

QUARTERLY BAR REVIEW

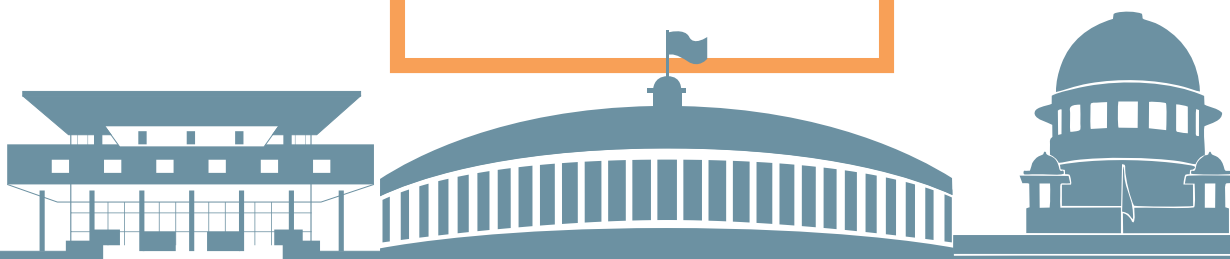
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DELHI HIGH COURT
BAR ASSOCIATION



Indian Independence —.&.— THE RULE OF LAW



Featuring eminent voices from diverse disciplines and standpoints, on what constitutes the Rule of Law in the Indian context. At a time when the foundational assumptions of the Constitution are being debated, we examine the essential elements of the Rule of Law, so that it remains relevant to the needs and aspirations of India, today and tomorrow.



QUARTERLY BAR REVIEW

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MESSAGE

Dear Readers,

I am happy to note that the Delhi High Court Bar Association is publishing its Quarterly Bar Review on the theme of "Rule of Law". It is essential for the practitioners to look for avenues to discuss and debate the theoretical nuances of the law. Scholarly engagement of lawyers and Judges not only forms a part of the courtroom discourse but is also representative of the finest traditions of the Bar. This journal is also symbolic of the same.

We must look at Rule of Law as our collective mission to minimize the rule of man and to maximize the rule of such law, which meets the standards of justness, reasonableness and constitutional soundness. The theme of this edition is of utmost importance and I congratulate the Bar for keeping the discourse alive. I am certain that the journal would be received well by members of the Bar and the Bench.

Before I part, I may take this opportunity to impress upon the younger members of the Bar to invest themselves in scholarly reading and to contribute in the academic endeavours of the Bar.


(Satish Chandra Sharma)

From the Editors

As India turns 75, the Indian Constitution is still young by Constitutional standards - the American is 233-years old. Many doctrines such as the Basic Structure of the Constitution are well established. Yet, there is considerable scope for deeper reflection on various others such as Rule of law.

The term 'Rule of Law' is widely used, its meaning and scope are still fluid and expanding. The credit for the term is given to A.V. Dicey who used it in the book "An introduction to the Study of Law in the Constitution" in 1885. Apart from Dicey's, there have been innumerable other definitions, which leads Professor Judith Shklar to suggest that the expression may have become meaningless. It lends itself to becoming a pre-eminent legitimating political idea in the world today without agreement on precisely what it means. The concept can be an instrument for various ideologies which may be conflicting in nature.

Support for Rule of Law is endorsed by Government heads from a range of societies. Russian president Putin continues to place judicial reforms and full implementation of principles of Rule of Law among his country's highest priorities. China recently signed a UN pact for cooperation and training to develop the rule of law. Surprisingly, Afghan War Lord, Abdul Rashid Dostum has also called for Rule of Law in his country: "Now is the time to defend ourselves not with tanks and armed

corps but by the Rule of Law..." he said. Thus even in countries which have rejected democracy, individual rights, capitalism, or opposed liberalism, there has been support for the concept of Rule of Law. This apparent unanimity in support of Rule of Law is unparalleled in history. No single global idea has ever achieved such universal endorsement as the Rule of Law.

In India, Rule of Law has been held to be part of the Basic Structure of the Constitution of India. It is an unsettling thought that a concept which is open to such diverse interpretation is considered part of the Basic Structure. It can give an apparent sense of uncertainty and instability. Yet there is some sense of what Indian Courts conceive the doctrine as.

The M Nagaraj Case made a distinction between the doctrines of Equality, Rule of Law, Judicial Review and Separation of Powers. It held that they are to be treated separately, though they are intimately connected. There can be no Rule of Law if there is no Equality before the Law; and Rule of Law and Equality before the Law would be empty words if their violation were not a matter of judicial scrutiny or judicial review and judicial relief and all these features would lose their significance if judicial, executive and legislative functions were united in only one authority whose dictates had the force of law. Separation of Powers refers to a system of government in which the powers are divided

among multiple branches of the government, each branch controlling different facets of government. According to this theory, each organ of the government shall have distinct features and shall be given separate powers. In more recent judgments, such as, *K.S. Puttaswamy v. Union of India (Aadhaar-5J.)*, Dipak Misra, C.J. and Sikri and Khanwilkar, JJ. observed that the essence of Rule of Law is to preclude arbitrary action. Where there is arbitrariness, there is denial of Rule of Law.

These developments are to be seen in the context of the primary role given to the State and its officers under the Indian Constitution, as also the interpretation by courts. The Indian conception is more in the nature of the Aristotelian concept of Rule of Law. It involves a set of people, mainly judges acting reasonably and against the influence of personal passions taking primary responsibility for upholding civilisational value. It is therefore not surprising that there has been a huge body of litigation in India which deals with arbitrariness in State action. This clearly reflects the robustness of Rule of Law in India at least insofar as arbitrariness in State action is concerned.

The acceptance of Rule of Law and democracy is currently going through a

churning process all over the world. In America, the storming of Capitol Hill by supporters of Trump when he lost elections, and the more recent invasion of Brazil's Presidential Palace, Congress and the Supreme Court by supporters of Bolsonaro are stark examples. In Asia, an estimated 80,000 people gathered in Tel Aviv's Habima Square to protest against judicial reforms proposed by the government of Benjamin Netanyahu, Israel's prime minister. The government intends to weaken the Supreme Court by letting a majority of lawmakers in parliament overrule its decisions, among other proposals. The Chief Justice has warned that they would "deal a fatal blow" to Israeli democracy.

India has not escaped the tremors. There is a heated debate going on on the issue of Rule of Law, among other aspects of the Constitution. In this volume, we have tried to bring together some ideas on Rule of Law from a wide range of writers. It would be too ambitious to expect any clarity to emerge from this collection. The ideas expressed are diverse and complex and would need further thought and discussion. It is hoped that the collection would compel deeper engagement with the concept from unexplored perspectives.

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Interpreting the Rule of Law: Seven Decades of the Supreme Court

*Justice Sanjay Kishan Kaul**

The Concept

Rule of law is an evolving concept and has been accorded varying interpretations over time. The piece examines how the Supreme Court of India has developed the jurisprudence of rule of law to provide predominance to the concept of rights such as equality and personal liberty. In a modern-day democracy, the unfettered enjoyment of the right to equality and liberty is a basic essential. Such rights are intrinsic to the existence of a human being and cannot be obliterated without the authority of law. The State has not conferred these rights, and therefore, any deprivation of rights must be within the contours and limits prescribed by the principles of rule of law. The unlawful deprivation of rights calls for the judiciary, as an independent institution, to act as the guardian of fundamental rights. In doing so, the judiciary in consonance with the principles of rule of law has adopted a rights-centric approach to grant primary importance to the concept of rights and further keep a check on State arbitrariness exercised to curtail the enjoyment of any such right. To explore the rights-centric approach of the Supreme Court, the article will discuss provisions of the Constitution that correspond to the principles of rule of law and the judicial interpretation of these provisions to accommodate an expansive meaning of rule of law aimed to protect the basic rights of

the people. Two prominent and divergent judgments of the Supreme Court, *ADM Jabalpur vs. Shivakant Shukla Etc. Etc*¹ and *K.S. Puttaswamy & Anr. vs. Union of India & Ors.*,² will be elaborated upon to portray the transition of the interpretation of rule of law in the Indian context.

The doctrine of rule of law postulates the supremacy of law and signifies that laws govern the State. The doctrine highlights that law formulated by the competent authority governs the life of a democratic society, and all citizens shall be equally subject to the law.³ The existence of such a doctrine curtails the exercise of arbitrary power and ensures that the State is not governed by the whims and fancies of any authoritative official.

The credit for coining the term rule of law is given to A.V. Dicey, who used it in the book “An Introduction to The Study of Law In The Constitution” in 1885.⁴ The idea of rule of law may have existed since antiquity, but it will be relevant to understand Dicey’s theory of rule of law since Dicey placed the first precise and masterly enunciation of the doctrine of rule of law.⁵ A.V. Dicey propounded three essential elements of law for a legal order to reflect rule of law. The first element is the supremacy of law. The supremacy of law signifies that the law established is the sole governing authority, and no person can be punished or can be lawfully made to suffer in body or goods except for a distinct breach of

*Judge, Supreme Court of India. Assisted by Andolan Sarkar, Law Clerk & Research Assistant

law established in the ordinary legal manner before the ordinary courts of the land. The supremacy of law prevents the discretionary power of the State since, according to Dicey, even the authority formulating the law has to adhere to the law formulated by them. The second element propagated by A.V. Dicey is equality before the law. Equality before the law reflects that every person, notwithstanding their rank or condition, must be subject to the ordinary law of the realm and submit to the jurisdiction of the ordinary courts. The third and last element is the predominance of legal spirit. The predominance of legal spirit argues that if an individual's rights are taken away, such rights are to be enforced by the courts implying that the general principles of the constitution, for instance, right to personal liberty or right to freedom of speech and expression are there because of judicial decisions determining rights of private persons in particular cases brought before the courts.

Rule of Law in the Indian Constitution

The constitution is the primary source of law in India. It is widely accepted that the Constitution of India is a revolutionary document. At one stroke, it brought in the concept of universal franchise, which took a long time in other countries to achieve. Part III of the Constitution enunciates fundamental rights granted to the people that reflect the adoption of a liberal philosophy. The fundamental rights go beyond generality and equality and seek to address specific social inequalities through Articles 15, 16, and 17 of the Constitution. The idea is to achieve substantive equality for all citizens. The Directive Principles of State Policy in Part IV of the Constitution postulates a welfare State in which the welfare of people is promoted by securing and promoting as effectively as possible a social order in which there is social, economic, and political justice.

The term rule of law may not be explicitly mentioned in the Constitution, but the broad principles envisioned by rule of law, such as equality before the law and other limitations imposed on the powers of the government to restrain any form of arbitrariness, can be found in the Constitution. Professor Upendra Baxi has further been able to identify four core themes prevalent in India that can be connected to the prevailing notions of rule of law: 'rights', 'development', 'governance', and 'justice'.⁶ The article will subsequently discuss various constitutional provisions and judicial pronouncements that highlight these elements and themes of rule of law.

In the realm of rights, Article 14 stipulates 'equality before law'. Article 14 creates an onus on the State to ensure that everyone is treated and protected equally by the law without discrimination.⁷ The Supreme Court has also interpreted Article 14 to devise a broad principle based on the doctrine of reasonableness.⁸ Based on the contours of Article 14, any form of classification will be considered reasonable if it is based on intelligible differentia and the purported classification has a rational nexus with the objective sought to be achieved by the law.⁹ The Supreme Court in *E P Royappa v. State of Tamil Nadu & Anr.*¹⁰ observed 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. In fact, equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch."*¹¹

As observed by the Supreme Court, the Constitution, as encapsulated within Article

14, guarantees right to equality to prevent and oppose arbitrary action of the State. This is the thrust of the provision, and Article 14 has been interpreted to be antithetical to arbitrariness – which is a foundation of rule of law.

It can be seen from the Constituent Assembly debates that the framers of the Constitution categorically adopted “procedure established by law” as an exception to the rights enshrined in Article 21 as opposed to the “due process” model of the United States.¹² It was only in *Maneka Gandhi v. Union of India*,¹³ wherein the Supreme Court held that the “procedure established by law” which does not provide for an opportunity for the aggrieved party to be heard is violative of Article 14 as it suffers from the vice of arbitrariness. The Supreme Court did a conjunctive reading of Articles 14, 19, and 21 to hold that, even though the right enshrined in Article 21 is being deprived of by the “procedure established by law”, such a procedure needs to be tested on the touchstone of Articles 14 and 19.

The above judicial interpretation of jointly reading Articles 14, 19, and 21 allowed the courts to adopt a substantive model of rule of law, wherein any law or executive action can be brought into question and declared ultra-vires if the stated law or action is not ‘just, fair and reasonable’.¹⁴ The substantive model of rule of law evolved through judicial interpretation ensures that the basic and intrinsic rights granted to the people are not obliterated under the guise of competent rule-making authority.

Notwithstanding judicial decisions and interpretations, there are also stand-alone provisions of the Constitution that take forward the notion of rule of law to keep a

check on executive action and legislative law-making. The federal structure of governance granted by the Constitution demarcates the subject matters on which the Parliament and State legislature can formulate laws.¹⁵ Any transgression committed by either of the authorities to formulate laws on subject matters they are not entitled to can be declared unconstitutional and void by the judiciary.¹⁶ The constitutional framework further propagates a scheme of separation of powers to implement a system of checks and balances. Separation of powers refers to a system of governance in which the powers and responsibilities are divided among the legislature, executive, and judiciary, each branch controlling a different facet of governance. For instance, Article 50 of the Constitution separates the judiciary from the executive in the public services of the State.¹⁷ The separation of power enables the judiciary to act as an autonomous and independent body to adjudicate and review matters involving any probable excesses committed by the executive and legislature.

In *M. Nagaraj & Ors. vs. Union of India & Ors.*,¹⁸ the court, in relation to the separation of powers and judicial review, held the following:

“Equality, rule of law, judicial review, and separation of powers are distinct concepts. They have to be treated separately, though they are intimately connected. There can be no rule of law if there is no equality before the law; and rule of law and equality before the law would be empty words if their violation was not a matter of judicial scrutiny or judicial review and judicial relief, and all these features would lose their significance if judicial, executive and legislative functions were united in only one authority, whose dictates had the force of law.”¹⁹

Supreme Court's Interpretation

In India, the primary utilisation of the principle of rule of law has been to uphold and protect the personal liberty and right to life of an individual vis-à-vis any State action to curtail such rights. However, the substantive interpretation of rule of law was not always the case. After the proclamation of emergency in 1975, several detainees approached the courts through the writ of habeas corpus challenging their detention. The emergency witnessed an unprecedented situation with the suspension of fundamental rights and the right to move any court. Against this backdrop, the five-judge bench of the Supreme Court in *ADM Jabalpur vs. Shivakant Shukla Etc. Etc*²¹ was broadly addressed with the question of whether Articles 21 and 226 of the Constitution can be suspended during a national emergency.

The majority in *ADM, Jabalpur* decided to strictly interpret the Constitution and not go beyond the letter of law. The majority held that with the suspension of Article 21, a detained person would no longer have any locus standi to approach any court under Article 226 to enforce their right to personal liberty. The court further held that Article 21 is the sole repository of the right to life and personal liberty. Therefore, any right to personal liberty that may have existed under the common law will now be considered to be subsumed after the enactment of the Constitution, and all such rights not within the constitutional framework shall cease to exist.²¹ The formal interpretation adopted by the majority opinion presupposes that the principles of rule of law must function within the limited contours of the Constitution, and the power of the judiciary is restricted if the legislature intends to lawfully abrogate the rights of the people.

On the other hand, the dissent of Justice H.R. Khanna in *ADM, Jabalpur* held that the rule of law inheres to natural and extra-constitutional rights. The principle of right to life and personal liberty existed prior to the formation of the Constitution and is a pre-constitutional right. Notwithstanding the suspension of Article 21, the State cannot be granted the liberty to deprive a person of his life or liberty without the authority of law.²² The following was further observed by Justice H.R. Khanna:

*“Rule of law is now the accepted norm of all civilised societies. Even if there have been deviations from the rule of law, such deviations have been covert and disguised for no government in a civilized country is prepared to accept the ignominy of governing without the rule of law. The rule of law has come to be regarded as the mark of a free society. Admittedly its content is different in different countries, nor is it to be secured exclusively through the ordinary courts. But everywhere it is identified with the liberty of the individual.”*²³

The minority opinion of Justice H.R. Khanna rejected a strict and originalist approach to interpreting the Constitution. Justice H.R. Khanna's observation correctly highlights that the principle of rule of law has become a way of life and legal understanding in every jurisdiction, and whichever may be the jurisdiction, the common imperative element of rule of law is the personal liberty of the people.

The majority decision in *ADM, Jabalpur*, allowing the deprivation of life and liberty came to be widely criticised across all spectrums and was overruled by a nine-judge bench decision of the Supreme Court in 2017 in *K.S. Puttaswamy & Anr. v. Union of India & Ors.*²⁴ The judgment in *K.S. Puttaswamy*,

being a nine-judge bench decision, is a pivotal referral point for personal liberty and rule of law matters. The nine-judge bench decision further highlights the contrast between the perception and interpretation of rule of law vis-à-vis the majority opinion in *ADM, Jabalpur*.

In *K.S. Puttaswamy*, the court concurred with the minority opinion of Justice H.R. Khanna in *ADM, Jabalpur*, and departed from the originalist interpretation of rule of law to adopt a more expansive meaning of rule of law primarily catering to the safeguard of the rights of people in a civilised society. The court acknowledged that the Constitution is an evolving document to cope with modern democratic challenges. Accordingly, the Constitution must be interpreted to deal with new exigencies compelling an expansive reading of liberties and freedoms to preserve human rights under the rule of law.²⁵ Adopting a rights-centric approach, the court further observed that:

*“No civilized state can contemplate an encroachment upon life and personal liberty without the authority of law. Neither life nor liberty are bounties conferred by the state nor does the Constitution create these rights. The right to life has existed even before the advent of the Constitution. In recognising the right, the Constitution does not become the sole repository of the right.”*²⁶

From Strict to Rights-Centric: A confidence-installing journey

The transition from the strict interpretation of law in *ADM, Jabalpur*, to the rights-centric approach adopted in *K.S. Puttaswamy*, highlights the predominance granted to life and personal liberty. The principle of rule of law and the concept of personal liberty are entangled. Rule of law acts as a mode of assurance granted to all citizens that their liberties will remain protected against any invasion by the State, and in the Indian context, the principle of rule of law further enunciates that all grievances regarding the deprivation of personal liberty by State action shall be amenable to the jurisdiction of the courts through the process of judicial review.

The evolution of rule of law, as seen in India, has installed confidence in the people to approach courts and have faith in the legal processes. The Indian population suffers from social and economic disparity. With the existence of such a social and economic disparity, it will be unfair to assert that all sections of society have access to similar resources. Rule of law resolves this anomaly by granting everyone equal protection before the law and ensuring that the rights of the citizenry are not curtailed by any arbitrary and unauthorised State action. An effective understanding of rule of law has created an awareness among the people that the Constitution, as the supreme source of law, protects everyone equally against any form of excesses.

¹2AIR 1976 SC 1207.

²AIR 2017 SC 4161.

³Tripathi, P.K., 'Rule of Law, Democracy, and Frontiers of Judicial Activism', Journal of the Indian Law Institute, Vol. 17, No. 1, pp. 17–36.

⁴Dicey, A.V., 'The Law of The Constitution' 8th Ed., pp. 198

⁵Supra Note 3

⁶Baxi, Upendra, 'Rule of Law in India: Theory and

Practice' in Peerenboom (ed), Asian Discourses of Rule of Law (n 8) pp. 324, 328.

⁷Constitution of India, 1950, Article 14.

⁸Singh, Mahendra P., 'The Constitutional Principle of Reasonableness', (1987) 3 Supreme Court Cases (Journal) 31.

⁹*K. Kunhikoman vs. State of Kerala*, AIR 1962 SC 723; *P. Rajendram vs. State of Madras*, AIR 1968 SC 1012.

¹⁰(1974) 4 SCC 3

¹¹ibid pp. 85.

¹²Constituent Assembly Debates (Dec. 6 and 13, 1948).

¹³AIR 1978 SC 597.

¹⁴Deva, Surya, '*The Rule of Law in India: The Chasm between Paper and Practice*', Guiguo Wang and Fan Yang, eds., Hong Kong: City University of Hong Kong Press, 2013, pp. 27– 45; Jain, M P, '*Indian Constitutional Law Vol I*', 5th edn, Wadhwa and Company, 2003 pp. 1309-36.

¹⁵Constitution of India, 1950, arts 246, 248–254 read with Schedule IX.

¹⁶*Medical and Educational Charitable Trust vs. State of*

Tamil Nadu, (1996) 3 SCC 15.

¹⁷Constitution of India, 1950, art 50.

¹⁸(2006) 8 SCC 212.

¹⁹ibid para 31.

²⁰AIR 1976 SC 1207.

²¹ibid

²²ibid.

²³ibid

²⁴Supra Note 2.

²⁵Supra Note 2 at para 259 - 260.

²⁶Supra Note 2 at para 136.

Access to Legal Education and the Legal Profession: A Gender Perspective

*Justice Hima Kohli**

Law is often characterized as an instrument of power. A natural corollary to this is that access to formal education in law would advance the cause of equality, fair play and social justice, thus being a sine qua non to the Rule of Law.

In India, formal education in the stream of law was introduced as early as in 1855-1857, with the establishment of Universities in Calcutta, Bombay and Madras. This was before India had gained independence from the British rule. In those days, the legal profession in India was treated as a man's preserve. In fact, before the year 1923, while women in India could study law, they were not allowed to be enrolled as advocates. This singular reason for their disqualification from entering the legal practice was their gender.

Some notable women, like Regina Guha, Sudhanshubala Hazra, and Cornelia Sorabji had to fight a hard and protracted legal battle to pave the way for a social movement that ultimately led to the promulgation of the Legal Practitioners (Women) Act, 1923 which entitled women to be admitted and enrolled as legal practitioners. Even after being admitted into the legal arena presence of women in the legal profession remained negligible till the 20th century.

In mid 1980's, National Law Universities (NLUs) that are autonomous institutions, were established and conceptualized to offer a robust face lift to law and legal education. Currently, academic institutions in India where legal education is imparted, broadly comprises of three categories: NLUs that offer a five-year course, Law Centers established in public universities and private Law colleges. Some of the latter two institutions offer a five-year course while others offer a three-years course only on completing an undergraduate discipline. As on date there are 1721 Law Colleges and Universities imparting legal education in India. India is the only country in the world that can boast of Universities exclusively dedicated to legal discipline. The very fact that several Law Colleges have been established and are thriving in cities across the country, shows how popular law is as a career option.

Despite a remarkable rise in the number of students preferring to select Law as a career option, the presence of women in the field of legal education remains skewed. As per an All India Survey in Higher Education conducted in 2019-20 and published by the Ministry of Education, Government of India, in 2020, out of 432,000 students who had enrolled in the stream of Law, only **33%** were women. This is a slight improvement over 2013, when **31.9%** females had got enrolled in the legal stream.

^{*}Judge, Supreme Court of India; Adapted from the author's article published earlier on the occasion of UN International Day for Education by International Association of Women Judges on 24.01.2023.

Coming to the legal profession, the Advocates Act, enacted in 1961, was a major milestone in improving the condition of legal education as it laid down the foundation for setting up of the Bar Council of India and the State Bar Councils that are entrusted with the duty of regulating and representing the Indian Bar. The data tabled by the Law Ministry in the Indian Parliament on 29th July 2022, on collating information from 24 State Bar Councils in respect of the total number of lawyers and the number of women lawyers, revealed that only **15.3%** of lawyers in India are women.¹ Representation of women lawyers in the Executive Committee of State Bar Councils also remains abysmally low. A recent study conducted by 'Bar and Bench', an online portal for Indian legal news states that only 2.04% of the State Bar Council representatives across India, are women. This means that out of 441 representatives of 18 State Bar Councils, only 9 are women. It is distressing to note that the Executive Committee of the Bar Council of India does not have a single women lawyer representative².

Now, a glimpse at the number of women in the Judiciary in India. As per the reply of the Law Ministry given on July 29, 2022 to an unstarred question in the Lok Sabha, out of 19,288 Judges employed in the District courts, 6,765 or 35% are women. A recent dataset released by KHOJ (Know your High Court Judges) states that in the past 25 years women account for less than 8% of the High Court Judges. More than half of the 25 State High Courts in India have not had a woman Chief Justice and just eleven women Judges have been elevated to the Supreme Court of India in the same time span³. The total strength of Judges in the Supreme Court is 34 and currently, out of 27 sitting Judges, there

are only 3 woman Judges which makes it the highest percentage of woman Judges in Supreme Court since its inception. Statistics in respect of women in legal academics disclose that only 5 out of 23 Universities established in India have had women Vice-Chancellors and just 25.96% of the professors teaching at the Universities are women. This is a stark reminder to all the stakeholders, that no matter what their position may be, they must work collectively to advance gender parity.

While it is creditable that in the face of adversity, women have come so far in overcoming discrimination, they remain in minority in the legal profession, particularly in private practice and in leadership positions in law firms and legal departments of the corporate and public sectors as also Government establishments. The trend in India is that several working women are compelled to abandon their career after marriage due to family commitments and motherhood. This invariably brings her profession to a grinding halt and by the time she returns to work, her male counterparts would have overtaken her.

The question that arises is: how can we promote the access of women to legal education and the legal profession? To monitor the progress made in this direction, it is imperative to track and publish gender statistics relating not only to the intake of female students in Law Colleges, but also the percentage of their retention since it is often seen that there are several dropouts during the course and the pass out numbers are far below the intake. It is equally important to conduct regular survey of the number of women lawyers who have registered themselves with the State Bar Council for

entering the legal practice vis-à-vis those who are actually in active practice. This will help throw light on the number of women who have remained in the profession, post registration with the Bar Council. A similar exercise must be undertaken in relation to appointment of women as partners in Law Firms, as Arbitrators, Mediators as Resolution Professionals and Liquidators under the Insolvency and Bankruptcy Code, 2016. Compiling and publishing these statistics will go a long way in analyzing where the problem lies and what are the steps required to control the attrition rate and redress the situation.

Another way of encouraging more women to join the legal profession would be to call upon the respective institutions from where women lawyers have been graduated, to have their accomplishments highlighted, for attracting more talent and broadening the pool. The legal industry as a whole would do better at appointing, promoting and retaining women lawyers. For doing so, it is necessary to address the underlying systematic bias and barriers that adversely affect women professionals who despite their merit have been historically treated unequally. This would include resolving issues relating to wage-gap, work-life balance, lack of advancement opportunities for women and lack of understanding their constant struggle at multitasking. It would also involve tackling more subtle forms of discrimination and bias at the workplace, such as unreasonable expectations and stereotypes that are often imposed on women.

Within the legal profession, one of the biggest barriers faced by women as practicing lawyers, as Arbitrators, as Technocrats, Domain specialists and Resolution

Professionals etc. is that they are not adequately represented on panels prepared by the government, state authorities, public sector undertakings, corporate sectors, banks and financial institutions. Names of women candidates are often overlooked when it comes to appointing an Arbitrator, Technocrat or a Resolution Professional. Given the fact that presently, men make up for a majority of key decision makers in the legal industry, the onus lies with them to play proactive role and advocate for gender parity at the workplace. They must assist their clients in drawing up lists of Arbitration and Mediation candidates, Technocrats and Resolution Professionals and Liquidators that include an equal number of men and women.

Women should not be nominated on panels of Banks, Government departments and State authorities just to make the numbers look better. Efforts should be made to genuinely invest in their professional development and promote the meritorious ones actively to the clients. Women should be nominated more often by law firms, legal departments and the corporate sector to attend international and domestic conferences and participate in panel discussions. Women are known to bring to the table, a unique perspective on several issues, thus giving them a multidimensional, angle, articulating their thoughts on various subjects will help in broadening the frame of reference. Law firms and legal organizations should make a concerted effort to improve diversity and inclusive policies at work. Launching initiatives such as mentorship programmes, sponsorship programmes and flexible work arrangements including work from home will support the advancement of women in the legal profession. Ultimately,

the presence of women in top leadership positions within the law firms and legal departments will help overcome an unconscious bias and instil confidence in women as framers of policy.

Despite recent efforts to increase gender diversity in the legal profession, there is still a long way to go in terms of equality and representation. A just and equitable society can be achieved only when all genders are afforded equal opportunities expended an even handed treatment and an inclusive approach when it comes to access to legal education and entry into the legal profession. No doubts, the number of women in the legal stream in India has increased in the recent years, but the number of women practicing law and achieving leadership positions remains disproportionately low. This lack of diversity has consequences not only for women, but for the justice dispensation system as a whole. Research has shown that

diverse teams make better decisions and are more innovative. A legal system that is representative of the aspirations of cross sections of the society, is more likely to deliver fair and just outcomes of disputes.

Ultimately, increasing gender diversity in the legal profession is not just about achieving equality, but about creating a more open and fair-minded society. A legal system that is representative of the diverse experiences and perspectives of its population, is more likely to deliver equitable and just outcomes for all.

I would conclude with the words of Justice Ruth Bader Ginsburg, Judge, Supreme Court of the United States of America who had once said:-

“As women achieve power, the barriers will fall. As society sees what women can do, as women see what women can do, there will be more women out there doing things and we’ll all be better off for it.”

¹<https://www.indiatoday.in/india/story/law-minister-kiren-rijiju-number-female-lawyers-country-no-data-nine-states-parliament-1981612-2022-07-29>

²<https://www.barandbench.com/columns/only-204-of-state-bar-council-representatives-across-india-are-women#:~:text=No%20woman%20officer%20beare>

³[r%20in,member%20who%20is%20a%20woman.](#)

³KHOJ (Know Your High Court Judges) dataset released on 17.09.2022 , jointly collated by a group of organizations including Agami, CivicDataLab, and the Centre for Public Policy, Law and Good Governance at National Law University, Cuttack, Odisha (NLUO)

Rule of Law: Word & Deed

*Justice Anup Jairam Bhambhani**

A civil society must be governed by the Rule of Law. So the saying goes. Or, to paraphrase Aristotle's wisdom : the *Rule of Law* must prevail, not the *Law of the Rulers*.

However, pedestrian verbiage about the Rule of Law will not subserve the interests of the society; and before it can be fruitfully applied, it is necessary to understand the principle first, by deconstructing it to some meaningful nuts-and-bolts.

So that this piece does not become pedantic or abstruse, the attempt of this author is to explain the contours and convolutions of the principle as plainly as possible, reducing it to the simplest common understanding.

Law, we all know, is not a monolith. It comprises 'substantive' and 'procedural' components. Substantive law lays-down the precept, and procedural law, the process for its implementation. But there is no society, however *mis-governed*, that *does not* have at least the pretence of a formal system of laws. Even if the system is only a fig-leaf of sorts, every government wants *s-o-m-e text*, founded in statute passed by parliament or other similar public forum, that it can lean-on for legitimacy. In a theocracy, for instance, legitimacy is drawn even from religious text.

But is that enough to say that a society is

governed by the Rule of Law ?

What if formally, there is a statute book prescribing a code of behaviour, identifying defaults and prescribing punishments, but it is applied randomly upon some and not on others; or differently upon some than on others. Would you still say that the society is governed by the Rule of Law ?

Or, consider another scenario, where there is a clearly laid down statutory law, which in its interpretation and application, is rife with ambiguity and uncertainty. Would you then say that the society is governed by the Rule of Law ?

If the answer to these questions is in the 'negative', then the sequitur is that the true definition of the Rule of Law must comprise at least the following ingredients : (i) *accuracy* of statutory text; (ii) *clarity* in judicial interpretation; (iii) *objectivity, fairness and even-handedness* in application; and (iv) *sufficient predictability* of results.

The common law, by which we are governed, evolves organically, inching ahead case-by-case. The advantage of this method is that the law remains in $\neg$ step with evolving times and adapts itself to changing societal needs and situations. Common law is therefore dynamic, not ossified. Like all other systems however, the common law system is far from perfect and has its pitfalls.

* Judge, High Court of Delhi

Statutes are drawn-up by a fairly complex process involving both the executive and the legislative branches of the State; and are scrutinized closely at various levels, including by being referred to committees of the legislature in some cases, to undertake a closer examination of draft legislation, often by inviting inputs from the public and from domain experts. The assumption is that draft statutes are placed for consideration before the legislature *after* meticulous consideration by various agencies, with the aim of comprehensively addressing the subject on hand. The legislature is supposed to then debate, discuss, thoroughly consider and give its imprimatur converting a 'Bill' into an 'Act', which becomes the law once notified by the executive. How much serious consideration goes into the legislative process in the present times, is however often debatable.

Our country has a particularly complex statutory and legal framework. Considering how we have evolved as a Republic, with pre-and-post independence statutes, with Central and State laws, with varying and nuanced personal laws, with complex land-ownership systems etc., there is not just multiplicity, but much complexity of legislations on most subjects. To add to this, is the woeful lack of accuracy of statutory text, which the courts have repeatedly lamented; but which may be a matter of debate for another day.

This is the point at which 'accuracy of text' of a statute takes a hit.

Once passed by the legislature and notified by the executive, the role of the courts gets triggered as interpreters of the statute, to spell-out what the legislature intended and how statutory provisions are to be applied. While interpreting statutes, the task of the courts is to lay-down their *general meaning*

and principles, which are then applied to a given case, in an effort to achieve a *just decision* in a particular matter. Common law evolves incrementally in the process of applying the general principles to particular cases, in an effort to deliver, what the court thinks the justice of a case demands.

Unquestionably, no general principle of law can have universal application to every case. Generalisations are always imperfect; which is why, in construing statutes, courts prefer as narrow an interpretation as is sufficient to address the facts of a case. Hence the dictum, that a judgement is precedent for what it decides; and not what may be inferred even logically, from what it decides¹.

Generality apart, quite often, there is also ambiguity of interpretation; and sometimes plain conflict of judicial decisions. It is commonplace to find discordant, if not plainly contradictory, views on the same statutory provision, with six judgements on one side and half-a-dozen on the other. This leaves both the lawyer and the judge befuddled.

Doubtlessly, inaccurate statutory text is itself a major contributing factor to ambiguous interpretation and conflict of judicial decisions.

Lack of clarity in interpretation' arises in this way.

Since generalized principles of law can only be applied to a dispute upto a point, and no generalized interpretation can fit all corners of the factual matrix obtaining in a particular case, this detracts from uniform application of the law. It is this factor that leads to subjectivity in application; to enunciation of judge- given and judge-driven law; and in the

consequent 'vagaries of the law'

In an effort to come to a *fair* and *sensible* decision, the judge is impelled to decide a case on "*its facts and circumstances*" or better still, on "*its peculiar facts and circumstances*".

This gives rise to the problems with objectivity, fairness and even-handed application of the laws.

All this does not help an honest citizen, who is willing to abide by the law and operate within its contours *provided he knows*, clearly and authoritatively, what the contours are. The citizen only desires *ex-ante* clarity, *viz.* to know what is, or is not, permitted *before* he does the act; and not some argumentative or laboured interpretation and application of the law, which tells him *ex-post facto* that what he did was illegal.

This engenders the need for sufficient predictability of results in application of the law.

This author would like to believe, that one of the reasons for the prolific and endless litigation in our country, is the plain reality that two persons similarly circumstanced *could* be handed different results, in similar matters, in a court of law, only because of subjectivity in application of the law. This encourages a litigant to *take a chance* on the judicial system, hoping that even if someone else in a similar position faced a dismissal, he may yet win his case, since his stars are more propitious.

With some experience of dealing with varied rosters on the Bench, this author can also say with certainty, that even where the courts have enunciated legal principles with accuracy, it is common for governmental

authorities not to apply the law even-handedly to similar matters, whether for lack of understanding or will, compelling parties to approach the court for redressal. This is particularly evident in fields like taxation and service law, where individuals are compelled to approach the courts repetitively in similar individual cases, despite the law being clearly laid-down. This also adds to the already burgeoning court docket.

If there is clarity of interpretation and assurance of even-handed application, at least at the stage when legal advice is sought, a confident lawyer would advise a litigant, and a reasonable litigant would assess his chances of success or failure with some certainty, and may be persuaded not to take the litigative option. Certainty of law-in-action would dissuade a prospective litigant from choosing his astrologer's advice over that of his lawyer.

To repeat a truism, Rule of Law must apply straight from the administrative level and not just in courts of law. To have to resort to the courts to enforce the Rule of Law, must itself be the exception and not the rule.

In the opinion of this author, it is the above facets that form the bedrock of the Rule of Law in its practical, on-ground and meaningful exposition. If the above exposition helps in better understanding the concept of the Rule of Law, concerted and co-ordinated effort by various agencies, including the legislature and the courts, to remedy the aberrations, would help in truer realisation of a law-abiding and just society.

To close with Thomas Paine's words : "*... For as in absolute governments the king is law, so in free countries the law ought to be king; and there ought to be no other.*"



SHE'S BEEN
AROUND A WHILE...

RULE
OF
LAW

THE INTRINSIC RELATION OF RULE OF LAW & HUMAN RIGHTS

*Justice Tara Vitasta Ganju**

"The clearest way to show what the rule of law means to us in everyday life is to recall what has happened when there is no rule of law"

Dwight D. Eisenhower (34th U.S. President)

Le principe de legalite, which translates to "the principle of legality," is the French word from which the term "Rule of Law" is derived. Black's Law Dictionary defines rule of law as the supremacy of the law in situations when decisions are made by following well-established rules or laws and where there is no use of discretion in doing so. Numerous academics have described the rule of law as are presentation of supreme power that no man can overrule.

It was first, in Albert Venn Dicey's book 'The Law of the Constitution', that introduced the concept of the 'Rule of Law', which had three pillars - (i) Supremacy of Law (ii) Equality Before Law (iii) Predominance of the Legal Spirit, based on the concept that law, no man, should be the foundation of governance. According to Dicey's definition of the rule of law, everyone is subject to the law, even those who enforce it.

The same concept has been carried out by the Indian Courts with the fact that Rule of Law is an essential facet of the Indian Constitution and that divergence from the same shall bring

about a paradigm shift. This has developed a catena of judgments and the jurisprudence emanating from *Shankari Prasad Vs. Union of India*¹ to *Golak Nath Vs. State of Punjab*² to *Keshavananda Bharti Vs. State of Kerala*³ and also in the case of *Bachan Singh Vs. State of Punjab*⁴. The Indian judiciary from time to time has enunciated as to why 'Rule of Law' is 'Supreme' and is essential for the protection of Human Rights. It has also acted as functionary to safeguard the fundamental freedom and entitlements for every individual and maintain the Rule of Law in the society.

The Link between the Rule of Law and Human Rights

Rule of Law ensures the protection and advancement of individual liberty, equality, and justice. Regardless of a citizen's social standing or level of political influence, rule of law ensures that laws are just, transparent, and equally applied to all citizens.

Rule of law has also played an intrinsic role in the inclusion of economic, social and cultural rights. In several constitutions across the world, Rule of Law is fundamental to bring equality among the people. The Constitution of the USA⁵ discusses the concepts of Freedom of Religion, Freedom of Speech and due process of law which derives its existence from Rule of Law.

The British Constitution also recognizes the

*Judge, High Court of Delhi

concept of Rule of Law and sets forth that everyone is equal in the eyes of the law, regardless of position. Establishing and upholding such rights by ensuring a redressal in the case of an infringement of human rights also has its roots of the Rule of Law.

The principle of living in dignity also forms part of international declarations, such as the Universal Declaration of Human Rights (UDHR). UDHR also sets out that everyone should have access to protection for fundamental human rights. India was among the first nations to ratify the UDHR in 1942.

Such declarations strengthen the application of the law and ensure that all internationally recognizable human rights and basic freedoms are upheld.

Rule of Law and Indian Constitution

Human rights and the Rule of Law are important tenets of the Indian constitutional framework. The Indian Constitution, the most comprehensive constitution in the world, came into effect on January 26, 1950, to establish its legal system to protect the basic human rights.

The Part III of the Indian Constitution, commonly referred to as the "*Magna Carta of India*" by some legal experts, enumerates the fundamental rights that are enforceable by the Constitution. Article 13(2) of the Indian Constitution⁶ specifically prohibits the state from enacting laws that violate fundamental rights. In case any portion of a statute contravenes any such rights, such part of the legislation can be invalidated. If the unconstitutional portion of the statute cannot be separated from the rest of the statute, the entire statute will be deemed invalid.

The Rule of law and Human Rights are inter-

related as both are derived from the principle of freedom to live with dignity, as enumerated in the Indian Constitution

An essential component of the rule of law is the division of powers between the legislature, the executive branch, and the judiciary as stated in the Indian Constitution. The Indian judicial system has frequently played a crucial role in upholding the rule of law and protecting human rights

Current Setbacks in the Promulgation of Rule of Law and how to curb them

The rule of law in India has undergone fluctuations overtime. During the pre-independence era, the rule of law proved to be disastrous, as the laws were deliberately distorted and included oppressive provisions to suit the exploitative ambitions of the colonial regime. Additionally, white juries in the colonies almost never convicted Englishmen, which further undermined the fairness of the legal system. The Raja Nanda Kumar case (1775), which is infamously known as the first judicial murder of India, exemplifies the gross disregard for the rule of law during the period of colonization. In the post-independence era, the concept of the rule of law has undergone significant change, demonstrating the resilience of its foundational principles in withstanding the test of time and regime change⁷.

However, despite these positive developments, India faces several challenges in ensuring the rule of law and protecting human rights. One such challenge is the issue of access to justice. India's legal system is complex and expensive, making it difficult to access for people, especially those from marginalized communities. There are also issues existing within the system for the

implementation of laws and court orders, leading to human rights violations and delayed delivery of justice, arising from a failure to comply with such orders.

Exceptions to the Rule of Law

With the change in time, a new concept of flexibility in the Rule of Law has arisen. This has led to carving out of certain exceptions to be taken in account in the occurrence of an unforeseen event. Certain exceptions must be made to establish a proper checks and balances for a progressive society.

Equality of law does not imply that all people have the same legal rights. For instance, in the case of public authorities, a Police official has the authority to make an arrest of an individual, but not vice-versa. Such a paradigm is indispensable to develop a nation that diligently adheres to the minutiae of legislation and executes the principles under pinning the Rule of Law.

Recommendations

Access to justice and human rights violations in India requires a multi-faceted approach. Here are some potential solutions:

- **Promoting accountability:** One of the biggest challenges in India is the lack of accountability for human rights violations. This could be achieved by strengthening oversight mechanisms, improving the reporting and investigation of human rights abuses, and ensuring that perpetrators are prosecuted and punished.
- **Education and awareness:** Education and awareness-raising campaigns to promote a culture of respect for human rights and the rule of law in India. This could include initiatives such as civic education programs, public awareness campaigns, and human

rights training for officials and law enforcement agencies.

- **Strengthening civil society:** Civil society organizations play a crucial role in promoting human rights and the rule of law in India. This can be achieved by funding resources, encouraging dialogue and collaboration between civil society organizations and government agencies, and protecting the space for civil society to operate.

- **Engaging with International Human Rights mechanisms:** India is a signatory to several international human rights treaties and agreements. Engaging with these mechanisms, such as the UN Human Rights Council and the Office of the High Commissioner for Human Rights, can help to promote accountability in society and ensure that international human rights standards are upheld in India.

Overall, addressing the issues affecting India's rule of law and human rights necessitates a comprehensive strategy that includes bolstering the legal system, encouraging accountability, raising public awareness, supporting civil society, and cooperating with global human rights organizations.

Any democratic society must adhere to the rule of law as it guarantees everyone's equality, fairness, and justice. It offers a foundation for an effective legal system that safeguards people's rights and fosters societal harmony. The rule of law protects individual rights in several ways by ensuring fair and impartial administration of justice, providing legal remedies for violations of rights, preventing the arbitrary exercise of power and more important by protecting individual freedoms.

CONCLUSION

“Independence means voluntary restraints and discipline, voluntary acceptance of the rule of law.”

-Mahatma Gandhi

Human rights must be safeguarded to have the Rule of law serve as the vehicle for putting human rights in to practice and making them a reality.

Even though our nation has made great strides toward ensuring access to justice, defending human rights, and upholding the rule of law, there are still several issues that need to be resolved. Fundamental rights are protected by the Indian Constitution, and the judiciary has been essential in defending these rights. Corruption, a lack of adequate infrastructure, and a slow pace of the justice delivery system has been some of the

obstacles that have hindered the successful implementation of these laws. To address these issues, the government has implemented several initiatives, including the creation of special courts, the implementation of fast-track courts, and judicial reforms.

To mitigate the challenges encountered by marginalized communities and ensure the unfaltering preservation of the Rule of Law across all realms of governance, it is imperative for the administration/authorities to assume a proactive stance. It is emphatically asserted that the Rule of Law reigns supreme, necessitating the safeguarding of individual rights. However, the attainment of this objective necessitates the implementation of various reformative measures aimed at securing its assurance.

¹AIR1951 SC455

²1967SCR (2)762

³AIR 1973 SC 1461

⁴AIR1982SC1325

⁵https://www.senate.gov/civics/resources/pdf/US_Constitution-Senate_Publication_103-21.pdf

⁶Constitution of India, 1950 – Article 13(2) - The State

shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void.

⁷Justice K.S. Puttaswamy (Retd.) & Anr. vs. Union of India & Ors. | (2017) 10 SCC 1, AIR 2017 SC 4161

Rule of Law and our Courts

Justice Mini Pushkarna*

The Rule of Law ought to be respected with the goal that the basic structure of our democracy is maintained and further strengthened - Lal Bahadur Shastri

The Concept of Rule of Law

A concept, existing since the days of Ancient Greece, entrenched in our legal and judicial system, 'Rule of Law' is defined in the Black Law's Dictionary as *"the predominance that is absolute of an ordinary law over every citizen regardless of that citizen's power."* In layman's language, Rule of Law is the Guardian Angel that protects the law of the land: this is to say that we all are subjected to the law which exists before us, and no single person is above the law. All citizens, companies, governing authorities are subjected to the law of the land, the laws of the country. It is a concept which gives a reality check to the authorities or governing bodies that they are not above the law, even if they might be the law makers, upholders of laws or policy makers. Accordingly, it sets up a chain of responsibility and accountability. In *Gouriet v. Union of Post Office Workers*¹ Lord Denning had aptly put it in the following words "Every person in land, no matter how powerful or high in status he may be, law will always be above them".

Aristotle was one of several major

philosophers who attempted to provide a substantive definition of Rule of Law. He strived to explain the theory by analogizing it to the Rule of Reason and other legal principles related to natural justice. The genesis behind the Rule of Law is to uphold the law and protect the rights of the citizens. To say that it is not just a term, but an emotion would be an understatement since it drives our entire judicial system. It finds its meaning through how courts across the globe and the legal fraternity function. Accordingly, this piece focuses not on the theoretical aspects of Rule of Law but on the practical application of the concept as enunciated by the courts.

Role of the Indian Judiciary

For many years, Indian courts have used judicial activism to expand the scope of the Rule of Law. For example, courts have begun to insist on 'fairness' and 'implementation of the law' in order to establish a Rule of Law society. Though many critics have claimed that the concept is merely a theoretical one with less practical application, Indian courts have played a crucial role in its expansion. Few examples follow

- (i) The case of *Tehseen S. Poonawalla v. Union of India*² sets out a dynamic view of the concept. To curb the menace of mob violence and lynching, several preventive, remedial and punitive measures were

*Judge, High Court of Delhi

taken. A three-judge bench directed the agencies and laid down certain crucial enactments in order to regulate social behaviour in the society against the horrendous cases of mob lynching. With respect to preventive measures, nodal officers in each district were designated to constitute a special task force so as to procure intelligence reports about the people who are likely to commit such crimes or who are involved in spreading hate speeches, provocative statements and fake news. The Central and the State Governments were asked to broadcast on radio and television and other media platforms including the official websites of the Home Department and Police of the States that lynching and mob violence of any kind shall invite serious consequence under the law. Other measures included the Director General of Police to issue a circular to the Superintendents of Police with regard to police patrolling in the sensitive areas keeping in view the incidents of the past and the intelligence obtained by the office of the Director General. Further, the police was directed to register FIR under Section 153A of Indian Penal Code and/or other relevant provisions of law against persons who disseminate irresponsible and explosive messages and videos having content which is likely to incite mob violence and lynching of any kind.

Coming to the remedial measures, State Governments were directed to prepare a lynching/mob violence victim compensation scheme in the light of the provisions of Section 357A of Code of Criminal Procedure within one month from the date of this judgment. In the said scheme for computation of

compensation, State Governments were to give due regard to the nature of bodily injury, psychological injury and loss of earnings including loss of opportunities of employment and education and expenses incurred on account of legal and medical expenses. The said compensation scheme also provided a provision for interim relief to be paid to the victim(s) or to the next of kin of the deceased within a period of thirty days of the incident of mob violence/lynching. Further, it was directed that the victim(s) or the next of kin of the deceased in cases of mob violence and lynching shall receive free legal aid if he or she so chooses and engage any advocate of his/her choice from amongst those enrolled in the legal aid panel under the Legal Services Authorities Act, 1987.

In respect of punitive measures, State Governments were directed to take disciplinary action against the concerned officials on findings where (i) such official did not prevent the incident, despite having prior knowledge of it, or (ii) where the incident has already occurred, such official(s) did not promptly apprehend and institute criminal proceedings against the culprits, as was held in terms of the ruling in *Arumugam Servai v. State of Tamil Nadu*.³ It was further directed that whenever a police officer or an officer of the district administration has failed to comply with directions in order to prevent and/or investigate and/or facilitate expeditious trial of any crime of mob violence and lynching, the same was directed to be considered as an act of deliberate negligence and/or misconduct for which appropriate action must be taken against him/her and not limited to departmental action under the service rules.

(ii) Further, among the many horrifying incidents, the *Nirbhaya* case was one such case which shook the entire country. The Criminal Law Amendment Act, 2013 was put forth for suggesting the amendments that could be done in the old laws for a better society. This led to the formation of Justice Verma Committee to recommend amendments in the criminal law and to provide speedy trial and harsh enhanced punishment for criminals accused of sexual assault against women. The committee also urged the general public, eminent jurists, legal professionals, NGO women groups to recommend the changes to achieve the desired goal. The definition of rape got amended, the definition of consent changed. The amendment now clarifies that absence of one's resistance does not mean consent is given. The law goes for life imprisonment for rape as the maximum sentence. It provides the death penalty for repeated offenders and cases where the victim is left in a 'vegetative state'. It defines new terms such as stalking and voyeurism as crimes with punishment up to seven years. It recognises gang rape as an offence and redefined sexual harassment. The law punishes police and hospital authorities with imprisonment of up to two years in case of failure in registering complaints.

(iii) *Lata Singh v State of U.P. & Anr.*⁴ was one of the cases where a Division Bench of the Supreme Court observed that no offence has been committed by the couple marrying outside their caste as "*there is no bar to an inter-caste marriage under the Hindu Marriage Act or any other law*". The Court opined that if parents do not approve the choice of partners of their children, the maximum that they can resort to is cut off social relations with

them. It further directed the police personnel throughout the country to ensure inter-caste couples are not subjected to any kind of violence and in the event of such, to institute criminal proceedings against such people.

(iv) The Supreme Court in *In Re: India Woman says Gang-raped on Orders of Village Court published in Business & Financial News*,⁵ took suo moto cognizance of gang rape of a 20-year-old woman in West Bengal on the orders of community panchayat for having a relationship with a man from a different community. The Court reiterated that the State is duty-bound to protect the freedom of choice of marriage, which is an integral aspect of Article 21 of the Constitution of India.

Global Perspective

The scope of the concept of Rule of Law has, likewise, been expanded in countries the world over. Taking a glance of the measures taken by different nations in strengthening the rule of law:

(i) Finland has recently ratified the Council of Europe Convention on preventing and combating violence against women and domestic violence. The entry into force has been accompanied by several practical measures to improve women's access to justice and combat violence against women, including a multi-sectoral action plan and a mechanism to coordinate national activities. The policies and activities are victim-centred.

(ii) Turkey has taken a set of important measures to strengthen the protection of human rights. It has established a Human Rights Department within the Ministry

of Justice and a Human Rights Compensation Commission. It has also introduced the possibility of an individual application before the Constitutional Court and an action plan on the prevention of violations of the European Convention Human Rights. Turkey has translated the judgments of the European Court of Human Rights into Turkish and made them available to the public on the website of the Ministry of Justice. The country has also improved its penal system in terms of physical infrastructure, training of staff and legislation. Right to appeal and probation have gained more functionality. It has amended legislation with the purpose of social rehabilitation and providing an alternative procedure to pre-trial detention.

- (iii) Chile has undertaken measures to combat corruption and to enhance transparency in public administration through legislative and administrative measures.
- (iv) Switzerland has made available to the public for free a “Practice Guide to International Treaties”, which describes the rules and practice followed by Switzerland on treaties. Originally conceived for a Swiss audience, it has generated considerable interest from other governments.
- (v) In Poland, the Commission on Rule of Law Framework was activated for the first time in 2016. Under this framework, the Commission engaged in an exchange of views with the Polish government and issued four recommendations. In the Commission's view, some Polish Constitutional Court (PCC) judges had

been unlawfully elected and the PCC's independence and legitimacy had allegedly been compromised by the parliament and government.

- (vi) The first infringement case brought to the European Court of Justice on a Rule of Law issue was *Commission v. Hungary (Compulsory retirement of judges)*, regarding the lowering of the retirement age of Hungarian judges and other legal professionals from 70 to 62 years. The Court agreed with the Commission that the Hungarian compulsory retirement scheme violated the principle of proportionality, and therefore illegal under the Directive. In 2019, the Commission put forward the idea of a 'Rule of Law Review Cycle'. Through this cycle, it proposed to promote a rule of law culture within the European Union through various measures, and to prevent rule of law backsliding in Member States by deepening its monitoring of Member States' compliance with the rule of law through. This cycle aims to cover all Member States and culminate in the adoption of an annual rule of law report that would summarise the situation in Member States.

Conclusion

The idea of the application of Rule of Law has never been perfect but is now slowly being adopted by various countries, especially in India, as the watchdog of the Constitution. Given that the courts are working to link the idea of the Rule of Law with human rights, it is the best means of achieving the supremacy of law. The rule was taken into consideration by the framers of the Constitution, who ensured that it was properly incorporated into the country's system. The judiciary

strives to uphold the rule of law by doing its part and carrying out all the procedures

outlined in the constitution to ensure that the people of this country are not denied justice.

¹[1978] AC 435 | United Kingdom Cases

²(2018) 9 SCC 501

³(2011) 6 SCC 405

⁴(2006) 5 SCC 475

⁵(2014) 4 SCC 786.



Rule Of Law: Emerging Dimensions

R Venkataramani*

Our textbooks on jurisprudence and lectures and literature on Rule of Law are by now overloaded. From World Bank to UNDP, they keep themselves engaged in drawing frameworks for guidance for the world outside major European Countries, England, and USA. It is assumed that these countries have reached the pinnacle and outer reaches of Rule of Law. This is like the following statement by Anthropologist Eric Wolf as quoted by Peter Frankopan in his book 'The Silk Roads'.

"The accepted and lazy history of civilisation, wrote Wolf, is one where 'Ancient Greece begat Rome, Rome begat Christian Europe, Christian Europe begat the Renaissance, the Renaissance the Enlightenment, the Enlightenment political democracy and the industrial revolution. Industry crossed with democracy in turn yielded the United States, embodying the rights to life, liberty and the pursuit of happiness'.

But this account was flawed; there were alternative ways of looking at history - ones that did not involve looking at the past from the perspective of the winners of recent history."

If one goes closely by the rules of Rule of Law chosen by them, I understand we need no guidance for adoption. India is without any doubt a Rule of Law nation. Our Constitution and its 75 years of working have

made us proud, notwithstanding Doubting Thomases at the peripheries. We have a legal system consisting of robust and fair procedures, systems of administration of justice, independent judiciary and parliamentary democracy which shows its strength and resilience to the natural challenges intrinsic to democratic enhancements and taming of all powers.

We are not comparable to any ex colonial country, or Arab provinces, or the nascent democracies of Eastern Europe, or some African nations, all of whom have passed through or transiting through democratic deficits of fundamental character. The deficits if any, in our institutional performances are evaluations on the aspirational matrices. We have our native intelligence and genius which constantly guide us in navigating our challenges. Thus, on the commonly narrated principles of Rule of Law, we have no huge lessons to be taken from elsewhere. Ideological differences and accusations on State performance are part of constitutional growth and not Rule of Law absence or lacking.

The story may not however end there. Like all nations, we too face certain fundamental challenges. They are common to global civilisational aspirations. The performance graph of economic systems - Free or regulated, controlled or compromised- in different parts of the world presents no

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comfort zones. While the indices on eradication of extreme want and poverty are encouraging and bright, many questions on equality beg for consoling answers. Rights or claims in regard to social resources namely education, employment, housing, social security, etc must find more credible institutions beyond freebie politics.

In *Slouching Towards Utopia* by J. Bradford Delong, the author observes:

“One reason why human progress toward utopia has been but a slouch is that so much of it has been and still is mediated by the market economy: that Mammon of Unrighteousness. The market economy enables the astonishing coordination and cooperation of by now nearly eight billion humans in a highly productive division of labor. The market economy also recognizes no rights of humans other than the rights that come with the property their governments say they possess. And those property rights are worth something only if they help produce things that the rich want to buy. That cannot be just.”

The choice between either free market economy with lessons learnt everyday on regulations and a completely mediated state-driven economy, will also soon become a matter for resolution. How that will be done will also be a Rule of Law issue.

It appears to me that these are intrinsically connected to hitherto raised first generation principles of Rule of Law and will become the most fundamental issues of Rule of Law.

India is uniquely qualified to churn out and provide broad answers in the above regard. But India needs to steer clear on basic changes in its legal frameworks- changes to meet justice needs of different sections of the

society. There is an urgent call for reworking the adversarial system in the criminal and good part of the civil law. Allied will be institutional changes in government structures to pave way for speedy and economically viable resolutions of disputes and claims. All these call for new perspectives on the reaches of good governance and Rule of Law.

Owing to unimagined and unprecedented technology contributions, inequality amongst countries and nation is on the wane. While differences in standards of living and the freedom to pursue matters of life are there to be seen between different countries, one may no longer engage in colonial occupations or expansions. The so called American dream is no longer an American phenomenon. However, domestic inequality within countries and nations continue to confront the wisdom and commitment of governance institutions. The resolution of the inequality riddle, is the most important Rule of Law challenge.

It will become evident, sooner or later that our current legal and governmental framework will stagnate, if not geared for significant changes. The Justice delivery system, which now focuses on disputes resolution tagged with the heavy cost and with time overruns, will find itself inadequate to meet the above challenges. Given the fact that we have promised to ourselves a fair social order through constitutional governance, our attention is on opening up more windows and doors of the Constitution.

The constitution is open to diverse readings. That by itself is a Rule of Law aspect. The current disagreements on readings of the

constitution are inevitable products of our post-colonial free rule and the jostling for just accommodations. Neither the claim for liberal reading - which can mean multiple variations of left leanings- nor the claim for cultural hegemony can be infallible or conclusive.

I think all of these will be the additional facets of Rule of Law. In other words, beyond the beaten track of Rule of Law lie many pathways to be comprehended.





Rule of Law: Role of Lawyers

*Abhishek Singhvi**

To view the concept of Rule of Law as a recent phenomenon, evolving (as per western thought processes) after the Treaty of Westphalia or the Magna Carta, is a myth which should be emphatically busted by our curriculum. Rule of Law is as old as the oldest civilizations of the world, of which the Indian subcontinent has always been a leader. It forms the basic foundation of civilizations and is the major differentiator between civilized societies and uncivilized ones. As Dwight Eisenhower said, “The world no longer has a choice between force and law; if civilization is to survive, it must choose the rule of law.”

Jurisprudence, advocacy and Rule of Law were always present in some form or the other in the Indian civilization, in a combination of concrete and abstract arrangements. However, the Indian Constitution made it more direct, streamlined, nuanced, and binding. No single provision can claim to be its sole repository, but Article 13 (Laws Inconsistent with or in Derogation of Fundamental Rights) and Article 14 (Equality before Law) lay the foundational basis for it.

Layers of post-independence Indian jurisprudence have further immeasurably enhanced and enlarged the scope and the spirit of the bare text of these constitutional

provisions. A single example qua a single provision, Article 14, the bedrock of Rule of Law, will illustrate the dynamics of this judicial review process. Starting from the discrimination facet alone, Article 14 chiseled and calibrated the doctrine of classification but within the confines of discriminatory executive or legislative behavior. *Royappa*¹, through *Ajay Hasia*² and several others added the non-arbitrariness dimension to the same sterile words of Article 14. *Maneka*³ made a jump by bringing in due process under Article 14—ironically the precise words Frankfurter J had strongly advised his visiting guest, Benegal Rau, the advisor to the Drafting Committee headed by Ambedkar, to strictly exclude. But *Maneka* (supra) and its progeny continued to pay lip service to the exclusion of due process by camouflaging itself in words of procedural due process not substantive i.e. not substantively judging the content of laws against immutable standards but only striking them down, where necessary, for procedural unfairness or error.

Maneka’s lip service was a fiction even in 1979 and all pretense of lip service was jettisoned by substantively reviewing laws and striking them down in cases like *Joseph Shine*⁴ (the adultery case) or the Triple Talaq case⁵ or the privacy judgment⁶. Substantive due process is thus an entrenched part of Indian jurisprudence, entitling judges to strike down laws and action found manifestly unfair, grossly arbitrary etc. What a journey

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article 14, the centerpiece and the show piece of Rule of Law, has seen from the days of the classification doctrine. Whether Benegal Rau and Frankfurter J are turning over in their graves or whether the suffering victim of egregious state action is exulting, is a different story altogether.

Over the years, lawyers have acted as the foot-soldiers, the infantrymen of the Constitution. Besides advocacy, justice delivery and representation, lawyers have a more holistic role to play in society by preserving the Rule of Law.

The first and primary role lawyers play in preserving the Rule of Law is by maintaining the Constitutional order. The Supreme Court, in Bar Council, *Maharashtra vs M.V. Dabholkar*⁷ had highlighted the role of the Bar “in the building up of a just society and Constitutional order”. As a member of society and as drivers of the judicial system, lawyers have a central role to play in ensuring constitutional order. A lawyer is essentially a fusion of a law enforcement officer and a public citizen. By the very nature of their training, the structure of their vocation and the demands of their ecosystem, lawyers are, or at least are supposed to be, natural crusaders, iconoclasts, no respecter of persons or authority but perennially subjecting actions and legislation to the harsh touch stone of penetrating analysis, ruthless reasoning and objective conclusions.

Secondly, justice delivery is not the exclusive duty of the Bench, but the Bar has a duty to assist the Bench proactively in justice delivery. A lawyer acts not just as a legal representative of the client, but also as an officer of the court. A lawyer ensures Rule of Law by informing the Bench about the facts and merits of the case. The fate of a case and justice delivery to

an entity largely depends on the efficiency and ethics of a lawyer. He must necessarily do a successful tightrope walk of multiple obligations: fearlessly represent his client’s point of view but within the confines of legal and ethical rules; simultaneously assist and promote the larger concept of administration of justice by being fair to the court; and, lastly, the larger duty to society as a professional in upholding citizen and public interest values. These three duties comprise the heart of Rule of Law. It may sound a very difficult set of acrobatics, but by and large a large number of lawyers do it every day, despite, unfortunately, a growing number of exceptions.

Third is the role of lawyers in the administration of justice. In a 2018 judgment, the Himachal Pradesh High Court observed, “In the administration of justice, Judges and lawyers play equal roles. Like Judges, lawyers also must ensure that truth triumphs in the administration of justice.”⁸ Moreover, the Supreme Court in *All India Judges Association vs Union of India*⁹ observed the importance of lawyers in the administration of justice and the part played by them in maintaining Rule of Law.

Fourthly, it becomes a moral duty of every lawyer to mentor, groom, and nurture young lawyers and law students. To this day, despite my hectic schedule and multitasking in the domains of parliament, law, press and public life, few things give me as much satisfaction as speaking to groups young lawyers, teaching a whole semester course at a leading university, endowing funds for scholarships and so on.

Fifthly, a lawyer should make continuous efforts to give back to society through the profession. Through legal aid, pro bono

appearances, judicial challenges and various voluntary and reduced-rate arrangements, a lawyer should always try to support the needy. From the Indian perspective, the lawyers have a central role to play in realization of Article 39A of the constitution which reads:

Certain principles of policy to be followed by the State: The State shall, in particular, direct its policy towards securing (a) that the citizens, men and women equally, have the right to an adequate means to livelihood...”

These noble initiatives would also include volunteer or community service, mentoring, or removing bulwarks for the marginalized in society. In short, a way of protecting the Rule of Law is by contributing towards convincing democracy that the public interest would be safeguarded by ethical legal representation.

Sixthly, lawyers play the role of peacekeepers in an order-based society. They are the ones who prevent the law of the jungle or the law of street justice taking the place of Rule of Law. Peacekeeping is firstly done by adding the element of equality in justice delivery. As Theodore Roosevelt said — no man is above the law, and no man is below it. Secondly, the legal community plays a decisive role in maintaining balance in society through their professional balance at the level of power and rights. Equilibrium and tranquility are the prerequisites for maintaining peace in society. It is truly said: “as a peacemaker the lawyer has a superior opportunity of being a good man”.

Seventhly and finally, the primary job of lawyers is to defend the Rule of Law from its enemies. How do we do it? The best possible way among many is litigation! In layman's terms, the objective of litigation is to uphold

the public interest. Through PILs, instead of the aggrieved party, the court itself may take *suo motu* cognizance and may file a PIL in a court of law. The Indian judiciary provides a massive scope for judicial activism. The Indian judiciary provides a member of the public or society the entitlement to file a lawsuit through a PIL. Here, a lawyer either himself or as a part of the public, plays a central role in defending the Rule of Law from its enemies. The idea is not only to preserve the Rule of Law but to defend it!

American President Calvin Coolidge famously highlighted that it is not the enactment, but the observance of laws, that creates the character of a nation. But above all, Rule of Law is what Rule of Law does. On that touchstone and criterion, I am not sure that we can say with certainty, confidence or conviction that we have done satisfactorily or very well in preserving, perpetuating and protecting the Rule of Law.

Can we really revel in the Rule of Law when statistics suggest that the criminal justice system in our country is in shambles? Figures and the law of probability suggest that there are overwhelming odds that a crime will not be detected; if detected, it will not be prosecuted; if prosecuted, the real culprit will not be apprehended; if apprehended, the conviction rate is so abysmally low, that he will not be convicted, and finally, if at all convicted, he will not be punished, or at least not punished adequately. Furthermore, all this, if done, will take us to not merely the next generation, but the second generation below.

Similarly, can we really be self-congratulatory on Rule of Law, when, on the one hand, we have the best and the brightest, as far as our Bar and Bench is concerned; where, on the one hand, we have several *avant garde*

doctrines like basic structure, PIL, and judicial review of unimaginable penetration but, on the other hand, we have always had 33 odd percent of judicial posts in all the high courts put together vacant since independence at any point of time and roughly 25% vacancies collectively for the lower courts? Can we really talk of rule of law with a post Covid pendency of approximately 4.25 crores where the average litigant can only express his lament in the Urdu couplet:

दोपहर तक बिक गया बाज़ार का हर इक झूठ
और मैं एक सच लेकर शाम तक बैठा रहा।

Dopaher tak bik gaya bazar ka har ek jhooth
Aur maen ek sach ko le kar shaam tak baitha raha

[Every single lie in the market was sold by noon
And I just kept sitting with one truth till evening]

Yes, we must all, and lawyers in particular, stand up for and stand for the Rule of Law.

Yes, we must all uphold it. But we must also reform it drastically. Unless we penetrate its illusory aspects, its structural deficiencies, its inherent inequalities and its humongous inefficiencies, we cannot really ever give ourselves pats on the back, full of smug satisfaction. The equality we need is not that found in those infamous words: “if you don’t have bread, have cakes”. The equality we need is not in the rich and the powerful alone getting the best legal representation. The Rule of Law must at least move in the direction, if not actually achieve it, of being uninfluenced by the three **P’s**, viz. Pelf, Power and Position. They must be able to at least approximate to an evolutionary reduction of the three **Cs** in the administration of justice viz. Casteism, Corruption and Criminalization.

Without all this, the Rule of Law will be a grand illusion and even its fiercest upholders – lawyers -- will be left chasing a mirage.

¹E.P Royappa v. State of T.N (1974) 4 SCC 3

²Ajay Hasia v. Khalid Mujib (1981) 1 SCC 722

³Maneka Gandhi v. Union of India (1978) 1 SCC 248)

⁴Joseph Shine v. Union of India (2019) 3 SCC 39)

⁵Shayara Bano v. Union of India And Ors (2017) 9 SCC 1

⁶K. S. Puttaswamy (Retd.) and Anr. v. Union of India

(2017) 10 SCC 1

⁷Bar Council of Maharashtra v. M. V. Dabholkar 1976 SCR (2) 48

⁸Ankur Sharma & Anr v. State Of H.P on 28 November, 2018

⁹All India Judges' Association v. Union of India (1992) 1 SCC 119

Rule of Law: A Basic and Eternal Principle

Arvind P. Datar and Dr. Sanjay Jain***

The expression “Rule of law” is difficult to define but easy to understand. It postulates that a country must be governed by legal principles that are just, equitable and apply equally to all persons who are similarly placed. The rule of law, like important legal principles such as “due process”, “natural justice”, “essential functions of legislatures” are incapable of a comprehensive definition. But this difficulty is actually their strength because it makes them basic, elastic and eternal.

If all rulers or leaders had the sagacity of a Marcus Aurelius, every country would be assured of good and fair governance. The rule of law would be the default rule. But such rulers have seldom been found in history and an imposed rule of law is essential to ensure that our rulers and leaders are not permitted to act as they please and or govern the country arbitrarily and on their whims and fancies.

It is a peculiar feature of most elected Governments that they are irked by checks and balances, particularly by the judiciary. The same political party, which when in opposition demands the rule of law, suddenly finds it annoying when elected to power. This is a common phenomenon all over the world. Even in the United Kingdom, judges have been labelled as “old fools” and “enemies of the people” by the mainstream media. The oft

quoted but mythical principle that an elected Government represents the “will of the people” and therefore, must be allowed greater latitude is anathema to the principle of the rule of law. However well-intentioned the law makers may be, the laws enacted by them have to be tested by the provisions of their Constitution and whatever checks and balances their legal system provides.

The need for a system of rules to govern society has been felt for several centuries. The Ten Commandments which were brought down by Moses from Mount Sinai, laid down essential and moral principles that ought to govern a just society. Later, the Old Testament described that laws must be administered by judges who were independent of the King.

In Islamic countries, the sharia and other texts prescribed the rule of law. Similarly, in ancient India, we had our own legal systems and principles that represented the rule of law and was followed in relation to various facets of life including governance, marriage, succession and so on. The present article is confined to the rule of law as has been implemented after we adopted the common law system and the English principles of governance and administration.

In the United Kingdom, perhaps the first example of the rule of law was signing of the

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Magna Carta in 1215. This document first challenged the unlimited powers of the monarch and sought to create a predictable, just and equitable system. It was this document that introduced, for the first time, the principles of trial by jury and the writ of habeas corpus. Later, John Locke (1632-1704) emphasized the need for the rule of reason to prevail in society. He observed that individual members of society were bound by natural laws which were synonymous with the rule of reason. The most significant concept that was introduced in the 18th century was by Montesquieu of France (1689-1755) who first emphasised the need for separation of powers and, in particular, the need for separation of the judiciary from the executive.

It must be mentioned that, in contrast, Thomas Hobbes (1588-1679) had earlier argued that while individuals are bound by the law, the King or monarch was not. Fortunately, the views of Locke and Montesquieu prevailed and established the primacy of the rule of law in almost all civilised societies.

Across the Atlantic, the American Revolution resulted in a written Constitution which made life, liberty and the pursuit of happiness as the unalienable rights of an individual. The historic U.S. Constitution, in concrete terms, set out limits on the powers of an elected Government and later introduced the Bill of Rights. The American Constitution provided the template for many of the basic and fundamental rights later adopted in several Constitutions.

In India, the rule of law as we currently understand is primarily based on the writings of Prof. A.V. Dicey in his book, "Introduction to the Study of the Constitution". Dicey defined three key aspects of the rule of law:

(i) *The supremacy of law over arbitrary power:* The supremacy of law required that no man could be punished except for a violation of the law and on the basis of a conviction before the established courts. A man could not be punished by the executive. Further, the essential feature of the supremacy of law was the exclusion of both arbitrariness and wide discretionary authority on the part of the Government. As Dicey put it: "Englishmen are ruled by the law, and by the law alone; a man may with us be punished for a breach of the law, but he can be punished for nothing else."

(ii) *The equality of all before the law, and government under the law:* This principle postulated that every person however so high he may be, is subject to the laws of the land and is accountable for his actions before a court of law. No official or high functionary can be excluded from the duty to obey the law.

(iii) *There is no higher law other than the rights of individuals as determined by the courts:* This principle, in a written Constitution, sets out the rights of individuals that must be respected by the executive. Any violation of their rights can be complained to the ordinary courts for redressal and justice.

A written Constitution now exists in a vast majority of countries all over the world. In many nations, the concept of rule of law exists in theory but is often unavailable to the ordinary citizen in fact. In these authoritarian regimes, there is rule of law *de jure* but arbitrary exercise of power *de facto*. Mercifully, India continues to be a vibrant democracy and as long our Constitution exists, the rule of law will do so too.

In *Bachan Singh v. State of Punjab*¹, it was held

that rule of law permeates the entire fabric of the Constitution and indeed forms one of its basic features. The rule of law excludes arbitrariness. This was elaborated further in *T.N. Godavarman Thirumalpad vs. Ashok*² Khot which held: "The 'rule of law' which serves as an aorta in the anatomy in our democratic system is 'the law is supreme'. Any country or society professing the rule of law as its basic feature or characteristic does not distinguish between high or low, weak or mighty."

The essential contract between the reign of law and the tyranny of power was superbly explained by Justice Mathew.³

"A reign of law, in contrast to the tyranny of power, can be achieved only through separating appropriately the several powers of Government. If the law makers should also be the constant administrators and dispensers of law and justice, then, the people would be left without a remedy in case of injustice since no appeal can lie under the fiat against such a supremacy."

Perhaps, the finest exposition of what constitutes the rule of law is from the historic dissenting judgment of Justice Khanna in *ADM, Jabalpur vs. Shivkant Shukla*⁴. Emergency was imposed between 1975-1977 and all fundamental rights were suspended. The majority held that no person could approach the court for violation of fundamental rights or any other right. It was argued since Article 21 had been suspended there was an absolute bar from the courts' examining any detention order. Thousands of persons had been imprisoned but were left without any remedy. It was emphasized by the then Attorney General that the Presidential Order of June 27, 1975 was distinct from the earlier presidential order and made judicial review impossible, even in the most egregious

cases. Justice Khanna dealt with the scope of Article 21 and traced the history of human liberty starting from the Magna Carta and reproduced its famous 39th chapter:

"no free man shall be taken or imprisoned or disseized, or outlawed or exiled or in any way destroyed; nor shall we go upon him nor send upon him but by the lawful judgment of his peers and by the law of the land."

He then discussed the views of various scholars from Plato onwards and in para 154, pointed out that the rule of law is the antithesis of arbitrariness. He then referred to *Olmstead v. United States*⁵ and held:

"To use the words of Justice Brandeis with some modification, experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded persons. The greatest danger to liberty lies in insidious encroachment by men of zeal, well-meaning but lacking in due deference for the rule of law".

Finally, Justice Khanna observed that even in the absence of Article 21, the State has no power to deprive a person of his life or liberty without the authority of law. Further, he observed that this is the essential postulate and basic assumption of the rule of law and not of men in all civilised nations. Without such sanctity of life and liberty, the distinction between a lawless society and one governed by laws will cease to have any meaning.

There is a serious setback to the rule of law if imprisonment of a person becomes easy and his getting judicial redressal becomes difficult. The essential feature of the rule of law is to ensure the separation of the judiciary

from the executive. Indeed, it is in the long-term interest of any civilized nation that it has a strong and independent judiciary. Curtailing the power of the judiciary by giving a greater latitude to the executive to act without checks and balances is the beginning of the end of a democratic society. Every inroad into the liberty of a citizen is an attack on the principle of rule of law.

The basic structure doctrine was laid down 50 years ago and enabled the country to survive the onslaught on the Constitution by the 42nd and other amendments. Democracy has survived and free and fair elections continue to be a proud feature of Indian democracy. But the existence of rule of law calls for eternal vigilance on the part of the citizen and particularly on the part of the judiciary. It is unlikely that any country will cease to be a democracy overnight unless

there is a revolution or a coup. But a tolerance of repeated inroads into the rights of citizens will eventually lead to a country ceasing to be governed by the rule of law. One must constantly pay heed to the sobering words of Justice William O. Douglas:⁶

“... The Constitution and the Bill of Rights were designed to get the Government off the backs of people—all the people. Those great documents did not give us the welfare State. Indeed, they guarantee to us all the rights to personal and spiritual self-fulfilment.

But the guarantee is not self-executing. As nightfall does not come all at once, neither does oppression. In both instances, there is a twilight when everything remains seemingly unchanged. And it is in such twilight that we all must be most aware of change in the air—however slight—lest we become unwitting victims of the darkness.”

¹AIR 1982 SC 1325,1336

²(2006) 5 SCC 1, 6 & 15, paras 3,4 & 21.

³Indira Nehru Gandhi vs. Raj Narain AIR 1975 SC 2299, 2380.

⁴AIR 1976 SC 1207

⁵277 U.S. 438 (1928)

⁶Cited with approval in Union of India v Madras Bar Association (2010) 11 SCC 1, 63.

Rule of Law as Part of Infrastructure: Improving the Indian Legal System

*Bibek Debroy**

There is a quote from Publius Tacitus (Gaius Cornelius Tacitus), author of several texts, including “Annals”. As commonly cited in English, the quote goes, “The more corrupt a State, the more numerous the laws”. That is not quite correct. Tacitus wrote, “*Corruptissima re publica plurimae leges*”.¹ We indeed have a clause about a corrupt State and another clause about plurality of laws. But there was no obvious causation in Tacitus. One could equally well translate this as, “The more numerous the laws, the more corrupt a State”. However, the correlation is not in doubt.

“Rule of law” is not an easy expression to define, quantify and measure, though attempts have been made. Across various organizations that have sought to measure it, indicators like speediness of the judicial process, intellectual property right protection, fairness of the judicial process, protection of private property, judicial independence, police efficiency, incidence of crime, enforcement of court orders, conviction rates, contract enforcement and trafficking have been used. These also tend to figure in assorted cross-country indicators of governance. The World Bank’s, now discontinued, ‘Doing Business’ indicators sought to measure some aspects of the legal regime, such as dealing with construction permits, registering property, enforcing contracts, resolving insolvency and labour

market regulation.² In 2006, the United Nations set up a Commission on Legal Empowerment for the Poor (CLEP) and this submitted a report in 2008, with a focus on access to justice, property rights, labour rights and business rights.³ Describing Rule of Law in general terms is easy. Quantifying it is much more difficult, especially since data on something that is difficult to measure are not easy to obtain. Some data can only be perception-based, drawn from subjective responses to questionnaires. They are not hard data. A word of caution is also required about cross-country comparisons across different types of legal regimes. After all, all the indicators involve some value judgements. For instance, is it better to have swift dispute resolution, regardless of whether principles of natural justice have been followed? That is inherently a value judgement.

The etymology of the word “law” is derived from old Norse, meaning “laid down, or fixed”. In human evolution, there was a period when humans interacted within small communities. Everyone knew everyone else and because there was no anonymity in such interactions, good behaviour, referred to as *sadachara* in our texts, was axiomatic. When communities became larger, with interactions with individuals not personally known, norms evolved on what was acceptable behaviour and what was not. The word *dharmā* has many meanings, depending

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on the context. In a specific context, it also means Rule of Law.⁴ As norms on *sadachara* evolved, there were notions of what is *dharma* and what constitutes its antithesis, *adharma*. As *dharma* declined and people were no longer naturally virtuous, there was a king, the counterpart of government today, to punish the wicked, shield the virtuous, protect property rights, ensure internal and external security and deliver swift justice. To that extent, for the greater common good, there was a curbing of individual rights and “Rule of Law” and “Law of Rule” are opposite sides of the same coin. This describes evolution of common law. Traditionally, legal regimes are divided into common and civil law jurisdictions. In the former, and India belongs to this category, law is not always codified. Though the difference between the two kinds of jurisdictions is getting blurred, with codification in common law countries, there are common law strands in India and case law sometimes determines “law”. Hence, in any discussion, we need to pin down “law”: (i) There is statutory law, either at Union or State government level. (ii) There is the category of administrative law, executive in nature. This is not statutory law, though it often obtains its sanction from some statutory law. Rules and orders belong to this category.⁵ (iii) There is the question of the legal system providing an efficient and effective deterrent against *mala fide* acts, while protecting the *bona fide*. If it does not do this, it is not credible.

As back of the envelope guesswork, and no more than that, an efficient legal framework can add an increment of 1% to India’s GDP growth. A similar figure for infrastructure will be of the order of 1.5%. What is infrastructure? We will think of examples like

transport and power - physical infrastructure. They support the economy. Reforms are about reliance on markets. But markets do not function in a vacuum. They function in a certain institutional context and the legal system is part of that institutional setting. Thus interpreted, in a broader sense, Rule of Law is part of infrastructure. The need for improving the legal system always existed, but has become even more important because of the emphasis on reforms and the template India is setting out for 2047. What are the ingredients of such changes?

First, there is the simple matter of old statutes. The 1949 East Punjab Agricultural Pests, Diseases and Noxious Weeds Act applies to Delhi. According to this, if Delhi is invaded by locusts, the District Magistrate will announce the invasion by beating of drums and every able-bodied person has to cooperate in fighting locusts. Old statutes do no harm, seemingly. But they can be used to harass and impede both G2B and G2C transactions. It is surprising these were not examined and junked in 1950, when the Constitution came into effect. (There was a perfunctory attempt in 1960/61 and a more serious attempt in 2001/2002.) In a common law jurisdiction, there is no civil law system of desuetude. In 2015 and 2016, such 1486 old statutes have been repealed at the Union government level. But the equivalent action has still not happened in States and that principle about eliminating the old and the dysfunctional applies not only to statutes, but also to administrative law.

Second, revamping old laws is not always that simple. Rare is the case when one can repeal a statute in its entirety. If that is the case, a simple repealing Bill will do. More often, there is an old section in the statute. That

needs to be scrapped or amended, while retaining the main statute. This requires a scrutiny of the statute, section by section, and is much more time-consuming. There is a related point. In the same area, statutes may not have been enacted at the same point in time. Therefore, definitions may not be uniform. Since the case law has also evolved separately, that too varies, causing further confusion. These statutes need to be harmonized and unified. As examples of dysfunctional elements, one can cite sections from Indian Penal Code, Indian Evidence Act, Indian Police Act and Transfer of Property Act. But there are several. As a recent instance of harmonization, Union government has unified labour laws into four codes on wages, social security, safety and industrial relations. But more broadly, one requires such systematic work, based on first principles, to be done by Union Law Commission and State-level Law Commissions.

Third, India has been described as a country that is over-legislated and under-governed, reminiscent of Tacitus. Both in Parliament and Legislative Assemblies, there is an attempt to solve every problem under the sun through legislation, even though that legislation cannot be enforced. Hence, there

is excessive government intervention through statutes. Why should the Delhi Shop and Establishments Act of 1954 specify which part of the city will be subjected to shop closures on which day? The Shops and Establishments Act is on a State subject, so other States have mirror images of this. This is sometimes perceived as taking ideological positions on degree of government intervention, but there is a better way of looking at the issue. Before passing any legislation, one should ask the following questions. Why is this statute needed? What are the costs if it is not enacted? What are the benefits and costs from enacting it? This is ostensibly meant to be addressed in “Statement of Objects and Reasons” that accompany any piece of legislation, but this is undertaken very perfunctorily. If done properly, as some other countries have, we will have fewer laws and better laws, especially when we combine this with desuetude principles (with desuetude built into the statute itself).

Finally, no Rule of Law is credible without efficient dispute resolution and a lot has been written on this, on the civil side and on the criminal side, including police reforms. One knows what has to be done. It is a matter of doing it.

¹*Annals*, Book III.27. In writing on law, Latin must invariably be used, since it never fails to impress.

²<http://www.doingbusiness.org/~media/GIAWB/Doing%20Business/Documents/AnnualReports/English/DB16-Chapters/DB16-About-Doing-Business.pdf>

³http://www.unrol.org/files/Making_the_Law_Work_for_Everyone.pdf

⁴For example, P. V. Kane’s multi-volume *History of Dharmashastra*, published between 1930 and 1962. The dividing line between *dharmashastra*, *nitishastra* and *arthashastra* literature gets blurred.

⁵The 2nd Administrative Reforms Commission was set up in 2005 and several of its recommendations concern administrative law. There were 15 Reports, spanning G2C, G2B and G2G transactions. Most discussions of administrative law tend to focus only on G2B transactions. Between 1966 and the mid-1970s, the 1st Administrative Reforms Commission submitted 20 Reports. The Reports of the 2nd Administrative Reforms Commission and the status of implementation are available at <http://darpg.nic.in/ArticleContent.aspx?category=311>

Rule of Law: Understanding a Long Distance Goal

*Professor M.P. Singh**

In the common law world generally, any discussion on the concept of the Rule of Law starts with the following three propositions which Dicey laid down in this regard:

1. It [the rule of law] means in the first place, the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government.
2. It means again, equality before the law, or the equal subjection of all classes to the ordinary law of the land administered by the ordinary law courts; the Rule of Law in this sense excludes the idea of any exemption of officials or others from the duty of obedience to the law which governs other citizens or from the jurisdiction of other tribunals; there can be nothing with us nothing really corresponding to the “administrative law” (*droit administratif*) or the “administrative tribunals” (*tribunaux administratifs*) of France....
3. The Rule of Law, lastly, may be used as a formula for expressing the fact that with us the law of the constitution, the rules which in foreign countries naturally form part of a constitutional code, are not the

source but the consequence of the rights of individuals, as defined and enforced by the courts; that, in short, the principles of private law have with us been by the action of the courts and Parliament so extended as to determine the position of the Crown and of its servants; thus the constitution is the result of the ordinary law of the land.¹

The perfection of these propositions was doubted during Dicey’s time also and has by now become subject to quite a few exceptions and clarifications. Particularly his second proposition was based on the misunderstanding of the functioning of administrative tribunals in France and Germany which were as protective of the interests of the individual as the ordinary courts of law or even more. Sir Ivor Jennings called the Rule of Law “an unruly horse”. It is imprecise and “merely a phrase for distinguishing democratic or constitutional government from dictatorship”.³

In support of Dicey’s first proposition, however an example from Professor Jeremy Waldron is worth citing. Late at night Ya Ya Padro was standing by the door of his brother’s house in London. He was approached by a policeman who identified himself as Martin Diss and asked Pedro what was he doing there. Pedro told him to “fuck off.” All questions of the policeman he answered with obscenity and pushed Martin

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Diss away. He was ultimately arrested with the help of other policemen who charged him with assaulting a constable in the execution of his duty. When Pedro appeared before the magistrates, he was convicted and fined fifty pounds. Pedro appealed in the High Court. Mr. Diss defended himself on the plea of performing his duty. Lord Lane in the High Court said that the police “do not have an unlimited power to detain people for questioning: their powers of legitimate detention and arrest are set down and governed by law. If they go beyond those powers, the person they have got hold of is entitled to strike back in self defence, just as he may resist any other person who attacks him.” The judge went on to state:

It is a matter of importance, therefore, to a person at the moment when he is first physically detained by a police officer, to know whether that physical detention is or is not regarded by that officer as a normal arrest or detention. That is one of the reasons why it is a matter of importance that the arresting or detaining officer should make known to the person in question the fact that, and the grounds on which, he is being arrested or detained.⁴

Discussing in detail issues such as the Rule of Law and not of men, legal positivism, a higher law that may involve the application of moral standards that go beyond the particular decrees and commands issued by legislative sovereigns, one law for all, special rules for officials, law and official discretion, freedom and predictivity etc., Professor Waldron concludes

The Rule of Law is neither a simple ideal nor any easy one to live up to. It expresses a number of principles and requirements, based on various grounds. They look attractive enough

when they are expressed as slogans, but they prove to be strikingly difficult to apply in any straightforward way to the governing apparatus of modern society. That does not mean we should abandon the Rule of Law. But we should recognize that it is an ideal that has its costs, and we ought to be as clear as we can about the reasons why those costs ought to be borne.⁵

A major and exhaustive study, exclusively devoted to the concept of the Rule of Law has been done by Lord Tom Bingham, as Sir David Williams’s lecture at the University of Cambridge in 2006 titled “*The Rule of Law*.”⁶ The lecture, which did not receive much publicity at the time of delivery, was insisted upon for publicity which acquired the form of a full-fledged book. Relying principally on Dicey’s concept of the Rule of Law, he says:

The core of the existing principle is, I suggest, that all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts.⁷

His major contribution lies in covering the principle’s application all over the world in its application in national, regional, and international spheres. Special attention has, however, been paid to its application and growth in England starting with the Magna Carta in 1215 and its application in different regimes in England including somewhat special developments in the seventeenth century such as dismissal of Chief Justice, killing of the then King, removal of his successor, bloodless revolution and the Act of Settlement 1701 and the stability since then leading to Dicey’s concept of justice stated above. The book is not confined to England,

rather exhaustively covers almost all examples of the application of the Rule of Law world over including its application in international law, interregional and regional organisations as well as special examples in different parts of the world. The book may not be a very critical examination in all these spheres but it helps us in knowing the expanding importance of the rule of law.

For quite a critical examination of German *Rechtsstaat*, British Rule of Law and the French *l'Etat de droit* we may move to Martin Laughlin's examination of these concepts. Laughlin says that "There are good reasons for believing that the Rule of Law is merely a slogan." It "is mere rhetoric, a conviction which is reinforced by its intrinsic ambiguity: the ubiquity of the expression 'the Rule of Law' is matched only by the multiplicity of its meanings."⁸ The same is true about the German *Rechtsstaatsprinzip* of which "over 140 legal concepts operating in the German legal system are claimed to be aspects of the *Rechtsstaatsprinzip*."⁹ The Rule of Law, according to Laughlin "cannot be conceived as a foundational concept of public law. ...The concept has value only for its aspirational qualities."¹⁰ According to the author "The concept of the Rule of Law emerges as a product of the formation of the modern state."¹¹ Associating Dicey's concept to several reasons the author concludes: "Dicey's concept of the Rule of Law is rich, intricate, and ambiguous."¹²

Coming to the German concept of *Rechtsstaat* the author says that "The analogous German concept of *Rechtsstaat* emerged earlier than the English expression, in relation to different governmental circumstances."¹³ According to him "Initially, the term *Rechtsstaat* was used as 'a descriptive category applicable to all modern

states which used general laws to harmonize the sovereign concentration of political power with liberal policy. ... This general expression was elevated to the status of doctrine only through the systematic work later undertaken by Robert von Mohl."¹⁴ This concept remained subdued during Nazi regime but after which it regained its position as an important concept.

The French concept of *l'Etat de droit* was explicitly introduced by French jurists as a normative principle to highlight perceived deficiencies in post-revolutionary governing arrangements. "As a consequence, the concept of *l'Etat de droit* has, in the French system, been addressed primarily in the realm of legal thought rather than in legal practice."¹⁵

Though the idea of the Rule of Law emerged at different times in England, Germany, and France there is "one common element in the analysis of origins of the concept in the regimes of Britain, Germany and France: debates over the idea of 'the Rule of Law' all reached their high point in the period of the late-nineteenth/early-twentieth centuries."¹⁶

Towards the concluding part of his long chapter on German, British and French notions of the Rule of Law Professor Laughlin states as follows:

The Rule of Law is just one expression of the objective of obliging government to control itself. It is part of the 'auxiliary precautions' needed in government. In this sense, the Rule of Law forms one aspect of the political theory of constitutionalism. But once constitutionalism is conceived to be a practical working principle of government rather than some universal moral aspiration, the central issue ceases to be that of achieving consensus amongst the citizenry on the moral authority

of the principle. ... The challenge is that of establishing an institutional arrangement with the potential to establish a system of countervailing powers such that it is able to function in a way that bolsters mutual respect for the rules.¹⁷

The arrangements work well only if they are able to garner the support needed to ensure resistance to any intended breach of the basic constitutional rules.¹⁸

The foregoing principles operate not only in England but in other countries of Europe and beyond Europe too. That is how they can create peaceful and progressive societies. And these issues are not relevant only to progressive societies of Europe or any other part of the world but for a peaceful and progressing society anywhere.

The issue of the Rule of Law is not relevant only to well advanced countries as in the West but it is equally, if not more, is important to not so advanced or comparatively backward societies as in Asia and Africa or in several other pockets of the world. A paper contributed to the Festschrift in honour of Professor Yash Ghai by Professor Abdul Paliwala depicts its urgency much more in the countries of Asia and Africa, including India, than in the advanced countries of the West.¹⁹

In view of miserable condition of the Rule of Law through various special laws to deal with

the so-called criminals for minor or no crime at all the people are incarcerated for different periods overcrowding our prisons towards which the our current President made some remarks regarding specially the innocent tribbles who are kept in prisons indefinitely and who do not seek any relief from the court under the fear of their family members being tortured. Higher educational institutions such as Delhi University and National Law University of Delhi have conducted some research at different times that point out very clearly that people are being kept indefinitely in prisons without telling them as to what wrong they have committed for which they are being detained indefinitely. In any case like *Pedro v. Diss*, discussed above any person in our country must risk his life. *Ramlakahan v. Delhi Administration*²⁰ is a good example where a farmer from a village was detained under the anti-begging law for no sign of his being a beggar. Innocent people or criminals in fake encounters are eliminated without the possibility of any action against the state officials. Considering these and many more examples of torturing or killing of innocent persons or even of criminals is plainly against the Rule of Law. Therefore, we have yet to travel a long distance to achieve the goal of the Rule of Law.

Let us hope we realise these and many more deficiencies in our legal system and take appropriate steps to remove them as early as possible.

¹Dicey, A.V., *An Introduction to the Study of the Law of the Constitution*, Universal Book Traders, Delhi, 1994, pp. 202-203

²Sir Ivor Jennings, *The Law and the Constitution*, 60 (E.L.B.S. edition 1971 University of London Press).

³Ibid.

⁴*Pedro v. Diss* [1981] 2 All ER 59, at 64.

⁵J. Waldron, *The Law*, Ch. 3 The Rule of Law, 29 ff. at 52

(Routledge, London, and New York, 1990)

⁶Lord T. Bingham, *The Rule of Law* (Allen Lane, 2010, Published in Penguin Books 2011).

⁷Id. 17–18.

⁸Laughlin, M., *Foundations of Public Law*, Oxford University Press, 2010, pp. 312-13

⁹Ibid.

¹⁰Id. 314.

¹¹Ibid.

¹²Id. 317.

¹³Ibid.

¹⁴Id. 318.

¹⁵Id. 323.

¹⁶Ibid.

¹⁷Id. 340.

¹⁸Id. 341.

¹⁹Paliwala, A., *'The Rule of Law as resistance'*, p. 145 ff. in the Festschrift in Honour of Professor Yash Pal Ghai titled *Furthering Constitutions, Birthing Peace*, Published by Strathmore University Press 2021 at 145ff

²⁰(2007) 137 DLT 1073

The Rule of Law: Notes from a Lawmaker

*Meghnad Desai**

Introduction

To begin with, let me say that while I am honoured by this invitation to contribute to the collection on the Rule of Law. I am not a lawyer, nor have I ever appeared in the law Court either as a defendant, prosecutor, witness or Judge! I am, however, a lawmaker in my capacity as a member of the House of Lords. I have again, however, never served on the Executive side of any government in my thirty plus years in the House.

My contribution is therefore as an inexpert observer and sometime participant in looking at the working of the Rule of Law. My experience spans three 'regimes' or Nations. These are India, where I lived till my twenty first year (1961), then the USA (1961-1965) and now the UK (1965- to date). All the three regimes have a common heritage in terms of the Rule of Law. Both the USA and India have not only been colonies of the UK (called England, Britain, Great Britain, United Kingdom at various times). What is more, the political set up of both colonies has been shaped by their perception and understanding of the operation of the Rule of Law in British history. In the USA, the sources are to be found in the deliberation for framing the Constitution in Philadelphia, as well as in the Federalist Papers. In India, it was through the development of the legal practice and tradition built along the English

precedent and practice and then in the deliberations of the Constituent Assembly and subsequent history.

What is the Rule of Law?

That said, my contention will be that the robustness of the efficacy of the Rule of Law is very dependent on the political and social history of the Regime, whose case we are examining. In a sense, the Rule of Law is an ideal. In practice, we are concerned about it only when we see it violated and then engage in a struggle to see it observed.

The basic idea of the Rule of Law is that 'no one' is above the law. In a way, this is implicit in all the three Abrahamic religions. The idea in the Old Testament is that the law is given from above by God (via Moses bringing down the Tablets). There is only one God. No King can defy God. The Law represents God on Earth. The Hindu Idea is about *Dharma* which is the prevailing Order and the King has to preserve it. Kings frequently are seen to defy *Dharma* in the epics and as the Bhagavad Gita has Krishna say, he has to take human birth whenever he sees *Dharma* being flouted. There are, however, many differences between the two concepts which I shall leave aside for another occasion.

By 'no one' is usually meant the Executive power in the regime. After all, it is the Head of the Executive, the King, the President, the Prime Minister who can wield the power to

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punish while being safe from any agency to thwart such an action. That, after all, is what being sovereign means. It started with the power of the Monarch. In England, it began with the Civil war in the Seventeenth century during the 1640s, when Parliament organised an army to challenge Charles I. But more importantly, it was in 1688 that Parliament decided to remove James II (on the ground that he was a Catholic and England had broken off with the Roman Catholic Church) and invite his daughter Mary and her husband William of Orange to take the Crown. This was the Bloodless Revolution. Thenceforth, the head of the Executive was subject to control by the Legislature. From here onwards, Britain became a regime where the sovereignty lay with Crown in Parliament. The power of the King was contained.

A Detour through History (A short footnote)

This result of Parliament controlling the Kingship occurred in England before other European or Asian/ African countries, because of the economic developments in England. English history shows how the King became dependent on the merchants in the City of London for financing wars. The merchants, who lent the money, wanted guarantee that they would be repaid, whatever the power of the King.¹ They demanded Freedom for the City of London as a protection against the King. Thus arose (collapsing a history of centuries in a few sentences) a class of ‘burghers’, who were independent of the King.

Hegel writing in the Nineteenth century saw this as basic to the development of ‘civil society’.² Civil society was composed of three Estates - Clergy, the Burghers (Bourgeoisie)

and the rest. It was the fact that the King restrained himself in his rule over the Burghers, established the material basis of the Rule of Law. Hegel also saw the Civil service as a separate Estate disinterested and detached from the class-based Estates. The English neo Hegelians in the early Twentieth century were to influence the nature of the Civil Service built upon this basis of a disinterested Estate of the Civil Society. India, much more than the USA, adopted this idea in the Indian Civil (Administrative) Service. The Civil Service is, however, an arm of the Executive and cannot challenge it.

In a basic sense, the existence of a class within the civil society, which considers itself independent of the King, is fundamental to the idea of the Rule of Law. This is why it arose in England which had a very highly developed commercial society. Rest of Europe followed a separate path to the development of relations between King and civil society.³

The Spread of the English Idea:

Montesquieu, who wrote *Esprit Des Lois*, which surveyed different forms of government, misunderstood the nature of British politics. He believed that in Britain there was a separation of powers between the Executive, the legislature and the Judiciary⁴. This was an inaccurate reading of the arrangement whereby the House of Lords constituted itself as the highest court of the land. Thus legislature and judiciary were not separate but Executive and legislature were separate in the Seventeenth century.

The writers of the Federalist Papers did take Montesquieu seriously and decided that they would restrict Executive power by separation of powers between the Executive and the

Legislature and having an independent Judiciary. Even so, they allowed the President to nominate appointees to the Supreme Court, albeit to be approved by the legislature.

Head of State and Head of the Executive :

An important distinction between England and the other two regimes - India and the USA, is that the office of the Head of the State and the Chief Executive became separated over the centuries in England as power passed from the King to the Parliament, especially the Prime Minister as the Chief Executive. When the USA became independent, the two roles were combined in the King. It was against King George III that the Declaration of Independence was framed. Hence, the USA chose its President to combine both roles in the President, except that the President, unlike the King, had a fixed term and could only hold the post for two terms of four years by convention following the precedent set by George Washington which was broken by Franklin Roosevelt in 1940. Later the Constitution was amended to confine the Presidency to two terms. In India, the two posts are separate, but the President chosen by election is typically a member of (or at the very least, chosen by) the Majority Party.

This in effect makes the English example of a hereditary Monarch and an elected Prime Minister separate from that in the other two regimes as the Prime Minister can be restrained *in extremis* by the Monarch. In the USA, the President can be impeached by the Senate, but as we recently observed in the January 6, 2021 example with Donald Trump, the President can violate the Rule of Law. The verdict on that case is still pending.

In India, as we observed in the Emergency of

1975, the President complied with his Party leader. Of course, the law is that the Head of State acts on the advice of the Prime Minister. But the residual freedom that a hereditary Monarch has is not available in the other two regimes. (It would be recalled by readers of a certain vintage that the First President of the Republic of India, Dr Rajendra Prasad, had differences with the First Prime Minister Jawaharlal Nehru on this question of the powers of the Head of State.) If the Chief Executive breaks the Rule of Law, who is to judge? Is the judiciary sufficiently independent of the Executive?

Independence of the Judiciary:

Thus, technically, while the Rule of Law is foundational to both the UK and the USA, there is a difference in the institutional arrangements. Until 2005, when a Supreme Court was set up in the UK, the Lord Chancellor was Head of the Judiciary; a member of the Cabinet and presided over the House of Lords, violating all the tenets of separation of power. Independence of the Judiciary is ultimately about independence from the Executive. The lifetime tenure of Justices of the US Supreme Court is a solid guarantee of such independence. In India, while such independence is guaranteed, the power of the Executive to decide whether a qualified Judge (or in rare cases a lawyer) is promoted to the Supreme Court in Delhi or shunted off to the provinces endangers such Independence. Another aspect of the Indian apex Judiciary is retirement according to Civil Service rules. While many perks are retained in retirement, the Executive can always compromise independence of a Supreme Court Judge by promising post- retirement rewards. Such a precedent has already been established by the appointment of a Judge post- retirement to the Rajya Sabha. While the independence of the person involved

(whom I shall not name) has not been compromised in any way, once the precedent is established, independence of the apex Judiciary must always be watchfully guarded, lest it be compromised.

Since the idea of the Rule of Law comes from the English tradition, it is worth understanding that in the centuries since 1688, while the titles have remained the same, Executive power has passed from the Crown to the Prime Minister which means whoever leads the political party commanding majority in the House of Commons. What was called Royal prerogative now rests with the Prime Minister. So nowadays the issue of Rule of Law is whether the Prime Minister is subject to the law of the land. In British politics, again due to historical factors, the Prime Minister, has enormous powers as he controls the Executive and the majority party in the House of Commons (the elected House) which gives him control of Law making. Indeed, in a purely British type of Constitution (such as India has), the Prime Minister has more power than the President of the USA.

Extension of Franchise

The principle of Crown in Parliament as the basis of Sovereignty was established before the franchise was widely spread. Thus, when Edmund Burke was fulminating against the French Revolution in his *Reflections*⁵, the right to vote could be exercised by only 2% of the adult male population. Over the next two and a half hundred years, Franchise has been extended universally. The USA in fact has been the slowest in this respect, lagging behind India as the extension of franchise to African Americans did not take place till Lyndon Johnson's Presidency (1963-1968).

India uniquely is a pioneer in extending Universal Franchise at independence.

This development has impacted on the principle of the Rule of Law in a way which was not anticipated. Prime Ministers were chosen by the Monarch in Eighteenth century England, though typically they were sacked by a vote of no-confidence in the House of Commons. But now the Prime Minister is chosen by the Elected Chamber (in the UK and India) and not by the Head of the State.

From this development, it is an easy temptation for the Prime Minister to argue that s/he has been chosen by a majority of voters and hence is not subject to any supra-Democratic restriction. In effect, the logic is that it is not God who has bequeathed the law but the people and the Prime Minister has been chosen by the People. So, the Prime Minister is above any limitation. Indira Gandhi, the Prime Minister of India (1964-1977; 1980-84) used this as a doctrine of the mandate in imposing the Emergency.

Also this idea of the Law, not being given from above by God, but made by the people through their elected representatives is a major threat to the Rule of Law. It was Jawaharlal Nehru, the First Prime Minister of India, who in May 1951 introduced the First Amendment which abridged most of the Fundamental Rights listed in Chapter V of the Constitution by adding qualifications which made these rights conditional on qualification present in the Indian Penal Code. He claimed that he had to do thus because of the urgency of passing some socially radical legislation such as land reform. But in fact, it could be argued that he had reestablished the situation that prevailed under Colonial Rule⁶. The effect was seen

recently when Mamata Banerji, the Chief Minister of West Bengal subjected a citizen who had circulated a meme of her to prison for violating the law. Freedom of Expression was thus compromised. In many cases recently 'hurting the sentiments of a religious group' (often the majority religion) has been used as a ground for legal process against citizens.

In the USA, because it is a Federation, the franchise is often qualified by State Legislation. This impacts principally on the African Americans in the Southern States. (The State of Georgia is often in the news on this matter.) This is a violation of the Rule of Law despite the fact that the legislation is passed by a democratically elected legislature.

Conclusion

The paradox then of the Rule of Law is that while it was created to qualify the arbitrary power of an unelected Executive (The Crown), its extension into a Democratic age with universal franchise has given rise to new obstacles to its implementation. The practical effect here is not that the Rule of Law is negated, but that upholding it becomes a tougher challenge where the Civil Society has to have recourse to the Courts frequently or launch direct mass action (as in the case of African Americans) to fight to protect the Rule of Law against attempts by the Executive, elected by the people.

Eternal Vigilance is, indeed, the price of Liberty.

¹Dobb, Maurice *Studies in the Development of Capitalism*, Routledge, London, 1946

²Hegel, G.W.F. *The Philosophy of Right* (translated by K.M. Knox), Oxford, Oxford University Press, 1821/1958

³Dicey, A.V. *Introduction to the Study of the Law of the Constitution* Macmillan, London, 1915

⁴Montesquieu *Des Lois / The Spirit of Laws* (edited by

David Wallace Carruthers), University of California Press, 1794/1977

⁵Burke, Edmund *Reflections on the Revolution in France* (many editions since 1790)

⁶Singh, Tripudaman *Sixteen Stormy Days : The Story of the First Amendment to the Constitution of India*, Penguin Random House, 2020

Fundamental Duties: An Ignored Area of the Rule of Law

*Gourab Banerji**

The Rule of Law has many facets. Usually when this topic is discussed, the focus is on the fundamental rights of citizens as against the State, fairness in the application of the law, separation of powers etc. Very rarely is there any mention of Fundamental Duties. In fact, it would not be wrong to say that the Fundamental Duties are a forgotten chapter of the Constitution. Yet, in the present scenario, it is an area of the Rule of Law that requires to be discussed.

The late Chief Justice of India R.C. Lahoti delivered the Justice KT Desai Memorial Lecture on this very topic¹ on 15.7.2014. It makes interesting reading. A quotation from that lecture catches the eye. It reads thus:

“I could not have chosen a subject better than the Fundamental Duties; more so, when as a student of Constitution I find that in the judicial circles and amongst the citizens, a significant provision like Article 51A is found to be conspicuous more by its absence. It is a beautifully well drafted piece of Constitutional enactment. Every word is so well chosen and placed as if a gem studded in necklace! To me, these 10 duties sound like incantations of some holy book.”

Despite these pearls of wisdom, the reality is that most of us lawyers are ignorant of the content of Fundamental Duties. This article is

an attempt to fill that gap.

Initially, in the Constituent Assembly, in the sub-committee on Fundamental Rights, Professor KT Shah recorded a note of dissent. In his view, there was too much talk of rights and distressing silence in regard to duties. However, the Constituent Assembly did not think it appropriate to include any chapter on Fundamental Duties in the Constitution, as originally enacted.

Twenty-six years after the coming into force of the Constitution, the Government decided to include Fundamental Duties through the Forty Second Amendment. The history of its introduction is quite controversial. The All-India Congress Committee appointed a committee of thirteen members headed by former Foreign Minister Swaran Singh. Eight duties were formulated:

- (1) To respect and abide by the constitution and the laws.
- (2) To uphold the sovereignty of the nation and to function in such a way as to sustain and strengthen its unity and integrity.
- (3) To respect the democratic institutions enshrined in the constitution, and not to do anything which may impair their dignity or authority.
- (4) To defend the country and to render national service including military service when called upon to do so.
- (5) To abjure communalism in any form.

¹Senior Advocate

- (6) To render assistance and cooperation to the State in the implementation of Directive Principles of State Policy, and to promote the common good of the people so as to sub serve the interests of social and economic justice.
- (7) To abjure violence; to protect and safeguard public property and not to do anything which may cause damage or destruction to such property.
- (8) To pay taxes according to the law. However, then Congress government led by Prime Minister Indira Gandhi did not accept all suggestions or recommendations made by the Swaran Singh Committee.

The Swaran Singh Committee suggested that non-compliance of Fundamental Duties would be met with a sanction or penalty under the law and could not be challenged in a court on the ground of infraction of Fundamental Rights. There were protests against the aspect of sanction for non-compliance. In view of the protests, the Fundamental Duties as finally introduced, were made non-enforceable.

The contents of the Fundamental Duties were elaborately debated in the Lok Sabha. H.R. Gokhale, the then Law Minister, commented that care should be taken to see that in all stages of education, from the beginning till a future stage, these duties be part of the educational curriculum.

Initially, ten Fundamental Duties were introduced by the Forty-Second amendment in 1976 during the period of Emergency. The Forty-Fourth Amendment did not disturb these provisions. An eleventh Fundamental Duty was introduced by the Constitution (Eighty-sixth Amendment) Act, 2002 (w.e.f. 1.4.2010).

Each of the Fundamental Duties is briefly discussed.

Under Article 51-A(a), it is the duty of every citizen to “*to abide by the Constitution and respect its ideals and institutions, the National Flag and the National Anthem*”. According to the National Commission to Review the Working of the Constitution (“NCRWC”) in 2001, headed by M.N.R. Venkatachalliah, CJI, the ideals mentioned in Article 51A are those reflected in the Preamble, namely justice, liberty, equality, and fraternity. The Supreme Court has discussed the scope of protection to the national flag in *Union of India vs. Naveen Jindal*², and held that Indian citizens have the right to fly the flag under Article 19(1)(a). In its judgment, the Supreme Court refers to the Constituent Assembly Debates. The national flag was described as “*a flag of freedom not for ourselves, but a symbol of freedom to all people who may seek it*”³. In the *National Anthem* case, (*Bijoe Emmanuel vs. State of Kerala*),⁴ the Supreme Court explained that if proper respect is shown to the National Anthem when it is sung, it would not be right to say that disrespect is shown by not joining in the singing. The Supreme Court further stated at paragraph 27 that “*...our tradition teaches tolerance; our philosophy preaches tolerance; our Constitution practises tolerance; let us not dilute it.*” Though the issue was referred to a Constitution Bench, ultimately the Constitution Bench declined to go into the question.

Article 51-A(b) requires citizens to “*cherish and follow the noble ideals which inspired our national struggle for freedom*”. This was explained by the NCRWC as meaning to achieve freedom from foreign rule so that the people of India would have self-government

which would establish a society where there would be no exploitation of men by men, no poverty, no disease, no illiteracy.

Articles 51-A(c) and 51-A(d) enjoin citizens to “...*uphold and protect the sovereignty, unity and integrity of India*” and “*to defend the country and render national service when called upon to do so*”. This was referred to by the Supreme Court in *Sarbananda Sonowal v. Union of India*,⁵ while striking down the Illegal Migrants (Determination by Tribunals) Act, 1983 as contrary to Article 355. These fundamental duties assume relevance in the present milieu.

Article 51-A(e) calls upon Indian citizens “*to promote harmony and the spirit of common brotherhood amongst all the people of India transcending religious, linguistic and regional or sectional diversities*” and “*to renounce practices derogatory to the dignity of women*”. This is a Fundamental Duty of which citizens need to be reminded. Each aspect of this Fundamental Duty should resonate with every citizen. The Supreme Court in *State of Punjab vs. G.S. Gill*,⁶ commented that public administrators should get rid of all mental blocks on “*narrow considerations of caste, religion — sectional or regional*” and that they should have a “*wider concern for society as a whole*”. It is my opinion that these observations are not only true for public administrators but are equally important for citizens at large.⁷

Article 51-A(f) calls upon its citizens “*to value and preserve the rich heritage of the country’s composite culture*”. This duty emphasizes that our culture has various strands and is a composite culture. Citizens have a duty to value and preserve the rich heritage of this composite culture.

Article 51-A(g) exhorts Indians “*to protect and improve the natural environment including forests, lakes, rivers and wildlife and to have compassion for living creatures*”.⁸ This duty has been emphasized time and time again by the Supreme Court, including in the famous case of *Rural Litigation and Entitlement Kendra vs. State of U.P.*⁹, where limestone mines in the Doon Valley were shut down. It was observed thus:

“...Preservation of the environment and keeping the ecological balance unaffected is a task which not only governments but also every citizen must undertake. It is a social obligation and let us remind every Indian citizen that it is his fundamental duty as enshrined in Article 51-A(g) of the Constitution.”

Article 51-A(h) states that every Indian citizen shall have the duty to “*to develop scientific temper, humanism and the spirit of inquiry and reform*”. This was referred to by Justice Lahoti (as his Lordship then was), in his judgment in *AIIMS Students' Union v. AIIMS*,¹⁰ where institutional reservation at the PG super-specialty level was struck down.¹¹

Article 51-A(j) states that every Indian citizen shall have a duty to “*strive towards excellence in all spheres of individual and collective activity so that the nation constantly rises to higher levels of endeavour and achievement*.”¹² This Fundamental Duty seemingly echoes the words of Tagore- “*Where the mind is led forward by thee into ever-widening thought and action; Into that heaven of freedom, my Father, let my country awake.*”

As mentioned above, Article 51-A(k) enjoins a duty on a parent or guardian to “*to provide*

opportunities for education to his child or ward between the age of six and fourteen years.” This was introduced by the Constitution (Eighty-sixth Amendment) Act, 2002 (w.e.f. 01.04.2010).

At this juncture, it is apposite to recall the words of Mahatma Gandhi, who observed: “The true source of rights is duty. If we all discharge our duties, right will not be far to seek. If leaving duties unperformed we run after rights, they will escape us like a will-o’-

the-wisp. The more we pursue them, the farther they fly”

In conclusion, although it is true that Fundamental Duties are not enforceable, however the key to realizing them is awareness. It is high time that the contents of Article 51A be made required reading for all citizens: students, lawyers, politics, and the society at large. Indeed, Article 51A provides a charter to each citizen for an ideal to aspire to.

¹Justice Lahoti, RC, *Fundamental Duties- A Forgotten Chapter of the Constitution (Justice K.T. Desai Memorial Lecture)*, 1st Edition, 2015, Universal Law Publishing, New Delhi.

²(2004) 2 SCC 510

³ibid at paragraph 11. See also paragraphs 71-777, 80, 85, 88, 90.

⁴(1986) 3 SCC 615: Also see *Rangnath Misra vs. Union of India*, (2003) 7 SCC 137 (paragraph 4), *Shyam Narayan Chouksey vs. Union of India*, (2017) 1 SCC 421 and *Shyam Narayan Chouksey vs. Union of India*, (2018) 2 SCC 574.

⁵(2005) 5 SCC 665 at paragraph 82.

⁶(1997) 6 SCC 129

⁷Also see *Om Prakash vs. State of U.P.* (2004) 3 SCC 402, *Vishaka vs. State of Rajasthan* (1997) 6 SCC 241 and

Scheduled Castes and Scheduled Tribes Officers' Welfare Council vs. State of U.P., (1997) 1 SCC 701.

⁸See also *Sachidanand Pandey v. State of W.B.*, (1987) 2 SCC 295, *State of Gujarat v. Mirzapur Moti Kureshi Kassab Jamat*, (2005) 8 SCC 534 and *Akhil Bharat Goseva Sangh (3) v. State of A.P.*, (2006) 4 SCC 162.

⁹1986 Supp SCC 517

¹⁰(2002) 1 SCC 428

¹¹ibid at paragraph 58. Also see *Union of India vs. Moolchand Kharaiti Ram Trust* (2018) 8 SCC 321 (paragraph 68) and *Ramlila Maidan Incident*, In re, (2012) 5 SCC 1 (paragraphs 20-22, 278).

¹²Also see *Mohan Kumar Singhania vs. Union of India* 1992 Supp (1) SCC 594 at paragraph 41 and *Balaji Raghavan vs. Union of India* (1996) 1 SCC 361 (paragraph 36).

Dissent, Democracy and the Rule of Law

*Saurabh Kirpal**

One of the central tenets of the Rule of Law is consistency whereby institutions of the State are required to act in a manner constrained by publicly known norms. An important facet of this requirement is uniformity in judicial decision making. Rulings which are arbitrary or do not appear to follow past precedent or legislative and constitutional mandates violate this fundamental feature of the Rule of Law. So, what role do dissenting judgments have within this conceptual framework? Inasmuch as dissenting judgments detract from this institutional certainty, it would appear that there is no room for them in a country governed by the Rule of Law. This is because dissents reveal that outcomes of cases depend not merely on what the law is, but on what a particular judge feels the law is.

Yet, there is a strong tradition of dissents in our country and most of us intuitively feel that such judgments add rather than detract from the Rule of Law¹. In judicial lore dissenting judgments are often portrayed as voices speaking to the future, appealing to ‘the brooding spirit of the law’². The media also covers dissents in politically sensitive cases with nearly the same degree of interest as the majority judgment. It is therefore necessary to examine the legal and jurisprudential basis for valuing dissenting judgments.

What is the Rule of Law?

The Rule of Law can often appear to be an amorphous concept that can at times mean all things to all people. Nevertheless, there are two commonly accepted formulations of the Rule of Law - the formalistic and the substantive³. Lon Fuller has posited eight formal principles, which he terms the ‘inner morality of law’, that a legal system must comply with. These principles are generality, publicity, prospectivity, intelligibility, consistency, practicability, stability and congruence⁴. It is at once obvious that these principles have an instrumental worth necessary for efficient legislation⁵. However, as Fuller himself contended, these principles also have an intrinsic worth which respects the dignity and the agency of state actors as well as citizens of the country⁶. This ties into the second, i.e. substantive, conception of the Rule of Law which is not merely formalistic⁷. As is argued in this article, recourse has to be had to this substantive formulation if the practice of dissenting judgments is to be reconciled with the requirement of the Rule of Law. A purely formalistic or procedural view will be insufficient to justify the practice of dissent.

Despite differences about the fullest extent of the concept, there is consensus on its minimum content. And this is that the Court must declare ‘what the law is’ in a non-arbitrary manner. This requires that any judgment must be the decision of the Court

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and that the verdict must not alter depending on who the party before the Court is or what the constitution of the bench is – nothing screams uncertainty more than two opposing views taken by benches of the court which merely differ in the composition of judges. While it is commonly agreed that decisions of the court do vary in this manner, this is surely not in keeping with the ideal of the Rule of Law.

In fact, the ideal of the Rule of Law would require that the court, as a matter of institutional process, deliver verdicts which do not appear to vary according to the personal views of the judges. After all, as long as the Rule of Law requires a government of laws and not men, the views of the court should not vary depending on who the justices deciding a particular case are. Extending this argument, the very practice of dissent is antithetical to this ideal⁸. Dissents by individual (or group of) justices unequivocally demonstrate that judicial determination is dependent on the views of individual judges. If the determination by the court is neutral of its personnel, there should be unanimity in decision making. In fact, this was the practice of the Privy Council which issued no dissenting orders until as late as 1966⁹.

Dissent and Democracy

How then can the ideal of the Rule of Law, the image of lady justice with her eyes blindfolded delivering impartial and dispassionate justice, be reconciled with the reality that dissents disclose? And the reality is that the judicial decision making process is often one where irreconcilable views are held by judges. Since the purely formal conception cannot explain the attractiveness of the concept, we have to turn to its substantive formulation.

Even the formal view of the Rule of Law requires actors to act with dignity and recognise the dignity of others. This follows from examining the negative – only a state which is tyrannical will have laws which are arbitrary, opaque and applied inconsistently¹⁰. States which have a fundamental desire to conform to the values underpinning the Rule of Law will be ones which value, at the very least, the ability of an individual to plan and conduct her life with certainty. This is nothing but an aspect of human dignity. Further, the very concept of law, implicit in the rule of ‘law’, requires it to be the rule of reason and rationality. To quote Aristotle, law must be the rule of ‘reason without passion’¹¹. It is important to note that this does not imply any particular moral formulation, but this is merely a quasi-formalistic requirement. Rationality is not morality.

Thus, law must be the product of rational deliberation. The outcomes of any dispute are the result of reasoning from the axiomatic foundations of that legal system. Any democracy will have several incommensurable values within a legal system, for instance free speech versus ‘morality’. Reasoning on these irreconcilable beliefs will invariably lead to varying and inconsistent results. In other words, the very processes by which law is brought into action will yield disparate, and hence inter-se dissenting, results. In a democracy, governed by the Rule of Law, dissent is inevitable¹².

The Rule of Law requires that reasons for a decision be made public. This is to ensure that no decision, which is secretly arbitrary, is passed. Both appellate courts as well as the general public are assured of this only when the rational basis for any decision is taken.

Failure to disclose dissent may lead the public, a vital stakeholder in a participatory democracy, to conclude that certain plausible outcomes (as revealed in a dissent) have not even been considered. Such a judgment might plausibly be non-rational and hence contrary to the Rule of Law, at least in the eyes of the reader.

Dissenting judgments are merely a reflection of an institutionalized form of dissent, a subset of the larger right of dissent. It need not

function as dramatically as a ‘safety valve of a democracy’¹³, but judicial dissent still serves a larger purpose where a variety of opinion is expressed and made available for discussion. Thus, the right to give a dissenting opinion is not merely an instrumental virtue – an appeal to a future intelligence – but the result of deliberative process in a country governed by a rule of law. In the end, a Court should strive to ‘be ultimately right than consistently wrong’¹⁴. At least- till it is shown to be wrong again.

¹The most comprehensive discussion on dissents can be found in Nariman, ‘*Discordant Notes*’, Penguin Allen Lane, 2021

²The dissent of Khanna J in *ADM Jabalpur vs. Shivakant Shukla* (1976) 2 SCC 521, para 594

³A similar conflict arose between formal and substantive forms of due process in the context of the Article 21. The Supreme Court ultimately opted for the latter despite the wording of the Article as well the ‘original intent’ of the members of the constituent assembly. For an illuminating discussion, please see Rohan J Alva, ‘*Liberty after Freedom*’, 2022, HarperCollins.

⁴Fuller, L., 1964, *The Morality of Law*, New Haven: Yale University Press.

⁵Hart, H.L.A., 1965, ‘Book Review: Lon Fuller, *The Morality of Law*’, *Harvard Law Review*, 78: 1281–96.

⁶Fuller, L., 1958, ‘*Positivism and Fidelity to Law: A Reply to Hart*’, *Harvard Law Review*, 71(4)

⁷See an interesting discussion of the various ‘substantive’ theories in Waldron, Jeremy, ‘*The Rule of Law*’, *The*

Stanford Encyclopedia of Philosophy (Summer 2020 Edition), Edward N. Zalta (ed.).

⁸Stack, Kevin M., *The Practice of Dissent in the Supreme Court*, 105 *YALE L.J.* 2235 (1996). The author argues that the practice of dissent, while incompatible with the rule of law, can be justified as a demonstrative of the deliberative process.

⁹Judicial Committee (Dissenting Opinions) Order 1966. In *R v. Howe*, Lord Griffith suggested that in criminal matters, there should only be one judgment.

¹⁰Finnis, ‘*Natural Law and Natural Rights*’, Clarendon Press, 1980

¹¹Aristotle, ‘*The politics of Aristotle*’, Oxford University Press, 1948

¹²Covey, ‘*Dissent and the Rule of Law*’, *BYU Journal of Public Law* 81, 2022

¹³Per Chandrachud J in *Navtej Johar vs. UOI* (2018) 10 SCC 1, para 375

¹⁴Per Krishna Iyer J in *Bangalore Water Supply vs. Rajappa* (1978) 2 SCC 213, para 24

ICC Arbitration: Enabling Justice and the Rule of Law

*Claudia Salomon**

On 19 January 1923, a pioneering group of entrepreneurs who called themselves the “Merchants of Peace” established the International Chamber of Commerce (ICC) International Court of Arbitration (ICC Court). They wanted to promote peace and prosperity through cross-border trade. And they understood that to facilitate cross-border business, there needed to be a dispute resolution procedure that met the needs of global business.

For 100 years, the ICC Court has been unwavering in its purpose - to provide access to justice and the rule of law to everyone, every day, everywhere. Access to justice is a basic principle of the rule of law. When parties have access to justice, they have avenues of recourse; they have the necessary legal tools and mechanisms to protect their rights.

ICC has forged and continues to safeguard the legitimacy of arbitration and other alternative dispute resolution mechanisms with a truly international, independent and neutral ecosystem to resolve disputes. And ICC has played a seminal role in making arbitration the preferred method for resolving disputes between parties from different countries and jurisdictions and creating the legal architecture for the recognition and enforcement of arbitral awards, including the 1958 United Nations

Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention).

The ICC Court is the only arbitral institution that is truly international – not tied to any one geography or subject to shifting political winds. In 2021, ICC administered cases involving:

parties from 145 countries (with Indian parties in the top 10)

- arbitrators from 99 different countries
- with arbitrations seated in more than 125 different cities, and
- awards drafted in 13 languages

The amounts in dispute ranged from less than US \$10,000 to more than US \$27 billion, across a broad range of industries, with construction and energy matters equaling about 40% of the total caseload.

The ICC Court has provided a wide range of businesses (including small and medium-sized enterprises, and multi-national corporations) as well as states and state-owned enterprises with the tools they need to prevent and resolve their disputes.

Five Key Elements

There are five key elements of ICC arbitration, which enable access to justice and the Rule of Law:

*President, International Chamber of Commerce (ICC) International Court of Arbitration, which celebrated its centenary in January 2023

1. Independence and neutrality

Under the ICC Rules, every arbitrator must be independent and impartial, and the ICC Court is known to maintain these requirements to the highest standards. All prospective arbitrators are required to complete and sign a Statement of Acceptance, Availability, Impartiality and Independence, in which they are required to disclose any circumstance that might be of such a nature to call into question his or her independence in the eyes of any of the parties or give rise to reasonable doubts as to his or her impartiality. Any doubt must be resolved in favor of disclosure. More details about what must be disclosed can be found in the ICC Note to Parties and Arbitral Tribunals, paras. 22-36. If any party believes that an arbitrator lacks independence or impartiality, that party may challenge the arbitrator pursuant to Article 14 of the ICC Rules.

2. Enforceability

Scrutiny is a distinctive feature of ICC arbitration. No arbitral award is issued without the Court's approval. When scrutinizing the award, the ICC Court assures that the reasoning is clear, and that all of the claims and defenses have been considered. When scrutinizing draft awards, the Court also considers, to the extent practicable, the requirements of mandatory law at the place of arbitration.

The ICC Court engages in the scrutiny process to ensure that the award is as enforceable as possible, recognizing that enforceability is one of the key reasons why parties have opted for arbitration. Under the New York Convention, an arbitral award is enforceable nearly worldwide, with limited grounds for

challenge. More than 170 countries are now signatories to the New York Convention. By contrast, there is no international treaty in place for the recognition of foreign court judgments. As a result, enforcement of a court judgment will differ depending on each country's own rules and courts. For those business transactions where the counterparty (and their assets) are largely in a foreign country, international arbitration is the preferred method for resolving disputes because the New York Convention provides certainty regarding enforcement of any arbitral award.

3. Transparency

In the dispute prevention and resolution process, transparency enables the democratisation of information, consistency and a greater understanding and trust in the process, while still respecting legitimate expectations of confidentiality. The ICC Court has sought to increase transparency in several ways:

First, under the ICC Rules, any party may request the ICC Court to provide reasons for its decisions made on challenges, as well as for other decisions, such as *prima facie* jurisdictional decisions and consolidations. (Appx II, Article 5). A party's request for reasons must be made before the decision of the court – meaning parties do not know the outcome first (Appx II, Article 5(2)). The ICC Court can refuse to provide reasons in exceptional circumstances (Appx II, Article 5(3)).

Second, ICC and Jus Mundi joined forces in 2021 to make publishable ICC arbitral awards and related documents freely

available to the global legal community. Notably, any party can object to the publication of awards at any time, and any personal data in the awards and related documents is redacted via pseudonymisation or anonymisation where appropriate.

Third, since 2016, the ICC Court has published the names and nationalities of arbitrators as well as whether the appointment was made by the Court or by the parties and which arbitrator is the president of the tribunal.

Fourth, a provision was added in the 2021 rules, requiring the disclosure of any third-party funding arrangements. (Art. 11(7)). The rule applies to a "*non-party*" which has "*an economic interest in the outcome of the arbitration.*" As a general rule, parties do not disclose the existence of insurers and the new rule is not intended to depart from that position.

And fifth, in 2022, ICC and Jus Mundi broadened the scope of their existing partnership to enable wider access to ICC's dispute resolution expertise via Jus Mundi's international law and arbitration research engine. With over 7,500 documents, the ICC Dispute Resolution Library (DRL) is a key resource for international businesses, legal practitioners, and academic institutions that grants easy access to, and research within, the ICC Dispute Resolution Bulletin, ICC arbitral awards, ICC Institute Dossiers, ICC Commission Reports, the ICC Enforcement Guide, the Secretariat's Guide to ICC Arbitration, ICC Model Contracts, and special publications. In line with ICC's commitment to bolster transparency and

inclusion and support the dispute resolution community globally, the DRL now also allows a free download of the latest issue of the ICC Dispute Resolution Bulletin.

5. Efficiency

In 2018, ICC introduced its expedited procedures for streamlined arbitration with reduced fees, which has provided the answer to concerns about time and cost in arbitration. Under the expedited procedures, the case is decided by one arbitrator with a simplified procedure and a final award rendered within six months from the case management conference. These procedures automatically apply to cases under US \$2 million or US \$3 million, depending on when the contract was signed, and they have been a resounding success and extremely popular. In numerous cases, the parties have opted into the expedited procedures, even in cases where the amount in dispute is above the threshold.

The ICC arbitration rules also offer a procedure for parties to seek urgent temporary relief from an emergency arbitrator when they are unable to wait for the constitution of a tribunal. The emergency arbitrator must issue his or her order within 15 days.

And last year, the ICC Court launched ICC Case Connect, a pioneering digital case management platform to enable more streamlined communication and file-sharing among parties, arbitral tribunal, and ICC case management teams. The new digital platform efficiently stores all case documents and data in one centralized, easily accessible location, using swift and user-friendly

document sharing and new time-saving online forms for arbitrators.

Accessible anytime, anywhere, from any device, the user-friendly ICC Case Connect:

- enables arbitrators and counsel to swiftly and securely transfer case files;
- facilitates simplified case tracking by providing an overview of documents and recent activity across all ongoing ICC Case Connect cases; and
- provides arbitrators with updatable online forms to replace the currently used forms.

The launch of ICC Case Connect is a key milestone in ICC's ongoing drive to put those who use our services first and bring case management online. Committed to its role as a pioneer of dispute resolution and case management solutions, ICC will further develop the platform and its digital services in 2023.

Diversity and inclusion

Diversity and inclusion are central to ICC culture and values. Diversity in all forms is essential to the legitimacy of arbitration because the global business community rightfully expects decision makers to reflect its own diversity and values.

The ICC Court is the most diverse in history, with 195 members from 120 countries, and women in the majority, ensuring a full range of experiences and perspectives in its work.

ICC statistics for 2021 show measured progress in recent years to improve the gender balance of arbitrators, with women making up close to 40% of appointments by the ICC Court in 2021 – either upon proposal of an ICC national committee or group, or directly – compared to just under

30% in 2017. But in 2021, only 25% of arbitrators were nominated by the ICC Court. Just 17.5% of the arbitrators nominated by parties were women (compared to 12% in 2017) and 26% of the arbitral tribunal chairs nominated by the co-arbitrators were women (compared to 14% in 2017).

To that end, ICC has recently introduced standard language in its model letters to parties and co-arbitrators. The inclusion of new language in ICC model letters to parties, co-arbitrators, appointing authorities and ICC national committees is the latest measure taken by ICC to improve diversity in arbitration. The letters now feature language introduced on 1 January 2022 in the ICC Note to National Committees and Groups on the proposal of Arbitrators, encouraging diversity to be considered when proposing arbitrators. This includes but is not limited to racial, ethnic, cultural, generational and gender diversity.

In 2022, ICC was recognized for its work to make arbitration more inclusive, taking home the Equal Representation in Arbitration Pledge Award during the annual Global Arbitration Review Awards, for achievements in building an LGBTQIA network and launching the Task Force on Disability Inclusion and International Arbitration.

2022 is also the year when ICC reached gender parity of the speakers in its events both regionally and worldwide, a unique milestone in gender representation, showcasing that ICC is leading the way and contributes significantly to ensuring gender diversity in international dispute resolution.

Conclusion

Since the ICC Court was established in 1923, it has been committed to providing access to justice and the Rule of Law. With the adoption of the New York Convention, and the ability to enforce arbitral awards around the globe, arbitration has become the preferred method for resolving cross-border disputes. And the ICC Court is widely

recognized as the world's preferred arbitral institution.¹ The scrutiny process - a unique feature of ICC arbitration - ensures that ICC awards are the highest possible standard. As business relationships and disputes evolve in an ever-changing world, ICC's track record of innovation places it in the perfect position to lead the world of dispute resolution and prevention into the future.

¹2020 International Arbitration Survey by Queen Mary University

Rule of Law as Reason: The Case of India

*Harish Narsappa**

The Rule of Law is of recent vintage in India: it came into the lives of Indians along with the adoption of the Constitution in 1950. There is no universally accepted theoretical framework for rule of law. This is not due to lack of theories- there are too many, in fact, making it difficult for any researcher to do a through analysis of the theoretical underpinnings of the Rule of Law.

Categories of Rule of Law

There are two well-known analyses of the theoretical landscape: one by Judith Shklar and the other by Brian Tamanaha. Shklar broadly divides the theories into two archetypes: the Aristotelian archetype and the Montesquieu archetype. Both these archetypes treat the rule of law as a political ideal, but with differing characteristics and applicability¹. In the Aristotelian archetype, the Rule of Law is linked to an entire way of life, nothing less than the rule of reason contrasted with the rule of man². On the other hand, the Montesquieu archetype treats the Rule of Law as consisting of those institutional restraints that prevent governmental agents from oppressing the rest of society³.

Tamanaha classifies the theories into thick and thin (or substantive and formal) theories. Broadly formal theories emphasize the instrumental features of the rule of law,

features that any legal system must possess to function effectively as a system of laws. Typically, these features are (a) general applicability of laws; (b) laws must be clear, stable and prospective; (c) laws must be enforced and fairly applied; (d) the process of making and enforcing laws should be clear; (e) the laws must be reasonably acceptable to a majority of the populace; and (f) the institutions making and enforcing the laws should also be governed by the laws. Substantive theories begin with the basic elements of the thin theories and incorporate additional elements such as: (a) forms of political morality like particular economic arrangements; (b) forms of government and (c) conceptions of human rights⁴.

Thickest conception of Rule of Law

The Rule of Law runs like a golden thread through our Constitution⁵. The Preamble states that the people have resolved to secure for all of India's citizens, (i) social, economic and political justice; (ii) liberty of thought, expression, belief, faith and worship; (iii) equality of status and of opportunity, and to promote among them all (iv) fraternity, assuring the dignity of the individual, and the unity and integrity of the nation. A reading of the Preamble itself leaves us in no doubt that the Constitution embodies a thick version of the rule of law, as it does not talk generally about justice, liberty, equality and fraternity, but specific ideas under each of those terms. Part III and Part IV of the Constitution seek

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to give meaning to the aspirations and ideals set out in the Preamble⁶.

The Indian conception of the Rule is one of the most substantive formats ever conceptualised and written. At the same time, it does not fit into any traditional theoretical framework as it provides a central role to the state in almost all affairs of society, contrary to most western theories on rule of law. The emphasis on substantive rights, justice and equitable development goes against the accepted thinking of mainstream western theories. The choice of substantive equality as against formal equality, the imposition of a positive duty on the state to achieve social justice and attributing a primary role to the state in the realm of social justice and development go against the prescriptions and warnings of Dicey, Hayek, Raz, Unger and other theorists. While this assumption of a primary role by the state and the need for discretion to play that role meaningfully can be explained by historical circumstances, the continued leadership of the state in India even after 75 years indicates that historical choices are being reaffirmed continuously⁷.

The primary role of the state and its officers and the obligation on them to act reasonably and fairly to achieve substantive societal goals are more in the nature of the Aristotelian rule of archetype than the Montesquieu archetype. Aristotle's archetype involves a set of people, mostly judges, acting reasonably and against the influence of personal passions, taking the primary responsibility of upholding civilisational values. Along with fitting into the Aristotelian archetype, we could also argue that the Indian rule of law is part of the dream of equality and justice that the Constitution embodies, making it similar to Dworkin's argument that the rule of law is part of a larger theory of justice.

The Indian rule of law is heavily dependent on the personal and institutional reasonableness of the lawmakers, bureaucracy, and the judges in pursuing the substantive goals set out in the Constitution. However, this reasonableness is tempered by the principles in law and not by untrammelled discretion as feared by Unger, at least in the constitutional scheme.

Four Broad Themes

In my view, the Indian Rule of Law has four dominant themes:

First, we have a substantive concept of the rule of law including within it as discussed above.

Second, the Rule of Law is characterized by a constant search for reasonableness. The judiciary has not only repeatedly declared that arbitrariness is antithetical to the Rule of Law but also insisted that the Rule of Law requires all government actions to be reasonable. Judges have gone beyond the concept of fair hearing and other natural justice principles and suggested that clear exercise of reason is required to meet the Rule of Law test. Even the basic structure doctrine can be understood to be an extension of this demand for reason in all government institutions. It is not only the judiciary that has imposed its view on what is reasonable. The Parliament has also insisted that the judiciary be reasonable in its exercise of the power of judicial review and has fashioned the unique technique of the Ninth Schedule to save certain actions it deems to be reasonable.

Third, and closely linked to the search for reasonableness, is the desire to fashion a delicate balance between the Part III rights and the Part IV principles. The conflict between Part III and Part IV is at the heart of the rule of law debate between individual rights and substantive societal goals.

Fourth, judicial independence and judicial review have both derived strength from the rule of law principle and in turn added real might to the Rule of Law. The obsession of the judiciary with its own independence, coupled with its (general) desire to effectively exercise the power of judicial review, appears to have upheld and advanced the Rule of Law.

The discourse around these four dominant themes has eclipsed the more routine, but

equally important aspects of the Rule of Law. For example, certainty and equality in implementation of the law, two fundamental aspects face serious challenges and do not get the attention they deserve⁸.

It is time that we worked towards creating an Indian theory of the Rule of Law and examine the strengths of, and challenges faced by, the Indian Rule of Law.

¹Shklar, J.N., 'Political Theory and the Rule of Law', in S. Hoffman (ed.), *Political Thought and Political Thinkers* (Chicago: University of Chicago Press, 1998).

²Aristotle's views on the Rule of Law are primarily contained in his *Politics*. Aristotle, *Politics*, Book III in *Introduction to Aristotle*, edited by R. McKeon (New York: The Modern Library, 1992).

³See Montesquieu, *Spirit of Laws*, edited by D.W. Carrithers (Berkeley: University of California Press, 1977).

⁴Tamanaha, B.Z., *On the Rule of Law : History, Politics*

& Theory (Cambridge: Cambridge University Press, 2004), pp 91-113.

⁵Sorabjee, Soli, 'Rule of Law: An Unruly Horse? Some Reflections on Its Application in India', *The Round Table: The Commonwealth Journal of International Affairs*, vol 101, no. 4 (2012): 331.

⁶Narasappa, H., *Rule of Law in India, A Quest for Reason* (New Delhi: Oxford University Press, 2018), p. 38

⁷Supra, pp39-59.

⁸Supra, pp102-104.

Rule of Law and Today's Indian Citizen: The Expectation Mismatch

*Atul Sharma**

'Rule of Law' is something that cannot exist in vacuum. Its meaning must evolve in terms of the expectation of the society from the law-making and law-enforcing system. The theory of separation of powers between the executive, legislature and judiciary contained in the Constitution of India has served the Indian citizen immensely in upholding the Rule of Law, particularly, the protection of fundamental rights, notwithstanding the occasional conflicts between the three limbs of the constitutional democratic framework. The Indian Constitution has been an outstanding piece of grund norm adopted by the Constituent Assembly. The value of this document can be appreciated when contrasted with the recent developments in the UK, with the country deciding to exit from the European Union (colloquially called "BREXIT"). In the absence of a written Constitution, the British Government was uncertain about the method of deciding to ascertain the public will and they ultimately bypassed Parliament and went to the public in a referendum.

The separation of powers theory has clearly defined the role of the Court system and the Constitutional courts namely, the Supreme Court of India and the High Courts of different States (commonly called 'higher judiciary') have done yeoman service in upholding the Rule of Law when it comes to

protection of fundamental rights incorporated under Part III of the Constitution of India. This exercise has essentially been seen in the context of State actions and their validity vis-à-vis citizens' rights. Is this what Rule of Law means to the next generation (the millennials) and does it meet his expectations from the Indian judicial system? Apart from upholding the Rule of Law in the context of fundamental rights, the Indian courts have assumed another role as adjudicator of disputes, not necessarily arising out of breach of fundamental rights and this role has assumed equal, if not more, importance in the current times.

The justice dispensation system needs to be viewed through the eyes of young India. They desire a modern, efficient and transparent justice system as consumers of justice delivery service. Each citizen of India is a stakeholder of this system and is closely looking at the management of the Supreme Court and the High Courts.

Every bench of the Supreme Court is Supreme Court for every citizen of India. It makes no difference to them whether a judgement is passed by a Bench of two, three, five, seven or nine Judges. These are finer nuances of law. Lack of consistency between two different Benches of the Supreme Court while answering the same question has been one of the major factors that affects its credibility. One can cite numerous examples.

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A key part of an institutionalized governance system is unification of decision making process at different levels. Today's Supreme Court and High Courts are a conglomeration of learned judges. There may be a case for developing an institutionalized management system supported by a diverse administrative support group. Nothing prevents the Supreme Court from taking the advice of the best in the management business.

The justice dispensation system is going through an attack on its credibility by all and sundry notwithstanding the good intentions of the judges managing them. The case-load handled by courts and the endless hours spent by judges in handling these cases, getting the legal research done and writing reasoned judgements, goes unnoticed but drawbacks get highlighted. Until the 1980s, governance of courts was premised on conventions which were borrowed from the English Court system. These are no longer available. The vacuum has to be filled by a structured system of Governance.

Today, the entire debate centers around personalities and individuals and not the system. While quite a few steps have been taken to improve the justice delivery system but most of these are outward facing like computerization of records, electronic methods of dissemination of information to litigants. What is needed is a set of internal governance reforms. Governance is akin to management. Thus any parallel from successfully managed organizations like the neo successful business organizations have taught us great lessons in management. A number of methods of institutionalization can be learnt from these experiences by appointing best professionals in the governance system of the courts. For example: The Supreme Court

and High Courts need a full-fledged research wing manned by the best drawn from the academia, management schools and career policy makers.

One of the questions that is always raised is regarding the enlargement of jurisdiction by the Supreme Court and the High Courts under Article 32 and 226 of the Constitution of India. Lack of clarity with regard to the circumstances in which the jurisdiction can be enlarged has been a matter of debate.

Broadly, there are five kinds of disputes which come before the Supreme Court or High Courts under various provisions of the Constitution or other statutes. These are –

- (i) Public law matters which are essentially for the enforcement or protection of Constitutional rights and judicial review of administrative action(s);
- (ii) Disputes between two private parties, substantially originating in Courts subordinate to Supreme Court;
- (iii) The new breed of cases directly appealable to the Supreme Court or High Courts under economic and non-economic regulatory statutes like Telecom, Electricity, Airport Economic Regulatory laws, Competition laws, Prevention of Money Laundering Act, Intellectual Property etc.
- (iv) Criminal cases originating from subordinate criminal courts.
- (v) Cases under fiscal laws like Income Tax, GST Laws etc.

So far as the last four categories are concerned, there is no scope for limiting the

right to approach the Supreme Court or High Courts, as these are specific remedies vesting in a citizen under the relevant laws or are in the nature of private disputes. It is only in the first category that the indulgence of the Supreme Court and High Court can be limited in certain circumstances.

Revisiting the internal governance systems and the scope of jurisdiction of the higher judiciary will help not only in improving the perception of the higher judiciary but will also go a long way in improving its efficiency.

Economic Reform And The Rule Of Law

*Akshay Jaitly**

The Indian Republic will soon be 75 years old. Significant strides have been made since the Constitution was adopted, but much of India's economic potential is yet to be realised. Indian entrepreneurship is held back by the ideologies and systems put into place by the state to control the economy after independence. With a demographic dividend, a growing start-up scene and global corporations looking to reduce their dependence on China, India could see a period of sustained high growth. To capitalise on this, India needs a new round of economic reforms founded on the principles of the Rule of Law and aimed towards maximising the economic freedom of market participants.

What is the Rule of Law?

Lord Bingham, one the most important judges of his generation in the UK, provided a succinct and comprehensive articulation in his 2011 classic, *"The Rule of Law"*. For him, the Rule of Law comprised the following 8 principles.

- The law must be accessible intelligible, clear and predictable.
- Questions of legal right and liability should be resolved by application of the law and not the exercise of discretion.
- The laws of the land should apply equally to all, other than where objective differences justify differentiation.

- Public officials must exercise their powers in good faith, fairly and for the stated purpose, without exceeding the limits of such powers and not unreasonably.
- The law must afford adequate protection of fundamental human rights.
- Civil disputes should be resolved without prohibitive cost or inordinate delay.
- The adjudicative procedures provided by the state should be fair.
- The state must comply with its obligations in international law as in national law.¹

These principles apply not only to personal liberties and individual freedoms, but also to economic activity. Economic actors, including businesses and individuals, need to know what the law is. They need the law to be clear and relatively easy to understand and need to know that they can invest in accordance with predictable and durable rules. While state discretion cannot be eliminated, it must be limited, and its boundaries must be clear for businesses to understand. Such discretion must be exercised fairly and within the bounds originally contemplated. Government ministries and regulators should give reasons for their actions and not prevent economic activity arbitrarily. The legal system must resolve business disputes fairly and efficaciously. And finally, the state must stick to its promises.

Rule of Law and the economy from independence to 1991

¹ Founder Trustbridge

The relationship of the Rule of Law to the economy has been difficult. For over four decades, the post-colonial Indian economy was dominated by central planning, partly due to ideology and partly due to memories of scarcity during World War II. As a result, the state implicated itself in every aspect of economic activity, including production, distribution, sales and storage. This led to a tightly controlled and quite unfree system, based on industrial licensing, price controls, exchange control and import substitution.

Rohit De's excellent *'A People's Constitution'* evaluates the relationship between the state and the economy post-1950 in the context of India's emergent constitutionalism.² The requirements of a building a constitutional culture, which inevitably meant being concerned with the Rule of Law, often came into conflict with the post-colonial project of nation building and social justice, which interestingly also claimed their roots in the Constitution.

This meant that the post-colonial state had an uncomfortable relationship with individual property rights and was sceptical of free private enterprise. Violating laws dealing with the economy often had criminal consequences. These economic crimes were outside the scope of the criminal law and therefore not amenable to protections ordinarily afforded by criminal procedure and the state often sought, under these laws, to circumscribe key features of the Rule of Law for instance by shifting the burden of proof to the accused, providing for obligatory imprisonment for certain offences, confiscation of property, denying rights of appeal and summary trials.

It is true, as De argues, that this period also saw the development of the judicial review of

state action, which is an essential feature of the Rule of Law.³ However, on balance, the Rule of Law found itself playing a back seat to the state's desire to control the economy and this set the tone for the nature of the state's relationship to the economy, that continues to the present day.

The 1991 reforms and beyond

While much has changed since, many features of the post-independence relationship between the state and the economy still guide the instincts of the state towards business. The 1991 reforms did much to dismantle the license raj by reducing or removing import tariffs, removing most import licensing and price and quantity controls and delicensing industrial production.⁴ Foreign investment, generally with prior approval, was permitted in several sectors. While the reforms did lead to some changes in the role of the state and the structure of markets, opening up was still selective and usually aimed at fulfilling instrumental objectives such as greater foreign direct investment, rather than aiming for deep economic freedom.

Reforms continued through the 1990s and 2000s, along the same lines. And while the state did withdraw from some areas of economic control, it oversaw the creation of a vast array of regulatory agencies, meant to act independently.⁵ Aspects of the managerial role performed by the various government ministries in the past are now performed by regulators. Over time, many of these regulators have begun to behave like the ministries they were meant to replace, with at times attenuated accountability and not always in accordance with the principles of the Rule of Law.

Notwithstanding the reform efforts of the past thirty years, many features of the license-

raj and the state's mistrust of business still cast a long shadow. A comprehensive analysis of how this plays out is beyond the scope of this article but here are some examples.

Consents: While industrial licensing is largely a thing of the past, a number of permissions are still required to carry out many business activities. For instance, in 2016, the Brihanmumbai Municipal Corporation announced that it had *reduced* the approvals to set up 38 different businesses from 72 to 51.⁶ Opening a restaurant in Delhi as of 2020, required submitting 45 documents and obtaining 26 licenses.⁷

Compliance: “Jailed for Doing Business”, a monograph by ORF and Teamlease RegTech, claims that there are there are 1,536 laws that govern doing business in India.⁸ These laws contain the requirement for 69,233 compliances. And these compliances need to be communicated to the governments through 6,618 annual filings. An MSME with more than 150 employees faces between 500 and 900 compliances. Compliance is of course important, but cannot place excessive burdens on businesses

Criminality: Many economic laws still have criminal consequences – 26,134 of them, to be precise. ORF-Teamlease point out that of India's 843 economic legislations, rules and regulations, 37.7 percent carry imprisonment as penalties. Many of these criminal consequences relate to procedural failures, including mistakes in submitting information or delayed filings.⁹ A deeper analysis of these laws shows significant disproportionality between the severity of the non-compliance and the extent of imprisonment.

The heavy burden of compliance, combined

with criminal consequence of failing to do so, has at least two negative consequences. This incentivises rent-seeking behaviour from state agencies and dissuades many potential entrepreneurs from taking the plunge to start a business.

Contracts: An important area of economic activity in India involves private parties contracting with the state. These contracts are often poorly drafted with inefficient risk allocation.¹⁰ This leads to problems in contract management and frequent disputes. For instance, the National Highways Authority of India accounts for almost 40% of the cases that the Union Government is party to in the Delhi High Court.¹¹

State bodies routinely deny valid contractual claims¹², rarely settle disputes and tend to carry on litigation till all appeals have been exhausted, regardless of the merits of the case.

Confidence: The reputation of the Indian state and confidence in the Indian economy was deeply bruised by the Vodafone and Cairn retrospective taxation cases¹³. These matters came just as India was clawing back its reputation as a safe place to do business following the Enron debacle. This behaviour continues. A little over a year ago, the Punjab government passed a law cancelling the tariff clauses in validly signed power purchase agreements.¹⁴

So, when commentators speak of the need for second generation economic reforms,¹⁵ we must think hard about the principles on which this second round of reforms should be based. The phrase coined by the Prime Minister, “Minimum Government, Maximum Governance,” is surely shorthand for greater economic freedom, together with

clear and simple laws to govern economic activity. This view reflects the spirit of this quote attributed to Friedrich Hayek: *“Under the Rule of Law...the individual is free to pursue his personal ends and desires, certain that the powers of government will not be used deliberately to frustrate his efforts.”* This requires building trust between the state, the law and business. And the way to do this is by looking at economic reform with a Rule of Law perspective.

Valuing the Rule of Law

The Rule of Law is not just a good to have. It is no surprise to see that in the World Justice Project’s Rule of Law Index, countries that perform best on Rule of Law are also amongst the most prosperous in the world.¹⁶ While some countries may bristle at their position on such indices, investors often pay attention.

This index drills down on two indicators which relate more closely to the economy, regulatory enforcement¹⁷ and civil justice¹⁸ and the same pattern is observed. The World Economic Forum Index of Global Competitiveness also show a reasonable degree of overlap between competitiveness and the Rule of Law.¹⁹ The Heritage Foundation curates an Index of Economic Freedom.²⁰ Again, there’s high correlation between a country’s ranking on this index compared with its economic performance. The now discontinued World Bank Doing Business Report used to compare business regulation in almost 200 economies, ranking countries’ performance in several indicators such as starting a business, construction permits, property registration, contract enforcement and tax administration, amongst others.²¹ India, unfortunately, does not fare well in any of these indices.

A recent report attempted to evaluate the economic value of English law to the UK economy.²² This is interesting because the UK is considered to be a jurisdiction in which the Rule of Law is respected. This report is based on the principle that economic value is created by “gains from trade”. For transactions to take place, there must be trust between the parties and confidence in the outcomes if the parties do not stick to their bargain. This confidence comes not only from the reputation of the contracting counterparty but also faith in the underlying institutional environment. Uncertainty causes risk and risks lead to higher transaction costs as parties put a price to such risks. This also means that fewer transactions are likely to occur.

On the other hand, a legal system which performs well on Rule of Law leads to higher predictability and confidence for transactions to take place. Easily understood rules are provided and contracts are enforced quickly and fairly. Ultimately, this results in greater transaction volumes and value creation. The law and its enforcement, that is the Rule of Law, is a critical part of the plumbing through which these transactions flow. The study argues that the widespread use of English law in contracting for global transactions comes from the high level of certainty and predictability English provides and confidence in underlying institutional framework.

This faith in English law in turn leads to the greater use of legal services within the UK for international transactions. The use of legal services by international businesses generates significant value for the UK - the UK legal services sector alone generated a trade surplus of £5.9bn in 2019.²³ This is the direction in which India needs to

head, by altering the architecture of economic laws and regulation to embody the Rule of Law as enunciated by Lord Bingham. While short-term incentives and limited reform can bring some immediate benefits, deep and sustained gains will require a fundamental

commitment to making the laws governing the economy fair, clear, predictable, transparent and responsive. This will in turn require the state and regulators to change their default attitude of scepticism and mistrust towards markets and business.

¹Bingham, Tom. *The Rule of Law*. Penguin Books, 2011.

²De, R. (2018). *A People's Constitution: The Everyday Life of Law in the Indian Republic*. Princeton University Press. <https://doi.org/10.2307/j.ctv346n37>

³Ibid, p118, p121

⁴See for instance, Mohan, R. (2018). *India Transformed: Twenty-Five Years of Economic Reforms*. Washington: Brookings Institution Press and Rajagopalan, Shruti, The 1991 Reforms and the Quest for Economic Freedom in India (December 14, 2021). Capitalism & Society, Volume 15, Issue 1 (2021), Available at SSRN: <https://ssrn.com/abstract=3985599>

⁵Kapur, D and Khosla, M. *Regulation in India: Design, Capacity, Performance*. Hart Studies in Comparative Public Law. Bloomsbury Publishing, 2019.

⁶https://www.business-standard.com/article/pti-stories/bmc-brings-down-number-of-permissions-needed-to-start-biz-116022601270_1.html

⁷<https://economictimes.indiatimes.com/small-biz/sme-sector/more-documents-needed-to-open-a-restaurant-than-to-buy-a-pistol-says-economic-survey-2019-20/articleshow/73799670.cms>

⁸https://www.orfonline.org/wp-content/uploads/2022/02/ORF_Monograph_JailedForDoingBusiness_Final-New-11Feb.pdf

⁹There have been reports of the Cabinet approving a law to decriminalise what are termed as “minor crimes” by businesses in India. This is a good idea.

<https://www.businessworld.in/article/Cabinet-Approves-Bill-To-Decriminalise-Minor-Offences-Of-Businesses/17-12-2022-458464/>

¹⁰<https://www.bqprime.com/business/what-happened-to-the-spv-model-in-ppp-projects>

¹¹<https://blog.theeapjournal.org/2022/07/identifying-roadblocks-in-highway.html>

¹²Akshay Jaitly & Ajay Shah, 2021. "The lowest hanging fruit on the coconut tree: India's climate transition through the price system in the power sector," Working Papers 9, xKDR.

¹³<https://www.internationaltaxreview.com/article/2a6a9ipgp0eg9m706twjk/cairn-and-vodafone-pursue-talks-to-settle-indian-tax-claims>

¹⁴<https://www.bqprime.com/opinion/punjab-ppa-bill-indian-power-sectors-vodafone-moment>

¹⁵<https://www.orfonline.org/research/economic-reforms-2-0-recommendations-for-a-new-economic-agenda-for-india/>

¹⁶<https://worldjusticeproject.org/rule-of-law-index/global/2022/>

¹⁷<https://worldjusticeproject.org/rule-of-law-index/global/2022/Regulatory%20Enforcement/>

¹⁸<https://worldjusticeproject.org/rule-of-law-index/global/2022/Civil%20Justice/>

¹⁹https://www3.weforum.org/docs/WEF_TheGlobalCompetitivenessReport2019.pdf

²⁰<https://www.heritage.org/index/ranking>

²¹<https://openknowledge.worldbank.org/bitstream/handle/10986/32436/9781464814402.pdf>

²²<https://legalluk.org/wp-content/uploads/2021/09/The-value-of-English-law-to-the-UK-economy.pdf>

²³The City UK, 'Legal excellence, internationally renowned UK legal services 2020', November, 2020

Rule of Law and the Independence of Judiciary: Post-Retirement Assignments

*Ranvir Singh**

The beguilingly simple legal concepts – rule of law and independence of judiciary – developed in India, in the initial decades, in different silos, often not conversing with each other. In the formative years, the Indian courts simply referred to the rule of law without examining its juridical definition. In *Shrilekha Vidyarthi* (1991), the Supreme Court mined the rule of law from Article 14 of the Indian Constitution and declared the rule of law and non-arbitrariness as two constitutional ideals intertwined with each other. About a decade later, rule of law was given the high constitutional status of being part of the ever-evolving ‘Basic Structure’ of the Constitution.

In contrast, independence of the judiciary received juristic attention, even before the Constitution came into existence. Way back in 1829, Sir Peter Grant, then Chief Justice of the Supreme Court of Bombay, finding that the Writs issued by his Court were not being obeyed, passed an order, shutting down the court, till it was assured of obedience by the executive, in order to ensure independence of the judiciary. Coincidentally, around the same time, in the United States of America, President Andrew Jackson had made a public statement to disobey the ruling of the US Supreme Court handed down in *Worcester vs. Georgia*, by Justice John Marshal. Both countries have come a long way since then and today, it is difficult to imagine that the

executive could openly and flagrantly disobey the orders of a constitutional court.

Having secured for itself an assurance that its orders will be obeyed, the judiciary has, over time, consolidated other facets of its independence, ranging from security of tenure and salary to immunities in respect of judicial duties. These facets of independence get their foundational strength from the oath that judges take to discharge their duties – “without fear of favour, affection or ill-will”. While an independent judiciary ensures and enforces rule of law, by a rather circular logic, the rule of law requires the existence of an independent judiciary as one of its significant facets.

The judiciary, however, also grapples with the responsibility of ensuring people’s confidence in the judicial institutions. What is true for Justice, holds true for the judges and judiciary as well – the judiciary should not only be independent but also appear to be so. This appearance of independence arguably comes under a cloud when a judge accepts post-retirement assignments. The issue of post retirement assignments has received substantial attention from the multiple quarters. In one very visible case, Justice Ranjan Gogoi, who retired as the Chief Justice of India, accepted a nomination to the Rajya Sabha in less than five months of his retirement. Under Article 80(3) of the Constitution, the President of India, acting on the advice of the government, nominates

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to the *Rajya Sabha*, persons having special knowledge or practical experience in matters such as literature, science, art and social science. Justice Gogoi is the first judge to have been nominated to the *Rajya Sabha* under this provision and his acceptance of the nomination drew sharp reactions from the Bar as well as from civil society, who viewed this as a compromise of the ethical and moral standards expected of a member of the higher judiciary. In the recent past, two other judges of the Supreme Court – Justice P. Sathasivam and Justice Abdul Nazeer – accepted (gubernatorial) assignments, even before the ink in their judgments had dried.

As early as in 1958, the 14th Law Commission Report (LCR) had recommended a prohibition on putting retired judges back on the public payroll on the grounds that sitting judges desirous of such post-retirement engagement may be less independent of the Executive. This recommendation came at a time when, unlike today, the government was not even a major litigant before the Supreme Court. The 14th Law Commission, apart from addressing the issue of retired judges desiring to be on the public payroll, also expressed concern about judges taking to chamber practice after superannuation. It noted that “if judges are to be permitted to practice by giving advice after retirement, the public would be apt to think that in dealing with the cases of rich litigants whom they may hope after retirement to be asked to advise, the judges may not act impartially”. This note of caution sounded in the 14th LCR has not been paid heed to. More than 200 persons have superannuated from judgeship from the Supreme Court of India. A large number of them accepted statutory positions after superannuation. Some chose to go back to chamber practice and accept arbitration

assignments while a small minority took to politics. Only a countable few chose to retire peacefully and contribute to law by commenting on its growth and development by writing in newspapers and journals.

Judges of the Supreme Court retire at the age of 65; there is no gainsaying that these judges have a long experience in the administration of justice and constitute a valuable resource. It is therefore expedient that there be a legal regime to employ retiring judges in such manner that their reengagement in public office does not compromise – or is not seen to compromise – the independence of the judiciary. A workable system can be thought of to regulate the post-retirement assignments of judges superannuating from the Higher courts. The natural habitat for superannuating judges are the regulatory tribunals created by legislation that contains the “is or has been judge” clause, providing a legislative fiat for judges to be offered post-retirement employment opportunities. About these statutory tribunals, Arun Jaitley, as a leader of the opposition in the *Rajya Sabha*, while supporting the Bill (JAC, 2013) to amend Article 124 of the Constitution, mockingly said that the Parliament through legislation creates post retirement jobs for judges and if the parliament does not do so, the judges create such jobs for themselves. The sequitur of this comment appears to be the abolition of all tribunals, sending their cases back to the courts. But we have come too far to revert to this system; we are going to have tribunals and we are going to need judges to preside over them. In fact, a constitution bench of the Supreme Court has frowned upon the practice of adjudication by a bench of a tribunal that does not have a judicial member on it. So, on the one side, we have an elaborate adjudicatory machinery

that requires trained and experienced judges and on the other side, the criticism that the appointment of judges on tribunals and commissions compromises the independence of the judiciary.

The allegation that the Executive rewards Supreme Court judges for handing out favourable judgments is not a new one. The watershed decision in the development of constitutional law – the *Kesvananda Bharti* case – too had to suffer similar criticism when all the seven judges constituting the majority in the judgment (except Justice A.K. Mukherjea who died in office) were given some or the other assignment when the Janta Government came to power in 1977.

A few years ago, Justice R.M. Lodha, while addressing the Supreme Court Bar Association on the eve of his retirement, countered the suggestion made by Attorney General Mukul Rohatgi, that there would be a short interval between his departure from the Supreme Court and the beginning of his “second innings”. In an interaction with the press, he clarified that he personally did not find it appropriate for a judge of the Supreme Court or a High Court judge to accept a post-retirement assignment from the government. He however was of the view that if a judge were to accept such assignment, there should be a cooling-off period of two years.

Justice J.S. Verma, however, was rather extreme in his views on judges accepting post-retirement assignment – “in addition to the system providing for the appointment of persons of proven integrity as guardians of the constitutional values, there is also the need for constitutional safeguards to insulate them from possible executive influence through temptations in subtle ways, to

preserve judicial independence...The obverse of the constitutional guarantee of security of tenure and conditions of service is the obligation of such constitutional functionaries to the observance of a code of post-retirement conduct eschewing any such temptation.”

The problem associated with the lack of a regime to regulate post-retirement assignment of judges was pithily captured by Geoffrey Robertson QC in a report prepared on behalf of the International Bar Association, titled *Judicial Independence: Some Recent Problems* (2014): “One form of pressure that has gone unnoticed, but which offers a particularly powerful incentive for judges subject to early retirement to favour the government’s case, is the prospect of lucrative post-retirement employment on government inquiries or commissions. The most intellectually dishonest judgment I have ever witnessed came from a judge close to retirement, who unconscionably protected the corrupt son of the Prime Minister of a small island nation from having evidence of his guilt collected outside the country by a royal commission. I thought he must have been bribed, but when I later heard that the Prime Minister had appointed him to various commissions, it struck me that judges may turn their coats in the hope of future government favours to supplement their pensions.”

Justice H.R. Khanna, who became the hero of the opposition during the emergency, for writing a dissent in the Habeas Corpus case and who later resigned on account of supersession, was offered the ministry of law when the Chaudhary Charan Singh government was formed. Justice Khanna writes in his autobiography that Charan Singh took him in his car for the oath taking to the Rashtrapati Bhawan. Noticing his

glum silence, Charan Singh remarked that “he appeared to behave like a sheep being taken to the slaughter house”. When Justice Khanna returned home after being sworn in, he received a call from the Opposition’s L.K. Advani, who, after congratulating him, said “we feel that the star from whom we received inspiration has let us down”. Justice Khanna writes “the inner tension within me on accepting the office remained unabated causing me sleepless nights”. In three days, Justice Khanna resigned. This anecdote is an interesting reflection on how much things have changed as far as readiness to accept post-retirement is concerned.

A judiciary that is, and appears to be, independent is a cornerstone for any country’s claim of having a robust ‘rule of

law’ in place. If existing lacunae in the system permit for a dilution of this foundational principle, they need to be urgently fixed. A large part of the problem can be addressed by having a legislation regulating the acceptance of post-retirement assignments by judges. The legislation must necessarily provide for a cooling-off period. Additionally, raising the retirement age of the judges of the High Court and the Supreme Court may help harness and better utilizing the existing pool of judicial talent. For appointments on tribunals, there may be a case for creating a commission through a legislation, providing for a collegium comprising of judges, lawyers and representatives from the executive who would recommend names of retired judges for such appointments.

Rule of Law: A Precondition to Ease of Life

*Manish Lamba**

Rule of Law is a concept which has existed in some shape and form throughout the history of human civilization. No society would, or rather could have, ever existed without some kind of rules and regulations in place. There is little or no debate today, that the Rule of Law is essential and quintessential for any civilized society to create and maintain a state of harmony and equilibrium. The principle is derived from a French phrase '*la principe de legalite*' which states that the government is guided by law and not by men. There has been more consensus and a little debate with respect to the concept of Rule of Law. Nevertheless, it is difficult to define what it actually means. This principle although does not find its place anywhere explicitly in the Indian Constitution, however, it forms an integral and basic structure of the Constitution of India.

The common understanding is that king is not the law, but law is the king; the law is the king of the Kings. No matter how high you are, the law remains higher. The expression 'Rule of Law' was, for the first time in its present context, used in the 16th century by Sir Edward Coke, the Chief Justice in King James I's Reign. The concept has, however, existed in one form or the other since time immemorial. Thereafter, Prof. A.V Dicey further propounded the concept of Rule of Law in his classic book 'Law and the

Constitution', wherein he postulated that the term is guided by the following three principles: (i) Supremacy of Law; (ii) Equality before law; and (iii) Predominance of Legal Spirit.

The adoption of Rule of Law in India can be traced back to the Common Law emanating from English jurisprudence. The concept cannot be implemented in letter and spirit until all instrumentalities of the government i.e., the legislature, the executive, and the judiciary act in a just and fair manner, free from the gust of arbitrariness. Sir John Dalberg-Acton has rightly said, "Power tends to corrupt, and absolute power corrupts absolutely". Therefore, all the three organs of the government must act independently without conflicting with other organs' functionality, and at the same time work for the common good of the society at large. Such independence of the organs of the government is mandatory for keeping checks and balances against concentration of power in a single organ.

The Indian judiciary has played a pivotal role in ensuring that the principle of Rule of Law is upheld and the constitution to remain a living document through its various judicial pronouncements in important cases. There may have been some exceptions, but the exceptions do not make a rule but only perfect it. One of the interesting issues the Supreme Court was faced with was whether Rule of

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Law enshrined in any other provision of the Indian constitution other than Article 21? The Constitution Bench in *ADM Jabalpur* answered in the negative by a majority of 4:1. The only dissenting opinion was that of Justice H.R. Khanna who stood his ground, maintained independence of the judiciary, and without being overwhelmed by external political pressure observed as under:

“Even in absence of Article 21 in the Constitution, the state has got no power to deprive a person of his life and liberty without the authority of law. Without such sanctity of life and liberty, the distinction between a lawless society and one governed by laws would cease to have any meaning... Rule of Law is now the accepted norm of all civilized societies.”

The Indian judiciary rose to glory with the pronouncement of its judgment in the case *Kesavananda Bharti vs. State of Kerala*¹. In the said case, Rule of Law was held to be a part of the basic structure of the Constitution, and Parliament has the power to amend any provision in the Indian constitution other than the ones which form its basic structure. The powers of Parliament to amend the constitution are limited under Article 368. The same ratio was reiterated by the Supreme Court in the matter of Indira Nehru Gandhi vs. Raj Narayan².

An interesting case elaborating the functions of the organs of the government is *Keshav Singh vs. Speaker, Legislative Assembly and Ors*³. which deals with the concept of Rule of Law, the interaction between a common man, the three organs of the government including the President of India, and last but not the least, the fourth pillar of the government, the Press. What makes the case more gripping is the fact that it was the first and the last time that a

judgment had to be passed by no less than twenty-eight judges of the Hon’ble Allahabad High Court.

The case in question involved the participation of the Speaker of the Uttar Pradesh Legislative Assembly, the then Chief Minister, two sitting judges of the Allahabad High Court, the intervention by the then Prime Minister of India, Shri Jawaharlal Nehru, Presidential reference, and the Constitution Bench of the Supreme Court. In the said matter, the entire fiasco emanated from the contempt of the Uttar Pradesh Legislative Assembly merely out of a pamphlet. Keshav Singh, member of a Socialist Party had, along with his two friends, printed and published a defamatory article about one of the sitting MLAs of the Congress party. When the pamphlet was circulated in the assembly, the MLA claimed it to be a violation of his privilege and dignity. A formal resolution was passed in the assembly and the perpetrators were summoned to the assembly to answer their actions. Keshav Singh did not present himself before the assembly and as a consequence, was ordered to be arrested and brought from Gorakhpur in front of the assembly speaker. Keshav Singh was reprimanded to a week-long imprisonment both for his actions and inactions. Thereafter, on the penultimate day from his release from the District Jail, his advocate filed a *habeas corpus* writ petition before the High Court of Allahabad and obtained a bail order in favour of Keshav Singh. The state assembly, aggrieved by the involvement of the judiciary in its order, proceeded to take actions against all the people involved in its alleged contempt qua both the judges of the division bench who ordered Keshav Singh’s bail, the advocate who represented Keshav Singh, and Keshav Singh himself

Upon receiving the summon from the State Assembly, the learned judges approached the Hon'ble Allahabad High Court under Article 226, contesting the unlawful act of the state assembly and contended that the State Assembly had violated and was in absolute contravention of Article 211 of the Indian Constitution, in terms of which, no discussion shall take place in the legislature of a state with respect to the conduct of any judge of the Supreme court and High court in the discharge of his/ her duties. The matter was taken up for hearing by the bench of 28 judges of the Allahabad High Court. It was not just a symbolic gesture of solidarity by the entire bench of the Allahabad High Court, the Chief Justice in his statement suggested *"the legislature will have to decide to arrest all the judges if they really persist in that course of action."* The bench directed that the resolution ordering the arrest of the judges be stayed. The state assembly withdrew its resolution warranting the summoning of judges, however upheld their decision of summoning the judges to the assembly to justify their actions.

Considering the ongoing rift between the legislature and the judiciary, a presidential reference under Article 143 was made to the

Hon'ble Supreme Court to seek and settle the ongoing dispute between the two pillars of the democracy. The Hon'ble Supreme Court held that the High Court judges were acting well within their jurisdiction and were not in contempt of the state legislature on granting bail to Keshav Singh. It further stated that Article 226 gives the High Court power and jurisdiction to order release of a person for an illegal detention as the same is guaranteed under Article 22 of the Indian Constitution.

If one was to do a survey of various judicial pronouncements delivered by the Supreme Court and the High Courts of various states, one will come to the irresistible conclusion that Rule of Law has a prominence and predominance in the Indian legal system. However, as stated earlier, Rule of Law cannot be restricted to judicial pronouncements alone. It depends as to how various organs of the democracy, the citizens and the society work; how it plays out. Not all disputes or arbitrary decisions go to court. The success or failure of Rule of Law depends upon how easy it has made the interaction of the common man in the society with the government and its institutions. It is not the leading cases decided by the Constitution Bench but the ease of the life of a common life which is a determining factor.

¹(1973) 4 SCC 225

²AIR 1975 SC 2299

³AIR 1965 All 349

Rule of Law and the Changing Landscape of Bail

*Pramod Kumar Dubey**

“Bail, not jail” was a fundamental canon of criminal jurisprudence taught at every law school as being part of the basic principle of Rule of Law. There has, however, been a paradigm shift in the law pertaining to grant of bail, especially with introduction of the draconian ‘twin conditions’ in special legislations including the Prevention of Money Laundering Act, Narcotics and Psychotropic Substances Act, Companies Act, 2013 amongst others. This piece explores the development of law pertaining to Bail in the past 75 years.

First and foremost, it is necessary to understand that the word ‘bail’ has been derived from a French verb ‘bailer’ which means ‘to give’ or ‘to deliver.’ Bail is granted keeping in mind the objective behind arrest which is to ensure the presence of the accused before the court for the trial without any inconvenience. However, if the presence of the accused can be guaranteed without detaining the person, then it would be unjust to violate his right to liberty. Undisputedly, jails in the country are flooded with undertrials. Therefore, bail is a form of security deposited to appear before the court for release.

Hasty arrests, prolonged incarceration for under trial prisoners has been an issue

affecting the criminal justice dispensation for decades. In 1978, Justice VR Krishna Iyer, in the case of *State of Rajasthan vs. Balchand alias Baliya*¹ held that “Bail is rule, jail is an exception”. This precedent changed the landscape and provided that detention of an individual infringes his right to life and liberty as guaranteed under Article 21 of the Constitution of India. The main purpose of detention is to ensure easy proceedings by availing the accused for the trials without any inconvenience. Thus, if it can be ensured that the accused will be available as and when required for the trial, then, detaining the person is not necessary. Therefore, it was held that the provisions of the Code of Criminal Procedure, 1973 regarding the arrest of an individual must be interpreted in a sense that unless indispensable, detention of a person must be avoided.

In recent times, there was a growing trend to arrest the accused post chargesheet despite the accused cooperating fully with the investigation. In 2021 dealing with the same issue, the Supreme Court of India, in *Siddhartha vs. State of U.P.*² laid down guidelines and held that:

“Section 170 of the Code of Criminal Procedure did not require a police officer to arrest each accused person when a chargesheet was filed”.

It also held that the Magistrate shall on

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appearance of the accused exercise his powers under Section 88 of the Code of Criminal Procedure and the accused shall furnish bonds. The Supreme Court was also constrained to note that many trial courts across the country insisted on the arrest of the accused persons as a pre-requisite to taking a chargesheet on record, and held that this practice was misplaced and contrary to the protection guaranteed to the accused under the Code as also under Article 21 of the Constitution. This position was further crystalised in *Satender Kumar Antil v. Central Bureau of Investigation*.³

Another facet is the violation of safeguards envisaged under Section 41 and 41A of the Code of Criminal Procedure which set out the procedure to arrest without warrant and for issuance of notice to accused for appearance. The Supreme Court in *Arnesh Kumar v. State of Bihar*⁴ laid down guidelines

to be followed by investigating officers and observed that it is mandatory for the investigating officers to issue notice to the accused for appearance in cases where offence is punishable up to seven years. Despite the landmark judgment in *Arnesh Kumar* many courts across the country have flagged the issue of non-compliance of Arnesh Kumar guidelines. The Supreme Court again in 2021 held that non-compliance with guidelines laid down in *Arnesh Kumar* would be a ground for grant of bail.

The significant development in the law pertaining to bail has taken Indian criminal jurisprudence to greater heights. That said, there is still a prevailing issue of meeting the test of twin conditions in special legislations at the stage of enquiry and investigation. The draconian test has raised various issues and shifted focus to adopting a bail-specific legislation.

¹1977 AIR 2447

²2021 SCC online SC 615

³SLP (CRL) 5191 of 2021 dated 07th October, 2021

⁴(2014) 8 SCC 273

Lawyers' Training in Advocacy Skills and the Rule of Law: A Correlation

*Sumeet Pushkarna**

A question and its Importance

Are the process of 'Training in advocacy skills for Lawyers' and the concept and establishment of 'Rule of Law' related to each other?

The importance of this question arises for the reason, that if we conclude, that there is a serious level of co relation between the two, then it is imperative that training in advocacy skills, ought to be a perennial, dedicated long-term phenomenon of any legal practice, to enhance and uphold the Rule of Law.

Training in advocacy skills, should then be committed to continuance even post attainment of the law school degree and not be limited to a learning experience, which comes simply because of working hands on, in a job.

Examining the Co relation between Advocacy training and the Rule of Law

For examining any correlation in the quality of training of lawyers, and the concept of Rule of Law, we will first set out the essential contours or ingredients of the concept of Rule of Law.

Consequent to that we examine the criticality of the participation of Lawyers in that system of rule of law, to understand the importance

of training during the profession of law, as it may have a direct bearing on the quality of the Rule of Law.

Sequential connection between the Rule of Law and the Lawyers

One of the most important instrumentalities in any country, for the purpose of maintaining the robustness of the fences of the system of Rule of Law, are the Courts, as any challenge to the infraction of the Rule of Law is brought eventually to the Court of Law.

Most often, the local constitutional scheme of any country, would foster and ingrain, an access to the system of 'Justice', as a necessary end, for establishment and enforcement of the Rule of Law.

One of the most important organs, which assists and guides this institution of justice in achieving a legal decision, is the Bar.

The Advocates are an integral part of the Bar, and hence integral to the system of justice built for ensuring the Rule of Law.

This is the primary reason, we ought to invest efforts constantly, in training our lawyers with the best of Advocacy skills, so that the system of Rule of Law always remains strong, with better and better quality of assistance.

Rule of Law has a Global Context

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Many consider the term Rule of Law to be too generic and vague. However, it would be interesting to note from the article of Professor Sir Jeffrey Jowell, a KCMG, King's Counsel, and a Barrister¹, where he discusses the global reach of the Rule of Law.

"It is strange that the rule of law has not been universally regarded as a requirement of democratic governance. It has sometimes been called "an essentially contested concept" or derided as unduly vague, a concept that means something different to everybody, but nothing much to anybody- or an ideal for the developed world only..."

He then quotes the words of eminent jurist Soli Sorabjee², about the concept of global reach of the Rule of Law.

"Soli Sorabjee differed. He said:

... It has a global reach and dimension. ...In the words of the great Justice Vivian Bose of [the Indian] Supreme Court, the rule of law "is the heritage of all mankind because its underlying rationale is belief in... the human dignity of all individuals anywhere in the world."

On Ingredients of the Rule of Law, it continues to note;

"For a start, the rule of law is not vague. ...This was pointed out in an important book on the subject by Tom Bingham, one of the UK's great judges of the twentieth century, who identified the rule of law's essential features which can conveniently be summarized into these four: Legality, Certainty, Equality and Access to Rights.

Legality requires that we live under the law, not under man (or woman). There are rules which we must all obey...

Certainty requires that we should be able to have access to the rules that govern our lives, which should be clear as they can, so as to aid compliance...

Equality requires that the law must be enforced equally, against the privileged and powerful as well as the marginalized.

Access to justice, the fourth ingredient of the rule of law, springs it into life by providing that people have the right to challenge decisions made about them through the courts or other tribunals, which must decide after a fair trial before independent judges...

None of this is vague and Sorabjee rightly said, none of this addresses only some countries or some parts of the world. ..."

Falling from the above, it could therefore be said that in order to protect the Rule of Law globally, the important ingredients of this protection could be; the 'Rule according to law'; the 'Certainty of law'; the 'Equality in enforcement of law' and 'Access to justice'.

As noted above, since lawyers are an active part of the process of justice, they help achieve these four ingredients in any system of law and therefore they have a definitive role in the process.

Driven by the kind of natural on the job training in advocacy skills, that they have had over the years while dealing with the law and law makers, the lawyers are a good choice even for becoming political leaders themselves.

Lawyers as Natural Leaders

Lawyers invariably find themselves intricately involved in politics and the law. In her book, '*Lawyers as Leaders*'³ American jurist,

Professor Deborah L Rhode notes:

“It is ironic that the occupation most responsible for producing America’s leaders has focused so little attention on that role. The legal profession has supplied a majority of American presidents, in recent decades, almost half the members of Congress. Many of our nations most revered and most reviled public figures have been attorneys: Abraham Lincoln and Thurgood Marshall; Joseph McCarthy and Richard Nixon. Although they account for just 0.4 percent of the population, lawyers are well represented at all levels of leadership, as governors, state legislators, judges, prosecutors, general counsel, law firm managing partners, and heads of corporate, government and nonprofit organizations. Even when they do not occupy top positions in their workplaces, lawyers lead teams, committees, task forces and charitable initiatives. Yet rarely have these lawyers received training for leadership responsibilities. Although leadership development is now a forty five billion dollar industry and an Amazon search reveals close to 88000 leadership books in print, the topic is largely missing in legal education.”

This accordingly places the importance on the concept of the training for the lawyers in the field of law. The position in countries like India has been no different.

Around the times of independence of India, there have been leaders who had been lawyers. We had the likes of Barrister Gandhi who practiced at the Bar in South Africa for about two decades. Then we had Bhimrao Ramji Ambedkar, who was one of the major architects of our Constitution. We had statesmen like Sardar Vallabhbhai Patel, Jawahar Lal Nehru, C Rajagopalachari, CR Das, Madan Mohan Malviya, etc., who were all lawyers. Even very recently, we have had

the likes of Arun Jaitley and even now the current Vice President of India, who have been eminent members of the Bar.

The point being, that the lawyers have historically been natural leaders with their training and have always enjoyed eminent positions from the time of the formation of the country, its laws, and in manning the eminent public institutions. They have therefore, played a very vital role in making of the laws and the administering the political institutions.

Thus, considering the fact of integral participation of lawyers in the process of law, it may be safe to suggest, that whether in a local context or in a global outreach, the role of lawyers and the quality of their training will most likely and directly affect, the achievement of various ingredients of the ‘Rule of Law’, in any country and its political institutions which administer the justice.

Significance of Training for Lawyers

Training plays an important part in public administration of justice. Training for lawyers is important, as lawyers have a definitive role in administering public institutions. Law makers can make clearer law with the help of lawyers.

Better training to lawyers can help in better understanding the legal implications in any challenge before the courts and taking of a proper stand in matters before the court.

So, there is an integral and substantial interest in preparing lawyers as law makers and judges of future.

We are constantly training lawyers in taking up a competent part in making of law by

Parliament and Assemblies and by rule-making bodies for the subordinate legislation. Even the Constitution is a legal, social, political document which keeps evolving and lawyers play an important part in that.

Departments which are drafting the laws for any country are also manned and advised upon predominantly by lawyers. There is, therefore, a definite public interest element in training of the lawyers and the concept of effective 'Rule of Law'.

Lawyers also advise on running of business and enterprise. Their advice may directly affect the employees, investors and the infrastructure and quality of the service that the enterprise provides, and hence wise guidance is always required.

Lawyers also advise people intellectually on legal questions which are constantly presented on matters of public interest in a government which seeks to rule according to law.

It is crystal clear that the lawyers play a very vital part in:

- Serving the machinery of justice
- Utilizing the public time of the court
- Affecting the outcome of trials with the quality of assistance
- Having reliance placed by the courts on their submissions; and
- Helping in narrowing down the findings in disputes to real issues of fact and law

It thus appears that, these are all aspects which clearly and directly impact the various ingredients of the Rule of Law which have been discussed above.

Training for Advocacy may on its own

strength, look like being a personal objective for a lawyer, but on the contrary, it has a great public value. Something, which looks so private and personal, could have a great cascading public implication as it serves vital public institutions in the system of Rule of Law.

Advocacy Training is Dynamic in its Requirements

The importance, critical nature, implications, and value of continuously and adequately updating training skills for ensuring and upholding the Rule of Law, is also seen as most pronounced and profound, in a scenario, when the nation starts integrating commercially to international legal markets and systems.

When a nation starts globalizing commercially and makes attempts to integrate into commercial markets worldwide, the legal support system of the nation has also to suddenly cope up with issues of compatibility with international firms and varying legal systems of law. This also brings in the need to get greater specialization and in turn leads to greater commercialization of the cost lines for operation for lawyers and law firms.

When all this is happening and commercial survival is also an issue for the lawyers and law firms, it requires an even greater effort to continue to ruminate and focus on larger things like the continued maintenance and applicability of the 'Rule of Law'.

To exemplify, when about three decades ago, India started the process of liberalization and opening of its market to international sector, it suddenly led to a change in the nature and requirements of the legal profession for many of the lawyers as well, who were now locally

catering to the international sector, new inflow of capital and enterprise.

In such a scenario, the legal support system tends to suddenly get inundated with so many new commercial opportunities of serving international business requirements, that we may tend to miss out on constantly addressing our own rule of Law. If the lawyers' who cater to this new challenge, do not take this role seriously and do not adequately or continuously train for such new challenges, it would lead to the rule of Law being diluted due to the apathy of the legal community itself. This brings in the need and focus to continuously train and sensitise the lawyers, about their unique role as upholders of the Constitution and the rule of law, for this is probably one of the few professions, which offers the opportunity to do commercial work and also play a larger role in the society of bringing justice to the doorstep of the common man and help in upholding the 'Rule of Law'.

Part of the training would therefore, be for an immense need to sensitise the lawyers about their unique role as upholders of the Constitution and the rule of law.

Integrating Legal Training with the Globally Shifting Perspective of the Rule of Law

Today in a global perspective, 'The Rule of Law', may be continuously shifting as per jurisdiction and is hence also a dynamic concept in any Constitutional scheme, for which the legal and advocacy training will also suitably have to be adapt and be dynamic. This is for the reason, that today, in a constantly growing unified global economy and liberalized market regime, the different markets of various countries, which are

interdependent on each other, may have to integrate and harmonize 'Rule of Law' of different countries, where the 'letter of law' and legal system may be respectively different.

Letter of law and compliance to the locally applicable legal system being an essential ingredient of 'Rule of Law', the advocacy skills will also have to constantly adapt.

In our routine lawyering and overcome by the commercial aspects of daily practice, one may often forget, that a lawyer also serves a larger Constitutional objective which is for continuously working towards a more robust regime, geared towards ensuring the existence of 'Rule of Law'.

Training in advocacy skills may be a critical input in maintaining the quality of legal services offered in protecting the rule of Law and protecting the profession of law itself. Continuous training is required to ensure a strong regime for the enforcement of Rule of Law.

In my view, there is thus, always a great element of public interest in training for advocacy skills in any system of law.

Conclusion

Training for the Bar and at the Bar, is a very important aspect for establishment and improving the quality of the 'Rule of Law'. This is because, lawyers are trained for a profession, which has a great public role in distinct political institutions and systems of delivery of justice like the Courts. They help in making of laws in our Parliament and the legislative assemblies. They also advise the public and the private sector in running the business and enterprise.

Proper training helps in preventing waste of public time in useless litigation in courts and helps in building a reputation for the Rule of Law, where citizens will have greater faith in approaching the systems of law.

Good advocacy helps by sifting out the relevant facts and putting them in logical order, working out their possible legal consequences, and narrowing the questions which the court must decide. All this is integral to establishment of a strong system of Rule of Law.

Investing in advocacy is tremendously important as on a particular day, this skill set may turn the tipping point in favor of one party against the other, in an adversarial system, which serves the system of 'Rule of Law'. Enhanced advocacy skills with lawyers will therefore ensure that the largest commitment always remains to the quality of assistance rendered to Courts and other institutions serving in the system of 'Rule of Law'.

There is thus a most apparent co relation, between the advocacy training for lawyers and the establishment of the concept of the 'Rule of Law'. There may be a definite public interest element in this private training in advocacy skills.

If you ask an average man on the street, as to which profession may help the law breakers the most in learning about avoiding the Rule of Law, a common answer, which is likely to come from many would be: 'lawyers'.

Conversely and paradoxically, the answer to the question remains the same when the question is flipped, and it is asked, as to which profession can help the best, in ensuring the

firm establishment of the rule of law.

A possible paradox in duty to the client being more important than the duty to the system of law often arises because it is considered by some, that a lawyer probably first owes a professional duty to his client and only thereafter to the system of law.

However, a well-trained lawyer can often ably balance and advise his client, about the larger picture and eventually the likely outcome, because of which the frivolous litigation may be reduced and load upon the public institutions may be reduced.

Conversely, it is also to be understood that if the overall system of justice fails, then it will defeat the very practice and the profession of law and consequently also in turn, dry up the sources of earning, which may come from the client.

It is therefore important to maintain this equilibrium in giving advice to the clients and hence learning enhanced advocacy skills will ensure that each time this exercise of balancing private versus public interest is to be done by a lawyer, it is done in a properly balanced manner allowing the Rule of Law to flourish, so that on each infraction of the Rule of law, there is a greater faith for the litigant, in approaching the system of law. This will eventually build even greater credibility for the profession and bring increasing numbers to the Courts for justice, even if one were to take it in a purely commercial perspective.

Too many of us, too much of the time are so engrossed in the individual lawyering and its commercial aspects, that we may ignore the required sensitivity to the Constitutional spirit and the imperative to continually work

and train ourselves towards the enhancement of the Rule of Law. Many or most of us are stuck with the daily lawyering in a way that we may forget our role as the upholders of the Constitution. We must remember that the Constitution in any setting, is simply not a fixed letter document, but is rather dynamic in a global perspective today and integral to the Rule of Law.

It is therefore very apparent that the training in advocacy skills for lawyers, has a clear, tangible, and subsisting and cascading impact on the establishment and continuance of the Rule of Law. Training in advocacy skills and the rule of law, definitively and integrally appear to relate to each other.

¹V. Sudhish Pai, Soli Sorabjee, *A Great Maestro* (Law and Justice Publishing, 2023); pp 361-362; contribution by Professor Sir Jeffrey Jowell KCMG QC Barrister and Emeritus Professor of Public Law, University College

London.

²*Ibid*

³Rhode, Deborah L, *Lawyers as Leaders* (Oxford University Press, 2013)

Arbitration and the Conundrum of Rule of Law

Shashank Garg^{1*}

Evolution of Rule of Law

“Rule of Law” has a long history. Since centuries, the principle of Rule of Law has been interpreted all around the world. While Rule of Law has been adopted and followed by both ancient and modern civilizations, it was developed as a concept by Aristotle², followed by many other scholars including Locke³, Dworkin⁴, Fuller⁵ and Dicey⁶. At the outset, Rule of Law appears to be a concept of legal philosophy for the use of jurists and academicians only, however, limiting it to a glorified philosophical concept will be a great travesty to the actual realm and practicality that Rule of Law entails even in today’s modern legal practice.

Rule of Law is the fundamental component that supports the foundation of a free society. In simple terms, Rule of Law means that all persons, entities and institutions within a society (including both private and public) are subject to and bound by the law. It would be safe to say that this simple definition, however, is deceptive and has blurred over time.

In the Indian context, Rule of Law has its strong roots in the ancient history wherein during the second century, the *Brahmins* drafted the laws and the legal text based on rules and principles which were existing as

part of traditions, tracing their sanctity to *vedas* which were crafted more than a thousand years earlier.⁷ Thus, historically, the kingdoms in India followed the time tested principles of *vedas*, *smritis* and *dharamshastras* which attained crowning glory and significance in both political and socio-legal systems of the state. While the rulers were entrusted with the power to dispense justice, they were often reminded of the four-corners of the *dharma* to ensure that justice is not king-centric and is rather driven by Rule of Law.

In the celebrated work of Late Lord Bingham⁸, one would find easy to understand and easy to adopt tenets of Rule of Law which he has termed as “strands”, when woven together will produce the fabric of Rule of Law. The following eight building blocks of Rule of Law are helpful in setting out the parameters for ideating the relevance and application of Rule of Law in the dispute resolution space:

- i. The law must be accessible and so far as possible intelligible, clear and predictable;⁹
- ii. Questions of legal right and liability should ordinarily be resolved by application of the law and not the exercise of discretion;¹⁰
- iii. The laws of the land should apply equally to all, save to the extent that objective differences justify differentiation;¹¹

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- iv. Ministers and public officers at all levels must exercise the powers conferred on them in good faith, fairly, for the purpose for which the powers were conferred, without exceeding the limits of such powers and not unreasonably;¹²
- v. The law must afford adequate protection of fundamental human rights;¹³
- vi. Means must be provided for resolving, without prohibitive cost or inordinate delay, bona fide civil disputes which the parties themselves are unable to resolve;¹⁴
- vii. The adjudicative procedures provided by the state should be fair;¹⁵
- viii. The Rule of Law requires compliance by the state with its obligations in international law as in national law.”¹⁶

Chief Justice Sundaresh Menon in his article¹⁷ on arbitration and Rule of Law has broadly divided Rule of Law into formal and procedural aspects. According to him, formal aspect encompasses the content and enactment of laws. In other words, laws must be unambiguous, have practical and general application, making them consistent and less prone to frequent amendments. Additionally, laws must be publicized and applied in a way that is in consonance with their purpose, intent and content. These attributes can be extrapolated to make them applicable to the mechanism of dispute resolution, i.e., consistency in the outcomes of the dispute resolution process which also have practical applicability and are reported in journals, unambiguous and stable processes of dispute resolution, etc. On the other hand, procedural aspects deal with the processes by which adjudication of disputes is undertaken. Dispute resolution should be accessible, systematic, structured, fast and economical. Procedural aspect also includes the application of principles of natural justice.¹⁸

The need of Rule of Law is paramount as it helps in curbing the arbitrary exercise of power by the adjudicating authority¹⁹ and promotes a person's right to liberty and dignity by defining the parameters of acceptable actions.²⁰ In essence, the purpose of Rule of Law is legitimacy which in turn depends on the litigants' acceptance of the decision-making process. People would show faith and confidence in the adjudicating processes only if the processes follow and abide by the principles of Rule of Law. By adhering to Rule of Law, legitimacy is ensured as it is believed that decisions would be based on sound application of law and facts by following the norms of procedural fairness. Rule of Law thus promotes and reinforces the effectiveness of the law itself, which is applicable to state and private institutions, entities and people alike.

Rule of Law and Arbitration: A Symphony

Arbitration has become a preferred choice for dispute resolution system globally and 172 countries²¹ adopting New York Convention on enforcement of awards is a live testament of the same. The popularity of resolving the disputes by arbitration and rising expectations of the parties necessitates that Rule of Law be followed in order to ensure fair adjudication of the disputes. Party autonomy stands tall as the cornerstone of the arbitration mechanism and thus often requires a self-regulatory mechanism to ensure that there is sanctity and legitimacy of the whole process.

Broadly, there are three school of thoughts that covers the field on whether the principles of Rule of Law are being applied in the realm of arbitration. The first set of jurists believe that through the operation of instruments such as New York Convention, UNCITRAL

Model Law on International Arbitration, 1985 and arbitral rules of institutions, there is already a rich jurisprudence and foundation of Rule of Law in arbitration. On the other hand, the second set of jurists believe that although these instruments do have certain provisions for ensuring that arbitration conforms with Rule of Law, there is a need of greater elucidation and adoption of better practices to maintain the standards. The third set of jurists, however, have put forth concerns regarding non-application of principles of Rule of Law and have even stated that arbitration runs on an impaired model of Rule of Law.

It will be interesting to see if these three schools of thoughts can be harmonized to ascertain whether and how much the Rule of Law is being embraced by the arbitrators and the arbitration community. To reach a conclusion, it is necessary to first understand the role of arbitrators and the purpose of arbitration proceedings and to what degree an arbitrator's role and duties are comparable to that of a judge in a court of law. The Rule of Law may not play a central role in the work of arbitrators because they are appointed by the parties involved and perform a function that is primarily based on contracts for those parties in private, whereas judges carry out a constitutional function that affects everyone and is carried out in public.²² Arbitration being a system of dispute resolution has to inevitably dispense justice, however, most legal systems accept that rules of equity and good conscience are not formally applicable unless parties decide otherwise.²³ This means that arbitrators perform a very similar function of a judge but are obligated to adjudicate purely on the basis of contract and pleadings in order to ensure that the award is primarily based on commercial sensibilities

rather than arbitrator's notion of justice.

Arbitrators are also commonly referred as private judges as they are paid for their work directly or indirectly by the parties nominating or appointing them but this does not mean that parties can exert any control over the arbitrators in the decision-making process other than setting out or agreeing to a procedure to be followed in the arbitration. Once the award is made, the same is tested in the courts of law and has to pass the rigors of the national law applicable to setting aside and/or enforcement proceedings. Thus, neither the process of arbitration nor its ultimate outcome in the form of an award can be treated as informal in the eyes of law, it would have to invariably integrate with the principles of Rule of Law to maintain sanctity and legitimacy as required by national laws as well as international conventions such as UNCITRAL Model Laws, New York Convention, etc.

Rule of Law in Arbitration: Role & Restrictions

If a party to arbitration is dissatisfied with the award, it may seek to set the decision aside by demonstrating that the arbitrator has not followed due process or has acted in contravention of the public policy, both of which are species of the concept of the Rule of Law. This may be done by showing that the arbitrator acted in an unfaithful or partial manner, was not acting in good faith, or failed to act in accordance with the agreement of the parties to the arbitration, etc.

In determining whether Rule of Law has been violated, a court must examine both the submissions and the award to determine if the arbitrator has exceeded its powers. If an award conforms to the submission, a court

will not vacate it. Generally, it will be easier for courts to determine if an arbitrator has exceeded his authority than it will be to prove manifest disregard of Rule of Law. However, the court must also consider other factors in determining whether an arbitrator has acted in bad faith or otherwise acted in violation of the rules. In a case, Paris Court of Appeal found that a tribunal exceeded its power by awarding a party damages in an amount that were significantly higher than the damages claimed, thereby setting it aside.²⁴ The duty to act in good faith is certainly an obligation cast upon the Arbitrator and but it has the potential of creating the dangerous due process paranoia.²⁵

Due process of law is the application of all legal rules and principles pertaining to the case so that all legal rights that are owed to a party to the dispute are respected. Due process paranoia is manifested in arbitration as to keep away from any allegations of arbitrator acting in bad faith there is excessive willingness of tribunals to condone disruptive behaviour by counsels this stems from the fear of the award being set aside by the court.

There are numerous examples of disruptive behaviour adopted by counsels such as repeated request for extension of deadlines, late submission of fresh evidence, request for amendment of claims at later stages of the proceedings, filing of new and irrelevant documents, late submissions, etc. If an arbitrator is confronted with due process complaints, they will tend to be unconsciously biased, either in favour of the complaining party (feeling the due process pressure) or in favour of the opposite party (out of frustration).²⁶ These kinds of seemingly trivial concessions tend to harm the integrity of the proceedings greatly.

In arbitral proceedings, due process and efficiency can both be maintained without compromising on either. These principals are actually aligned with each other rather than being in opposition. Focusing disproportionately on one principle at the expense of the other can compromise an arbitrator's ability to pronounce a sound and accurate award.

Arbitration as a process is driven on the will of the parties and therefore creates a free market set up where the users will continue to choose and use arbitration, till they can trust the process to be fair, efficient and effective. Therefore, a balance must be achieved between efficiency and due process to ensure that litigants do not lose faith in this adjudicating process. If the process is costly and time consuming, then the purpose would not be served. However, the process must be sanitized from apparent abuse in the garb of due process and fairness. For example, UNCITRAL Model Law provides that "*The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case*"²⁷, however, full opportunity to present one's case does not mean that a party can obstruct the proceedings by dilatory tactics.²⁸ Tribunal's decision on matters of procedure is in fact the most common and effective parameter applied by courts internationally to determine whether that decision has merely caused an inconvenience or actually violated a party's right.²⁹

Internationally, arbitrators often assert procedural discretion in matters not agreed upon by the parties.³⁰ For instance, Article 19(2) of UNCITRAL Model Law allows the arbitral tribunal to conduct the proceedings as it considers appropriate. Similarly, Section 19 of the Indian Arbitration and Conciliation

Act, 1996 goes a step further to make the Code of Civil Procedure and Evidence Act inapplicable while maintaining the same discretion as given in UNCITRAL Model Law. This discretion has also been upheld by various courts.³¹ However, this discretion needs to be exercised in consonance with the duty to act with efficiency.³²

When the award is challenged, the courts should apply the test of reasonableness by ascertaining whether the tribunal's conduct/decision was reasonable or not rather than what would the court have done.³³ Courts have often applied a very high threshold for interference and thus, are reluctant to substitute their view with that of the tribunal till the view taken by the tribunal is a plausible view even if not the same view as that of the court.³⁴ It is commonly seen that arbitral tribunals give in to the unreasonable demands of the parties/counsels due to the fear of the award being set aside by the court. Interestingly, the empirical data suggests that courts rarely overturn the arbitral awards on the grounds of due process.³⁵

Another crucial aspect enabling application of Rule of Law in arbitration is the fulcrum from the 'Confidentiality vs Transparency' debate. As most jurisdictions have based their domestic legislations on the UNCITRAL Model Law, which has no clear provision for confidentiality, it allows parties to decide whether or not they want their proceedings to stay confidential, for this the parties are free to include a clause in their arbitration agreement. The absence of standardized guidelines regarding confidentiality in arbitration cases has resulted in varying laws across jurisdictions regarding whether or not arbitration proceedings should remain confidential.

Unless there is an explicit agreement for

confidentiality, there is no inherent duty to keep the proceedings/award confidential in United States, Australia, and France.³⁶ In contrast, in India, confidentiality is part of the domestic law in a non-derogable form³⁷ and on the other hand some of the leading institutions have made it an opt-in provision.³⁸ Undeniably confidentiality is important to protect the interest of the parties where there is a potential of commercial damage however, it also breeds the great danger of abuse of process and in turn impinging the very essence of Rule of Law. In the words of Jeremy Bentham, "where there is no publicity there is no justice. Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity."³⁹

With increase in investor state treaty arbitration disputes and commercial arbitration disputes involving state and state-undertakings, it is increasingly becoming important that the subjects of the state that is the public at large must not be kept in dark about these proceedings and their result. It is from the taxes paid by the public that the state satisfies a monetary award and thus should not press for confidentiality. Rule of Law is intrinsically connected to transparency and thus with some restrictions it is possible that a balance is struck between the need of the parties to keep certain matters confidential and the need of Rule of Law to bring in more transparency in the adjudication process adopted by the arbitrator.

'Rule of Law in Arbitration' in India

As discussed before, the flexibility in choosing the procedure and conduct of the arbitral proceedings which is both in form of party autonomy and very often guided by the arbitrator has the potential of enabling the stake-holders to unknowingly overstep and create a conflict with the Rule of Law. This

creates interesting situations where Indian courts have to strike a balance between party autonomy, powers of the arbitrator and the Rule of Law. Supreme Court of India has held in many cases that the Rule of Law in arbitration requires that the arbitration award be final and binding. The courts have often emphasized that the award must be based on the agreed terms of the arbitration agreement, and that the award must be enforceable in accordance with the law.

One of the somewhat recent developments which arguably is unique to India (as was the problem) is with respect to unilateral appointment of arbitrators which formed part of the arbitration agreement between the parties. The Indian Supreme Court upheld the Rule of Law by holding that unilateral appointments were contrary to the codified law with respect to conflict of interest as these contracts were often entered between parties wherein the party reserving the right to nominate the sole arbitrator had a greater bargaining power in the equation.⁴⁰ Progressively, the courts have followed these principles to come to rescue of the weaker party by setting aside awards solely on the basis of the way the arbitrator was appointed.

More recently, the Indian Supreme Court dealt with the issue of arbitrary fixation of fee by the way arbitrators for themselves.⁴¹ The apex court mandated arbitral tribunals to not fix their fee without consultation and consent of the parties by harmonizing interest of the parties, autonomy of the process and Rule of Law. Similarly, the Supreme Court of India clarified in PASL wind solutions judgement⁴² that two Indian parties in an arbitration can choose a neutral seat of arbitration which can be outside India as well. The said judgement was instrumental in dismissing the

misconception that two Indian parties in a domestic arbitration choosing foreign seat will be against the public policy of India or the Rule of Law.

The Arbitration and Conciliation Act, 1996 itself being modeled after UNCITRAL Model Law is a comprehensive code on the procedure of arbitration to be followed in India. The Rule of Law, and specifically the notion of procedural fairness, is essential in arbitration. This requires that the arbitration proceedings be conducted in an objective and open fashion, and that all parties be given a reasonable opportunity to submit their case. Section 18 of the Act codifies this idea by mandating that the arbitrator provide each party with equal treatment and a fair opportunity to submit their case.

The idea of impartiality underpins the Rule of Law in arbitration and is hence essential. This means that the arbitrator cannot have a vested interest in the outcome of the arbitration and must act independently. Sections 12, 13 and 14 of the Arbitration and Conciliation Act (relating to arbitrators) enshrines this notion by outlining the standards that must be met.⁴³ The Act further mandates that the arbitration award must be enforceable under the applicable law and thus must be final and binding.

Conclusion

The overall importance of Rule of Law in arbitration by adopting a fair and reasonable arbitration procedure cannot be overstated. The concepts of procedural fairness, impartiality, and enforceability are important components of the framework provided by the Arbitration and Conciliation Act, 1996 for the regulation of arbitration in India and are similarly found in UNCITRAL Model

Law which has been adopted by over 85 countries as part of their domestic law on arbitration. As a result of arbitrators' adherence to these principles, disagreements are more likely to be settled in accordance with the Rule of Law and in a timely fashion. This does not mean that adherence to Rule of Law is only an obligation on the arbitrators but as discussed in this article above, it has an overarching effect in the whole dispute resolution mechanism which requires all stake holders to perform their roles in conformity with basic notions derived out of Rule of Law. Arbitration undeniably is vital as a means of resolving disputes and continues to constantly expand while simultaneously

upholding the principle of Rule of Law. As the American veteran lawyer for civil liberties Tiffany Madison said, "*when the Rule of Law disappears, we are ruled by the whims of men.*" The flexibility of the process which includes great discretion accorded to the arbitral tribunal should not become an obstacle in deriving a fair and just result through arbitration rather should be used to increase efficiency, accuracy and quality of justice. Thus, it can safely said that there is no apparent conflict between the process of arbitration and its tryst with Rule of Law unless the same is created deliberately to disrupt their harmonious co-existence.

²Aristotle, "*The Politics*" (c. 350BC), Stephen Everson (trans.) (Cambridge University Press 1988).

³Locke, John "*Two Treaties of Government*" (1689), (P. Laslett ed., Cambridge University Press 1988).

⁴Dworkin, Ronald "*Taking Rights Seriously*" (Harvard University Press 1977).

⁵Fuller, Lon "*The Morality of Law*" (Yale University Press 1964).

⁶Dicey, Albert Venn "*Introduction to the Study of the Law of the Constitution*" (1885) (McMillan and Co, 1982).

⁷Pirie, Fernanda "*The Rule of Laws: A 4000-Year Quest to Order the World*", pp. 45 – 70.

⁸Bingham, Tom "*The Rule of Law*" (Penguin Books 2010).

⁹Supra n. 7., at 37.

¹⁰Supra n. 7., at 48.

¹¹Supra n. 7., at 55.

¹²Supra n. 7., at 60.

¹³Supra n. 7., at 66.

¹⁴Supra n. 7., at 85.

¹⁵Supra n. 7., at 90.

¹⁶Supra n. 7., at 110.

¹⁷Menon, Sundaresh "*Arbitration's Blade: International Arbitration and the Rule of Law*", in Maxi Scherer (ed), Journal of International Arbitration, (Kluwer Law International 2021, Volume 38 Issue 1) pp. 1 -26.

¹⁸Waldron, Jeremy "*Is the Rule of Law an Essentially Contested Concept (in Florida)?*", in "*The Rule of Law and Separation of Powers*" 119 (R Bellamy ed., Ashgate 2005).

¹⁹Supra n. 4, at 40.

²⁰Supra n. 2, at s. 137; and Supra n. 6, at 38.

²¹Timor – Leste acceded to the New York Convention on 18.01.2023.

²²Lord Neuberger, Chartered Institute of Arbitrators Centenary Celebration, Hong Kong, Arbitration and the Rule of Law (20 March 2015).

²³Section 28, Arbitration and Conciliation Act, 1996.

²⁴*Paris Lapeyre v. Sauvage* [2001] Rev Arb 806, n. Derains.

²⁵Menon, Sundaresh "*Dispelling Due Process Paranoia: Fairness, Efficiency and the Rule of Law*", in Lawrence Boo and Gary B. Born (eds), Asian International Arbitration Journal, (Kluwer Law International 2021, Volume 17 Issue 1) pp. 1 -28.

²⁶Supra n. 24.

²⁷Article 18 of UNCITRAL Model Law.

²⁸*China Machine New Energy Corp. v. Jaguar Energy Guatemala LLC and another* [2020] 1 SLR 695, at 97(g), citing Redfern and Hunter on International Arbitration (6th ed, Oxford University Press 2015), para. 6.14.

²⁹*Ibid.*; *Terna Bahrain Holding Co v. Ali Marzook Ali Bin Kamil Al Shamsi et al* [2012] EWHC 3283 (Comm); *ALS & Assocs v. AGM Marine Constructors Inc*, 557 F Supp 2d 180 (D Mass 2008); *Trustees of Rotoaira Forest Trust v. Attorney-General* [1999] 2 NZLR 452; and *Shenyang Xinying Nets Industrial Co Ltd v. Poway Ltd* (2015), Si Zhong Min (Shan Te Zi No 284).

³⁰Waincymer, Jeffrey "*Procedure and Evidence in International Arbitration*" (Wolters Kluwer 2012).

³¹*Millennium School v. Pawan Dawar* 2022 SCC OnLine Del 1390; *Sahyadri Earth Movers v. L & T Finance Ltd. and anr.* 2011 SCC OnLine Bom 434; *Anwar Siraj v. Ting Kang Chung* [2003] 2 SLR(R) 286, at 41; and *ADG and another v. ADI and another matter* [2014] 3

SLR 481 ('ADG'), at 111.

³²Rule 21, Delhi International Arbitration Centre (Arbitration Proceedings) Rules, 2023 (to be effective from 01.04.2023); Article 14.5, The London Court of International Arbitration (LCIA) Arbitration Rules; and Article 22, ICC Rules of Arbitration.

³³*Yee Networks v. Econet Wireless International Limited* [2004] EWHC 2909 (Comm) at [90].

³⁴*Atlanta Limited v. Union of India* (2022) 3 SCC 739; *Oswal Woollen Mills Limited v. Oswal Agro Mills Limited*, (2018) 16 SCC 219; *Ravindra Kumar Gupta and Company v. Union of India*, (2010) 1 SCC 409; and *State of U.P. v. Allied Constructions*, (2003) 7 SCC 396.

³⁵Supra n. 23, at pp. 36.

³⁶'Chapter 20: Confidentiality in International Arbitration', in Gary B. Born, *International Commercial*

Arbitration (Third Edition), 3rd Edition (Kluwer Law International 2021)

³⁷Section 42A, Arbitration and Conciliation Act, 1996.

³⁸Rule 31.3, Delhi International Arbitration Centre (Arbitration Proceedings) Rules, 2023 (to be effective from 01.04.2023)

³⁹Supra n. 20.

⁴⁰*Perkins Eastman Architects DPC and Anr. v. HSCC (India) Limited* (2020) 20 SCC 760 and *TRF Ltd. v. Energo Engg. Projects Ltd.* (2017) 8 SCC 377.

⁴¹*Oil and Natural Gas Corporation Ltd. v. Afcons Gunanusa JV* 2022 SCC OnLine SC 1122.

⁴²*PASL Wind Solutions Private Limited v. GE Power Conversion India Private Limited* (2021) 7 SCC 1.

⁴³Read with Schedule 5, 6 and 7 of the Arbitration and Conciliation Act, 1996

Rule of Law and the Indian Experiment: A Note

Tariq Khan* and Tushar Behl**

Introduction

Dwight D. Eisenhower had famously said, “*The clearest way to show what the rule of law means to us in everyday life is to recall what has happened when there is no rule of law.*”

Rule of Law can be tracked down to Plato and Aristotle and has been held as a torch by Roman jurists, medieval natural law thinkers and enlightened philosophers as early as 350 BC.

While law is a tool of social control backed by the sovereign, the Rule of Law is the basis for any and every action of the State. The decisions taken by the State and its functionaries cannot be absolute and unfettered, meaning, the decisions should be predictable and taken by applying the known rules and principles, such that the citizen should really know where he stands.

The new *lingua franca* of universal moral thought, the Constitution of India forms the bedrock of the Rule of Law which further embodies the doctrine of supremacy of law. It is illusory to see that the Rule of Law, characterized as a basic feature of the Constitution finds no place, yet it finds place in the Constitution and neither can it be abrogated nor destroyed even by the Parliament.

Dicey’s Exposition

Albert Venn Dicey in his *Introduction to the Study of the Law of Constitution* championed and refined the Rule of Law by giving three meanings to the concept. First, where he beautifully contrasts the Rule of Law with the system of government based on the exercise of those in authority of wide discretionary powers of constraint and propounds that the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, excluding the existence of arbitrariness of prerogative or even the wide discretionary authority on the part of the Government....a man may with us be punished for a breach of law, but he cannot be punished for nothing else. This essentially means no one can be made to suffer penalties except for a distinct breach of law established before ordinary courts. Second, where he defines Rule of Law with equality before law or equal subjection of all classes to the ordinary law of the land administered by the ordinary courts. This means that no one is above the law and even the State officials and functionaries like private citizens have a duty to obey the same law as it exists and that there can be no administrative courts to decide the claims and issues raised by the citizens against the State or its officials. Third, where he enunciates that the rights of an individual are secured, not by guarantees set down on a piece of paper, but by the ordinary remedies

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contained in private law available against those who unlawfully interfere with his or her personal liberty, whether they are private persons or State Officials. It means that with us, the law of the Constitution, the rules which in foreign nations as a matter of course form part of a Constitutional code, are not the source, but the consequence of the rights of individuals, as defined and enforced by the courts.

The Constitution of India

India is a nation governed by the Rule of Law and it is a necessary foundation of India's democracy. In a country like India, there is nothing like absolute or unbridled power exercisable at the whims and fancies of the repository of such power.

The Rule of Law is the most essential facet of the basic structure doctrine. It guarantees Parliament's supremacy while at the same time contesting sovereignty over the Constitution. The golden triangle of Articles 14, 19 and 21 as they stand and the Rule of Law forms part of the basic structure and cannot be abrogated. Furthering Dicey's exposition of the Rule of Law, we see that the Indian Constitution contains all the three elements of the doctrine of Rule of Law codified expressly, i.e. the fundamental rights under part III. The Rule of Law in the Indian context entails compliance with the Constitution which is the supreme law. Such an obedience to supremacy of law, equality before law and the predominance of legal spirit is to be maintained not only by the Executive or Administrative body, but also by the Legislature.

While the liberal view of Rule of Law claims

that a law which provides for the underlying values of a section of society against the acts of government must be evaluated, the modern view is fairly wide and connotes that the functions of the government in a free society should be exercised as to create conditions in which the dignity of a man as an individual is upheld.

Rule of Law is the antithesis of arbitrariness. Rule of Law prevails even where the court interprets a statute as it expects a statute to be transparent, responsive, non-ambiguous, knowable, dependable, accountable and shielded from excessive manipulation. Rule of Law is violated whenever the instrumentalities of the State do not discharge their duties or functions in a fair and just manner. The Rule of Law regards that every action must be reasonable and *bona fide* for it stands as the foundation of India's democracy. Rule of Law ensures that the government exercises its powers conditioned by law and not by arbitrary will for an Executive action to the prejudice or detriment to the right of an individual must have the sanction of law. The principles of fairness, reasonableness, non-arbitrariness and judicial review coupled with the doctrine of public trust in governmental action form the core of the Indian Constitutional scheme, its structure and the Rule of Law.

Rule of Law, as it exists today, is the accepted norm of all civilized societies. It strikes a balance between the opposing notions of individual liberty and public order. True freedom requires the rule of law and justice, and a judicial system in which the rights of some are not secured by the denial of rights to others. Rule of law is not an option, it is a must.

Criminal Writ Jurisdiction: A Need For Course Correction

*Kirtiman Singh**

The purpose of the present work is to identify a theoretical contradiction in the development of the judicial narrative on the scope of writ jurisdiction under Article 226 of the Constitution. It is argued that this theoretical contradiction is not just a minefield for academic skirmishes and musings; it has potential ramifications for the enforcement of writ jurisdiction in the Indian Legal System.

Briefly stated, the contradiction arises principally because of two reasons (i) a disconnect that has arisen purely on account of the change in the meaning of certain words & (ii) a forgetfulness of the true nature of Writ Jurisdiction and its conflation with other remedies/ jurisdictions that are available for addressing legal wrongs within the Indian Legal system.

Writ Jurisdiction as always understood is a guarantee against the excesses of the Sovereign or its agents. It is, as it were, the last port of call for the citizenry to seek remedy against State action. Classically it is this call that is answered by the Courts when invoking writ remedy and therefore, must always be understood as distinct from ordinary civil and criminal remedies that are provided in the legal system.

Unfortunately, however, given the broad-based omnibus manner in which this jurisdiction has been applied judicially its uniqueness has been

completely lost. The result of this has been the fact that while lip service is paid to its 'extraordinariness' by Courts time to time, yet these Courts clearly fail to remember this distinction in practise. It is the author's claim that because of the loss of distinction between Writ remedies and other remedies, the Courts in fact have begun to adopt an approach that is exactly the reverse of what should otherwise be done; they have begun to define the architecture of this jurisdiction not from its obvious constitutional higher order justifications, but from words and phrases in archaic instruments that cannot in any way determine the nature of writ jurisdiction. As a result, this jurisdiction has been reduced to yet another ordinary remedy with very little qualitative distinction whatsoever from other available remedies.

The aforementioned consequence is best seen in the application of Writ remedy in criminal law. As will be seen below, because of the attempt of the Courts to understand Writ remedy through terminology used in certain archaic instruments, this jurisdiction has effectively been divided into two different categories altogether i.e. 'Criminal' Writ Jurisdiction and 'Civil' Writ Jurisdiction with potentially distinct aspects in terms of application, consequence and appellate remedy.

In this respect it is submitted that Writ Jurisdiction is a constitutional jurisdiction which cannot be divided into 'civil' and 'criminal' subsets. Although, such an artificial sub-division

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maybe necessary for administrative purposes for the Courts in terms of allocation of roster etc., this by no means has any consequence whatsoever for the jurisdiction itself which is a wholly composite and qualitatively superior one than the other ordinary jurisdictions of the Courts. In any case the last thing that should be permitted is to split this jurisdiction into different halves purely on the basis of phrases and words that otherwise have no relevance whatsoever in this respect.

In this context the present article criticises the law as understood by the High Court of Delhi in CS Agarwal v. State – (2011) 125 DRJ 241 [‘CS Agarwal’] and subsequently by the Supreme Court in Ram Kishan Fauji v. State of Haryana & Ors. – (2017) 5 SCC 533 [‘Ram Kishan Fauji’]. It is argued that the distinction drawn by the High Court of Delhi and Supreme Court between Civil and Criminal Writ Jurisdiction on the basis of the words used in the Letters Patent is fundamentally flawed. It is an approach that surely is not just counterintuitive, it is in fact counterproductive.

It is further submitted that the Letters Patent does not in any way commend itself to the reading given to it by the High Court in CS Agarwal and so readily accepted by the Supreme Court in

Fauji. Even if it did, the courts would still be wrong in letting the Letters Patent determine the architecture of Writ Jurisdiction. The former must cede to the latter; it cannot be the other way round.

The first section of the present article sets out a historical context and the source of writ jurisdiction in India. The second section very briefly deals with some judicial opinions that have considered the nature of writ jurisdiction in the context of the present discussion. And in the third section the two judgements i.e. CS Aggarwal and Fauji and the consequences that these judicial

opinions portend have been critically analysed. The final section delineates the author’s conclusions.

I

A BRIEF HISTORICAL BACKGROUND

The Regulating Act was passed by the English Parliament in 1773. Section 13 of the Regulating Act empowered the Crown to establish by charter a Supreme Court of Judicature at Fort William in Calcutta.¹ A Letters Patent² was also signed by King George III³. Similarly, the Supreme Courts of Madras and Bombay were established in 1800 and 1823. The powers vested in the Supreme Court of Madras and Bombay were similar to that of Calcutta.

A very useful discussion on the source of writ jurisdiction in the Indian legal system can be found in *Umaji Keshao Meshram & Ors. v. Radhikabai*⁴. As stated in the opinion of D.P. Madon J. in the context of the history of the Supreme Court of Judicature at Bombay, the exercise of Writ Jurisdiction by the said court was the one exercised by the King’s Bench in England:

“46. Three things are pertinent to note about the Letters Patent of the Supreme Court of Judicature at Bombay. The first is that by Clause 5 it was invested with the same jurisdiction as was possessed by the Court of King’s Bench in England which included the power of issuing prerogative writs. The second is that under Clause 55 the Court of Requests and the Court of Quarter Sessions at Bombay and the Justices and other Magistrates appointed for the Town and Island of Bombay and the factories subordinate thereto were made "Subject to the order and control of the said Supreme Court" in the same way as the inferior Courts

and the magistrates in England were subject to the order and control of the Court of King's Bench and for this purpose the said Supreme Court was empowered and authorized to issue writs of mandamus, certiorari, procedendo and error. The third is that there was no intra- court appeal provided against the judgment and decree of any Judge or Judges of the said Supreme Court but under Clause 56 an appeal lay directly to the Privy Council.””

With the passage of the Government of India Act, 1858 after the revolt of 1857 the Indian High Courts Act, 1861 ***Act, 1861**’+ was passed by the English Parliament. The Act, 1861 empowered the crown to establish, by Letters Patent, High Courts of Judicature at Calcutta (for the Bengal division of the Presidency of Fort William), Madras and Bombay abolishing the Supreme Court and the courts of Sadr Diwani Adalat and Sadr Nizamat (Faujdari) Adalat⁵.

The Original Side of the Bombay High Court replaced the Supreme Court while the Appellate Side replaced the Sudder Diwani and Sudder Foujdaree Adawalut⁶. The High Courts inherited the writ jurisdiction of the Supreme Court’s under Sections 9⁷ and 10⁸ of the Act, 1861. In 1865, the Letters Patent were issued vide 24 and 25 Vict. C.104 replacing the original Letters Patent of 1862. The jurisdiction and powers of the High Courts were to be fixed by the Letters Patent⁹. The Letters Patent empowered the High Court to enrol and remove advocates, vakils and Attorneys-at-Law¹⁰.

In 1915, the Government of India Act, 1915 was passed by the English Parliament. Under Section 106¹¹ thereto, it preserved all such jurisdiction, powers and authority as were vested in the High Court’s existing at the

commencement of the Act. The Constitution was enacted and Article 226¹² as it originally stood came to be. During the Constituent Assembly debates there was an amendment moved by Sh. HV Kamath to delete the mention of various writs in the provision which eventually became Article 226 of the Constitution, the amendment was negatived and the reply of Dr. Bakshi Tek Chand to the amendment is instructive with respect to the historical construct prevalent in pre-Independent India in which Writs were issued by Presidency and non-Presidency High Courts:

“This amendment to amendment brings the phraseology of this article in line with that of article 115 which we have already passed in regard to the Supreme Court, and also of article 25, where similar powers are given to the Supreme Court in respect of the Fundamental Rights. This amendment is, therefore, purely of a verbal character and I would ask the House to accept it. In doing so, I may make one or two observations with regard to the remarks made by my friend Mr. Kamath. He suggests that it is not necessary to enumerate or specifically mention in the article habeas corpus, madamus, prohibition, quo warranto and certiorari. With great respect, I entirely differ with my honorable friend. It is, in my opinion, very necessary and that these writs should be mentioned by name. We have done so with regard to the fundamental rights in article 25 and we have also mentioned them in connection with the Supreme Court in article 115; and for the reasons for which these writs were specifically mentioned in these articles, they should be mentioned here also. *These are the writs which, I may remind the House, have been among the greatest safeguards that the British judicial system has provided for upholding the rights and liberties of the people, and it is very necessary that*

they should be incorporated in our constitution. At present High Courts which are not Presidency High Courts viz., the High Court of Allahabad, East Punjab, Patna, Nagpur, Orissa, Assam, etc. have not got any of these powers. The writ of certiorari cannot be issued by any of these High Courts. Even in the provinces of Bengal, Bombay and Madras, this particular writ can be issued only within the limits of their respective ordinary original jurisdiction. For instance, in the province of Madras, if a particular proceeding is pending in the court of Trichinopoly or Madura, the High Court in Madras has got no jurisdiction to issue a writ. It is only in regard to cases coming from the city of Madras and a few miles around that the High Court has got this power. Outside these limits, it had got this power only with regard to European subjects. The reason for this was that the jurisdiction of these High Courts was supposed to be derived from the charters of the Supreme Courts which had been established in these provinces during the time of the East India Company by charters issued by the King of England, and it was said that their jurisdiction was limited only to the Presidency towns or to subjects of British extraction wherever they are found. In the new Constitution it is intended to give the power to issue these writs to every High Court, and will be exercised throughout the territories within its jurisdiction, and in order to put matters beyond doubt, it is necessary that these writs be specifically mentioned."

II

Since the establishment of the Supreme Courts in the three Presidencies of Madras, Bombay and Calcutta, the power to issue prerogative writs was always considered to be 'original' in nature. This 'original' power was inherited from the Kings Bench in the Kingdom of Great Britain, where the exercise of this power was always considered to be the

exercise of exclusive and original jurisdiction.

Judicial precedents preceding the enactment of Constitution of India such as Chief CIT v. North Anantpur Gold Mines, Ltd.¹³, Penugoda Venkatratnam & Anr. v. Secretary of State¹⁴, Ryots of Garabandho v. Zamindar of Parlakimedi.¹⁵, and Hamid Hassan Nomani v. Banwarilal Roy¹⁶, have always categorized such power as 'original' in nature.

An interesting aspect in this regard may be noted here: this 'original' power to issue writs was circumscribed within the Presidency itself and the High Courts exercised 'extraordinary original' jurisdiction beyond the Presidency i.e. in the Mofussil as exercised by the erstwhile Appellate Civil and Criminal Courts i.e. Sudder Diwani and Sudder Foujdaree Adawalut. In other words, a writ issued by the High Court's then did not operate outside the Presidency. The exercise of power by the High Courts on the courts in the Mofussil was supervisory in nature and it was in this sense that the nomenclature 'extraordinary' was used¹⁷. In judicial opinion however, particularly after independence the term 'extraordinary' has been used to indicate the qualitative superiority of writ jurisdiction as opposed to other jurisdictions that a court may possess. So, while it is may be correct to refer to the qualitative superiority of writs in using this term, this is clearly not the case when referring to clauses of the Letters Patent in which the term 'extraordinary' finds mention. The use of the term 'extraordinary' in the latter had a geographical connotation, whereas in contemporary usage it is clearly used to express a substantive superiority.

This may itself be of no consequence whatsoever; but for the fact that in judicial opinions while reference is made to historical

developments, this distinction is glossed over, thereby adding to the confusion.

Even post-independence¹⁸, Hon'ble Courts have held that the exercise of power under Article 226 is 'original' in nature and has to be contrasted with remedies provided under the Letters Patent in the nature of 'ordinary civil jurisdiction', 'extraordinary original civil jurisdiction', 'ordinary criminal jurisdiction' etc. Some instructive precedents in this regard are posited hereunder:

(i) *Belait Sheikh Vs. State of West Bengal*¹⁹

"In exercising this power, is the Court exercising original jurisdiction. It is quite clear that in exercising the power under Article 226, the High Court is not exercising the ordinary original civil jurisdiction, that is vested in the Court under Clause 11 of the Letters Patent, or the Extraordinary Original Civil Jurisdiction, as is vested in the Court under Clause 13; nor is it exercising the Ordinary Original Criminal Jurisdiction vested by Clause 22, or the Extra-ordinary Original Criminal Jurisdiction vested by Clause 24. It is equally clear that it is not exercising, in exercising power under Article 226 of the Constitution, the appellate jurisdiction vested in the Court under Clause 16 or Clause 27 of the Letters Patent."

(ii) *State of Uttar Pradesh Vs. Vijay Anand Maharaaj*²⁰

"It cannot be disputed that the issue of such writs is a matter of original jurisdiction."

It is, therefore, clear from the nature of the power conferred under Art. 226 of the Constitution and the decisions and the subject that the High Court in exercise of

its power under Art. 226 of the Constitution exercises original jurisdiction, though the said jurisdiction shall not be confused with the *ordinary civil jurisdiction of the High Court. This jurisdiction, though original in character as contrasted with its appellate and revisional jurisdiction, is exercisable throughout the territories in relation to which it exercises jurisdiction and may, for convenience, be described as extraordinary original jurisdiction. If that be so, it cannot be contended that a petition under Art. 226 of the Constitution is a continuation of the proceedings under the Act*".

(iii) *Tata Engineering and Locomotive Company Ltd. Vs. Asst. Commissioner of Commercial Tax*²¹

"11. The power and jurisdiction of the High Court under Article 226 of the Constitution has been the subject of exposition from this Court. That it is extraordinary and to be used sparingly goes without saying. In spite of the very wide terms in which this jurisdiction is conferred, the High Courts have rightly recognised certain limitations on this power. The jurisdiction is not appellate and it is obvious that it cannot be a substitute for the ordinary remedies at law. Nor is its exercise desirable if facts have to be found on evidence. The High Court, therefore, leaves the party aggrieved to take recourse to the remedies available under the ordinary law if they are equally efficacious and declines to assume jurisdiction to enable such remedies to be by-passed..."

(iv) *Star Paper Mills Ltd. Vs. State of Uttar Pradesh*²²

"5. Except for a period when Article 226 was amended by the Constitution (42nd

Amendment) Act, 1976, the power relating to alternative remedy has been considered to be a rule of self imposed limitation. It is essentially a rule of policy, convenience and discretion and never a rule of law. Despite the existence of an alternative remedy it is within the jurisdiction of discretion of the High Court to grant relief under Article 226 of the Constitution. At the same time, it cannot be lost sight of that though the matter relating to an alternative remedy has nothing to do with the jurisdiction of the case, normally the High Court should not interfere if there is an adequate efficacious alternative remedy. **If somebody approaches the High Court without availing the alternative remedy provided the High Court should ensure that he has made out a strong case or that there exist good grounds to invoke the extraordinary jurisdiction.”**

The preceding discussion demonstrates that the exercise of writ jurisdiction has always been considered to be ‘original’ in nature. And this is for good reason. As seen above, ever since 1774 this was a power exercised on behalf of the sovereign albeit judicially. With independence and enactment of the Constitution, the writ jurisdiction available to courts is meant as check on the exercise of State action, in fact it is understood to be the best and most effective tool for the prevention of violations of Part III. That is why, judicial review under Article 226 and 32 is considered to be a part of the basic structure of the Constitution²³. It is in this sense therefore that in contemporary usage this jurisdiction is referred to as ‘original’ and extraordinary’.

It would not be incorrect to state that the development of the Indian legal system has been determined by the challenges that the

nation has thrown up, as this would indeed be true of any legal system governing a defined geographical area. As a country that has gained independence fairly recently still finding its feet, the nature of the disputes that the courts have been called upon to grapple with have in a very large measure been matters that concern protections offered under Part III of the Constitution. As a result the development of writ jurisdiction as a judicial tool has been hugely disproportionate to other available remedies.

A consequence of this ‘overuse’ however is the ignorance of other remedies, judicial and non-judicial that are by and large readily accepted as not being efficacious enough and therefore are given a go-by in preference to writ remedy. This may have been entirely unintentional and perhaps to a great extent unavoidable. But the result of this has been the loss of its identity as an ‘extraordinary original jurisdiction’; with the consequence that most often there is very little distinction discernible between this remedy and other less efficacious and alternative ones. So much so a very dangerous trend is apparent in certain judicial opinions, i.e. that there is in fact very little distinction whatsoever and that differences if any, are merely technical and procedural; arising, as I claim, because of a ‘forgetfulness’ of the true nature of this jurisdiction and its place in the legal system.

The following two cases concern the interplay of writ jurisdiction, criminal law and the Letters Patent. As will be seen below, they amply demonstrate the aforementioned hypotheses.

III

CS AGGARWAL

CS Agarwal concerned a Writ Petition for quashing of an FIR. The said Writ Petition

was dismissed and the Petitioner preferred a Letters Patent Appeal to the Division Bench. An objection was taken before the Division Bench that the order passed by the Ld. Single Judge was in the exercise of criminal jurisdiction and therefore an Appeal against the same was clearly barred in terms of Clause 10²⁴ and 18²⁵ of the Letters Patent. The Division Bench referred the matter to a Full Bench with the following reference:

“Whether the writ petition filed under Article 226 of the Constitution of India read with Section 482 of the Code of Criminal procedure for quashing a FIR amount[s] to invoking ‘original jurisdiction’ or these proceedings are to be treated as invoking ‘criminal jurisdiction’”

It will be apparent immediately from a reading of the order of reference that it proceeds on a certain assumption i.e. that there are two competing jurisdictions i.e. ‘original jurisdiction’ and ‘criminal jurisdiction’. Unfortunately, this distinction between the two kinds of jurisdictions that has been assumed in the order of reference is nowhere to be found in Article 226. That begs the question, where did this distinction come from? Very clearly, from Clause 10 of the Letters Patent²⁶. According to Clause 10 orders passed by a Ld. Single Judge are appealable to a Division Bench subject to certain exceptions. One of such exceptions is an order passed in exercise of ‘criminal jurisdiction’. The order of reference therefore poses the question as to whether the order passed by the Ld. Single Judge is in the exercise of ‘original jurisdiction’ or ‘criminal jurisdiction’; for if it is in the exercise of ‘criminal jurisdiction’ no appeal would be maintainable.

As stated earlier ex-facie the method adopted for this reasoning is clearly fallacious. Clause

10 cannot define the meaning of Article 226. If anything, Clause 10 must be reinterpreted if necessary in terms of Article 226 and not the converse. Yet this is exactly what the order of reference called upon the Full Bench to do and unfortunately this is exactly what the Full Bench did.

While paying token salutation to the nature of proceedings under Article 226, the Full Bench in Para 19 states as under:

“19. No doubt, as per the aforesaid pronouncements explaining the nature of power conferred under Article 226 of the Constitution, the High court in such proceedings exercises original jurisdiction. At the same time, it is also clarified that the said jurisdiction is not to be confused with the “original civil jurisdiction” of the High Court. Further, proceedings under Article 226 of the Constitution would be treated as original civil proceedings only when it concerns civil rights. A fortiori, if it concerns a criminal matter, then such proceedings would be original criminal proceedings. Letters Patent would lie when the Single Judge decides the writ petition in proceedings concerning civil rights. On the other hand, if these proceedings are concerned with rights in criminal law domain, then it can be said that the Single Judge was exercising his ‘criminal jurisdiction’ while dealing with such a petition filed under Article 226 of the Constitution.”

While the statement of the Full Bench that the power under Article 226 must not be confused with ‘original civil jurisdiction’ is well taken, the further statement that proceedings under Article 226 would be ‘original civil proceedings’ only if it concerns ‘civil rights’ and proceedings would become

‘original criminal proceedings’ if it concerns a ‘criminal matter’ is inexplicable and clearly unsustainable. Once again it is apparent that this is an attempt to understand the nature of Article 226 in a manner that would be consistent with the Letters Patent.

Once the Full Bench setup this premise, the remainder of the judgment expanded this further most notably by expounding what constitutes a ‘criminal proceeding’. Relying principally on *S.A.L. Narayan Row & Anr. vs Ishwarlal Bhagwandas*²⁷, the Full Bench went on to explain that a ‘criminal proceeding’ is one, which if carried to its logical conclusion may result in the imposition of a sentence such as death, imprisonment, fine or forfeiture of property. The Full Bench summed up the test as under:

“32. The test, thus, is whether criminal proceedings are pending or not and the petition under Article 226 of the Constitution is preferred concerning those criminal proceedings which could result in conviction and order of sentence.”

The High Court of Delhi, thereafter in *Vipul Gupta Vs. State*²⁸ while conceding that the challenge in the Writ Petition was with regard to administrative orders²⁹ issued by authorities revoking earlier orders of withdrawal of prosecution applied the test laid down by the Full Bench in *CS Agarwal* and held that the Letters Patent Appeal would not be maintainable:

“14. We have considered the rival contentions. **Though undoubtedly the writ petitions were not filed for quashing of FIR, as in *C.S. Agarwal case* [2011 SCC OnLine Del 3136 : ILR (2011) 6 Del 701] and were also not with respect to any order in prosecution cases against the appellants but**

the test laid down by the Full Bench in the judgment supra to determine whether the writ petition is invoking “original jurisdiction” or “criminal jurisdiction” is very wide, as the language of the passages of the judgment of the Full Bench quoted by us hereinabove would show and the senior counsels for the appellants have not been able to satisfy us as to how the writ petitions preferred by the appellants would not fall within the ambit of the said language. Even though the challenge in the writ petitions was to a decision of Hon'ble the Lieutenant Governor but the said decision was relating to the prosecution already underway of the appellants and the direct effect of the dismissal of the writ petitions is of continuation of the prosecution which may result in imposition of sentences such as death, imprisonment, fine or forfeiture of property, of the appellants. We are thus of the view that this Court while dealing with the writ petitions was exercising its criminal jurisdiction. It cannot be also lost sight of that the writ petitions were intended to avoid the consequences of criminal proceedings initiated under the Code of Criminal Procedure and concerned with rights in criminal law domain. We have thus no doubt that the learned Single Judge, in dealing with the writ petitions was exercising “criminal jurisdiction” and these Letters Patent Appeals are not maintainable.”

RAM KISHAN FAUJI

In *Ram Kishan Fauji* a challenge was laid by the Petitioner before the Hon'ble High Court seeking quashing of orders recommending registration of a case against him under the Prevention of Corruption Act, 1988 by way of a Writ Petition. The said challenge had succeeded before the Ld. Single Judge. The State challenged the order of the Ld. Single Judge before the Division Bench under

Clause 10³⁰ of the Letters Patent which stayed the order of the Ld. Single Judge. The interim order of the Division Bench was carried in Appeal to the Supreme Court. The principal contention of the Petitioner before the Hon'ble Supreme Court was that the Appeal filed by the State was not maintainable under Clause 10 of the Letters Patent inasmuch as the Ld. Single Judge had exercised criminal jurisdiction while quashing orders recommending registration of case under the Prevention of Corruption Act, 1988.

After making a reference to Clause 10 of the Letters Patent (Lahore) Punjab, Haryana and Delhi, the Supreme Court in para 18 framed the question as follows:

“18. On a plain reading of the aforesaid clause of the Letters Patent, it is manifest that no appeal lies against the order passed by the Single Judge in exercise of criminal jurisdiction. Thus, the question that is required to be posed is whether the learned Single Judge, in the obtaining factual matrix has exercised criminal jurisdiction or not.”

Having framed the issue for consideration as aforesaid, the Court embarks on a somewhat elaborate discussion on the question of the competence of a State Legislature to amend the Letters Patent. In para 26 the courts indicate the relevance of the said discussion:

“26. The purpose of referring to this judgment in *Jamshed N. Guzdar case* [*Jamshed N. Guzdar v. State of Maharashtra*, (2005) 2 SCC 591] is that till a competent legislature takes away the power of the Letters Patent, the same can be exercised by the High Court. *However, while exercising the power under the Letters Patent, it is imperative to see what is the nature of jurisdiction that has actually been provided in the Letters Patent. The exercise of*

jurisdiction has to be within the ambit and scope of the authority enshrined in the provision meant for intra-court appeal.” [Emphasis Supplied]

Notice the implications of the italicised portion of the aforementioned paragraph. To be sure, the case concerns the exercise of power by the High Court under Article 226 and not under the Letters Patent. The contours of writ jurisdiction can be defined only by the constitutional foundations of Article 226. Yet, while considering the nature of this power of the High Court the Supreme Court finds it *‘imperative to see what is the nature of jurisdiction that has actually been provided in the Letters Patent.’*

Clearly there is an error here. The High Court was not exercising its powers under the Letters Patent. It was exercising its jurisdiction under Article 226. And this jurisdiction cannot be controlled by an instrument that determines the maintainability or otherwise of an intra-court appeal. Yet this is what the Supreme Court has done and in fact specifically stated so in Para 26.

Once again, the court, after elaborately discussing a host of authorities observes in a similar vein in para 45 and poses the question in para 46 as under:

“45. The aforesaid argument suffers from a fundamental fallacy. It is because the submission is founded on the plinth of whether the writ jurisdiction has been exercised under Article 226 or 227 of the Constitution. It does not take note of the nature of jurisdiction and the relief sought. If the proceeding, nature and relief sought pertain to anything connected with criminal jurisdiction, intra-court appeal would not lie as the same is not provided in Clause 10 of the

Letters Patent. Needless to emphasise, if an appeal in certain jurisdictions is not provided for, it cannot be conceived of. Therefore, the reliance placed upon the larger Bench authority in *Hari Vishnu Kamath* [*Hari Vishnu Kamath v. Ahmad Ishaque*, AIR 1955 SC 233] does not render any assistance to the argument advanced by the learned counsel for the respondent State.”

46. The crux of the present matter is whether the Learned Single Judge has exercised “civil jurisdiction” or “criminal jurisdiction....”

After considering various judgments of High Courts³¹ including the judgement of the Full Bench of the High Court of Delhi in CS Aggarwal and the Division Bench judgment in Vipul Gupta (*Supra*), the court sums up its opinion on the matter in para 56 and 61:

“**56.** As we find from the decisions of the aforesaid three High Courts, it is evident that there is no disagreement or conflict on the principle that if an appeal is barred under Clause 10 or Clause 15 of the Letters Patent, as the case may be, no appeal will lie. The High Court of Andhra Pradesh, however, has held that when the power is exercised under Article 226 of the Constitution for quashing of a criminal proceeding, there is no exercise of criminal jurisdiction. It has distinguished the proceeding for quashing of the FIR under Section 482 CrPC and, in that context, has opined that from such an order, no appeal would lie. On the contrary, the High Courts of Gujarat and Delhi, on the basis of the law laid down by this Court in *Ishwarlal Bhagwandas* [*CIT v. Ishwarlal Bhagwandas*, (1966) 1 SCR 190 : AIR 1965 SC 1818], have laid emphasis on the seed of initiation of criminal proceeding, the consequence of a criminal proceeding and also the nature of relief sought before the Single Judge under

Article 226 of the Constitution. The conception of “criminal jurisdiction” as used in Clause 10 of the Letters Patent is not to be construed in the narrow sense. It encompasses in its gamut the inception and the consequence. It is the field in respect of which the jurisdiction is exercised, is relevant. The contention that solely because a writ petition is filed to quash an investigation, it would have room for intra-court appeal and if a petition is filed under inherent jurisdiction under Section 482 CrPC, there would be no space for an intra-court appeal, would create an anomalous, unacceptable and inconceivable situation. The provision contained in the Letters Patent does not allow or permit such an interpretation. When we are required to consider a bar or non-permissibility, we have to appreciate the same in true letter and spirit. It confers jurisdiction as regards the subject of controversy or nature of proceeding and that subject is exercise of jurisdiction in criminal matters. It has nothing to do whether the order has been passed in exercise of extraordinary jurisdiction under Article 226 of the Constitution or inherent jurisdiction under Section 482 CrPC.

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61. In the case at hand, the writ petition was filed under Article 226 of the Constitution for quashing of the recommendation of the Lokayukta. *The said recommendation would have led to launching of criminal prosecution, and, as the factual matrix reveals, FIR was registered and criminal investigation was initiated. The learned Single Judge analysed the report and the ultimate recommendation of the statutory authority and thought it seemly to quash the same and after quashing the same, as he found that FIR had been registered, he annulled it treating the same as a natural consequence. Thus, the effort of the writ*

petitioner was to avoid a criminal investigation and the final order of the writ court is quashment of the registration of FIR and the subsequent investigation. In such a situation, to hold that the learned Single Judge, in exercise of jurisdiction under Article 226 of the Constitution, has passed an order in a civil proceeding as the order that was challenged was that of the quasi-judicial authority, that is, the Lokayukta, would be conceptually fallacious. It is because what matters is the nature of the proceeding, and that is the litmus test.”

The evolution of the reasoning given by CS *Agarwal* and *Ram Kishan Fauji* can be discerned from another decision rendered by the High Court of Delhi in *Vinod Kumar Pandey Vs. Sheesh Ram Saini*³² where the Writ Petition was filed by the Complainant before the Single Judge seeking registration of a First Information Report, the Writ Petition was subsequently allowed and Appeals were preferred under Clause 10 of Letters Patent (Lahore) Punjab, Haryana and Delhi. One of the arguments on behalf of the Appellants as regards the maintainability of the Appeals was that since the Writ Petition was filed for setting criminal law in motion and admittedly no criminal proceedings were pending against the Appellants at the time of filing the Writ Petition, the Single Judge did not exercise ‘criminal jurisdiction’³³, the Appellant relied upon Para 32 of CS *Agarwal*³⁴ in this regard. The Court negated the said argument while relying upon CS *Agarwal* and *Ram Kishan Fauji* as follows:

“20. In the present case, the proceedings were to register an FIR, conduct criminal investigation so that on conclusion of the proceedings a conviction and consequential punishment of imprisonment or fine can be imposed. That being the nature of relief

claimed, we have no iota of doubt that the proceedings in the present case as held by the Full Bench are “criminal proceedings” and therefore the exception carved out in Para 29 would not apply in the facts and circumstances of this case.

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32. Similarly, the question as to whether a civil right or a criminal right is violated, would depend upon the nature of right violated and the relief sought for in a writ petition under Article 226 of the Constitution. Thereafter, we may take note of the law laid down in the case of *S.A.L. Narayan Row* (supra) and the fact that when a criminal Court takes cognizance of an offence and sends a complaint for investigation under sub-Section (3) of Section 156 of the Code of Criminal Procedure, the same will not make any difference to the nature of proceedings concerned. It is observed that even if cognizance is not taken that would not take out the case from the purview of the criminal jurisdiction.

33. In our considered view, **if proceedings that are initiated to avoid the consequence of a criminal act or crime, come within the purview of a criminal proceedings, then a proceeding instituted for setting in motion a proceeding on account of any criminal act would also fall in the same category, that is, jurisdiction exercised by a Court in exercise of its criminal jurisdiction.** This, in our considered view, is the principle reiterated in the case of *Ram Kishan Fauji* (supra) also wherein after considering various provisions, the law has been discussed in detail as indicated hereinabove in our judgment. **In our considered view merely because the proceedings are initiated for registration of**

FIR it would not mean that a Court which issues a direction for registration of an FIR or carrying out an investigation has not exercised criminal jurisdiction. A Court which directs for investigation in accordance with the requirement of criminal law, namely, the procedure contemplated in the Code of Criminal Procedure, in our considered view, exercises criminal jurisdiction and it does not make any difference if the proceedings initiated are for initiating a criminal proceedings or to quash a criminal proceeding already initiated. In both cases, as observed in the judgments referred to hereinabove, the effect of the order would be to proceed with a matter, criminal in nature with regard to a criminal offence committed and to bring to its logical conclusion, i.e., either conviction or acquittal of the alleged accused. That being so, we see no reason to take a different view in the matter merely because the prayer in the writ petition was to register an FIR and proceed with the investigation.”

Thus the test laid down by *CS Aggarwal* in para 32 to determine as to whether a proceeding is ‘criminal’ in nature has ultimately collapsed in *VK Pandey*; as is apparent from the aforementioned extracted passage. However, this has occurred purely on account of reasons of coherence; in doing away with the distinction drawn in *CS Aggarwal* the court in *VK Pandey* clearly acknowledges that in fact, the test laid down in *CS Aggarwal* is theoretically and fundamentally unsustainable and inconsistent. However, *VK Pandey* stops at just this juncture and does not take the line of enquiry further.

IV CONCLUSION

As can be seen from the above, there is a clear

division of this jurisdiction into different compartments; ‘criminal writ jurisdiction’ and ‘civil writ jurisdiction’. This is not only inconsistent with its composite ‘extraordinary and original’ nature, it also creates different ‘rungs’ for seeking relief through writ remedy, inasmuch as a petition invoking ‘criminal writ jurisdiction’ does not have the benefit of an intra-court appeal, something that is available in a petition invoking ‘civil writ jurisdiction’. Neither Article 32, 226 or judicial review as part of the ‘basic structure’ of the Constitution permit this kind of distinction. There is no independent substantive justification except adherence to terminology that otherwise has no relevance whatsoever.

The distinction made between ‘civil rights’ and ‘criminal rights’ is also forced. If the test is that the consequence may be, inter alia, imprisonment at the end of the proceedings, then, given the existence of certain circumstances various proceedings under ordinary procedure may lead to imprisonment, irrespective of whether, to begin within the proceeding was a ‘criminal’ or a ‘civil’ one. There are also proceedings that can lead to ‘imprisonment’ in the popular sense of the term without any ‘proceeding’ whatsoever i.e Preventive Detention³⁵. Again, how would one categorise proceedings under statutes that could contemplate both i.e. Foreign Exchange Management Act, 1999, Customs Act, 1962 etc?

Of course, one could identify the nature of proceedings through a complex process of reasoning after examining the nature of the powers given to the concerned authorities, the consequences that may flow from non-compliance, the applicability of certain provisions of the CrPC etc. But these are

precisely the arguments that should not be permitted to be utilised to distinguish what should be distinguished on principle and not on intricately woven arguments. It is therefore submitted that the legal position

as laid down by the Supreme Court in *Ram Kishan Fauji* (Supra) and that of the Full Bench of the High Court of Delhi in *CS Aggarwal* (Supra) needs reconsideration; there is an urgent need for course correction here.

¹Gandhi, B.M. (1959) *VD Kulbreshtha's Landmarks in Indian Legal & Constitutional History*. 10th edn. Lucknow: Eastern Book Company, page 142;

²“All and every the said courts and magistrates shall be subject to the order and control of the said Supreme Court... in such sort, manner, and form, as the order and control of our Court to King's Bench; to which end the said Supreme Court is hereby empowered and authorized to award and issue a writ or writs of mandamus, certiorari proceeded or Error to be prepared in a manner above mentioned and directed to such courts or magistrates, as the case may require....”

³Basu, D.D. (1950) *Commentary on the Constitution of India*. (Volume 6). 8th edn. Lexis Nexis Butterworths Wadhwa Nagpur. page 6476;

⁴AIR 1986 SC 1272, Para 45 and 46

⁵ note 1, page 188–189;

⁶Chandrachud, A. (2015) *An Independent, Colonial Judiciary*. 1st edn. New Delhi: Oxford University Press. Page 22

⁷ **“Section 8-Abolition of Supreme Courts and Sudder Courts-**Upon the establishment of such High Court as aforesaid in the Presidency of Fort William in Bengal the Supreme Court and the Court of Sudder Dewanny Adawlut and Sudder Nizamat Adawlut at Calcutta in the same Presidency shall be abolished:

And upon the Establishment of such High Court in the Presidency of Madras the Supreme Court and the Court of Sudder Adawlut and Sudder Foujdarry Adawlut in the same Presidency shall be abolished.

And upon the establishment of such High Court in the Presidency of Bombay the Supreme Court and the Court of Sudder Adawlut and Sudder Foujdarry Adawlut in the same Presidency shall be abolished:

And the records and Documents of the several Courts so abolished in each Presidency shall become and be Records and Documents of the High Court established in the same Presidency.”

⁸ **“Section 9 – Jurisdiction and power of High Court –** Each of the High Courts to be established under this Act shall have an exercise all such civil, criminal, admiralty and vice admiralty, testamentary, inter-state and matrimonial jurisdiction, original and appellate and all such powers and authority for and in relation to the administration of justice in the presidency for which it is

established, as Her Majesty may by such letters patent as aforesaid grant and direct, subject, however, to such direction and limitation as to the exercise of original, civil and criminal jurisdiction beyond the limits of the presidency towns as may be prescribed thereby, and save as by such letters patent may be otherwise directed and subject and without prejudice to the legislative powers in relation to the matters as aforesaid of the Governor General of India in Council, the High Court to be established in each presidency shall have an exercise all jurisdiction and power and authority whatsoever in any manner vested in any of the Courts in the same presidency abolished under this Act at the time of such last mentioned court.”

⁹ *Supra* note 1, page 189;

¹⁰ *Ibid*

¹¹“Section 106: Jurisdiction of High Court – (1) The several High Courts are courts of record and have such jurisdiction, original and appellate including admiralty jurisdiction in respect of offences on the high seas and all such powers and authority over or in relation to the administration of justice, including power to appoint clerks and other ministerial officers of the court, and the power to make rules for regulating the practice of the court, as are vested in them by letters patent and, subject to the provision of any such letters patent, all such jurisdiction, powers and authority as are vested in these courts respectively at the commencement of this Act.

¹² **Article 226 – Power of High Courts to issue certain writs –** (1) Notwithstanding anything contained in Article 32, every High Court shall have power, throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority including in appropriate cases any Government, within those territories, directions, orders or writs including writs in the nature of habeas corpus, mandamus, prohibition, quo warrant and certiorari or any of them for the enforcement of any of the rights conferred by Part III, and for any other purpose.

(2) The power conferred on a High Court by clause (1) shall not be in derogation of the power conferred on the Supreme Court by clause (2) of Art. 32.”

¹³ AIR 1921 Mad 524

¹⁴ AIR 1930 Mad 896

¹⁵ AIR 1943 PC 164

¹⁶ AIR 1947 PC 90

¹⁷ **9. Extraordinary original civil jurisdictions** And We do further ordain that the High Court of Judicature at Lahore shall have power to remove, and to try and determine, as a Court of extraordinary original jurisdiction, any suit being or falling within the jurisdiction of any Court subject to its superintendence when the said High Court may think proper to do so, either on the agreement of the parties to that effect, or for purposes of justice, the reasons for so doing being recorded on the proceedings of the said High Court.

13. By the High Court in the exercise of extraordinary original civil jurisdiction. And We do further ordain that, with respect to the law or equity to be applied to each case coming before the High Court of Judicature at Lahore in the exercise of its extraordinary original civil jurisdiction, such law or equity shall, until otherwise provided, be the law or equity which would have been applied to such case by any local court having jurisdiction therein.

17. Extraordinary original criminal jurisdiction. And We do further ordain that the High Court of Judicature at Lahore shall have extraordinary original criminal jurisdiction over all persons residing in places within the jurisdiction of any Court subject to its superintendence, and shall have authority to try at its discretion any such persons brought before it on charges preferred by any magistrate or other officer specially empowered by the Government in that behalf.

¹⁸ Refer Ahemdabad Manufacturing & Calico v. Ram Tahel Ramnand & Ors., (1972) 1 SCC 898, Para 11; Patel Kashiram Lavjibhai v. Narottamdas Bechardas & Ors., AIR 1979 Guj 1 (FB), Para 14; Manoj Kumar v Board of Revenue, 2008 (1) MPLJ 152, Conclusions; Shalini Shyam Shetty & Anr. v. Rajendra Shankar Patil, (2010) 8 SC 329, Para 46.

¹⁹ AIR 1952 Cal 753

²⁰ AIR 1963 SC 946

²¹ (1967) 2 SCR 751

²² (2006) 10 SCC 201

²³ L. Chandra Kumar v. Union of India, (1997) 3 SCC 261

²⁴ **10. Appeals to the High court from Judges of the Court.** And We do further ordain that an appeal shall lie to the said High Court of Judicature at Lahore from the judgement (not being a judgement passed in the of exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a Court subject to the superintendence of the said High Court, and not being an order made in the exercise of revisional jurisdiction, and not being a sentence or order passed or made in the exercise of power of superintendence under the provisions of Section 107 of the Government of India Act, or in the exercise of criminal jurisdiction) of one Judge of the said High

Court or one Judge of any Division Court, pursuant to Section 108 of the Government of India Act, and that notwithstanding anything hereinbefore provided an appeal shall lie to the said High Court from a judgement of one Judge of the High Court or one Judge of any Division Court, pursuant to Section 108 of the Government of India Act, made on or after the first day of February, one thousand nine hundred and twenty-nine in the exercise of appellate jurisdiction in respect of a decree or order made in exercise of appellate jurisdiction by a Court subject to the superintendence of the said High Court where the Judge who passed the judgement declares that the case is a fit one for appeal, but that the right of appeal from other judgements of Judges of the said High Court or of such Division Court shall be to Us, Our Heirs or Successors in Our or Their Privy Council, as hereinafter provided.

²⁵ **18. No appeal from High Court exercising original jurisdiction, Court may reserve points of law.** And We do further ordain that there shall be no appeal to the High Court of Judicature at Lahore from any sentence or order passed or made by the Courts of original criminal jurisdiction which may be constituted by one or more Judges of the said High Court. But it shall be at the discretion of any such court to reserve any point or points of law for the opinion of the said High Court.

²⁶ Letters Patent (Lahore) Punjab, Haryana and Delhi

²⁷ AIR 1965 SC 1818

²⁸ 2014 SCC OnLine Del 434

²⁹ *Ibid*, Para 1 & 8

³⁰ **10.** And We do further ordain that an appeal shall lie to the said High Court of Judicature at Lahore from the judgement (not being a judgement passed in the of exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a Court subject to the superintendence of the said High Court, and not being an order made in the exercise of revisional jurisdiction, *and not being a sentence or order passed or made in the exercise of power of superintendence under the provisions of Section 107 of the Government of India Act, or in the exercise of criminal jurisdiction*) of one Judge of the said High Court or one Judge of any Division Court, pursuant to Section 108 of the Government of India Act, and that notwithstanding anything hereinbefore provided an appeal shall lie to the said High Court from a judgement of one Judge of the High Court or one Judge of any Division Court, pursuant to Section 108 of the Government of India Act, made on or after the first day of February, one thousand nine hundred and twenty-nine in the exercise of appellate jurisdiction in respect of a decree or order made in exercise of appellate jurisdiction by a Court subject to the superintendence of the said High Court where the Judge who passed the judgement declares that the case is a fit

one for appeal, but that the right of appeal from other judgements of Judges of the said High Court or of such Division Court shall be to Us, Our Heirs or Successors in Our or Their Privy Council, as hereinafter provided.

³¹Patel Kashiram Lavjibhai v. Narottamdas Bechardas, (1978) 19 Guj LR 1047; Sanjeev Rajendrabhai Bhatt v. State of Gujarat, (2000) 1 Guj LR 206; Gangaram Kandaram v. Sundaram Chikha Amin, (2000) 2 An LT 448 (overruled)

³²2019 SCC OnLine Del 7652

³³*Ibid*, Para 10

³⁴**32.** The test, thus, is whether criminal proceedings are pending or not and the petition under Article 226 of the Constitution is preferred concerning those criminal proceedings which could result in conviction and order of sentence

³⁵The Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974

The Rule of Law : Fuller's Eight Precepts

Gautam Bhatia*

In *Indira Nehru Gandhi v. Raj Narain*, the Supreme Court of India famously held the “rule of law” to be a part of the unamendable basic structure of the Constitution.¹ That specific case involved the constitutionalisation of a “bill of attainder” – specifically, a provision (Article 329A(4)) that immunised the election of the Prime Minister from judicial scrutiny.² The Supreme Court’s judgment, then, articulated the Rule of Law in its most basic form: a vision of a society in which nobody is above the law, and governance takes place *under* law – and not under people.

The Supreme Court’s articulation referred to one aspect of what is commonly understood to be a “thin version” of the Rule of Law. The most famous exponent of the “thin version” is the philosopher Lon Fuller. In his book, *The Morality of Law*, Fuller was concerned with excavating the basic, minimum moral content of law, without which it could not be considered “law”, properly called. He called this the “inner morality” of law, and identified eight features: generality, publicity, prospectivity, intelligibility, consistency, practicability, stability, and congruence.³ For example, secret laws (the “publicity” requirement) were simply incapable of being followed; unintelligible laws, or laws that frequently changed from one day to another,

likewise. For a legal system to be considered *law* – and not the arbitrary decrees of a monarch – it would have to conform, in some degree, to these eight basic precepts.

Fuller’s theory raised a basic question: are these eight precepts *moral* in any genuine sense? Responding to Fuller, the philosopher Joseph Raz argued that this “thin conception of the rule of law” essentially meant that the rule of law was morally neutral, like a knife: it could be used to cut a cake, or to kill a person, depending upon the intentions of the person who wielded it.⁴ The eight basic precepts did not infuse law with a moral content at all: they simply set out the basic minimum conditions under which modern states could effectively govern their citizens. Indeed, one could imagine a situation where the eight basic precepts allowed a morally evil state to perform evil with greater efficiency – much like a sharp knife allows an evil person to be more effective at committing crimes. Raz argued that for moral content, one would need a *thicker* conception of the rule of law, embodying substantive principles beyond the eight precepts

In response, Fuller insisted that the eight precepts were *substantive* in nature: that a legal system that adhered to them would inevitably be of a higher *moral* quality than one that didn’t. However, the most eloquent defence of this “thin” vision of the rule of law

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came from a most unlikely source: in his famous book, *Whigs and Hunters*, the respected British Marxist historian, EP Thompson, devoted the final section to discussing the rule of law. Thompson had spent much of the book analysing the “Black Acts”, and a set of laws in 17th and 18th century England that had been used to dispossess and criminalise the peasantry. As a Marxist, Thompson began with deep skepticism towards the very idea of the rule of law, imagining it to be a sham, and a rhetorical device used to advance the class interests of capitalist, using the machinery of the State. By the end of his analysis, however, Thompson was much more hesitant about this conclusion: instead, he argued that the rule of law was a qualified good. What Thompson found in his analysis was that the very form that the rule of law took – i.e., the form of generality and universality – acted as a degree of constraint upon the exercise of raw power. In other words, the moment that law made a *claim* to universal and general applicability – the first of Fuller’s eight precepts – it would at least, on occasion, have to *be* generally and universally applied, if it were not to descend into self-parody. This, then, would provide the powerless and the vulnerable a space – a tiny space, but a space nonetheless – to hold the powerful accountable, and place limits upon their power. And in his historical study, Thompson found that, on occasion, this had happened.⁵

Thompson’s eloquent argument drives home the need of even this basic, minimalist idea of

the rule of law, and how necessary it is. However, if we are to dispassionately examine the Indian legal system, we find that in some crucial ways, it comes up short. For example, consider the use of “sealed covers” in many public law cases. The use of “sealed covers” violates the publicity requirement of Fuller’s inner morality of law: it allows for far-reaching decisions to be made on the basis of material that the public is forbidden from seeing, and therefore is in no position to assess. In some cases, the position is worsened, when “sealed covers” are used to indict individuals, as in some UAPA cases, where the ban upon an organisation is upheld on the basis of materials in sealed covers, giving the accused no opportunity to defend themselves. Another example is that of preventive detention cases, where public interest can be invoked to deny a detenu the material upon which his detention is sought to be justified. Once again, such practices violate the basic, minimal content of the rule of law, as articulated by Fuller.

It therefore behoves us to ask, dispassionately, what are the manifold ways in which our legal system – despite proclaiming itself to be a legal system of a modern, democratic country – fails to meet Fuller’s eight precepts – and to work towards remedying those weaknesses. Otherwise, the Supreme Court’s lofty pronouncement about the rule of law and the basic structure in *Indira Nehru Gandhi* will remain – in the words of Mathew Arnold – “an ineffectual angel beating his luminous wings in the void.”

¹Indira Nehru Gandhi v. Raj Narain.

²Article 329(A)(4).

³Fuller, Lon “The Morality of Law”

⁴Raz. Joseph “The Authority of Law”

⁵Thompson, E.P. “*Whigs and Hunters: The Origins of the Black Act*”

Rule Of Law: An Essential Aim Of The Constitution

*Subrith Parthasarathy**

The phrase “The Rule of Law” is so frequently used in public discourse that it has become something of a cliché. Pick any newspaper on any given day and you’ll see one reference or another to “The Rule of Law.” Consider a few recent examples: “Prime Minister Netanyahu and His Far-right Allies Wage War Against the Rule of Law,” read the title to an opinion piece published on January 24 in Haaretz. Speaking in the British Parliament, the country’s Treasury minister said that his ministry would ensure that “the rule of law is upheld” after the founder of the Wagner mercenary group was able to hire a law firm to sue a British journalist despite being sanctioned by the government. Last week, at the UN Security Council, India’s Permanent Representative to the UN. Ambassador Ruchira Kamboj said, “The application of rule of law at the international level should protect the sovereignty and territorial integrity of states from aggression, including terrorism, and including cross border terrorism.”

As is evident, it is a term that is used widely and in varying contexts. But what does it, in fact, mean. To begin with, we must distinguish The Rule of Law from a rule of law. The latter refers to something tangible. For example, if the Code of Civil Procedure

prescribes a timeline within which a decree of a civil court can be appealed, that directive represents a rule of law. The doctrine of *res judicata*, similarly, will be *a* rule of law.

The Rule of Law, on the other hand, is a term of abstract conception. It connotes a particular value; it represents a political ideal, an ideal that partakes within it different moral precepts. It refers, as the legal philosopher Jeremy Waldron has put it, to the institutions of governance as a collective whole, to the idea that we are all equally subject to the law. But can its abstractness be dissolved into something resembling a concrete set of principles? The aim of this essay is to argue that it can indeed be so reduced, and that those precepts are by and large contained within the text and spirit of India’s Constitution.

There have been quibbles over the true origins of the phrase, The Rule of Law—on whether it originated in Albert Venn Dicey’s writings, or not. But those arguments apart, the phrase has also not been beyond criticism. Joseph Raz, for example, has pointed to the inherent arbitrariness in it, how it is often used to denote whatever one might deem positive in an administrative system. Judith Shklar has similarly pointed to how the overuse of the term has virtually rendered it meaningless. There’s also, as Waldron has emphasised, the problem with governments

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appealing to the rule of law only to apply a debased version of it. Here, the law may be used as an instrument to achieve a government's objectives, but the government itself doesn't subject itself to the constraints of the law.

Therefore, in theory, one can have a state that uses the law towards certain ends but still isn't in fact a nation that is governed by the rule of law. Take the example of Nazi Germany. There were certainly laws that existed there and laws that were enforced, but we cannot, under any stretch of imagination, describe that as a society governed by the rule of law. The laws lacked a fundamental morality. They were stripped of the ideas of equality, and the basic guarantee of human rights to all persons.

Yet that such societies and states can exist, that countries can be governed in this form, doesn't by itself mean that the phrase the rule of law—in its abstract sense—isn't important. It continues to express an ideal that is in many ways of universal value. And we'll understand that value when we try and define the term and try and excavate its contents. The eminent British judge, Thomas Bingham, in his book *The Rule of Law*, says there are eight broad principles that are subsumed within the term.

First, the law must be accessible, intelligible, clear, and predictable. If the law says jaywalking is a crime, we must know what jaywalking means. We must know what punishment we might face should we be guilty of the crime. This is important not only from the point of view of criminal laws, but civil and commercial laws too.

Second, questions over legal rights and liability must be resolved by the exercise of

the law and not through the exercise of discretion. By this Bingham doesn't mean that all decisions should be taken by a court or a tribunal, just that discretion exercised by an administrative official should be guided by law, that there should be clear stipulations and rules on how discretion is to be exercised. Say, the government intends to lay a new highway and wants to outsource this job to private operators. To that end, it opens a tender and different companies submit bids. How is the successful bidder to be chosen? This cannot be by pure discretion but must be guided by law.

Third, laws should apply equally to all. This dictum is rather more self-explanatory. That no one is above the law. Every person is subject to the same laws of the land. No doubt, equality by itself is an abstract conception that partakes many different doctrines, but the general principle expressed here is unambiguous and uncontentious.

Four, ministers and public officials must exercise the powers conferred in good faith, fairly, for the purposes for which they were conferred, reasonably, and without exceeding the limits of such powers. This principle, as Bingham explains, is really an extension of the third and fourth rules. The ideas of natural justice, of *audi alteram partem*, of the rule against bias, are all intrinsic to the rule of law. They are contained within the general archetype of a non-arbitrary state.

Five, the law must afford adequate protection of fundamental human rights. This sounds unexceptional. But it proves rather more controversial when we start to think about what human rights in fact include. We know from various international conventions that certain rights are universal in nature—the right to life, the right to freedom of religion,

the right to free speech, the right to assembly, the right to form associations, the right against torture, the right to personal liberty, etc. But what about, say, the right to property? Our Constitution no longer guarantees it as a fundamental right. What this then means is that we can agree that the promise of human rights represents an important component of the rule of law, while being less certain about the purport and scope of those guarantees.

Six, the state must provide a way of resolving disputes which the parties cannot themselves resolve. In other words, it is the responsibility of a state invested in the Rule of Law to ensure that it puts in place an accessible justice-delivery system.

Seven, the adjudicative procedures provided by the state should be fair. This is linked to the earlier principle, but its emphasis lies in the right to a fair trial. That right encompasses several different factors. In a criminal trial, for example, this idea would mandate that a person be tried by a fair and impartial judge or jury. This demand for fairness though is placed not only on the judge but also on the prosecutor, on the prosecutorial agency. It starts from the point of investigation by the police and stretches to the role played by the prosecutor. In the absence of a fair adjudicating process what you'll end up with is a diminished simulacrum of the rule of law, where arbitrariness becomes the norm.

Eight, the rule of law requires compliance by the state with its obligations in international as well as national laws. At first blush, this facet might seem an overstatement, but maintaining an international legal order, one in which a set of norms are respected, is important for the purposes of securing peace and order.

These eight principles that Bingham posits all look unexceptionable, they seem like promises that we'd all perhaps agree with. But in India we are governed by a written constitution. We have an underlying document that helps us glean what the rule of law in our nation is supposed to mean. The Constitution is, in many ways, a transformative document: it ushered India, to cite one feature, into an era of universal adult franchise. But the basic premise that underlined the intention of the Constitution's makers was a commitment to put in place a text that would make India a nation governed by the Rule of Law. It is for this reason that the Constituent Assembly embedded a number of ideas inherent to the phrase in the document: by memorialising values such as the separation of powers, the existence of an independent judiciary, principles of equality of all before the law, and the guarantee of fundamental rights.

James Madison had to say at the framing of the American Constitution:

"If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions."

This is really what the Indian Constitution also seeks to do. It seeks to provide a charter of governance. It proceeds on the presumption that India will be a nation

governed by laws. Of course, there are plenty of other aims that are linked to the Constitution. For example, it seeks to tether India from its colonial past, to break free from those shackles and to create a society that is devoid of inequality, to create a society that is free, to create a society where all of us will strive to live together as fraternal beings, regardless of our caste, religion, etc, where justice will be equally available to all. But the framers were conscious that the Constitution isn't some sort of magic potion, where through a snap of the fingers a society of this kind can be created.

Here, it is important to pause for a moment and consider what Dr. Ambedkar, the chairperson of the Constituent Assembly, envisioned. He saw the Constitution as not merely a charter of rights but also as a document that would lay the foundation for republican governance. His worries that democracy in India was “only a top-dressing on an Indian soil, which is essentially undemocratic”, saw him lay stress on a need to diffuse constitutional morality among India's citizens. Citing the classical historian, George Grote, while moving the draft Constitution on November 4, 1948, Ambedkar said constitutional morality had to be seen as representing “a paramount reverence for the forms of the Constitution”. Since this reverence had to be cultivated, he thought it imperative that the Constitution commend the minutiae of administration rather than leave such matters purely to the legislature's wisdom. In the absence of such prescriptions, democracy, he feared, would wallow in decline.

It is this commitment to detail that has made our Constitution endure. It is not that the Indian Constitution doesn't borrow from elsewhere where it was thought necessary. It

is not that our Constitution is the only way to provide for a society that will be governed by the Rule of Law. There are multiple ways to achieve this. And we can see this in what was chosen and what was disregarded by the framers. Therefore, in some ways, the Rule of Law transcends the Constitution. The Rule of Law can exist within different systems of government, within both the Westminster style of parliamentarianism and the American presidential style, both in a federal and a unitary setup. However, there are some features that are non-negotiable. For example, the guarantee of basic human rights and the idea of an independent judiciary.

“The Constitution only contains legal provisions, only a skeleton,” said Ambedkar. “The flesh of the skeleton is to be found in what we call constitutional morality. The framework of constitutional morality would mean that there must be no tyranny of the majority over the minority...The minority must always feel safe that although the majority is carrying on the Government, the minority is not being hurt, or the minority is not being hit below the belt.”

In addition to Ambedkar's belief that constitutional laws will have to rest on the bedrock of constitutional morality, one might argue that any Constitution will have to rest on a substratum of the rule of law, on a set of principles that transcend the text of the Constitution itself. Perhaps we can consider this through an example. Article 21 of the Constitution guarantees a right to life and personal liberty. The question that we need to ask—and this question has proven salient in Indian history—is whether Article 21 is the source of this right. Let's assume when the Constitution was being framed, the framers—in their wisdom—chose to leave out a guarantee of a right to life from the

Constitution. Would we still have such a right or not? The answer to this might depend on which philosophical account of law that we want to abide by. In *ADM Jabalpur v. Shivkant Shukla*, the infamous *habeas corpus* case, the Supreme Court held that the remedy of habeas corpus can be lawfully suspended when a state of Emergency was prevailing. The Court effectively held that the source of our rights was the text of the Constitution and given that the Constitution sanctioned the suspension of the right to secure habeas corpus in an Emergency, there was no basis on which any person who was detained during the Emergency could petition the judiciary seeking a habeas corpus—even if this claim was predicated on his or her right to life and personal liberty.

This view, we now know, is incorrect. In *KS Puttaswamy v. Union of India*, a 9-judge bench of the Supreme Court in holding that the right to privacy is an integral part of the right to personal liberty also overruled the judgment in *ADM Jabalpur*. Justice

Chandrachud noted that “Natural rights are inalienable because they are inseparable from the human personality. The human element in life is impossible to conceive without the existence of natural rights.”

The idea here is to use the rule of law as an interpretive tool. Ultimately, the Rule of Law is an essential aim of the Constitution. It is a moral precept, a moral ideal. The Constitution contains several imperatives. Some of those imperatives are abstract guarantees. Their meanings require fleshing out. Considerations of natural justice, for example, have been read into the guarantee of the right to equality. The idea of non-arbitrariness has similarly been seen as an extension of the guarantee of equality. But seeing our Constitution in these terms, as we’ve learnt, is only part of the job. True justice is done only when the Rule of Law, through each of the eight principles that Bingham posits, is followed without any derogation whatsoever. That must always remain our basic democratic aim.

Party Autonomy in International Arbitration: Undermining the Rule of Law in International Commerce?

Nandita Rao*

“Each rule of the game, even if stated in a way that “applies to all players”, can be analyzed for its impact on the chances of each player.”¹

This essay seeks to analyze the above statement in the context of International Trade Law, specifically Alternate Dispute Resolution (Arbitration Law) as a technique of dispute resolution in international trade and its impact on State Sovereignty in the third world. It is argued that in the guise of party autonomy, the stronger party gets to choose the rules of the game, resulting more often than not the imposition of the powerful countries laws, arbitrators and seat of arbitration upon the businesses of less powerful countries. On the surface the playing field is level but between unequal parties, a rule of law, built on the philosophy of party autonomy, often results in bullying of the less powerful party. The essay interrogates the role of international treaties in promoting Arbitration as a tool of international commercial dispute resolution and its impact on the third world sovereignty and business.

The idea or entitlement of *free trade* was coined by Vitoria in the 16th century, with a view to justify the Spanish Conquest of Indian lands in what is now known as Latin America. He held that Indians were bound to allow foreigners to travel to their lands, trade

among them, arguing that free trade was a universal right. In the event that any obstruction was created by the Indians in these activities, the foreigners i.e. the Spanish, were entitled to engage them in a just war with a view to secure this right². It is relevant to mention that these criteria for *just war* were stipulated after the Spanish had already conquered the Indians and were using them as slave labor to extract bullion or gold that was discovered on their lands.

It is also significant that the Indians were not in a position to demand reciprocity of this right of free trade deemed to be Universal. Similarly, in the late Eighteenth Century, India had a thriving cotton textile Industry and a vast market both within India and in Africa and the Middle East. There were thriving factory towns with skilled labour that produced high quality textile at such low costs that even after being shipped to England they could be sold at a 100% mark up. England was at the same time just embarking on the Industrial Revolution and the textile interests in Britain at the time demanded tariff protection against Indian textile imports. The Government accordingly placed a tariff of 70%-80% on all imported Indian Textiles, thereby pricing them out of the British Market. The Indian market was simultaneously forced open to British Textile export. The export of raw cotton from Indian was not restricted by Tariffs, thus making it

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more profitable for cotton textile producers and the British East India company merchants to invest in and trade-in raw cotton, resulting in the transformation of India from a textile exporting to a raw cotton-exporting nation³.

Therefore, the creation of the Centre and the Periphery (former colonizers and colonized or the present developed and developing countries) was not the result of any natural process of evolution based on racial attributes or natural resource endowments but is the creation of the rules of international law that structure international trade in the late 19th and early 20th Century.

With the end of colonialism and inevitability of de-colonisation, monopoly capital, represented by developed / industrialised countries, so as to secure their access to natural resources created the Bretton Woods Institutions. The ideological basis of their functioning and their policy prescriptions for intervention in inter and intra country trade and economic policy bypassed even classical economics and encouraged speculative finance capital interests through policies of privatization, liberalization of the domestic market for goods and capital, withdrawal of the state from economic activity and free trade in all countries, irrespective of their stage of development, industrialization or institutional organization.

The obvious contradiction between the stated motives of these institutions and the effects of their policies, now widely studied and known, coupled with their refusal to acknowledge or alter their policy prescription, have led several third world countries and scholars to comment that, "the threat of recolonization is haunting the worldIndeed, international Law is the

principal language in which domination is coming to be expressed in the era of globalization⁴.

When the General Agreement on Trade and Tariff was set up in 1947, developed and developing countries were treated as being at par. Therefore, no country could give either its domestic industry or any other country preferential treatment over any other signatory of GATT. Developing countries had to justify recourse to any non tariff barriers according to standard GATT principles and provisions. Third world countries realizing the structural problems with the global economic/ legal system, in perpetuating status quo, and they resisted by developing countries within the GATT⁵ system for special and differential treatment.⁶ After a long struggle of 30 years, developing countries had finally managed to achieve the principle of non reciprocity in trade relations, when in 1984, the Uruguay round was concluded. However, GATT was simply replaced by the World Trade Organization (WTO) thus practically nullifying the gains made in the Uruguay Round by the third world. There was a shift from the non reciprocity of obligation to a system of non reciprocity of implementation. Time limits were set for developing countries to comply. These time limits had no correlation with levels of development but were based on the negotiating power of each country.

The Human Development Report published in 1992⁷ found that globalization of the market had resulted in the increase in global inequality, the share of the poorest 20 percent in the world had dropped from 2.3 percent of world income (196) to 1.4 percent (1989) and there was a corresponding worsening of the Gini Co-efficient. Sub-Saharan Africa, South Asia, China and Latin America showed

deterioration in per capita income relative to the world average.

It is in this background that we must interrogate International Arbitration and the law that governs international commerce. The convention on the Recognition and enforcement of Foreign Arbitration Awards (New York , 1958) better known as the New York Convention, where Nation States undertook to give effect to agreements to arbitrate and to recognise and enforce awards made in other states. This was followed by the The United Nations Commission on International Trade Law (UNICTRAL) Model Rules adopted in 1985. The General Assembly of the United Nations has recommended that all countries give due consideration to these Model Rules, in view of the desirability of uniformity of law of arbitral procedures and the specific needs of international arbitration practice. An important features of the UNICTRAL model law was that these rules were intended to harmonize concepts on arbitration and conciliation of different legal systems of the world and thus contain provisions which are designed for universal application. Again the unequal were equalized and the concept of party autonomy was universalized in a world where parties were far from having the same negotiating power or arbitration infrastructure.

Based on this presumption of Universal Application the Arbitration and Conciliation Act of 1996 was introduced first by ordinance in India and later passed through the Indian legislature as a Statute. The key chapter to be considered in the Arbitration and Conciliation Act 1996, is chapter V, which defines the parameters of how to conduct Arbitral Proceedings. The chapter opens with a declaration of equality under Section 18

which provides that the parties would be treated equally and be given full opportunity to present their case. However, Section 19 , provides that the rules of procedure and evidence are left to be determined by the parties and should they fail to do so upon the act empowers the arbitrator to determine a procedure and rule of evidence as considered appropriate by the arbitrator. Section 20 leaves the parties to determine the place of arbitration. On the surface the rules seem fair and reciprocal, adopted through the UN General Assembly, thus unlike 19th century international trade rules and laws, the Arbitration Rules can certainly not be said to have been obtained by coercion or duress. However, treating unequal parties as equal, often results in the capital investing party ending up wielding power over the capital receiving private party or nation state, resulting in both the procedure and the place of arbitration being dictated by them. One can only say that in the guise of party autonomy, an ambiguous Rule of Law has been enforced upon the world, which is based purely on the negotiating power of two parties and not any principles of fair play or natural justice.

One cannot also deny that universalisation of Arbitration, does have the element of subordination of sovereignty, by permitting parties to avoid the legal system prevalent within a nation state where investment is being made and impose upon it negotiated conditions, which may be patently exploitative or unfair. The lack of reciprocity due to the absence of bargaining power or arbitration infrastructure in one party or nation state results in the more powerful or developed parties dictates the terms. As has been argued by Mathew Craven, in his essay "*What Happened to unequal treaties ?*" the 20th century international lawyer has

effectively eliminated the challenge to international treaties, agreements and awards on the grounds that they subordinate sovereignty of a nation state and are often not based on genuine reciprocity. Section 34 of the Arbitration Act 1996, for example, which defines the scope of objections to an award, also does not provide for any challenge to an award on these grounds. The recent case of *White Industries-India (Bilateral Investment Treaty) Award*, held that, India is liable for damages to white Industries, on account of judicial delays of over nine years in enforcing an International Commercial Courts Award. This award not only undermines our National Sovereignty but also judicial independence. One may also question the probable racist undertones of the Award. However, these are not available

grounds to challenge the award or at least have thus far not been tested as grounds to challenge such an award.

With an increasing use of Arbitration as a preferred form of dispute resolution in international trade and commerce, it would be advisable for the developing world to interrogate and caveat the scope of party autonomy so as to ensure that the economic and other power differentials that often inform commercial agreements and bilateral treaties does not result in subordinating a third world contracting party and legal system to a first world contracting party and legal system in the guise of party autonomy. This would undermine the principle of Rule of Law and constitute a return to a more 19th century rule of power international law regime.

¹Kennedy, David “*The Stakes of Law*”; Hale and Foucault, “*Legal Studies Forum*”, Volume XV, Number 4 (1991) at p328

²For a discussion on naturalist frame of international law, in defining the relations between Europeans and Non Europeans, See Chapter 1, p.399 - 400, SJ Ananya, “*Indigenous People in International law*”, Oxford University Press, New York

³For a detailed discussion on the continuing economic impact of colonialism See Chapter 3, Cypher and Dietz, “*The Process of Economic Development*”, Rutledge.

⁴Chimni, B.S. “*Third world Approaches to International*

Law” as quoted in chapter 5 at page 246 in “*Imperialism Sovereignty and the making of International law*”, Cambridge Anthony Anghie.

⁵Abbreviation for General Agreement on Trade and Tariff

⁶For a detailed discussion on special and differential treatment, see p 42-44, ibid foot note 18.

⁷Stewart, Frances, edited by Mahbub-ul-haq, “*Consequences of the global market in creating inequalities and marginalization*”, The UN and the Bretton Woods Institutions, Newyork Street, Martins Press 1995 P170-172

Pre-trial Detention: A Tool for Instant Justice?

*Chirag Balyan** & *Atmaram Shelke***

Discretion is inevitable, but in the rule of law society there should be a relentless pursuit of constraining it.¹ Excessive discretion, be it with the legislature, executive or judiciary, is a potential weapon to curtail liberty.² The Criminal Justice System³ ('CJS') is a formal tool which State⁴ can use to deprive the individual life and liberty. CJS provides a framework for infliction of criminal sanction according to the due process and the principles of the fair trial.⁵ The various laws place the limits on the powers of the functionaries of the CJS to make sure that the deprivation of life and liberty occurs only when it is permitted within the 'four corners of the law'⁶ – which Constitutions define as 'procedure established by law'⁷ or 'due process'.⁸ In substantive criminal law, to limit the discretion of functionaries of CJS, offences and punishments have been defined. Similarly, in procedural law various safeguards have been provided to the accused and fetters have been imposed on CJS functionaries to prevent the miscarriage of justice.⁹

The provision of bail is one of such important safeguards that ensures liberty and dignity to the individual during the pendency of investigation and trial. However, despite the

importance of the bail to individual liberty, the bail jurisprudence remains mucky. There are no systematic efforts to overhaul the bail laws. This brings the question that whether, state as well as courts see any incentive in keeping the bail laws vague and ambiguous? We argue the answer in affirmative.

In the first part of this piece, we layout the ambiguousness in existing bail laws. In the second part, we address an important issue: whether denial of bail is a tool for instant justice. In the final part, we conclude by arguing that bail laws need complete overhaul and piecemeal efforts are not sufficient.

Mucky bail jurisprudence

An arrest of an individual is an extreme step taken by an investigating agency. Yet, this power is exercised casually, and many undesirable arrests are made by the police.¹⁰ After arrest when the accused are remanded, as the prison statistics as well as judicial decisions indicate, magistrates tend to pass remand orders mechanically.

Each day, on an average four thousand and three hundred seventy-nine (4,379) persons were detained in India as under-trials in the year 2019. The average period of detention of under-trial prisoners is approximately six

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months. A total of 15,98,218 under-trials were released during 2019. Out of it, 14,99,028 under-trial prisoners were released on bail, 61,359 under-trials were acquitted by the trial courts and 21,895 convicts were acquitted by the appellate court.¹¹ The fact that there is an occupancy of more than 100% shows that Indian prisons are overcrowded. Furthermore, the conviction rate for the crimes under Indian Penal Code, 1860 was marginally above 50%. In 2019, a total of 19,28,705/- under-trials were incarcerated for different durations. The problem of overcrowding and large undertrial population also tells us that many accused are deprived of their liberty without being proven guilty. Figures haven't much changed in the following years as well.

The wide discretion possessed by the courts in bail determinations is usually exercised against the accused, which is contrary to the settled principle that 'bail is the rule and jail is an exception'. The guidelines framed by the Supreme Court to check the judicial discretion include an elaborate list with sufficient broad and vague heads for discretion to sneak into bail determinations.¹² The inherently vague bail standards invite nebulous judicial calculations into the bail calculus. Further, the bail laws proceed on the erroneous assumption that risk of accused fleeing from justice can be offset by taking monetary bail or surety. As the Supreme Court has held in numerous decisions, such requirements are detrimental to liberty of poor and marginalized.¹³ Thus, the 'preventive State' trumps the individual liberty in the name of security and victim justice.

The period of pre-trial detention is indeterminate. This means that the accused will stay in prison till another order releasing

the accused on bail is passed.¹⁴ Though the apex court in a suo moto case has issued the guidelines for time bound completion of trials¹⁵ and decongestion of prisons¹⁶, there are no fetters in law on how much time an accused must spend in prison before the trial is over.¹⁷ The accused, to get his liberty, will have to keep trying the luck with bail applications¹⁸ or will need to wait till the conclusion of the trial¹⁹. The accused thus spends time in a prison as an under-trial along with convicts in the same onerous circumstances.²⁰ This is compounded by the fact that completion of trial in our country takes a lot of time. According to National Judicial Data Grid, more than three crore criminal cases are pending of which 47% of criminal cases which are pending are more than three-year-old.²¹

In *Sanjay Chandra v. CBI*,²² the Supreme Court noted:

"...one must not lose sight of the fact that any imprisonment before conviction has a substantial punitive content and it would be improper for any Court to refuse bail as a mark of disapproval of former conduct whether the accused has been convicted for it or not or to refuse bail to an un-convicted person for the purpose of giving him a taste of imprisonment as a lesson."

Thus, though pre-trial detention is justified as 'essentially regulatory'²³, it nonetheless serves a punitive function.²⁴ Is it not appalling that a society governed by Rule of Law is shoving mere accused persons to prisons without any trial for an indefinite time and in the same facility as that meant for convicts?

Denial of bail – a tool for instant justice?

The courts²⁵, the Law Commission²⁶ as well as civil society²⁷ has been lamenting about poor

bail laws in the country and have suggested overhaul in the general approach to bail laws. However, the State has not done much to reform these laws. A question, thus, arises: Does the inaction of the State in reforming bail laws imply that it sees a utility in keeping the law obscure?

Overcrowded prisons, abysmally low conviction rates and long pendency of cases buttress the argument that pre-trial detention is not only ‘excessive’ but also a primary tool of the State for delivering instant justice in cases where the individual is an accused.

There is a vested interest of both the government and judiciary in sustaining and feeding the prisons through the pre-trial detention.²⁸ Pre-trial detention enhances the legitimacy of both government and judiciary in the eyes of public. The ability of the government to arrest and then get judicial custody of the accused enhances public confidence in the law and order.²⁹ This is more so in cases where the arrestee is accused of “anti-national” activities or conduct.³⁰ The judiciary, which is often attacked for slow justice dispensation, by exploiting pre-trial detention maintains its credibility by communicating to public that it can render instant justice. In a recent judgment, the Supreme Court pertinently observed:

“The rate of conviction in criminal cases in India is abysmally low. It appears to us that this factor weighs on the mind of the Court while deciding the bail applications in a negative sense. Courts tend to think that the possibility of a conviction being nearer to rarity, bail applications will have to be decided strictly, contrary to legal principles.”³¹

Thus, one may argue that courts see pre-trial detention as an opportunity to convey to the

society that they are also ‘functioning’.³² While courts, unlike Parliament, are not populist institutions, they seek to attain institutional legitimacy by rendering decisions based on public opinion.³³ Schumann, while laying down his public repute discourse, contends that courts while delivering decisions are conscious of how their decisions will be viewed in public and whether, their decision will undermine the confidence in administration of justice. In fact, in Canada and Europe alleged criminals can be detained to sustain “public confidence in the administration of justice”³⁴ The Bangalore Principles of Judicial Conduct also recognizes that court’s moral authority relies on sustained public confidence in its moral sanction.³⁵ The Supreme Court has held that the conditions that would support the granting of bail must be weighed against the accused’s right to personal freedom in the broader context of the public concerns associated with it.³⁶ The court implied that the bail may be rejected “for collective cry and desire.”³⁷

The rejection of bail to sustain public confidence in law and order can potentially override the fundamental human rights of the accused. At the cost of individual liberty - the government, the judiciary, and the society’s sense of security are fulfilled by the vague laws, excessive discretion and ubiquity of preventive justice. The attempts to decongest prisons only explain the propensity and advantages of delivering instant justice. Once the perception is created that perpetrator is immobilised or a message has been rendered in the society, the State would not mind such an individual getting released on bail.

The increased use of pre-trial detention to deliver quick justice not only undermines the rights of the accused but also subverts the efficacy of fair trial. As argued above, such

under-trial prisoner stays in the same facility and conditions as of convicts. Further, in the eyes of society the stigma which is carried by under-trial prisoner is no different from convicted offenders. If the State can secure pre-trial detention, then it does not even have to worry about trial. Through pre-trial detention, State can bypass the trial procedure as well as rigorous burden of proof standard. Pre-trial detention is akin to punishment without trial. If the State can communicate to the society and the victim that justice has been done through pre-trial detention by immobilising and detaining the accused, why would it take interest in concluding the trial? As per official data, approximately three million criminal cases are pending in Indian courts and out of them 10% of cases are pending for more than ten years.³⁸

Conclusion

Settled principles of jurisprudence mandate that the aim of pre-trial detention should not be victim justice or preventive justice, but to ensure the fair trial by ensuring that the accused appears before the court. While the avowed objective of pre-trial detention is preventive, it has substantial punitive content. Pre-trial detention is justifiable only

to secure attendance of accused at trial. For other purposes, objective assessment of risk must be carried out. Bail must be declined only as an exception.

However, in India, we first clog our prisons with under-trials and then find out ways to decongest them through piecemeal efforts. There is no systematic effort to overhaul the bail jurisprudence. The major focus to address overcrowding in prison is to build additional prisons, barracks, increase the budget, fast-tracking of cases and the formation of committees to identify under-trials who deserves to be released on bail. We often fail to address the root of the problem i.e., indiscriminate arrests and faulty bail jurisprudence.

Indeterminate detention pursuant to rejection of bail on vague and ambiguous parameters is not consistent with principles of Rule of Law and Due Process. Instant justice through indiscriminate arrests and mechanical pre-trial detention orders must be curbed. The thwarting of trial process by pre-trial detention undermines the value of entire criminal justice system. It is, therefore, imperative to make concrete efforts in overhauling the bail jurisprudence.

¹See, Hayek, F.A., *The Road to Serfdom* (1944, Chicago Uni Press).

²*Babu Singh and Ors v. The State of U.P.* AIR 1978 SC 527, per Justice V.R. Krishnaiyer.

³The term has been used in the widest sense to also include Preventive Justice System (PJS). Though, the CJS and PJS have different architecture and justificatory framework, the effect of both is the criminalization of the subject.

⁴The term State has been used to also include judiciary.

⁵*Maneka Gandhi v. Union of India*, A.I.R. 1978 SC 597.

⁶*Gudikanti Narasimhulu v. Public Prosecutor* (1978) 1 SCC 240. Justice V.R. Krishnaiyer of the Supreme Court of India ("SCI") observed, "personal liberty of an accused or convict is fundamental, suffering lawful eclipse only in

terms of procedure established by law."

⁷The Constitution of India, 1950, Article 21. It reads as: "No person shall be deprived of his life or personal liberty except according to procedure established by law."

⁸*Maneka Gandhi v. Union of India*, A.I.R. 1978 SC 597. In *Maneka Gandhi*, the SCI equated 'procedure established by law' in Indian constitution to 'due process' under the US Constitution. See, *Rajesh Kumar v. State through Government of NCT of Delhi* (2011) 13 SCC 706, wherein, the SCI read Eighth Amendment of the US Constitution in Article 21 of the India Constitution. Eighth amendment read as: "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

⁹For ex., See, *Uday Mohanlal Acharya v. State of*

Maharashtra, (2001) 5 SCC 453.

¹⁰*Satendra Kumar Antil v. CBI*, Judgment dated 11 July 2022 in SLP (Cri) 5191 of 2021, para 5; See, *Armesh Kumar v. State of Bihar*; (2014) 8 SCC 273. Recent report of Parliamentary Standing Committee while endorsing the National Police Commission view that 60% of arrests are unjustified and results into overcrowding of prisons recommended that police need to desist from unwarranted arrest. Thirteenth Report, 'Women in Detention and Access to Justice', Parliamentary Standing Committee on Empowerment of Women (2017-18), Sixteenth Lok Sabha, Parliament of India (2018). Available

at:https://eparlib.nic.in/bitstream/123456789/783396/1/16_Empowerment_of_Women_13.pdf

¹¹Id at pg. xviii

¹²Balyan, Chirag, *"Bail or Jail: The Antinomies in Liberal Theory and the Way Forward"*, in Khurshid, Salman et. al., *"Taking Bail Seriously: The State of Bail Jurisprudence In India"*, (Lexis Nexis 2020) at 79-86.

¹³For ex, See, *Hussainara Khatun & Ors. v. Home Secretary, State Of Bihar*, 1980 (1) SCC 81

¹⁴See, *Kalyan Chandra Sarkar v. Rajesh Ranjan alias Pappu Yadav*, AIR 2005 SC 921.

¹⁵In *Re: To Issue Certain Guidelines Regarding Inadequacies and Deficiencies in Criminal Trials v. The State of Andhra Pradesh & Ors.*, Supreme Court of India, Judgment dated April 20, 2021 in *Suo Moto Writ (Crl) No.(S) 1/2017*; Also see, *Hussain & Anr. v. Union of India & Ors.*, 2017 (5) SCC 702 wherein the SCI noted, "...Magisterial trials, where accused are in custody, be normally concluded within six months and sessions trials where accused are in custody be normally concluded within two years..."

¹⁶See *Rama Murthy v. State of Karnataka*, AIR 1997 SC 1739.

¹⁷There are two provisions in the Code of Criminal Procedure, 1973 wherein an accused may be released after a certain duration. These provisions are section 167 and 436A.

¹⁸An accused can apply for bail for any number of times. The court will usually look if some new circumstances have arisen in the case that may warrant the release of the accused. See, *State of Maharashtra v. Captain Buddhikota Subha Rao*, 1989 CrLJ 2317.

¹⁹In India courts, total 29, 904, 545 criminal cases are pending in various courts. Approximately 10% of these cases are more than 10 years old. National Judicial Data Grid (January 06, 2022), available

at:<https://njdg.ecourts.gov.in/njdgnew/index.php> The average time a trial takes in India to finish is approximately six years. This period excludes time taken by appellate courts. See, Narasappa, Harish, *The long, expensive road to justice*, India Today, (May 09, 2016)

available at: <https://www.indiatoday.in/magazine/cover-story/story/20160509-judicial-system-judiciary-cji-law-cases-the-long-expensive-road-to-justice-828810-2016-04-27>

²⁰See, 78th Report of the Law Commission of India on "Congestion of Under-trial Prisoners in Jails" (1979). The commission recommended that under-trials and convicts should be lodged separately. However, barring in few prisons the same hasn't been implemented yet.

²¹National Judicial Data Grid,

<https://njdg.ecourts.gov.in/njdgnew/index.php> (March 20, 2023).

²²(2012) 1 SCC 40

²³*United States v. Salerno and Cafaro* (1987) 481 US 739

²⁴See, Husak, D. *"Lifting the Cloak: Preventive Detention as Punishment"*, San Diego Law Review 48 (2011), 1173–204.

²⁵An example of most recent judgment being - *Satendra Kumar Antil v. CBI*, Judgment dated 11 July 2022 in SLP (Cri) 5191 of 2021, para 67.

²⁶Law Commission of India, Amendments to Criminal Procedure Code, 1973 – Provisions Relating to Bail (268th Report, May 2017).

²⁷See, *"Re-imagining Bail Decision Making: An Analysis of Bail Practice in Karnataka and Recommendation for Reform, CLPR & APPI"*, https://clpr.org.in/wp-content/uploads/2020/03/BailReport_AW_Web_Final.pdf

²⁸See Roberts, Julian V. et al., *"Populism and Public Opinion: Lessons from Five Countries"* (2003).

²⁹Bottoms, Anthony *"The Philosophy and Politics of Punishment and Sentencing in"* Clarkson C. and Morgan R. (eds.) *"The Politics of Sentencing Reform"*, 17–49 (1995). Anthony Bottoms outlines the notion of 'populist punitiveness'.

³⁰Mohan, Anand, *"Jantar Mantar slogans: No bail for three; court says 'undemocratic'"*, The Indian Express, (Aug. 14, 2021), available at:

<https://indianexpress.com/article/cities/delhi/scathing-undemocratic-remarks-delhi-court-rejects-bail-plea-of-three-accused-in-jantar-mantar-sloganeering-case-7451903/>

³¹*Satendra Kumar Antil v. CBI*, Judgment dated 11 July 2022 in SLP (Cri) 5191 of 2021, para 67.

³²The large delays and experiences of litigants with court may give them an experience as if courts don't function.

³³See, Schumann, Fredrick *"The Appearance of Justice": Public Justification in the Legal Relation*, 66 U. Toronto Fac. L. Rev. 189 (2008).

³⁴Davidson, Caroline *"May It Please The Crowd? The Role of Public Confidence, Public Order, and Public Opinion in Bail for International Criminal Defendants"*, <https://www.corteidh.or.cr/tablas/r28484.pdf>

³⁵Commentary on the Bangalore Principles of Judicial

C o n d u c t , U N O D C ,
https://www.unodc.org/res/ji/import/international_standards/commentary_on_the_bangalore_principles_of_judicial_conduct/bangalore_principles_english.pdf

³⁶*Ash Mohammad v. Shiv Raj Singh @ Lalla Bahu & Anr.*, (2012) 9 SCC 446

³⁷Id.

³⁸In India courts, total 29, 904, 545 criminal cases are pending in various courts. Approximately 10% of these cases are more than 10 years old. National Judicial Data Grid, <https://njdg.ecourts.gov.in/njdgnew/index.php> (last visited Jan. 6, 2022).

Rule Of Law In The Age Of Techonology-Assisted State Decision Making*

Prasanna S*

Human discretion, it is often said, and more so in India, the source of all maladies of governance— from *error simpliciter*, to malice, and sometimes corruption. The ready solution at the hands of leaders in the administration that attempt to reduce or eliminate discretion, is the employment of solutions that have a technology element. Depending on the use to which such technology is put, government decision making is now either technology-led or technology- assisted. In some cases, the technology being adopted is an AI system.

This essay assumes that the reader is familiar with the history of discretion, the birth of administrative law as a branch of public law, and the techniques of legislative and judicial control over administrative discretion. If the reader is not familiar these topics, they may consult the author's previous version of this work on this theme, which is a working paper made available to the public¹, that has a somewhat detailed treatment of such topics. This essay proceeds to argue, supplying a post-constitutionalist understanding to the ideas of Rule of Law & Non-arbitrariness in administrative decision making, that such norms ought to be enforced even when the

decision making of the State is technology-assisted.

Judicial Control over Administrative Discretion

State decision making is controlled by several judicially evolved norms. State liability for wrongful acts²; The necessity to adhere to principles of natural justice³. - such as the right of effective hearing to affected parties⁴; the right to contest decisions⁵; the right to cross- examine; the requirement to pass reasoned / speaking order⁶⁷; the requirement to act reasonably⁸; the requirement to not impose upon itself fetters⁹ on its discretion; the requirement to not act under dictation¹⁰; and in some cases to answer the test of proportionality¹¹

Relevance of Administrative Law when Decision-making is Technology-led

The question that arises now is whether these tests remain relevant when the decision is technology-assisted or technology-led. It is a widely held theory¹² that technological fallibility is different from human fallibility in both degree and nature. In *degree* because one ends up with fewer errors in the medium to long run; in *nature* because technology fails not for reasons for which human error occurs – for example malice, corruption etc.; This theory goes further to argue that the norms

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that we have adopted for testing state decision making, given that they are rooted in suspicion of the state and the fallibility of the human decision maker, those norms are neither necessary nor relevant any longer.

Unlike in the UK, where the development of administrative law through the law courts evolved as common-sense check principles, the norms in India are rooted in the text of the constitution and are derived from the constitution. Rule of Law & Non-arbitrariness as a state practice norm is traced to the fundamental right under Article 14. Justice PN Bhagwati, in the celebrated case of *E.P. Royappa*¹³, reasoned that “From a positivistic point of view, equality is antithetical to arbitrariness. In fact, equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14.”¹⁴ Similarly, reasonableness and proportionality have been traced to the express requirements of reasonableness under clauses 19(2) through 19(6) under Part III of the constitution, since the early 1950s¹⁵.

Even more fundamentally, this ideal of non-arbitrariness as a solemn promise of the state is not merely a wordplay from the text of the constitution – but an essential feature of India’s constitution – that it represents a break from the past – a necessary severance from the ways of the colonial government, which was known for its ‘whim and caprice’. In the words of Justice Vivian Bose in *Virendra Singh vs. State of UP*¹⁶, “... In our opinion, the Constitution, by reason of the authority derived from, and conferred by, the peoples of this land, blotted out in one

magnificent sweep all vestiges of arbitrary and despotic power in the territories of India and over its citizens and lands and prohibited just such acts of arbitrary power as the State now seeks to uphold.”¹⁷

The ideals that have informed our constitutional contract and the administrative norms that have emerged and evolved from that constitutional promise, cannot be done away with by merely changing the mechanism by which state decision making occurs and without a surer legal footing. It is undeniable that there are also elements in the constitution that represent a continuity in the style and functioning from the Government of India Act, 1935 and the era of the *Raj* – the system of parliamentary democracy, the retention of the high courts and their practices for instance¹⁸. However, there are elements that clearly represent a severance – and the promise of non-arbitrariness in state’s decision making is crucially one such element.

Effective reinforcement of administrative law norms

This work therefore proposes the following measures constituting as an approach to control state decision making that takes the assistance of technology reliant processes.

First, before employing or adopting a technological solution to assist in decision making, an impact assessment and an inquiry ought to be undertaken for the possibility and extent of compliance with administrative decision-making norms as outlined above. For instance, an inquiry on whether the system can produce logs on demand that constitutes a reasonable explanation to the decisions being made. This is somewhat akin to the emergence of the ‘right to explanation’¹⁹ in contemporary AI policy literature. However, under Indian law, the

requirement and the right to a reasoned order captures the norm adequately and the newer terminology is perhaps surplusage. It is worth noting here that administrative law norms are articulated such that they presuppose an analytical inquiry in decision making. It may be argued that algorithmic decision making, and more particularly AI decision making, on the other hand rely on statistical and stochastic processes and may not be able to provide a reasoned order in the same sense as an analytical decision would do. At a minimum, there is certainly a requirement atleast to produce on demand, even the probabilities and the statistics that are relied on to make those decisions. Further, an inquiry of whether all relevant factors have been taken into account and whether any irrelevant factors have been considered. This represents also somewhat of a fresh challenge. The emerging field of studies on algorithmic bias²⁰ establishes how AI algorithms are notorious for taking into account- whether intentionally or otherwise, irrelevant factors in their working. One must underscore the importance of making such an assessment before investing in such an effort – not unlike the ‘precautionary principle’²¹ that environmental law practitioners are familiar with. This is because once significant investment is made, the unscrambling of the egg is often difficult as a practical matter – a consideration that the government kept reminding about to the supreme court, in the *Aadhaar* case²².

Second, the requirements of compliance with these norms must be flown down²³ as contractual obligations to the AI solution providers, even if they are private companies, as they are likely to be. The government may seek appropriate indemnity provisions from such solution providers. Irrespective of that, the solution providers shall be reminded that

they may be amenable to writ jurisdiction, for participating in a public function – a situation that is not necessarily unprecedented²⁴.

Third, in the event that it is found that the decision-making system is unable to comply with administrative legal norms outlined above, and non-adoption of such a system is demonstrably not an option, a purely non-automated option ought to be given to persons involved – either in the first instance²⁵, or as an override.

Fourth, no prejudice ought to be visited with for the person and no adverse presumption to be affixed on either the state actor or the decision subject for having used a non-automated option. In the *Aadhaar*-authentication based PDS distribution for instance, despite the manual override option being provided, the fair price shop operators were reluctant²⁶ to use that, as it created an unwritten presumption of them being corrupt and allowing ghost beneficiaries to swindle benefits not due to them.

Fifth and finally, the body of principles of administrative law and the rights flowing therefrom ought to be considered and protected within the broad conception of the right to privacy in the digital age. The modern notion of privacy has expanded from the rudimentary notion of a mere right to be left alone, to accommodate other rights that relate to the digital domain – for instance, the right against automated processing under Article 22 of GDPR. It is also worth noting that if the most fervent idea of the earlier generations were liberty²⁷ and equality²⁸, and there had been attempts to trace other values to one of these two ideas so as to bring under the protection of law, that idea for this century may very well be privacy²⁹. Such protection will cast additional compliance

norms – such as a clear definition of the ways of control of use and abuse of the ‘data exhaust’³⁰ that emerges out of the adoption of that particular technology for state purposes

is also essential. An exposition on such additional norms is outside the scope of this essay even if they merit a mention here. They may form part of a future allied work.

¹S, Prasanna, ‘Tech-Assisted State Decision Making – Issues & Approaches to Control’ (January 23, 2023). Available at SSRN: <https://ssrn.com/abstract=4335343> or <http://dx.doi.org/10.2139/ssrn.4335343>

²See Yadav, S. (2001). ‘State Liability: A New Dimension From Rudul Sah’. Journal of the Indian Law Institute, 43(4), 559-569; and Verma, G. P. (1993) ‘State Liability in India: Retrospect and Prospects’, Deep and Deep Publications.

³See for instance *A.K. Kraipak vs. Union of India* (1969) 2 SCC 262

⁴See for instance *National Textile Workers’ Union vs. P.R. Ramakrishna* (1983) 1 SCC 228

⁵See for instance *Municipal Corpn. Greater Bombay vs. BEST Workers Union* (1973) 3 SCC 546

⁶See for instance *Siemens Engg. vs. Union of India* (1976) 2 SCC 981

⁸See for instance *Harshit Agarwal vs. Union of India* (2021) 2 SCC 710

⁹See for instance *Rama Sugar Industries vs. State of Andhra Pradesh*, (1974) 1 SCC 534

¹⁰See for instance *Chintpurni Medical College & Hospital vs. State of Punjab*, 2018 SCC online SC 653

¹¹See for instance *Gujarat Mazdoor Sabha vs. The State of Gujarat*, 2020 SCC OnLine SC 798

¹²<https://economictimes.indiatimes.com/news/india/india-well-placed-to-apply-ai-to-solve-challenges-tap-into-opportunities-nandan-nilekani/articleshow/83033148.cms?from=mdr>, (last visited: 2023-03-05 0930 IST)

¹³*E.P. Royappa vs. State of Tamil Nadu* (1974) 4 SCC 3

¹⁴*Id.*, at 38

¹⁵*Chintaman Rao vs. State of MP* AIR 1951 SC 118

¹⁶1955 SCR 415

¹⁷*Id.* at 419

¹⁸It is another matter that there have been calls for even

eliminating these vestiges. See for instance Kannabiran, K. G. (2004). *The wages of impunity: Power, justice, and human rights*. Orient Blackswan pp 18 - 29 19

¹⁹Winikoff, M., & Sardelić, J. (2021), ‘Artificial Intelligence and the Right to Explanation as a Human Right’, IEEE Internet Computing, 25(2), pp. 116-120.

²⁰See Fu, R., Huang, Y., & Singh, P. V. (2020), ‘Artificial intelligence and algorithmic bias: Source, detection, mitigation, and implications. In *Pushing the Boundaries: Frontiers in Impactful OR/OM Research*’ (pp. 39-63). INFORMS.

²¹See for instance, See ILA Resolution 3/2002: New Delhi Declaration of Principles of International Law Relating to Sustainable Development, in ILA, Report of the 17th Conference (n.d.)

²²*Justice (Retd.) K.S. Puttaswamy vs. Union of India* (2019) 1 SCC 1.

²³See Crawford, K., & Schultz, J. (2019). *AI systems as state actors*. *Columbia Law Review*, 119(7), 1941-1972.

²⁴See for instance *Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust vs. V.R. Rudani*, (1989) 2 SCC 691

²⁵See for instance, the right under Article 22 of the GDPR

²⁶<https://www.epw.in/engage/article/aadhaar-failures-food-services-welfare> (last visited: 2023-03-05 0930 IST)

²⁷Snowden, Edward. *Permanent Record: A Memoir of a Reluctant Whistleblower*. United Kingdom: Pan Macmillan, 2019 pp 9 at Preface

²⁸See *supra* 13

²⁹*Supra* 27

³⁰Zuboff, S. (2019, January), *Surveillance capitalism and the challenge of collective action*. In *New labor forum* (Vol. 28, No. 1). Sage CA: Los Angeles, CA: SAGE Publications, pp. 10-29

Blurred Lines: Covid-19 and the Rule of Law

*Ritambhara Narang**

The onset of the Covid-19 pandemic has had multifarious effects on the laws of governance and the concept of “Rule of Law” across jurisdictions. Governments found themselves in precarious positions where they had to take immediate, unprecedented actions, the ramifications of which became a matter of life and death for millions of people. During this time, in more cases than not, the parliamentary and legislative procedure of establishing and promulgating laws was often bypassed. The Executive arms of Governments wielded power without restraint and/or any scrutiny as they passed executive orders to firefight and limit the spread of Covid-19, while providing resources to affected citizens.

Most would assume the existence of certain safeguards and democratic controls on the decision-making of the Executive even during times of a pandemic. But on the contrary, numerous international organisations and NGOs have cited violations,¹ including the 2021 ‘V-Dem Report’², which decried the global trend towards democratic decline through increasing autocratisation of states, whereby the use of the pandemic threat was used by certain governments to consolidate power within the Executive.³ Such negative practice from a Rule of Law perspective was

exacerbated where the separation of powers was weakened by the marginalisation of parliaments,⁴ and the minimisation of judicial scrutiny.⁵

It was often observed that the Executive dominated decision-making over pandemic response to the extent that they appeared to ‘rule-by-decree’, operating with such a latitude of discretion as to act beyond the scope of Rule of Law. This significantly diminished the doctrine of Rule of Law in a state, which in itself is a paramount pillar of democracy. A.V. Dicey set out the meaning of “Rule of Law”, wherein he concluded that the term included at least three concepts: first, the supremacy of the law as opposed to arbitrariness or even wide discretion by governments; second, the equality of all persons before the law; and third, in England, principles establishing the rights of individuals developed by case law through the centuries in that country.⁶ The Indian Constitution has established a socialist, democratic and welfare state which is governed in accordance with the principles of Rule of Law.

During the Covid-19 pandemic, the Indian administration drew its statutory power from the Disaster Management Act, 2005 on a federal level and under the colonial Epidemic Diseases Act 1897 on a state level. Neither of the acts pertain exclusively to Covid-19 or a

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response to a pandemic as India did not have any legislation pertaining exclusively to a health emergency. The scope of powers granted by these acts are very expansive which gives the executive far-reaching powers to bypass the legislative process, effectively removing any checks and balances and obviating the requirement for parliamentary debates and discussions.

The lockdown brought life to a standstill in India, resulting in huge economic and commercial losses for individuals and businesses alike, the impact of which is felt even today. The lockdown imposed a comprehensive transport ban, only hours before it came into effect. Such action left millions of people stranded, without employment and without any government aid or support. Shortage of medical infrastructure significantly beds in hospitals, medicines and doctors led to one of the worst health crisis suffered by India in modern times. Such was the emergency that the Indian judiciary also had to step in and thereafter played an integral part in administering the distribution of vital resources such as oxygen at a time when its scarcity was acutely being felt by hundreds of thousands. The Hon'ble High Court of Delhi⁷ took matters into its own hands to ensure that relief was provided to those in need by passing appropriate orders and directing public agencies to take immediate measures with appropriate accountability. Such desperate times led to a dissolution of the usual walls of separation between the legislature, executive and judiciary.

In India, the traditional separation of powers is the legislature as the primary law maker, the executive the enforcer of laws and the judiciary the interpreter of the laws ceased to

exist and the segregation of powers blurred contrary to the Rule of Law. India did not possess the appropriate mechanism and infrastructure medically, legally or administratively to face a deadly pandemic such as COVID-19. This experience has alerted the Indian lawmakers of the necessity to implement efficient and sustainable law-making to deal with emergent public health emergencies, for a large country like India.

Therefore, during the pandemic the ethos of the doctrine of Rule of Law were significantly compromised resulting in multiple infractions on various levels. India, being the largest democracy with a population of over a billion people, requires the functioning of all its factums i.e., executive, judiciary and legislature in perfect harmony. In order to future proof and safeguard itself from such unprecedented challenges, India needs comprehensive management, the best modus operandi is to initiate a specific and targeted codified legislation to limit arbitrary and ambiguous wielding of power. A specifically enacted law would provide the vital clarity and accessibility to the citizens. Further, only such restrictions on freedoms of movement, work or expression should be imposed which are realistic, proportionate and indispensable. It would also foreclose, to some extent, possibilities for nebulous directions and abuse of powers. To protect Rule of Law, the government must comprehend the significance of transparency in governance and initiate measures to restore the trust of the public in a welfare democracy such as India. There must be initiatives undertaken to encourage public consultation and dialogue and separation of powers between the executive, legislature and the judiciary even in challenging and unforeseen times such as those experienced during the Covid-19 pandemic.

¹World Justice Project Rule of Law Index 2021, available at: <https://worldjusticeproject.org/our-work/research-and-data/wjp-rule-law-index-2021>; IDEA International, Global State of Democracy 2021: Building Resilience in a Pandemic Era (International Institute for Democracy and Electoral Assistance, 2021) <https://www.idea.int/gsod/>

²an independent research institute founded by Professor Staffan I. Lindberg in 2014 and is funded by a number of government organizations, World Bank and several research institutions.

³V-Dem Institute, *Autocratization Turns Viral, Democracy Report 2021*, <https://www.v-dem.net/media/filer_public/74/8c/748c68ad-f224-4cd7-87f9

-8794add5c60f/dr_2021_updated.pdf

⁴Cormacain, Ronan and Bar-Siman-Tov, Ittai, *Legislatures in the Time of Covid-19* (2020) *The Theory and Practice of Legislation*, pp 8:1-2, 3-9, DOI: 10.1080/20508840.2020.1816017

⁵Baldwin, J.M.; Eassey J.M. and Brooke, E.J., *Court Operations during the COVID-19 Pandemic* (2020) *Am J Crim Just* 45, pp. 743–758 <https://doi.org/10.1007/s12103-020-09553-1>

⁶Dicey, Albert V., *The Rule of Law, In Introduction to the Study of the Law of the Constitution*, St. Martin's Press 1959 (1885), pp.188

⁷*Rakesh Malhotra vs. Government of National Capital Territory of India and Ors*, W.P.(C) 3031/2020

Disendangering The Gender Through Rule Of Law

Yosha Dutt*

"I firmly believe in the Rule of Law as the foundation for all our basic rights."-Sonia Sotomayor

The midnight of 15th August 1947 witnessed the rise of an independent sovereign, democratic and republic state which committed itself to paving a path for Liberty, Equality and Justice. The nation vowed to bring its people out of the clutches of poverty and inequality that gripped it in the colonial era by embracing democracy and strengthening the Rule of Law, which allowed for the enactment of legislations and judicial pronouncements aimed at creating a just society. Therefore, the story of celebration of India's 75th year of Independence is also the story of a progressive transformative alignment towards a free, just and egalitarian society.

For such a society to evolve in a relatively short span of 75 years, India adopted a strong legal system with Rule of Law as the bedrock rule of governance. In the Indian context, Rule of Law in common parlance can be understood in terms of the Supremacy of Law, and Equality before Law. By regarding the Constitution as the supreme law of the land, it has not only ensured the existence of the nation as a democratic polity but has also been central in providing basic rights to its citizens and doing away with unequal social

structures that have contributed to inequalities in every sphere of society, especially against the vulnerable.

The freedom of India in its true sense then can only be measured in terms of its enjoyment by the weakest sections of the society, particularly Indian women. It was soon realized that gendered inequalities and discriminatory social structures and practices prevalent in society result in discriminatory laws and gaps in legal protection, undermining the very notion of Rule of Law. To avoid a similar scenario in India, the courts in several landmark judgments regarded Rule of Law as part of the basic structure of the constitution which could neither be abolished nor modified by the Parliament. This guaranteed the protection of rights for all, specially women by ensuring it to be the very fabric of the Indian Constitution.

Right to Equality (Article 14), Right to Freedom (Article 19), Right to Protection and Personal Liberty (Article 21), and Right of women against Exploitation (Article 23,24) are a few provisions that have been enshrined in the Constitution of India, made legally enforceable as part of Fundamental Rights, while other provisions like Equal Pay for Equal Work, Right to Adequate means of Livelihood to both men and women were part of the Directive Principles that lay a duty on the state to inculcate these while making laws. Application of balanced organizational options in these provisions ensured the treatment of women as legal citizens of a

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country wherein they were discriminated against since time immemorial.

Post- Independence era law has proved to be an instrumental tool in the emancipation of women through legislations that have rigorously aspired to equalize their social standing and enhance their presence in the public sphere. The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 proved to be a major milestone in protecting women against any kind of harassment at their workplace and protecting their Fundamental Right to work with dignity. Acknowledging the role of women in economic development of the nation, The Maternity Benefit (Amendment) Act 2017 extended paid maternity leave for women employees with less than two surviving children, from 12 weeks to 26 weeks, while also catering to the rights of adopting and commissioning mothers and providing other facilities like work from home after leave and creche facilities at their workplace. The Criminal Law (Amendment) Act, 2018 further amended the Indian Penal Code, 1860 to enhance the minimum punishment of rape of women from seven to ten years and laid stringent measures against the perpetrators of violence against women. The Muslim Women (Protection of Rights on Marriage) Act 2019, upholding the Right of Equality for women as enshrined in our Constitution, declared the practice of 'Triple Talaq' as void and illegal, making it a cognizable offence with an imprisonment and fine.

In the words of Lord Hewart, "it is fundamentally important that justice not only be done but also clearly and undeniably seen to be done", the independent, proactive, responsive, and transitional flexibility the Indian Judiciary has displayed in addressing gendered discrimination and

upholding the rule of law through various judgments must then be lauded. In *Mary Roy v. State of Kerala*, the Supreme Court delivered a landmark judgement granting Syrian Christian women the right to seek an equal share in their father's property, rectifying the traditional patriarchal family system. In 2013, in the absence of a domestic legislation, The Supreme Court, with power under Article 32, issued guidelines aimed at creating a safer and equal working environment for women, also called the 'Vishakha Guidelines', thus safeguarding the rights of women under article 14, 15, 21 and 19(1)(g). In *Joseph Shine v/s Union of India*, a five-judge bench of Supreme Court unanimously struck down section 497 of the IPC which criminalized adultery, stating that the "law was archaic and that men were not mere masters of their wives." In *Secretary, Ministry of Defence v. Babita Puniya and Ors*, the Supreme Court, while observing that absolute exclusion of women from command postings is against Article 14, held that all women army officers were eligible for permanent commission including command appointments.

A nation's advancement is not linear. India has a long way to go when it comes to empowering its women. India's ranking in the Global Gender Gap Index remains a dismal 135 out of 146 countries indicating that women still remain one of the most vulnerable groups in the society that suffer in terms of almost all parameters, be it political empowerment, economic participation or health and survival. Yet one cannot ignore the strides the country has covered in its quest for gender parity. The 75th year of Independence of India, is witness to an important landmark in liberation of women through the laws and judgments that have consistently challenged the unequal social

structures and have upheld the Rule of Law, on its path to the geostrategic supremacy it deserves. In the words of Swami Vivekananda, "Is there any sex distinction in the Atman

(Self)? Out with the differentiation between man and woman- all is Atman!". Therefore, in the liberation of India's women lies the progress of the entire nation.

REFERENCES

1. "Gender and the Rule of Law | UNODC." *Gender and the Rule of Law* | UNODC, www.act4ruleoflaw.org/en/news/gender. Accessed 22 Sept. 2022.
 2. https://www3.weforum.org/docs/WEF_GGGR_2022.pdf
 3. <https://legislative.gov.in/sites/default/files/COI...pdf>
 4. <https://indiankanoon.org/>
 5. <https://loksabhaph.nic.in/Legislation/billspassed.aspx>
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Rule of Law and Event Certainty: The Case of Listing of Cases

*Surya Prakash B S**

The adage “everybody wants progress, nobody wants change” conveys a familiar conundrum. There is an ideal that we aspire to realise collectively; it is in agreeing on the details of the pursuit and means of realising it that the difficulties arise.

Rule of Law is one such ideal. Most of us agree that it is a good thing to have, to aspire for, to pursue - who wouldn't want an orderly society that is governed and behaves in accordance with rules that have been collectively decided. When we get down to defining the term and its details, there are significant differences that we run into.

Without going into the doctrinal and theoretical aspects of these definitions or their variations, a good general working definition for immediate purpose would be that ‘the Rule of Law’ is “one of the ideals of our political morality and it refers to the ascendancy of law as such and of the institutions of the legal system in a system of governance”¹ and that it “comprises a number of principles of a formal and procedural character, addressing the way in which a community is governed. The formal principles concern the generality, clarity, publicity, stability, and prospectivity of the norms that govern a society. The procedural principles concern the processes by which these norms are administered, and the

institutions—like courts and an independent judiciary that their administration requires.”².

The essence of the Rule of Law is that all authority is subject to, and constrained by, law. The opposing idea is of a state of affairs in which the will of an individual, or a group, is the governing force in a society.

While the body of laws in any state clearly determines legal obligations and legal rights, these often can not be met or obtained without the possibility of turning to an independent judiciary with the capacity to enforce them. As such, it is the role of the judiciary to guarantee legal certainty, determine disputes and protect the rights and the liberties of all. The role of an independent judiciary cannot be overemphasised enough. The legal realist Oliver Wendell Holmes Jr. goes so far as to say, “The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.” It is only natural therefore to expect such an institution to follow the high standards that it expects from, and enforces on, others.

To truly uphold the Rule of Law, it is essential that the functioning of the courts and tribunals have the attributes expected of substantive legislations - clarity and certainty. While there is extant literature on this from the perspective of justice dispensation on substantive matters, the judicial administration aspects of it have not received

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the level of attention it deserves. This is more so for courts and tribunals in India where delay and uncertainty (to the extent they are caused by judicial administration and processes) are seen to be the factors that have led to loss of trust in these institutions.

As an illustration, let us apply this to the listing of cases. How cases are listed and before whom they are listed significantly impact access to justice and justice delivery. Any attempt at understanding whether courts function under a Rule of Law must take into consideration the legal framework and rules that guide listing of cases and how they are practised. These vary both vertically (levels of courts and tribunals) and horizontally (between jurisdictions of courts for subject matter of disputes). Listing practices that are highly discretionary could also impact the right to equality before law that the Courts are supposed to protect and enforce.

Another important factor that has a strong bearing on listing, and consequently on case progress, at the High Courts and the Supreme Court level, is the roster system.

The roster system is essentially a practice under which the judges or the judges assigned to hear a category of cases (e.g. Writ Petitions, or Regular First Appeals) are periodically changed. Or looked at the other way, judges are periodically allocated different categories of cases to hear. A frequent reassignment of cases/judges can negatively impact case progress. It also has a bearing on the general principle that a judgement should be made only by a judge who has heard the case from its initiation till its conclusion.

If uncertainty of timeliness is a feature of progress of cases in courts and tribunals, it begs the question on the relationship between these institutions and Rule of Law. In an adversarial system such as the one followed in India, the right to fair hearing of parties to a dispute is a significant factor that affects case progress. There is a need for a framework that balances these rights with institutional obligations that can be implemented in a clear and transparent manner. This would go a long way in enhancing trust in the functioning of India's courts from a process perspective.

¹Stanford Encyclopaedia of Philosophy, accessed at <https://plato.stanford.edu/entries/rule-of-law/>

²ibid

UNDERScoreD

Book Review

Discretion, Discrimination and the Rule of Law: Reforming Rape Sentencing in India
By Dr. Mrinal Satish (2016), Cambridge University Press

Rape laws in India, both in their formulation and implementation have been widely critiqued. However, one aspect of these laws—perhaps the one that has profound implications for our adherence to the rule of law—which often remains unaddressed is sentencing post conviction. Mrinal Satish’s 2016 book explores the history, patterns, and guidelines or lack thereof surrounding sentencing in rape cases in India.

Satish’s core proposition in the work is that it is necessary to introduce parity and a sense of consistency into the sentencing phase of trials for rape, and ultimately, into sentencing for all categories of crimes, if we are to have sentencing that is premised in the principles of rule of law. Such parity and uniformity, he argues, is essential if we are to have a criminal justice system that does not produce “unwarranted disparity” as a result of unguided discretionary power in sentencing, thereby perpetuating inequality. The other crucial tenet of Satish’s proposition is that these fragmented sentencing patterns actually reveal that our present justice system has not done away with the myths and stereotypes surrounding rape, but merely shifted their site from the adjudicatory stage of the trial to the sentencing stage.

In order to contextualize his argument, Satish

undertakes an extensive historical survey of not only landmark decisions taken by the higher judiciary of the country over the last 25 years but also the recommendations which have periodically been put forth by different committees in India—most prominently the Malimath and the NR Madhava Menon committees—as well as committees across the world. In addition to this he looks at the statutory framework of rape laws, medical evidence jurisprudence, and the sentencing jurisprudence evolved by the Supreme Court in the absence of formalized guidelines. Furthermore, he identifies important data points which were the cornerstone of considerations that Courts took into account while determining guilt and the quantum of punishment for the guilty. An analysis of these different factors leads to Satish’s own roadmap for the creation of uniform sentencing guidelines with a more consistent usage of theories of punishment.

Satish’s work offers an accessible understanding of the rule of law in practice by using sentencing as a point of entry. His dissection of the realities of adjudication and sentencing in rape trials highlights the arbitrariness that still pervades the process, leaving room for consideration of often wholly irrelevant factors. However, what is perhaps most promising and refreshing is Satish’s recognition of the need to also divorce outdated patriarchal concepts of chastity, purity, and also of archetypal victims, from the administering of rape laws in the country so as to ensure that regressive

understandings of these concepts do not further contribute to the arbitrariness.

The need for evolution of sentencing law thus enunciates a larger, critical point vis-a-vis the rule of law—if it is to sustain it cannot be static. This is not in contradiction to what Satish, relying on Ashworth, posits as the manifestations of the rule of law in sentencing, i.e. rules which are “fixed, knowable and certain” and therefore non-arbitrary. Crystallisation of guidelines, subject to reasonable future changes, will not render the rule of law in sentencing static. This is precisely because justice cannot be accessed either on arbitrary unknowns or on outdated standards of evidence, behavioral makeup of the victim, etc.

The take-away remains that the legal system, as a composite, must continue to evolve its approach at every step of the adjudication process in order to ensure obsolete perspectives are not furthered. It must also formulate guidelines it can follow while exercising discretion—without hampering independence—to uphold equality and non-discrimination which maintains rule of law. Arbitrariness in the case study of rape sentencing that Satish examines in the book is evidently perpetuated in many ways due to slow moving progress in adopting a sensitive, equitable, approach in the trial process, as much as it is due to a lack of clear set of judicially or legislatively developed rules, guiding discretion in the sentencing process.

From the time the book came out in 2016, and even prior to that—as Satish himself notes—change has been forthcoming in the area of rape laws and sentencing, creating a prime moment for his recommendations to be incorporated into driving this change.

The Great Repression- Chitranshul Sinha

Sedition and free speech have been entangled in conflict since time immemorial. A solitary provision, namely, section 124A of the Indian Penal Code has a history which dates back to centuries, a history which Chitranshul Sinha has attempted to trace in his book **‘The Great Repression- the story of sedition in India’** (Penguin 2019). However, this book does not merely tell the story of section 124A IPC, but also traces the history of the origins of the modern Indian criminal law. The context is important to understand how and why the law of sedition, for which there is no word in the Indian vernacular, was imposed on the native Indian population by the British Government. The book goes into the details of the Indian Penal Code was enacted in India – including the origin of codification of laws and Macaulay’s first attempt at such codification. Interestingly, and ironically, as the book points out - codification in India had nothing to do with aggregation of Indian laws but was essentially an exercise in importing English common law because of inconsistency of native Indian laws and customs.

The book takes a deep dive into how the law of sedition evolved (or regressed) during the Indian freedom movement. Towards this end, the book tells exhaustive stories of famous political trials of stalwarts like Bal Gangadhar Tilak, Mahatma Gandhi, Maulana Azad and Jawaharlal Nehru. It also explores the militant nationalist movement which spread across India after the turn of the 20th century aided and abetted by Indian vernacular and english press. This highlights the important role that the print media had to play in getting India its independence. There are a lot of stories that the book delves upon

which have otherwise been lost in the annals of history.

Upon independence it would have been expected that political laws like sedition, which the British used to browbeat Indians, would have disappeared from our statute books. Unfortunately the law of sedition continued as an offence under the IPC despite fierce opposition in the Constituent Assembly to its existence as a restriction on free speech. While it was successfully removed as a restriction from Article 19 of the Constitution of India, it continued as a stand alone offence. The book thereafter explores the journey of the law in post-independence India and how it came to survive the test of constitutionality in the 1960 judgment of the Supreme Court in *Kedar Nath Singh vs State of Bihar*. Despite the Supreme Court laying down the public order test for application of sedition law, the author believes that the provision has been abused and exploited as a political weapon till date by various political parties.

The book looks into such stories of abuse of the law in the recent decades and shows how it has been used as a tool to strike fear in the minds of activists, journalists, dissenters and minorities. Without saying so explicitly, the book makes out a case for repeal of the law, like as has been done in England. This book will serve as a historical record of a provision which does not deserve any place in a modern and mature democracy.

The Rule of Law (Tom Bingham) Book Review

The principle of the rule of law has, paradoxically, both united and divided jurists. It is hard, if not impossible, to conceive of any

society governed by a system of laws that exists devoid of the rule of law. Even in Raz's "society of angels", one must necessarily recognise the rule of law for the law to exist at all. Since the Diceyan inception of this term, however, the legal discourse has been divided between formalists and substantivists. The formalist school of thought led most prominently by Dworkin, contends that the rule of law only requires of laws a strict matrix of only procedural fairness and that it does impose any obligations on the internal content of laws. The substantivist school, as explain by Waldron, conceives of a more demanding understanding of the rule of law which imposes substantive fairness.

Amidst this debate and varying conceptions of the rule of law, it gets increasingly easy to lose sight of what the rule of law even fundamentally is. The layperson may tend to grasp too little of these fundamentals and the legal expert may tend to ignore these fundamentals in lieu of greater nuance. It is worrying, however, that at both these ends of the spectrum of understanding the rule of law, there is a fatal failure of the rule of law itself. Very fundamentally, the rule of law requires an assumption about the normative virtue in fairness. Both the layperson and legal expert may rapidly lose sight of this, making the rule of law, at best, a convoluted fiction in books used by lawmakers to justify polarising political agendas.

It is in this context that Lord Bingham's *The Rule of Law* sets itself brilliantly apart from existing accounts on the topic, and in this process does exceptional service to furthering the rule of law. Lord Bingham's account of the rule of law forms a much needed bridge between the nuance and the fundamentals of the rule of law. Though this principle has long

been an elusive concept, Lord Bingham was able to succinctly, yet comprehensively, condense the rule of law to its 7 fundamental features. Lord Bingham is able to skilfully take the reader through a host of obscure jurisprudence to conclusively pin down each of the 7 features of the rule of law as being both grounded in theory and recognised judicially.

Lord Bingham's most celebrated success in presenting his conception of the rule of law is his identification of "Accessibility" as one of the most fundamentally central features of the rule of law. Lord Bingham convincingly argues that any rule of law becomes implausible and, possibly, destructive if law ceases to be accessible. His interpretive account of the relevant jurisprudence and history impactfully demonstrates the failure of inaccessible law and he succeeds in communicating the urgency of increased accountability of the law. His identification of accessibility as the first and central feature of the rule of law also elucidates the fundamental nature of the rule of law. It is perhaps in this regard that Lord Bingham's book both explains and advances the rule of law. By clearing the haze on an increasingly complicated yet basic tenet of the law, to rephrase its features in a manner accessible to both the understanding of a layperson and the intellectual development of an expert, Lord Bingham's book makes itself worthy of the generational praise it has received.

The achievements of this book become even more apparent when judged in the challenging concept of the English Constitution. Scholars have widely held

Parliamentary Sovereignty and the Rule of Law to arguably be the only two permanently inviolable principles of the UK's uncoded Constitution. The notions of parliamentary sovereignty and the rule of law are, however, inherently incompatible with each other and in the absence of a written constitution the two principles inadvertently create a devastating and irreconcilable rift between political and legal constitutionalism. Within this context of the tension inherent in the principle of the rule of law, Lord Bingham's achievement of being able to conceptualise the Rule of Law as a real and coherent doctrine is magnified.

Lord Bingham's The Rule of Law has thus rendered itself an indispensable account on a much-debated principle and has uniquely achieved the ability to ground the theoretical discussions on the rule of law into practical operation. Lord Bingham is able to ingenuously derive the features of the rule of law from judicial reasoning and attitude without getting bogged into its theoretical themes. The Rule of Law must, therefore, be essential reading for a host of persons. The layperson would be able to derive from it a simple yet conceptually deep understanding of the principle and better understand their daily interactions with the law. The legal scholar would derive from it a renewed and much needed accurate barebones clarity on the topic. Legal practitioners, and judges in particular, would crucially be able to raise, identify and deal with, what are often subtle yet crucial, matters of rule of law in an effective, conducive and democratically desirable manner.

SNAPSHOTS

Photos from DHCBA Events

There were very few DHCBA events held physically in the year 2020-2021 (which period this edition of QBR covers) due to the Covid pandemic. Most events were held virtually through online platforms.

Therefore, there are no photos DHCBA can offer for this QBR except for the farewells for Hon'ble Dr. Justice S. Muralidhar, Hon'ble Mr. Justice G.S.Sistani and Hon'ble Mr. Justice Jayant Nath, which were held physically when the pandemic was on the wane for brief periods.

DHCBA would like to mention that the Bar has also bid virtual farewells in 2020-2021 to Hon'ble Ms. Justice Hima Kohli (who is now an Hon'ble Judge of the Supreme Court of India), Hon'ble Mr. Justice Rajiv Sahai Endlaw, Hon'ble Mr. Justice J.R. Midha, Hon'ble Mr. Justice Brijesh Sethi, Hon'ble Mr. Justice A.K. Chawla, Hon'ble Ms. Justice Sangita Dhingra Sehgal, Hon'ble Mr. Justice I.S. Mehta.



Dental _ Eye Care Check Up



Dental _ Eye Care Check Up



Dental _ Eye Care Check Up



Run for Justice



Run for Justice



Run for Justice



Run for Justice



Run for Justice



Photography Exhibition



Photography Exhibition



Photography Exhibition



Photography Exhibition



Photography Exhibition



Photography Exhibition



Photography Exhibition



Photography Exhibition



Health Awareness Seminar for Women



Health Awareness Seminar for Women



Health Awareness Seminar for Women



Health Awareness Seminar for Women



Health Awareness Seminar for Women



Deepawali Celebration



Deepawali Celebration



Deepawali Celebration



Deepawali Celebration



Republic Day Celebration



Republic Day Celebration



Republic Day Celebration



Republic Day Celebration



Republic Day Celebration



S Block Inauguration



S Block Inauguration



S Block Inauguration



BADMINTON TOURNAMENT



BADMINTON TOURNAMENT



BADMINTON TOURNAMENT



BADMINTON TOURNAMENT



BADMINTON TOURNAMENT



BADMINTON TOURNAMENT



BADMINTON TOURNAMENT



Delhi Arbitration Weekend



Delhi Arbitration Weekend



Delhi Arbitration Weekend



Inauguration of E-Inspection Software



Inauguration of E-Inspection Software



EXECUTIVE COMMITTEE DELHI HIGH COURT BAR ASSOCIATION



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Mr. Shyam Sharma
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Mr. Sanjay Dewan
Member Executive
(25 Years Standing)



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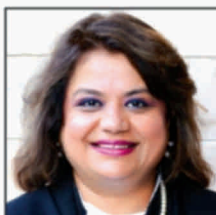
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“ More is at stake in these cases than the liberty of a few individuals or the correct construction of the wording of an order. What is at stake is the rule of law [...] the Constitution and the laws of India do not permit life and liberty to be at the mercy of absolute power of the executive. ”

ADM Jabalpur v Shivkant Shukla AIR 1976 SC 1207 at para [22]



Hon'ble Justice HR Khanna
(One of the first four Judges of
the Delhi High Court)