Substantive Model of rule of law (*Singh 2008: 201-04*)
- Any law or executive action which is not 'just, fair and reasonable' could be declared unconstitutional (*Singh 2008: 201-04*). The Courts, for example, invalidated a penal provision prescribing the mandatory death sentence for murder committed by a life convict (*Mithu v State Punjab, AIR 1983 SC 473*)
- Retrospectivity
- In January 2012, the Indian Supreme Court passed the judgement in favour of Vodafone, saying that the Indian Income tax department had "no jurisdiction" to levy tax on

overseas transaction between companies incorporated outside India. However, Indian government thinks otherwise. It believes that if an Indian company, Hutchison India Ltd., conducts a financial transaction, government should get its tax out of it. Therefore, in 2012, India changed its Income Tax Act retrospectively and made sure that any company, in similar circumstances, is not able to avoid tax by operating out of tax-havens like Cayman Islands or Lichtenstein. In May 2012, Indian authorities confirmed that they were going to charge Vodafone about ₹20000 crore (US \$3.3 billion) in tax and fines. The second phase of the dispute is about to start.¹⁸

Judicial Review by an Independent Judiciary

The power of an independent judiciary to review the decisions of the other two organs of the government is considered an integral aspect of the rule of law and the Indian Constitution does everything possible to put in place this mechanism. Judges of the Supreme Court and the High Courts are appointed by the President in 'consultation' with relevant judges of these courts (*Arts 124(2) and 217*). Subsequent to the decision in *Supreme Court Advocates on Record Association v Union of India (4 SCC 441 (1993))*. See also *In re, Presidential Reference, AIR 1999 SC 1*, judges of the higher judiciary are in essence appointed by the judiciary itself. Detailed provisions have also been made to provide judges security of tenure (*Arts 124 and 218*), and protect their salaries, allowances and privileges. (*Arts 125 and 221*) Legislative bodies are barred from debating the conduct of judges unless dealing with impeachment motions (*Arts 121 and 211*). In fact, on a closer look, it seems that the Indian judiciary has become over-independent in that there are not many checks on its powers and the functioning/conduct of judges. The judiciary, for instance, resists any attempt to introduce accountability measures and impeaching judges so far has proved to be an almost impossible even in suitable cases.

Although the power of judicial review does not require an express recognition in a constitutional text, Article 13(2) of the Indian Constitution provides such recognition by laying down that the state 'shall not make any law which takes away or abridges' the fundamental rights. The remedy to approach the Supreme Court for violation of fundamental rights under Article 32 is in itself a fundamental right. (*A similar - in fact wider - power is vested with the High Courts under Article 226.*) The Court has widened the scope of this power over the years by

- (1) Implying many new rights within the ambit of Article 21;
- (2) Chartering the course of public interest litigation as a tool of deepening justice to the masses;
- (3) Declaring judicial review a 'basic feature' of the Constitution and thus putting this beyond the Parliament's amendment power; and
- (4) Conferring on itself the power to review the validity of even constitutional amendments.

As for creation of conditions for realisation of the potential of every citizen in a dignified and free manner, the Directive Principles in part four of the constitution has ample provisions.

Recently, the Supreme Court has delivered four landmark judgments in the direction of the electoral reforms and decriminalization of politics.

The first verdict ruled that if an MP or MLA was convicted in a serious offence and sentenced to 2 or more years' imprisonment, he or she would lose his or her seat immediately.

Another judgment concerned with banning the arrested person from contesting elections. But this judgment has been nullified on the ground that it would provide a handle to the ruling dispensation to arrest potential winners from opposition on the eve of filing nomination to bar them from the contest.

In a separate judgment, the court has ruled that no one could contest elections without making a full and honest disclosure about his assets and educational and criminal antecedents.

In a latest verdict, the Supreme Court has ruled that voters had an intrinsic right to cast a negative vote, telling parties that none of the candidates fielded by them were worthy of votes.

In addition to above, some PILs are also pending in the Supreme Court wherein the stand of the government thwarting the electoral reforms mooted by the Election Commission of India has been challenged.

Sometimes it appears that the Supreme Court of India has taken upon itself the job of legislature to spearhead the cause of the electoral reforms.

From above, it can be safely concluded that the Indian Constitution enshrines the rule of law as a fundamental governance principle, though the term is not mentioned expressly in the text of the Constitution.

But at the same time it should be kept in mind that, there are several challenges that pose threat to building a society based on robust rule of law framework. Continued socio-economic inequalities (despite affirmative active provisions and programmes), large population, pervasive corruption (including in judiciary), judicial delays, law and order problems in view of regionalism and Naxalism, and the general apathy of people towards the rule of law are matters of serious concern.

On the one hand, the freedom of press is vital for the survival of democracy. But on the other hand, this freedom going haywire and starting media trials of the cases will not augur well for the regime of rule of law. Even the Supreme Court has deprecated this tendency in the media to influence the trial of the cases before courts. So, there must be some in house mechanism in the press which takes care of the acts of press which breach the fundamental rights of the citizens that too, paradoxically, for safeguarding the same.

It is undoubtedly generally acknowledged that rule of law is very pertinent to do justice to the affairs of the citizens but at the same time we cannot be fanatical about this concept at the cost of democratic norms. Democracy is a way of assertion for achievement of one's rights. It may entail protests against the laws which deny the achievement of these rights which a community lays claims on.

The rule of law cannot be oblivious to the fact that it has a greater purpose to serve and that is the welfare of the people. So, any action or judgment which frustrates the ultimate welfare of people – though taken in the name of the rule of law – should not be allowed to stand in the way.

Democracy and the rule of law are two concepts which form the bedrock of a healthy life of a nation. These two concepts are complementary and supplementary to each other. Where the democracy has its weaknesses in blatant majoritarianism with extremity of anarchy, the rule of law suffers from the potential risk of dry formalism with extremity of absolutism.

So, the sobering effect of democracy should be allowed to work on the rule of law to make it a living and vibrant idea. Vice-versa, the rule of law should operate in the democratic setup to safeguard the fundamental rights of the citizens irrespective of their status. Unless the citizens are capable and free we cannot dream of having a capable nation. Therefore, once again, it is commented that a healthy balance needs to be struck between the rule of law and the democracy.

CONCLUSION

Indian sub continent is comprised of fledgling democracies. The area is specially marked by strife, poverty, hunger, disease, illiteracy, lack of infrastructure (Social as well as physical), and trust deficit in the concept of rule of law. All these factors when taken into account in the context of implementation of rule of law are working as big impediments. Therefore sometimes it appears to be a catch 22 situation wherein we find that rule of law and removal of above factors are juxtaposed against each other. This is because, we know that ultimate goal of the rule of law is removal of these challenges. But at the same time for the operation of rule of law, the above challenges need to be tackled firstly.

Further, because in the absence of favourable conditions the rule of law faces fetters on its implementation. Therefore, in the ultimate analysis, we can say that the rule of law as well as creation of attendant good conditions will have to go together. One will complement and supplement the other.

However, the picture of operation of rule of law in the sub continent is not as rosy as one cherishes it to be. Yet, many optimistic developments are taking place in this area which portends the birth of healthy judicial traditions direly needed for the rule of law.

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