

Rule of Law

Constitutional Governance

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Rule of Law

- ▶ “We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.--That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed,” US Declaration of Independence, July, 4, 1776 (in Congress...by 13 States”
- ▶ “Men are born and remain free and equal in rights. Social distinctions may be founded only upon the general good”.. Article 1 of the Declaration of the Rights of Man and Citizen Approved by the National Assembly of France, August 26, 1789
- “All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood”...Article 1 of

- ▶ Rule of law - the **supreme manifestation of human civilization and culture**
- ▶ Derived from 'la principe de legalite' (French) = 'principle of **legality**'. Also known as **nomocracy**
- ▶ The core idea is that the government must abide by legal rules declared publicly in advance.
- ▶ **denotes** the legal principle that **law should govern a nation, and not arbitrary decisions by individual government officials.**
- ▶ Provides that **decisions should be made by the application of known principles or laws without the intervention of discretion** in their application
- ▶ **"Be you ever so high, the law is above you."** - Lord Denning

- ▶ **Of old origin**- discussed by Ancient Greek philosophers such as **Plato** and **Aristotle** around 350 BC.
- **Samuel Rutherford** in *Lex, Rex* (1644) **gave theoretical foundation to the principle.**
- **Lex, Rex**- title in Latin for "the law is king" and reverses the traditional *rex lex* ("the king is the law").
- In UK, **Sir Edward Coke** -the originator of the concept, said "**that the king must be under the god and law**"
- In 1607, **Coke** said in the *Case of Prohibitions* "**that the law was the golden met-wand and measure to try the causes of the subjects; and which protected His Majesty in safety and peace: with which the King was greatly offended, and said, that then he should be under the law, which was treason to affirm, as he said; to which I said,quod Rex non debet esse sub homine, sed sub Deo et lege (That the King ought not to be under any man but under God and the law).**"

Rule of Law

- “Between a tyrant and a prince there is this single or chief difference, that the latter obeys the law and rules the people by its dictates, accounting himself as but their servant”- John of Salisbury
- Rule of law refers to a system in which law is able to impose meaningful restraints on the state and individual members of the ruling elite
- Prof. A.V. Dicey developed the concept - the rule of law contemplated the absence of wide powers in the hands of governmental officials. & wherever there is discretion, there is room for arbitrariness.
- Reflects notions of a government of laws, the supremacy of the law, and equality of all before the law.

Dicey's formulation of the concept of Rule of law –the three principles

- **1. Absence of discretionary power in the hands of the governmental officials.**

It denotes that justice must be done through known principles. Discretion implies absence of rules, hence in every exercise of discretion there is room for arbitrariness, and **Supremacy of law (Predominance of Legal Spirit)**

Rule of law –the three principles (contd..)

- ▶ 2. **No person should be made to suffer in body or deprived of his property except for a breach of law established in the ordinary legal manner before the ordinary courts of land.**

In this sense, the **rule of law implies:**

- a) **Absence of special privileges for a government official or any other person**
- b) **All the persons irrespective of status must be subjected to the ordinary courts of the land.**
- c) **Everyone should be governed by the law passed by the ordinary legislative organs of the state.**

(Equality of law)

Rule of law –the three principles (contd..)

3.The rights of the people must flow from the customs and traditions of the people recognized by the courts in the administration of justice

[role of judiciary in enforcing individual rights and personal freedoms irrespective of their inclusion in a written constitution]

(Constitution is the result of the ordinary law of the land)

The Declaration of Delhi, 1959

- International Congress of Jurists, consisting of 185 judges, practicing lawyers and teachers of law from 53 countries, assembled in New Delhi on 10th January 1959 under the aegis of the International Commission of Jurists
- Discussed freely and frankly the Rule of Law and the administration of justice throughout the world, and having reached conclusions regarding the legislative, the executive, the criminal process, the judiciary and the legal profession
- Reaffirmed the principles expressed in the Act of Athens adopted by the International Congress of Jurists in 1955, particularly that independent judiciary and legal profession are essential to the maintenance of the Rule of Law and to the proper administration of justice;
- Recognized that the Rule of Law is a dynamic concept for the expansion and fulfillment of which jurists are primarily responsible and which should be employed not only to safeguard and advance the civil and political rights of the individual in a free society, but also to establish social, economic, educational and cultural conditions under which his legitimate aspirations and dignity may be realized;

Attributes of Rule of Law in 21st Century

▶ As regards individual liberty

- State should not pass discriminatory laws
- Should not place undue restrictions on individual freedoms
- Adequate safeguards against abuse of power
- Effective maintenance of law and order

▶ As regards criminal administration

- Due criminal process
- No arrest without the authority of law
- Presumption of innocence
- Legal aid
- Public trial and fair hearing

▶ As regards judicial process

- Independence of judiciary
- Independent legal provision &
- Standards of professional ethics

General Notions of RoL

- **State powers ought to be differentiated; no single public authority ought to combine the roles of the judge, jury, and executioner**
- **Laws/decrees ought to remain in the public domain; that is, laws ought to be general, public, and ought to remain contestable political decisions**
- **Governance via undeclared emergencies remains violative of RoL values and illegitimate**
- **Constitutionally declared states of emergency may not constitute indefinite practices of governance and adjudicative power ought not to authorize gross, flagrant, ongoing, and massive violation of human rights and fundamental freedoms during the states of emergency**
- **The delegation of legislative powers to the executive ought always to respect some limits to arbitrary sovereign discretion**

- **Governance at all moments ought to remain limited by regard for human rights and fundamental freedoms**
- **Governance powers may be exercised only within the ambit of legislatively defined intent and purpose**
- **Towards these ends, the State and law ought not to resist, or to repeal powers of judicial review or engage in practices that adversely affect the independence of the legal profession.**

(Source: Prof.Upendra Baxi in The Rule of Law in India)

Rule of Law under Indian Constitution

- Art.14 - **Right to Equality- Equality Before Law & Equal Protection of Laws** (Reasonable Classification, Protection against arbitrariness , Legitimate expectation etc)
- Art.21 - **Fairness, Justice and Reasonableness**
- **Article 265** - Taxes not to be imposed save by authority of law :
No tax shall be levied or collected except by authority of law
- **Exceptions to Rule of Law:** Protective Discrimination and Compensatory Discrimination [Art.15(3),(4),(5)&(6) 16(4),(4A) & (4B)&(6) etc]
- Legislative Privileges and immunities-**Art.105 & 194**
- Immunities of the President etc- **Article 361**

RoL and Judicial Response in India

- *A.D.M Jabalpur v Shivakant Shukla* [AIR 1976 SC 1207] , the question before the apex court was, whether there was any rule of law in India apart from Article 21 of the Indian Constitution. **The court by majority held that there is no rule of law other than the constitutional rule of law.** However, Justice Khanna did not agree and said , “**Even in the absence of Article 21 of the constitution, the State has no power to deprive a person of his life or liberty without the authority of law.**”
- **Common Cause (A Regd. Society) v.Union Of India** [9 March, 2018 - passive euthanasia declared as is lawful and legally permissible in this country.]
- **Shayara Bano v.Union Of India** [22 August, 2017- Triple talaq (‘talaq-e-biddat) -declared unconstitutional and an offence-led to promulgation of the Muslim Women (Protection of Rights on Marriage) Ordinance,2018 issued in Sept.2018]
- **Navtej Singh Johar v.Union of India (06th Sept.2018)- Section 377,IPC substantially decriminalized**

- **Justice K.S.Puttaswamy(Retd) vs Union Of India [4:1 judgment- 26 September, 2018-**
The requirement under Aadhaar Act to give one's demographic and biometric information does not violate fundamental right of privacy in all cases]
- **Joseph Shine v. Union Of India (27 September, 2018 - 5 Judges Bench)- declared Section 497,IPC as unconstitutional-** being violative of Articles 14, 15 and 21 of the Constitution...(ii) Section 198(2) of the Cr.P.C. which contains the procedure for prosecution under Chapter XX of the I.P.C. shall be unconstitutional only to the extent that it is applicable to the offence of Adultery under Section 497.]

RoL limits the Government

- As a practical matter the Rule of Law limits the efficiency of an evil government because the Rule of Law limits any government's freedom of maneuver to act in its own arbitrary self interest.....**John Finnis**
- ROL is always and everywhere a terrain of peoples' struggle incrementally to make power *accountable, governance just, and state ethical*...**Upendra Baxi**

Conclusion

- Rule of Law- a basic feature of the Constitution
- Absolutely essential to render justice to the people
- The best shield of protection to government officials
- “whenever there is discretion there is room for arbitrariness”
- The distinctiveness of the Indian ROL lies in providing space for a continuing conversation among four core notions: “rights”, “development”, “governance” and “justice”. (Jawaharlal Nehru captured this relationship by insisting that the “rule of law” must not be divorced from the “rule of life”)
- A beacon light to all the officials in discharging their duties

THANK YOU