

Rule of Law in India: An Overview

*Surya Deva**

I. Introduction

The term 'rule of law' is not used in the Indian Constitution anywhere,¹ but there is no doubt that the rule of law pervades the Constitution as an underlying principle. In fact, the Supreme Court has declared the rule of law to be one of the 'basic features' of the Constitution,² so this principle cannot be taken away even by a constitutional amendment. As this Country Report will outline, the Indian conception of the rule of law is both formal and substantive. It is also seen as an integral part of good governance. Questions are though raised as to the extent to which the constitutional promise of the rule of law matches with actual situation in India.

In this Report, I focus on three broad aspects of the rule of law. First, the rule of law as a check on governmental powers, including by requiring that laws are clear, predictable, and prospective. Second, the rule of law as an embodiment of protecting people's human rights. Among others, this will entail a guarantee for equal treatment. Third, judicial review of legislative and executive actions by an independent judiciary. In a way, the last two aspects complement the first aspect in that they limit the power of governmental agencies.

* Associate Professor, School of Law, City University of Hong Kong, Hong Kong.

¹ The term is though used frequently by the Indian courts in their judgments. For instance, an online search of the Supreme Court's reportable judgments delivered between 1 January 1950 and 1 January 2010 resulted in 1,299 hits of the term 'rule of law'. See <http://judis.nic.in/supremecourt/chejudis.asp>.

² *Indira Nehru Gandhi v Raj Narain*, AIR 1975 SC 2295; *SP Gupta v Union of India*, AIR 1982 SC 149.

II. Checks on Governmental Powers

The Indian Constitution establishes a limited government. In a federal country, both the central and state legislatures have the power to make laws, but only subject to express and implicit constitutional limitations. First of all, the constitution specifies and demarcates the matters on which the central legislature and state legislatures could make law.³ Any law that breaches these limitations (e.g., a state law made on a matter within the exclusive competence of the central legislature) could be declared unconstitutional by courts.⁴ Second, the power of executive to make laws by issuing Ordinances is limited – both in terms of duration and situations triggering the exercise of such power.⁵ The executive, of course, cannot make a law on a matter on which the corresponding legislature lacks the competence to legislate.⁶

Third, although the Indian Constitution – having established a parliamentary form of government – does not follow any strict separation of powers,⁷ a system of checks and balances has been put in place. For instance, all the Bills passed by the Parliament require the President's assent to become law.⁸ The Parliament, on the other hand, has the power to impeach the President for violating the Constitution.⁹

Fourth, the courts have held that any executive action without the support of a valid law will be void, more so if it violated fundamental rights.¹⁰ Similar to the position in many other jurisdictions, laws cannot generally be retroactive, especially if they seek to impose any penalty or

³ Constitution of India, 1950, arts 246, 248-254 read with Schedule IX.

⁴ *Medical and Educational Charitable Trust v State of Tamil Nadu* (1996) 3 SCC 15.

⁵ Arts 123 and 213.

⁶ Art 123(3) provides: 'If and so far as an Ordinance under this article makes any provision which Parliament would not under this Constitution be competent to enact, it shall be void.'

⁷ Article 50 though mandates to separate the judiciary from the executive.

⁸ Art 111.

⁹ Art 61.

¹⁰ *Kharak Singh v State of UP*, AIR 1963 SC 1295; *Bijoe Emmanuel v State of Kerala*, AIR 1987 SC 748.

punishment.¹¹ The judiciary also does not treat vague laws or administrative guidelines favourably.

Fifth, in a multi-party democracy, the presence of a free press and the requirement of periodic elections can be one of mechanisms against the abuse of governmental power. The Constitution expressly limits the term of legislatures,¹² and the freedom of speech and expression under Article 19(1)(a) has been interpreted to include the freedom of press.¹³

In addition to these checks, the fundamental rights provisions and the power judicial review provide effective means of checking the power of the legislature and executive. These two aspects are discussed below.

III. Equality Guarantee and the Protection of Human Rights

Establishing an egalitarian society was/is one of the main goals of the India Constitution. The fundamental rights and the directive principles of state policy were the primary tools adopted to achieve this goal. Part III of the Constitution entitled 'Fundamental Rights' comprises Articles 12 to 35 which lay down various rights, their limitations and remedies for their enforcement. The rights range from the equality before the law to the freedom of speech and expression, the protection against double jeopardy, the right to life and personal liberty, the freedom of religion, prohibition of discrimination, and the protection against arrest and unlawful detention.

It will be useful analyse to a few rights in some detail in order to appreciate the rule of law in operation. Article 14 prohibits the state from denying 'to any person equality before the law or the equal protection of the laws'. The guiding principle of equality being that like should be treated alike and that unlike should be treated differently, Article 14 permits reasonable classification. The court has invalidated several laws

¹¹ Art 20(1). See also Mahendra P Singh, *Shukla's Constitution of India*, 11th edn., (Lucknow: Eastern Book Co., 2008), 177-81.

¹² Arts 83 and 172.

¹³ *Express Newspapers v Union of India*, AIR 1958 SC 58; *Bennett Coleman v Union of India*, AIR 1973 SC 106.

under Article 14 because the classification was without a difference,¹⁴ or the basis of classification had no nexus to the object of the law,¹⁵ or the law established special courts for trial of certain cases or types of cases without any reasonable classification or guidelines,¹⁶ or the law singled out a person for giving a special or discriminatory treatment.¹⁷

More important, however, has been the judicial employment of Article 14 to develop a broad principle of reasonableness. In *E P Royappa v State of Tamil Nadu* the Court said that 'Equality is a dynamic concept with many aspects and dimensions and it cannot be "cribbed, cabined and confined" within traditional and doctrinaire limits. From a positivistic point of view, equality is antithetic to arbitrariness.'¹⁸ Later on, the Supreme Court in *Maneka Gandhi v Union of India* observed that 'Article 14 strikes at arbitrariness in state action and ensures fairness and equality of treatment. The principle of reasonableness, which logically as well as philosophically, is an essential element of equality or non-arbitrariness pervades Article 14 like a brooding omnipresence.'¹⁹ Therefore, allegation of discrimination vis-à-vis others is no longer sine qua non for attracting Article 14²⁰ and the Court would strike down any arbitrary executive or legislative action unconstitutional as ipso facto violating Article 14.²¹

Another interesting fundamental right has been Article 21, which lays down that 'no person shall be deprived of his life or personal liberty except according to the procedure established by law.' This provision has

¹⁴ *K Kunhikoman v State of Kerala* AIR 1962 SC 723.

¹⁵ *P Rajendram v State of Madras* AIR 1968 SC 1012.

¹⁶ *State of West Bengal v Anwar Ali Sarkar* AIR 1952 SC 75; *Northern India Caterers Ltd. v State of Punjab* AIR 1967 SC 1581.

¹⁷ *Ameermisa Begum v Mehboob Begum* AIR 1952 SC 91; *Ram Prasad v State of Bihar* AIR 1953 SC 215.

¹⁸ (1974) 4 SCC 3, 38.

¹⁹ (1978) 1 SCC 248, 284. See also *R D Shetty v International Airport Authority* AIR 1979 SC 1628; *Ajay Hasia v Khalid Mujib* AIR 1981 SC 487.

²⁰ *A L Kalra v Project & Equipment Corporation* (1984) 3 SCC 316, 328.

²¹ *Mithu v State of Punjab* AIR 1983 SC 473; *Central Inland Water Corporation v B N Ganguly* (1986) 3 SCC 156; *DTC v DTC Mazdoor Congress* AIR 1991 SC 101; *Common Cause v Union of India* (1996) 6 SCC 530; *Shivsagar Tiwari v Union of India* (1996) 6 SCC 558.

proved to be a residuary repository of many fundamental rights. 'Life' in this article has been interpreted by the courts to mean more than mere physical existence;²² it 'includes right to live with human dignity and all that goes along with it'.²³ Ever-widening horizon of Article 21 is illustrated by the fact that the Court has, inter alia, read into it the right to health,²⁴ livelihood,²⁵ free and compulsory education up to the age of 14 years,²⁶ unpolluted environment,²⁷ shelter,²⁸ clean drinking water,²⁹ privacy,³⁰ legal aid,³¹ speedy trial,³² and various rights of under-trials,

²² See, for the evolution of such an interpretation, *Kharak Singh v State of UP* AIR 1963 SC 1295; *Sunil Batra v Delhi Administration* (1978) 4 SCC 494; *Olga Tellis v Bombay Municipal Corporation* AIR 1986 SC 180; *Francis Coralie v Union Territory of Delhi* AIR 1981 SC 746; *Bandhua Mukti Morcha v Union of India* AIR 1984 SC 802; *Consumer Education & Research Centre v Union of India* (1995) 3 SCC 42; *Bodhisattwa Gautam v Subhra Chakraborty* (1996) 1 SCC 490; *Visakha v State of Rajasthan* AIR 1997 SC 3011. In some of these cases the Court has relied upon the observation of Justice Field in *Munn v Illinois* 94 US 113.

²³ *Francis Coralie v Union Territory of Delhi*, AIR 1981 SC 746, 753 (per Justice Bhagwati).

²⁴ *Parmanand Kataria v Union of India* AIR 1989 SC 2039; *Paschim Banga Khet Mazdoor Samity v State of West Bengal* (1996) 4 SCC 37.

²⁵ *Olga Tellis v Bombay Municipal Corporation* AIR 1986 SC 180; *DTC Corporation v DTC Mazdoor Congress* AIR 1991 SC 101.

²⁶ *Unni Krishnan v State of AP* (1993) 1 SCC 645.

²⁷ *Indian Council for Enviro Legal Action v Union of India* (1996) 3 SCC 212; *M C Mehta v Union of India* (1996) 6 SCC 750; *Vellore Citizens Welfare Forum v Union of India* (1996) 5 SCC 647; *Narmada Bachao Andolan v Union of India* (2000) 10 SCC 664.

²⁸ *Gauri Shankar v Union of India* (1994) 6 SCC 349.

²⁹ *A P Pollution Control Board II v M V Nayudu* (2001) 2 SCC 62.

³⁰ *Kharak Singh v State of UP* AIR 1963 SC 1295; *Govind v State of MP* AIR 1975 SC 1378; *R Raj Gopal v State of Tamil Nadu* (1994) 6 SCC 632; *PUCL v Union of India* AIR 1997 SC 568; *'X' v Hospital Z* (1998) 8 SCC 296.

³¹ *M H Hoskot v State of Maharashtra* AIR 1978 SC 1548; *Hussainara Khatoon v State of Bihar* AIR 1979 SC 1369; *Khatri v State of Bihar* AIR 1981 SC 928; *Suk Das v Union Territory of Arunachal Pradesh* AIR 1986 SC 991.

³² *Hussainara Khatoon (I) to (VI) v Home Secretary, Bihar* (1980) 1 SCC 81, 91, 93, 98, 108 and 115; *Kadra Pahadiya v State of Bihar* AIR 1982 SC 1167; *Common Cause v Union of India* (1996) 4 SCC 33 and (1996) 6 SCC 775; *Rajdeo Sharma v State of Bihar* (1998) 7 SCC 507 and (1999) 7 SCC 604.

convicts and prisoners.³³ Another innovative use of this provision has been in reaching violation of right to life and personal liberty by even private persons,³⁴ and to grant compensation for violation of fundamental rights.³⁵

It should also be noted that although the constitution framers had expressly rejected the due process requirement in Article 21, the Supreme Court introduced this guarantee by judicial interpretation.³⁶ Furthermore, by a joint reading of Articles 14 and 21, the courts have basically developed a substantive model of rule of law – any law or executive action which is not ‘just, fair and reasonable’ could be declared unconstitutional.³⁷ The Courts, for example, invalidated a penal provision prescribing the mandatory death sentence for murder committed by a life convict.³⁸ More recently, the Delhi High Court ruled that Section 377 of the Indian Penal Code ‘insofar it criminalises consensual sexual acts of adults in private, is violative of Articles 21, 14 and 15 of the Constitution.’³⁹

IV. Judicial Review by an Independent Judiciary

The power of an independent judiciary to review the decisions of the other two organs of the government is considered an integral aspect of the rule of law and the Indian Constitution does everything possible to put in place this mechanism. Judges of the Supreme Court and the High Courts are appointed by the President in ‘consultation’ with relevant

³³ *Sunil Batra v Delhi Administration* AIR 1978 SC 1675; *Prem Shankar v Delhi Administration* AIR 1980 SC 1535; *Munna v State of UP* AIR 1982 SC 806; *Sheela Barse v Union of India* AIR 1986 SC 1773.

³⁴ See, for example, *M C Mehta v Union of India* (1987) 1 SCC 395; *Consumer Education & Research Centre v. Union of India* (1995) 3 SCC 42; *Kirloskar Brothers Ltd. v ESIC* (1996) 2 SCC 682; *Bodhisattva Gautam v Subra Chakraborty* AIR 1996 SC 922; *Vishaka v State of Rajasthan* AIR 1997 SC 3011; *‘X’ v Hospital ‘Z’* (1998) 8 SCC 296; *M C Mehta v Kamal Nath* AIR 2000 SC 1997.

³⁵ *Rudul Sah v State of Bihar* (1983) 4 SCC 141; *Bhim Singh v State of J & K* (1985) 4 SCC 677; *Nilabati Behra v State of Orissa* (1993) 2 SCC 746.

³⁶ *Maneka Gandhi v Union of India*, AIR 1978 SC 97.

³⁷ *Singh, Shukla’s Constitution of India*, above n 11, 201-04.

³⁸ *Mithu v State Punjab*, AIR 1983 SC 473.

³⁹ *Naz Foundation v Government of Delhi*, WP(C) No.7455/2001 (2 July 2009), para 132.

judges of these courts.⁴⁰ Subsequent to the decision in *Supreme Court Advocates on Record Association v Union of India*,⁴¹ judges of the higher judiciary are in essence appointed by the judiciary itself.⁴² Detailed provisions have also been made to provide judges security of tenure,⁴³ and protect their salaries, allowances and privileges.⁴⁴ Legislative bodies are barred from debating the conduct of judges unless dealing with impeachment motions.⁴⁵ In fact, on a closer look, it seems that the Indian judiciary has become over-independent in that there are not many checks on its powers and the functioning/conduct of judges. The judiciary, for instance, resists any attempt to introduce accountability measures and impeaching judges so far has proved to be an almost impossible even in suitable cases.

Although the power of judicial review does not require an express recognition in a constitutional text, Article 13(2) of the Indian Constitution provides such recognition by laying down that the state 'shall not make any law which takes away or abridges' the fundamental rights. The remedy to approach the Supreme Court for violation of fundamental rights under Article 32 is in itself a fundamental right.⁴⁶ The Court has widened the scope of this power over the years by (i) implying many new rights within the ambit of Article 21; (ii) chartering the course of public interest litigation as a tool of deepening justice to the masses; (iii) declaring judicial review a 'basic feature' of the Constitution and thus putting this beyond the Parliament's amendment power; and (iv) conferring on itself the power to review the validity of even constitutional amendments.

⁴⁰ Arts 124(2) and 217.

⁴¹ (1993) 4 SCC 441. See also *In re, Presidential Reference*, AIR 1999 SC 1.

⁴² See Mahendra P Singh & Surya Deva, 'The Constitution of India: Symbol of Unity in Diversity' (2005) 53 *Jahrbuch des Offentlichen Rechts der Gegenwart* 649, 673-74.

⁴³ Arts 124 and 218.

⁴⁴ Arts 125 and 221.

⁴⁵ Arts 121 and 211.

⁴⁶ A similar (in fact wider) power is vested with the High Courts under Article 226.

V. Conclusion

On a brief overview of the constitutional provisions and judicial decisions, it can be safely concluded that the Indian Constitution enshrines the rule of law as a fundamental governance principle, though the term is not mentioned expressly in the text of the Constitution. Having said this, there are several challenges that pose threat to building a society based on robust rule of law framework. Continued socio-economic inequalities (despite affirmative active provisions and programmes), large population, pervasive corruption (including in judiciary), judicial delays, law and order problems in view of regionalism and Naxalism, and the general apathy of people towards the rule of law are matters of serious concern. Despite these challenges, there is no doubt about the constitutional mandate or government's commitment to establishing a rule of law society.

Further reading

Granville Austin, *The Indian Constitution: Cornerstone of a Nation* (Oxford: Clarendon Press, 1966).

Granville Austin, *Working a Democratic Constitution – The Indian Experience* (New Delhi: Oxford University Press, 1999).

Upendra Baxi, 'The Rule of Law in India', (2007) 6 *Sur - Revista Internacional de Derechos Humanos* 7, <socialsciences.scielo.org/pdfs_sur/v3nse/scs_a01.pdf>.

Surya Deva, 'Public Interest Litigation in India: A Critical Review' (2009) 28 *Civil Justice Quarterly* 19.

B N Kirpal et al (eds.), *Supreme but not Infallible – Essays in Honour of the Supreme Court of India* (New Delhi: Oxford University Press, 2000).

Randall Peerenboom (ed.), *Asian Discourses of Rule of Law: Theories and Implementation of Rule of Law in Twelve Asian Countries, France and the US* (London: RoutledgeCurzon, 2004).

Victor V Ramraj & Arun K Thiruvengadam (ed.), *Emergency Powers in Asia: Exploring the Limits of Legality* (Cambridge: Cambridge University Press, 2010).

S P Sathe, *Judicial Activism in India – Transgressing Borders and Enforcing Limits* (New Delhi: Oxford University Press, 2002).

Mahendra P Singh, 'The Constitutional Principle of Reasonableness' (1987) 3 *Supreme Court Cases (Journal)* 31.

Mahendra P Singh, 'Securing the Independence of the Judiciary – The Indian Experience' (2000) 10 *Indiana International & Comparative Law Review* 245.

Mahendra P Singh & Surya Deva, 'The Constitution of India: Symbol of Unity in Diversity' (2005) 53 *Jahrbuch des Offentlichen Rechts der Gegenwart* [Yearbook of Public Law, Germany] 649.

Vijayashri Sripati, 'Toward Fifty Years of Constitutionalism and Fundamental Rights in India: Looking Back to See Ahead (1950-2000)' (1998) 14 *American University International Law Review* 413.

S K Verma and Kusum (eds.), *Fifty Years of the Supreme Court of India – Its Grasp and Reach* (New Delhi: Oxford University Press, 2000).