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Critique on the Concept of Rule of Law and its Application in the Indian Polity

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“The rule of law is a product of the imagination before it is a product of legislation or judicial acts.”²

ABSTRACT

This author of this article first goes about to briefly define what exactly the term Rule of Law implies, and then moves onto the major issues that it presents. Post this, the author points out the common errors or limitations in the implication of the doctrine. Further, the author goes on to enumerate the aspects it affects the most, specifically covering the application of the doctrine in a welfare state such as that of India. The article concludes with the evolution of its application by tracing its growth from the colonial period till date.

I. INTRODUCTION

What The law is an area without boundaries. This means that there is no one principle or procedure that can cover the entire ambit and scope that it possesses. However, of the existing pool, one that particularly stands out is the doctrine of Rule of Law.

It is a doctrine that guides us with an understanding of time, space, subjects, authority and legitimacy.³ More often than not, a legal system is judged based on its application of the Rule of Law, when it comes to recognising good and legitimate legal systems⁴. India, undoubtedly is a nation that is under the law, and where the law is a normative measure of all that it might do.⁵

It is difficult to define the term. However, certain common parlance for the concepts that are associated to the term are often stated such as supremacy of law, government under law etc. It

¹ Author is a student at Symbiosis Law School, Pune, India.

² Paul W. Kahn, 1999.

³PAUL W. KAHN, THE CULTURAL STUDY OF LAW: RECONSTRUCTING LEGAL SCHOLARSHIP (1999); PAUL W. KAHN, THE REIGN OF LAW (1997).

⁴Karina T. Hwang, *The Procedural Aspect of the Rule of Law: India as a Case Study for Distinguishing Concept from Conception*, (2015),

https://scholarship.claremont.edu/cgi/viewcontent.cgi?article=2156&context=cmc_theses.

⁵Paul W. Kahn, *Comparative Constitutionalism in a New Key*, (Jan 1, 2004),

<https://pdfs.semanticscholar.org/b899/980d1b15b366e11e0f87c8b79886cbc1ba56.pdf>.

is also common knowledge that the Rule of Law's purpose is protection of the individual against state power-holders and that it is essential for good governance.⁶

The Rule of Law, according to Dicey, has three major principles⁷:

1. Supremacy of law- which means that the law is supreme and absolute, negating the possibility of arbitrariness.
2. Equality before law- this implies that all are equal before the law, and must hence be treated the same, with no space for systems such as the French system of *Droit Administratif*⁸.
3. Predominance of legal spirit- this goes on to entail that rights are the results of judicial decisions or judgments, with the courts being the guardian of these rights.

The most important aspect of these would be that established laws must be applied equally to all, to avoid any form of discrimination or arbitrariness that may arise from such application.⁹

II. ISSUES¹⁰

Now, it becomes important to note that there is no strict laid out concept for the rule of law; which implies that it does not clearly state any substantive law or theorems, neither does it answer the question of how to go about something procedurally¹¹. With this, we see how there is no guarantee of potent laws being in force, nor the negation of the possibility of inadequate laws.

Yet another issue that presents itself during the application of the Rule of Law is that as there is no guideline as to the balance to be maintained in terms of the rights of the individual and of the society. For example, for the situations of handling suicide bombers or terrorists, it becomes difficult to find mid-ground to balance the rights of those who were affected, the government and the accused. What further complicates the issue is the fact that more often than not, these terrorists are not afraid of even the harshest penalty (i.e. death) and are prepared for it when they undertake their mission. Because the entire purpose of the law is to uphold law and order,

⁶58 HARRY W. JONES, THE RULE OF LAW AND THE WELFARE STATE, 143-156 (No. 2 Feb., 1958).

⁷ A.V.DICEY, THE LAW OF THE CONSTITUTION (1885).

⁸ This is the principle that deals with the specific relations of the public servants, giving them a whole different set of rules, since they were officials and part of the Government. This was a widely applied Administrative Law principle in France.

⁹ S. Jayakumar, *Applying the Rule of Law*, 43, 1, THE INTERNATIONAL LAWYER, 83-89 (2009).

¹⁰ *Ibid.*

¹¹ Other than Waldron's procedural aspect given: Jeremy Waldron, *The Rule of Law and the Importance of Procedure*, PHILOSOPHY OF LAW, 14 (2014).

if the objective is not achieved, then it becomes redundant¹².

The application is to be determined keeping in mind the social, cultural, and political values of the society in which it is to be applied. This is backed by the fact that it is impractical to have a universal code as to how and when to apply the Rule of Law.

Although there may be some content that may be universally agreed upon such as the substantive law of the serious offences such as murder, rape etc. being crimes and certain procedural law such as fair trial for those accused of crimes; for other areas such as implementation of laws, there is no consensus.

The most frequent mistake made when it comes to the Rule of Law, is its misinterpretation as rule of good law or of the kind of law, such as those laws that ensure freedom and human dignity.¹³ This leads to the constant moral-political philosophy debate about what the law should achieve and the values it should uphold.¹⁴ Because it can be so broadly interpreted, it becomes a necessity to ensure that a narrower interpretation of the doctrine to be applied.

The first notion that the people ought to be governed by law, would require that governments or the governing political authorities should rule, only as authorized by the law, because of the principle of 'government by law, not by men'. Raz also states that 'Actions not authorized by law cannot be the actions of the government as government'¹⁵; and although the truth of this may seem absolute, in reality, this isn't the case, as there can be instances when they act ultra vires, but the deed does not get labelled as illegal or non-governmental actions. This brings up the question of what exactly falls under the ambit of governments following the Rule of Law¹⁶, which is difficult to answer because the answer depends on a theory about what law is, and what kinds of means of social control are legal.¹⁷

Now the biggest question is, whether this ideal, be carried over to the welfare state. Prima facie, such a state would definitely face a challenge in setting the limits and applications of the Rule of Law. This is owing to the involvement of the government in multiple roles such as the regulator of the economy, dispenser of benefits etc. This in turn implies that the government has taken upon itself the duties that were distributed among other powers such as private companies, trade associations, charitable institutions etc. Therefore by this logic, does it imply

¹² S. Jayakumar, *Applying the Rule of Law*, 43, 1, THE INTERNATIONAL LAWYER, 83-89 (2009).

¹³ FRIEDRICH HAYEK, THE ROAD TO SERFDOM, Chapter 6, (Chicago, 1944, 1972).

¹⁴ J. RAZ, THE AUTHORITY OF LAW, 211, (Oxford, 1977).

¹⁵ *Ibid*, 212.

¹⁶ Andrei Marmor, *The Rule of Law and Its Limits*, 23, 1, LAW AND PHILOSOPHY, 1-43 (Jan. 2004).

¹⁷ J. AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED (London: Weidenfeld & Nicolson, 1954).

that that a welfare state can only progress with the decline and ultimate disappearance of the rule of law?¹⁸

III. APPLICATION IN INDIA

Colonial Era:

According to Sir James Fitzjames Stephen, a member of the Viceroy's Council in the early 1870s, in order to curb the varying rule of men, through personal power, the Rule of Law was critical to the efficiency of power. By having laid down rules, the means in which this power was exercised became clear and transparent. Lord Macaulay's Indian Penal Code being brought into words in the 1830s, is probably the best representation of this doctrine, during the British rule.¹⁹

The Indian Penal Code had replaced the second rate structure of a criminal law that existed during the East India Company's rule that was initially based on Muslim law. The law during this time is to be much appreciated for the dual aspects that it possessed. It had managed to be an instrument of morality (eg. the importance of subordinating personal power) and of power (which depicted the states' power, alongside the superiority notion of the British).²⁰

Gandhian View:

Gandhi, on the other hand, had extremely contradictory views on the law prevailing during that time. He went on to say extremist ideas. One such idea was when he claimed that the government exerts its force on the people in institutions such as the civil and criminal courts', claiming that it was the same case with rulers (that they rather make their subjects follow procedures of the court than blatantly applying force upon them). Further, he went on to affirm in his faith that those who promulgated and propagated the law, were part of the "*colonialism's autocratic structure*" and that they "*enslaved India*".²¹ It was at this point that Gandhi realized that the Rule of Law was central to India's colonial domination.

However, Gandhi did recognize and endorse the structure of the Rule of Law as an important framework to the mobilization of a nationalist identity, notably months after Independence.²² This was evident when he went on to state that²³:

¹⁸ Hayek, F. A., *The Road To Serfdom*, (Chicago: University of Chicago Press, 1994)

¹⁹ Jonathan K. Ocko & David Gilmartin, *State, Sovereignty, and the People: A Comparison of the "Rule of Law" in China and India*, 68, 1, THE JOURNAL OF ASIAN STUDIES, 11 (Feb. 2009).

²⁰ *Ibid.*

²¹ MAHATMA GANDHI, COLLECTED WORKS OF MAHATMA GANDHI, 5, Vol. 21, (1960).

²² Jonathan K. Ocko & David Gilmartin, *State, Sovereignty, and the People: A Comparison of the "Rule of Law" in China and India*, 68, 1, THE JOURNAL OF ASIAN STUDIES, 30-35 (Feb. 2009).

²³ MAHATMA GANDHI, COLLECTED WORKS OF MAHATMA GANDHI, 112, Vol. 89, (1960).

"Liberty never meant the licence to do anything at will, rather independence meant the voluntary restraint and discipline, voluntary acceptance of the rule of law in the making of which the whole of India had its hand through its elected representatives".

IV. CURRENT APPLICATION:

Through a basic knowledge of the Indian Constitution and the Indian Polity, one can easily garner that the Constitution is considered the Supreme Law of the land, and that all other laws are subordinate/subject to it. In the preamble itself, along with Articles 14, 19 and 21, one can see Dicey's three principles being incorporated; and is as fundamental that it cannot be suspended in any ordinary situation and is referred to as the "Golden Triangle".

*"Three Articles of our Constitution, and only three, stand between the heaven of freedom into which Tagore wanted his country to awake and the abyss of unrestrained power. They are Articles 14, 19 and 21."*²⁴

The most important player in incorporating the Rule of Law in contemporary India is the Judiciary. It had ensured that this doctrine was not just a right on paper, but in spirit as well. This was achieved by appropriating a positive approach and though interpretation of the constitutional provisions, besides numerous other methods.

Certain cases that are very vital to the promotion of the entire concept include:

- *A.D.M. Jabalpur v. Shiv Kant Shukla*²⁵-herein it was accepted that the doctrine was the accepted norm of civilized nations, and that even in the absence of a laid out rule, the state cannot deprive a person of his life and liberty.
- *Kesavananda Bharati v. State of Kerala*²⁶- it was declared that the doctrine of Rule of Law was the basic structure of the Constitution.
- *Golak Nath v. State of Punjab*²⁷- herein, it was stated that there were certain limitations that the doctrine had placed, mainly being limited amending powers.
- *Maneka Gandhi v. Union of India*²⁸- in this case, we see how Article 21 was made a Rule of Law, that a person could not be deprived of under any circumstance.

²⁴ Y.V. Chandrachud, C.J., *Minerva Mills Ltd. v. Union of India*, (1980) 3 SCC 625.

²⁵ AIR 1976 SC 1283.

²⁶ AIR 1973 SC 1461.

²⁷ 1967 SCR (2) 762.

²⁸ AIR 1978 SC 597.

- *Som Raj v. State of Haryana*²⁹- the assumption that the absence of arbitrary powers, being the key objective of the Rule of Law, was followed through.

Although we have these and many more cases that lay significant importance on the Rule of Law, there is enough evidence to support otherwise as well. This is evident from India's 66th rank out of 99 countries, in the Rule of Law Index³⁰.

The report does look into the systems that the nation has in place, such as those of an independent judiciary, the importance and protection placed on freedom, checks and balances etc. But it states that the reason for the lack of complete effectiveness of the Rule of Law is due to its institutions and procedures³¹.

Out of these, the biggest issue being the staggering amount of pending cases in the courts, due to the lack of manpower and ineffective systems, have made it impossible for the Rule of Law to have an impact as bearing as it did on other nations.

V. CONCLUSION

With the courts manifesting the doctrine and the common folk documenting the same in movies such as *Lagaan*, it becomes evident that the Rule of Law is one of the most important symbolic ideals of contemporary India. In this movie, wherein an arrogant and exploitative British administrator, challenged the drought-stricken villagers to a game of cricket, lost (despite his numerous attempts at ensuring they lose) and they had to be released of their tax arrears for a number of years; the persons behind this had the intention of symbolically implementing this rule with the village team representing the nation and cricket the metaphor of justice because it is played by the rules of the game, with justice being upheld without lawyers.³²

²⁹ 1990 SCR (1) 535.

³⁰The World Justice Project, *WJP Rule of Law Index 2014*, (2014), <https://worldjusticeproject.org/our-work/publications/rule-law-index-reports/wjp-rule-law-index-2014-report#:~:text=The%20WJP%20Rule%20of%20Law,to%20the%20rule%20of%20law>.

³¹ *Ibid.*

³² Prasenjit Duara, *The Limits of Legal Sovereignty: China and India in Recent History*, 68, 1, THE JOURNAL OF ASIAN STUDIES, 122-127 (Feb., 2009).