

# **RULE OF LAW A MORAL IMPERATIVE FOR SOUTH ASIA AND THE WORLD**

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Rule of Law has meant different things to different people at different times and has evoked sharply divergent reactions. To some legal historians it is ‘the unqualified human good’ whereas to others Rule of Law is “a device that enables the shrewd, the calculating, and the wealthy to manipulate its form to their own advantage”. Professor Brian Tamanaha has described Rule of Law as “an exceedingly elusive notion giving rise to a rampant divergence of understandings and analogous to the notion of the Good in the sense that everyone is for it, but have contrasting convictions about what it is”. Probably that prompted the constitutional historian, Sir Ivor Jennings, to characterize Rule of Law as ‘an unruly horse’.

Let me try and grapple with the so-called unruly horse. But before I do so at the outset we should be clear that the Rule of Law is not a meaningless ritualistic legal slogan promiscuously chanted at seminars and workshops and university lectures. We may not be able to define Rule of Law with scientific precision but it cannot be dismissed as an elusive notion. It has a definite content as will be pointed out later. It is noteworthy that the comparatively

modern 1996 Constitution of South Africa lists the supremacy of the Constitution and the rule of law as the values on which the republic is founded.

Rule of Law in essence embodies a lofty concept, a commitment to certain principles and values. It is a salutary reminder that “wherever law ends, tyranny begins”. This is well brought out in an anecdote attributed to Voltaire, the French thinker. Voltaire was imprisoned for a piece of writing he did not write, whose sentiments he did not share and whose author he did not know. His imprisonment was on account of the arbitrary whim and caprice of the ruling authorities in France who detested his views. When he escaped and came to London his first reported observation was, “here I breathe the air of freedom because in this country men are ruled by law and not by whim and caprice”. When John Adams used the historic phrase, “a government of laws and not of men”, he was not indulging in a rhetorical flourish but was emphasizing that law containing rules of general applicability, not individual whimsicality, should govern the conduct of people and law should be the mechanism for resolving disputes.

It needs to be emphasised that there is nothing western or eastern about the principles underlying the concept of Rule of Law. It has a global reach and dimension. Rule of Law symbolizes the quest of civilized democratic societies’, be they eastern or western, to combine that degree of liberty without which law is tyranny with that degree of law without which liberty becomes licence. In the words of Justice Vivian Bose of the Supreme Court of India, Rule of Law, “is the heritage of all mankind” because its underlying rationale is belief in the human rights and human dignity of all individuals everywhere in the world.

An essential principle of Rule of Law is that every executive action, if it is to operate to the prejudice of any person must have the sanction of law. This

is the settled opinion of the Supreme Court of India. This principle provides a potent antidote to executive lawlessness. Thanks to the prevalence of Rule of Law no administrator or official can arrest or detain a person unless there is legislative sanction for such action. Again a Police Commissioner or any other public functionary cannot ban a meeting or the staging of a play or the screening of a movie by passing a departmental order or circular which is not backed by law. Likewise no person can be deprived of his property without the authority of law. Rule of Law ensures certainty and predictability so that people are able to regulate their behaviour according to a published standard against which to measure and judge the legality of official action. Experience testifies that absence of Rule of Law leads to police raj.

Rule of Law runs like a golden thread in the Indian Constitution. Part III of the Indian Constitution guarantees certain fundamental rights akin to a Bill of Rights. For example, Article 14 states “The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India”. No fundamental right in the Indian Constitution is absolute. Reasonable restrictions can be imposed on the exercise of the various fundamental rights guaranteed under Article 19 but the primary requirement is that the restriction must be prescribed by law, not by administrative non-statutory instructions. Consequently freedom of speech and expression and freedom of the press cannot be restricted save by enacted law. Again, no tax can be levied or collected except by authority of law (Article 265). Article 300A stipulates that no person can be deprived of his property save by authority of law.

I wonder if you know the decision of the Supreme Court of India in the case of *Keshavananda Bharati*. In that unique decision the Court ruled in April

1973 that even a constitutional amendment can be struck down as unconstitutional if it abrogated any essential features of the Constitution, such as democracy, secularism, federalism, periodic free and fair elections etc. The Court considered rule of law an essential feature of the Constitution. In a subsequent Nine bench decision in January 2007 in the case of *I.R. Coelho vs. State of Tamil Nadu* Rule of Law is regarded as part of the basic structure of the Constitution. Consequently Rule of Law cannot be abolished even by a constitutional amendment. This manifests the high status accorded to the Rule of Law in Indian constitutional jurisprudence. And, mind you, that is not merely in theory. In practice the Indian Supreme Court has vigorously enforced the Rule of Law.

A remarkable instance is the invalidation of a constitutional amendment by the Supreme Court in its judgment in the case of *Indira Gandhi v. Raj Narain* delivered on 17<sup>th</sup> November 1975. Let me provide some background facts of this judgment.

Mrs. Indira Gandhi's election was challenged by her political rival, the feisty Raj Narain, in the Allahabad High Court on the ground of commission of certain electoral malpractices. The High Court invalidated Mrs. Gandhi's election on that ground. An appeal was preferred to the Supreme Court by Mrs. Gandhi. In order to get over the High Court judgment Clauses 4 and 5 of Article 329-A were introduced in the Constitution by the Thirty Ninth Amendment of the Constitution on 10<sup>th</sup> August 1975. This was done during the spurious emergency which was foisted on the people of India. Clause 4 exempted the disputed election of Prime Minister Indira Gandhi from the restraints of all election laws and declared her election as valid notwithstanding any judgment. Clause 5 further ordained that any appeal pending before the

Supreme Court shall be disposed of on the assumption that the findings contained in the judgment under appeal against Mrs. Indira Gandhi never had any existence in the eye of the law and that the election declared void by the judgment of the High Court shall continue to be valid in all respects. It is incredible that such blatantly discriminatory and arbitrary provisions could be enacted in the Constitution of the democratic republic of India. But regrettably during the period of emergency democracy suffered a temporary demise. It was revived when the emergency was revoked by the successor government in April 1977. These provisions were castigated by Justice Chandrachud of the Supreme Court of India, as “calculated to damage or destroy the Rule of Law” and as “the very negation of the Rule of Law”. The appeal of Mrs. Gandhi was however allowed on other grounds.

Take another case before the Supreme Court arising from Punjab whose police officials are known for their no nonsense approach. They had forcibly thrown out unauthorized occupants, trespassers in fact, from government premises. The Court struck down the action because the State was unable to point out any law to justify forcible eviction without recourse to a court of law. The Court was not impressed by the State’s fervent plea that the persons who were forcibly evicted were rank trespassers.

Another striking instance where the Court enforced the Rule of Law was in the case of Pakistani prisoners who had served their full term of imprisonment but were kept in jail by Indian authorities. The stand of the government was that Pakistani authorities had meted out the same kind treatment to Indian prisoners. The Court brushed aside that argument and observed that in India we enforce the Rule of Law enshrined in Article 21 which applies to citizens and non-citizens alike.

All this may appear strange to some people and is certainly irksome to administrators. But that is the price we have to pay for a democratic society based on the Rule of Law. And remember one litmus test of our belief in principles is to apply them to cases with which we have no sympathy at all.

Another major premise of the Rule of Law is that law shall be equal in its application. Thus there is a link between the Rule of Law and principle of equality. If there is cogent evidence of commission of a grave crime for which an ordinary citizen would be arrested, the law cannot be differently applied depending on the status of the person. The basic tenet of Rule of Law as articulated by the poet Thomas Fuller and adopted by courts is: “however high you may be the law is above you”. Therefore you may be the Prime Minister or the Speaker or the Imam or the Archbishop or the Sankaracharya or a judge or the powerful Chief Minister of Gujarat, Narendra Modi, or whoever, all are equally subject to the law of the land because “... in our democratic polity where the Rule of Law reigns no one – however highly placed he may be – can claim immunity, much less absolute immunity from the law”. According to the Indian Supreme Court “the doctrine of equality before the law is a necessary corollary to the high concept of Rule of Law accepted by our Constitution”.

Let me give you an interesting illustration of the application of the doctrine of Rule of Law by the Indian Supreme Court. It may appear surprising but the fact is that till the year 1967 there was no law enacted to regulate the grant or refusal of passport without which a person cannot travel abroad. The entire matter of grant or refusal of passport rested in the absolute discretion of the authorities uncontrolled by any enacted law. In the case of *Satwant Singh* which I argued in 1967 before the Supreme Court I successfully persuaded the Supreme Court to hold that in a matter concerning the fundamental right of a

person to travel abroad total absence of any law would result inevitably on arbitrariness and that was itself violative of the Rule of Law. After the judgment the Passport Act 1967 was enacted to regulate grant, refusal, revocation and impounding of the passports. Understandably I am quite proud of that judgment and regard it as a feather in my cap.

What is the position when an enacted law confers discretionary powers on public officials? At one time under Dicey's pervasive influence it was believed that wide discretionary powers were antithetical to the Rule of Law. But it was soon realised that discretionary powers are needed in administration especially in implementation of socio-economic welfare measures. A play in the joints is required for effectuating socio-economic legislation. What Rule of Law frowns upon is the conferral of absolute unfettered discretion. The Indian Supreme Court in its decision in *Jaisinghani's* case in 1967 ruled that "the first essential of the rule of law upon which our whole constitutional system is based is that discretion, when conferred upon executive authorities, must be confined within clearly defined limits". The Court reaffirmed this position and held in 1975 that "in a government under law, there can be no such thing as unfettered unreviewable discretion". The Court referred to the famous statement of Justice Douglas of the US Supreme Court that "Law has reached its finest moments when it has freed man from the unlimited discretion of some ruler ... Absolute discretion is a ruthless master. Where discretion is absolute, man has always suffered".

An important question arises: Does the concept of Rule of Law find its fulfillment by the mere enactment of a law, or is it also concerned with the content and quality of the law? Enactment of a law is no doubt essential but is that sufficient? Or do we need to expand the concept of the Rule of Law by

examining the quality of the law. In this context I would refer to the view of the International Commission of Jurists. It declared in 1959 that the Rule of Law “is not merely to safeguard and advance civil and political rights of the individual in a free society, but also to establish social, economic, educational and cultural condition under which his legitimate aspirations and human dignity may be realized”. Thus, Rule of Law is a dynamic concept, which also takes within its ambit all human rights of all individuals, which are indivisible and are interdependent.

The heart of the matter is that there is a certain core component without which a government cannot really be said to be based on the Rule of Law. That core component is respect for the basic human rights of the people and for human dignity. Otherwise commission of atrocities and gross violation of human rights could be justified by pointing to the mere existence of a law. On this interpretation, Rule of Law, in the colourful language of Prof. Upendra Baxi would “perpetuate States of Radical Evil”. It would also purportedly justify racially discriminatory legislation of the kind which was enacted during the apartheid regime in South Africa or infliction of torture or cruel and unusual punishment pursuant to a law which permitted it. In that event Rule of Law would become an instrument of oppression and give legitimacy to laws grossly violative of basic human rights. A formalistic narrow concept of the Rule of Law which leads to that interpretation and consequences is not acceptable.

We must never forget that there is an essential inextricable link between the Rule of Law and human rights. Flouting Rule of Law leads to horrific violations of human rights as happened in large parts of Europe which were under subjugation of the brutal Nazi regime. We witnessed the midnight knock



on the door, the mysterious disappearances, confessions extracted by torture, concentration camps and the gas chambers. In the Germany of the Nazis, the problem was not a lack of law. Most of the actions of the Nazi State were carried out under laws made by law makers. It is not without significance that the Universal Declaration of Human Rights 1948, described by Mrs. Eleanor Roosevelt as the Magna Carta of mankind, declares in its Preamble that it is essential that human rights should be protected by the Rule of Law.

Therefore when we speak of law, it must satisfy at least the prerequisite that it guarantees basic human rights and ensures their implementation by due process through an independent judiciary exercising power of judicial review. Absent these requirements Rule of Law would become a shallow slogan. In the memorable words of Lord Justice Stephen Sedley of the Court of Appeal in UK “the irreducible content of the rule of law is a safety net of human rights protected by an independent legal system”. I would like to stress that to enforce the Rule of Law an independent judiciary is a must. My country has been fortunate in having a judiciary which has except for occasional aberrations proved to be a good judicial sentinel and protected the human rights of the people. Without an independent judiciary Rule of Law is meaningless and human rights become mere high-sounding moral platitudes.

Some thoughts on globalisation. Has the Rule of Law any role or relevance in the age of globalisation? It is undeniable that globalisation impacts on legal systems of developing countries. With the advent of globalisation, entry of Multi-national Corporations [MNCs] and other globalisation players is inevitable. MNCs because of their vast resources undertake several activities and perform functions which have serious repercussions and affect the human rights of the people in developing societies especially in the field of

employment. Unregulated globalisation would produce deleterious consequences especially in relation to economic and social rights. For example, respect for the right to work and the right to just working conditions is threatened where there is an excessive emphasis upon competitiveness in disregard of labour rights. The right to form and join trade unions is threatened by restrictions placed upon freedom of association, or by the effective exclusion of possibilities for collective bargaining, or by the closing off of the right to strike. Furthermore in contract with the employees restrictions are put on the exercise of their freedom of expression. Multi-national and transnational corporations have become dominant actors not only economically, but also politically. Indeed in some cases they can be rightly described as State actors in view of the wide powers they wield the vast resources they possess and the wide-ranging nature of their functions and their effect on the community.

In principle there is no reason for exempting MNCs and other globalisation players from the constraints on power which the Rule of Law regime imposes on governments. What does discipline of Rule of Law entail? Observance of certain rules and principles in the workings and operations of MNCs. In particular that there should be no arbitrariness, no decision-making without consultation and open debate with the affected persons, transparency and, above all, no absence of accountability and not conferral of unfettered discretion. Whichever school of thought one belongs to vis-à-vis globalisation, to my mind there cannot be a fair process of globalisation unless it is accompanied by an effective Rule of Law structure and it is made subject to its discipline.

Next, I would like to mention about the scourge of terrorism from which India has suffered over the years culminating in the terrorist attacks in Mumbai in November 2008. There is no question that terrorism needs to be fought rigorously and relentlessly. However anti-terrorist laws must not contain provisions which destroy or impair basic human rights. A law, which permits killing of persons suspected to be terrorists or which enables their indefinite detention in the absolute discretion of the executive is destructive of the Rule of Law. Fake encounters and ‘encounter specialists’ have no place in a government professedly based on the Rule of Law. The purported justification that there is a ‘grave emergency’ to fight the ‘war on terror’, overlooks the basic fact that the end does not justify the means. This was an article of faith with the Father of the Nation, Mahatma Gandhi. A State in a free democratic society cannot have recourse to measures which violate the very essence of the Rule of Law. In the memorable words of Justice Stevens of the US Supreme Court, “if this nation is to remain true to its ideals symbolized by its flag, it must not wield the tools of tyrants even to resist an assault by the forces of tyranny”. In this context we should always remember the wise words of Justice Brandies in his judgment in *Olmstead vs. United States* : “Crime is contagious. If the government becomes a law-breaker, it breeds contempt for law; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means – to declare that the government may commit crimes in order to secure the conviction of a private criminal – would bring terrible retribution”. These words had a special resonance in the Constitutional Court of South Africa in the case of *Mohamed vs. President of the Republic of South Africa*.

Rule of Law is not a one way traffic. It places restraints both on governments and individuals. If the underlying principles of Rule of Law are to become a reality in governance as also in our lives laws are no doubt necessary

but they alone are not sufficient. In addition development of the Rule of Law culture is imperative. The only true foundation on which the Rule of Law can rest is its willing acceptance by the people of each country until it becomes part of their own way of life. Therefore we should strive to instill the Rule of Law temperament, Rule of Law culture at home, in the schools and in universities. We should strive for the universalization of its basic principles. Our effort should be to constantly aim at the expansion of the Rule of Law to make it a dynamic concept which not merely places constraints on exercise of official power but facilitates and empowers progressive measures in the area of socio-economic rights of the people. That indeed is a moral imperative both for South Asia and the World. You may well ask why? The answer, recalling the words of Justice Vivian Bose, is that “Because we believe in human worth and dignity. Because, on analysis and reflection, it is the only sane way to live at peace and amity with our neighbours in this complex world. Because it is the only sane way to live in an ordered society”.

I for one eagerly look forward to the time when the quintessential principle of the Rule of Law, namely the protection and promotion of all human rights and human dignity of all human beings is universally accepted. My ardent hope is that in a world torn by violent sectarian and religious strife Rule of Law with its capacious dynamic content becomes the secular religion of all nations based on tolerance and mutual respect. That no doubt appears Utopian and you may be right in thinking that I am in the realm of fantasy. Maybe. But remember that progress is the realisation of Utopias. Let us resolve here today to steadfastly realise the Utopia.

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