Page 1078 - 1086 **DOI:** *https://doij.org/10.10000/IJLMH.113439*

INTERNATIONAL JOURNAL OF LAW MANAGEMENT & HUMANITIES

[ISSN 2581-5369]

Volume 5 | Issue 4

2022

Achievement, Paradox and Trivialization of Rule of Law

SHALINI KUMARI[1] AND JASLEEN WALIA[2]

The bedrock of our democracy is the rule of law and that means we have to have an independent judiciary, judges who can make decisions independent of the political winds that are blowing." - Caroline Kennedy

The term 'Rule of Law' is nowhere defined in the Indian Constitution but this term is often used by the Indian judiciary in their judgments. Rule of law has been declared by the Supreme Court as one of the basic features of the Constitution so it cannot be amended even by the constitutional amendment. So in brief one can say that the rule of law means the government of law, not men.

I. RULE OF LAW ITS ACHIEVEMENT, PARADOX AND TRIVIALIZATION

The history of mankind is full of many such events which depict the struggle of a common man and the society to free itself from the clutches of autocratic and dictatorial rulers. They may be known to history as Kings, Dictators, Nawabs, Maharajas or Rajas. As a consequence of their grim struggle they achieved success and installed democratic rule of the people; for the people and by the people, as Abraham Lincoln puts it. Thus the rule of 'might is right' has been transformed into a 'Rule of Law'. It is not possible to discuss in detail all those events in this paper. However, a quick reference may be made to the examples from the Constitutional History of England. In the year 1215 some success was achieved by extracting from the King a small charter of rights in the form of "Magna Carta". It was signed in June 1215 and is also known as a great charter of liberty of England. Magna Carta was the first document extracted from the Kind of England by a group of his subjects - the Feudal Barrons - in an attempt to limit his power by law. The King accepted that no freeman should be punished except through the law of the land, a right that still exists. The second important document in the series is the "Petition of Rights". It was signed in June 1628, more than 400 years later. This is a major English Constitutional document which sets out special liberties of the subject that the King is prohibited from infringing. It contains restrictions on non-parliamentary taxation, forcing a citizen to give shelter to a soldier, pay to his boarding lodging, imprisonment without cause and restrict the

[1] Author is a Legal Consultant Directorate of Enforcement, India.
[2] Author is a Legal Consultant Directorate of Enforcement, India.

 [ISSN 2581-5369]

use of martial law. Sir Lord Edward Coke, a well known Chief Justice of England played a pivotal role in bringing about the Petition of Rights. The third document in the line is "Bill of Rights" 1689 which is an Act of the Parliament, declaring the rights and liberties of the English subjects. It lays down limits on the powers of the Crown and sets out the rights of Parliament, rules for freedom of speech in the Parliament, the requirement of regular elections to the Parliament and right to petition the Monarch without fear of retribution. Thereafter the way was laid for asserting more and more rights by the English subjects, like Habeas Corpus Act, 1679, Parliament Acts of 1911 and 1949 and Human Rights Act 1898.

Some major events in the world history were inspired by three famous and well known political philosophers, Hobbes Locke and Rousseau. They ignited the flame of liberty, equality and fraternity. Hobbes devised Social Contract Theory. Their writings inspired the revolutionary wars in the United States against 13 colonies controlled by Great Britain. The import of revolutionary was forced Britain to eventually recognize United State of America. One time Prime Minister, Pitt the younger, opposed the resolution of recognition of United States of America in the British Parliament by delivering a fierce speech when he himself was running higher fever. Such was the passion and anger that he swooned to the floor of the house. The story of French Revolution is also not different which resulted in putting an end to the autocratic rule. In Russia people were up in arms against the atrocities of Tsar Nicholas the IInd in the year 1917. The transformation has also taken place in South Africa, Zimbave and many other countries. In all these revolutions there has been much bloodshed and the transformation has not been that easy.

'We the People of India' also faced tyrannical repressive and autocratic rule of the Britishers. The freedom struggle led by great leaders of this Country like Mahatma Gandhi, Pandit Jawahar Lal Nehru, Sardar Patel, Neta Ji Subhash Chander Bose, Viswanath Pasayat and many others largely remained peaceful. Therefore, transfer of power from the Britishers to the Indian was smooth and peaceful.

It follows that lakhs of people known and unknown gave supreme sacrifice of their lives to free themselves from suffocating regimes of tyranny, genocides and dictatorships. It is on account of those sacrifices that we are able to breathe free air of freedom and independence. Eventually the principle of "might is right" gave way to the installation of 'Rules of Law'. Thus there ushered in Rule of Law that took birth from the womb of struggle. The trinity of Goddesses of equality, fraternity and liberty were given exalted place in our constitution.

The question then is what is meant by the phrase "Rule of Law". Prof. Dicey has been regarded

 [ISSN 2581-5369]

as the most recognized protagonist of Rule of Law who has scholarly crystallized the concept in his celebrated book "Law of the constitution". Prof. Dicey has authored that book in 1885 and since then wealth of legal literature has been added to the subject. According to Prof. Dicey, three ideas were discernible from the British Constitution.

1. Firstly, no man is punishable or can be lawfully made to suffer in body or goods except for distinct breach of law established in the ordinary legal manner before the ordinary Courts of Law (Law of the Constitution p.188). Thus the Government cannot punish anyone arbitrarily by its authority.
2. Secondly, "no man is above the law". Every man whatever be his rank or condition, is subject to ordinary law of the realm and amenable to jurisdiction of the ordinary Tribunals.(P.193).
3. Thirdly "that the general principles of the constitution (as for example right to personal, liberty, right to public meeting etc.) are the result of judicial decision determining the rights of private persons in particular cases brought before the courts."

However, in recent times there has been thinking that these three percepts of Rule of Law given by Prof. Dicey must include many other principles which are the result of evolutionary process. Lord Bingham has described the following eight principles in his latest address delivered on November 16, 2011.

1. The law must be accessible and so far as possible intelligible, clear and predictable.
2. Questions of legal right and liability should ordinarily be resolved by application of the law and not the exercise of discretion.
3. Laws of the land should apply equally to all, save to the extent that objective differences justify differentiation. While some legislation can be made separately for children, prisoners and the mentally ill, legislation made for people with red hair (Warrington LJ's long-lived example) is incompatible with Rule of Law.
4. Law must afford adequate protection of fundamental human rights. (Dicey did not include this).
5. Means must be provided for resolving, without prohibitive cost or inordinate delay, bona fide disputes which the parties themselves are unable to resolve.
6. Ministers and public officers at all levels must exercise the powers conferred on them reasonably, in good faith, for the purpose for which the powers were conferred without exceeding the limit of such powers.(Judicial review).

 [ISSN 2581-5369]

7. Adjudicative procedures provided by the State should be fair. The Rule of Law would seem to require no less.

8. Rule of Law requires compliance by the State with its obligations in international law. The law which derives sanction from treaty or international custom and practice governing the conduct of nations.

The concept of "Rule of Law" in contradistinction to "rule of man" or "might is right" cannot be contained in one single definition. Therefore, I feel that it is not necessary to undertake such a tedious exercise. Broadly speaking, rule of law is a body of principles which is anti-arbitrariness, anti-oppression. These principles aim at promotion of just and equitable society. All these basic tenants and spirit of the Rule of Law given by Prof. Dicey or Lord Bigham permeates the Constitution of India. It is reflected in the preamble, which adopts the lofty slogans of Hobbes, Locke and Rousseau namely Justice, Liberty and Fraternity. These principles are also visible from the Chapter dealing with Fundamental Rights and Directive Principles of the State Policy.

1. The preamble declares the high ideals of equality, justice, liberty and fraternity.

2. Part III of the Constitution contains a list of Fundamental Rights of citizens. These provisions in the Constitution define many restrictions on the law making power of the Parliament of India. However, power of Parliament to amend Part III is conceded yet it cannot change the basic structure of the Constitution. Fundamental Rights are subject to reasonable restrictions in times of emergency.

3. Part IV of the Constitution pronounces Directive Principles of State Policy which go to strengthen the liberties by guaranteeing protection of the same. State can take measures for this purpose under Part IV. These principles are like antidotes against too much insistence of Fundamental Rights. A citizen can approach High Court or the Supreme Court of India against breach of his Fundamental Rights.

4. Legislature, Judiciary and the executive are three organs under the constitution and the constitution is the supreme authority. Every organ is free to act in its own field according to the powers conferred on it. If this is not done and some organ transgresses the limits of its jurisdiction or its powers, there is a provision in the Constitution under Article 32 and 226 whereby a judicial review of its actions is possible. An individual who has been wronged can approach the High Court or the Supreme Court and can get redress.

5. The President of India has to take an oath to preserve, protect and defend the Constitution.

 [ISSN 2581-5369]

6. The maxim "Kind can do no wrong" is not applicable in India because there is equality before the law and equal protection of law is afforded to everyone.
7. In public service we have accepted the Doctrine of Equality.
8. The Union of India and respective state Governments can be sued in ordinary courts like individuals for any breach of contract entered into by them and for any tort against an individual.

We, the people of India, have given ourselves this Constitution but it is not a static document. It has in fact been treated as an evolving and living organism. During the last more than sixty years Hon'ble the Supreme Court has contributed to the growth of Rule of Law. A plethora of judgments delivered by our Supreme Court has not only strengthened Rule of Law but has also provided easy access to justice. This contribution in fact is not easy to fathom. However, we will make a humble attempt to discuss few cases in this paper which have been considered landmark in the history of our Constitutional law.

Articles 20 and 21 of our Constitution are considered to be its soul. These articles deal with personal liberty of a citizen which is secured by the writ of Habeas Corpus. Prof. Dicey in his book "Law of the Constitution" referred to the case of Wolfe Tone of the year 1798 and stated that "nothing better illustrates the noble energy with which judges have maintained the rule of regular law, even at periods of revolutionary violence than Wolfe Tone's case (1798) 27 St. Tr. 614. Wolfe Tone was an Irish rebel and took part in a French invasion of Ireland. The ship in which he sailed was captured and he was brought to trial before a Court Martial in Dublin. He was sentenced to death. He did not hold any commission as an English Officer in the Army. On the morning when his execution was about to take place an application for issuance of writ of Habeas Corpus was filed before the Court of King's Bench. The ground taken was that Wolfe Tone, not being a military person, could not be tried and punished by a Court Martial. The Court of King's Bench granted the writ. Prof. Dicey says, "When it is remembered that Wolfe Tone's substantial guilt was admitted, that the court was made up of judges who detested the rebels, and that in 1798 Ireland was in the midst of revolutionary crisis, it will be admitted that no more splendid assertion of the supremacy of the law can be found than the protection of Wolfe Tone by the Irish Bench".

In our Country a 5-Judge Bench in the case of A.D.M.*Jabalpur v. Shivkant Shukla* (AIR 1976 SC 1207) by majority held that Article 21 of the Constitution could be suspended during emergency. In the declaration issued by the President of India under Article 359 of our Constitution it was specifically provided that Article 21 would not be available to the citizens

 [ISSN 2581-5369]

of this Country during emergency. However, Justice H.R. Khanna, who delivered a dissenting judgment, refused to accept that the basic fundamental right of a citizen to file Habeas Corpus Petition can be snatched even during the operation of emergency. In his book "Neither Thorn nor Rosess" Justice H.R. Khanna wrote that he was on holiday at Haridwar when he was writing the judgment in the case of A.D.M. Jabalpur and he told his sister that the judgment would cost him his elevation to the highest judicial office of the Country as Chief Justice of India. Despite the fact that Justice Khanna was fully aware about the result for his views, the great judge delivered a dissenting judgment and he was overruled. He was not elevated as Chief Justice of India. His Lordship later resigned. The sacrifice made by a bold and fearless Judge paved the way for amendment of Article 359 of the Constitution. It has now been ensured that even during emergency no declaration could be issued for suspension of Article 20 and 21 of the Constitution. The amendment is a sure guarantee and a guard against suspending Article 20 and 21 of the Constitution. The personal liberty of every citizen of this Country is secured by arresting the arbitrary power of the State.

It is well known that there was tussle between the Parliament on the one hand and the Supreme Court on the other with regard to extent of power to amend part III of the Constitution. Broadly speaking the Parliament has been proclaiming in seventies that it has blanket power to amend the Constitution on the ground that it represents the 'Will of the people'. The Supreme Court, however, has not accepted the view. Eventually in *Keshva Nand Bharti v. State of Kerala*, (1973) 4 SCC 225 the question was debated before a largest Bench ever constituted comprising of 13 Judges. The argument raised was that the Constitution is the creator and all other organs are the creatures which include Parliament, State Assemblies, High Courts and the Supreme Court. The Supreme Court accepted the view that a creature cannot acquire the power to eliminate the Creator. In other words, there are inherent limitations on the power of every creature of the Constitution and it cannot be amended in such a manner and to such an extent that it grows out of recognition. It was the judgment in the Keshva Nanda Bharti's case which has given birth to the theory of the basic structure of the Constitution. In the process Hon'ble the Supreme Court defines the expression "Law" as used in Article 13 to include the amendment of Constitution as well". In other words, amendment of the Constitution could always be tested on the touchstone of the basic structure of the Constitution and if found violating the basic structure then such amendment could be declared *ultra vires.* Thus, amending power of the Parliament under Article 368 was considered to be limited and not absolute as was claimed on behalf of the State.

At this stage, it is also appropriate to make a reference to a later judgment rendered in the case

 [ISSN 2581-5369]

of I.R.*Coelho v. State of Tamil Nadu (*AIR 2007 SC 861). A 9-Judge Bench of the Supreme Court considered the validity of laws included in Schedule 9 after 24.04.1973 and the protection available to such laws. The Authoritative Bench also considered the applicability of basic structure doctrine and ruled that all Constitutional amendments, laws and statutes included in the ninth Schedule on or after 24.04.1973 has to satisfy the test of basic structure doctrine. The Bench comprehensively considered the issue of limitations of legislative power of the Parliament and State Legislatures. The judgment has been analyzed in depth by Prof. Virinder Kumar in an article published in the Journal of Indian Law Institute of 2008.

It is pertinent to mention that 9th Schedule was added to the Constitution by the first amendment. The Government Policy of Agrarian Reforms also brought about Article 31-B which provided that any Act of Parliament and State which has been specified in the ninth schedule would not be deemed to be void on the ground that it contravenes the provisions Fundamental Rights enshrined in Part III of the Constitution. This power was given to the Parliament as well as to the State Legislatures. The Ninth Schedule became virtually a burial ground for all illegal Acts and Statutes. The 9-Judge Bench in I.R.Coelho's case declared that all statutes which have been enacted after the judgment of the Supreme Court in Keshva Nanda Bharti's case on 24.04.1973, would be open to judicial review. Such statues can be declared *ultra vires* by the Courts if they are found to contravene the basic structure of the Constitution. In other words, the Rule of Law has been restored and access to justice has been provided by Hon'ble the Supreme Court to any aggrieved party. Such statutes can now be challenged on the ground that its provisions contravenes the basic structure of the Constitution and fundamental rights. Therefore, special protection provided to such a statute has now been lifted and such statutes have now been made amendable to challenge on the ground that basic structure is violated despite the fact that it has been kept in ninth schedule.

Another interesting judgment in our constitutional history was delivered in the case of D.C.Wadhwa v. State of Bihar (1987) 1 SCC 378. This judgment has been reiterated in 2017 by Hon'ble the Supreme Court. Prof. Wadhwa was deeply interested in the promotion and preservation of the Constitutional functioning of the administration of this country. He carried out a detailed research in the matter of promulgation of Ordinances by the Government of Bihar from time to time and published his results in a book title as 'Repromulgation of Ordinances: Fraud on the Constitution of India'. The book was presented to the Supreme Court in the form of a writ petition. The Supreme Court while examining the scope of Article 213 of the Constitution held that practice of such repromulgation of some Ordinances repeatedly in same manner amounted to usurpation of Legislative function by the Executive. It was colourable

 [ISSN 2581-5369]

exercise of power and fraud on the Constitution and Article 213. The continuation of all such ordinances was held to be unconstitutional.

Reference may also be made to another judgment of the Supreme Court rendered in the case of *Prakash Singh v. Union of India* (2006) 8 SCC 1. In that case the Supreme Court took notice of far reaching changes that had taken place in our country after the enactment of Police Act, 1861 and the absence of any comprehensive review at the national level in respect of our police system, particularly after independence. The recommendation made by the National Police Commission in its report between 1979 to 1981 remained on paper. The crux of the police reform as per the recommendations was to secure professional independence for the police to function truly and efficiently as an impartial agent of the land and to uphold the Rule of Law. It suggested for devising a supervisory mechanism without scope of irregular or *malafide* interference from political/executive government. The Supreme Court issued comprehensive directions by keeping in view the underlying principle of policing namely devotion of the police has to be only to the Rule of Law. The supervision and control has to be such that it ensures that the police serve the public without any regard to any status or position of any person while investigating a crime or while taking preventive measures. In appropriate cases where on account of acts of omission and commission of police the Rule of Law becomes casualty then the police officer must be brought to book and appropriate action be initiated against such an officer. The investigation by the police agency has not only been arctic but it is tardy. Sometimes collection of evidence and delay in visiting the scene of crime is the result of extraneous consideration and political interference. The police is not well equipped which results in shelving Rule of Law because it is a primary agency and protector of Rule of Law. Fundamental duty of the police is to ensure that those who indulge in crime are not spared. They are segregated and the society is permitted to live in peace. However, the performance of the police in the present time is far from satisfactory and Hon'ble the Supreme Court is making efforts to provide for better police. There are recommendations for dividing the functioning of the police into different parts. The police has to have separate wings for law and order, investigation, VIP security and so on and so forth.

There are score of judgments on the interpretation of Article 14 of the Constitution. Article 14 strikes at arbitrariness and is antithesis of any discriminatory action. In E.P. *Royappa v. State of Bihar* AIR 1974 SC 555, Justice Bhagwati attempted to simplify and expand the scope of Article 14 but it has not met the approval of H.M. Seervai, who thought that it is unscientific way. According to Seervai, there was no truth in the claim that the case of Royappa has added new dimensions to the Constitution which has again been repeated in the case of Maneka

 [ISSN 2581-5369]

Gandhi v. Union of India AIR 1978 SC 597, Ramana Dayaram Shetty v. The International Airport Authority of India and others AIR 1979 SC 1628 and Ajay Hasia etc. v. Khalid Mujib Sehravardi & Ors., (AIR 1981 SC 487).

The Development of Rule of Law and its establishment is affiliated with many paradoxical situations. First and the foremost is framing of laws by Government dramatically elected. A close examination of the percentage of vote casts in favour of the Government of day does not exceed 37%. It is paradoxical situation that a Government which represents 1/3 of the voters wrest the power to pass law. The opinions of 2/3 of the voters may not find voice in the process of framing of laws. Professor Dicey in his celebrated book "Law of the Constitution" has observed that if the laws are framed according to the Will of the people then there is a natural tendency to obey the law otherwise disobedience follows. The question is when the laws are framed in accordance with the pulse of the people which evoke natural obedience of the laws are framed otherwise. There is no dearth of statue passed by the Parliament and various States Legislative Assemblies which are lifted from foreign states and imposed on over society. The laws are always framed to serve the need and requirement of a particular society which are ordinarily different than that of the other society like United Kingdom, United States or other European countries. The way of thinking of the citizens there emerges from different historical background, different culture, customs and various other social developments. Without any empirical study it may not be advisable to borrow the laws of foreign nations. Therefore the rule of law suffers in its application.

Another aspect is treating the unequal equally. When India secured freedom there were 565 Indian states which were under the Nawabs, Rajas and Maharajas. Only 13 states ceded with Pakistan and the rest had joined India. The population living in the princely states was not comparable in its lifestyle, thinking and knowledge of modern law, which has enriched the population living in British India. The nature and content of people living in British India and Princely States was significantly different. The treatment of both the citizens like in a blatant manner has resulted inheritent negation of Rule of law. It appears to be a case of treating unequal equally although the founding fathers made an attempt to deal with Tribal areas by inserting separate provisions in the Constitution. However less attention has been paid to the historical facts of emerging the citizens from the princely states with the citizens of British India and treating them with the same principal. This has resulted in Tri of Rule of law and has caused further grapes between rich and poor, educated and illiterate and so on so forth. The country is a whole is faced with the challenge to deal with these inequalities so as to meet the basic features of constitution Rule of Law.

 [ISSN 2581-5369]