

**'ROLE OF COURTS
IN UPHOLDING
THE
RULE OF LAW'**

A paper by

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ROLE OF COURTS IN UPHOLDING THE RULE OF LAW

The concept of “Rule of Law” has evoked sharp reactions. Some people call it as an ‘unruly horse’.¹ But the concept of rule of law is not a meaningless legal slogan normally discussed in seminars and workshops and Lectures in Universities. One may not be able to precisely define rule of law with scientific precision; but it cannot be dismissed as an elusive notion. It is worthy to note that in the 1996 Constitution of South Africa the supremacy of the Constitution and the Rule of law have been declared as values on which a new Republic of South Africa is founded. Rule of Law embodies a noble concept with a commitment to certain principles and values.

John Adams used the historic phrase “a government of laws and not of men”. John Adams emphasized that law containing rules of general applicability should govern the conduct of people and law should be the mechanism for resolving disputes.

¹ P.P.Rao, “Rule of Law and Human Rights in India Today”, in *Rule of Law and Human Rights in India: Essays in Honour and Memory of Justice H.R.Khanna*, edited by Dr.L.Malik, New Delhi, Universal Law Publication, 2012, p.38

It is also important to note that there is nothing eastern or western about the principles underlying the concept of rule of law and it has a global reach and dimension. It is useful to quote Justice Vivian Bose, former Judge, Hon'ble Supreme Court of India, who has defined Rule of Law as "the heritage of all mankind", since the underlying rationale is belief in the human rights and human dignity throughout the globe.²

The settled opinion of the Hon'ble Supreme Court of India is that if any executive action is to operate to the prejudice of any person must necessarily have the sanction of law.³ As such, the concept of Rule of Law acts as a brake to the executive lawlessness. As a result of this concept, no official or an administrator can arrest or detain a person unless there is legislative sanction. Similarly, no person can be deprived of his property without the authority of law. It is always said that Rule of Law ensures predictability and certainty in the actions of the executive.⁴ This concept of Rule of Law runs like a golden thread in the entire Indian Constitution. Fundamental rights guaranteed under the Constitution of India are akin to bill of rights and this is more evident from the mandate of Articles 14, 19,

² www.brandeis.edu/programmes/southaseanstudies/pdf visited on 2nd March 2014 at 7.30pm

³ M. P. Jain, *Indian Constitutional Law*, 6th ed Nagpur: Lexis Nexis Butterworths Wadhwa, 2010, p.1081

⁴ *Supra Note 2*

20, 21, 265 and 300-A. Article 14 ensures equality before the law or equal protection of the laws and Article 19 mandates that the restrictions imposed must be prescribed by law and not by administrative instructions. Hence freedom of speech and expression and freedom of press cannot be easily restricted except by properly enacted law. Similarly no tax can be levied or collected except by authority of law.

In the landmark judgment of *Keshavananda Bharati Vs. State of Kerala*,⁵ Hon'ble Supreme Court has held that even a constitutional amendment can be struck down as unconstitutional if it affects or takes away the basic or essential features of the Constitution. It need not be reiterated that democracy, secularism, federalism, fair, periodic and free elections etc. are few essential features of the Constitution. Importance of Rule of Law is emphasized in this decision.

Similarly, in *I.R.Coelho Vs. State of Tamil Nadu*,⁶ Hon'ble Supreme Court has specifically held that Rule of Law is a basic structure of the Constitution and that this basic structure cannot be abolished even by a constitutional amendment. All invalid laws cannot be protected by parking

⁵ AIR 1973 SC 1461

⁶ AIR 2007 SC 861

them in ninth schedule of the Constitution is the essence of the decision rendered in *Coelho's* case.

In *Nandini Sundar and Others Vs. State of Chattisgarh*,⁷ Hon'ble Supreme Court has once again reiterated the majesty of rule of law in upholding democracy. The executive action of supporting youths in the State of Chattisgarh with arms to quell naxalism is held to be opposed to rule of law. This decision is a landmark judgment in upholding the rule of law and questioning the executive action of supporting Salwa Judum in the guise of checking the naxal menace.

On going through various illuminating judgments of our Hon'ble Supreme Court, it can be certainly said that Rule of Law is a dynamic concept which also takes within its ambit all human rights of all individuals. A formalistic or narrow concept of the Rule of Law which leads to that interpretation and consequences is not acceptable since there is a close link between the Rule of Law and human rights.⁸ If rule of law is flouted, it leads to horrific violations of human rights.

⁷ (2011) 7 SCC 547

⁸ *Supra Note 3*, p.8.

All of us know very well that in large parts of Europe which were under the brutal control of Nazi regime, confessions were extracted by torture; people were pushed to concentration camps or gas chambers and mysterious disappearances were writ large. Nazis in Germany did all these under the laws made by the law makers. Therefore, the concept of Rule of Law necessarily means only such laws which uphold the human rights and human dignity of men all over the globe.

Under the Indian Constitution both the Central and State Legislatures have the power to make laws but subject to the express limitations imposed in the Constitution. In the Constitution, separate demarcation has been made about the matters on which the central legislature and state legislatures could make laws. Any law that breaches these limitations will be declared as unconstitutional. The power of the executive to make laws by issuing ordinances notifications is limited both in terms of duration and the situations triggering the exercise of such power.

It is said that the three organs of the State have powers and they are separated. In reality, they are not powers but in its strict sense separation of functions. There is a system of checks and balance since any law passed

by the Parliament necessarily requires the assent of the President to become a law and similarly, Parliament has the power to impeach the President for violating the Constitution. Constitutional Courts have consistently held that any executive action without the support of a valid law would be void more particularly, when such action violates the fundamental rights. As such judiciary does not treat laws which are vague or vague administrative guidelines favorably.

In addition to all these checks found in the Constitution, there is a mechanism of judicial review adopted by the constitutional courts both in regard to legislative actions and executive actions. The power of independent judiciary to review the decisions of the other two organs of the state is considered as an integral part of the concept of rule of law.⁹ As such, Indian Constitution does everything possible to put in place this mechanism. Although the power of judicial review does not require an express recognition in the Constitutional text, Article 13(2) of the Indian Constitution states that state shall not make any law which takes away or abridges the fundamental rights.

Though the term “Rule of Law” is not expressly indicated in the text of the Constitution, it is evident from an overview of the constitutional

⁹ *Supra Note 4*, p.9

provisions and the judicial decisions of the Apex Court. This rule of law is fundamental to good governance. But we cannot forget the challenges which have posed threat to build a society based on strong rule of law framework.

The concept of rule of law does not find its fulfillment by mere enactment of a law. It is equally concerned with the content and quality of law though enactment of law is, no doubt, essential. The concept of rule of law can be expanded by the quality of the law.¹⁰

In the aftermath of globalization, the constitutional courts have to interpret various international covenants keeping in mind the concept of rule of law. With the advent of globalization, multinational companies and other global players play a dominant role, more particularly, due to the vast resources they have and the several activities they undertake and functions they perform. Their activities and functions have serious repercussions and thus affect the basic human rights of the people in developing countries more particularly in the field of employment. Unregulated globalization would produce serious consequences in relation to socio and economic rights.

¹⁰ B.Z. Tamanaha, *On the Rule of Law: History, Politics, Theory*, Cambridge: Cambridge University Press, 2004, p.101

In this regard, the Constitutional courts are expected to keep in mind the respect for the right to work, and the right to just working conditions etc. This has assumed more importance in view of excessive emphasis on competitiveness in disregard of labour rights. If MNCs and other global players are exempted from constraints, the Constitutional Courts will have to examine as to what is the effect of the same on the rule of law. In providing exemption, there should not be any arbitrariness and there cannot be any scope for decision making without consultation or open debate with the affected persons. There cannot be a fair process of globalisation unless it is accompanied by an effective rule of law structure.

The threat of terrorism strikes at the very concept of rule of law.¹¹ India is facing a great threat of terrorism as a result of which, innocent lives are lost and serious damages are caused to people and property. Ours is basically a secular State and the secularism is based on tolerance and mutual respects. Rule of law is not one way traffic and it places restraints both on the governments and individuals. If the rule of law is to become a reality in governance and in our lives, not only laws are required but laws with good content are required and a rule of law culture is a dire necessity.

¹¹ Dr.Justice Arijit Pasayat, “ Terrorism and Threat to The Rule of Law in India”, (2010) 6 SCC (J) p,10.

The three organs of the State viz., Legislature, Executive and Judiciary are expected to work within their own spheres. One organ should not try to encroach the area of the other since the borders of each organ are very sensitive. Though Judiciary is independent of Executive and Legislature, under the guise of judicial review, interference in the policy making decisions must be slow unless policy decisions have no regard for concern of the public. Therefore, the Constitutional Courts will be very slow in interfering with policy decision making of the Legislature. Accusing finger cannot however, be pointed out at legislators alone.

It has been observed that the length, complexity and sometimes, prolixity of modern common law judgments, particularly at the highest level, raise problems of their own.¹² The decisions of inconsistency, if any, in the decisions leading to confusion will come in the way of the rule of law. This assumes importance as decisions of the Apex Court are virtually law being binding precedents under Article 141 of the Constitution.

In view of the crisis of confidence amongst the persons to take decision at the highest level in the legislature or executive, many matters are being filed before the Constitutional Courts and even Presidential

¹² Lord Bingham, “ The Rule of Law”, *Cambridge Law Journal*,66(1),March 2007,p.70

references are made to the Apex Court seeking advice. One such latest attempt made by the Central Government in seeking Presidential reference was as to whether the allocation of natural resources to be done only by auction.¹³

Similarly, Presidential reference was made to the Apex Court in 1992 about the existence of an old temple structure in the disputed site at Ayodhya.¹⁴ Thus, the authorities at the highest level who are expected to take bold decisions at times abdicate their responsibility and thus shift their responsibility on the shoulders of Constitutional Courts. Therefore, the Constitutional Courts have greater responsibility in deciding such cases.

Judiciary is faced with docket explosion. Common man cannot understand the predicament of judiciary in tackling the problem of docket explosion. The Judge ratio based on the present population is quite inadequate; but still common man has great confidence in the institution of judiciary right from the Courts at the cutting edge i.e., the Magistrate Courts/Courts of Civil Judge up to the Apex Court. The expectation of the people from the judiciary is to provide qualitative, responsive and timely justice. This is also an underlying principle in the concept of rule of law. The Courts of the District judiciary or the Constitutional Courts have a

¹³ (2012) 3 SCC 1

¹⁴ AIR 1995 SC 605

greater responsibility in upholding the rule of law by exercising the discretion vested in them under various statutes or under Articles 226 and 227 of the Constitution, as the case may be, and under Article 32, a power vested in the Hon'ble Supreme Court. The responsibility of judiciary is so much that there should not be any scope for anybody to feel that judiciary has become too active or over independent.

The role of judiciary is to constantly evaluate and re-work the fine balance between the rights of citizens and governmental actions. The judicial review adopted by the Constitutional Courts in India has evolved three dimensions-

1. Ensuring fairness in administrative action,
2. Protecting fundamental rights and
3. To rule on the questions of legislative competence.¹⁵

The power of the Supreme Court of India to enforce fundamental rights as guaranteed to the citizens under the Constitution is derived from Article 32 and the writ jurisdiction under Article 226 with the High Courts. With the advent of public interest litigation, Articles 32 and 226 have been invoked to shape innovative remedies. In fact, the concept of “continuing

¹⁵Justice K.G.Balakrishnan, “ How To Check The Erosion of The Rule of Law”, (2011) 1 SCC (J) p.3

mandamus” is the outcome of the public interest litigation in order to ensure compliance of judicial directions by the executive agencies.

In this category of litigation, Judges have also imported private law remedies such as “injunctions” and “stay orders” into what are essentially public law related matters. Successful challenges against statutory provisions have paved way for striking down statute as a whole or striking down certain provisions or even reading down of statutes.

Many a times, it is criticized that the concept of judicial review is opposed to the democratic setup on the ground that judiciary is not an elected body and therefore, it is not accountable to the people. But by and large, people in our country are satisfied with the Constitutional Courts invoking the process of judicial review. Only caveat to be added is that, the Judges should not use their personal discretion to direct action in areas in which they have no expertise or experience.

The concept of judicial review designates the higher judiciary as the protector of the Constitution and this scheme works smoothly as long as the demands and aspirations of the majority of the population correspond with

the constitutional prescriptions. Application of judicial review avoids erosion of the rule of law.

Supreme Court of India is the interpreter of the Constitution. The decisions of the Apex Court are binding on all the High Courts and Courts subordinate to them and other authorities. As a result of interpretation of various provisions of the Constitution, and other statutes decisions are rendered which have precedent value under Article 141 of the Constitution. Hence, it is essential that the binding precedents are scrupulously followed in order to avoid confusion and uncertainty. There is also an important role of the Constitutional Courts invoking Article 226 and Courts of the District Judiciary applying the provisions of various statutes. Fair trial and avoiding inordinate delay are an integral part of Article 21 of the Constitution.

The figures of cases of various types of Civil and Criminal cases pending in the courts of District Judiciary (subordinate courts) in the entire country are roughly about three (3) crores. Number of Courts in India is not proportionate to the population. Existing Courts are too inadequate to tackle not only the disposal of cases but also mounting of arrears. In few big States like Madhya Pradesh, Uttar Pradesh and Bihar, Criminal cases

outnumber the civil cases. Due to lack of adequate number of judges, Courts and connected infrastructure inclusive of Forensic Science Laboratories, there will be delay in criminal cases. Speedy and fair trial in a criminal case is an integral part of Article 21 of the Constitution. Inordinate delay in trial of criminal cases violates Article 21 of the Constitution. Our criminal jurisprudence is now sufficiently victim oriented also more particularly in the light of several amendments being incorporated into Criminal Procedure Code on the basis of Dr. Justice Malimath Report Committee Report. For the first time, the word “victim” finds a place in the definition of clause 2(w) of Cr. P.C. Judges in the District Judiciary need to be geared up to meet this alarming situation.

State Judicial Academies and National Judicial Academies have been doing their best in imparting continuous legal education not only on Constitutional Law and traditional and substantive and Procedure laws like Personal laws, Transfer of Property Act, Specific Relief Act, Contract Act, Evidence Act, Limitation Act, Indian Penal Code, Civil and Criminal Procedure Code but also special laws like Arbitration & Conciliation Act, Information Technology Act, laws dealing with Intellectual Property Rights, Consumer Protection Act, Conflict of Laws, Direct and Indirect Tax Laws, Companies Act, etc, to the Judges at various levels.

In the hierarchy provided for appeals and revisions, a case takes a long journey till it is disposed off. Even a civil case on institution, takes on an average 3-5 years in the trial Court, 2-4 years in the first appellate Court and 3-4 years in the second appellate Court. The percentage of civil cases which go to first appellate Court or second appellate Court are comparatively lesser in the sense that most of the litigants will be satisfied with the result in the original court. Hence disposal of civil and criminal courts at the appellate level within a reasonable time will further enhance the faith of the public in the judicial system.

Of late Alternative Dispute Resolution Mechanism is provided by introducing Section 89 of C.P.C. with effect from 01.07.2002. Judges, more particularly in the Civil Courts, have an added responsibility to persuade the parties to a suit to opt either mediation, conciliation, Arbitration or Lok-Adalath. Good number of Motor Accident Claims Compensation Cases, cheque bounce cases u/S 138 of the N.I. Act and compoundable criminal cases are being referred to Lok Adalaths and are disposed off in large numbers. Encouraged by the importance of Lok-Adalaths in settlement of these types of cases, National Legal Services Authority with the Hon'ble Chief Justice of India as its Patron, has given

call to organize Lok Adalaths on a large scale under the title “Mega Lok Adalath” throughout the Country and they have been highly successful.. Mediation has been an important Alternative Dispute Resolution Mechanism in solving cases in which an element of relationship is involved, more particularly, in matrimonial cases, partition suits, suits between employer and employee, suit between landlord and tenant. Hon’ble Apex Court has gone even to the extent of ruling that even criminal cases arising out of matrimonial disputes must also be referred to mediation. Decisions of the Apex Court in AFCONS case¹⁶ and K. Srinivas Rao Vs. Deepa¹⁷ have added new dimension to Alternative Dispute Resolution Mechanism.

The endeavor of the author of this article is that Courts also play vital role in making rule of law a meaningful one by providing qualitative, responsive and timely justice. Existing Alternative Dispute Resolution Mechanism is not alternative to the existing judicial system. On the other hand, Alternative Dispute Resolution Mechanism is supplemental to the existing judicial system. That is why mediation centers are opened in almost all the places where Courts function. Even various Legal Services

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2010 (8) SCC p.24

¹⁷ (2013) 5 SCC 226

Authorities and Committees established at different levels are being effectively managed by the serving Judges ably supported by persons actively involved in helping poor and the needy..

It would be apt to conclude that the responsible exercise of judicial review is both a precondition as well as a characteristic feature of a Society, which values the maintenance of the rule of Law. The Courts are an important space for conducting a dialogue in respect of conflicts arising out of competition for material resources and identity based differences and thereby, resolve through deliberation. The willingness of citizens to engage with public institutions including the institution of judiciary is a basic requirement for building a vibrant democracy and the Rule of Law.

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