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The Virtue of Rule of Law

by
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I. INTRODUCTION

Rule of law is one of the primal principles that are indicative of foundational well being of any state. It is basically a principle of government. The phrase "Rule of Law", said to be derived from Latin phrase *La Legalite*, connotes *government on principles of law and not of men.*[1] There is an element of assurance that is deeply inherent in the concept of rule of law. A state where rule of law is "protected and promoted" is also *taken* to be a state where people are *assured* of their basic rights.[2] And as Principe says: "If respected by government, the Rule of Law inspires loyalty among citizens. By observing the Rule of Law, a nation demonstrates that it values individuals and their importance. Conversely, by ignoring the Rule of Law, a nation acts arbitrarily, capriciously, and discriminatorily and illustrates that race, gender, wealth, and power are the values most important to the regime. In the end, ignoring the Rule of Law produces an elitist society."[3]

People marching under the banner of "Rule of Law" use it for myriad purposes "depending on the interests at stake, for example, to oppose individual freedom to totalitarianism, to claim the importance of individual rights, or to propound individual autonomy against bureaucratic intrusiveness."[4] Therefore, when it comes to drawing the conceptual contours, it often becomes difficult to agree upon what constitutes rule of law *conceptually* given the fact that at different times different people have tried

to define or explain its definitional content differently.[5] It is one of those concepts which are easier to understand, but difficult to express with *theoretical precision*[6], though there is no denying the fact that there is a *minimum content*[7] of rule of law, that forms the substratum of all the theoretical formulations which have over the years tried to draw the definitional outlines of 'rule of law' with *definitive precision*. In view of the above, the present paper tries to bring together the *theoretical threads* that are rooted in the writings of people like Dicey, Lon Fuller, Jeremey Waldron, Brian Tamanaha, and Joseph Raz.

II. AN EVOLVING IDEA

Rule of law has been an evolving idea, origin being traceable to ancient times.[8] Justinian Code, which happens to be one of the earliest Codes and

was written in the 6th century, had one provision that provided: "It is a statement worthy of the majesty of a ruler for the prince to profess himself to be bound by the laws."[9] It was generally understood in practice that the Emperor was subject to existing rules within the legal tradition, although he undoubtedly had the power to modify the law if he desired.[10] In 1037 AD, Holy Roman Emperor Konrad II (1024-

1039) decreed that no holder of a feudal estate "shall be deprived of his fief"., but by the *laws of the Empire* and the judgments of his peers."[11] The expression used was "laws of the Empire" and *not* laws of the emperor. It is one of the earliest assertions, though in a very rudimentary form, of an idea of *rule of law* as against *rule by man*. However, what remains an epochal moment in the history of rule of law is the coming into being of *Magna Carta* of 1215, which in Chapter 39 postulates: "No free man shall be taken or asserted or disseised or exiled in some way destroyed nor will we go upon him nor will we send for him, except under a lawful judgment of his equals and *by the law of the land*." In 1667, Louis XIV said in an ordinance: "Let it not be said that the sovereign is not subjected to the laws of his State; the contrary truth is a truth of natural law"; what brings perfect felicity to a kingdom is the fact that the king is obeyed by his subjects and that *he himself obeys the law*."[12] By this time, it had come to be generally accepted that there should be some "legal restraint" to bind even the sovereign, and "it came to be an accepted measure of *legitimacy* that the sovereign, nobles and government officials operate within legal restraints"[13], the word "legitimacy" signifying an "external legal rule or principle by reference to which authority is constituted, identified and controlled".[14] With the passage of time, the idea of rule of law began to gain wide acceptance and slowly became deeply entrenched in legal process as is reflected by the famous *Somersett* case in seventeen sixties, where in response to the query, where was the law prohibiting slavery, Lord Mansfield famously said that the law was in the "air" of England, i.e. it was in the legal and political climate of England, in which the institution

of slavery could just not survive for a moment.[15] One of the foremost English Legal scholars Albert Venn Dicey in his monumental work *An Introduction to the Study of the Law of the Constitution* (1885) defined Rule of Law thus:[16]

> It means in the first place, the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government…. It means, again, equality before the law, or the equal subjection of all classes to the ordinary law of the land administered by the ordinary courts … [and], lastly,…that, in short, the principles of private law have with us been by the action of the courts and Parliament so extended as to determine the position of the Crown and of its servants; thus the constitution is the result of the ordinary law of the land.

Notwithstanding the fact that rule of law had gained acceptance even prior to Dicey, there is denying the fact that it was *only* after Dicey that Rule of Law could become popular, and "Generations of law students in the English-speaking world studied Dicey's treatise and became so acquainted with these words that the adherence to the idea of the "rule of law" became a badge of professional competence."[17] In modern times, new theoretical *explications* have surfaced generating a discussion both as to the content and colour of the time-honoured principle of rule of law.[18] Therefore, those who theorise or have theorised about rule of law may be seen as walking under the banners of *old* and *new* conceptions of rule of law. Be that as it may, to quote Fallon, who succinctly puts the evolution of the idea(l) of rule of law thus:[19]

> Some have traced the modern ideal to Aristotle, who equated the Rule of Law with the rule of reason; others have identified the Rule of Law with natural law or respect for transcendent rights. In another famous account-perhaps

the most influential of the past half-century-Lon L. Fuller argued that the Rule of Law requires publicly promulgated rules, laid down in advance, and adherence to at least some natural-law values. By contrast, positivists have insisted that the Rule of Law is one thing, its moral virtue or abomination something else.

III. RULE BY LAW

Many a time, it is not sufficient that there exists a law. It has to have the life blood that keeps alive the basic human rights and dignity of people, which, if taken away, renders the human existence inhuman. What matters is not merely the *colour* of law, but the *content*. Colour may be of "rule of law", but, in essence, it is often "rule by law". To bring home the point, Soli Sorabjee says:[20]

> It is important not to confuse Rule of Law with rule by law. The existence of a law is necessary but that is not sufficient. The law must have a certain core component which guarantees the basic human rights and the human dignity of every person. Nazi Germany put Jews in concentration camps and thereafter sent them to the gas chambers. The justification offered was that there was a law which empowered such acts to be done. But that was rule by law, not Rule of Law. During the apartheid regime in South Africa, repressive and racially discriminatory laws against the black majority were sought to be justified on the basis of enacted laws. It is a heresy that mere existence of a law would permit gross violation of human rights at the altar of the Rule of Law.

At a time, when there is growing concern for the protection of basic human rights and human dignity the world, it is imperative to understand that mere existence of *law* is sufficient, it has to have *that* which will protect and preserve a society where human rights and human dignity of people are not violated, with impunity as is being witnessed in some parts of

the world. A twenty first century understanding of rule of law mandates protection of "core human rights".[21] Therefore, rule by law connotes a system where there is an apparent presence of law, which, however, fails to protect the basic (human) rights of people on account of the absence those universal elements which form the *core* of the idea of rule of law. In many parts of the world today, there is *apparently* only rule by law, and even in those societies where rule of law is the overarching principle, we do come across situations which compel us to wonder both at the *content* and *colour* of law prevailing in such a society. In short, rule by law is opposed to rule of law.

IV. RULE OF LAW VIRTUES: FULLER AND RAZ

So much jurisprudential water has flown down the river since Dicey that it is but natural to revisit some of the contemporary explications of the age-old principle of rule of law. And, this revisitation is also necessitated given the transition that world has been through, both theoretically and in reality as well. There is a pressing need to recast our understanding of rule of law in view of contemporary challenges such as human rights violations and the need to uphold some of the basic needs of people, and threats to democratic values. In the twentieth century, the explication of the concept of rule of law by Fuller and Raz has generated a huge corpus of legal literature both in favour of their theorisation and against it also.

Lon Fuller

Fuller's eight principles of legality represent the essence of rule of law, and notwithstanding the criticism that Fuller's description invites[22], there is no denying the fact that his eight principles, which are, in fact, the eight "requirements" of rule of law may well serve to initiate any discussion on rule of law, because "most contemporary discussions of the rule of law

are similar to Fuller's account. Lawrence Solum, for instance, offers seven requirements, for the rule of law, five of which resemble elements of Fuller's list. Margaret Radin condenses Fuller's list into two main principles: first, that rules exist, and second, that these rules can be followed."[23]

He emphasised upon law having generality, prospectivity, publicity, consistency, practicability, clarity, stability, and congruence with official action, and these principles, according to him, form the *inner morality of law*. These eight criteria specify necessary conditions for the activities of lawmakers to count as *lawmaking*.[24] Fuller is among those scholars who argue that "good legal process (including adjudication and enacted lawmaking) contains an "inner" or "internal morality" that supports and may be inherent in democracy because it constrains and validates the broader "enterprise of subjecting human conduct to the governance of rules".[25] According to Waldron[26],

> On Fullers account the Rule of Law does not directly require anything substantive: for example, it does not require that we have any particular liberty. All it requires is that the state should do whatever it wants to do in an orderly predictable way, giving us plenty of advance notice by publicising the general norms on which its actions will be based, and that it should then stick to those norms and not arbitrarily depart from them even if it seems politically advantageous to do so. Requirements of this sort are described sometimes as procedural, but I think that is a misdescription. They are formal and structural in their character: they emphasize the forms of governance and the formal qualities (like generality, clarity, and prospectivity) that are supposed to characterize the norms on which state action is based.

Fuller's account of rule of law entails certain moral consequences like "citizens have a moral obligation to obey the law"; however, this obligation, as Colleen says is "conditional" because "When government officials routinely violate the rule of law, passing retrospective legislation or basing their legal rulings on personal whim, then citizens no longer have a duty to obey the dictates of a government."[27] According to Luban[28],

> Fuller believes that the rule of law enhances human dignity. The point is not that the rule of law is logically incompatible with despotic government or harsh laws. Rather, the point is that the rule of law robs despotism of some of its most characteristic devices, and in this way it is practically incompatible with despotism. Why would repressive governments want to burden themselves by restricting the laws they enact to those permitted by Fuller's canons? It seems overwhelmingly likely that

they would not, because their power to intimidate their subjects would diminish."

Joseph Raz

Raz argues for an *institutional conception of the rule of law*, and highlights two points in this respect: first, government action should be authorized by law, and second, laws should be capable of guiding people's conduct for them to plan their life.[29] The aforesaid conception of rule of law "is not concerned with the *content* of the rules and the values they uphold but rather on whether the legal system has the formal characteristics that make it work."[30] He holds that "the rule of law is an inherent virtue of the law, but not a *moral* virtue as such."[31] According to Raz, "…the rule of law is just one of the virtues which a legal system may possess and by which it is to be judged. It is not to be confused with democracy, justice, equality (before the law or otherwise), human rights of any kind or respect for persons or for the dignity of man. A non-democratic legal system, based on the denial of human rights, on extensive poverty, on racial segregation, sexual inequalities, and religious persecution may, in principle, conform to the requirements of the rule of law better than any of the legal systems of the more enlightened Western democracies. This does not mean that it will be better than those Western democracies. It will be an immeasurably worse

legal system, but it will excel in one respect: in its conformity to the rule of law."[32] Raz elucidates his eights principles that "can be derived from the basic idea of the rule of law"[33] thus:[34]

1. All laws should be prospective, open, and clear.
2. Laws should be relatively stable.
3. The making of particular laws (particular legal orders) should be guided by open, stable, clear, and general rules.
4. The independence of the judiciary must be guaranteed
5. The principles of natural justice must be observed.
6. The courts should have review powers over the implementation of the other principles.
7. The courts should be easily accessible.
8. The discretion of the crime-preventing agencies should not

be allowed to pervert the law.

According to Raz, "The eight principles listed fall into two groups. Principles 1 to 3 require that the law should conform to standards designed to enable it effectively to guide action. Principles 4 to 8 are designed to ensure that the legal machinery of enforcing the law should not deprive it of its ability to guide through distorted enforcement and that it shall be capable of supervising conformity to the rule of law and provide effective remedies in cases of deviation from it. All the principles directly concern the system and method of government in matters directly relevant to the rule of law."[35] Raz's account of rule of law is "congruent" with Fuller's understanding rule of law depicted through his famous list of eights principles. He seems to be supplementing Fuller's account of rule of law. Raz emphasizes prospectivity, transparency, clarity, and stability, all of which are on Fuller's list, but he adds

"generality" besides further adding to the list the requirement of an *independent judiciary* and *judicial review*, and ends the list with observation that "the discretion of the crime-preventing agencies should not be allowed to prevent the law."[36] Raz cautions that "'the rule of law also enables the law to serve bad purposes. That does not show that it is not a virtue, just as the fact that a sharp knife can be used to harm does not show that being sharp is not a good-making characteristic of knives. At most it shows that … it is not a moral good."[37] And this observation of Raz has to be seen in the context of Fuller's belief that "demanding clear communication and reasonableness from lawmakers will result in morally better law."[38]

V. CONCLUSION

The theoretical scholarship on Rule of Law is broadly consistent both with Dicey's preoccupation with narrowing of official discretion and with the Fuller-Raz focus on the qualities of a good legal system.[39] Rule of law is today seen as being essential to good governance, and attainment of objectives thereof. It should be seen as "an ideal that helps to define what we mean by law itself: governance through law is the means by which we protect ourselves from the abuse of political power. Law is itself the remedy, not the problem that an independent ideal-the rule of law-seeks to remedy."[40]

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[1] See, V.G. Ramachnadran, Administrative Law, 19 (Lucknow, Eastern Book Company, 1991).

[2] As Ramachandran says, "In modern times, it is clear that the Rule of Law has come to be identified with the concept of the rights of man." Id. at 21.

[3] Michael L. Principe, "Albert Venn Dicey and the Principles of the Rule of Law: Is Justice Blind? A Comparative Analysis of the United States and Great Britain", 22 Loy. L.A. Int'l & Comp. L. Rev. 357, 371 (2000).

[4] Pietro Costa, "The Rule of Law: A Historical Introduction" In Pietro Costa And Danilo Zolo (ed), The Rule of Law History, Theory and Criticism 73 (Springer, 2007).

[5] As Soli Sorabjee says, "Rule of law has meant different things to different people at different times. This prompted constitutional historian Ivor Jennings to characterise it as "an unruly horse". It may be difficult to define the'concept with precision but in essence it signifies commitment to certain principles and values." See, Soli Sorabjee, "A Rule of Law Culture", Indian Express (22.09.2015). Paul Craig distinguishes between formal and substantive meanings of rule of law. According to Craig, "Formal conceptions of the rule of law address the manner in which the law was promulgated (was it by a properly authorised person, in a properly authorised manner, etc.); the clarity of the ensuing norm (was it sufficiently clear to guide an individual's conduct so as to enable a person to plan his or her life, etc.); and the temporal dimension of the enacted norm (was it prospective or retrospective, etc.). Formal conceptions of the rule of law do not however seek to pass judgment upon the actual content of the law itself. They are not concerned with whether the law was in that sense a good law or a bad law, provided that the formal precepts of the rule of law were themselves met. Those who espouse substantive conceptions of the rule of law seek to go beyond this. They accept that the rule of law has the formal attributes mentioned above, but they wish to take the doctrine further. Certain substantive rights are said to be based on, or derived from, the rule of law. The concept is used as the foundation for these rights, which are then used to distinguish between "good" laws, which comply with such rights, and "bad" laws which do not."Paul A. Craig, "Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework", Public Law (1997) at 467. For thick and thin interpretation of Rule of Law, see Brian A. Tamanaha, On the Rule of Law: History, Politics, Theory (Cambridge University Press, 2004).

[6] As Brian Tamanaha says, "The rule of law is like the notion of 'the good'. Everyone is for the good, although we hold different ideas about what the good is." Brian Tamanaha, "The History and Elements of Rule of Law" Singapore Journal of Legal Studies (2012) 232-247. Also see, Jeremy Waldron, "Is the Rule of Law an Essentially Contested Concept (Florida)?" (2002) 21 Law & Phil. 137.

[7] See, Murray Gleeson, "Courts and the Rule of Law", Rule of Law Series (Melbourne University, 2001).

[8] For example, "ancient Greeks-- especially, Aristotle-- provided a theoretical justification for the rule of law. On Plato's account, rule of law was an inferior alternative to rule by men, his philosopher kings, who were to be guided by their perfect knowledge of the good. By contrast, Aristotle argued that, because of the inevitable infirmities of rulers, the laws should be sovereign: "We do not permit a man to rule, but the law." See, World Justice Project, "History and Importance of Rule of Law", available at

http://worldjusticeproject.org/sites/default/files/history_and_importance_of_the_rule_of_law.pdf (last accessed on 12.04.2016). According to Sarkar, "The doctrine of "rule of law" was recognised in ancient India from the very beginning. Hence it was not a legacy of the British rule in India. Even in ancient and medieval India, kings and judges were alike subject to the rule of law like the subjects themselves. Thus if a theft could not be detected or the stolen property could not be recovered, the king was to compensate the aggrieved person out of his own treasury; sometimes the villagers and sometimes the officers concerned were to make good the loss." See, U.C. Sarkar, "Hindu Law: Its Character and Evolution", 6 J.I.L.I. (1964) at 226.

[9] Brian Tamanaha, "The History and Elements of Rule of Law" Singapore Journal of Legal Studies (2012) at 237.

[10] Ibid.

[11] See, V.G. Ramachandran, Administrative Law 13 (Lucknow, Eastern Book Company, 1991). Emphasis added.

[12] Andre Tune, "The Royal Will and the Rule of Law" in Arthur E. Sutherland (ed), Government Under Law 404 (Cambridge: Harvard University Press, 1956). Emphasis added.

[13] Brian Tamanaha, "The History and Elements of Rule of Law" Singapore Journal of Legal Studies (2012) at 238.

[14] Supra note 6.

[15] P.K. Tripathy, Spotlight on Constitutional Interpretation, 172 (Bombay, N.M. Tripathy, 1972).

[16] Albert Venn Dicey, An Introduction to the Study of the Law of the Constitution, 202-203 (New Delhi, Universal Law Publishing Co. Pvt. Ltd. 2000).

[17] Jesus Fern'andez-Villaverde, "Magna Carta, the Rule of Law, and the Limits on Government", 6 (2015), available at http://economics.sas.upenn.edu/~jesusfv/Magna_Carta.pdf (last accessed on 12.03.2015).

[18] For example, in recent times, scholars like Lord Bingham, Brian Tamanaha, Jeremey Waldron and Joseph Raz have written profusely theorising the notion of rule of law.

[19] Richard H. Fallon, Jr, " "The Rule of Law" as a Concept in Constitutional Discourse", 97 Columbia Law Review 2 (1997).

[20] Soli Sorabjee, "Rule of law should not be confused with rule by law", Indian Express (21.01.2014). According to him, "Rule of Law is essential for the protection of human rights. The Universal Declaration of Human Rights, 1948, the Magna Carta of Mankind, in its third Preamble mentions that human rights should be protected by the Rule of Law. In its path-breaking judgment in *Kesavananda Bharati* v. *State of Kerala*, (1973) 4 SCC 225, our Supreme Court ruled that there are certain essential features of the Constitution which cannot be amended by Parliament even if it possesses the requisite majority. In its list of essential features is included the Rule of Law." Ibid. Also see, Leigh K. Jenco, "Rule by Man and 'Rule by Law' in Early Republican China: Contributions to a Theoretical Debate", 69 The Journal of Asian Studies, 181-203 (2010).

[21] World Justice Project defines rule of law as a system in which the following four universal principles are upheld:

1. The government and its officials and agents as well as individuals and private entities are accountable under the law.

2. The laws are clear, publicised, stable, and just; are applied evenly; and protect fundamental rights, including the security of persons and property and certain core human rights.

3. The process by which the laws are enacted, administered, and enforced is accessible, fair, and efficient.

4. Justice is delivered timely by competent, ethical, and independent representatives and neutrals who are of sufficient number, have adequate resources, and reflect the makeup of the communities they serve.

See, World Justice Report available at http://worldjusticeproject.org/what-rule-law (last accessed on 12.04.2016)

[22] Also see, Fuller's "Reply to Critics" in Lon L Fuller, The Morality of Law, 187-242 (2004, Indian reprint).

[23] Yasmin Dawood, "The Antidomination Model and the Judicial Oversight of Democracy", 96 Geo. L.J. 1411 (2007 -2008) at 1435. Also See, Lawrence B. Solum, Equity and the Rule of Law, in The Rule Of Law 120, 122 (Ian Shapiro ed., 1994); Margaret J. Radin, Reconsidering the Rule of Law, 69 B.U. L. Rev. 781, 785 (1989).

[24] Colleen Murphy, "Lon Fuller and the moral value of the rule of law", 24 Law and Philosophy 239-262 (2005) at 241. Colleen "defends" Fuller arguing that, "The rule of law specifies a set of requirements which lawmakers must respect if they are to govern legally. As such, the rule of law restricts the illegal or extra-legal use of power. When a society rules by law, there are clear rules articulating the behaviour appropriate for citizens and

officials." Id. at 239.

[25] Fred C. Zacharia, "True Confessions About The Role of Lawyers in a democracy", 77 Fordham L. Rev. 1591 (2008-2009) at 1605.

[26] Jeremy Waldron, "The Concept and the Rule of Law", 6 (2008), available at http://ssrn.com/abstract=1273005 (last accessed on 12.04.2016).

[27] Supra note 24 at 243. For example Fuller says: "Certainly there can be no rational ground for asserting that a man can have a moral obligation to obey a legal rule that does not exist, or is kept secret from him, or that came into existence only after he had acted". Lon L Fuller, The Morality of Law, 39 (1969).

[28] D. Luban, 'The Rule of Law and Human Dignity: Re-examining Fuller's Canons, 2 Hague Journal on the Rule of Law 29-47 (2010) at 40.

[29] Alvaro Santos, "The World Bank's Uses of the "Rule of Law" Promise in Economic Development", in The New Law And Economic Development: A Critical Appraisal 253-300 (2006) at 259.

[30] Id. at 260.

[31] Infra note 32 at 226.

[32] Joseph Raz, The Authority of Law, 211(2009).

[33] Id. at 214.

[34] Id. at 214-218. Raz however makes it clear that "This list is very incomplete. Other principles could be mentioned and those which have been mentioned need further elaboration and further justification (why'as required by the sixth principle'should the courts and not some other body be in charge of reviewing conformity to the rule of law? etc.). My purpose in listing them was merely to illustrate the power and fruitfulness of the formal conception of the rule of law. It should, however, be remembered that in the final analysis the doctrine rests on its basic idea that the law should be capable of providing effective guidance. The principles do not stand on their own. They must be constantly interpreted in the light of the basic idea." Id. at 218.

[35] Ibid.

[36] See, Daniel B. Rodriguez, Mathew D. McCubbins, Barry R. Weingast, "The Rule of Law Unplugged", 59 Emory Law Journal 1455, 1467 (2010).

[37] Raz op. cit. at 208.

[38] David Luban, "The Rule of Law and Human Dignity: Re-examining Fuller's Canons", 2 Hague J. on Rule L. 29-47 (2010) at 9.

[39] Daniel B. Rodriguez, Mathew D. McCubbins, Barry R. Weingast, "The Rule of Law Unplugged", 59 Emory Law Journal 1455, 1468 (2010).

[40] T.R.S. Allan, The Sovereignty Of Law: Freedom, Constitution And Common Law, 111-12 (2013).