



The Expansive Domain of Rule of Law: Arguing from the International Legal Framework

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Abstract

Rule of law binds humankind together, or at least, is expected to do so. In an attempt to keep the sanctity of the UN Charter, the San Francisco conference and the vision which made way for the modern contemporary world, rule of law is the quintessential word. But, has there been any realization on the importance of the principle, with regard to the international legal regime is the question that propels thought. Ever since the conception of the term 'rule of law', there have been enormous scholarly explorations on its nuances. Through this paper, the author tries to understand in depth, how the practical implications of the same are felt across different sectors of the mechanisms of law. Be it in the international setting or the domestic set-up with the UN framework, the author outlines the significance of rule of law at work. The paper also attempts to answer some basic questions with respect to the administrators of rule of law from an international legal platform, the instruments that propel rule of law and explores the human rights dimensions to this.

Keywords: Human rights, Derogation, Jus Cogens, International Law, Right to Protect, United Nation

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1. Introduction

Rule of law is the universal language of change where law acts as the instrument for this change. It is highest manifestation of human rights that can be conceived, especially in a democratic set up. War on terror has modified the definition of rule of law, especially because the series of events that have unfolded in the past years subsequent to it. The idea has traversed beyond the narrow understanding of governmental authorities and their discretionary powers as initially conceived to a much broad idea of transnational rule of law, wherein the contribution of the UN, treaty bodies and regional bodies is of immense significance. The Indian model of governance too has implemented this idea appropriately in a wider sense. However, does it require re-visitation? Has the conceptualization of rule of law changed in the Indian context? The paper shall aim to find these answers and bring to light the renewed version of rule of law as conceived by the author.

2. Rule of Law

James Madison very aptly states that “If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal control would be necessary”². To bring harmony between the desire of man and controllability of government certain basic principles are required to which rule of law suffices the need. Rule of law being a dynamic concept³ takes care of the needs of the evolving and changing society. What we need is not only mere principles which should only to philosophize, but certain guidelines which would direct and be a guiding principle for the governing as well as the governed. The aim which rule of law foresees is to bring about appropriate order in the society. Rule of law is justified as a dynamic concept because it takes the color of the society without destroying the essence. For the naturalists, it is the natural law, for the positivists, it is the positive law, for the ancient India, it was located in *Dharma*⁴. It shows that

² James Madison, Federalist Papers, Paper No.51.

³ I.P. MASSEY, ADMINISTRATIVE LAW 23 (2012).

⁴ I.P. Massey, Administrative Law 27 (1995).

albeit the *status quo* of rule of law changes with the change but the grundnorm remains the same.

The creators of the concept of rule of law can be traced back to Edward Coke, but significant contribution has been made by revered A.V. Dicey. Dicey has contributed by giving three meanings to this concept that has remarkable impact in its conceptualization and development;

1. Supremacy of laws: Absence of discretionary power in the hands of the government officials which has high propensity of being misused and leads to uncontrolled and unbridled power. Discretion is the root cause for most of human rights violations and controlling this uncontrollable urge is provided under this principle.
2. Equality of laws: whereby no individual will be preferred over the other and thus human rights and dignity of every individual will be protected. This is characterized by absence of special privileges, all persons be subjected to ordinary court proceedings and everyone should be governed by the legislature leaving no scope for alteration of the common procedure to the disadvantage of any.
3. Upholding legal spirit: wherein rights of the people should flow from the customs and traditions of the country towards protecting human rights in a culturally relative pattern best suited to the conditions of the region in question.

2.1. What is Rule of Law?

Rule of law is the supreme manifestation of human civilization and is a new lingua franca of global moral thought.⁵

It acts as the basic tenet for the society and its continued functioning. The term rule of law is derived from *la principe de legalite* which points towards a government which is based on principles of law and not of man⁶. Justice Edward Coke, who is traced to be the originator of the concept was of the belief that Kings must be under

⁵I.P. Massey, Administrative Law 27 (1995).

⁶I.P. Massey, Administrative Law 28 (1995).

the god as well as the law. In essence he vindicated the supremacy of law over the pretensions of the executives⁷.

The term rule of law has been assigned with two meanings:

- a. Formalistic: refers to the organized power instead of being ruled by one tyrant.
- b. Ideological: refers to the relationship shared by the government with its citizens in lieu of the social contract that governs this relationship.⁸

Approaches to understanding every concept is critical, because there can be no one interpretation of a concept. Rule of law, too has approaches to be followed. The right-wing approach is geared towards 'desirable developmental objective' like protection of property rights and foreign investments; whereas left wing approach observes this as a means towards fulfilment of 'fair and equal treatment for all' and the centrist approach aims for a 'technocratic ideal' with predominance of good governance⁹. In the discussion in this research, the last approach seems the most appropriate in ensuring adequate human rights protection.

2.2. Who maintains Rule of law?

Rule of law as an idea and an important element of good governance primarily makes the government responsible for its implementation. However, as a principle which facilitates working of the entire governmental framework, it is all the three branches of the government, i.e. legislature, executive and judiciary are bound by it. The facets of rule of law, as elaborated above are equally applicable for each of them, with modifications as per their functioning and the features it is enshrined with.

At the same time, the responsibility of maintenance of international rule of law (as discussed below) is upon the various international bodies, organizations, authorities and institutions. Some of them can be identified as:

⁷ I.P. Massey, *Administrative Law* 26 (1995).

⁸ I.P. Massey, *Administrative Law* 30 (1995).

⁹ Chan Sek Keong, *The Courts and The 'Rule of Law' In Singapore*, Singapore Journal of Legal Studies 209, 211 (2012).

- **States-** the primary concern for protecting rule of law in each country rests upon the States and their governments. After all, the concept was propounded in the context of State's power with the intention to halt the growing uncontrolled power of the States. Rule of law is thus equally applicable to all the concerned branches of the government in an attempt to secure a favorable system of governance which respects human rights and human dignity. UN may have the functional capacity to fulfill the roles envisaged- indeed, the second of these functions, conflict resolution through its political organs or its principal judicial organ- but it is not a sovereign body¹⁰ like States and thus its resolutions and reports derive legal force only with the voluntary assent of the nations, many a times collectively. Much of the discussion has been dealt with in the subsequent sections.
- **United Nations-** is the guardian of international law regime and is the custodian of human rights principles. It ensures balance of rule of law vis-à-vis human rights and excessive governmental control. Chapter 3 deals exclusively with the contribution of UN in regard to rule of law.
- **International Court of Justice-** the international court adorned with the power of adjudication of international disputes in consonance to the principles recognized by the UN Charter in an attempt to preserve and promote human rights, peace and security¹¹, which in essence is preservation of rule of law. The court has decided on several contentious issues like *Kosovo crisis*¹², *Nicaragua vs. USA*¹³, *Corfu Channel case*¹⁴, *Asylum case*¹⁵ among many others which have uphold

¹⁰ Hurst Hannum, et. al, International Human Rights Problems of Law, Policy and Practice 484 (2011).

¹¹ Art. 1, UN Charter 1945.

¹² Accordance with international law of the unilateral declaration of independence in respect of Kosovo, Advisory opinion, ICJ 423 (ICJ 2010).

¹³ The Republic of Nicaragua V. The United States of America, (1986) ICJ 1.

¹⁴ United Kingdom of Great Britain and Northern Ireland V. Albania, [1949] ICJ Rep 4.

¹⁵ Columbia V. Peru, [1950] ICJ Rep 266.

rule of law and most of these have attempted to protect human rights apart from deciding on various other aspects of rule of law in an effort to prohibit the uncontrolled powers in line with rule of law.

- **International Criminal Court-** the world criminal court established by the nations in a concerted effort through the Rome treaty in 2002 has been mandated to protect gross human rights violations through recognition of certain crimes as international crimes under Art.5¹⁶. The establishment in itself recognizes the commitment of the international community for maintaining rule of law and giving way to supremacy of law to preserve peace and stability. Despite being comparatively a new organization, the court has significantly contributed to safeguarding of human rights, bringing peace in conflict laden areas and striving to bring deterrent effect by gravely penalizing the perpetrators under individual criminal responsibility. The *Al-Basheer case*¹⁷, *Ongwen case*¹⁸, *Robert Mugabe* among others which have ensured maintenance of rule of law and tried reducing anarchy and bringing back stability. This institution is an appropriate example of the convergence of human rights and rule of law in the truest sense.
- **Ad-hoc tribunals-** the greatest contribution that has been made by the UN Security Council towards protection of human rights in line with its mandate of international peace and security. Tribunals like International Criminal Tribunal for Rwanda (ICTR) and International Criminal Tribunal for the former Yugoslavia (ICTY) have made immense efforts to contribute to the jurisprudence of international rule of law, whereby supremacy of the laws have time and again been reiterated and the purpose of their establishment has been to ensure human rights be fortified. The initiation of such tribunals can be traced back to the Nuremberg Trials wherein

¹⁶ Rome Statute of the International Criminal Court, Article 5(1), 1998 (Rome Statute).

¹⁷ The Prosecutor V. Omar Hassan Ahmad Al-Bashir, ICC-02/05-01/09.

¹⁸ The Prosecutor v. Dominic Ongwen, ICC-02/04-01/15.

restoration of the rule of law was envisaged and adequately bright about. The post world war II war zones were marred by conflicts and distorted rule of law and in order to bring about coherence with human rights.

- **Hybrid Courts-** an innovation of the domestic and international judicial forums. Courts like African Extraordinary Chambers (AEC), Extraordinary Chambers in the Courts of Cambodia (ECCC), Special Court for Sierra Leone (SCSL), Special Courts for Bangladesh are examples of such courts which contribute uniquely to the development of jurisprudence in protection of human rights attempting to meet rule of law situations, both at domestic and international level. These courts signify the importance of rule of law at both levels and is a perfect illustration for rule of law and human rights protection mechanism.
- **Regional human rights courts-** are undoubtedly the most important element of the contemporary understanding of rule of law. Chapter IV has discussed this in detail.

2.3. Rule of Law and its relation to Human Rights

Rule of law is a necessary facet of good governance¹⁹ that aspires to respect the dignity of human beings²⁰- the cornerstone of human rights jurisprudence for dignity defines the respect accorded to human rights, whose blatant disregard means societal disharmony and consequently eruption of anarchic state of nature destroying the ideal state of rule of law. Thus, there is no rule of law within a society if there is no respect and protection of human rights and vice-versa. The primary purpose which the concept aims to seek is the protection of human rights which can be fulfilled with utmost sincerity if and only if there is maintenance and adherence to the principles of rule of law. Rule of law, thus, is the implementation

¹⁹ Anshu Jain, *Good Governance And Right To Information: A Perspective*, 54(4) JOURNAL OF THE INDIAN LAW INSTITUTE 506, 507 (2012).

²⁰ JOSEPH RAZ, *THE AUTHORITY OF LAW* 221 (1980).

mechanism through which the principle is turned into a reality²¹ and the ultimate goal of legal and social order are maintained²².

Both rule of law and human rights are intertwined and are inseparable from each other, wherein rule of law is the means to the end of achieving protection of human rights and the latter helps to maintain the *status quo* of the former. It ensures that when there are human rights preserved, there definitely is existence of rule of law. Rule of law assures the establishment of redressal mechanisms and it is this mechanism that operates in a manner incorporating the principle of rule of law to render justice. It is often opined that both these elements are two sides of the same coin based on the idea of freedom to live with dignity.

It is of much significance that what was once thought to be exclusively an element of domestic governments has been considered and accepted in the international platform and today when nations emphasize upon internal rule of law, consequently its recognition of the international rule of law is attracted and vice-versa²³. However, the mere existence of rule of law as a concept is not enough, it requires laws and policies to be framed and more importantly effectively implemented because strengthening of the institutions, whether national or international is very important, because success of adherence to rule of law is effectuated with the authorities implementing it.

3. Rule of Law and Derogation

Derogation is a justifiable response to uncertain events to restrict certain rights temporarily- the essence of restrictions. It basically to preserve the *status quo* and peace amongst the citizens within the nation. This essentially involves the states from temporarily negating certain derogable rights like right to move in and out of the

²¹ UN and Rule of Law, Rule of Law and Human Rights (Sept. 02, 2018), <https://www.un.org/ruleoflaw/rule-of-law-and-human-rights/>.

²² THOMAS WEATHERALL, *JUS COGENS INTERNATIONAL LAW AND SOCIAL CONTRACT* 41 (2015).

²³ UN Secretary General Report, *In larger freedom: towards development, security and human rights for all*, ¶135, UN Doc. A/59/2005 (March 21, 2005).

country or right²⁴ to peaceful assembly²⁵ in times of conflict in order to ensure maintenance of human rights through the mechanism of rule of law.

The essence of imposition of derogation is to shrink the individual rights and increase the executive duties, especially when there is external threat and the threat is imminent²⁶ which has the capacity to endanger rule of law and human rights situation of the nation questioning the territorial integrity and existence of basic functioning of these entities²⁷. The emergencies imposed in India can be taken as illustrations to this effect, whereby it can be observed that the rule of law had deteriorated and anarchy was commonplace that necessitated such imposition. This restricted, but not reduced certain human rights to take control of the lawlessness that ensued. The working of imposition of derogation takes place in this manner that assures human rights protection and rule of law being maintained. The underlying principle of this notion is based on the presumption that such derogation shall be lifted once the emergency is lifted in order to ensure that excesses of rule of law is not effected.

In order to effectuate derogation during emergency in any country there is requirement to adhere to two principles, i.e. Necessity and Proportionality. The adherence to these principles portray the nature of derogation that is amenable to the essentials of rule of law propagates security of human rights. Art. 4 ICCPR lays down the conditionality with inculcation of these principles within which lawfully emergency can be declared that will be in adherence to rule of law and shall aid human rights protection.

4. Rule of Law and Customary International Law

Customary rules of international law comprise of certain practices of nations (state practice) to which all nations feel obligated to follow (*opinion juris et necessitas*) in an attempt to maintain international

²⁴ Art. 12, ICCPR.

²⁵ Art. 21, ICCPR.

²⁶ *Lawless vs. Ireland*, [1961] ECHR 2.

²⁷ Principle 39, *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, 1984.

order and decorum- peace and security of and among the nations²⁸. Most of the rules of customary international law are aimed at preserving human rights. The fact that it aims to protect human rights and is being recognized by the international community portrays the international realization of rule of law. The invocation of such rules limits the powers of the government from using it unfettered ensuring maintenance of the legal spirit²⁹ by propagating human rights for the nationals.

The Martens' Clause which provided since 1899 that aspects not covered by the Conventions, be governed by the 'laws of humanity and by the dictates of public conscience' is evidence of the international rule of law that has been in vogue for times immemorial. The material sources of custom are numerous and include press releases, official manuals, policy statements, etc.³⁰ which point at the rule of law that is being attempted to be achieved because these sources ultimately make them binding that cannot be derogated since it forms a part of the international custom. Thus, these forms restrict the arbitrariness of power ensuring human rights protection and upholding the legal spirit.

Additionally, the Hague Conference has considered this to be a *jus cogens*³¹ and thus the impact (as discussed below) shall follow. This essentially means that these rules or laws are non-derogable in nature and it has immense impact in preservation of human rights.

5. Rule of Law and Jus Cogens

Jus cogens, the compelling law with its Roman origin³² accounts for being the supreme law which cannot be derogated at any instance and certainly cannot be modified by any treaty or ordinary customary international law³³. Accordingly, the essence of human

²⁸ Art. 1, UN Charter, 1945.

²⁹ A.V. DICEY, LAW OF THE CONSTITUTION 145 (1915).

³⁰ Ian Brownlie, Principles of Public International Law 6 (2008).

³¹ Manoj Kumar Sinha, Implementation of Basic Human Rights 25 (2013).

³² Manfred Lachs, *The Development and General Trends of International Law in our Time* 169 RECUEIL DES COURS 202 (1980); see JERZY SZTUCKI, JUS COGENS AND THE VIENNA CONVENTIONS ON THE LAW OF TREATIES 9 (1974).

³³ Manoj Kumar Sinha, Implementation of Basic Human Rights 20 (2013).

rights that is sought to be protected through rule of law is effectuated by the idea of *jus cogens* that is aptly amenable to the elements of rule of law.

Formally, *jus cogens* constitutes a form of public order by delineating the boundaries within which positive law may be concluded.³⁴ It is a principle that has been universally accepted and guides the municipal law regimes of every nation attempting to limit the excesses of the governmental control over the people. Therefore, it has a direct nexus with the concept of rule of law as envisaged by Dicey and others. The distinctive feature of this lies in its degree of seriousness attached therewith and the impact of non-adherence that comes about with sanctions of varied kinds by the international community.

However, it is very pertinent to note that not all rules or practices have been assigned the status of *jus cogens* because the severity it is attached with, cannot be loosely understood. Therefore, considering the nature of crimes of genocide³⁵, apartheid, torture³⁶ slavery, murder or disappearances, arbitrary detention and systematic racial discrimination³⁷, these have been narrowly recognized to form part of *jus cogens*. This propagates the notion of protection of human rights from the gravest violations possible through the mechanism of rule of law by limiting the governments to undertake such actions which are liable to breach the basic tenets of rule of law. These obligations upon states is justified on account of the social contract that the governments are bound with whose deviations are concise under international documents like the ILC Draft Articles on State Responsibility 2002³⁸.

³⁴ Alexander Orakhelashvili, *Peremptory norms in International Law* 19 (2006).

³⁵ Advisory Opinion on Case of Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, [1951] ICJ Rep 15.

³⁶ P. KOOJIMANS, UN COMMISSION ON HUMAN RIGHTS, TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT, UN Doc. E/CN. 4/1987/13 13-15 (1987).

³⁷ US Restatement(Third) of Foreign Relations Law 702 (1987).

³⁸ THOMAS WEATHERALL, *JUS COGENS INTERNATIONAL LAW AND SOCIAL CONTRACT* 436 (2015).

5.1. Singapore- A different approach

Democracy is an essential element for subsistence of rule of law³⁹. However, the case of Singapore is talking a different. The country has economically progressed however at the cost of subversion of human rights, fundamental freedom and rule of law. Scholars in Singapore have compared the situation of Singapore's democracy with that of Nazi Germany and Fascist Russia⁴⁰. In order to succeed in the convict front Singapore has lost its freedom of speech and expression assembly and association and expressing dissent against the government is absolutely prohibited⁴¹. Singapore's model of development is seen as an unacceptable rival to liberal democracy and its values, wherein respect for human rights has been shunned away. It is often said that rule of law is more important than human rights⁴² however the distinction between these two concepts is inseparable which has not been envisioned by the Singaporean form of democracy and rule of law. Lee Kuan Yew is of the opinion that democracy is inversely proportional to development. Singapore, thus happens to be an exception, which is a democratic nation, yet rule of law is peculiarly given way for implementation without adequate human rights protection⁴³.

³⁹ UNHRC, Human Rights and democracy of rule of law, A/HRC/19/L.27.

⁴⁰ William Safire, *The Misrule of Law: Singapore's Legal Racket*, N.Y. TIMES, June 01, 1997, at 17.

⁴¹ International Bar Association, Prosperity Versus Individual Rights? Human Rights Democracy and the Rule of Law in Singapore, http://www.ibanet.org/Human_Rights_Institute/Work_by_regions/Asia_Pacific/Singapore.aspx ; see KELLEY BRYAN, LAWYERS' RIGHTS WATCH CANADA, RULE OF LAW IN SINGAPORE: INDEPENDENCE OF THE JUDICIARY AND THE LEGAL PROFESSION IN SINGAPORE, http://www.lrwc.org/ws/wp-content/uploads/2012/03/LRWC.Rule_of_Law_in_Singapore.17.Oct_07.pdf .

⁴² Brian Z. Tamanaha, *The History And Elements Of The Rule Of Law*, SINGAPORE JOURNAL OF LEGAL STUDIES 232, 234 (2012).

⁴³ PARAG KHANNA, FOREVER FOREIGN POLICY, LEE KUAN YEWISTAN, http://www.foreignpolicy.com/articles/2011/05/24/leekuanewistan_forever.

6. UN's involvement in maintaining rule of law

The history of the establishment of the UN as an aftermath and as a necessity after the dreaded world war is based on the ideas of peace, security, protection of human rights and economic and social progress. The idea of rule of law was accordingly incorporated within this framework, specifically the Charter. It is probably the first instance whereby rule of law- as a concept to be practically implemented was culled out of national constitutional framework and sought international applicability. The idea of rule of law until then was limited to the boundaries of the nations and was construed as administrative and legislative prerogative. The Charter gave way for internationalization of rule of law⁴⁴ so much so that today, most effective application of the idea is found in the international perspective.

The key principles enshrined in the Charter circumscribed to the protection and promotion of human rights- an essential element and objective of rule of law. The introduction of the UDHR brought human rights within the realm of international law⁴⁵ and strengthened the urge and need to secure governments that adhered to rule of law. Since then, the organization has been diligently securing protection of human rights through legal and non-legal means with extensive involvement in the ground actions. These elements are a part of rule of law and the UN is facilitating in achieving the same.

The international legal framework that has been identified and formulated primarily by the UN in consensus with the international community incorporating international human rights law, international humanitarian law and international criminal law ensure freedom to live in dignity- the pivotal aspect of human rights and rule of law⁴⁶. The rule of law consequently is the vehicle for

⁴⁴ Upendra Baxi, *The Rule of Law in India*, 3 SUR SCIENTIFIC ELECTRONIC LIBRARY ONLINE, (2007), http://socialsciences.scielo.org/pdf/s_sur/v3nse/scs_a01.pdf.

⁴⁵ OHCHR, Protect Human Rights, <https://www.ohchr.org/EN/Issues/HIV/Pages/RoleOHCHR.aspx>.

⁴⁶ UN Secretary General, *Rule of law and transitional justice in conflict and post-conflict situations*, ¶39, UN Doc. S/2004/616 (August 23, 2004).

promotion and protection of human rights laying down the structure within which it functions.

7. Rule of Law and UN Charter

The Preamble and Art. 1 of the UN Charter are the repositories of human rights protection that ensures perpetuation of rule of law. In essence, the entirety of the UN framework is to augment human rights in efforts to conserve rule of law in the international forum.

Within the Charter based mechanism, there are some other entities which are worth mentioning for their contribution towards upholding rule of law.

1. **Universal Periodic Review (UPR):** in 2006, with the abolition of the Human Rights Commission, the Council was established. In order to ensure that the fate of the Council be long-lived, amongst several steps adopted, a primary one was UPR. This watchdog mechanism within the UN framework ensures continuance of human rights and subsequently rule of law amongst all the nations. The working group functions throughout the year by reviewing the status of human rights in all the member states vis-à-vis the Charter, UDHR and other treaty obligations⁴⁷. The mandate of the Council⁴⁸ portrays the importance of this working group in protecting human rights and preserving rule of law, especially with involvement of the Non-State Actors (NSAs) upholding inclusiveness and legal spirit giving way for equality fo States. In fact, this body within the Charter based system is the pivotal body in regulating and monitoring any derogation of human rights that has the probability of destabilizing rule of law.
2. **Special Procedures:** these procedures bring to life the vision of Dicey that has remained a part of the UN human rights system since the days of the Commission. The experts and special rapporteurs are appointed under this scheme who are assigned certain thematic areas or country-specific mandates

⁴⁷ Hurst Hannum, et. al, International Human Rights Problems of Law, Policy and Practice 624 (2011).

⁴⁸ UNGA Res. 60/251, at 3 (April 03, 2006).

to report on the rule of law situation that is prevailing with the idea of advancement of the principles of the Charter. The mandate of these procedures vary, in accordance with the specific resolutions of the Council reauthorizing or establishing them. Nonetheless, there are some common features in the mandates and the corresponding work methods exist. However, greater uniformity has been called for under the Code of Conduct⁴⁹ adopted by the Council as a part of its institution-building package.⁵⁰ But, the controlling body does not discriminate between the variances that exist inherently among these individual procedures.

3. **Complaint Procedures:** in 1970, the Economic and Social Council (ECOSOC) adopted the Resolution 1503 which authorized commission and sub-commission to examine, in closed sessions, communications from individuals and other sources concerning “situations which appear to reveal a consistent pattern of gross violate and reliably attested violations of human rights”.⁵¹ This a mechanism that has been adopted by various treaty bodies (discussed below) and marks the direct participation of the people with the implementation of human rights aptly invoking the principles and features of rule of law.

8. Rule of Law and UN authorities and bodies

- **United Nations General Assembly (UNGA)-** This is the mother organ of the UN and within the UN framework, it is the storehouse of human rights protection and safeguard of rule of law is accordingly its sole mandate. The recognition of rule of law was conceived much before the recent trends

⁴⁹ UNHRC, Code of Conduct for Special Procedures Mandate-holders of the Human Rights Council, UN Doc. Res. 5/2 (March 15, 2006).

⁵⁰ Hurst Hannum, et. al, International Human Rights Problems of Law, Policy and Practice 654 (2011).

⁵¹ Hurst Hannum, et. al, International Human Rights Problems of Law, Policy and Practice 640 (2011).

of understanding through a Declaration of 1970⁵². Apart from forging distant nexus with all its resolutions to this juxtaposition, the resolution adopted by it in September 2012 was envisaged to propel international consensus on this utmost important relation⁵³, wherein they agreed to respect rule of law to establish just and lasting peace all over the world through principal organs of States and national bodies.

- **United Nations Security Council (UNSC)**- one of the principal organizations of the UN structure which is instilled with the responsibility to maintain rule of law while dealing with its mandate of protecting the world from the scourge of grave human rights violations. It imposes economic sanctions on nations, implements arms embargo, appoints special envoys or dispatch missions to preserve the world order. These steps taken by the body ensures protection of rule of law and preservation of human rights.
- **UNGA 3rd Committee on Social, Humanitarian and Cultural Committee**- another body of the UN which discusses questions relating to advancement of women's rights, protection of children, indigenous people's rights and works towards elimination of racism and racial discrimination. This passingly works upon rule of law, but definitely contributes to the preservation of the same.
- **United Nations Human Rights Council (UNHRC)**- The Council and the erstwhile Commission have been dedicated to the cause of humanity and have adopted various resolutions and measures to curb human rights violations and balance rule of law. Its formulation of National Human Rights Institutions (NHRIs), working groups, experts, special rapporteurs amongst others are crucial in this regard. The

⁵² UNGA, Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, UN Doc. A/RES/2625(XXV) (Oct. 24, 1970).

⁵³ UNGA, Declaration of the high-level meeting of the General Assembly on the rule of law at the national and international levels, UN Doc. A/RES/67/1 (Nov. 30, 2012).

Council adopted a resolution on democracy, human rights and rule of law⁵⁴ to reiterate the importance of this conglomeration for propagating the ideals envisaged under the UN Charter.

- **Office of the High Commissioner for Human Rights (OHCHR)**- This is the primary organization involved with maintenance of human rights subsequent to rule of law. The quintessential document to be referred here is resolution of 2005/32 had called upon nations and to uphold separation of powers vis-à-vis rule of law in order to ensure ending of any arbitrary functioning of the states. It also sought strengthening of rule of law and democracy through limiting the scope of power of the authorities. It is envisaged that states take appropriate measures for all the branches of government and ensure public access to information, transparency, engaging the civil society and NGOs, taking active and consistent measures for fulfilment of all these principles ensuring effective judicial mechanism and accountable officials. It also pointed out that fairness in investigation and non-tolerance for violation of human rights are elementary aspects of strengthening rule of law.⁵⁵
- **United Nations Security General (UNSG)**- Several reports of the UNSG showcases commitment of the UN to protection of rule of law and human rights. One such report while addressing the UNSC that is worth mentioning which impresses on the theme relevant for us- “a principle of governance in which all persons, public or private, entities, individuals including the State itself or accountable to the lawyers that are publicly promulgated equally and forced and independently educated and which are consistent with international human rights nonsense standards. It requires as well measures to ensure attendance to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of law, separation of

⁵⁴ UNHRC, Human Rights and democracy of rule of law, A/HRC/19/L.27.

⁵⁵ OHCHR, Democracy and the rule of law Human Rights, UN Doc. Res.2005/32 (2005).

powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural as well as legal transparency.”⁵⁶ The report of the SG supports rule of law through the principles of natural justice and technical assistance rendered by the better off nations. The above quoted statement can be divided into two elementary understanding of transnational rule of law. *First*; in regard to the formulation of laws akin to rule of law and human rights and *second*, creating environment where enjoyment of human rights can be effectuated. In this sense rule of law requires to be limited and it is the rule of law principles that will determine its limitedness. Accordingly, rule of law also includes international human rights law, international humanitarian law and international criminal law. It also means that acceptable and sustainable approaches to rule of law with inculcation of national needs is the need of the hour.

- **United Nations Development Group’s Human Rights Mainstreaming Mechanism (UNDG-HRM)**- advances human rights mainstreaming efforts within the UN development system⁵⁷ by being a facilitator through working groups focusing on policy making, human rights expertise available to nations, etc.
- **Special Adviser on the Responsibility to Protect**- the idea of R2P has been elaborated below which showcases a novel aspect of rule of law and human rights. The special adviser is the representative of this notion and in its official capacity contributes to the rule of law situation.
- **UN Peace keeping operations**- most of these operations are aimed not only at bringing back stability and fighting the rebels or militants, but are also instilled with human rights related mandates aimed at contributing to protection and promotion of human rights both immediate and long-term action; empowering the population to assert and claim their

⁵⁶ UN Secretary General, Rule of law and transitional justice in conflict and post-conflict situations, ¶6, UN Doc. S/2004/616 (Aug. 23, 2004).

⁵⁷ OHCHR, Protect Human Rights,

<https://www.ohchr.org/EN/Issues/HIV/Pages/RoleOHCHR.aspx>.

human rights; and enabling State and other national institutions to implement their human rights obligations and uphold the rule of law.⁵⁸ However, an important question that requires to be addressed is what will be the fate of rule of law of a country where peacekeeping operations are being withdrawn. Whether such withdrawal will lead to mean destruction of rule of law in the nation? Western Sahara is an example of this.

- **International Commission of Jurists-** is another ancillary body which has significantly contributed to the jurisprudence in this field. It has adopted various documents at various intervals and attempted to regulate human rights and ensure rule of law. It has accepted rule of law as a dynamic concept and accordingly stressed on the importance of it being propagated adequately.

9. Rule of Law and Treaty bodies

In pursuant to the UN Charter, the need was felt to lay down such mechanisms that will address certain specific areas concerning the international community and the concerns of human rights formed the core of such mechanisms. This ultimately led to formulation of the modern international law regime that is in place post 1945.

The first document that was adopted towards protection of human rights and maintaining stability and tranquility in the world at large was the UDHR. This laid down the conviction of the world on protection of human rights. In the opinion of the researcher, this was the starting point of internationalization of rule of law. Much after this, the ICCPR and ICESR were adopted in 1966 that condensed the idea of human rights protection into the International Bill of Rights. By this time need for preserving rule of law was well accepted and to an extent the pathway to achieving it was set out.

The various human rights treaties that were subsequently adopted were aimed at safeguarding human rights both at an international level and also from the domestic level. Protection of rule of law is

⁵⁸ OHCHR, Protect Human Rights,

<https://www.ohchr.org/EN/Issues/HIV/Pages/RoleOHCHR.aspx>.

thus ingrained into all these human rights treaties, though not explicitly, but their attempt at protecting and propagating the aims and objectives of the Charter reinstates the same. These treaties forge various facets of human rights protection and thus several dimension of rule of law in conjunction to human rights get recognized.

International Covenant On Civil and Political Rights (ICCPR) accounts to be the most crucial of all these treaties that has established the human rights committee which has since inception endeavored to protect rule of law and human rights. The committee has undertaken adjudicatory mechanisms, especially through individual complaint mechanisms alongside interstate complaints and also conducting independent research on human rights situations across the world. The committee has many a times expanded the meaning and interpretation of rule of law. Other committees like Convention Against Torture (CAT), Convention on Rights of the Child (CRC), Convention against Elimination of Racial Discrimination (CERD), Convention on Migrant Workers (CMW) are set up in line with the mechanism of ICCPR and follows a similar pattern for interpreting human rights, though from a specified perspective in an attempt to preserve rule of law in the countries which are plagued with gross human rights violations. These committees have contributed in culmination to the development of jurisprudence in this arena and their activities are in conjunction with the mandate of the United Nations and its charter. In this arena and their activities are in conjunction with the mandate of the UN and its charter.

It is also imperative to note the contribution of human rights defenders and groups which are constantly on the ground work and work in close cooperation and coordination with other civilian and peacekeeping operations of the UN to combat state of anarchy and restore peace, stability and rule of law in assuring human rights to all.

10. Rule of Law and Universal Declaration of Human Rights (UDHR)

UDHR is the basic human rights document which establishes in a well determined manner the idea and importance of protection of

human rights. The articles that it provides for are in absolute coherence with the principle of rule of law in the truest sense and definitively links the protection of human rights with rule of law⁵⁹. Elinor Roosevelt, who was assigned the task for formulation of UDHR described the document as ‘essential, if man is not to be compelled to have recourse, as a last result, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law’⁶⁰ which was later adopted in the Preamble of UDHR⁶¹.

While most of the articles determine protection, preservation and promotion of human rights, Arts. 28 to 30 gives way to the idea that the paper aims to bring forth. It seeks to forge the concept of rule of law with the ideas of human rights in order to ensure a holistic human rights protection mechanism at work. Art. 28 establishes the 2nd principle of rule of law as propounded by Dicey, whereby, irrespective of conditionality, every individual is entitled to the social order that the society in which s/he lives offers. Art. 29 in a way describes the 3rd principle of upholding the legal spirit by according duties alongside rights in a manner that the rule of law is balanced against the arbitrariness of the government as also the rights and duties of the citizens. Art. 30, summarizes the entirety of the notion of human rights and rule of law whereby the 1st principle is achieved in a way that restricts arbitrary power of the states from infringing upon the human rights in order to preserve rule of law.

11. Rule of Law and Right to Protect (R2P)

The emergence of the concept of Responsibility to Protect (R2P) has direct nexus to rule of law and the notion of international aspect of rule of law. International Commission on Intervention and State Sovereignty along with the High-level Panel on Threats, Challenges and Change, with its 16 members from all around the world, endorsed what they described as an “emerging norm that there is a collective responsibility to protect”⁶². This establishes circumstances

⁵⁹ Tom Bingham, *The Rule of Law* 66 (2011).

⁶⁰ Tom Bingham, *The Rule of Law* 6 (2011).

⁶¹ Preamble, UDHR, ¶3.

⁶² UN Secretary General, *Follow-up to the outcome of the Millennium Summit*, ¶ 203, UN Doc. A/59/565 (Dec. 02, 2004).

under international law wherein an effort to protecting human rights, the basic principles of non-intervention are derogated with and given way for maintaining rule of law. The idea behind this ensures that the philosophy behind R2P is justified and at the same time propelled by the notion of rule of law for both these concepts assure protection of human rights- the quintessential element in their operation and conceptualization.

The idea that rule of law has now traversed boundaries and is an internationalised realisation is evidenced by the idea of R2P adopted by the UN General Assembly⁶³. The resolution forges the correct balance between Art. 2.7 of the Charter and Art. 1 in consonance to Chap. VII of the Charter on domestic intervention authorised by the Security Council. The aim of such intervention is to 'maintain peace and security'⁶⁴ which in essence is to ensure that state of anarchy is avoided and rule of law prevails where human rights are accorded optimum protection. R2P thus assures rule of law within the UN framework under international law to which all nations are obligated. 'Internal security' as envisaged under the UN Charter is the root from which the globalisation of rule of law emanates. Rule of law ensures that within the boundaries of a nation, there be utmost security and safeguard of human rights. The same idea has been extended to the international fora to incorporate within the penumbra of rule of law important aspects of international peace and security.

However, R2P is a contested notion where the interference is often questioned on grounds of *mala fide* intention of the powerful nations. The paper does not intend to comment upon the political diplomacy involved, but places before the readers the analysis of the theoretical underpinnings in relation to its effectiveness to combat human rights violations towards maintaining rule of law⁶⁵. As mentioned above,

⁶³ UN Secretary General Report, *In larger freedom: towards development, security and human rights for all*, ¶135, UN Doc. A/59/2005 (March 21, 2005).

⁶⁴ Art. 1, UN Charter, 1945.

⁶⁵ UN Secretary General Report, *In larger freedom: towards development, security and human rights for all*, ¶199, UN Doc. A/59/2005 (March 21, 2005).

the international legal framework works on the principle of protection of human rights and that being lately through rule of law. Additionally, rule of law under this view conceptualises a much higher threshold of human rights violence, almost to the idea of catastrophe. So, while general understanding of rule of law is on a lower footing for everyday matters and for every kind of human rights violence, rule of law under the international framework envisions anarchic state of nature for justifying the rights or obligation of the international community to extent protection towards maintenance of rule of law. Finally, while the responsibility under rule of law as existing was the subject-matter of consideration for every nation within its borders, the expansive meaning attempts to bring together all the nations for rule of law to be preserved.

12. Rule of Law and Regional Mechanism

Regional systems can make a significant contribution to 'regional universality', bridging international standards and domestic implementation and developing a distinctive regional human rights culture.⁶⁶ It is often the experience of the world community that state of anarchy or overhaul of government mechanisms necessitates their establishment. Thus, these bodies have direct nexus with the rule of law for it is during degradation of rule of law that these are established with the aim of protecting the future of rule of law. These mechanisms have been successful in forging stronger institutional human rights cultures over time which are aimed at resolution of conflict and political transitions, the crucial phase when chances of missing grip of rule of law can be ensued. Most of these mechanisms incorporate the individual complaint procedure that plays a pivotal role in ensuring the States to respond to specific allegations and to demonstrate their respect for human rights through taking concrete measures, in contrast to other procedures based broadly on constructive dialogue⁶⁷.

This chapter seeks to bring to light the contribution of the regional mechanisms towards protection of human rights propelling rule of

⁶⁶ Ilias Bantekas & Lutz Oette, *International Human Rights Law and Practice* 270 (2013).

⁶⁷ Ilias Bantekas & Lutz Oette, *International Human Rights Law and Practice* 270 (2013).

law be retained. In this regard, the researcher has identified few crimes which deserve special mention for the newness they encapsulate.

European Union: The European Convention on Human Rights 1950 envisages an idea of rule of law that is suitable to the European context based on its tradition and culture⁶⁸. Part I of the Convention is the reminiscence of rule of law in the conglomerate of nations. It covers all aspects of human rights and thus definitively contributes to the safeguard of rule of law in the region. It is based on 'human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities'⁶⁹. Further, it has adopted several agreements⁷⁰ that reflect its commitment for human rights. The court and commission established under this framework has contributed remarkably to the interpretation of rule of law in an attempt to preserve the same, whether through adjudication or reporting mechanism. *Kurt v. Turkey*⁷¹ was the first case decided by the court and the first case to recognize the new crime of enforced disappearances- that portrayed the judicial involvement in expanding the facets of rule of law suitable to the situation it is plagued with. This new crime had disrupted stability and *status quo* of most of the nations at that given point in time and thus rule of law had to be rethought. In order to protect human rights, this new dimension was added.

Inter-American Court of Human Rights: The contribution of this court to protection of human rights is extraordinary. With the adoption of several documents⁷², protection of rule of law happens

⁶⁸ Tom Bingham, *The Rule of Law*, 6 (2011).

⁶⁹ Kieren Fitzpatrick & Michael O'Flaherty, 11th Informal ASEM Seminar on Human Rights, National and Regional Human Rights Mechanisms, 18 (2012).

⁷⁰ European Social Charter 1961; European Convention on the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, 1987; Council of Europe Convention on Action against Trafficking in Human Beings, 2005; Framework Convention on Protection of National Minorities 1998.

⁷¹ *Kurt V. Turkey*, (1999) 27 EHRR 373.

⁷² The American Convention on Human Rights, 1969, and its Protocols of 1988 and 1990; The Inter-American Convention to Prevent and Punish

to be the predominant and exclusive domain of the court through preservation of human rights. The mandatory right to individual petition being permitted⁷³ further activates the mechanism. Yet again, the expansive and detailed work of the court and the development of the jurisprudence in regard to the crime of enforced disappearances is unthinkable, so much so that, it single-handedly brought the attention of the world community to the plague of this crime. The first case of *Velasquez Rodriguez v. Honduras*⁷⁴ rightly affirmed that “*The phenomenon of disappearances is a complex form of human rights violation that must be understood and confronted in an integral fashion.*”⁷⁵ This triggered the need for protection of the state of nature- rule of law in most of the nations that lived under fear of their lives. The court thus kept expanding its mandate to ultimately convince the adoption of the Convention against Enforced Disappearances, 2006.

Organisation of African Unity: The most striking feature of this organization is its constitutive Act⁷⁶ whereby emphasis has been accorded to rule of law. The primary efforts that this organization taken up since its inception was its resistance to unconstitutional change of governments⁷⁷. This itself indorses the commitment of the union to respecting human rights and securing rule of law for the mass decolonization in Africa was founded on the menace of apartheid. Thus, rule of law and human rights protection are inseparable in this part of the world. The organization has adopted

Torture, 1985; The Inter-American Convention on Forced Disappearance of Persons, 1994; The Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, 1994.

⁷³ OHCHR, Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers, <https://www.ohchr.org/Documents/Publications/training9chapter3en.pdf>

⁷⁴ Inter-Am.Ct.H.R. (Ser. C) No. 4 (1988).

⁷⁵ *Velásquez Rodríguez v. Honduras*, (Ser. C) No. 4, Inter-American Court of Human Rights (IACrHR), 29 July 1988 ¶¶ 150, 155.

⁷⁶ Constitutive Act of the African Union.

⁷⁷ Joseph M. Isanga, *Rule of Law and African Development*, 42 NORTH CAROLINA JOURNAL OF INTERNATIONAL LAW AND COMMERCIAL REGULATION 1, 13 (2016).

various documents⁷⁸ which further reinstates its commitment towards promotion and protection of human and peoples' rights⁷⁹ and furthering rule of law in order to respect democratic principles assuring good governance. Another prominent aspect unique to this organization is the voluntary progressive development adorned by the member States, mostly by adoption of new constitutions. In *Movement burkinabé des droits de l'Homme et des peuples v. Burkina Faso*⁸⁰, there was immense appreciation for the new constitution that was adopted which re-established a new rule of law that was compassionate towards human rights. Similarly, *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v. Sudan*⁸¹ and *Antonie Bissangou v. Congo*⁸² were decided in light of protection of human rights vis-à-vis rule of law.

Asia: The concept of rule of law is not very concretely established within the regional mechanisms prevalent in the region, like Bay of Bengal Initiative for Multi-Sectoral Technical and Economic Cooperation (BIMSTEC), South Asian Association for Regional Cooperation (SAARC) and Association of Southeast Asian Nations (ASEAN). However, ASEAN has explicitly acceded to the concept of rule of law since its inception in its founding document- Bangkok

⁷⁸ The African Charter on Human and Peoples' Rights, 1981; Africa Charter On Democracy, Elections and Governance.

⁷⁹ Preamble, Constitutive Act of the African Union.

⁸⁰ *Movement burkinabé des droits de l'Homme et des peuples v. Burkina Faso*, Communication 204/97, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.] (May 7, 2001), http://www.achpr.org/files/sessions/29th/comunications/204.97/achpr29_204_97_eng.pdf [<https://perma.cc/7EVQ-5GS9>].

⁸¹ *Sudan Human Rights Org. v. Sudan*, Communication 279/03-296/05, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.] (May 27, 2009), http://www.achpr.org/files/sessions/45th/comunications/279.03-296.05/achpr45_279.03_296.05_eng.pdf [<https://perma.cc/L473-PP6C>].

⁸² *Antonie Bissangou v. Congo*, Communication 253/02, African Commission on Human and Peoples Rights [Afr. Comm'n H.P.R.] (Nov. 29 2006), http://www.achpr.org/files/sessions/40th/comunications/253.02/achpr40_253_02_eng.pdf [<https://perma.cc/4K55-F48M>].

Declaration⁸³ and incorporated in the present Charter⁸⁴ to maintain regional peace and stability. BIMSTEC has sparingly referred to cooperation amongst all the nations in case of terrorist attacks⁸⁵. However, its contribution to warranting rule of law in the region is not quite significant, primarily because it is loosely connected and has been a failure to a large extent. On the contrary, SAARC has some adherence to rule of law with its Social Charter and regional conventions such as SAARC Regional Convention on Suppression of Terrorism, SAARC Convention on Narcotic Drugs and Psychotropic Substances, that it subsequently adopted. But, unlike ASEAN, none of the other regional mechanisms in Asia are established with the sole motive of protection of rule of law and for its sustenance which creates disparity in the growth comparable to the other regional mechanism. Finally, lack of any court for these mechanisms have seldom questioned the veracity of their existence and so adjudication on human rights and rule of law are a distant dream till now.

13. Rule of Law and India

Rule of law is a compendious expression comprehending not only the law made by the legislature, but also the fundamental law- the constitution ⁸⁶ in this regard. India has been an example of convergence of human rights and rule of law within the democratic framework of the country. The turmoil that the country faced at various times with the colonial past and subsequently have been the primary impetus for a strong mechanism for ensuring rule of law. The active role of the judiciary is noteworthy which is the catalyst for the development and continuance of rule of law. In the opinion of the researcher, it is the active role of the judiciary that has paved the way for rule of law to be maintained by each and every branch of the government whether in the administrative field or in regard to the lawmaking procedure or various adjudicatory mechanisms

⁸³ ASEAN Declaration 1967.

⁸⁴ Art. 1, ASEAN Charter, 1967.

⁸⁵ MEA, Brief on BIMSTEC,

https://www.mea.gov.in/Portal/ForeignRelation/BIMSTEC_Brief_February_2014.pdf.

⁸⁶ D.D. BASU, HUMAN RIGHTS IN CONSTITUTIONAL LAW 275 (2003).

comprising of even the quasi-judicial bodies. The expensive interpretation and meaning that has been accorded to rule of law in India is remarkable. As mentioned above rule of law has been used in every branch of governance in India. The distinctive feature of the India rule of law is the continuing conversation among four core notions: “rights”, “development”, “governance” and “justice”⁸⁷

It is interesting to note that rule of law enjoyed a well-developed position in ancient India. What we see today is merely a glimpse of it. *Dharma rajya* then was synonyms to ‘rule of law’ and *dharm* was known as king of kings. The basic idea was that a person should be under the supervision of *dharm* and if worthy enough only then he should rule. In Sanskrit *dharm* is expanded as *dharayati iti dharmah* i.e whatever holds is *dharm* since they are the principles which upholds starting from an individual to a king.

Dharma consisted of those immutable principles which could not be derogated and if so punishments would follow. It was also dictated that the person who exercise power in the political sphere must wear the gloves of *dharm* and was mandated to follow the *dharmic* principles while governing. The *dharmshastras* too provided for duties to be borne by the kings while ruling, any deviation to that would portray his unworthiness and would accordingly meet the fate of becoming unfit to rule.

However, as we shall see that the interpretation of rule of law vis-à-vis human rights protection in India lately has primarily been limited within the penumbra of Art. 21⁸⁸ of the Constitution or the basic structure doctrine or within the notion of discretionary powers of the governmental and administrative authorities. Even though it has been widely applied but it still clams itself to the scope of only few provisions. With the transnational understanding of rule of law, it is pertinent that elements of such varied understandings be incorporated within the framework of Indian governance and efforts

⁸⁷ Upendra Baxi, *The Rule of Law in India*, 3 SUR SCIENTIFIC ELECTRONIC LIBRARY ONLINE, (2007), http://socialsciences.scielo.org/pdf/s_sur/v3nse/scs_a01.pdf.

⁸⁸ Right to life and personal liberty- No person shall be deprived of his life and personal liberty except according to the procedure established by law.

be made to traverse beyond the constitutional framework. The plethora of documents on protection of human rights in ensuring rule of law has not quite aptly been ingrained into the municipal system. Whether the efficacy of the concept has been under threat due to such non-implementation is doubtful, but surely the outcome would be different if way to international interpretation be given. India will then become a party to the internationalized rule of law strengthening the existing human rights protection mechanisms.

In the infamous case of *ADM Jabalpur vs. Shivkant Shukla*⁸⁹, there was an attempt made to identify rule of law in the Constitution apart from Art. 21, but the apex court failed to recognize them, except for H.R. Khanna J., who dissented and opined that no government can subvert right to life and liberty under any circumstances, whether or not it comes within Art. 21, lest the essential difference between lawless and law abiding society will be obliterated.

14. Case laws

The commonplace meaning of rule of law in India has been in vogue since *Som Raj vs. State of Harayana*⁹⁰, wherein it was held that restriction on discretionary power lessens arbitrary power of decision making providing for protection of rule of law.

*Union of India vs. Raghbir Singh*⁹¹ opined rule of law in terms of independence of judiciary and reiterated supremacy of courts as an extension to that being endowed with the power of review of administrative actions and executives acts. Rule of law in this sense propagates judicial review. The restricted meaning of the phrase lays down procedural inaccuracy as breach of rule of law and appreciates the power of judicial review incase of faulty administrative actions⁹².

The understanding of rule of law cannot be complete without the famous Basic Structure doctrine. In *Kesavananda Bharati vs. State of Kerala*⁹³, the supreme court held rule of law to constitute a part of the basic structure of the constitution which cannot be abrogated. In the

⁸⁹ *ADM Jabalpur V. Shivkant Shukla*, AIR 1976 SC 1207.

⁹⁰ *Som Raj V. State of Harayana*, AIR 1990 SC 1176.

⁹¹ *Union of India V. Raghbir Singh*, AIR 1989 SC 1933.

⁹² *Chief Settlement Commissioner Punjab V. Om Prakash*, AIR 1969 SC 33.

⁹³ *Kesavananda Bharati V. State of Kerala*, (1973) 4 SCC 225.

similar lines the *Indira Nehru Gandhi vs. Raj Narain*⁹⁴ was decided and keeping in line with these principles Art. 329-A was struck down.

*Sukhdev vs. Bhagatram*⁹⁵ stands to be yet another remarkable decision wherein the rule of law was interpreted within Art. 21 to construe protection of individual liberty against arbitrary exercise of power even if that involved privileges of some other class of people.

*Bacchan Singh vs. State of Punjab*⁹⁶ suggested democratic legislature to make laws while emphasizing upon the rule of law in the legislative capacity. *Frank Anthony Employees' Union vs. Union of India*⁹⁷ and *D.S. Nakara vs. Union of India*⁹⁸ are examples of cases primarily dealing with derogation of right to equality due to unjustified rules framed by administrative bodies, but have drawn appropriate linkage with rule of law as it stands today.

Apart from some landmark judgments of the apex court, there is catena of cases⁹⁹ where rule of law has been interpreted time and again, but all these interpretations boil down somewhere to the aspects highlighted above. Rule of law in India, thus peripherally touches human rights, but scarcely bores in-depth to the essence of the notion as recognized in the transnational rule of law.

15. Constitutional and Statutory bodies

Rule of law is quintessential to the governance of any nation and governance is not limited to the governmental bodies strictly, but extends to other bodies. Accordingly, there are constitutional bodies like Comptroller and Auditor General, Central Vigilance Commission, Election Commission, National Finance Commission amongst many more contribute to the maintenance of rule of law by upholding the elements essential to it in consonance to human rights ideals incorporated. Moreover, various statutes pertaining to human rights preservation have founded several statutory bodies like

⁹⁴ *Indira Nehru Gandhi V. Raj Narain*, AIR 1975 SC 2299.

⁹⁵ *Sukhdev V. Bhagatram*, AIR 1975 SC 1331.

⁹⁶ *Bacchan Singh V. State of Punjab*, AIR 1980 SC 898.

⁹⁷ *Frank Anthony Employees' Union V. Union of India*, AIR 1987 SC 311.

⁹⁸ *D.S. Nakara V. Union of India*, AIR 1983 SC 130.

⁹⁹ *Gadakh Yashwantrao Kankarrao V. Balasaheb Vikhe Patil*, AIR 1994 SC 678.

National Human Rights Commission, National Green Tribunal, National Commission for Women amongst several others which directly protect human rights and secures rule of law in the country. Thus, the status of rule of law in the country has been significantly contributed by these bodies which is no less in comparison the judicial influence.

16. Rule of law, Rights, duties and directives

The constitution of the nation is the sole repository of all the principles of rule of law. Additionally, fundamental rights and duties alongside the Directive Principles of State Policy- as a trio defines and sustains rule of law in the Indian context¹⁰⁰. Civil and political rights from the international regime has found place under Part III, whereas socio-economic rights have been included in Part IV¹⁰¹. Nevertheless, the Indianness asserted in these provisions contextualizes rule of law to the Indian scenario and within that the essence of human rights in the Indian setting is established. Few distinctive features of this idea can be expressed under Art. 17 on abolition of untouchability- unique to India, Arts. 25 and 26 on secularism which is remarkable considering the religious diversity India boasts of and Arts. 29 and 30 on respecting linguistic and religious minorities who constitute a great part of the Indian community.

17. Rule of law and Preamble

The essence of rule of law in its legal sense emanates from the principles enshrined in the Preamble of the Constitution of India. At the same time, ideals of human rights are inculcated in great depth in this short prelude to the lengthiest constitutional document. The symbiotic relation human rights forge for propagation of rule of law is envisioned under the Preamble. It is noteworthy that it is indeed the Preamble which in its truest sense represents the theoretical

¹⁰⁰ Upendra Baxi, *The Rule of Law in India*, 3 SUR SCIENTIFIC ELECTRONIC LIBRARY ONLINE (2007),

http://socialsciences.scielo.org/pdf/s_sur/v3nse/scs_a01.pdf.

¹⁰¹ K.K. Venugopal, *The Rule of Law and Human Rights in India*,

<http://www.livelaw.in/the-rule-of-law-and-human-rights-in-india/>.

underpinning of rule of law in India for it endorses all the principles and essentials of rule of law within it.

18. Conclusion

Rule of law is the idea that the governing governs the governed in a manner that is consistent with principles of justice, equality and dignity respecting the rights of every member of the society and not disadvantaging any one at the cost of others. It augments unbridled power and discretion be shunned away in the larger interest of the public. Rule of law propounds a state a nature contrary to state of anarchy. It is the former in which human rights finds prominence and hence adequately protected. It envisions certain immutable laws from which derogation is impossible and accordingly a protection mechanism is set up which gives way for testing these rights and possible derogation in order to find an effective solution. The discourse here has been aimed at forging a relation between human rights and rule of law, which has been aptly established.

The research paper has tried to draw a trajectory starting from the concept of rule of law as propounded by A.V. Dicey with its three essentials of supremacy of law, equality before law and upholding of legal spirit and connecting that with human rights protection mechanism available across the globe. In this regard great emphasis has been laid upon the UN human rights protection mechanism and rule of law because the organization has immensely contributed to the development and preservation of this field. The rule of law which was primarily identified for the international and internal governance of the nations has now been more aptly used by the international community establishing 'transnational rule of law'. The role of the regional human rights protection mechanism too is of utmost importance in adding to the existing knowledge base, the same has been identified in this research. The case laws that have interpreted this idea trying to pacify the tyrannical situations of the countries they deal with are enlisted in order to draw a holistic picture of how rule of law is sustained by them.

However, with the onset of the Indian system of governance in regard to rule of law in this discourse, it is interesting to note that even though there has been assurance of human rights and rule of law being widely interpreted, the same has found expression only

within the constitutional outline. In the opinion of the researcher, there is lack of inclusivity in the Indian model of governance with regard to incorporation of international instruments, documents and varied international conceptualization. The lively aspect of rule of law construed under the international system, especially that of UN alongside organization and bodies that aid and assist its functioning is missing in the judgments of the Indian judiciary which is reflective of the discretionary power of the authorities or reading within Art.21 of the Constitution or deciphering time again the basic structure doctrine. This mundane interpretation somewhere loosens the vigor even though effectiveness need not be questioned, but the efficacy is uncertain. It may be said that with incorporation of these ideals and principles from the internationalized rule of law, the Indian model would have benefited in recognizing human rights protection.

The judiciary has lately been assertive and accepting of the developing international idea of human rights and expanded its branches vividly, yet the judicial stagnancy is still lurking which needs to be done away with. The researcher is unable to provide a concrete solution to the problem identified because India is fortunate to have governance akin to rule of law and subversion of human rights is not tolerated. However, the absorption of the rule of law understanding from the international forum is likely to give a greater voice and an impetus to keep the flag of human rights high with interesting deliberations finding place with each passing day.