RULE OF LAW, DEMOCRACY AND FRONTIERS OF JUDICIAL ACTIVISM: CONSTITUTIONAL AND JUDICIAL PARADIGMS

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Abstract

Civil societies that emerged and developed around the globe have not only been sustained but flourished with the changing time. The emergence of the state as an institution was a significant phenomenon that itself underwent a change from the police to *laissez-faire* and *laissez-faire* to social welfare. In the social welfare era functions of the state have been increased in a manifold manner, which is to be discharged in consonance with laws. Civility itself hinges upon the superiority of laws, which meant every human and administrative action is to be backed by rules and principles. Law herein meant a just, reasonable and fair, and not an arbitrary or like a command of the sovereign. Governance, government and administration, are to be conditioned by law. This paper analyses the rule of law and democracy through the shifting paradigms of its development from the judicial perspective. The paper also argues that constitutionalism, democracy and rule of law, the trinity of these values is the core conscience of civil society.

I Introduction

FREEDOM IN THE WORLD 2022 report notes "as a lethal pandemic, economic and physical insecurity, and violent conflict ravaged the world, democracy's defenders sustained heavy new losses in their struggle against authoritarian foes, shifting the international balance in favor of tyranny."[1]Democracy and rule of law together constitute a liberal, civil society and enable its people to exercise and enjoy their rights.[2] The progress and success of the democratic state are founded upon the twin principles of equality and liberty of individuals.[3] Democracy though has its different facets nevertheless it integrates justice, liberty and equality. Democracy nonetheless yields equality and rule of law. It's equally true that equality itself is an aspect of inter alia of rule of law. These conditions are the facets of constitutionalism. Rule of law and constitutionalism,therefore, form the basic fabric of civil society, where the latter becomes the rule of the former one.[4]

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1 Sarah Repucci and Amy Slipowitz*, Freedom in the World 2022: The Global Expansion of Authoritarian Rule* (New York: Freedom House, 2022).

2 Sudhir Krishnaswamy, *Democracy and Constitutionalism in India: A Study of the Basic Structure Doctrine* 33-37 (Oxford University Press,2019).

3 David Abraham, "Liberty without Equality: The Property-Rights Connection in a "Negative Citizenship" Regime" 21(1) *Law & Social Inquiry* 1-65 (Winter, 1996).

4 Richard H. Fallon, Jr., ""The Rule of Law" as a Concept in Constitutional Discourse" 97(1) *Columbia Law Review* 1-56 (1997).

As Arthur Goodhart argued, "Rule of law is one of the basic principles of the British Constitution and is known in Dicey's name."[5] Judicial independence or independent judiciary plays a pivotal role in regulating, restructuring, and rejuvenating/safeguarding these core consciences of civil society.[6] The Judicial process is the process where clients, advocates and judges participate to achieve possible justice for the concerned parties. Professor Lon Fuller has described the judicial process as a social process, wherein according to him, every judicial decision affects not only the concerned parties but also the whole society.[7]Independence of the judiciary and access to justice are the twin features that are ingrained in the notion of rule of law. It is a bounden constitutional, legal and moral obligation of the judiciary to uphold and protect rule of law and democracy, which includes the basic rights and liberties of individuals.

In the judicial decision-making process, courts have to adopt and adapt to the rules, principles, doctrines along with the provisions of the laws, constitutional or statutory.[8]The role of the judiciary has been transformed from an arbiter to a provider, provider of justice to the masses. Judiciary has assumed this self-acquired and novel 'avatar' in view of judicial activism or creativity.[9] This role of the judiciary is not envisaged either by the constitution or any law under which it is created and vested those powers. However, the demands of changing time have been responded to by the judiciary fashioning itself with the help of new tools and techniques. The trinity or troika of rule of law, democracy and judicial activism has become new 'mantras' of justice in modern time. It necessitates screening the integral relationship enjoyed by these three. This paper canvases the notion of rule of law in the first part, whereas the second part would dwell upon the concept and contours of democracy. In the third part of the paper, an attempt is made not only to highlight the emergence and growth of judicial activism but its common cord shared by it with democracy and rule of law is highlighted.

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5 Arthur L. Goodhart, "The Rule of Law and Absolute Sovereignty" 106(7)*University of Pennsylvania Law Review* 943-963 (May, 1958).

6 Martin Shapiro, "Judicial Independence: New Challenges in Established Nations"20(1)*Indiana Journal of Global Legal Studies* 253-277 (2013).

7 Douglas Sturm, "Lon Fuller's Multidimensional Natural Law Theory"18(4)*Stanford Law Review* 612-639 (1966).

8 Joel B. Grossman, "Social Backgrounds and Judicial Decision-Making"79(8)*Harvard Law Review* 1551-1564 (1966).

9 Granville Austin, *The Indian Constitution: Cornerstone of a Nation* (Oxford University Press, Delhi, 1966); Granville Austin, *Working a Democratic Constitution*(Oxford University Press, Delhi, 1999); UpendraBaxi, "The Avatars of Judicial Activism: Explorations in the Geography of (In) Justice" in S.K. Verma and Kusum (eds.), *Fifty Years of the Supreme Court of India: Its Grasp and Reach* Oxford University Press and Indian Law Institute, Delhi, 156-209 (2001).

II Rule of, rule of law

The notion of rule of law has its underpinnings in natural law theory.[10] Sometimes its appeal was to be to the divine reason, some time to the human reason and some time with changing content. Even though the natural law theory has changed with the changing time, two of its principles were never changed and they remained constant. Universal order governing all men and secondly inalienable rights of individuals were the two principles that formed the core of the natural law theory. These two principles together constitute the core of the principle of rule of law. The first principle connotes the notion of equality, which is the basic foundation of rule of law and the latter offers basic rights, liberties and freedoms which are not only required but are essential for every individual human being to lead his/her life as a human being. These rights are basic, fundamental, natural and human and therefore they are immutable and inalienable.

The principle of rule of law has furnished the foundation for many constitutions around the world.[11] One of the most basic fundamental principles of the British Constitution is that of rule of law, and the Constitution is founded upon it. Rule of law is concerned with the allocation of legislative, executive and judicial powers and control of their exercise by the respective organ.[12] The noted political scientist and philosopher, Aristotle has said that the rule of law is preferable to the rule of any individual.[13] Aristotelian precept denies an arbitrary exercise of power by any individual.[14] Hence, it reiterates the exercise of powers by the government which shall

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10 Jeremy Waldron, "The Rule of Law", Edward N. Zalta (ed.) in The Stanford Encyclopedia of Philosophy (Summer, 2020 edn.), *available at:* https://plato.stanford.edu/archives/sum2020/entries/rule-of-law/ (last visited on Dec. 12, 2021).

11 A. Cohler, C. Miller, *et. al.*(eds.),*Montesquieu: The Spirit of the Laws*(Cambridge University Press, 1989); Robert Nozick, *Anarchy, State and Utopia*(Basic Books, New York, 1974); M. Oakeshott, "The Rule of Law", in his *On History, and Other Essays* 129-78(Barnes and Noble, NJ); Plato, *The Statesman,* Julia Annas (trans.)(Cambridge University Press, Cambridge, 1995); E Posner,A. Vermeule,*The Executive Unbound: After the Madisonian Republic*(Oxford University Press, Oxford, 1995);R. Posner, *Overcoming Law* (Harvard University Press, 1995); G.,Postema, *Bentham and the Common Law Tradition* (Oxford University Press, 1986); J. Raz, "The Rule of Law and its Virtue" in *The Authority of Law* (Oxford: Oxford University Press, 1979).

12 Barro, R., "Democracy and the Rule of Law" in B. de Mesquita and H. Root (eds.), *Governing for Prosperity*, (Yale University Press, New Haven, 2000); T. Carothers, "The Rule-of-Law Revival", *Foreign Affairs*77: 95–106 (1998); R. Cooter, "The Rule of State Law versus the Rule-of-Law State: Economic Analysis of the Legal Foundations of Development" in *Annual World Bank Conference on Development Economics* 191–206 (World Bank, Washington, 1997); P. Craig, "Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework" (1997): 467–87 *Public Law*, (1997); K.C. Davis, *Discretionary Justice: A Preliminary Inquiry* (Louisiana State University Press, 1969).

13 Aristotle, *The Politics (c. 350 BC)*, Stephen Everson (trans.) (Cambridge University Press, Cambridge, 1988).

be conditioned by law and that people shall not be exposed to the arbitrary will of their ruler.

Historical underpinnings of rule of law could be traced to the 13th Century during the Bracton era, where rulers were subject to laws. Though royal prerogatives existed, yet, the king was to do things in particular ways only. Chief Justice Fortescueduring the Henry VI period had observed that 'rule of law is that the taxation could not be imposed without the consent of the parliament.'[15] This principle has been reflected in the Indian Constitution under article 265 where it is provided that tax could not be levied without the authority of Law. It connotes the supremacy of all parts of the law, enacted and unenacted. In England Magna Carta of 1215 which provided some basic freedoms to people is the first document of a universal principle of inalienable rights of individuals.[16] Thereafter the Bill of Rights of 1688 has sought to establish the supremacy of the law and the Parliament. Similarly,the American Independence Act, 1776, Bill of Rights of 1787, French Declaration of Rights of Men 1791, Universal Declaration of Human Rights, 1948 *etc.*, are the primary and significant instances of the reiteration of the principle of rule of law at the national and international level. The committee on the minister's powers was constituted in England in the year 1929 to suggest and recommend the safeguards *vis-à-vis* rule of law and administration.[17] It has recommended inter alia the safeguards like citizens cannot be punished except for breach of law and be tried by ordinary courts.

A.V. Dicey is the main propounder of the notion of rule of law. Lectures delivered by him at Oxford University in 1885 were published in the form of law and the Constitution. He affirmed the faith in ordinary law and ordinary courts, and people were to be governed by ordinary laws only.[18] He has emphasized that the notion of rule of law connotes simplicity, publication and accessibility. He opposed arbitrary powers. According to him, the primary function of the state is to preserve law and order, defense and foreign relations.[19] However, the 19th Century has witnessed the transition of the state from *laissez-faire* to social welfare. With the expansion of the functions of the state, discretionary powers became necessary. Rule of law, therefore,

14 Aristotle, *The Rhetoric* (c. 350 BC), Rhys Roberts (trans.) (Cosimo Classics, New York, 2010).

15 Caroline A. J. Skeel, "The Influence of the Writings of Sir John Fortescue" 10 *Transactions of the Royal Historical Society* 77-114 (1916).

16 Lawrence Goldman, "Magna Carta: history, context and influence",*University of London Press, Institute of Historical Research* 98-111(2018).

17 S. A. de Smith, "Delegated Legislation in England" 2 (4) *The Western Political Quarterly* 514-526 (1949).

18 Mark D. Walters, "Dicey on Writing the Law of the Constitution"32(1) *Oxford Journal of Legal Studies* 21-49 (2012).

19 Richard Vande Wetering, *Lectures on the Relation between Law and Public Opinion in England during the Nineteenth Century* (Liberty Fund, Indianapolis, 2008).

meant that the government's all actions are to bein accordance with rules/laws which already exist.[20]

The other aspect of rule of law as envisaged by Dicey is that of equality before the law. There ought not to be any discrimination amongst people on any ground whatsoever. The doctrine of equality is the foundation of the doctrine of rule of law. All laws shall be made applicable to all irrespective of status *etc*. However, classification based on rationality or reasonability is not contrary to rule of law. There has to be rational nexus between the classification and the goal which is sought to be achieved by way of such classification.

Rookes v. *Bernard* [21] is a very notable decision delivered by the House of Lords. Trade Disputes Act, 1906 section4(1) prohibited the bringing of any action against a trade union in respect of tort. The issue involved was, whether the trade union could be sued in its own name or through its officers. House of Lords held that individual officials of the trade union be sued for the tort of intimidation. Trade unions though a legal entity, cannot intimidate on their own. If any tort of intimidation is to be committed by its officials only, and hence, they shall be sued for the same. The decision reiterates the 'rule' of law that it shall lead to justice.

After the Second World War, the principle of rule of law has become a matter of universal concern and discussion. It came to be identified more with the rights of men. It has become an international obligation and the international institutions took upon themselves the onus to make it mandatory for every nation-state to adhere to the notion of rule of law. United Nations international commission of jurist's congress on rule of law was held in New Delhi in 1959 and was represented by 53 countries judges, lawyers, teachers *etc*.[22] Congress has affirmed that 'rule of law is a dynamic concept and advances political and civil rights of individuals in a free society. These safeguards recommended by the committee reflect the limitations upon the exercise of powers by the legislature and executive. It also enhances the credibility of the independence of the judiciary. These safeguards seek to widen the gamut of the notion of rule of law, which has become necessary with the changed circumstances in changing times. This is known as the "Delhi Declaration" and the conference was attended by Lord Denning and Professor Devlin.[23] The declaration has contained the basic,

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20 Schmitt, Carl, *The Crisis of Parliamentary Democracy*, Ellen Kennedy (trans.), (MIT Press, Cambridge, 1985); N. E. Simmonds, *Law as a Moral Idea* (Oxford University Press, Oxford 2008).

21 (1964) A.C. 1124.

22 The theme of the New Delhi Congress was "The Rule of Law in a Free Society".

23 R. Devlin, and A. Dodek, "Regulating Judges: Challenges, Controversies and Choices' in R. Devlinand A. Dodek(eds.), *Regulating Judges: Beyond Independence and Accountability* (Edward Elgar, 2016).

fundamental object of the notion of rule of law, *i.e.* 'Respect for the supreme values of human personality be the basis of Law'.[24]

The doctrine of rule of law encapsulates in its fold various rights, liberties and freedoms. Be that as it may, it appears that the Magna Carta 1215, Bill of Rights of 1791 in England, American Independence Act of 1776 and Bill of Rights of 1787, French Declaration of Rights of Man 1791 which was confirmed by the Constitutions of 1946 and 1958 and Universal Declaration of Human Rights 1948 are instances of extension of the notion of rule of law, which foster and sought to further the said principle. It has become a universal, immutable and basic principle of governance around the globe.

Professor Joseph Raz[25] says that "any legal system is to be judged by rule of law, but it is not to be confused with democracy, justice, equality, human rights or person's dignity. He argues, a non-democratic legal system based on the denial of human rights, poverty, racial segregation, sexual inequalities and religious persecution etc. may conform to rule of law better than the west."[26] The basic idea of rule of law is that where people should obey the law and be ruled by it. However, in political and legal theory the concept is narrowed down and the meant government is to be ruled by law and shall be subject to it. In legal parlance, the law is that which meets the conditions of validity laid down in the system of rule of recognition, which includes the Constitution, parliamentary legislation, ministerial regulations *etc*.[27] The eightfold principles of rule of law enunciated by Professor Raz constitute the core of the doctrine in modern-day circumstances.[28] This is a radical and pragmatic departure from the notion of rule of law as it was evolved by Professor A.V. Dicey. Another notable feature of his caricature

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24 Mt Scopus International Standards of Judicial Independence, 2008, *available at*: https://www.jiwp.org/mt-scopus-standards (last visited in Dec. 20, 2021); The New Delhi Code of Minimum Standards of Judicial independence 1982', *available at:* https://www.jiwp.org/new-delhi-declaration (last visited in Dec. 20, 2021); Universal Declaration of The Independence of Justice(1983); The Bangalore Principles of Judicial Conduct November 2002, *available at:* https://www.unodc.org/pdf/crime/corruption/judicial_group/Bangalore_principles.pdf (last visited in Dec. 15, 2021); United Nations, Basic Principles of Independence of the Judiciary (United Nations 1988); P Sands, C McLachlan and R Mackenzie, "The Burgh House Principles on the Independence of the International Judiciary" 4(2) *Law and Practice of International Courts and Tribunals* 247 (2005) (for the international judiciary).

25 J.Raz," The Rule of Law and its Virtue" in his book, *The Authority of Law*(Oxford University Press, Oxford, 1979).

26 Patrick Durning, "Joseph Raz and the Instrumental Justification of a Duty to Obey the Law" 22(6) *Law and Philosophy* 597-620 (2003).

27 Leslie Green, "Reviewed Work: Rights Culture and the Law: Themes from the Legal and Political Philosophy of Joseph Raz by Lukas H. Meyer, Stanley L. Paulson, Thomas W. Pogge" 25(3) *Oxford Journal of Legal Studies* 503-523 (2005).

28 Timothy A. O. Endicott, "The Impossibility of the Rule of Law" 19(1)*Oxford Journal of Legal Studies* 1-18(1999).

of rule of law is that it appears to be somewhat identical to that of the doctrine of 'internal morality' advocated by Professor Lon Fuller. Publication, generality, stability, continuity of laws, are the common features that appear in both.[29]

Lord Camden Chief Justice,[30] has categorically pointed out that 'any executive/ administrative power claimed by the secretary of state is not supported by any law and claimed only in this kingdom. If it is a law, it is to be found in our statute book, if not found then it is not a law at all. Invasion of the property though minute is a trespass.' This emboldens the spirit of the doctrine of rule of law. Any act or action of the public authority necessarily is to be backed or authorized by law otherwise it negates the principle of rule of law.[31] Lord Bridge put forth the view in a more categorical manner[32] and says that "no principle is more basic to any proper system of law than the maintenance of the rule of law itself."

The notion of rule law has been transformed from Dicean one to Raz's one encompassing in its fold various other contemporary precepts and principles including judicial review and natural justice. The concept of rule of law is not static, but it is a vibrant, dynamic and pragmatic one. Jurists like Dicey, Joseph Razetc, have evolved the concept, yet judges like Lord Bridge, Lord Griffith etc. have accorded a new dimension with expansive meaning and spirit to it.[33] The notion of rule of law not only consists of the governance in accordance with law or principle of equality but with the changed notion of due process, it also consistsof the fairness, reasonability, justness of procedures as well.

Inthe modern or post-modern era, where individual freedom and liberty have become the subject matter of public scrutiny, the wider or broader- all-encompassing meaning of rule of law will denude these freedoms and liberties. Any attempt on the part of the authorities to read, interpret and apply the notion of rule of law in a restricted/ narrower manner, would pose danger not only to the freedoms and liberties of individuals but could jeopardize the very existence of the institutions as well as the

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29 Jeremy Waldron,"Is the Rule of Law and Essentially Contested Concept (in Florida)?" 21 *Law and Philosophy* 137, 148 (2002).

30 *Entick* v. *Carrington* (1765).

31 Brian Tamanaha, *On the Rule of Law: History, Politics, Theory* cited in Mark Bennett, ""The Rule of Law" Means Literally What it Says: The Rule of Law" 32 *Australian Journal of Legal Philosophy* 90, 92 (2007); Augusto Zimmermann, *Western Legal Theory: History, Concepts and Perspectives*83 (LexisNexis, Butterworths, 2013); Mark Bennett, ""The Rule of Law" Means Literally What it Says: The Rule of Law" 32 *Australian Journal of Legal Philosophy* 90, 91 (2007).

32 *R.* v. *Horse FerryRoad Magistrate's Court ex-parte Bennet* (1994) AC 42.

33 Robert P George, "Reason, Freedom, and the Rule of Law: Their Significance in the Natural Law Tradition" 46 *The American Journal of Jurisprudence* 249, 251 (2001); Friedrick A Hayek, *The Constitution of Liberty* 206 (Chicago University Press, 1960) cited in Augusto Zimmermann, *Western Legal Theory: History, Concepts and Perspectives* 87 (Lexis Nexis Butterworths, 2013); Lord Bingham, "The Rule of Law" 66(1) *The Cambridge Law Journal* 67, 76–77 (2007).

democracy. The Indian Supreme court in *ADM Jabalpur* v. *Shivakant Shukla*[34] has accorded such narrow or restricted meaning to the notion of rule of law. It is known as *Habeas Corpus*case where the issue of suspension of fundamental rights during the course of a national emergency came to be challenged, including the right to approach the court.

Chief Justice Beg in a majority judgment has observed that, since the national emergency was imposed by the president and in the exercise of a power conferred upon him under article 359 of the Indian Constitution, he has suspended fundamental rights including the right to approach to the Supreme Court and thereby rejected the matter. He said "during emergency MISA (Maintenance of Internal Security Act) is itself the instance of rule of law. Rule of law is not a magic wand like Allah Uddin's*chirag* (lamp) so that you can rub and will get whatever you want….."[35] The majority decision of the apex court is a negation and in contravention of not only with the notion of rule of law but natural law as well.

The dissenting judgment delivered by H.R. Khanna J., has been lauded as a leading light in the darkness which emboldens the spirit of the concept of Rule of law.[36] In his judgment, he held that even during the period of national emergency the president has no power to suspend certain fundamental rights like the right to life and liberty including the right to approach the court. These rights are natural and hence can not be taken away/suspended at any point in time. Rule of law demands fairness in law as well as fair procedure. Rights being fundamental can't besubjugated or subordinated to the whims and caprices of the executive nor can the doctrine of executive necessity influence the subordination of such rights. Rule of law is the rule of governance/ administration and thereby obligatory/mandatory upon the administration to adhere to its tenets and principles. The content and context of rule of law assume more significance during the period of emergency when the government of the day make some attempts to devalue and though not destroy but disturb such notions to achieve their own goals through some machinations.[37]

Excesses, atrocities, tortures *etc.*, committed during the period of emergency and injustices heaped upon various people have opened the eyes of all and changed the mindsets of the judiciary. Judges have realized the value of the procedural due process and rule of law as it was envisaged by Fazal Ali J, and Khanna J, in their dissenting judgments in *Gopalan* and *ADM Jabalpur* respectively. More importantly, the political managers and elected representatives who have suffered severely, were of the opinion to strengthen the principles and procedures in tune with rule of law. Khanna's J., dissenting judgment not only has influenced the future courts' decision-making process

34 (1977) 2 SCC 834: AIR 1976 SC 1207 (Supreme Court of India).

35 *Ibid.*

36 *Ibid.*

37 Daniel C. Kramer, "The Courts as Guardians of Fundamental Freedoms in Times of Crisis" 2(4) *Universal Human Rights* 1-23 (1980).

but also the Parliament. Parliament has enacted the 44th Constitutional amendment Act which excluded articles 20 and 21 from the purview of article 359. It meant even though the national emergency could be imposed and the president could suspend fundamental rights, except articles 20 and 21 of the Constitution. Though the amendment is carried out by the Parliament. This exercise of its power vested under article 368, yet in reality whatever Parliament did was due to the dissenting judgment of Justice Khanna. 44th Constitutional Amendment is the facet of rule of law and it has strengthened the rule of law, democracy and basic rights in India.[38]However, certain factors pose some threats to the notion of rule of law. Power of imposition of national emergency, state emergency or appointment of judges or invocation of the doctrine of executive necessity *etc*. Exercise of either law-making power in a draconian manner based onthe brutal majority or executive power for the furtherance of one's self-interest (we may call even privatization of public power) whereby rule of law may be substituted with the rule of men.[39]

In *Yusuf Khan* v. *Manohar Joshi*[40] the Supreme Court has laid down "the proposition that it is the duty of the state to preserve and protect the law and the Constitution and that it cannot permit any violent act which may negate the rule of law. The two great values which emanate from the concept of Rule of Law in modern times are (a) no arbitrary govt. and (b) upholding individual liberty."Emphasizing these values Khanna J. observed in the *Habeas Corpus* case[41]"Rule of law is the antithesis of arbitrariness…. Rule of Law is now the accepted norm of all civilized societies…Everywhere it is identified with the liberty of the individual. It seeks to maintain a balance between the opposing notions of individual liberty and public order. In every state, the problem arises of reconciling human rights with the requirements of public interest. Such harmonizing can only be attained by the existence of independent courts which can hold the balance between citizen and the state and compel governments to conform to the Law".[42]

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38 Massimo Tommasoli, Rule of Law and Democracy: Addressing the Gap Between Policies and Practices, United Nations, *available at*:https://www.un.org/en/chronicle/article/rule-law-and-democracy-addressing-gap-between-policies-and-practices (last visited on Dec. 20, 2021).

39 Edson R. Sunderland, "The Exercise of the Rule-Making Power" 12(8) *American Bar Association Journal* 548-552 (1926).

40 *Yusuf Khan* v. *Manohar Joshi* (1999) SCC Cri. 577.

41 *Supra* note 7.

42 Law Commission of India in its report in 1961 has recognized the significance of Rule of Law and observed, "The rule of Law and Judicial review acquire greater significance in a welfare state. The maintenance of Law and order and the prevention from external aggressions are but part of the functions of such a state. It has a variety of other functions, which bring it into constant touch with the life of the citizens. The greater, therefore, is the need for ceaseless enforcement of the rule of law, so that the executive may not, in a belief, in its monopoly of wisdom and its zeal for administrative efficiency, overstep the bounds of its power and spread its tentacles into the domains where the citizens should be free to enjoy the liberty guaranteed to him by the Constitution."

III Notion of democracy- Jurisprudential and constitutional contours

The peculiarity of democracy and its state of affairs lies in its characteristic of being an open-ended actuality of being both fragile and dynamic. Across the world, there have been instances of democracy being hijacked by undemocratic authorities to legitimize undemocratic objectives. This equation confines democracy as a product of majoritarian beliefs. However, thinkers of political science have said that it is wrong to confine democracy to voting and majoritarian procedures. For example, Ronald Dworkin has called for a more expansive understanding of democracy that not only connotes majority rule but also substantive protection for human rights.[43] For legal sanctity, democratic systems and the process of democracy have to satisfy the spirit of law through the convergence of values of democracy and the concept of law. In this regard, American Progressive jurisprudence or Dworkin associates democracy with the jurisprudence of rights enforced by the judiciary.[44]

Democracy and rule of law are twins which share a commonality between them and are interconnected with each other. It can be said that they are mutually reinforcing. Democracy is the process of selecting the sovereign authority, and rule of law constitutionalizes the manner in which that selected authority exercises the power. "Law", Aristotle said, "should govern".[45] So, governance of rule of law is called a "nomocracy", from the Greek *nomos* (law) and *kratos* (rule). In this context, the modern equivalent of monarchy or autocracy is a replica of Hobbesian principles of single-minded coordination that determine social order. In a constitutional structure of governance, democracy is closely associated with the governance of rule of law. In a democratic society, the development of socio-legal culture will traverse across democratic jurisprudence based on sources-criteria for political legitimacy

Democracy is not only the form of government or a majoritarian rule but it is the system and process which organizes the societal life of individuals. Today, states have reduced democracy to elections. However, the real essence of democracy lies in what happens between the elections. Democracy and dictatorship are sworn enemies, wherein the former provides rights and liberties to its own people whereas the latter not only denies but sometimes even destroys the same. Any politically organized society which chooses the democratic form of government and democracy as its mode of governance inevitably encapsulates the notion of rule of law in its fold. Democracy operates not

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43 Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution*, Ch. 1 (Harvard University Press, Cambridge, 1996).

44 AraLovitt, "Constitutional Confusion? Reviewed Work: Freedom's Law: The Moral Reading of the American Constitution by Ronald Dworkin"50(2) *Stanford Law Review* 565-603 (1998).

45 A. Laks, "The Laws," in C. J. Rowe and M. Schofield (eds), *The Cambridge History of Greek and Roman Political Thought* 258–92 (Cambridge University Press, Cambridge, 2000); F. Miller, *Nature, Justice and Rights in Aristotle's Politics* (Clarendon Press, Oxford, 1995).

only in the field of politics but there are different notions of democracy that exist.[46] Political democracy, social democracy, economic, cultural democracy *etc.* are the different versions or kinds of democracy which exist around the world.

Jurisprudential underpinnings of democracy reveal that it is the product of social contract theory. The great political thinker Plato in his book *Republic* had observed that, in view of the violent and volatile political situation and circumstances, when a state (political authority) has decided to distance itself from Church, that has created tussle and tensions between the three classes *viz.,* political authority, church and rising commercial middle class.[47] Thereby they undertook amongst themselves not to inflict injuries upon others nor suffer from them. For survival and sustenance, people decided to come together, join hands together so that the human species will not be extinguished form the planet. This vow of the people brought and binds them together. Though Plato didn't use the term social contract, yet the content or the spirit of it was the same and reflected the democratic norms in it.

However, it was an Italian jurist Marsilius Padua (1270-1343) who had used the term 'social contract' first time and fought against the supremacy of the church in other than spiritual matters.[48] He said 'people are the source of all political power and government is by mandate and with the consent of the people. The prince is therefore under an obligation to observe the law and can be punished if he violates it. As per the social contract, due to the state of nature in which there were no laws, order or government, which was a chaotic one, human reason has prevailed and people came together to form the society as an institution first and then thereafter they elected, selected or nominated somebody or somebody as their ruler and thereby institution of the state came into existence. In the second part of the contract people thus were united and undertook to obey the government which they themselves have chosen along with laws to be made by the govt.

Renowned jurist Professor Hugo Grotius (1583-1645) branded social contract theory as a forerunner to democracy.[49] He said that "social contract is an actual fact of human history. The Constitution of each state had been preceded by a social contract, by means of which each people had chosen the form of govt. which they considered

46 J. Waldron,"The Wisdom of the Multitude: Some Reflections on Book 3, Chapter 11 of Aristotle's Politics, Political Theory" 23:563–84 in R. Kraut and S. Skultety (eds), *Aristotle's Politics: Critical Essays*145–65 (Rowman and Littlefield, Lanham, MD, 1995).

47 M. Schofield, *Plato: Political Philosophy* (Oxford University Press, New York, 2006); G. Santas,*The Blackwell Guide to Plato's Republic* (Blackwell, Oxford, 2006); C. C. W. Taylor," Plato's Totalitarianism," in R. Kraut (ed.), *Plato's Republic: Critical Essays* 31–48 (Rowman and Littlefield, Lanham, MD,1997).

48 Marsilius of Padua: The Social Contractarian, *available at:* https://cadmus.eui.eu/handle/1814/67836 (last visited on Dec. 23, 2021).

49 Marcelo de Araujo, "Hugo Grotius, Contractualism, and the Concept of Private Property: An Institutionalist Interpretation" 26(4) *History of Philosophy Quarterly* 353-371 (2009).

most suitable for themselves."[50] The theory of social contract has been further developed by Thomas Hobbes, John Locke and Rousseau. All these social contractarian's advocated that the government is to be by the people and for the people with some deviations about its content. The theory of social contract or consent theory provides jurisprudential or theoretical foundations to the notion of democracy.

Hugo Grotius' version of the social contract has been completely reflected in the Indian Constitution. The preamble of the constitution begins with the words, "We the people of India, having solemnly resolved to constitute India in to…….DEMOCRATIC REPUBLIC and secure to all its citizens: Justice, Liberty, Equality…"The Indian Constitution has been made by the people and they have had chosen the democratic and republican forms of government. People are sovereign in a democratic and republican form of government, and they are to be governed by the laws enacted by their own elected representatives. Democratic governance is like self-governance through some mechanism like elected legislature and executive.

Democratic polity is a *sine qua non* for the basic fundamental human rights. The political history of the world is ample testimony tothe history of natural rights. Democracy, democratic polity and governance have their impact on providence, promotion and protection of certain fundamental rights. Philosophically, Prof. John Locke, an advocate of social contract and democracy, emphasized upon natural fundamental rights of individuals, inter alia right to life, liberty and property (estate). Rights not only exist but flourish in a society that is an educated, tolerant and more importantly democratic one, wherein there could be a sense of respect for fellow human beings. The United Nations General Assembly on 24 September 2012 adopted a declaration that reaffirmed that "human rights, the rule of law and democracy are interlinked and mutually reinforcing and that they belong to the universal and indivisible core values."[51]

In the Indian context, even though the Constitution took shape in 1950, the philosophy of the Constitution took shape during the society's struggle for freedom. This social struggle is a vital source of legitimacy of the Constitution as a social document. The end of colonial rule was the beginning of constitutional rule of law and other principles of constitutionalism in India. The sustenance of Indian democracy is a result of a new social order that neutralized socio-economic tyranny. In his last speech in the Constituent Assembly, the Drafting Committee Chairman Dr. B.R. Ambedkar raised some valuable points on Indian democracy. He said, "the second thing we must do is to observe the caution which John Stuart Mill has given to all who are interested in the maintenance of democracy, namely, not "to lay their liberties at the feet of even a great man, or to

50 *Ibid.*

51 para. 5 in Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels (A/67/L.1).

trust him with a power which enables him to subvert their institutions".[52] Considering the colonial history of anarchy, there was a sense of fear and apprehension expressed in the Constituent Assembly about the future of India. A doubt that was cast was whether a large population with a minimal democratic history of governance can do justice to rule of law. In expressing this fear of whether India would remain democratic, Dr. Ambedkar said:[53]

> If we wish to maintain democracy not merely in form, but also in fact, what must we do? The first thing in my judgement we must do is to hold fast to constitutional methods of achieving our social and economic objectives. It means we must abandon the bloody methods of revolution. It means that we must abandon the method of civil disobedience, non-cooperation and satyagraha. When there was no way left for constitutional methods for achieving economic and social objectives, there was a great deal of justification for unconstitutional methods. But where constitutional methods are open, there can be no justification for these unconstitutional methods. These methods are nothing but the Grammar of Anarchy and the sooner they are abandoned, the better for us."

Ever since justice was asserted as the rule of the stronger, men have sought to legitimize the actions ofthe state because of the high purposes it seeks to protect. The human mind jacqueries from the impulse that the possession of coercive power can be defended regardless of the ends to which it is staunched. Today, we live in a Machiavellian age where politics has primacy over ethics. This Machiavellianism is translated into the functioning of democracy. Limiting democracy to electoral accountability of those who make the law, is a shortsighted approach. Democracy is about the democratic legitimacy of the law itself. Viewing itthrough a jurisprudential lens, the authoritativeness of a law does not make it undemocratic. Professor Raz according to his "normal justification thesis" argues that law necessarily presents itself as authoritative, but it may not be authoritative.[54] What decides the democratic value of law is its legitimacy and inclusiveness. For instance, Joseph Raz says that even if the policies are economically misguided, that does not make them violative of the rule of law if they are principled and announced beforehand.[55] In a pure democracy, the law can be a 'sword' against undemocratic practices. However, in societies with undemocratic cultures, the role of

52 The Constituent Assembly speech by Dr B.R. Ambedkar on Friday, the 25th November, 1949, Vol. XI.

53 *Ibid.*

54 Leslie Green, "Reviewed Work: Rights Culture and the Law: Themes from the Legal and Political Philosophy of Joseph Raz by Lukas H. Meyer, Stanley L. Paulson, Thomas W. Pogge" 25(3)*Oxford Journal of Legal Studies* 503-523 (2005).

55 Joseph Raz, "The Rule of Law and Its Virtue" in Joseph Raz*, The Authority of Law* 210, 228 (OUP, 1979)

law is to act as a 'shield' to subvert and resist injustice. In Michael Oakeshott's memorable phrase, "The rule of law bakes no bread, it is unable to distribute loaves or fishes (it has none), and it cannot protect itself against external assault, but it remains the most civilized and least burdensome conception of a state yet to be devised".[56] The need is to study democracy along with a moral and ethical dimension. John Dewey has said that "democracy, in a word, is social, that is to say, an ethical conception, and upon its ethical significance is based its significance as governmental."[57]

Relative economics and the rise of functioning democracies are often concatenated with structural changes in the legal order. The fundamental difference between the western conception of societal order and *de jure* hypothesis lies in the emphasis on cultural perspectives toward law, economics and society. Asian narrative components like Dharma provides a comprehensive notion of regulatory jurisprudence that make up the contemporary idea of 'democratic internationalization' and 'rule of law' inclusively constructive. The rule of law is a moral ideal that protects distinctive legal values such as generality, equality before the law and due process rights. Ancient Asian approaches to 'rule' and 'law' are yet to join the club of "western values" and forms of supranational and transnational interpretation of rule of law primarily due to the presumption of ubiquitous insularities. The idea of rule of law resonates across borders and strengthens transnational stability. The Eurocentric conception of rule of law has failed the test of time to prevent undemocratic forces from legitimizing their undemocratic objectives through hijacking the utility of rules and laws.The present structure of rule of law is an outcome of classic liberalism, where the law is closely associated with some social goal. This also opens the scope for discovering the normative history of rule of law as a civilizational identity that can conjure to redefine the substructure of rule of law for global democracy in this era.

IV Judicial activism

The works of Aristotle and Plato show that law in its present form and nature cannot anticipate the endless permutations of circumstance and situation. It is natural that there will be a gap between thegeneralities of law and the specifics oflife. For the sustenance of a civil society built on democratic principles, this gap in the administration of justice is to be filled by the judicial institution.This inherent and inevitable judicial process requires the making and moulding law with an essence of creativity and activism.Judge Frank Easterbrook famously remarked,"Everyone scorns judicial activism, that notoriously slippery term."[58] In the Indian democratic order, the judiciary

56 Michael Oakeshott, *The Rule of Law, in On History: And Other Essays* 119, 164 (Barnes and Noble Books, 1983).

57 John Dewey, *The Ethics of Democracy* 240 (University Microfilms, INC.,1969).

58 Frank H. Easterbrook, "Do Liberals and Conservatives Differ in Judicial Activism?" 73 *U. Colo. L. Rev.* 1401, 1401 (2002).

plays a key role in protecting democracy under its judicial wings. As the sole interpreter of the Constitution, the judiciary has time and again responded to the contemporary challenges faced by the democratic society. In this quest to minimize harm and prosper constitutional values, judges are often criticized for playing an activist role in their interpretation.Before the 20th Century, judicial activism was closely associated with the judges making positive laws or what is known as the concept of judicial legislation. Where Blackstone favoured judicial legislation as the strongest characteristic of the common law, Bentham regarded this as a usurpation of the legislative function and a charade or "miserable sophistry".[59] In the cosmopolitan discourse, the term "judicial activism" finds its early public reference in Arthur Schlesinger Jr.'s article in Fortune magazine in 1947.[60] The widely-read piece categorized all United States Supreme Court justices according to their alliances and divisions.

The activist nature symbolizes how judges when they approach the Constitution, use their interpretative tools in a result-oriented manner. In American jurisprudence, the conventional understanding of the role played by the Court rests on the conceptual reading of the *Marbury* v. *Madison case.*[61] In a constitutional democracy, the Marbury judgement exposes the culture of courts as the final reviewer of actions of the branches of the government. The inevitability reflects the responsibility of the judicial structure and system to maintain the sanctity of the democratic process. A charge levied against the culture of "judicial activism"is disregarding precedents. However, constitutional understanding reflects that, in a democratic society, the responsibility is on the courts to treat different kinds of law differently. The culture of interpretation of laws in a democratic society may often demand shifting away from a strict constructionist approach. Justice Scalia also opinioned his understanding of judicial activism while arguing for *Republican Party of Minnesota* v. *Kelly*, he claimed that "calling oneself a strict constructionist while criticizing others for being judicial activists doesn't mean anything. It doesn't say whether you'regoing to adopt the incorporation doctrine, whether you believe in substantive due process. It's totally imprecise. It's just nothing but fluff."[62]

In the Indian context, the Supreme Court has been called upon to protect rule of law and safeguard civil and minority rights. The judiciary plays the role of 'guardian of the social revolution'. According to G. Austin,"it is the interpreter of the law of the land."[63] Rule of law prescribes standards of accountability to a democratic design. Rule of law also contributes toward constitutional maintenance of the "attitudinal component"

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59 Richard A. Cosgrove, *Scholars of the law: English jurisprudence from Blackstone to Hart* 56-57 (New York University Press, New York and London, 1996).

60 Arthur M. Schlesinger, Jr., "The Supreme Court: 1947" *Fortune* 202, 208 (1947).

61 *Marbury* v. *Madison*, 5 U.S. 137, 177 (1803).

62 *Republican Party of Minnesota* v. *Kelly*, 534 U.S. 1054 (2001).

63 Austin Granville, *The Indian Constitution - Cornerstone of a Nation* 169 (Oxford University Press, 2000).

of democracy, like the value, trust and perception of the people towards democracy.[64] Likewise, the power of judicial institutions through review and activism contributes toward a constitutional culture in which the arbitrary exercise of power is discouraged through a process of adherence to rule of law and justification.The judicial component in a democratic society contributes to the rule of law because the judicial process reinforces the distinction based on rule of law between authoritative power and legitimate authority.

India witnessed the evolution of judicial activism in the case of *A.K. Gopalan* v. *State of Madras,*[65] when the court asserted that judicial review was an inbuilt responsibility of judicial interpretation of the Constitution. Judicial activism over time has developed to be an essential feature of judicial review. According to S.P. Sathe, "There are two models of judicial review. One is a technocraticmodel in which Judges act merely as technocrats and hold a law invalid if it is ultra vires the powers of the legislature. In the second model, a court interprets the provisions of a constitution liberally and in the light of the spirit underlying it keeps the Constitution abreast of the times through dynamic interpretation."[66] This dynamic interpretation has paved for the culture of judicial activism through the progressive development of law in India. The decisions in the case of *Minerva Mills* and *Keshavanda Bharti* signify that while maintaining the basic structure doctrine, the Supreme Court enshrined that the judiciary is an essential foundation of India's constitutionalism and constitutional culture.

Indian political history has seen a vulnerable phase of anti-democratic practices finding its legitimacy during the period of internal emergency imposed by Mrs. Indira Gandhi in 1975 and the subsequent fiasco of the 39th Constitution Amendment Bill. The Supreme Court in the case of *Indira Gandhi* v. *Raj Narain* struck down the amendment on the grounds that "it was inconsistent with the basic features of the Constitution and holding the importance of democracy as a foundation of the Indian society."The landmark cases of *S.R. Bommai* v. *Union of India*[67] and *State of Rajasthan* v. *Union of India*[68] have shown the judicial approaches toward protecting democratic sanctity.The proactiveness of the decisions of the Supreme Court was also seen in the last few years when the courts developed the culture of adhering to constitutional morality while testing the constitutional sanctity of the laws. The Indian Supreme Courts have played a revolutionary role in transforming the constitutional culture of the diverse

64 Juan Linz and Alfred Stepan, "Toward Consolidated Democracies" 7 *Journal of Democracy* 16 (1996).

65 *A.K. Gopalan* v. *State of Madras*, 1950 AIR 27, 1950 SCR 88.

66 S.P Sathe, *Judicial Activism in India - Transgressing Borders and Enforcing Limits* 5 (Oxford University Press, 2002).

67 *S.R. Bommai* v. *Union of India*, AIR 1977 SC 1361.

68 *State of Rajasthan* v. *Union of India*, AIR 1994 SC 1918.

Indian society. Courts have played a reneging role in filing the legislative lacunae,[69] overriding discriminatory policies and curb down non-democratic actions.

As Lord Denning asserted that "judges cannot afford to be timorous souls."[70] They cannot remain impotent, incapable and sterile in the face of injustice. This judicial awakening has resulted in wider protection of rights that insist that a state cannot act undemocratically to validate arbitrary acts. In this context, Justice Bhagwati observes that "judicial activism is a central feature of every political system that vests adjudicatory power in a free and independent judiciary."[71] The philosophy of judicial activism in a constitutional democracy is a philosophy or creative will whereby new legal principles are created by sharing the values of the Constitution towards achieving social justice.Writings on realism have shown that various internal and external factors influence judicial decision-making that promotes and preserve democracy. The courts have to proactively think in terms of socio-economic and political justice.While the link of a pro-active judiciary and the realization of democratic principles are indispensable, the expression of judicial activism is often ambiguous for literary understanding. Questions have also been raised on whether the assertion of law-making power by the unelected judicial activists poses a threat to democracy when the unelected make law rather than interpret it.

V Conclusion

In the contemporary definition, democracy can be a 'formal democracy' or 'substantive democracy'. Formal democracyor procedural democracy means,that a procedure is adopted to determine what the majority wants, which in representative democracy usually means that a simple majority elects the authority. In a substantive democracy, "we the people" constitute a democratic state. This power of the sovereign to decide outcomes and to elect the authority with constitutional power also raises several ethical dilemmas. What if a majority wish to terminate democracy? Should a decision made by the majority through a democratic process to terminate democracy itself be welcomed? Because, in democracies, ultimately the citizens decide the extent of their very freedom. As Schmitt observes, "The democratic concept of law is a political concept, not one of a state of the law; it is based on the power of the people and expresses that the law is anything the people want; the law is what the people have commanded."[72] These dilemmasethical conceptions of democracy find their answers in the notions of rule of law.

69 *Vishaka and others* v. *State of Rajasthan*, AIR 1997 SC 3011.

70 L. Waller, "Bold Spirit" 56(8) *Law lnst. J. (Vic.)* 564 (1982); "Denning's Legal Philosophy" *N.ZL.J.* 236 (1982).

71 A. Lakshminath, "Jurisprudence of Judicial Activism" 42(2) *The Administrator* 106 (1997).

72 Carl Schmitt, *Legalität und Legitimität* (1932).

The changing socio-political approaches of society towards cultural heterogeneity, the crisis of governability, multi-nationalization of institutions and democratic malaises are also influencing the nature of democratic institutions in a representative democracy. However, the philosophy and approaches of democracy are a broader conception than a procedural procedure. Principles of rule of law and not the law of rules are the foundation upon which other dimensions of democratic society rest.As an alternative proposition, Joseph Raz noted that the rule of law can also be realized in a non-democratic state.[73] In the context of judicial decision making or judicial review, reliance on neutral principles to further the ideals of rule of law has also forced governmental decision-makers to articulate their decisions on the basis of democratic principles, rather than exercising *ad hoc* discretion. This approach has also favoured the development of judicial activism to neutralize constitutional instability. Constitutional instability can take different forms and shapes. In fragile democracies, disorientation might beso intense that states find it difficult to even draft a constitution in thefirst place, as seen in the case of Nepal. In constitutional democracies, institutions may face attempts to usurp powerfrom legitimate constitutional authorities and relocate sovereignty, as seen in the recent case of Coup in Myanmar recently. The role of rule of law, constitutionalism and judicial activism in a democracy is to prevent this instability.

73 Joseph Raz, *The Rule of Law and Its Virtue* 14 (1999).