

ESTIMATING THE RULE OF LAW: A COMPARISON OF THE UNITED KINGDOM, CHINA AND INDIA

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“When the Rule of Law disappears, we are ruled by the whims of men”

- Anonymous

The ‘Rule of Law’ is one such term, which finds place in almost all the Constitutions of the world. This term has always been there in all systems of governance and it keeps reviving according to the needs of the society. The rule of law is extremely important to the progress of countries and it is for this reason, this term never goes out of style. As the scale of human existence has widened its horizon, the study of comparative law has become even more important. Rule of law is one of the important elements of the Public law and for this reason, this article attempts to compare the present modern ideas of the rule of law along with summarizing the origins and constitutional foundations of this concept in the Constitutions of United Kingdom, China and India.

This article begins by discussing the evolution and philosophical foundation of the concept. The article then throws light on how China still has a long way to go until it reaches the rule of law unlike the United Kingdom, where the rule of law is an established concept, which plays a major role in strengthening the relationship between the government and the people. This article will then discuss as to how, in India, democracy and the rule of law are inextricably connected with each other by throwing light on the role of the judicial control of actions of the government in maintaining the rule of law. The article aims to compare and analyze the existing scenario and the presence of rule of law in these countries and concludes by reflecting that the observance of rules by all institutions of the democracy is key to the maintenance of Rule of law and the same needs to be revived in the society again.

INTRODUCTION

The ‘*Rule of Law*’ is one such term, which finds place in almost all the Constitutions of the world. In the words of H Kelsen, the constitution is viewed as the most basic law, the Grundnorm (from which all other laws derive their validity) of any society and thus serves as the foundation of the law within a society.¹ And, it is for this reason, the rule of law as a concept is of utmost importance in all the Constitutions of the world. This term has always been there in all systems of governance and it keeps reviving according to the needs of the society. The rule of law is extremely important to the progress of countries and it is for this reason, this term never goes out of style. As the scale of human existence has widened its horizon, the study of comparative law has become even more important. Rule of law is one of the important elements of the Public law and for this reason, this paper attempts to compare the present modern ideas of the rule of law along with summarizing the origins and constitutional foundations of this concept in the Constitutions of United Kingdom, China and India.

This paper begins by discussing the evolution and philosophical foundation of the concept. The paper then throws light on how China still has a long way to go until it reaches the rule of law unlike the United Kingdom, where the rule of law is an established concept, which plays a major role in strengthening the relationship between the government and the people. This paper will then discuss as to how, in India, democracy and the rule of law are inextricably connected with each other by throwing light on the role of the judicial control of actions of the government in maintaining the rule of law. The paper aims to compare and analyze the existing scenario and the presence of rule of law in these countries and concludes by reflecting that the observance of rules by all institutions of the democracy is key to the maintenance of rule of law and the same needs to be revived in the society again.

¹ Eric H. Voegelin, *General theory of law and state* by Hans Kelsen, LOUISIANA LAW REVIEW (Dec. 1945) <http://digitalcommons.law.lsu.edu/cgi/viewcontent.cgi?article=1441&context=lalrev.html>.

EVOLUTION OF THE RULE OF LAW

The early history of the rule of law is frequently conflated with the history of law itself. The Code of Hammurabi, promulgated by the king of Babylon around 1760 BC, was one of the first sets of written laws. As it was inscribed in stone and made publicly available was a significant advance for a legal system.²

The term 'Rule of law' is derived from the French phrase 'la principle de legalite' which means the 'principle of legality'. It refers to 'a government based on principles of law and not of men. In other words 'the principle de legalite' is opposed to arbitrary powers.

The Rule of law took root in England in theory before it did in practice. For several theorists, the most important idea in the rule of law as a concept of governance was the signing of the Magna Carta in England in 1215 when King John and his rebellious barons agreed to the signing of this charter.³ Sir Edward Coke, the Lord Chief Justice of the Common Pleas, relied on Bracton, the writing of the thirteenth century which held that the world was governed by law, human or divine, and the king himself ought not be subject to man but subject to God and to the law.⁴

The rule of law, in its modern conception, owes a great deal to late Professor A.V. Dicey. According to Dicey, the phrase 'rule of law' included 3 distinct conceptions:

1. The *absence of arbitrary power* and the absolute supremacy or predominance of regular law.
2. *Equality before the law*.⁵
3. The *Constitution is judge made*.⁶

Now, due to the needs of practical government, a number of exceptions have been engrafted on these ideas in modern democratic countries.⁷ Nevertheless, the basic notions are worth preserving and promoting.

² Simon Chesterman, *An International Rule of Law?*, NEW YORK UNIVERSITY PUBLIC LAW AND LEGAL THEORY WORKING PAPERS (Nov. 4, 2008), http://lsr.nellco.org/cgi/viewcontent.cgi?article=1070&context=nyu_plltwp.html.

³ *ibid*

⁴ John Phillip Reid, *Rule of Law: The Jurisprudence of Liberty in the seventeenth and eighteenth centuries*, NORTHERN ILLIONIS UNIVERSITY PRESS, Cambridge University Press (Aug. 1, 2010), <https://www.cambridge.org/core/journals.html>.

⁵ KAILASH RAI, *THE CONSTITUTIONAL LAW OF INDIA* 58 (Central Law Publications, Allahabad 2005).

⁶ *Supra* note 3

With this background, the researcher would now move on to the first country in order to understand the prevalence and applicability of the rule of law in the country.

UNITED KINGDOM

The United Kingdom or the UK, unlike most modern countries does not have a codified Constitution; on the contrary it has an unwritten one formed of Acts of Parliament, court judgments and conventions.⁸ There is no constitutional document named as such, therefore this is sometimes referred to as an unwritten or uncoded constitution.⁹

THE CONSTITUTIONAL HISTORY OF THE UK CONSTITUTION

The United Kingdom Constitution, unlike many constitutions of most other countries, had evolved very gradually over time.¹⁰ In UK, sovereignty of Parliament is the focal point of the UK constitution and this sovereignty of Parliament was established in the events and aftermath of the English Civil War.¹¹

The Old Constitution

According to Bagehot, the Britain's Traditional Constitution was of the simple type, with no formal separation of powers between executive, legislature and judiciary. It remained simple like this until quite late in the twentieth century.¹²

The old constitution, together with its associated political culture, was a power-hoarding constitution, or a power-concentration constitution¹³ However, despite this centralization and

⁷ M.P. JAIN, INDIAN CONSTITUTIONAL LAW 66 (Lexis Nexis Buttersworth Wadhwa, Nagpur 2015).

⁸ Robert Blackburn, *Britain's Unwritten Constitution*, BRITISH LIBRARY, (Mar. 13, 2015), <https://www.bl.uk/magna-carta/articles/britains-unwritten-constitution.html>.

⁹ Black Andrew & Blackburn, Robert, *Mapping the Path to Codifying - or not Codifying - the UK's Constitution*, THE UK PARLIAMENT, (May 22, 2012), <https://publications.parliament.uk.html>.

¹⁰ WI JENNINGS, THE LAW AND THE CONSTITUTION, 20-22 (University of London Press 1959).

¹¹ J Goldsworthy, *The Sovereignty of Parliament: History and Philosophy*, (Oxford University Press 1999).

¹² WALTER BAGEHOT, THE ENGLISH CONSTITUTION 48 (The Poplars, 2 ed. 1873).

concentration of power, Britain's constitution by the early decades of the twentieth century was unquestionably democratic.¹⁴

The New Constitution

The 1960s perfect constitution, in the early years of the twenty first century faced the impetus to change. Britain lost its vast empire and its historic status as a great world power, for instance in the events like independence to India, Burma, and Ceylon in 1947.

In 1973, Britain became a full member of the European Economic Community. The member states of the European Union (EU) had now become an integral part of the UK's constitutional structure.. It comprised of all the old elements plus the EU, Scottish Parliament, Welsh National Assembly and the Judiciary being far more activist than the past.¹⁵

After the election to power of the first New Labour government in 1997, the UK Constitution experienced an era of reform, the individual rights became directly actionable in domestic courts, a Supreme Court was created to replace the Appellate Committee of the House of Lords, alongside reform to judicial leadership and appointments.¹⁶

DEVELOPMENT OF THE CONCEPT OF RULE OF LAW IN THE UK

The rule of law, in UK, was developed over the centuries as a brake on arbitrary power. The modern concept of Rule of law owes much to the great battles between the English kings and their subjects, the struggle for supremacy between parliament and Stuart kings, and finally the war between the British Empire and its American Colonies.¹⁷

In England, the doctrine of rule of law was applied in concrete cases. If the police wrongfully

¹³DAVID BUTLER ET AL, THE LAW, POLITICS AND THE CONSTITUTION: ESSAYS IN HONOUR OF GEOFFREY MARSHALL 24 (Oxford University Press 1999).

¹⁴ *Supra* note 14.

¹⁵ *ibid.*

¹⁶ Constitutional Reform Act, 2005.

¹⁷ PAUL GOWDER, THE RULE OF LAW IN THE REAL WORLD 121 (1 ed. Cambridge University Press 2016).

arrest a man, he can file a suit for damages against them as if the police were private individuals. In *Wilkes v Wood*¹⁸ it was held that an action for damages for trespass was maintainable even if the action complained of was taken in pursuance of the order of the minister. The doctrine of rule of law proved to be effective and powerful weapon in keeping administrative authorities within their limits. The broad principle of rule of law was accepted by almost all legal systems as a constitutional safeguard.¹⁹

FUNDAMENTAL RIGHTS IN THE UK CONSTITUTION

The UK does not have a written constitution, however it does have a constitution (much of it written) which is an amalgam of statutes, rules and conventions which govern the way in which Britain is governed and the relationship between the government and people.²⁰

One of the most important fundamental rights of equality UK is governed by the intersection of few strands of law, the European convention on Human Rights (ECHR), which became directly enforceable in the UK in 2000 as a result of the enactment of the Human Rights Act, 1998 and EU legislation.²¹

The European Union grew out of the European Economic Community which was established by six founding member states through the Treaty of Rome in 1957. Article 157 of the Treaty of Rome provides for a discrimination law, i.e., it ensures equal pay for male and female members for equal work and the same has been interpreted by the ECJ as well. To simplify the equality law, the UK Parliament passed the Equality Act 2010 which replaced the previous legislations.

The ECHR became enforceable in the UK in the year 2000 when it adopted the Human Rights Act, 1998. This Act establishes a bill of rights and freedoms actionable by individuals through the courts.²² Article 14 of the Convention is directly concerned with equality. It

¹⁸ *Wilkes v. Wood*, 1763 19 St Tr 1153.

¹⁹ IP MASSEY, *ADMINISTRATIVE LAW* 56 (7 ed. Eastern Book Company 2008).

²⁰ TURPIN AND ADAM TOMKINS, *BRITISH GOVERNMENT AND THE CONSTITUTION* 78 (6th edn, Cambridge University Press 2007)

²¹ KATE O' REGAN & NICK FRIEDMAN, 'EQUALITY' in TOM GINSBURG AND ROSALIND DIXON, *COMPARATIVE CONSTITUTIONAL LAW* 94 (Edward Elgar Publishing 2011).

²² *Supra* note 11.

prohibits discrimination on the grounds of sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property or other status in respect of the 'enjoyment of the rights and freedoms'.

The UK has its own Human Rights Act, 1998 which, although, incorporates the ECHR provisions in the UK law,²³ is still a part of the UK law. Moreover, the Equality Act of 2010 which replaced the previous legislations of the European Communities treaties with respect to simplify the equality law. Therefore, as far as these two acts are concerned, the position is quite clear.

However, what is important to mention here is that on March 29, 2017, the UK gave notice to the European Council under Article 50 of the Treaty on European Union (TEU) of the UK's intention to leave the EU and the same based on the public opinion. Article 50 provides for a two-year period for the withdrawal to take effect. Accordingly, there will be now negotiations between the UK and the European Commission. Article 50 has never been used before so the UK would be setting a new precedent as there is no clear framework for how it would work.²⁴

Now, the most important piece of UK legislation that would need to be repealed is the European Communities Act, 1972 (ECA), which provides for the supremacy of the EU law. Repealing the ECA will bring an end to the constitutional relationship that exists between EU and UK law.

Although, the same will only be done after the expiry of two year period in order to give effect to Article 50, the Government's intentions seem to be strong enough to repeal the ECA by giving effect to the 'Great Repeal Bill', which will convert all existing EU-derived law into domestic law allowing UK to decide over time what laws it wishes to retain.²⁵

With the clarity on the current situation, the researcher would like to discuss some of the important cases and incidents that took place in the UK that shed light on the Fundamental Rights upholding the Rule of law.

²³ Human Rights Act, 1998, s. 1.

²⁴ Vaughne Miller & Arabella Lang, *Brexit: How does the Article 50 process work?*, HOUSE OF COMMON LIBRARY (Apr 27, 2017), <http://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-7551>.

²⁵ Joosje Hamilton & Andrew Sheftel, *Brexit- UK and EU legal framework*, NORTON ROSE FULBRIGHT (Mar 3, 2017), <http://www.nortonrosefulbright.com/knowledge/publications/136975/brexit-uk-and-eu-legal-framework.html>.

The researcher would now like to reiterate the fact that by now the position is quite clear that the UK constitution imposes no limits upon the authority of lawmakers. The executive branch of government is in effective control of a legislature that has unlimited constitutional authority to make law.

And, the same can be seen by the incident of the UK Parliament passing the Anti-terrorism, Crime and Security Act, 2001 post 9/11 attacks, which allowed the government to imprison (notwithstanding the absence of any criminal charge or trial) suspected foreign terrorists who could not be deported. This regime proved to be highly controversial.²⁶ Even the courts could not strike down an Act of Parliament, even if it infringes upon fundamental constitutional values. However, as per the Human Rights Act, 1998, the courts, in appropriate cases, are authorized to issue a 'declaration of incompatibility', although it remains valid until amended.²⁷

When the people were detained under the abovementioned act and were kept in *Belmarsh* high security prison, the detainees asked the court to rule on whether the Anti-terrorism Act breached their right to liberty, which is one of the rights protected by the Human Rights Act, 1998. The House of Lords by a majority of 8:1 held that the legislation was incompatible with the Human Rights Act, 1998 and since the conditions were not satisfied, if it was not necessary to lock up the nationals it cannot be necessary to lock up the foreigners.²⁸

The *Belmarsh* case is significant today because it clearly demonstrates what Soli Sorabjee himself recognized in a lecture given by him in 2003 that "you cannot declare war on the civil liberties of your people in a war against terrorism."²⁹ This is a landmark case for the fact that it supports liberty and equality, even in times of great national danger. After this, new anti-terrorist measures were passed by Parliament, which respect the principles of a rights based democracy and the new British constitutionality.³⁰

²⁶ MARK ELLIOTT & ROBERT THOMAS, PUBLIC LAW 224 (2 ed. Oxford University Press 2014).

²⁷ *Ibid.*

²⁸ A v. Secretary for the Home Department, [2004] UKHL 56.

²⁹ THE RT. HON. THE LORD WOOLF, A NEW CONSTITUTIONAL CONSENSUS IN THE UNITED KINGDOM in CONSTITUTIONALISM, HUMAN RIGHTS AND THE RULE OF LAW, ESSAYS IN HONOUR OF SOLI J SORABJEE 15 (Universal Law Publishing 2005).

³⁰ *Supra* note 27.

CONSTITUTION, JUDICIARY AND THE RULE OF LAW

The UK Judicial System

As has been discussed above in the Constitutional history segment, UK is made up of several separate jurisdictions. UK does not have a single unified legal system, there is one system for England and Wales, another for Scotland and a third for Northern Ireland. The Supreme Court sits above all of these as the final court of appeal. The Supreme Court also decided the 'devolution issues', that is issues about whether the devolved executive and legislative authorities in Scotland, Wales and Northern Ireland have acted or propose to act within their powers or have failed to comply with any other duty imposed on them.³¹ Earlier, the highest court in the UK was the House of Lords but following the Constitutional Reform Act of 2005, the Supreme Court was established in October 2009 and the Justices were appointed.³²

It is a settled principle in the UK whereby the laws passed by the Parliament are presumed to be constitutional and the court attaches deference in the favour of constitutionality. Moreover, the public opinion helps in maintaining the reasonable balance in the UK.

Judicial Review

The position that was prevalent in the 1600s with respect to Judicial review could be understood with J. Coke's statements in the *Bonham's case*³³ decided in 1610 in which he said that Judicial Review is not followed in UK unlike India and the US except in a few cases where primary legislation is contrary to the law of the EU. However, for administrative actions, Judicial Review is applicable (Wednesbury Principle) but for legislative actions, Judicial Review is not possible because the Parliament is supreme. For the longest time, only administrative decisions were challenged in the court of law by the process of judicial review.

Till recently, the Courts were meant to enforce the will of the Parliament, however this position has been changing with time, not just due to the acts of Parliament itself but also because of the active role that the judiciary has started taking in this respect. Although, many scholars have identified a tension between the rule of law and an absolutely sovereign British

³¹The Supreme Court, *UK Judicial System*, <https://www.supremecourt.uk/about/uk-judicial-system.html>.

³²Press Notice released on 13 December 2010, *The Supreme Court of the UK*, https://www.supremecourt.uk/docs/pr_1013.pdf.

³³Thomas Boham v. College of Physician, 77 Eng Rep 638.

Parliament as in the absence of binding judicial review or a written Constitution, Parliament could arguably abolish settled rights,³⁴ the significant development has taken place with respect to judicial review. There has been express recognition of constitutional rights, coupled with the principle of legality. The rule of law has been the main source of such rights.³⁵

In the case of *Pierson*, Lord Steyn held that “*Parliament does not legislate in a vacuum. Parliament legislates for a liberal democracy based upon the traditions of the common law and unless there is the clearest provision to the contrary, Parliament must be presumed not to legislate contrary to the Rule of law.*”³⁶

As mentioned by the researcher above in this segment, it is the established position in the UK that the Judiciary can only adjudicate the laws and not decide the constitutionality of the laws. But, with the enactment of the Human Rights Act, 1998, the doors for the era of judicial review were opened and the same can be seen in the words of Lord Steyn in the famous *Fox-Hunting case*³⁷ that “*the Human Rights Act has created a new legal order in which the UK assumes obligations to protect fundamental rights towards all individuals within its jurisdiction.*”

So, the position in the UK could be concluded by saying that there constitutionalism in the UK public law discourse has emerged in many different contexts, ranging from the rule of law and judicial review to constitutional culture and political morality.³⁸ The rule of law in UK is certainly treated as an important political principle in the sense that it informs political discourse, it is considered while proposing for new laws.³⁹

³⁴ *Supra* note 26.

³⁵ *Supra* note 27.

³⁶ *R v. Secretary of State for the Home Department*, (2003) 2 AC 115.

³⁷ *Jackson & others v. Attorney General*, [2005] UKHL 56.

³⁸ Jo Eric Khushal Murkens, *Quest for Constitutionalism in UK Public Law Discourse*, OXFORD JOURNAL OF LEGAL STUDIES, (Jul. 15, 2009), <http://www.jstor.org/stable/pdf/27750058.pdf>.

³⁹ *Supra* n 38

CHINA

China is one of the countries with the longest histories in the world.⁴⁰ China, officially the People's Republic of China (PRC), is a unitary sovereign state in East Asia.⁴¹

THE CONSTITUTIONAL HISTORY OF CHINA

The Constitutional history of China could be traced back to the outbreak of the Xinhai revolution in 1911.⁴² China has a feudal system that was gradually reduced after 1840 to a semi-colonial and semi-feudal country.⁴³ The Revolution of 1911, led by Dr. Sun Yat-sen abolished the feudal monarchy and gave birth to the Republic of China.⁴⁴

The Chinese people led by the Communist Party of China in 1949 under the leadership of Mao Zedong, overthrew the rule of imperialism, feudalism and founded the PRC.⁴⁵

With development in the 20th century, self-conscious Constitution making phenomenon was seen in China. The adoption of the Constitution in 1954 was a manifesto which outlined the objectives of the Socialist revolution and plotted the principal paths towards those ends.⁴⁶

In China, various cultural, social, political changes have taken place in the last hundred years and therefore it's difficult to reconstruct a conceptual framework,⁴⁷ however the researcher has tried to give a brief account of the important events of the making of the Constitution. The current Constitution of PRC was adopted by the 5th National People's Congress (NPC) on December 4, 1982 and was further revised in 1988, 1993, 1999 and 2004. Three earlier drafts of 1954, 1975 and 1978 were superseded in turn.⁴⁸

⁴⁰ CONSTITUTION OF PEOPLE'S REPUBLIC OF CHINA, Preamble.

⁴¹ *Encyclopedia Britannica*, <https://www.britannica.com/place/China>.

⁴² Harley Farnsworth MacNair, *The Political History of China under the Republic*, AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE, (Nov. 1930) <http://www.jstor.org/stable/1016556>.

⁴³ *Supra* note 53.

⁴⁴ Jerome Alan Cohen, *China's Changing Constitution*, THE CHINA QUARTERLY, CAMBRIDGE UNIVERSITY PRESS, (Dec. 1978), <http://www.jstor.org/stable/pdf/652647>.

⁴⁵ *Supra* note 53.

⁴⁶ H. Arthur Steiner, *The Constitution of the PRC*, World Affairs, SAGE PUBLICATIONS, (Fall, 1955), <http://www.jstor.org/stable/pdf/20669098>.

⁴⁷ Vincent Shen, *In Search of Modernity and Beyond- Development of Philosophy in the Republic of China in the last hundred years*, CHINA REVIEW INTERNATIONAL, UNIVERSITY OF HAWAII PRESS, (2012) <http://www.jstor.org/stable/pdf/43491728>.

⁴⁸ *Supra* note 57.

CONSTITUTION OF THE PRC AND THE FUNDAMENTAL RIGHTS

The Constitution of the PRC encompasses an extensive scope covering all kinds of personal, economic, social, civil and political rights including the right to equality, right to freedom of speech and expression. The Government of PRC also claims that the people are enjoying these rights in real life.⁴⁹

However, what is important for us to understand at this juncture is that how far does China appreciate the rights envisaged in the Constitution in order to establish the rule of law.

For this we should understand what the experts have to say in this regard and as per the legal experts and scholars, the Chinese Constitution proclaims the right of citizens, but in practice does not support those rights. The Chinese constitution cannot be used as the basis to challenge the infringement of citizen's rights.⁵⁰

But, as the times are changing there is little hope that China would also change and establish a just rule of law in the near future. For instance, in the case of *Weibo* where the Courts invoked the foreign concept of “due process” whereby the issue that had arisen in this case was whether Weibo which is a microblogging site (China's version of Twitter) could be used as a medium to express criticism or not? The Beijing No.1 court declared that Weibo is a space for free expression, protected by the Constitution of the PRC and that Weibo could be used as a medium to express criticism because it exercised “a supervisory role that is positive for society”.⁵¹

Professor He Haibo had discussed one instance, which could be considered as a major development in the field of establishment of rule of law in China. In his article published in the *Columbia Journal of Asian Law*, he had mentioned a case whereby local government agencies had transferred property without giving notice to plaintiffs with existing rights. The court invalidated the transfer for lack of notice even though it did not indicate that law required notice. Professor He Haibo acknowledged that references to “due process” are rare,

⁴⁹ Human Rights in China, *Embassy of the People's Republic of China in the Republic of Lithuania*, (2015), <http://lt.china-embassy.org/eng/zt/zfbps/t125236.htm>.

⁵⁰ Thomas E. Kellogg & Keith Hand, *China Brief: NPCSC: The Vanguard of China's Constitution?* (Feb. 4, 2008), <https://jamestown.org/program/npcsc-the-vanguard-of-chinas-constitution>.

⁵¹ Stanley Lubman, *Citizen's Rights, The Constitution and the Courts, China Real Time Report*, (Sep. 26, 2011), <https://blogs.wsj.com/chinarealtime/2011/09/26/citizens'-rights-the-constitution-the-courts.htm>.

but he is of the view that procedural legality requirements have strengthened in China⁵² which in a way effectively establishes the rights of the citizens when read with the rule of law.

CONSTITUTION, JUDICIARY AND THE RULE OF LAW

As far as the Rule of law and the Judiciary is concerned, it is an established principle that independence of Judiciary is one of the major requirements for establishing the principle of rule of law.

The Chinese Judicial System

China's judicial system refers to people's court system. It institutionally comprises of three parts: People's Court System, the People's Procuratorate System, the Public Security System. In a broad sense, judicial structure does not only refer to courts, but also to Procuratorates and Public Security Organs.⁵³

Independence of the Judiciary: Present or not?

Articles 126 of the PRC Constitution envisages that the People's court exercise judicial power independently, in accordance with the provisions of the law, and are not subject to interference by any administrative organ, public organization or individual.⁵⁴

The Constitution proclaims the independent judicial power as per Article 126 but whether it is followed or not is discussed in the following section.

As per China's Constitution and the statute of the Judiciary, the Supreme People's Court is the highest judicial organ of the country.⁵⁵ So, once a decision has been passed by the Supreme People's Court, it cannot be further questioned unless the national judicial supervision body, the Supreme People's Procuratorate challenges the judicial decisions of the Supreme People's Court. This challenge would result in de novo trial against the final

⁵² He Haibo, *The Dawn of the Due Process Principle in China*, COLUMBIA JOURNAL OF ASIAN LAW 54 (2008).

⁵³ *Supra* note 65.

⁵⁴ CONSTITUTION OF PEOPLE'S REPUBLIC OF CHINA, 1982, art. 126.

⁵⁵ CONSTITUTION OF PEOPLE'S REPUBLIC OF CHINA, 1982, art. 128.

judgment. This shows that the Procuratorate is dominant over the judiciary and for this reason independence of Judiciary is not fully established in the functioning of the Chinese legal system. Moreover, according to the judicial interpretation made by the Supreme People's Court, all levels of courts must accept the supervision of the People's Congress. This has paved the way for the People's Congresses to interfere with the activities of the judiciary and also to 'supervise' individual judicial cases beyond what has been permitted by law.⁵⁶

Because of the supervision of the Supreme People's Court by outside bodies, the judicial body finds it hard to resist external interference by legislative bodies. Under such circumstances, the independence of the Judiciary cannot be established.⁵⁷

Judicial Review

Unlike most legal systems, the Chinese legal system vests the power of constitutional review not in courts, but in the legislature. According to the PRC Constitution, National People's Congress and its standing committee have the power to review whether laws or activities violate the Constitution.⁵⁸ China lacks the basic elements that strengthen the rule of law, which are the independence of Judiciary and the power to judicially reviewing the constitutionality of the laws.⁵⁹

When we see China today, i.e., in the time of Xi Jinping as the ultimate leader of the CCP, a new slogan for the system of governance has come up which is certainly not the principle of Rule of law but the principle of 'Governing the Nation in Accord with the law' a.k.a. 'yifa zhiguo'. As per the legal scholar, Susan Trevaskes, Xi Jinping's 'yifa zhiguo' may lead to better transparency and accountability. But, this concept will not promote improvement in the relation between the government and the people. This is because the purpose of 'yifa zhiguo' is to promote the idea that the law is a manifestation of the people's will and interest, and the party exists in order to protect the people's interests.⁶⁰

⁵⁶ Ji Weidong, *The Judicial Reform in China: The Status Quo and Future Directions*, INDIAN JOURNAL OF GLOBAL LEGAL STUDIES, INDIANA UNIVERSITY PRESS, (2013), <http://www.jstor.org/stable/pdf/10.2979/indjglolegstu.20.1.185>.

⁵⁷ Susan Finder, *The Supreme People's Court of the People's Republic of China*, J. CHINESE L. 85 (1993).

⁵⁸ Edwards Wong & Jonathan Ansfield, *Reforms aim to get China to live up to own Constitution*, N.Y. TIMES, Feb. 4, 2013.

⁵⁹ Jeffrey N. Wasserstrom, *China in the 21st century*, OXFORD UNIVERSITY PRESS 232 (2010).

⁶⁰ *ibid.*

INDIA

India has been hailed as the world's largest and most vibrant democracy and the constitutional history of India can be said to be equally vibrant. The Indian Constitution is a product of a revolutionary demand of the people of the country for a Constitution.⁶¹

THE CONSTITUTIONAL HISTORY OF INDIA

The making of the Indian Constitution was a detailed process and to give a brief account of those arrangements is quite difficult to do, however the researcher has tried to give a brief description of the same as it is pertinent to have a basic knowledge about the system that prevailed before the Indian Constitution came into being in order to appreciate the developments that took place.

The British took over the governance of India from the East India Company in 1858, after the unsuccessful attempt of the Indians to overthrow that regime in 1857. And, the major portion of the India was under the British rule from 1857 to 1947. Several developments took place within this time frame and several legislations were passed including the Government of India Act 1858, Indian Councils Act 1861, Indian Councils Act 1892, Indian Councils Act 1909, Government of India Act 1919, Government of India Act 1935 and the Indian Independence Act 1947. These legislations also acted as major sources for framing of the Constitution.

The Indian Independence Act 1947 had already elected the Constituent Assembly in 1946 as a sovereign body free from all limitations.⁶² The Assembly appointed several committees, out of which Drafting Committee chaired by Dr. B.R. Ambedkar with the help of B.N. Rau undertook the task of drafting the Constitution, and steering it through the Assembly for its adoption on 26th November 1949.⁶³

⁶¹ W.A.J. Archhold, *Outlines of Constitutional History*, THE AMERICAN POLITICAL SCIENCE REVIEW, (Jun. 1976), <http://www.jstor.org/stable/pdf/1959696.pdf>.

⁶² *Supra* note 89.

⁶³ H.R. KHANNA, MAKING OF INDIA'S CONSTITUTION 45 (2 ed., Eastern Book Company 2008).

DEVELOPMENT OF THE RULE OF LAW

In India, the concept of rule of law can be traced back to the Upanishads, which means that even before 1950s, the Rule of law was prevalent.⁶⁴

The scheme of the Indian Constitution is based upon the concept of rule of law. The framers of the Constitution were well familiar with the postulates of rule of law as propounded by Dicey and as modified in its application to British India.⁶⁵

FUNDAMENTAL RIGHTS AND THE DPSP

The Fundamental rights and the DPSP enshrined under Part III and Part IV of the Constitution respectively concretize the lofty goals of justice, equality, fraternity and the dignity of the individual set out in the Preamble.⁶⁶ These rights are not absolute and are subject to reasonable restrictions imposed by the state.

Article 13- Laws inconsistent with or in derogation with Fundamental Rights

The main object of this article is to secure the Constitution in regard to fundamental rights. This article also upholds the power of judicial review by the courts.

Article 14 – Equality before law

According to this article, the state shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

Article 19- Protection of certain rights regarding Freedom of Speech, etc.

This article guarantees six fundamental rights to the citizens of India which are exercisable by them throughout and in all parts of the territory of India.

Article 20- Protection in respect of conviction of offences

⁶⁴ PRIYA NATH SEN, GENERAL PRINCIPLES OF HINDU JURISPRUDENCE 12 (Allahabad Law Agency 1984).

⁶⁵ Upendra Baxi, *The Rule of law in India in Revista Internacional de Derechos Humanos, São Paulo*, UNIVERSITY OF WARWICK, (2007) http://socialsciences.scielo.org/pdf/s_sur/v3nse/scs_a01.pdf.

⁶⁶ S.P. SATHE & SATYA NARAYAN, LIBERTY, EQUALITY & JUSTICE 33 (Eastern Book Company 2003).

This article provides protection to the accused persons against ex-post facto law,⁶⁷ double jeopardy⁶⁸ and self-incrimination.⁶⁹

Article 21- Protection of life and personal liberty

According to this article, no person shall be deprived of his life and liberty except according to procedure established by law. This Article has found its place along with the Articles 19, 20 and 22 in the heading 'Right to Freedom' under the Part III of the Constitution that deals with the Fundamental Rights.

The scope of the right to personal liberty received two-dimensional judicial approach in the *Gopalan*⁷⁰ case, which was the very first case on personal liberty in the Supreme Court of India immediately after the commencement of the Constitution of India. The majority bench adopted a restricted approach to Article 21.

In the year 1976, during the time of national emergency, in the case of *ADM Jabalput v. Shivakant Shukla*,⁷¹ the question before the Court was whether, in view of the Presidential Order dated 27 June, 1975 issued under Article 359(1) a petition under Article 226 before a High Court for a writ of habeas corpus to enforce the right to personal liberty of a person detained under the Maintenance of Internal Security Act (MISA), 1971 was maintainable. The nine High Courts of the country held that the petitioners could not move the court to enforce their Fundamental Rights under Article 21. The Supreme Court held that the no person had any locus standi to move any writ petition under Article 226 before a High Court or any other court for habeas corpus.

But, *J. H.R. Khanna* gave his dissenting opinion and held that in spite of the Presidential Order, a detenu could challenge his detention. According to him Article 21 was not the sole repository of the right to life and personal liberty because it was not a gift of the Constitution rather it existed and was in force before the drafting of the constitution.

⁶⁷ CONSTITUTION OF INDIA, 1950, art.20(1).

⁶⁸ CONSTITUTION OF INDIA, 1950, art.20(2).

⁶⁹ CONSTITUTION OF INDIA, 1950, art.20(3).

⁷⁰ *A.K. Gopalan v. State of Madras*, AIR 1950 SC 27.

⁷¹ AIR 1976 SC 1207.

The 44th Constitutional amendment⁷² was passed in order to remove partially the distortions that were introduced into the Constitution by 42nd Amendment and it was held that enforcement of rights under Article 20 and 21 can never be suspended. It restored the secular and democratic ideals present in the Constitution and upheld the rule of law.

CONSTITUTION, JUDICIARY AND THE RULE OF LAW

The Indian Judiciary has played an instrumental role in shaping rule of Law in India. By adopting a positive approach and dynamically interpreting the constitutional provisions, the courts have ensured that the rule of Law and respect for citizens' rights do not remain only on paper but are incorporated in spirit too.

As has been discussed above the case of *ADM Jabalpur*⁷³, although is considered as a black mark on the Indian judiciary, it is this case where J. Khanna held that: "*Rule of Law is the antithesis of arbitrariness and the 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.*"

The first case which stirred a debate about rule of Law was *Shankari Prasad v Union of India*,⁷⁴ where the question of amendability of fundamental rights arose. The issue was finally settled in the case of *Kesavananda Bharati v State of Kerala*.⁷⁵ In this case, the Hon'ble Supreme Court held that the rule of Law is the "basic structure" of the Constitution. The Hon'ble Supreme Court by majority overruled the decision given in *Golak Nath's case*⁷⁶ and held that Parliament has wide powers of amending the Constitution and it extends to all the Articles, but the amending power is not unlimited and does not include the power to destroy or abrogate the basic feature or framework of the Constitution.

⁷² The 44th Constitutional Amendment Act, 1978 <http://indiacode.nic.in/coiweb/amend/amend44.htm>.

⁷³ *Supra* note 107.

⁷⁴ AIR 1951 SC 1461.

⁷⁵ AIR 1973 SC 1461.

⁷⁶ *Golaknath v. State of Punjab*, 1967 SCR(2)762.

In the case of *Indira Nehru Gandhi v Raj Narayan*⁷⁷ the Apex Court held, “rule of Law embodied in Article 14 of the Constitution is the basic feature of the Indian Constitution and hence it cannot be destroyed even by an amendment of the Constitution under Article 368 of the Constitution.”

The concept of right to life and personal liberty in the Indian Constitution has been the target of many legal battles starting from the case of *A.K. Gopalan*⁷⁸ to the case of Justice K.S. Puttaswamy v Union of India⁷⁹. The Supreme Court over these years has brought about significant changes in interpreting the provision of Article 21 of the Indian Constitution while upholding the rule of law.

It is only with the decision in *Maneka Gandhi*⁸⁰ that a new era of development by way of judicial activism was ushered in. Now with the decision of the Hon’ble court in the case of Justice K.S. Puttaswamy v. Union of India⁸¹, Article 21 has brought a new dimension to personal liberty, which will lead to future development of Indian jurisprudence to incorporate new rights into the Constitution. To give effect to all the fundamental rights, Article 32 is of utmost importance as it gives the right to move to the Supreme Court whenever any fundamental right gets violated.

Judicial Review

The Indian Constitution directs and facilitates the independence of the Judiciary.⁸² In the case of *Maneka Gandhi*,⁸³ the concept of judicial review acquired wider dimensions.

It could be conclusively concluded that in India, the rule of law promotes the rights and lofty ideals enshrined in Part III and Part IV of the Constitution and draws its sustenance from the higher judiciary, which upholds the constitutionality of laws keeping in view the philosophy of these ideals.⁸⁴

⁷⁷ 1975 SCC (2) 159.

⁷⁸ *Supra* note 103.

⁷⁹ WP Civil No. 494 of 2012.

⁸⁰ *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248.

⁸¹ *Supra* note 117.

⁸² MP Singh, *Securing the Independence of the Judiciary- The Indian Experience*, IND INT’L & COMP LAW REVIEW, 92 (2000).

⁸³ *Supra* note 118.

⁸⁴ *Supra* note 89.

MAPPING THE DIVERGENCE: RULE OF LAW IN THE UK, CHINA AND INDIA

Comparison

These three countries are considered to be the powerful economies and are doing really well at the global level. In this segment, the researcher would map the divergence with regard to the concept of the rule law, the degree of its applicability in these countries in the present scenario.

With the understanding of the constitutional history and the constitutional principles as discussed in the above segment, it could be said that the rule of law is the main elusive of the main constitutional principles in the UK. The concept of the rule of law was developed over the centuries as a brake on arbitrary power and this concept has a lot to owe to Professor Dicey for the further formulation of this concept. Although, the Parliament is sovereign there, it always tries to legislate in accordance with the rule of law. The presence of constitutionalism in UK has been evolved by rule of law and the rule of law is certainly treated as an important principle in the UK constitution and is given due consideration in the public law discourse.

As far as China is concerned, being one of the most powerful countries in the world, it certainly does not have a powerful rule of law regime. The researcher says this because the Chinese Constitution proclaims that the rule of law is followed, however these are just false claims.

To substantiate further on this point, the researcher would like mention that the Chinese system lacks independent judicial power (discussed above in the Chinese segment) which is of utmost importance to uphold the rule of law. What is required is not a change in the regime but better implementation of the Constitutional provisions, which in effect, can establish the rule of law. China today, in the time of Xi Jinping as the ultimate leader of the CCP, follows the slogan which is certainly not the principle of Rule of law but the principle of 'Governing the Nation in Accord with the law' a.k.a. '*yifa zhiguo*'. The researcher is of the view that this new concept and slogan will not promote improvement in the relation between the

government and the people because as per this slogan, the people cannot enjoy any rights and interests outside the leadership of the Party whose role is to develop and protect (Party-initiated) rights and interests. On the contrary what is required is to promote the idea that the law is a manifestation of the people's will and interest, and the party exists in order to protect the people's interests, only then the rule of law would be established.

In India, the conception and notion of the rule of law has been in existence since time immemorial. The Indian Supreme Court serves not just for delivering justice but also to modulate the life of the nation. Although, on several occasions there had been unsatisfactory application of the rule of law, as was seen in the case of *ADM Jabalpur*⁸⁵, what is required is the fundamental reexamination of the approaches in order to enforce the already prevalent rule of law.

With this comparison, the researcher would like to move on the Conclusion of this paper.

CONCLUSION

The paper discussed the evolution and philosophical foundation of the concept in the three countries and with the help of the above mentioned comparison of the current scenarios, it could be conclusively said that China still has a long way to go until it reaches the rule of law unlike the United Kingdom, where the rule of law is an established concept, which plays a major role in strengthening the relationship between the government and the people.

In India, the rule of law is prevalent, however in the recent times, there has been deterioration in the applicability of the rule of law. For instance, the rule of law goes out of window when politics is not treated as an instrument for public welfare but as an instrument for private gain. The increasing competitiveness in Indian politics has trampled upon the rule of law time and again.

When the Lau Prasad Yadav's misrule in Bihar ended, it was greeted with hope that a new era of public service may begin with Nitish Kumar's government. However, it is depressing

⁸⁵ *Supra* note 107.

to find out that MLAs of Nitish Kumar's government have been served with non-bailable warrant by the courts. In the words of Mr. Somnath Chatterjee, the former Lok Sabha Speaker, who, while delivering the Bhimsen Sachar Memorial Lecture said, "*Large Sections of the people are greatly worried about the nexus between crime and politics as well administration in the country. I am saddened to observe that politics in the country has to a large extent, become criminalized and crime has become politicized.*"⁸⁶ It implies that there is hardly an optimistic future for the rule of law.

With this example that researcher is trying to put forth a point that the just rule of law would be established when all the organs of the government work together to achieve this goal.

The Indian judiciary is well regarded domestically and internationally for its progressive role in interpreting various provisions of the Constitution with a view to promoting social justice and upholding the rule of law and the same has been recently done in the cases of *Shayara Bano*⁸⁷ and *Justice K.S. Puttaswamy*.⁸⁸

As per the case of *Arundhati Roy*,⁸⁹ the Constitution has its foundation in the concept of rule of law and that it enshrines and guarantees rule of law. The Constitution is supreme and guarantees the applicability of the rule of law but unless, all the organs of the government, political parties of the country, and citizens of the nation while choosing their leaders dedicate themselves to this cause, the rule of law which is prevalent could not be strengthened. What is required is the observance of rules by all institutions and stakeholders of the democracy which can act as a key to the maintenance of rule of law that will revive the same in the society again.

⁸⁶ National Human Rights Commission, New Delhi <http://nhrc.nic.in/speeches.htm>.

⁸⁷ *Shayara Bano v. UOI*, WP(c) No. 118 of 2016.

⁸⁸ *Supra* note 117.

⁸⁹ *Arundhati Roy*, In re, AIR 2002 SC 1375.