

## RULE OF LAW AND DEMOCRACY

-Dr. M.D.Krishna\*

### Introduction:

*Democracy and the Rule of Law are inextricably connected with each other. Urgent steps are needed to establish a rule of law society in India without which our fundamental credentials as a democracy will be seriously undermined.* For a democratic government rule of law is a basic requirement. For maintenance of rule of law, there must be an independent and impartial judiciary. In a state professing the rule of law, the aim should be to provide for a system, which secures to its citizen's adequate procedure for the redress of their grievances against the state. Indian constitution embodies the modern concept of the rule of law with the establishment of judicial system, which should be able to work impartially and free from all influences. Rule of law requires that there should be a proper forum for the redress of his grievances. Rule of law does not mean rule according to statutory law pure and simple, because such a law may itself be harsh, inequitable, discriminatory or unjust. Rule of law connotes some higher kind of law, which is reasonable, just and nondiscriminatory. Rule of law to day envisages not arbitrary power but controlled power. Courts are making all concerted efforts to establish a rule of law society in India by insisting on 'fairness' in every exercise of power by the state. It is the rule of law that must define law rather than law defining the rule of law. Rule of law is endangered by the existence of hunger, poverty and unemployment, several positive actions were suggested.(a) Equitable distribution of wealth, resources and opportunities (b) Free and Fair elections to uphold democracy(c) compulsory and free education which also nourish active democracy.

We as a nation are proud of being a great Democratic nation, guided by a Constitution, which declares India to be a Secular, Socialistic Republic. We are governed by the rule of law. Law is supreme and the most fundamental of the rights conferred is "equality before law" and "equal protection of law". On paper, theoretically, we have good laws, the civil society seem to be ruled by a democratically elected body of politicians, functioning with the able guidance of highly qualified bureaucrats and an independent judiciary. In reality do we really

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adhere to the rule of law? We are a nation with hypocrites at the helm of affairs and innocent gullible as its subjects. When the Supreme Court comes out with suggestions for election reforms giving the electorate the freedom to know the criminal antecedents of the candidates contesting for elections, the politicians of all shades join hands to see that such reforms are not accepted. With hundreds of members of legislatures and parliament facing criminal prosecutions at various stages of investigation or trial it is farce to talk of nation ruled by committed men of excellence.

### **Landmark Supreme Court Judgement for Cleaner Elections :**

A Petition was filed in the Supreme Court in the name of PUCL [People's Union for Civil Liberties] and Dr.Y.P. Chhibbar and another making the Union of India and the Election Commission of India respondent. The petition sought to strengthen people's faith in their elected representatives, which could ensure protection of their legal and fundamental rights in a democracy governed by rule of law. The reason for filing this petition has arisen because of the corruption not only affecting the social fabric of the country but reflecting badly on the legal and Fundamental Rights of the people whose voice ultimately translate itself in law through their elected representative.

These elected representatives on oath discharge the constitutional duties and therefore, they must even at the threshold, at the time of filing of nomination papers should declare their assets in public. As held in *Dinesh Trivedi Vs Union of India*<sup>1</sup>, the citizens have right to know under Article 21 of the constitution the affairs of the Government elected by them and that it seeks to formulate policies aimed at their welfare. The citizens have a right to know that the MPs/ MLAs /Ministers they have elected discharge their duties as per the constitution and the law and are not amassing wealth/assets for their personal benefit. The Law Commission in its 170<sup>th</sup> Report has also recommended changes in the Representation of the Peoples Act, 1951 as well as Rules 1961. It has been recommended that at the time of filing of nomination for a seat in the House of the People, the Council of States, and The Legislative Assembly or Legislative Council of State, the person should file a declaration of all his assets possessed by him/her or by his/her spouse and dependent relations supported by an affidavit and that he/she should also declare as to whether any charge in respect of any offence referred to in Section 8 B has been framed against him/her by any criminal court. The Supreme Court had spelt seven principles of Public life in *In Vineet Narain Vs Union of India*<sup>2</sup> as follows.

1. (1997) 4 SCC 306
2. (1998) 1 SCC 226

- **Selflessness**

Holders of public office should take decisions solely in terms of the public interest. They should not do so in order to gain financial or other material benefits for themselves, their family or their friends.

- **Integrity**

Holders of public office should not place themselves under any financial or other obligation to outside individuals or organizations that might influence them in the performance of their official duties.

- **Objectivity**

It carrying out public business, including making public appointments, awarding contracts, recommending individuals for rewards and benefits, holders of public office should make choices on merit.

- **Accountability**

Holders of public office are accountable for their decisions and actions to the public and must submit themselves to whatever scrutiny is appropriate to their office.

- **Openness**

Holders of public office should be as open as possible about all the decisions and actions that they take. They should give reasons for their decisions and restrict information only when the wider public interest clearly demands

- **Honesty**

Holders of public office have a duty to declare any private interests relating to their public duties and to take steps to resolve any conflicts arising in a way that protects the public interest.

- **Leadership**

Holders of public office should promote and support these principles by leadership and example.

The petition was aimed at upholding the democracy, rule of law, that the law making process and preservation and protection of citizen's rights under constitution are secure, it is necessary to know that they are governed by those who are honest and dedicated to the faith put on them by the people in discharging their duties under the constitution honestly. The obligation of the court under Art. 32 of the constitution for the enforcement of fundamental rights in the absence of legislation must be viewed along with the role of judiciary envisaged in the Beijing Statement of principles of the independence of the judiciary in the LAWEASIA region. These principles were accepted by the Chief Justices of Asia and the Pacific at Beijing in 1995, as those representing the minimum standards necessary to be observed in order to maintain the independence and effective functioning of the judiciary. The objectives of the judiciary mentioned in the Beijing Statement are

- to ensure that all persons are able to live securely under the rule of law
- to promote, within the proper limits of the judicial functions, the observance and the attainment of human rights and
- administer the law impartially among persons and between persons and the State

Thus, an exercise of this kind by the court is now well settled practice which has taken firm roots in our constitutional jurisprudence. This exercise is essential to fill the void in the absence of suitable legislation to cover the field. In *Vishaka Vs State of Rajasthan*<sup>3</sup> elaborate guidelines have been laid down for observance in workplaces relating to sexual harassment of working women. It is the duty of the executive to fill the vacuum by executive orders because its field is coterminous with that of the legislature, and where there is inaction even by the executive, for whatever reason, the judiciary must step in, in exercise of its constitutional obligations under the aforesaid provisions to provide a solution till such time as the legislature acts to perform its role by enacting proper legislation to cover the field. Similarly, the petitioners prayed the court for (a) issue of necessary direction in the nature of Writ of Mandamus against Respondents to bring in such measure which provide for declaration of assets by the candidates for the elections and for such mandatory declaration every year during the tenure as an elected representative continues as elected MP/MLA, to uphold the constitutional provisions. (b) Issue a Writ, order or Direction in the nature of Mandamus against Respondents to bring in such measures which provide for declaration by the candidates standing for elections whether any charge in respect of any offence has been framed against him/her.

(c) Frame such guidelines under Article 141 of the Constitution by taking guidance from the 170th Report of the Law Commission of India.

The court observed partly that “in our view this court would have ample power to direct the Commission to fill the void, in absence of suitable legislation, covering the field and the voters are required to be well-informed and educated about contesting candidates so that they can elect proper candidate by their own assessment. The adverse impact of lack of probity in public life leading to a high degree of corruption is manifold. Therefore, if the candidate is directed to declare his/her spouse’s and dependents assets immovable, movable and valuable articles it would have its own effect. In *Vineet Narain*’s case the Court has issued necessary guidelines to the CBI and the Central Vigilance Commission as there was no legislation covering the said field to ensure proper implementation of rule of law. The following provisions of the constitution provide sufficient powers to the Election commission.

- The jurisdiction of the Election Commission is wider enough to include all powers necessary for smooth conduct of elections and the ‘elections’ is used in wide sense to include the entire process of election which consists of several stages and embraces many steps.

The limitation on plenary character of power is when the parliament or State Legislature has made a valid law relating to or in connection with elections, the Commission is required to act in conformity with the said provisions. In case where law is silent, Article 324 is a reservoir of power to act for the avowed purpose of having free and fair election. Constitution has taken care of leaving scope for exercise of residuary power by the Commission in its own right as creature of the Constitution in the infinite variety of situations that may emerge from time to time in a large democracy, as every contingency could not be foreseen or anticipated by the enacted laws or the rules. By issuing necessary directions, Commission can fill the vacuum till there is legislation on the subject. In Kanhiya Lal Omar's case, the court construed the expression "superintendence, direction and control" in Article 324 (1) and held that a direction may mean an order issued to a particular individual or a precept which may have to follow and it may be a specific or a general order and such phrase should be construed liberally empowering the election commission to issue such order.

- The word 'election' includes the entire process of election which consists several stages and it embraces many steps, some of which may have an important bearing on the process of choosing a candidate. Fair election contemplates disclosure by the candidate of his past including the assets held by him so as to give a proper choice to the candidate according to his thinking and opinion.

- To maintain the purity of elections and in particular to bring transparency

In the process of election, the commission can ask the candidates about the expenditure incurred by the political parties and this transparency in the process of election would include transparency of a candidate who seeks election or reelection. In a democracy, the electoral process has strategic role. The common man of this country would have basic elementary right to know full particulars of a candidate who is to represent him in parliament where laws to bind his liberty and property may be enacted.

- The right to get information in democracy is recognized all throughout and is natural right flowing from the concept of democracy. It is relevant to quote Article 19(1) and (2) of the International Covenant of Civil and Political Rights which is as under;

(i) Every one shall have the right to hold opinions without interference

(ii) Every one shall have the right to freedom of expression,

this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

- Under our Constitution, Article 19 (1) (a) provides for freedom of speech and Expression. Voters' speech or expression in case of election would include

casting of votes, that is to say, voter speaks out or expresses by casting vote.

For this purpose information about the candidate to be selected is must. Voter (citizen's) right to know antecedents including criminal past of his candidate contesting election for MP or MLA is much more fundamental and basic for survival of democracy. The little man may think over before making his choice of electing law makers.

### **Police and the Rule of Law :**

It has been the experience of the majority that policemen in India are known for inflicting cruelty and torture. We have been watching over the years in increasing number of violations of human rights and growing disregard for the rule of law with dangerous consequences for the country.

It is an uphill task to inculcate in the police a culture conducive to respect for human rights. More than abstract teaching and text-book reading of the subject of human rights education, discussion on specific instances of violation of human rights by the police under the pretext of investigation will be useful to drive home the point that the suffering and loss of freedom of the victims can never be redeemed even if the courts ultimately right the wrongs. Accountability should be stressed because in the name of living upto their duties the police indulge in excesses. If they are to be lauded for bringing criminals to book and overcoming terrorist threat they should also be responsible and accountable for cruelty and sadism that they deploy in the process. It is an admitted fact that the police cruelty for law will result in the destruction of our democratic system. Inflicting torture is not the way to curb crime, fight insurgency and terrorism. In this context it is relevant to have interaction between activists of voluntary agencies and the police become necessary<sup>4</sup>

### **Do we really adhere to Rule of Law ?**

India being a great democratic nation is guided by a constitution which declares it to be a Secular, Socialistic Republic. We are governed by the rule of law. Law is supreme and most fundamental of the rights conferred is 'equality before law' and 'equal protection of law'. We have wonderful laws, the civil society seem to be ruled by a democratically elected body of politicians with the able guidance of qualified bureaucratic and an independent judiciary.

In reality do we really adhere to the rule of law? We are a nation with hypocrites at the helm of affairs and innocent gullible as its subjects. When Supreme Court comes out with suggestions for election reforms giving the electorate the freedom to know the criminal

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3. (1997) 6 SCC 241

4. PUCL (Peoples Union of Civil Liberties) Bulletin, November 1995: R.M.Pal

antecedents of the candidates contesting for elections, the politicians of all shades join hands to see that such reforms are not accepted. With hundreds of members of legislatures and parliament facing criminal prosecutions at various stages of investigation or trial it is a farce to talk of a nation ruled by committed men of excellence. In western countries there is an emphasis on personal purity of life for their leaders, in India it is conspicuous by its absence. In a relatively free and promiscuous society such as the United States, the president was hounded by the press and taken seriously by the judiciary when he was found to have had an extra marital affair.

The lack of respect for rule of law is seen in all walks of life. Day in and day out we read reports of the police not registering complaints for various reasons. Though it is mandatory that the police have to register complaints whenever it is preferred and then transfer it to the concerned police station which has jurisdiction to receive the same, it is not done. In many instances the complainant is made to run from pillar to post to just register a complaint.

The failure of government hospital to provide treatment in case of emergency cannot be ignored. Medical profession has a greater role to play in saving the life of accident prone victims. Lack of reports of the police not registering complaints for various reasons in accident cases may seriously affect the basic right to life of the accident victim.

Failure of government hospital to provide medical treatment in case of emergency to a person in need of such treatment has been declared as a violation of his right under Art.21 of the constitution in *Paschim Banga Khet Mazdoor Samity Vs State of West Bengal*<sup>5</sup>

While delivering the judgment the Supreme Court laid down in the order that proper medical facilities are available for in dealing with emergency cases.

- (1) Adequate facilities are available at the primary health centre where the patient can be given immediate primary treatment so as to stabilize his condition.
- (2) Proper arrangement of ambulance is made for transport of a patient from the primary health centre to the district or sub-divisional hospitals.
- (3) The ambulance is adequately provided with necessary equipment and medical personnel.

In view of the apex court mandate it is imperative on the part of the medical profession to treat the accident victims on priority to save the life by providing effective emergency treatment. The right to medical care is recognized as a basic human right which is included under Art.21 of the constitution<sup>6</sup>.

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5. AIR 1996 SC 2426

6. PUCL Bulletin: September 2002 Sudha Ramalingam

## **MAKING DEMOCRACY WORK :**

### **Deficits of Democracy and Governance :**

Democracy works when citizens and the most marginalized people have the capability to ask questions seek accountability from the state and participate in the process of governance. Democracy becomes meaningful when people can shape the state and the state in turn creates enabling social, political, economic and legal conditions wherein people can exercise their rights and achieve freedom from fear and want. It is not merely elections or universal adult franchise that defines the process of democracy. Quality of democratic process depends on the capability and integrity of the organs of the state, institutions of governance and the extend of peoples' participation in governance. While constitutional framework and human rights guarantees can build the grammar of democracy, it is always people and the ethical quality of the political process that makes democracy works. Democracy involves dignity, diversity, dissent and development. Unless the last person can celebrate his or her sense of dignity, exercise democratic dissent and involve themselves in the process of governance and development, democracy becomes an empty rhetoric. Democracy dies where discrimination begins and the politics of exclusion takes root.

Accountable and people centered governance can provide an operational framework for making democracy work. Governance is a political process involving exercise of different forms of power (social, political, economic, legal and administrative) within various institutional areas. It comprises the mechanism, process and institutions, through which citizens and groups can articulate their interest, exercise their legal rights, meet their obligations and mediate their differences. The real challenge in a democratic process is to ensure that the process of governance does not get subverted or appropriated or controlled by economic and political elites who control the institutions of government or powerful market forces and international financial institutions like the World Bank and International Monetary Fund (IMF). The key question that needs to be asked here is "who exercises power in the process of governance: people or bureaucrat or those who control the government?"

There is need to challenge the 'good governance' paradigm and to begin to process and promote people centered governance as an expression of grassroots democratization process. A right-based approach to governance is a function of power relationships within and beyond the institutions of government and the exercise of such power with sense of justice, fairness and equity. Such an approach is based on five key elements; human rights, distributive justice, democratic legitimacy, peoples' participation and accountability.

Governance is critical because it encompasses both processes and arenas wherein public policies are formulated, legitimized, legislated and implemented. And it provides institutionalized means to claim rights and seek justice through the justice

delivery system. It can be the interface through which citizens and marginalized people can interact and mediate with the state and seek accountability.

In reality governance is a site of unequal and unjust power relationships: here patriarchy gets reinforced through various forms of marginalization and oppression and poverty gets perpetuated and people become mere 'vote banks' based on caste, creed and colour. Such unequal and unjust power relations entrenched in the institutions and processes of governance need to be challenged and changed by the people, particularly the marginalized, including women, dalits, adivasis and millions who go to bed hungry almost every day.

The process of governance and the institutions of governance need to be reclaimed by the people; questions need to be asked, policies need to be monitored, rights need to be claimed and accountability needs to be asserted. Assertion and claiming of rights by the people and marginalized groups demand a transformation of power relationships in various areas of governance. This also means that seeking accountability is a pre-requisite for realizing rights, particularly socio-economic rights. Fighting poverty and injustice requires the realization of rights and justice through the process of accountable governance. Governance becomes accountable when people are educated, enabled and empowered to ask questions, seek justice and demand participation.

The process of democratization and governance are passing through a critical phase. The potential and possibilities of the liberal democratic constitution of India often gets annulled by a feudal, casteist and communal political tendencies and the colonial character of Indian bureaucracy. The quality of democracy is determined by the quality of rule of law, institutions of governance and political process, including that of the political parties. Political parties are the legitimizing agents and vehicles of the parliamentary democratic process. The quality of institutions of governance and parliamentary process are shaped by the nature, character and culture of political parties and the character of the leadership. The erosion of transparency and accountability and increasing instances are corruption in various institutions and arenas of governance is a reflection of the political process and patron-client culture of political parties. The lack of democratic norms, accountability and transparency within most of the political parties contribute to the decadence of democracy. Transparency, accountability, integrity, athletic leadership and democracy culture within the political parties are indispensable to ensure democratic, accountable, and effective and people centered governance<sup>7</sup>.

While the strength of Indian democracy has withstood the last decades of social, political and economic developments, there are numerous challenges to democratic governance. The rule of law is still not sufficiently protected in the Indian society.

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7. Making Democracy Work- Citizens Report 2004

The social and economic progress achieved by the deepening of democracy in many societies has been shaped by their efforts to successfully protect the rule of law. In this regard, a number of challenges to the rule of law continue to undermine Indian democracy and pose grave threats to governance. Since independence, various attempts to enforce and institutionalize the rule of law in the Indian society have not achieved the intended results. While the normative framework of constitutional governance is established through the constitution of India and the various institutions established under it, deeply embedded values of constitutionalism have not taken roots in the Indian society.

While six decades of governance may not be too long enough to assess the situation, huge social expectations have been generated by institutions that are responsible for checking abuse of power. But given the capacity for dealing with abuse of power is disproportionate to the demands imposed upon them by the sheer size and magnitude of the country, there has been numerous unfulfilled promises.

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. Expanding the interpretation of the fundamental rights enshrined in the constitution, overcoming restrictions based on rules relating to locus standi, creating new avenues for seeking remedies for human rights violations through PIL pleas and promoting genuine judicial interventions in the areas of child labour, clean and healthy environment, and women's rights are a few examples of successful judicial intervention to uphold the rule of law and ensure justice.

The Indian legal system is faced with numerous crises starting with the fundamental challenge of enforcing the rule of law. While the system of governance in India is based on law, this does not necessarily translate into the behaviour of those who govern and the governed to have respect for the law. This lack of respect translates into serious threats to democracy as the legal system may not be able to respond to the growing sense of lack of trust and faith in the institutions.

Enforcement of the rule of law and efforts to protect the rule of law ought to be shaped by a number of factors that will improve the capacity of the legal system to respond to injustices. Passing more laws and the establishment of more institutions credited with responding to injustices may not be the right approach. There needs to be a fundamental re-examination of the approaches that we have adopted to enforce the rule of law. There is need to critically examine the effectiveness of Indian democracy, given the fact that corruption is institutionalized in all spheres of governance. A report of the National Commission to Review the Working of the Constitution in India noted: "The paradox of India, however, is that in spite of vigilant press and public opinion, the level of corruption is exceptionally high. This may be attributed to the utter insensitivity, lack of shame and the absence of any sense of public morality among the bribe takers. Indeed, they wear their badge of corruption and shamelessness with equal clan and brazenness." The laws that are

constantly violated for creating a vicious cycle of bribery have resulted in a cynical attitude towards law enforcement. Even anti-corruption laws that are occasionally enforced become political ploys to settle scores with opposition. This has further accentuated the twin problems of 'criminalization of politics' and 'politicization of crime.'

The Indian judiciary has acquired enormous faith and trust from the people. The judiciary as an institution particularly the High Courts and the Supreme Court of India has performed admirably well in upholding the constitution and protecting the rights of the people<sup>8</sup>.

### **Conclusion :**

It is important to note that in the election, the Election Commission has done wonderful job in enforcing the model code of conduct for political parties to uphold democracy directly respecting the principle of Rule of Law. It is in this context that the civil society has to wake up and as an organization committed to the rule of law by promoting civil liberties and democratic notions to establish the Rule of Law. Though the concept of Rule of Law has all the merits, the only negative side of the concept is that respect for law degenerates into legalism which from its very rigidity works injury to the nation. Recent aggressive judicial activism can only be seen as a part of the efforts of the Constitutional courts in India to establish rule of law society which implies that no matter how high a person may be the law is always above him. Court is also trying to identify the concept of rule of law with human rights of the people. The court is developing techniques by which it can force the government not only submit to the law and also to create conditions where people can develop capacities to exercise their rights properly and meaningfully. The public administration is responsible for effective implementation of rule of law and constitutional commands which effectuate fairly the objective standards laid down by law. Every public servant is a trustee of the society and is accountable for due effectuation of constitutional goals.

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8. Democracy and the Rule of Law in India: The HINDU, September 21, 2007