

A STUDY ON THE RULE OF LAW AND ITS THREATS IN 21ST CENTURY

By

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"Human security comes only with human rights and the rule of law. Human rights are the basis for creating strong and accountable States without which, there can be no political stability or social progress"

—Irene Khan

Introduction :

The ultimate goals of all the people in India are to uphold the letter and spirit of the Constitution *i.e.*, Justice, Liberty, Equality, and Fraternity. The people in India are bound to uphold the Constitutional values and principles of democracy. India is vibrant democracy and its democratic polity is based on the rule of law. The message is very clear that 'if we do not save democracy, democracy will not save us'. Thus, it is essential to protect the life, liberty, property and all the rights that are guaranteed under the Constitution of India and the laws of the land. The eternal value of Constitutionalism is the Rule of Law. The principles of constitutionalism and rule of law lie at the root of the system of the Government of India. The rule of law is a fundamental postulate of our constitutional structure¹. Rule of law is seen as directly integral to the implementation of the rights. Without the rule of law, rights remain lifeless paper promises rather than the reality. In recent years, much discussion has been taken place with regard to threats to the rule of law such as corruption, urban terrorism, violations of international law, direct action by militant groups, campaigns of civil disobedience, student's sit-ins, strikes, protests and demonstrations *etc.*, in our social life. In this paper, an attempt has been made to

analyze briefly about the conceptual nature of rule of law, judicial interventions in protecting the rule of law, and also highlight about the major threats such as the terrorism and corruption under rule of law.

Concept of Rule of Law:

Rule of Law is a magnetic and multi-dimensional concept, which is an accepted norm in all civilized societies. It has different facets because of its indiscriminate promiscuous use, which has meant different things to different people at different times. There are contrasting meanings to the rule of law throughout worldwide. The term 'Rule of law' is derived from the French phrase '*la principe de legalite*', which refers to a Government based on principles of law and not of men. More than 2000 years ago, Aristotle said that the rule of law is better than that of any individual. Broadly speaking, the rule of law is the regulation of human conduct by legal norms through the working of a legal system². According to Sir *Ivor Jennings*, the famous constitutional historian, the rule of law is an unruly horse or a legalistic slogan, which denotes a way of life, commitment to certain principles and values³. In a modern and democratic society, the objective of the rule of law should not be simply to maintain peace in a frozen or

1. The Constitutionalism principle requires that all Governmental action comply with the Constitution, while the Rule of Law principle requires that all Government action must comply with the law including the Constitution;

2. *Mathew H. Kramer*, "On the moral Status of the Rule of Law", *Cambridge Law Journal*, Vol.63 (2004), pp. 65-97

3. *Soli J Sorabji*, 'Rule of Law : Its Ambit and Dimension', at P.3; *infra* note at 14

paralyzed state, rather it should have dynamism of life and should adapt itself to the constant process of transformation which characterizes all living organisms. Law as a feature of transformation and growth of human society is intended to ensure the process takes place in an orderly and non-violent fashion, while at the same time contributing to the greater justice. In order to avoid recourse to rebellion, it is imperative that the rule of law be based on the principle of justice, where the freedom of individual is guaranteed⁴.

Rule of law is a dynamic concept, which has three facets *i.e.* 'rule by law' (No written law may be enforced by the Government, unless it confirms with certain unwritten, universal principles of fairness, morality and justice that transcend human legal system), 'rule under law' (No branch of the Government is above the law and no public officials may act arbitrarily or unilaterally outside the law), and 'rule according to law' (No individual can be ordered by the Government to pay civil damages or suffer criminal punishment except in strict accordance with well-established and clearly defined laws and procedures). The most outstanding observation made by our late Prime Minister Sri Jawaharlal Nehru, who is a great Juristic Philosopher, is that rule of law should reflect the rule of life⁵. It means that there should be an absolute concomitance between the law and the real needs of the society. The society is always progressive and changing, but never be static, so also the law is subjected for change.

Rule of Law and Judiciary:

The judicial pronouncements exhibits a dynamic and positive approach to the concept of the rule of law, by laying the need of fair play and justice in every walk of administrative

action. The Supreme Court of India has come forward to make legal remedies available for all and sundry, which takes care of human rights against any administrative encroachment in order to uphold the dignity of man in the society. In our constitutional system, the most characteristic feature is that the authority of the law courts to test all administrative action by the standard of legality⁶. The concept of the rule of law is invoked often to convey the sense that the administration cannot exercise arbitrary powers and that it should function according to law. *Bhagwathi J.*, has emphasized in the case of *Bachan Singh v. State of Punjab*⁷, that rule of law excludes arbitrariness and unreasonableness. While in *A.D.M. Jabalpur v. Shivkanth Shukla*⁸, *Khanna J.*, has stated that 'Rule of law is the antithesis of arbitrariness...'.⁹

The Apex Court has observed that the absence of arbitrary power is the first essential of the Rule of law, upon which our whole Constitutional system is based. In a system governed by the Rule of law discretion, when conferred upon executive authorities must be confined within clearly defined. The rule of law from this point of view means that decisions should be made by the application of known principles and rules, and in general, such decisions should be predictable and the citizen should know where he is⁹. In India, the concept of rule of law is duly recognized by the Constitution¹⁰, as well as by a catena of decisions of the

6. Gandhi, B.M., 'Landmarks in Indian Legal and Constitutional History', Eastern Book Company, Lucknow, at p.427

7. AIR 1982 SC 1325

8. AIR 1976 SC 1207 at Para 220

9. *S.G. Jaisinghani v. Union of India* AIR 1967 SC 127, Para 14

10. In India, the Constitution is supreme, and its the Preamble, Fundamental Rights especially Article 13 clearly sets out the principles of rule of law. Despite that, the law of preventive detention is obnoxious to the rule of law and must conform to the procedure established by law under Article 21 of the Constitution.

4. Adama Dieng, 'The Independence of Judiciary and the Rule of Law', IJHR, at p.52

5. Dr. U.C. Sarkar, 'Legal Research Essays', All. Law Agencies, Allahabad, at p.177

Supreme Court of India¹¹. It is to be noted that the independence of the judiciary is the backbone of the rule of law. The existence of an independent judiciary with powers of judicial review of executive action to ensure that the power is exercised within the limits of law. Naturally, an independent judiciary is an indispensable pre-requisite of a free society under the rule of law. Equal protection of law for the rich and poor alike is essential to the maintenance of the rule of law, which implies that, it is the obligation of the State that no one is deprived of access to justice because of social or economic disabilities. For this purpose, in India the horizons of the rule of law has been expanded by the process of judicial activism. Access to courts for have-nots, who suffered from different kinds of disabilities has become a reality, through the medium of Public Interest Litigation, which is brought by social activists. It has been a welcome development in Indian Public Law, which facilitates access to courts and helps public-spirited individuals and groups, to initiate the legal process in the larger interests of society.

Threats to the Rule of Law:

The turning point of this millennium has been full of changes and accordingly this paper throw light on the people around the globe entered 21st century. The 'Globalization' and 'Liberalization' is the order of the day, which is the grand-trend of the contemporary world. We shall have to march with the advancements in the fields of science and technology, trade and commerce in the international prosperity and achievements. It is well known premise even during the Middle Ages that the Government should

be subject to the law rather than the law subject to the Government and the exercise of the powers of the Government shall be conditioned by the law, but not arbitrary actions of the executive. The 21st century has seen the widespread growth of discretionary powers at the hands of the public bodies to administer the welfare State, as it has to perform manifold functions. In a democracy governed by the rule of law, where arbitrariness in any form is eschewed, no Government or authority has the right to do, what it pleased. The doctrine of pleasure in the hands of the Government does not mean a license to act arbitrarily, capriciously or whimsically. It is presumed that the discretionary powers conferred in absolute and unfettered terms on any public authority, will necessarily and obviously be exercised reasonably for the public good. In the words of Albert Venn Dicey, wherever there is discretion, there is room for arbitrariness. In his thesis, he excluded arbitrary powers and insisted that the administrative authorities should not be given wide discretionary powers¹².

To establish the socio-economic justice, rule of law is indispensable foundation. Economic empowerment is a fundamental right, as a part of right to life, to make political democracy stable. Socio-economic democracy must take strong route to be a way of life. Thus, the State is enjoined to provide adequate means of livelihood to the poor, weaker sections of the society, the dalits, the tribes and distribute material sources of the community to them for common welfare. The doctrine of political economy must include interpretation for public good which is based on 'justice' that would guide the people, when questions of economic and social policy are under consideration¹³. It is to be noted that in India, there is uneven development of the rule of

11. *Golaknadh v. State of Punjab*, AIR 1967 SC 1643; *A.K. Kraipak v. Union of India*, AIR 1970 SC 150; *Daryo v. State of U.P.*, AIR 1961 SC 1457; *State of Bihar v. Sonawati Kumari*, AIR 1961 SC 221; *Haryana Finance Corporation v. Jagdamba Oil Mills*, AIR 2002 SC 834; *Indra Sawhney v. Union of India*, AIR 2000 SC 498;

12. *The Law and the Constitution*, 1915.

13. *K. Rama Swamy J.*, in *Air India Statutory Corporation v. United Labour Union*, AIR 1997 SC 645 para.46

law, which is still under the constant threat from a variety of sources within and from outside the State, such as terrorism, corruption which are at alarming level¹⁴, which are discussed hereunder.

Terrorism and Rule of Law:

Currently the terrorism has become the greatest threat to the world peace and particularly to the national security in India. According to the United States Department, the terrorism is described as 'premediated, politically motivated violence perpetrated against non-combatant targets by sub-national groups or clandestine state agents'. While according to the United Kingdom Ministry of Defence, it treated as the unlawful use or threatened use of force or violence against individuals or property in an attempt to coerce or intimidate Governments or societies to achieve political, religious or ideological objectives¹⁵. It is pertinent to mention that the biggest threat in the history of terrorism was occurred in United States of America, which took a quantum leap on World Trade Centre and on the Pentagon on 11th September, 2001, leads to a major casualties and maximum economic damage. Subsequent to the post 9/11 phase, the United States¹⁶, has been leading the war against the international terrorism. Despite the above, the countries like France¹⁷, Canada¹⁸, Australia¹⁹,

and Japan²⁰, enacts specific legislations to combat the menace of terroristic activities.

It is indisputable fact that the people of India are living in troubled times without peace and tranquility in the society and gets disturbed by the acts of terrorism, which represents a very real and serious threat and danger, to the entire life of the nation and the rule of law itself²¹. It needs no emphasis that rule of law is the antitheses of violence and anarchy. During the past few years, more than 50,000 people have directly lost their lives due to cross-border terrorism in the State of Jammu and Kashmir. The Government of India has been followed a strategy to deal with the insurgency in the Jammu and Kashmir, such as proactive tackling of cross-border terrorism, which comprises a series of measures which includes preventing infiltration, countering militancy in the hinterland, protection of minorities, improved technology, weapons and equipment for security forces, strengthening and modernizing the state police, and launching well-planned counter-terrorist operations²².

The right to life which is the most precious fundamental right under the Article 21 of the Constitution of India, has been exposed to serious threats and risks from terrorists. It is the constitutional mandate to protect the life, liberty and human rights of the people of India, and thereby protect the rule of law. At the same time, it is the duty of the every individual to ensure that the terrorism is fought. It does not left solely to the Government to do away. The society as a whole and every individual, has to consider the disastrous effect of terrorism and join hands, to fight the battle against the terrorism.

14. *Madhav Menon*, N.R (ed.), 'Rule of Law in a Free Society', (Oxford University Press, 2008).

15. Ibid. NATO Allied Administrative Publication, 2002.

16. In USA, (PATRIOT) Act, 2001 *i.e.* Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act, is approved to deter and punish terrorist acts in the United States and around the world.

17. Relevant provisions mentioned in Chapters I and II of Title II (Terrorism) of the Penal Code and Code of Criminal Procedure.

18. Anti-Terrorism Act, 2001; Security Offences Act, 1984; Canadian Security Intelligence Services Act, 1984, are to deal with the acts of terror.

19. Anti-Terrorism Bill, 2004, strengths the counter-terrorism legislation.

20. Anti-Terrorism Special Measures Bill, 2001, to support the efforts of the international community for the prevention and eradication of international terrorist acts.

21. *Madan Singh v. State of Bihar* (2004) 4 SCC 622.

22. Supra note 14 at p.153

Tackling the terrorist threat would require a multidimensional approach, and which would require co-operation at the regional and international levels.

Corruption and Rule of Law :

Another major threat to the rule of law in a free society is corruption. It is often embedded in the hierarchical structure of bureaucracy. Corruption helps in distorting the basic objectives of the rules, regulations and thereby, sabotages the rule of law. Corruption is the use of public office for private gain, which springs from the basic human tendency of greed. India can claim to be the foremost country committed to the concept of the rule of law and in the meanwhile, India is rated as one of the most corrupt countries in the world. Corruption can be eradicated from India provided people from all walks of life maintain a high level of honesty, integrity and morality. Every country has deserves its own governance, but we, the people of India deserves a better governance and rule of law. It is the effective implementation of the rule of law that confers legitimacy on the State. If the Rule of law is compromised by corruption, the State loses its legitimacy. So that, to protect the rule of law in a free society, every individual aware of the need for the rule of law.

It is pertinent to mention that when the corruption compares to AIDS, 'just as AIDS knocks out the immune systems of the human body, corruption knocks out the immune system of the society in the forms of checks and balances, which is designed to ensure rule of law and takes society towards anarchy'. Corruption has become a low-risk, and high-profit activity in India. In India, in every

department of public administration, corruption has become so pervasive and demanding that, it can be more appropriately likened to the extortion rackets practiced by the organized criminal gangs in the big cities. Criminalization of politics would further damage the framework designed for ensuring good governance and the rule of law. In any organization or society, the level of corruption depends on 'individuals sense of values', 'set of social values' and 'the system'.

Conclusion:

Rule of law has different facets, which shows a way of life and commitment to certain principles and values. Rule of law is meant to safeguard and advance the human rights of an individual in a free society. Rule of law is used to avoid conflicts, provide security, balance of interests of individuals in different sections of society, and to avoid arbitrariness in dealing with the different individuals and to ensure that, the governance is done, not as per the whims and fancies and discretions of rulers, but within the parameters of law. In India, it is the need of the hour to take the urgent steps to establish a rule of law society, without which, democracy will be seriously undermined. There are number of challenges like terrorism, corruption, transnational organized crime, *etc.*, to the rule of law which pose grave threats to governance. It is important to note in asserting that internal and external security was paramount and required foremost attention in India. There is also a need for co-ordination between the Centre and State Governments to uphold the rule of law, and had to work hand-in-hand to fortify the security and create an effective deterrence to achieve zero-tolerance to the terror activities.