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# LEGAL EVOLUTION: THE RULE OF LAW IN HISTORICAL CONTEXT AND CONTEMPORARY PRACTICE

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& PURBALI SENGUPTA

## *Abstract*

*The rule of law is a foundational principle ensuring that all individuals and institutions are accountable to laws that are publicly promulgated, equally enforced, and independently adjudicated. This research explores the evolution, implementation, and challenges of the rule of law globally, with a particular focus on India.*

*Globally, the rule of law is a cornerstone of democratic governance and human rights. Its implementation varies widely, influenced by historical, cultural, and socio-political factors. In developed nations, strong legal frameworks, independent judiciaries, and robust enforcement mechanisms typically characterize adherence to the rule of law. Conversely, developing countries often grapple with corruption, weak institutions, and inadequate legal frameworks, hindering effective implementation. India presents a unique case study due to its complex legal history and socio-economic diversity. The Indian Constitution enshrines the rule of law, with an independent judiciary and comprehensive legal codes. However, India faces significant challenges such as judicial backlog, corruption, and disparities in access to justice. Recent reforms and judicial activism have aimed at strengthening the rule of law, yet issues persist.*

*This research employs a comparative analysis, examining case studies from various countries to highlight best practices and pitfalls. It also analyses data from global indices on rule of law, such as the World Justice Project, to assess India's position relative to other nations. Through this comprehensive examination, the research aims to provide insights into enhancing the rule of law in India and other developing nations, emphasizing the need for judicial reforms, anti-corruption measures, and greater legal awareness among citizens.*

## I. HISTORY OF RULE OF LAW

Rule of law is the law, which is publicly promulgated, enforced and is independently adjudicated where everyone i.e., the individuals, institutions and the government are subject to the law. It ensures that justice is provided to the individuals and is done in such a manner that laws are transparent, just and are uniformly applied. Further, it ensures that the legal processes are just and fair, provides justice to the people and no one is above the law which means law Supreme. This is essential for democracy and functioning of the society.

It can be further understood by an example, when a driver, regardless of his occupation, caste, status receives a ticket from the traffic police officer for speeding up his vehicle. After, issuing such a ticket, the driver has the right to go to the court and contest it. This process is applicable for everyone which ensures that the law is equal and applied fairly. It can also be understood by another example, where a government official is accused of embezzling public funds. Despite the accused person is having a powerful position, the case will be investigated and is to be tried in a court of law where the process needs to be followed. The trial which is to be conducted is transparent where there is no biasness. During the trial, if the accused person is found guilty, then he shall be sentenced according to the law, just like any other ordinary citizen would be subjected to. Hence, no one is superior to the law and legal principles are consistently and impartially enforced.

### *A. Historical background behind rule of law*

The history of Rule of Law originated from the ancient civilizations. The Code of Hamurabi i.e., c. 1754 BCE, is one of the oldest written legal codes which was established in Babylon. It set out laws and corresponding punishments, emphasizes the idea that the king is not above law. The Rule of Law also has its origin from its ancient Egypt and Greece. Greek philosophers like Plato and Aristotle developed the notion of the Rule of Law. For instance, Aristotle distinguished between the Rule of Law and Rule of Men arguing that laws should govern.

In the medieval period, in England, the Magna Carta established the principle that the King was subject to the law and not above it. It was signed by the King John of England in 1215. It further introduced ideas like due process and habeas corpus, which became fundamental to the development of the Rule of Law. It is the cornerstone in the history of the Rule of Law. It laid the foundation for modern constitutional and legal systems that emphasizes the protection of individual rights and the limitation of governmental power.

In the Early Modern period, philosophers like John Locke and Montesquieu expanded on the idea, advocating for the separation of powers and checks and balances to prevent tyranny.

Locke's idea on natural rights and Montesquieu's on the separation of power deeply influenced modern democratic thought.

### *B. Rule of law in ancient India*

The Rule of Law begins with the ancient Hindu and Buddhist legal traditions through Islamic law and further evolves during the British Colonial Rule before reaching in the Modern legal framework. It reflects that the country's socio-political and cultural evolution. In the ancient India, the concept of dharma was central to the legal and moral code. The Vedas are the oldest sacred texts of Hinduism which laid the foundations for social and legal order. Whereas Dharmashastras and Manusmriti talked about the duties, rights and laws prescribed governing personal and social conduct. The King was considered the upholder of Dharma. His duty was to ensure justice and protect his subjects. He was guided by the principles of Dharma and was advised by the Brahmins. Later, in the Mauryan Empire between 322 BCE – 185 BCE, Arthashastra came into picture which was written by Kautilya (Chanakya). It emphasized the importance of a legal framework for the governance and justice to the people. He advocated for a strong centralized administration where the king was advised by a council of ministers.

In the Medieval period, the Gupta Period is referred to as the Golden Age of Law where the administration of law was sophisticated and well-structured. The Hindu legal traditions flourished, and the King continued to be the protector of Dharma. Furthermore, the advent of Islamic rule brought significant changes. The Sharia or the Islamic Law was introduced with the existing local laws. This judicial system was a blend of Islamic jurisprudence and the local customs. Further during this period, the Ain-i-Akbari compiled by Abu'l-Fazl under Akbar, documented administrative practices, legal procedures, and the role of justice in governance. Akbar's policy aimed at ensuring justice and harmony among his diverse subjects.

In the colonial period, initially, the British East India Company allowed local customs and laws to prevail but gradually it introduced English common law principles. The company courts operated alongside indigenous legal systems. The Regulating Act of 1773 marked the beginning of the legal administration in British India, establishing a Supreme Court in Calcutta and laying the foundation for the British legal system in India. Later, the Pitt's India Act of 1784 strengthened

the regulatory framework and oversight of the East India Company's administration. The British undertook expensive legal codifications which established comprehensive codes for criminal, civil, and procedural law. Some of those were: - Indian Penal Code, 1860 which was drafted by Lord Macaulay, this act standardized the criminal law across British India. Secondly, Indian Contract Act, 1872 which provided a framework for contracts and obligations. Thirdly, Indian Evidence Act, 1872 which standardized the law of evidence. Fourthly, Transfer of Property Act, 1882 which regulated property transactions. Fifthly, High Courts Act, 1861, this act was established for the High Courts in Bombay, Calcutta and Madras which became the highest courts of appeal and played a crucial role in shaping the legal landscape. Lastly, Indian Councils Act, 1892 and 1909, both the acts introduced reforms that allowed for greater Indian participation in legislative councils, laying the groundwork for future democratic governance.

In the Post – Independence period, the adoption of Constitution of India, 1950 marked a new era. The Constitution is the Supreme Law which established India as a sovereign, socialist, secular and democratic republic. Part III of the Constitution gives fundamental rights to all the citizens, including the right to Equality (Article 14), the right to freedom (Article 19), the right to life and personal liberty (Article 21). These rights can be enforced by the courts for ensuring protection against arbitrariness. Furthermore, the Part IV of the Constitution outlines the Directive Principles of State Policy which aims to create social and economic for a just society.

## **II. JURISTS VIEW IN RULE OF LAW**

### **A. Aristotle**

Aristotle's concept of the rule of law, as explored through various research papers, remains a significant foundation in the study of political philosophy and jurisprudence. Aristotle's idea that laws, rather than individuals, should govern is a fundamental aspect of his political theory. He argues that “it is more proper that law should govern than any one of the citizens.”<sup>1</sup> According to Aristotle, laws are expressions of reason and common agreement, superior to the whims of individual rulers. This principle is fundamental for ensuring stability, predictability, and fairness in governance<sup>2</sup>. Aristotle's division of justice into distributive and corrective forms highlights the role of law in ensuring fairness. Distributive justice pertains to the fair allocation of resources, while corrective justice addresses the rectification of wrongs. Research indicates that the rule of law is crucial for both types of justice, as it provides consistent standards for adjudication and

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<sup>1</sup> Aristotle, *Politics*, trans. Benjamin Jowett (Oxford: Clarendon Press, 1885), Book III, Part 16

<sup>2</sup> Hansen, M H, 'The Rule of Law in Ancient Greek Thought' (2004) 99 *Classical Philology* 94

resource distribution. Without established laws, justice becomes arbitrary and inconsistent<sup>3</sup>. Central to Aristotle's advocacy for the rule of law is his belief in the supremacy of reason. Laws represent rational deliberation aimed at the common good, unlike individual rulers who might be swayed by personal biases. Research supports this view, suggesting that legal systems rooted in rational principles are more effective in achieving justice and stability.

Aristotle's concept related to mixed government and the rule of law. Aristotle did not endorse a single form of government but favoured a mixed system combining elements of monarchy, aristocracy, and democracy. He believed that such a system would balance the strengths and weaknesses of each form<sup>4</sup>. For this mixed government to function well, it must operate under the rule of law. This prevents the concentration of power and ensures accountability, reducing the risk of tyranny. According to Aristotle, the ultimate aim of rule of law is to promote the common good. Laws should be designed to benefit the entire community rather than specific individuals or groups<sup>5</sup>. This aligns with Aristotle's teleological approach, where the purpose of the state and its laws is to create conditions conducive to human flourishing (eudaimonia). Research highlights that laws which aim at the common good contribute to societal stability and individual well-being. He also emphasized the role of education and the cultivation of virtue in upholding the rule of law. He believed that laws alone are insufficient; citizens must also be virtuous and well-educated<sup>6</sup>. Despite the foundational nature of Aristotle's ideas, they have limitations and have faced criticism. One significant limitation is his acceptance of hierarchical structures, such as slavery and the subordination of women, which conflict with modern notions of justice and equality<sup>7</sup>. Critics argue that his vision of the rule of law is constrained by his cultural and historical context, limiting its applicability to contemporary democratic societies. Aristotle's ideas on the rule of law have profoundly influenced modern democratic theory. The principle that laws should govern a state rather than individuals is a cornerstone of contemporary democratic systems<sup>8</sup>. Modern interpretations of the rule of law emphasize equality before the law, the protection of individual rights, and the accountability of government officials, which resonate with Aristotle's principles, albeit in a more inclusive manner.

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<sup>3</sup> Ober, J, 'Law and Political Theory in Classical Athens' in Michael Gagarin and David Cohen (eds), *The Cambridge Companion to Ancient Greek Law* (Cambridge: Cambridge University Press, 2005) 394

<sup>4</sup> Lane, M S, 'Mixed Government, the Rule of Law, and the Idea of Balance' in Marguerite Deslauriers and Pierre Destrée (eds), *The Cambridge Companion to Aristotle's Politics* (Cambridge: Cambridge University Press, 2013) 228

<sup>5</sup> Aristotle, *Politics*, Book III, Part 9

<sup>6</sup> Simpson, P L P, *A Philosophical Commentary on the Politics of Aristotle* (Chapel Hill: University of North Carolina Press, 1998) 78

<sup>7</sup> Nussbaum, M C, *The Fragility of Goodness: Luck and Ethics in Greek Tragedy and Philosophy* (Cambridge: Cambridge University Press, 1986) 357

<sup>8</sup> Finley, M I, *Democracy Ancient and Modern* (New Brunswick: Rutgers University Press, 1973) 23

Hence, it can be said that his theory underscores the importance of governance based on rational laws aimed at the common good, rather than arbitrary rule by individuals. While his views were shaped, the fundamental principles he articulated continue to resonate in modern discussions about justice, governance, and the role of law in society. The rule of law, as Aristotle envisioned it, remains a critical element of any just and stable political system, ensuring that power is exercised in a fair and predictable manner, ultimately promoting the well-being and flourishing of all citizens.

## B. *Montesquieu*

Montesquieu, a prominent Enlightenment thinker, is best known for his work *The Spirit of the Laws*, in which he discusses the rule of law extensively. His ideas have significantly influenced modern political thought, particularly the development of constitutional law and the principle of separation of powers. Montesquieu's rule of law is predicated on the idea that laws should be supreme over the actions of individuals, including rulers. He argued that "law in general is human reason" and that the laws must be appropriate to the people for whom they are framed, reflecting their customs, climate, and circumstances<sup>9</sup>. This principle ensures that laws are not arbitrary but grounded in reason and tailored to societal needs.

One of Montesquieu's most influential contributions is the doctrine of the separation of powers, which he believed was essential for preserving liberty and ensuring the rule of law. Montesquieu asserted that government should be divided into three branches: legislative, executive, and judicial, each with distinct functions and checks on the others. This framework prevents any single entity from gaining absolute power, thereby safeguarding individual freedoms and promoting justice<sup>10</sup>. According to scholars, this division helps prevent tyranny and abuse of power, as it creates a system of checks and balances. Furthermore, the separation of powers encourages a more equitable distribution of authority, ensuring that laws are enforced fairly and impartially. Montesquieu believed that the rule of law should aim at the common good, and laws must reflect the general will of the people. He argued that laws should be designed to promote public welfare and should be consistent with the principles of justice and equality. This idea resonates with the concept of legal positivism, which asserts that the legitimacy of laws derives from their alignment with societal values and norms. Studies indicate that when laws are perceived as just and equitable, there is greater compliance and less need for coercive enforcement<sup>11</sup>. This underscores

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<sup>9</sup> Montesquieu, *The Spirit of the Laws* (Cambridge University Press, 1989) 10 (Book I, Chapter 3)

<sup>10</sup> M.J.C. Vile, *Constitutionalism and the Separation of Powers* (Liberty Fund, 1998) 67

<sup>11</sup> H.L.A. Hart, *The Concept of Law* (Clarendon Press, 1994) 88

Montesquieu's argument that the rule of law should be based on principles that resonate with the populace and promote their collective well-being.

Montesquieu also emphasized the influence of climate and geography on the nature of laws. He posited that different regions require different legal frameworks because the social and environmental conditions vary significantly<sup>12</sup>. This view reflects a pragmatic approach to lawmaking, acknowledging that one-size-fits-all solutions are often ineffective.

Contemporary research supports this perspective, highlighting how environmental factors shape legal systems and governance structures. Studies have found that regions with diverse climatic and geographic conditions often develop distinct legal traditions that address their unique challenges<sup>13</sup>. This aligns with Montesquieu's assertion that effective laws must consider the specific circumstances of the people they govern.

Montesquieu further believed that the rule of law is essential for ensuring both freedom and security. He argued that laws should protect individuals from arbitrary rule and provide a framework within which freedom can flourish. This balance between freedom and security is crucial for a stable and just society. Legal scholars argue that laws must protect individual rights while also ensuring public safety and order. When laws achieve this balance, they enhance public trust and cooperation, fostering a more cohesive and resilient society. While Montesquieu's ideas have been highly influential, they are not without criticism. Some scholars argue that his views on the influence of climate and geography are overly deterministic and can lead to cultural stereotyping<sup>14</sup>. Additionally, his emphasis on the separation of powers has been critiqued for potentially leading to gridlock and inefficiency in government. However, these criticisms do not diminish the significance of Montesquieu's contributions to the concept of the rule of law. Instead, they highlight the need for a nuanced and context-specific application of his principles.

Montesquieu's ideas about the rule of law continue to influence modern legal and political systems. The principle of separation of powers is a cornerstone of many democratic constitutions, ensuring that power is distributed and that government actions are subject to legal constraints<sup>15</sup>.

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<sup>12</sup> Tom R. Tyler, *Why People Obey the Law* (Princeton University Press, 2006) 112

<sup>13</sup> Montesquieu, *The Spirit of the Laws* (Cambridge University Press, 1989) 212 (Book XVIII, Chapter 11)

<sup>14</sup> Jared Diamond, *Guns, Germs, and Steel: The Fates of Human Societies* (W.W. Norton & Company, 1997) 135

<sup>15</sup> Thomas L. Pangle, *Montesquieu's Philosophy of Liberalism: A Commentary on The Spirit of the Laws* (University of Chicago Press, 1973) 78

Moreover, the emphasis on laws reflecting the common good and being tailored to specific societal conditions remains relevant in contemporary legal discourse.

### C. *Dicey*

A.V. Dicey, a prominent British constitutional theorist, is best known for his work on the rule of law as articulated in *Introduction to the Study of the Law of the Constitution*. Dicey's conceptualization of the rule of law has had a lasting impact on legal and political thought, particularly in the context of constitutional law and the development of democratic governance. Dicey's rule of law is based on three fundamental principles: the supremacy of law, the equality of all before the law, and the protection of individual liberties. Dicey argued that no one is above the law, and the law must apply equally to all individuals, including government officials. This view emphasizes that the law should govern a nation, not arbitrary decisions by rulers<sup>16</sup>.

Dicey's principle of the supremacy of law means that the constitution is not an arbitrary or unilateral expression of power but is grounded in law that is applicable and enforceable. This contrasts with the concept of a constitution that might be subject to changes by political decisions or executive orders.

Dicey's view on the supremacy of law posits that all actions by government officials must be based on legal authority, and any action taken without legal backing is considered *ultra vires* and thus unlawful. This perspective ensures that the government operates within the confines of established laws and cannot act beyond its legal powers<sup>17</sup>. Research on Dicey's theory highlights its importance in maintaining legal order and accountability. For instance, studies show that the supremacy of law is crucial for preventing abuses of power and ensuring that government actions are justified and transparent. Furthermore, this principle is integral to the concept of judicial review, where courts have the authority to review and nullify unlawful government actions<sup>18</sup>.

Dicey also emphasized the principle of equality before the law, which asserts that all individuals, regardless of their status or position, should be treated equally by the legal system. This principle is fundamental to the rule of law, as it ensures that justice is administered impartially and without bias. Studies demonstrate that equal application of the law helps in maintaining social stability

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<sup>16</sup> Jon Elster, *Ulysses Unbound: Studies in Rationality, Precommitment, and Constraints* (Cambridge University Press, 2000) 93

<sup>17</sup> A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (Liberty Fund, 1982) 202

<sup>18</sup> Dicey, *Introduction to the Study of the Law of the Constitution* (Liberty Fund, 1982) 137

and promoting justice<sup>19</sup>. Moreover, equality before the law serves as a check against discriminatory practices and helps uphold fundamental human rights.

The protection of individual liberties is a central tenet of Dicey's rule of law. Dicey argued that the law should safeguard individual freedoms and rights from arbitrary interference by the state<sup>20</sup>. This protection is achieved through the enforcement of legal norms that uphold civil liberties and ensure that any limitations on individual freedoms are justified and proportionate.

While Dicey's rule of law has been highly influential, it has also faced criticism. Some scholars argue that Dicey's conception of the rule of law is too rigid and does not adequately account for the complexities of modern governance. For example, Dicey's focus on the formal aspects of legality may overlook the substantive requirements of justice and equity in contemporary legal systems<sup>21</sup>. Moreover, Dicey's rule of law has been critiqued for its limited consideration of the role of international law and human rights norms in shaping domestic legal systems. In an increasingly globalized world, the integration of international legal standards and human rights considerations has become more prominent in discussions about the rule of law.

Despite these criticisms, Dicey's rule of law remains a foundational concept in legal and political theory. His emphasis on the supremacy of law, equality before the law, and protection of individual liberties continues to inform contemporary discussions about constitutionalism and democratic governance<sup>22</sup>. Modern legal systems often incorporate Dicey's principles while also adapting to new challenges and incorporating international legal norms.

For example, contemporary legal systems may integrate human rights protections and international legal standards into their frameworks, reflecting an evolution of Dicey's principles in response to global developments. Additionally, the principle of judicial review remains a key feature of democratic governance, ensuring that government actions comply with established legal norms.

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<sup>19</sup> M. Elliott, *Public Law* (Oxford University Press, 2018) 98

<sup>20</sup> T.R.S. Allan, *Law, Liberty, and Justice: The Legal Foundations of British Constitutionalism* (Oxford University Press, 1993) 83

<sup>21</sup> Dicey, *Introduction to the Study of the Law of the Constitution* (Liberty Fund, 1982) 176

<sup>22</sup> S. Unger, *The Critical Legal Studies Movement* (Harvard University Press, 1986) 60

### III. REVISUALISING RULE OF LAW IN THE CONTEMPORARY WORLD

After the treaty of Westphalia was successful to stop the thirty years of war in 1648, it is said that an international structure composed of a hierarchy of emperor, kings, princes, and cities was dramatically replaced with one composed of many formally independent and formally equal states. The nation state was established as a solution the chaos that had followed the breakup of the medieval order when religious and trade schemes had overflowed across traditional boundaries and submerged them. Although the then nation states were highly authoritarian and their theoretical champion writers like Jean Bodin, Jean Jacques Burlamaqui, Thomas Hobbes applauded and justified them for that particular specified reason. They also stated that “Life was poor, nasty, brutish and short” due to civil war, banditry or religious zealotry, at that particular span of time a rational man would not think twice to submit without complaint to a government strong enough to keep the peace by whatever means necessary.

Now in the contemporary era, the principles and practices behind the scenes of the operations of the rule of law are reasonably well digestible in national legal systems having a jurisdictionally defined, democratic and constitutional foundation. But their perfectness tends to fracture in the fragmentation, fluidity and consistency of global inter interrelationships. To define new and appropriate meaning to an ‘international rule of law’, therefore, requires that we reconsider and reapply its principal ethical and institutional underpinnings in this new context. Given the polycentric nature of the global political, economic and legal order, it is not an easy task. Yet it is one that needs urgently to be undertaken. In its landmark report, the United Nations Commission on Global Governance stated the importance of considering the rule of law in the international arena in the strongest terms:

“The rule of law has been a critical civilising influence in every free society. It distinguishes a democratic from a tyrannical society; it secures liberty and justice against repression; it elevates equality above dominion; it empowers the weak against the unjust claims of the strong. Its restraints, no less than the moral precepts it asserts, are essential to the well-being of society, both collectively and to individuals within it. Respect for the rule of law is thus a basic neighbourhood value. And one that is certainly needed in the emerging global neighbourhood.”<sup>23</sup>

This statement puts its light into the idea of the rule of law, ideas of justice and fairness that some thinkers may with some legitimacy claims do not belong there.<sup>24</sup> However, it emphasizes the

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<sup>23</sup> Commission on Global Governance, *Our Global Neighbourhood*, Oxford: Oxford University Press, 1995, p.303.

<sup>24</sup> See: Dicey, A.V., *An Introduction to the Study of the Law of the Constitution*, 10th edition,

critical significance of translating both the rationale and value of the doctrine to the global arena. While there are, and always will be, different opinions regarding the content of the core values behind the idea of the rule of law, in the international arena.

A. *Rule of Law in the eyes of Tom Bingham*

Bingham identified the core of the existing principle of the rule of law by stating 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.” After that he acknowledged that this principle, so stated, was not comprehensive and not universally applicable. Thereafter Bingham gave us eight principles of the rule of law but there is nothing magical about it. He also left space for other thinkers to come up and serve their own principles in this particular subject matter. But besides this he also mentioned that, he thinks, it is necessary to go behind the very general principle he has stated to try and identify what the rule of law really means to us, here and now.<sup>25</sup>

Bingham talked about the accessibility of law, in his opinion in order to establish a so called proper rule of law in a greater or broader point of view to make it a successful rule of law, the laws must be accessible by the citizens of the states in order to maintain the rule of law the citizens have to know that what they are not to or what they are entitled to by the laws of the state otherwise they cannot claim their rights and perform their obligation. Also, he mentioned that for the successful conduct of trade, investment and business it needed to be operated by a body of accessible legal rules governing commercial rights and obligations. To do a business where a man involves large sums of his hard-earned money, it is necessary that the country’s rights and obligations are not vague. This was elaborated in more detail by Lord Mansfield, who is generally regarded as the father of English commercial law, around 250 years ago when he said: ‘The daily negotiations and property of merchants ought not to depend upon subtleties and niceties; but upon rules easily learned and easily retained, because they are the dictates of common sense, drawn from the truth of the case.’ In the same vein he said: “In all mercantile transactions the great object should be certainty: and therefore, it is of more consequence that a rule should be certain, than whether the rule is established one way or the other. Because speculators [meaning investors and businessmen] then know what ground to go upon.”<sup>26</sup>

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London: MacMillan, 1959, chapter 4; Raz, J. ‘*The Rule of Law and its Virtue*’, p. 195; Summers, R. ‘*A Formal Theory of the Rule of Law*’, *Ratio Juris*, vol. 6, no. 2, July 1993, p. 127

<sup>25</sup> Tom Bingham “The Rule of Law” 2011, p. 47

<sup>26</sup> *Vallejo v Wheeler* (1774) 1 Crown 143, 153

a) *The clash between Fuller, Joseph Raz and Tom Bingham regarding the aspects of “Rule of Law”*

It is generally accepted that Lon Fuller’s 8 principles<sup>27</sup> or the set requirements to be considered as Rule of Law gets the hold of the true essence of the “Rule of Law”. Some of the great thinkers like Sir Joseph Raz<sup>28</sup>, had supported this formal aspect promulgated by Lon Fuller but some people were also against the notion, in between them who are of a different point of view than Lon Fuller one special candidate was Sir Thomas Bingham. Before getting into such an interesting conversation let’s see the 8 excellences set by Lon Fuller which a Law of the state must have in order to be considered as “Rule of Law”, the 8 excellences of law namely: -

- i. Generality
  - ii. Publicity
  - iii. Prospectivity
  - iv. Intelligibility
  - v. Consistency
  - vi. Practicability
  - vii. Stability
  - viii. Congruence
- i. *Generality* – Fuller stated that Laws must be general for all the citizens of that particular state having an established “Rule of Law”. By this Fuller wanted to direct that specified rules shall be there for prohibiting or permitting certain kinds of behaviours.
  - ii. *Publicity* - Fuller mentioned that if it is a properly established Rule of Law then the laws of the state must be accessible by the people of that particular state.
  - iii. *Prospectivity* – By this criterion Fuller wanted to focus on “how individuals ought to behave in the future rather than prohibiting behaviour that occurred in the past.
  - iv. *Intelligibility* – Intelligibility states about the Clarity of law, that laws shall not be ambiguous and easily understandable by the normal citizens.
  - v. *Consistency* – Fuller established that laws must be consistent to each other rather than contradicting each other. Laws shall be non-contradictory.
  - vi. *Practicability* – Generally Practicability is what makes sense, so basically Fuller meant that the laws must be sensible, and it must not ask the impossible.
  - vii. *Stability* – By this particular criterion Fuller wanted to direct that laws shall not change frequently, and the demands laws make on the citizens should remain relatively constant.

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<sup>27</sup> Fuller, Lon, *Morality of Law*, rev. ed. (New Haven: Yale University Press.1969), p. 39

<sup>28</sup> Joseph Raz “*The authority of law: Essays on law and morality*” 1979

- viii. Congruence – “Congruence requires Lawmakers to pass only laws that will be enforced and require officials to enforce no more than is required by the laws. Judges should not interpret statutes based on their personal preferences and police should only arrest individuals they believe to have acted illegally.”<sup>29</sup>

After discussing these specific themes produced by Lon Fuller, Sir Joseph Raz has supported him in order to discussing the true essence of “Rule of Law”, In support of Lon Fuller if we quote him, he stated that –

“Lon Fuller' has claimed that the principles of the rule of law which he enumerated are essential for the existence of law. This claim if true is crucial to our understanding not only of the rule of law but also of the relation of law and morality. I have been treating the rule of law as an ideal, as a standard to which the law ought to conform but which it can and sometimes does violate most radically and systematically. Fuller, while allowing that deviations from the ideal of the rule of law can occur, denies that they can be radical or total. A legal system must of necessity conform to the rule of law to a certain degree, he claims. From this claim he concludes that there is an essential link between law and morality. Law is necessarily moral, at least in some respects.”<sup>30</sup>

But this support and the entire theme discussed by Lon Fuller and Joseph Raz was challenged by Sir Thomas Bingham by introducing a whole new aspect of the “Rule of Law” which is the substantive aspect of the “Rule of Law”. Bingham came with direct contradiction with the thinkings of Lon Fuller and Joseph Raz. Bingham criticized Sir Joseph’s approach to the rule of law, Bingham pointed out that, a “Rule of Law” is not truly a “Rule of Law” until it includes the substantive aspect in it. Basically, by the substantive aspect Bingham meant mainly the human rights of the citizens of the state. In his opinion the inclusion of the substantive aspect in the rule of law brings in its true essence. While criticizing Sir Lon Fuller and Sir Joseph Raz’s approach to describe rule of law, Bingham gave the example of the apartheid government of South Africa. The Apartheid Government can be defined in the way of ‘racial segregation’, this particular abusive and discriminatory legislation was sanctioned by law and was widely practiced in South Africa before 1948. But when the national party, led by Daniel F. Malan gained force that year, it extended the policy and gave name Apartheid often called “separate development” since the 1960s. This apartheid government had separated all south Africans either as ‘Bantu’ which means all black Africans and ‘Coloured’ which are of mixed race and ‘whites’. This government had enacted a legislation named “Group Areas Act 1950” by which members of other races were

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<sup>29</sup> Colleen Murphy “*Law and Philosophy*” 2005, p.241

<sup>30</sup> Joseph Raz “*The Authority of Law Essays on Law and morality*” oxford university press 1979

barred from living, operating businesses or owning land in them which led to thousands of coloureds, blacks and Indians being removed from the areas classified for white occupation.<sup>31</sup>

By giving this example Bingham criticized the approach of Sir Joseph Raz and Sir Lon Fuller by stating the fact that the 8 criteria which were given by Fuller in order to establish the validity of “Rule of Law” of a particular state was not totally correct because the laws made by the Apartheid government of South Africa had all of these criteria in them but still they were discriminatory and abusive towards a group of people out there then Bingham introduced a whole new aspect of “Rule of law” which he named the substantive aspect which includes certain basic human rights in it. Then Bingham criticized the laws of the apartheid government of South Africa by stating –

“The abhorrent laws of apartheid South Africa were constitutionally impeccable, so indeed were some of the appalling laws of Hitler’s Germany. We must therefore distinguish between constitutionality and the rule of law. Constitutionality is a vital ingredient of rule of law, but not always, nor in every country, definitive of it.”<sup>32</sup>

Bingham first intervened constitution through rule of law which is of a great significance. He mentioned that in modern day social structure if a state does not have the substantive aspect of rule of law that cannot be considered as a proper rule of law established state. He meant the rule of law must go hand in hand with the constitution of that particular state and should not discriminate or abuse any citizens of the state and should treat every citizen equally and justifiably. This is how Bingham established a notion to make the “Rule of Law” to go with the flow of time in our society, in the human society.

#### **IV. THE ENLIGHTENMENT OF RULE OF LAW IN INDIA**

Andre Beteille who is a sociologist and a known critical commentator on the theory of “rule of law” has commented in his populist interpretation and mobilization of democracy that Indian scholars have not paid enough attention to the demand for following scrupulously rules and procedures. Beteille is a thinker who gives us the insights about the constitutionalist approach into democracy. Democracy is interrelated with the procedural aspects, but our society is more faced towards “Our society is for life to be regulated by the persons not their rules.”<sup>33</sup> The view of Iravati Karve that Indian civilisation has been shaped by principles of accretion (accretion means,

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<sup>31</sup> Britannica: Apartheid Social Policy

<sup>32</sup> Bingham centre for the rule of law: Annual Bingham Lecture 2017

<sup>33</sup> Andre Beteille, “*Experience of governance: A sociological View.*” In R.K Darr (ed.) Governance and the IAS (New Delhi Tata McGraw Hill 1999, p.200

there is continuous accumulation of rules without eliminating the older rules.), “ When we add new rules , we do not necessarily discard old rules, so that the old rules becomes crowded with obsolete anachronistic and inconsistent rules. In India the administration by impersonal rules resists systematization because that demands continuous elimination of old and anachronistic rule”<sup>34</sup>.

On the other hand, Upendra Baxi appreciated the existing legal infrastructures which creates hurdle for the realisation of the normative promises made by the Constitution of India. In his words, “the constitution and the law have generally strong redistributive thrust”, yet “the orientation of the major institutions of India Legal system is towards maintenance and even aggravation status quo. The legal institutions generally decelerate and even prevent the inherent dynamism of the constitutional aspirants towards just a social order”<sup>35</sup>. In the words of Rajeev Dhavan, “There was never any great dissonance between Nehru’s developmental plan for the Indian people and the positivist theory of law that the British had bequeathed to the courts of independent India. The fact that constituent assembly had scripted a judicially enforceable Bill of Rights into the text of constitution did not disturb the positive credentials of the Indian Law. The fundamental rights guaranteed to the citizen of had been perceived as essentially ‘legal rights’ granted by super statute: each one of the rights had been hedged in by limitations and was interpreted like any other statute”<sup>36</sup>.

India currently is being ruled by a coalition of parties which is namely ‘National Democratic Alliance’ and it’s leading democratic party is Bharatiya Janata Party which is highly enthusiastic about Hindu Fundamentalist forces. The rise of the democracy in the Indian Political system has led to the demise of one-party dominance system in India’s political and electoral scenario. The ruling coalition that is NDA (National Democratic Alliance) has established the constitution review committee to review the constitution that is mainly made out for looking into “ salient issues in the area of governance and primarily federalism reforms [ pertaining relation between the centre and states which is still characterized by unfairness with regard to sharing of economic resources and political power], attainment of political stability for the present and future, union governments in an era of fractions coalitions.”<sup>37</sup> While the main job of the constitution review committee is to look into the directive principles of state policy and may, if needed convert them

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<sup>34</sup> . Ibid,228

<sup>35</sup> Baxi (op. ct., 1982), p. 30.

<sup>36</sup> Dhavan (op. ct.,2000) p. 32.

<sup>37</sup> Upendra Baxi, “*Kar seva of Indian Constitution? Reflections on proposals for review of the Indian Constitution.*” Economic and political weekly March 11, 2000, p.892

into the fundamental rights provided by Indian Constitution , the main fear of the contemporary Indian society is that , the ruling coalition, if, by any chance does anything for the benefit of the political agendas and the party system which may hurt the basic structure if the Indian Constitution.

In the opinion of Upendra Baxi there is no need of a constitution review committee because constitution had allowed numerous changes within it through amendments. But while constitution allows to make changes in it but it does not allow to make a change 'of' it; "changes of constitution are not allowed any scope by the present Indian constitutionalism which denies legitimacy for its profound sub version"<sup>38</sup>.

The establishment of the rule of law in India is a profound testament to the country's commitment to democratic governance and legal integrity. This principle, fundamental to democratic societies, signifies that all individuals and institutions are subject to and accountable under the law that is fairly applied and enforced. This essay outlines the development and establishment of the rule of law in India, highlighting historical contexts, constitutional provisions, judicial interpretations, legislative and executive roles, and the challenges faced.

#### *A. Historical Context*

The rule of law was introduced in India during the British colonial era, albeit within a framework that was often skewed towards colonial interests. The British Raj implemented various legal reforms, such as the Indian Penal Code of 1860 and the Civil Procedure Code of 1908, which laid the groundwork for a structured legal system<sup>39</sup>. These laws reflected principles of justice and equality before the law, although their application was often inconsistent and served colonial interests.

#### *B. Post-Independence Framework*

With the attainment of independence in 1947, India embarked on a journey to establish a robust legal system founded on democratic principles. The Indian Constitution, adopted on January 26, 1950, was pivotal in embedding the rule of law into the fabric of Indian governance. The Constitution not only established India as a sovereign, democratic republic but also entrenched

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<sup>38</sup> Ibid, p. 891

<sup>39</sup> . Maitra, S. (2005). "The Impact of British Rule on Indian Legal System." *Economic and Political Weekly*, 40(1), 1-10.

fundamental rights and legal principles that safeguard justice and equality<sup>40</sup>.

### C. *Constitutional Provisions*

The Constitution of India enshrines the rule of law through various key provisions:

1. Article 14: This article guarantees equality before the law and equal protection of the laws. It mandates that no individual shall be discriminated against by the state based on religion, race, caste, sex, or place of birth<sup>41</sup>. This provision underscores the principle that the law must apply equally to all individuals, ensuring fairness and preventing arbitrary actions by the state.
2. Article 21: Article 21 protects the right to life and personal liberty, stating that no person shall be deprived of these rights except according to a procedure established by law. This provision ensures that any deprivation of personal liberty must be in accordance with legal procedures that are just and fair<sup>42</sup>.
3. Article 32: Article 32 provides a fundamental right to individuals to approach the Supreme Court directly for the enforcement of their fundamental rights. This article is crucial for maintaining the rule of law, as it allows citizens to seek judicial redress against violations of their rights and ensures that the rule of law is upheld through judicial review<sup>43</sup>.

### D. *Judicial Interpretation*

The judiciary in India, particularly the Supreme Court and High Courts, has played a pivotal role in upholding and interpreting the rule of law. Landmark judgments have significantly shaped the legal landscape:

In the case of “**Kesavananda Bharati v. State of Kerala (1973)**” It was established that the “basic structure doctrine,” which holds that certain fundamental features of the Constitution cannot be altered by amendments. This doctrine reinforces the inviolability of core constitutional principles, including the rule of law<sup>44</sup>.

Similarly, “**Maneka Gandhi v. Union of India (1978)**” In this case, the Supreme Court expanded the interpretation of Article 21 to include the right to a fair procedure. The court held that any law that deprives an individual of their personal liberty must not only be just, fair, and reasonable but must also follow due process<sup>45</sup>.

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<sup>40</sup> Constitution of India, 1950.

<sup>41</sup> Article 14, Constitution of India.

<sup>42</sup> Article 21, Constitution of India

<sup>43</sup> Article 32, Constitution of India.

<sup>44</sup> Kesavananda Bharati v. State of Kerala (1973) 4 SCC 225.

<sup>45</sup> Maneka Gandhi v. Union of India (1978) 1 SCC 248.

These judgments reflect the judiciary's role in not only interpreting laws but also ensuring that legislative and executive actions comply with constitutional principles.

#### E. *Legislative and Executive Roles*

In India, both the legislative and executive branches play crucial roles in upholding the rule of law:

- a) *Legislative actions*: The Indian Parliament and state legislatures are responsible for enacting laws that reflect the rule of law. Laws must be created within the framework of the Constitution and should adhere to principles of justice and equality. The legislative process includes mechanisms for scrutiny and debate, ensuring that laws are subjected to rigorous examination before enactment<sup>46</sup>.
- b) *Executive actions*: The executive branch, comprising the President, Prime Minister, and various administrative agencies, must implement laws in accordance with the Constitution. The executive is accountable for ensuring that its actions and policies conform to legal standards. Administrative decisions are subject to judicial review, ensuring compliance with the rule of law<sup>47</sup>.

#### F. *Challenges and Reforms*

Despite the strong constitutional and legal framework, India faces several challenges in fully realizing the rule of law:

- a) *Judicial delays*: The Indian judicial system often suffers from significant delays in case adjudication, which undermines timely justice. Reforms are being pursued to streamline judicial processes and reduce case backlogs<sup>48</sup>.
- b) *Corruption*: Corruption within both the executive and legislative branches poses a threat to the rule of law. Efforts to combat corruption include legal reforms, anti-corruption agencies, and initiatives aimed at increasing transparency and accountability<sup>49</sup>.
- c) *Legal aid and access to justice*: Access to justice remains uneven, particularly for marginalized communities. Legal aid services and reforms are being implemented to

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<sup>46</sup> Rajagopal, S. (2017). "The Role of the Legislature and Executive in Upholding the Rule of Law in India." *Journal of Indian Law and Society*, 8(1), 45-67.

<sup>47</sup> Ghosh, R. (2020). "Challenges and Reforms in the Indian Legal System." *International Journal of Law*, 15(2), 85-101.

<sup>48</sup> Law Commission of India Reports on judicial reforms.

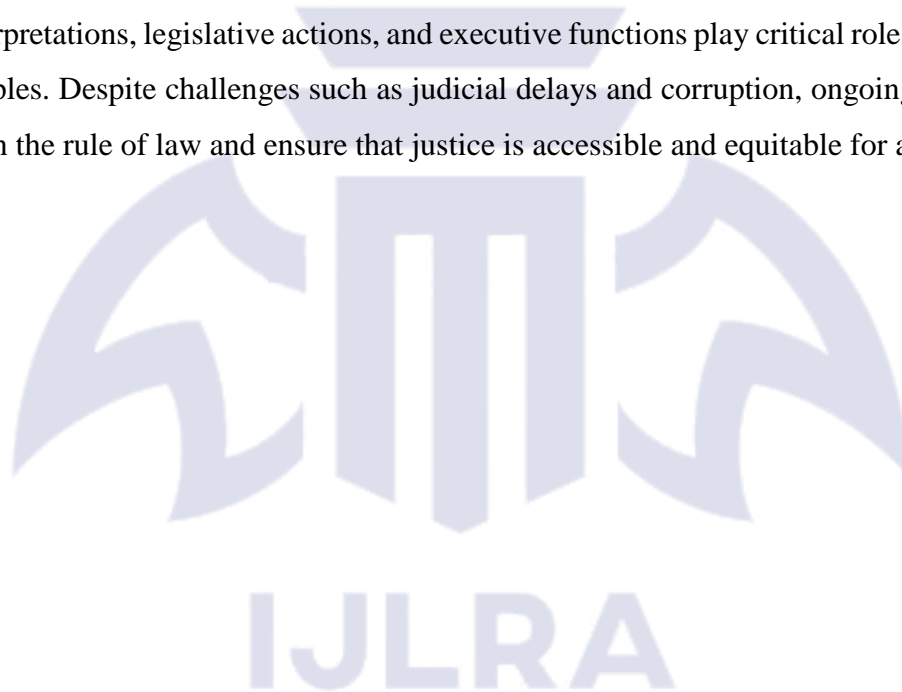
<sup>49</sup> Central Vigilance Commission Reports on anti-corruption.

enhance access to legal resources and ensure that all individuals can effectively seek and obtain justice<sup>50</sup>.

- d) *Police reforms*: The functioning of the police force, which is crucial for law enforcement, has been a subject of scrutiny. Reforms aimed at improving police accountability and effectiveness are essential for ensuring that law enforcement aligns with the principles of justice and fairness<sup>51</sup>.

## V. CONCLUSION

The establishment of the rule of law in India represents a fundamental aspect of its democratic framework. The Indian Constitution provides a robust foundation for legal principles, while judicial interpretations, legislative actions, and executive functions play critical roles in upholding these principles. Despite challenges such as judicial delays and corruption, ongoing reforms aim to strengthen the rule of law and ensure that justice is accessible and equitable for all citizens.



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<sup>50</sup> National Legal Services Authority Reports on legal aid.

<sup>51</sup> Supreme Court of India Reports on police reforms.