

**INTERNATIONAL JOURNAL OF LAW**  
**MANAGEMENT & HUMANITIES**

**[ISSN 2581-5369]**

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**Volume 4 | Issue 3**

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**2021**

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# Exploring a Working Definition of the Rule of Law

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NAIMA AHMAD<sup>1</sup>

## ABSTRACT

*The doctrine of rule of law has been the most frequently quoted legal principle across the world. Its significance can be gauged from the fact that it not only infuses law with moral qualities but also plays an indispensable role in balancing the needs of the society and the individual. It is the lifeblood of an accountable, transparent and justice-driven system of governance in a civilized human society. The rule of law principle is no more merely confined to being one of the fundamental pillars of the Constitution of the United Kingdom rather its relevance and importance has been universally recognized and acknowledged by the mature and nascent democracies of the world. Respect and protection of human rights form the very part of the nucleus of the rule of law. This doctrine has evolved to include more active protection for the weak, vulnerable and less privileged sections of citizens.*

*The present paper delves into tracing the genesis and evolution of the rule of law doctrine. It endeavors to look into the need of modern approach to the rule of law wherein it is not just a function of or limited to a set of institutions, statutes, and procedures. It scrutinizes the defects inherent in the strictly formal definition of the rule of law and thus attempts to explore a working definition of the rule of law.*

**Keywords:** *Rule of Law, Human Rights, Governmental Power, Magna Carta, Majoritarianism.*

## I. INTRODUCTION

*“Often we mistake stability, in terms of security and economic activity, to mean a country is doing well. We forget the third and important pillar: rule of law and respect for human rights”*

- **Kofi Annan**

These golden words by the former Secretary General of the United Nations, resonate deeper in today's world torn by pandemic-induced uncertainty, conflicts and steep rise in nationalistic fervor and xenophobic tendencies globally. There has not been a single political philosophy that has gained such unanimous universal acceptance across the globe as the “rule of law”. It

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<sup>1</sup> Author is a LLM Student at Chanakya National Law University, India.

is the sine-quo-non of any developed and well-governed political and legal system.

The phrase rule of law can be etymologically traced to the French phrase ‘la principe de legalite’ which literally means the principal of legality. It is the very antithesis of the arbitrary powers. In the course of human civilization, when the human society developed the intrinsic ability of reasoning, deliberation and introspection, the rule of law was born. It has been evolving since then. The importance and relevance of this doctrine has remained unfazed across many eras of the history of mankind. Its significance can be gauged from the fact that it not only infuses law with moral qualities but also plays an indispensable role in balancing the needs of the society and the individual.

## **II. THE HISTORIC EVOLUTION**

The role played by law in the society has always been a subject of philosophical discourse among the Greeks and the Romans. It was in ancient Greece in the late seventh and early sixth centuries B.C. that the first evidence of a European society administered by law, wherein the rules were ascribed in permanent and public form, was found<sup>2</sup>.

Plato is credited with putting forward the idea that the government should be subservient to the law in his work “The Laws”. Many Greek works exerted strong influence on the Roman legal thoughts. In *De Legibus*, Cicero highlighted that the law must be for the good of the community as a whole, in that way subjecting law to ideals of justice. The Greeks valued the written statutes as a source of law. A close look at the configuration of governmental power in ancient Greece reveals that the power was split among bodies representing different classes of people to forestall the concentration of all state power in one entity and prevent totalitarianism. The breakdown of the Roman empire followed by the fragmentation of Europe and the power struggle between church and the monarchs shaped the rule of law in the medieval Europe.

It was more than 800 years back that the Great Charter of Freedoms - Magna Carta Libertatum was signed by King John in 1215. It began the tradition of respect for the law, limits on government power, and a social contract where the government ruled with the consent of the people. It symbolizes a joint commitment by Monarchs, Parliamentarians and the Courts, to the rule of law. It was the Magna Carta that gifted the idea that no person including the sovereign, is above the law, and that all persons shall be secured from arbitrary exercise of powers of the government. Magna Carta was never deliberately planned to be a charter of human rights. Nevertheless, the citizens of the democratic and civilized societies look up to it

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<sup>2</sup> JOHN KELLY, *A SHORT HISTORY OF WESTERN LEGAL THEORY*, (Clarendon Press, Oxford).

as a covenant based on legal system built on rule of law free from arbitrariness and tyranny. For the guardian and protectors of the rule of law, Clause 39 and Clause 40 happen to be the frequently cited clauses of Magna Carta. Clause 39 established the idea that people could only be judged according to the law, and that even the king himself had to follow the law. Clause 40 ensured that nobody would be deprived of their rights, or had to pay for their rights, or be made to suffer by waiting for their rights. The Magna Carta is indeed the spiritual and legal ancestor of the concept of the Rule of Law<sup>3</sup>.

The significance of rule of law was further reaffirmed subsequently in the Petition of Grievances of 1610, Petition of Right of 1628 and ultimately found expression in English Bill of Rights of 1689. The learned jurist, Sir Edward Coke, reaffirmed the supremacy of law when he asserted that the king must be under the god and law. In the historic case of *Prohibitions del Roy*<sup>4</sup>, Sir Edward Coke held that the King could not act as a judge using his own reason to reach decisions, but should be tried by judges who applied the law to the facts.

The emergence of liberalism was conducive to the growth of the rule of law. The English philosopher John Locke, regarded as the father of liberalism, propounded the theory of social contract in his work, *Two Treatises of Government*. This theory was precursor to the next level of evolution in the realm of the rule of law. Subsequently, the separation of power theory formulated by Montesquieu in *L'Esprit des Lois* to check the abuse of power by the organs of the government and put fetters on the tyrannical impulses of the ruling authority contributed further to the development of the doctrine of rule of law.

It was Professor Albert Venn Dicey who is credited with bringing “rule of law” back into legal discourse in the nineteenth century. Dicey’s *Introduction to Study of the Laws of the Constitution* provides the firsthand explanation of what the rule of law involves in a liberal democracy. According to Albert Venn Dicey, rule of law is an amalgam of the three core tenets that are supremacy of law, equality before law and the predominance of the legal spirit.

The core tenets of Dicey’s interpretation of rule of law were reiterated by the distinguished philosopher and economist Friedrich Hayek in *The Road to Serfdom*. Hayek regarded rule of law as a meta-legal principle, an account of what good law looks like. For a legal system to be in conformity with rule of law, Hayek put forward three attributes that the law should be general, equal and certain.

Hans Kelsen who drafted the Austrian Constitution of 1920, had a considerable bearing on the

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<sup>3</sup> Justice Sandra Day O’ Connor, First Annual White Lecture, Indiana University School of Law, Indianapolis.

<sup>4</sup> (1572-1616) 12 Co Rep 63

development of rule of law in the civil code tradition countries. According to him, the rule of law necessitates a hierarchy of norms within the legal order with the constitution at its apex. All laws are subject to compliance with the constitution and government action is constrained by this legal framework.

The Lord Chief Justice of UK and Senior Law Lord of House of Lords, Lord Tom Bingham identified certain core principles incorporated in the rule of law. He further expanded his definition into eight sub-rules. These are - the law must be accessible, clear and predictable; questions of legal right and liability should ordinarily be resolved by application of the law and not the exercise of discretion; the laws of the land should apply equally to all, except wherein objective differences justify differentiation; ministers must exercise their powers reasonably and in good faith; the law must afford adequate protection of fundamental human rights; means must be provided for resolving disputes without prohibitive cost or inordinate delay; adjudicative procedures provided by the state should be fair and the State should comply with its obligations under international law<sup>5</sup>.

Be it the rendition of rule of law given by Albert Venn Dicey in his “Law of Constitution” or the definition given by Freidrich Hayek in his “Road to Serfdom” and “Constitution of Liberty” or the proposition laid down by Harry Jones in his “Rule of Law and Welfare State”, the most fundamental purpose of rule of law concept is the protection of individual against arbitrary exercise of power.

### **III. THE NEED FOR MODERN APPROACH**

The rule of Law refers to a set of certain established legal principles that imposes limitations on the governmental authority. It endorses the supremacy of law over the pretense and narcissism of the executives.

It is indeed unthinkable that in a democracy governed by the rule of law, the executive government or any of its officers should possess arbitrary power over the interests of the individual. In most of the democracies of the world including mature and nascent ones, the framers of the Constitution have invariably attempted to integrate the rule of law into the Constitution's governmental framework by expressly limiting the government's powers. The rule of law does find explicit mention in the section 1 of the Constitutional Reform Act 2005 of the United Kingdom, the preamble to the European Convention on Human Rights 1950 and the preamble to the Treaty on European Union. However, problems arise when governments

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<sup>5</sup> TOM BINGHAM, *RULE OF LAW*, (Allen Lane, London 2010).

conveniently ignore the rule of law when it conflicts with their political whims and fancies. In many instances, it has been found that the government authorities have conveniently ignored the legal limitations imposed by the rule of law.

The problem with a strictly formal definition of the rule of law is that it provides no guidance in respect of regimes that establish clear legal rules yet commit gross human rights violations and flout international obligations<sup>6</sup>. There could be a state adhering to the rule of law superficially with a functioning legislature and futile but independent judiciary wherein the legislative statutes have enacted laws in flagrant violation of international human rights instruments as was seen in the case of Zimbabwe. The same can be said of South Africa during the apartheid era. The Nuremberg Laws of the Nazis passed the test of constitutionality. So did the apartheid laws of South Africa. According to John Griffiths, the rule of law has a correct function in ensuring that public authorities do not exceed their powers and that criminal offences are dealt with in a fair and just manner; but the concept has also been misused to preserve legal and political institutions, which are no longer relevant<sup>7</sup>.

Thus, the rule of law cannot mean merely a set of institutions, statutes, and procedures. It is becoming increasingly clear with reference to many authoritarian states, that basic legal standard and procedures are insufficient deterrent against the arbitrary exercise of government power. In response to this, and in tandem with developments in international law, a substantive approach has gained new favor. This approach begins with formal definitions of law, but reaches beyond the letter and procedure of law to incorporate qualitative principles of justice. There are certain characteristics of the rule of law that must be retained in legal provisions as well as in literature. They are prohibition of arbitrariness, primacy of the law, legal certainty, separation of powers, independence and impartiality of the judiciary, respect for human rights, and non-discrimination and equality before the law.

#### **IV. EXPLORING A WORKING DEFINITION OF RULE OF LAW**

In the contemporary modern world, the new “global rule of law” relates to the emerging ideas of suniversal social policy and regulation. Indeed, human rights advocates believe that the rule of law can prevent and remedy human rights abuses; security analysts believe that establishing the rule of law is crucial to rebuilding states plagued by internecine conflict; development experts assert that the rule of law is a critical factor behind economic growth<sup>8</sup>.

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<sup>6</sup> Mark Ellis, *Toward A Common Ground Definition of The Rule of Law Incorporating Substantive Principle of Law*, 72 U. Pitt. L. Rev. (2010).

<sup>7</sup> J. A. G. Griffiths, *The Political Constitution*, 42 Mod. L. Rev. (1979).

<sup>8</sup> Mark Ellis, *supra* note 5

There are multiple definitions and understandings of the rule of law. Rule of Law assembles together the principles of freedom, equality, non-discrimination, fraternity, accountability and non-arbitrariness and is certain and predictable. At the most fundamental level, rule of law means a system of governance which is based on unbiased and universal rules. According to Wade, the rule of law requires that the government should be subject to law, rather than the law subject to the government<sup>9</sup>. The rule of law is a universal set of principles, according to which, irrespective of the differences based on race, gender, education, or economy, each individual is treated equally and fairly by the government. If respected by the government, the rule of law inspires loyalty among citizens. By observing the rule of law and adherence of its core tenets, a nation acknowledges and values individuals and their importance. On the other hand, by ignoring the rule of law, a nation acts arbitrarily, capriciously, and discriminatorily. The doctrine of rule of law has grown to include more active protection for the weak, vulnerable and less privileged. In the modern era human rights have become indispensable for the existence and sustenance of rule of law.

According to the United Nations, the rule of law is a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards<sup>10</sup>. It requires assessment of systematic adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency. This definition gives due recognition to the substantive human rights principles<sup>11</sup>. The U.S. military defines rule of law as a principle under which all persons, institutions, and entities, public and private, including the state itself, are accountable to laws that are publicly promulgated, equally enforced, and independently adjudicated, and that are consistent with international human rights principles. Strict adherence to the highest human rights standard forms the nucleus of the rule of law in the modern era.

A purely structural conception of the rule of law could be inadequate. Such a description threatens to legitimize governments that are absolutist, but not arbitrary; ruled by means of public and general, but unjust rules and supported by a powerful majority but oppressive to a

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<sup>9</sup> WADE & FORSYTH, *ADMINISTRATIVE LAW* (2005)

<sup>10</sup> U.N. Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies*, 6, U.N.

Doc. S/2004/616

<sup>11</sup> *Ibid.*

powerless minority<sup>12</sup>. Consequently, it is argued that, to serve as a bulwark against tyranny, the rule of law must go further and expressly protect moral and political rights of the individuals. The very spirit of human rights encompasses the tenet that human rights should be protected by the rule of law.

The question that confronts the jurists, the scholars of law and the world community at large is how to integrate the substantive principles of human rights and justice in the definitions of the rule of law.

The legal provisions referring to the rule of law are rare, both at national and at international level, and are of a very general character. They do not define the concept. As it has become increasingly clear in the twentieth century, a purely structural conception of the rule of law could be inadequate.

## V. CONCLUSION

Religious and racial majoritarianism along with deep nationalistic zeal has emerged as the most potent threat to the rule of law and constitutionalism globally. The disturbing and alarming trend that has developed recently is that on the pretext of political expedience, governments are inclined to deliberately violate the rule of law and the constitution. The instances of terrorism have imposed strain on the rule of law. There is global consensus that the events of the recent decades warrant a fundamental reexamination of the basis of government and the legal order.

Hence, there is an urgent need to develop the rule of law in tandem with the changing needs of human society. Effective rule of law reduces corruption, combats poverty and disease, and protects people from injustices large and small<sup>13</sup>. It is the foundation for communities of justice, opportunity, and peace—reinforcing development, accountable government, and respect for fundamental rights<sup>14</sup>. Customarily in the past, the rule of law was the exclusive domain of lawyers and judges. But, today in this modern era, every citizen of the world is a stakeholder in the rule of law for the simple reason that the daily issues of safety, rights, justice, and governance affect us all.

The concept of rule of law represents values and not institutions and connotes a climate of legal order which is just and reasonable, wherein every exercise of legal power aims at adding

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<sup>12</sup> Gerard J. Sanders, keynote address at Rule of Law on the Silk Road Conference , Asia-Pacific Law Forum ,University of South Australia (2018).

<sup>13</sup> WORLD JUSTICE PROJECT, (May 20, 2021, 1:05 AM), <https://worldjusticeproject.org/about-us/overview/mission>.

<sup>14</sup> Ibid.

something more to the quality of life of the people. As a result, it is the rule of law which must define law rather than the law defining the rule of law. The present and emerging human societies would continue to demand positive action in their quest for better life for their people. The rule of law has become a vital and compelling vision in a world torn by conflicts, violence and uncertainties since the institutions on which it depends for its survival and sustenance are becoming more systematically undermined. Renowned jurist Tom Bingham states in his book, *Rule Of Law*, that in a world divided by differences of nationality, race, colour, religion, and wealth, it [the rule of law] is one of the greatest unifying factors, perhaps the greatest, the nearest we are likely to approach to a universal secular religion.<sup>15</sup>

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<sup>15</sup> TOM BINGHAM, *supra* note 5.