JOURNAL FOR LAW STUDENTS AND RESEARCHERS

RULE OF LAW AND RULE BY LAW: ANALYSING THE DIFFERENECE PACKED IN THIS VARIANCE

VEDDANT MAJUMDAR

AMITY LAW SCHOOL DELHI

ABSTRACT

"Rule of Law" is an inherent feature in the governance model of numerous governments around the Globe, which aims for equality before law, supremacy of law and predominance of legal spirit. Both Common and Civil Law countries have upheld the tradition of Rule-of-Law for its Democratic nature. It originated as a concept under Sir Edward Coke, where he opined that even the king is under the law. However, earlier instances of the essence of Rule of Law have been found in Upanishads in India, where it is stated that Law is the king of kings. Several legal scholars worked on the concept of Rule of Law, but it was popularized by Prof. A.V Dicey. Dicey based Rule of Law on the pillars of anti-arbitrariness in State action, he opposed discretionary powers in the hands of the government as he thought that it gives a window for arbitrariness in state action to prosper. With times passing, his definition of Rule of Law lost relevance and was criticized for overemphasizing on anti-arbitrariness and leaving the other aspects of Rule of Law unaddressed. A separate concept, which is deceptively similar to Rule of Law, called "Rule by Law", emerged in China, as a result of Confucian philosophy. It had its basis in effecting compliance with the letter of the law, but it digressed from the Rule of Law when it came to the measures and methods resorted to ensure this compliance. When Rule by Law became the order of the day in Nazi Germany, it left no stone unturned to effect compliance with the letter of the law. State's political morality was non-existent in a Rule by Law regime and resorted to even violence and brutality if the law assented to it. Widespread dehumanization of Jews in the Nazi regime is an example of the same. Supremacy of Law is also a tenet not known to Rule by Law regimes, to give an example of which, The Chinese Constitution accords the status of a leader to the Communist Party of China. This paper

discusses the differences between Rule of Law and Rule by Law at length, and advocates for Rule of law for the reasons stated in this paper.

INTRODUCTION

The concept of Rule of Law does not have a fixed definition/interpretation, at least as yet! Rule of Law is widely considered as the 'Lingua Franca' of global moral thought. It is an indispensable facet of Constitutionalism and an inherent characteristic of value-based governance.

Etymologically speaking, "Rule of Law" does not equate to either "Rule" or "Law". It represents the political morality of the state.[1] The said concept aims at striking a balance between "rights" and "powers", between individuals, and between state and individuals. Therefore, Rule of Law denotes law infused with moral qualities.[2]

Rule of Law can be used both in a functional and normative sense. A state may adhere to Rule of Law in the normative sense but may depart from the same in the functional sense of the concept. This greatly hampers upon the efficacy of the doctrine, reducing it to a utopian idea, devoid of possibilities of actuation. Rule of Law is a hallmark of democratic societies, where it puts a restraint on majoritarianism. Summing up the essence of Rule of Law, it mandates the accountability of power, equality in governance and the ethicality of the state. This is the point where it diverges from the debased version of it: "Rule By law". The variance of just one preposition: "by" rather than "of", but a lot of difference packed in this variance. The existence of a law is necessary but not sufficient. The law must also include a **core component** of basic human rights.[3] The concept of "Rule by Law" is oblivious to the latter. Anything authorised by law can perpetuate without any regard to human rights or justifications in instances of their violation. Like Rule of Law, Rule by Law also guarantees supremacy of law, but unlike Rule of Law, Rule by law does not pay heed to morality in law. Therefore, Rule by Law can become a potent instrument of oppression, thereby legitimizing the disparagement and large-scale violation of human rights, if any such oppression/oppressive act is enacted by law.

[1] I.P Massey, Administrative Law (9th Edition, 2017)
[2] Alex Carol, Constitutional and Administrative Law 40 (2nd Edition, 2002)
[3] Rule of Law v/s Rule by Law, available at: https://www.civilsdaily.com/rule-of-law-vs-rule-by-law/ (Visited on July 27, 2019)

HISTORY

i) Rule of Law

1) Origin and Development

The term "Rule of Law" is derived from a French term: "*la principe de legalite*", which translates into "The Principle of Legality".[4] Rule of Law is thus premised on the notion of a government functioning on tenets of law and not of man. It is at absolute loggerheads with arbitrary powers. Though not given formal recognition, Upanishads in India also contained the concept of Rule of Law in the true spirit of the concept. It opines the law being more powerful than kings. Nothing was placed at a higher pedestal than law.

One of the earliest known proponents of Rule of Law is Aristotle. He took this as a window to differentiate between procedural justice and moral justice.[5] He remarked Rule of Law to be a facet of moral justice. However, Sir Edward Coke is largely credited for being the originator of this concept. Sir Coke, while developing the concept of Rule of Law, propounded that even the king is to be under the law, thereby implying that law is the ultimate sovereign and it demands the subservience of even the executive.

Rule of Law had been talked about by many philosophers and scholars across a myriad of domains, but it didn't receive the recognition yet; that it was worthy of. Popularising the concept of Rule of Law goes to the credit of Professor A.V Dicey, an English jurist. He delivered expansive lectures on Rule of Law at The Oxford University. He was a staunch partisan of anti-arbitrariness in state action.[6] Professor Dicey opined that discretion gave a room for arbitrariness and thus, was opposed to discretionary powers in hands of the

[4] *Supra* note 1
[5] *Supra* note 4
[6] Dicey, Law of the Constitution (8th Edition, 1982)

government. Dicey's idea of Rule of Law, which forms the basis of English Constitutional law, constituted of three principles:

- Absence of discretionary powers in the hands of the government. Justice is only to be done through known principles of law
- Every person, regardless of his/her rank or condition, is subject to the ordinary law and jurisdiction of the ordinary courts.
- The rights of all people are to originate from customs and traditions which are recognised by courts.

Professor Dicey's evaluation of Rule of Law was premised on the shortcomings of France's administration and prevention thereof in England. France had a system of adjudication where any dispute between a government official and a private individual was tried by a special administrative court, as per the system of "Droit Administratif". These courts applied special laws developed by the aforementioned administrative courts, this digressed from the concept of equality before law, which forms the backbone of Professor Dicey's notion of anti-arbitrariness in Rule of Law. However, as years rolled by, Professor Dicey's concept of Rule of Law lost relevance and it invited criticisms from world over.

Sir Ivor Jennings, an eminent English jurist, was one of the first people to have effectively criticised A.V Dicey's notions of Rule of Law. He exclaimed that Dicey's concept of the Rule of Law was influenced by his personal political outlook and that his understanding of the concept of Rule of Law lacks practicality in any modern governance[7]. In the words of Sir Ivor Jennings, 'No two citizen are entirely equal.'[8] The concept of equality intends to treat equals equally, thus, literally every person being subject to law identically, would only act in derogation of it. Professor R.A Cosgrove also highlighted the fallacies of Dicey's vision of Rule of Law. He pointed out that Dicey's vision of Rule of Law was premised solely on the opposition to the system of "Droit Administratif", which operated in France. He went on further to comment that Rule of Law is more than anti-arbitrariness and the same is only a facet of the

[7] The Rule of Law and Separation of Powers, available at: https://lawexplores.com/the-rule-of-law-and-a-separation-of-powers/ (Visited on July 29, 2019)
[8] Rule of Law and Public Law, available at: https://www.lawteacher.net/free-law-essays/constitutional-law/rule-of-law-and-public-law-constitutional-law-essay.php (Visited on July 29, 2019)

concept of Rule of Law, thus, anti-arbitrariness cannot be synonymously used in place of the concept of "Rule of Law". Prof. Cosgrove gracefully accepted A.V Dicey's definition and interpretation of the concept of Rule of Law but opined that the same is not inclusive or exhaustive enough.

2) Rule of Law in India

Though not explicitly mentioned in The Constitution of India, Rule of Law is an inherent feature of it. The forefathers of The Constitution of India were resolute in their intent to incorporate the concept of "Rule of Law" in the basic law of the land, under various provisions.[9] Thus, Rule of Law was readily incorporated into the Indian Constitution; after having taken reference of the said concept from England. The essence of Rule of law is found in the preamble, under part III of the Constitution and under various other provisions of the Constitution.[10] Briefing upon those lines, Article 14 talks about equality before law, which negates arbitrariness, anti-arbitrariness being a principle tenet of Rule of Law.[11] Article 141 talks about the law declared by the Supreme Court to be binding on all courts throughout the territory of India. This implies uniform subjection of all persons to the same law, thereby concreting Predominance of legal spirit.

The Indian Judiciary has time and again brought to our notice the concept of Rule of Law in India and its inalienability. In the case of Kesavananda Bharti v. State of Kerala [12], the Supreme Court opined that Rule of Law is a part of the basic structure doctrine of the constitution, which is out of even the ambit of the plenary amending power of the parliament. A rather broad interpretation of the concept of "Rule of Law" was carried out in the case of Indira Gandhi Nehru v. Raj Narain[13], where the Supreme court considered free and fair elections a basic tenet of supremacy of law and pervasiveness of the spirit of law, thereby invalidating clause (4) of Article 329-A[14], inserted in the Constitution by the Constitution (39th Amendment) Act, 1975. The repealed provision immunised any election dispute to the office of the Prime Minister from judicial review. Probably as an ode to Dicey's vision of Rule of

[9] Rule of Law, available at: http://www.legalserviceindia.com/legal/article-719-rule-of-law.html (Visited on August 1, 2019)
[10] The Constitution of India, art.14
[11] The Constitution of India, art.141
[12] AIR 1973 SC 1461
[13] AIR 1975 SC 2299
[14] The Constitution of India, art.329

Law, the Supreme Court in the case of [15]Som Raj v. State of Haryana, ruled that the absence of arbitrary power forms the essence of Rule of law upon which the constitutional edifice is primarily premised.

The largely "Rule of Law-abiding" Indian judiciary once digressed from the said path during what is referred to as the "Darkest Hour of the Indian Judiciary". The case was ADM, Jabalpur v. Shivakant Shukla[16], where the Supreme Court delivered an indeed saddening verdict. Some detention orders were challenged during the period of emergency in India, on the ground of violation of Rule of Law. The contention didn't make it through, the writ of Habeas Corpus was not granted to dismiss the detention orders. The court rendered a judgement which is considered a disgrace till date. It opined that during emergency, emergency provisions themselves constitute the Rule of Law. This might be theoretically correct, but lacks the actual essence of Rule of law, which talks of the absence of arbitrariness at length. The court, in the particular circumstance, followed Rule of Law by its letter, but overlooked its spirit big time. Except for the abovementioned judgement, the Supreme Court of India has always patronaged the Rule of Law and called for its holistic applicability, vociferously. Widely regarded as the "conscience keeper of the supreme court", Justice V.R Krishna Iyer used to abide by his guiding principle: *"The law of all laws is that the 'Rule of Law' must sustain the 'Rule of Life"' by climbing down from its high pedestal, to ascertain ground realities for meeting the needs and aspirations of the people in an ever-changing society*." A humanistic view of rule of law was Justice Iyer's methodology to ascertain maximum possible justice.

3) Rule of Law in Civil Law Countries

With times evolving, Rule of Law has spread beyond the realm of equality and anti-arbitrariness. A holistic path for a more inclusive version of the concept of "Rule of Law" is the accepted norm at present. In civil law countries, the concept is comprehended in both: material and formal sense. Materially, it implies the state powers to be submitted to basic

[15] AIR 1990 SC 1176
[16] AIR 1976 SC 1207

substantive values of the constitution, including human rights and welfare order[17]. In the formal sense of the concept, Rule of Law equates to procedural fairness, and it includes the tenets of equity, independence of judiciary and proportionality.

ii) Rule by Law

1) Origin and Development

The old Chinese civilizations in the 4th Century B.C were governed by the "Rule of Man". The Rule of Man originated as an understanding of Confucian philosophy. As per the Confucian philosophy, social relations were an integral part of the "Natural Order" everyone was subservient to. A logical corollary of the same was a system of "Rule by Rite." The said social relations had comply with the Confucian doctrines, with conformity to cosmic harmony: humans and god, heaven and earth, all things: animate and inanimate.[18]

On a contrasting line of thought, there existed the Chinese legalist school of thought, which severely criticized the Confucian system and its practice of "Rule of Man," or "*Re Zhi"*, as per which, the Confucian sage decided what was best in a given situation; based on his own acumen of judgement, rather than on legal rules of universal applicability. Therefore, in response, the legalists devised the doctrine of "Rule by Law", or "*Fa Zhi"*, and advocated for its actuation. According to which, laws had to be publicly promulgated, clearly codified and impartially applied to the commoner and nobleman alike. However, in actual practice, as per the concept of "Rule by Law", devised by the legalist school, the ruler reigned as the ultimate authority, both in practice and in theory, with the scope of his discretion being limited by his own standards of morality and his inference of social expectations.[19] Law, to the ruler, was quite simply a pragmatic instrument for attaining and maintaining political control and social order.

[17] The Rule of Law in the Federal Republic of Germany, available at: https://www.icj.org/wp-content/uploads/1958/12/Germany-rule-of-law-non-legal-submission-1958-eng.pdf (Visited on August 2, 2019)

[18] The Significance of the Rule of Law and its Implications for the European Union and the United States, available at: https://lawreview.law.pitt.edu/ojs/index.php/lawreview/article/view/159/159 (Visited on August 4, 2019)

[19] Ibid

Later, at the onset of Imperialism in China, the Chinese Imperial legal system combined the Confucian "Rule by Rite" and the legalist "Rule by Law", however, the system, in absolute contradiction to its apprehended benefits, glaringly reflected the inherent weaknesses of both. Various efforts were made at reducing these shortcomings, which failed and the efforts to do away with the said shortcomings were wrapped up by 1912.

In modern China too, "Rule by law" was taken up as a subject of serious discussion and eventually was put into practice. Briefly after the Chinese Republic was established in 1911, eminent Chinese thinker, Liang Qichao, along with Wu Guanyin and Du Yaquan came up with the idea to introduce a moral, ideological reform in China by introducing "Rule by Man" in Chinese governance to make a transition from imperial rule to democracy. Rule by Law, finding its roots in the system of "self-rule", was denied to be put to execution in China. The rationale behind this, as per Liang Qichao, was that the Chinese people were inept of pulling off a regime of self-rule effectively. At absolute loggerheads with this idea of "Rule by Man" in China, Zhang Shizhao, an influential Chinese journalist and politician, advocated for the doctrine of "Rule by Law". He believed in the role of institutions, and not of people, in bringing about a favourable social and political reality.

The debates and disagreements therein were not restricted to choosing between men over institutions, or vice versa, but included tracking tensions between moral and legal authority and thereafter, drawing a comparison between institutional and personal efficacy. China's inclination towards governance by "Rule by Law" seeps well into the current times as well, the present scenario thereof shall be discussed later in the comparison between "Rule of Law and "Rule by Law".[20]

2) Branching into other nations

Flipping through history books, the existence of Rule by Law can also be witnessed in Nazi Germany. Under the Nazis, laws were debased beyond repair and recognition. It stirred hatred against the Jews and justified it by giving the assent of law. Here, law worked as the

[20] "Rule by Man" and "Rule by Law" in Early Republican China: Contributions to a Theoretical Debate, available at: https://www.jstor.org/stable/20721775?read-now=1&seq=1#page_scan_tab_contents (Visited on August 4, 2019)

antithesis of its popular notions of justice, fairness, due process and most importantly: state's political morality.

Hitler, who came into power to become the Chancellor of Germany, is said to be have been ashamed of his partly Jewish lineage. Another plausible explanation contemplates the trauma caused by a poisonous gas attack in World War I. Without any conclusive evidence, certain theories also suggest that Adolf Hitler had contracted a venereal disease from a Jewish prostitute.[21]Whatever might have the reason behind Hitler's hatred for Jews, infusing Anti-Semitism into the laws of Germany is not acceptable by any means. Well, it is, if the country operates on a "Rule by Law" basis!

For the preservation of purity in the Aryan race, legislations outlawing marriages between Aryans and Jews were passed. If this wasn't enough ostracism already, the Reich Citizenship Law denied Jews the right to citizenship and, with it, the political rights which chaperone citizenship, including the right to vote.

The blueprint formulated by the infamous "Nuremberg Laws" was completed via the first ordinance to them, on 14th November, 1935. The said ordinance defined a "Jew". The groundwork of a system of legally assented oppression was established. In the words of the ordinance: *A Jew was, first and foremost, someone who was descended from at least three grandparents who belonged to the Jewish religious community*. The Jews, been defined as a distinct community, added to their worries, as being identified as an outcast made them all the more vulnerable to subjugation and discrimination. The Nuremberg laws branched from the ideology of racial superiority of the Aryan Race, and as a natural consequence of which, they were ex-facie unjust towards the Jews. Jews were considered to be the worst polluters of the Aryan blood. Thus, to preserve the purity of the Aryan race, any contact with the Jews was outlawed.

In absolute contradiction to the principles of "Rule of Law", even assaults on Jews were legalised. Rule by Law, however, knew no bounds when it came to compliance with the letter of the law, political morality of the state was not a limiting factor!

[21] Hitler's antisemitism. Why did he hate the Jews?, available at: https://www.annefrank.org/en/anne-frank/go-in-depth/why-did-hitler-hate-jews/ (Visited on August 5, 2019)

Rule by Law, in the context of Nazi Germany, lead to widespread dehumanisation of Jews, ranging from depriving them of the rights to work and earn a livelihood to oust them from the then educational system of Germany.[22] The entire narrative of Nazi Germany revolves around the absence of Rule of Law, and instead, the inclusion of Rule by Law. The exclusion of morality from laws forms the central theme of negation of human rights to the Jews, which became the point of divergence in the understanding of the term "Law". The understandings stemmed therefrom were discussed and debated at length in the 'Hart-Fuller Debate'.

THE HART - FULLER DEBATE

The Hart- Fuller debate revolves about the contrasting views of positivism and natural law, both being the anti-thesis of the other. The Natural law theory proposes that in addition to the positive law; there exist certain ideal principles or values to which the positive law must confirm for it to qualify to as genuine law. Thus, while positivism holds that to be valid law, all that is required is that it should issue from a competent legislator after following the prescribed process, natural law theory requires in addition, that such law to be valid, must conform to some ideal principle (which may emanate from God, morality, or reason). As is very obvious from the explanation of the aforementioned concepts, Natural Law Theory is the precursor to "Rule of Law" and Positivism is the precursor to "Rule by Law".

This debate has gone down in the pages of history as one of the fiercest intellectual battles till date. [23]Gustav Radbruch, a Jew, and a firm believer of the positivist idea of law, eventually had his ideological paradigms shifted and he became a staunch partisan of the Natural Law Theory. Gustav's change of perspective was a conscientious decision, premised on the atrocities inflicted on the Jews by the lopsided laws in the Nazi regime. This invited criticisms to the doctrine of Positive Law. This shift in public opinion against The Positive Law doctrine encouraged Prof. H.L.A Hart, being a positivist, to deliver a lecture patronaging the Positivist idea of Law in the Holmes lecture at Harvard Law School in April 1957, titled as "Positivism and the Separation of Law and Morals" which got published in the Harvard Law Review in 1958 and became the cynosure of all jurisprudential discussions.

[22] The Day Evil Became the Rule of Law, available at: https://forward.com/opinion/2830/the-day-evil-became-the-rule-of-law/, (Visited on August 5, 2019)
[23] Steven Shavell, "Law versus morality as regulators of conduct", 4 ALEA 227 (2002)

A natural law philosopher and an eminent jurist, Prof. Lon L. Fuller countered Prof. Hart's stand and advocated for The Natural Law Doctrine.[24] His reply titled: **"Positivism and Fidelity to Law: A reply to Prof. Hart"**, consequently got published in the Harvard Law Review in 1958. This laid the foundation stone of the famous debate that took place between them.

The Hart-Fuller "debate" illustrates the opposing points of view of positivism and natural law, particularly in the context of Nazi laws. The debate began when Hart published his Holmes Lecture (entitled *Positivism and the Separation of Law and Morals*) delivered at Harvard Law School in April 1957 and published in *Harvard Law Review* in 1958. The reply was given by Fuller in his article "Positivism and Fidelity to Law - A reply to Prof. Hart", also published in 1958 in *Harvard Law Review*. Prof. Hart then replied in his book: '*The Concept of Law'*, to which Prof. Fuller gave his reply in the first edition of his book '*The Morality of Law'*. Prof. Hart thereafter again replied to Prof. Fuller in 1965 in *Harvard Law Review*. Sitting back and witnessing the disparagement of Natural Law was not an option for Prof. Fuller and thus, he replied in the Second Edition of *The Morality of Law*, published in 1969.

The debate between Natural law and Positive Law had taken the shape of an inconclusive series of repartees and rejoinders.

A contentious example in the Hart-Fuller debate was of the German lady who reported her husband to the Gestapo (German police in the Nazi regime) for criticizing Hitler's conduct of the war. The husband was tried and firstly sentenced to death, but later his sentence was converted to service as a soldier on the Russian front, in the wake of the requirement of soldiers in World War II. Fortunately, the husband survived the war and thereafter initiated legal proceedings against his wife. The wife stated in her defence that her husband had committed an offence under a Nazi statute of 1934. However, her contentions were rejected and Post-war Germany held the wife liable.

Hart expressed his discontent over the decision of the court, as the Nazi law of 1934 was a valid law, whereas Fuller stated the Nazi regime to be "lawless" in itself, as a result of which the court's decision was in perfect sync with his thought process.

[24] Benjamin C Zipursky, "Practical Positivism versus Practical Perfectionism: The Hart Fuller Debate at fifty", 83 N.Y.U.L. Rev 1170 (2008)

The basic tenet of Nazi law was laid down in the enabling Act passed by the German Reichstag on July 12, 1934, which expiated the German Constitution to allow Hitler to issue decrees even those which are not in conformity with the Constitution, including decrees to make treaties, pass the budget, and even to amend the Constitution. It is Germany's misfortune that the will of the then Chancellor of Germany and the law become synonymous. Rule of Law and its inalienable belief of supremacy of law and equal subjection of all to it had itself become an alien concept in Germany.

The nature and quality of the Nazi justice regime has been aptly described in William Shirer's book: [25]'*The Rise and Fall of the Third Reich'*. It enlightens with the information that Nazi laws were racially discriminatory and regarded Jews as inferior beings, thereby treating them inhumanly. Arbitrariness was the order of the day and the Gestapo was empowered to arrest, torture or even kill any person without adjudication by courts. The end result was the cold-blooded murder of 6 million Jews in gas chambers.

It is pertinent to mention here that Germany had been industrialized long before Hitler came to power. Democracy and the Rule of Law are the indispensable features of an industrial society for the following reasons:

- An industrial society operates on science, and science is based on research and application of objective laws. Industrial society simply cannot operate in an atmosphere of arbitrariness, the rule of law being mandatory to sustain industries, otherwise the productive processes in such a society will get disrupted. Science, unlike an authoritarian Rule by Law regime, does not operate on mere whim!
- Industries require to be placed in a democratic setting to prosper and function efficiently. Abnormally high tax slabs to satisfy the government's revenue requirements and stringent trade restrictions imposed by laws in a Rule by Law regime devoid of democratically designed industrial action plans would not act as a fertile ground for the establishment of industries. The industries in such circumstances will be statistically impaired and would be bound to collapse in virtually no time.

Prof. Hart is right when he recognises the laws under the Nazi regime as "law" per se, laws in Nazi Germany were ultimately laws and had the force of the same, but such laws were

[25] William Shirer, The Rise and Fall of the Third Reich 357 (1998)

wholly inconsistent with the mode of production in the already established industrial society. The modes and processes of production suffered a huge setback in the Nazi regime with the incoming of unfavourable and arbitrary laws. Thus, in the context of the Nazi regime, Rule by Law was a big fiasco at the industrial front. Hitler transformed the German economy into a war economy, with a huge number of resources being diverted into the production of wartime goods. This resulted in the disruption of the industrial society, with the country's economy collapsing at a rapid pace. Hitler's regime would have come to an end just on the basis of economic failures, let alone social ones, had he not received the support of Daladier and Chamberlain.

The Nazi regime also faltered in tracing the history of Germany and acting on it. Hitler attempted to throw Germany back into the middle ages, considering that slavery had perished 1500 years ago with the Roman Empire, the laws in Nazi Germany were prima facie inconsistent with the historical development in Europe. Attacking Jews and introducing a framework of law that virtually outlawed the peaceful existence of Jews in Germany is nowhere near the ideal model of governance.

Prof. Hart made a close observation in this regard and stated that if the laws made under the Nazi regime are not treated as laws, the persons who have inflicted unjust atrocities in the Nazi regime will walk away unharmed and without any punishments whatsoever, as in that case no violation of law would have taken place.[26] Ordinarily, retrospective application of criminal statutes is frowned upon, but the Nazi regime in this regard was an exception. In the criminal trials that took place post the Nazi regime, the then criminal law was applied and Hitler's accomplices were punished. In sharp contrast to normal circumstances, the retrospective application of criminal law in case of the offenders of the Nazi Regime was not unjust and was rather an ode to justice.

Prof. Fuller, on the other hand, said that a law qualify as a law must have "inner morality". But where does this morality come from? It vests in the mode of production. The ancient Romans and Greeks did not consider slavery to be immoral. On the contrary, slavery is widely considered immoral in present times. Thus, subscribing to the current line of thought,

[26] The Hart-Fuller Debate, available at: http://www.ebc-india.com/lawyer/articles/496_1.htm (Visited on August 5, 2019)

The Nazi regime was certainly immoral, and the reason of its immorality being: no conformity to the mode of production of modern industrial society and the social relations.

Both the distinguished legal luminaries raised valid points, and though the debate did not sum up on a conclusive note, an inference could be drawn that law functioning in exclusion to morals could only bring devastation to the society in all spheres, with Rule by Law being its mode of implementation.

COMPARISON BETWEEN RULE OF LAW AND RULE BY LAW

Any universally acceptable definition of Rule of Law necessarily needs to include the following four basic principles:

- Power is not to be exercised arbitrarily (this impliedly disqualifies the operation of the concept of Rule of Man)[27]
- The principle of upholding universal human rights, where abeyance of the same is strictly denied. Human Rights are to be respected in the manner as international instruments and conventions command for it.
- The principle of general applicability of laws, which demands every person to be subject to the law equally.
- The principle of supremacy of law, it implies the separation of powers, and commands that the law applies to all including the sovereign, where the application of law is done by an independent judiciary. This is the point where Rule by Law diverges from the idea of Rule of Law.

Speaking of the present times, the most glaring example of a country run by "Rule by Law" is China. The Chinese Constitution, since 1999, provides for a socialist state regulated **by law**. In China, Rule by Law or *Fa zhi* functions as an expression of extensive legislation. *Fa zhi* aids in realisation of the political objectives rather than working towards limiting the

[27] Supra note 18

political power of the state reasonably. This is the point where China digresses from the concept of supremacy of law, and thus, from Rule of Law as well.

i) Rule by Law in Modern Day China and comparison with Rule of Law contemporary: India

Supremacy of law is a lost feature in China; therefore, it does not qualify to be called a Rule of Law country. [28]The preamble of the Chinese Constitution itself speaks of "leadership" of the Chinese Communist Party. This is the way in which the "leadership" of the Chinese Communist Party seeps into the legal order of the state and is a severe blow to the concept of Rule of Law, as China, time and again, identifies it as a Rule of Law country. Having a one-party ruling system is perhaps the parent peril towards the notion of Rule of Law in China if it wishes to identify it as so. The so-called all-inclusive ambit of law clearly falls shy of a valid justification, and so does China's idea of it being a Rule of Law country; when it is noted that the Constitution of China and other legal acts do not contain any provisions concerning the legal nature of the Chinese Communist Party.

Thus, two major facts pointing towards the absence of supremacy of law and thus, the absence of Rule of Law in China, are:

- The Chinese Constitution mentions in its preamble, the "**leadership**" of the Communist Party of China, which no Rule of Law country would do, as giving supremacy to a said political party hampers upon the supremacy of law.

- The Constitution of China and other legal acts do not contain any provisions as to the legal nature of the Communist Party of China, thereby giving it uncapped powers and not obliging it to work within the framework of law.

Fortunately, there is a hint of inclusion of law in the working of the all-mighty Communist Party of China! [29]Article 5 of the Chinese Constitution states that: *"all ... political parties and public organizations ... must abide by the Constitution and the law ... No*

[28] The Legal Status of the Chinese Communist Party, available at: https://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=1080&context=mscas (Visited on 4th August, 2019)
[29] Ibid

organization or individual may enjoy the privilege of being above the Constitution and the law."

On the other hand, in India, no political party has been given the status of "leader" by the Constitution of India, the basic law of the land. The government in power, be it of any political party, is included within the ambit of supremacy of law. The powers of the government are not uncapped, there are several riders onto it, the foremost being chapter III of The Constitution of India, entailing the fundamental rights, which are inalienable by governmental action or even otherwise. Even chapter IV of the Constitution of India acts as a limit on the powers of the government, mentioning the Directive Principles of State Policy. The parliament is, ethically, supposed to legislate in coherence with the tenets of the DPSP's. Though, not enforceable, legislations based the DPSP's have been put to execution, whereby it amounts to an actual violation of law in case of legislating while overlooking DPSP's.

ii) Rule of law and Rule by law, vis-à-vis Constitutionalism

1) Constitutionalism

Under this subhead, it is pertinent to discuss the concept of "Constitutionalism". The term "Constitutionalism" is not to be confused with "Constitution", for a country might have a latter but lack the former. [30]Even a country with dictatorship as the mode of governance, where the dictator's word is the law, can have a constitution.

The Constitution of any country empowers the government and defines its powers, whereas Constitutionalism comes into the frame to limit the powers of the government in furtherance of justice and prevention of arbitrary rule, current or prospective. In majority of the countries following the philosophy of constitutionalism, constitutionalism does not have a defined provision for it in any statute, let alone in the Constitution. It is accepted as a practice of good governance and has been given the status of 'law' through precedents. Speaking in the context of India, in the case of [31]Manoj Narula v. Union of India, the Hon'ble Supreme Court of India opined that in a country where rule of law prevails, the fundamentals of

[30] M.P Jain, Indian Constitutional Law (4th Edition, 1999)

[31] (2014) 9 SCC 1

constitutionalism cannot be neglected. Time and again, the features of constitutionalism have been accepted to be a part of India's model of governance, with the said features being:

- **An Independent Judiciary**, as has also been endeavoured by the Constitution of India in [32]Article 50, whereby it mentions the separation of the executive from the judiciary.

- **Separation of Powers and Checks and Balances**, it has been accepted as an inviolable doctrine by the Hon'ble Supreme Court of India, in the case of [33]Ram Jawaya Kapur v. State of Punjab, whereby it stated that one organ of the government cannot assume the essential functions of another organ.

- **Rule of Law,** which has been accepted and contemplated in great depth in several judicial decisions, as already discussed.

The guiding philosophy of constitutionalism being, "Power corrupts and absolute power corrupts absolutely**".** The concept of constitutionalism has been formulated to limit the powers of the government, but as we discussed earlier about the uncapped powers of the government in a Rule by Law country, the feature of constitutionalism is unknown to Rule by Law countries.

2) Police State and Welfare State

A police state uses the police to enforce the political power of the government. Rule by Law countries maintain a police state, which and does not hesitate to use even violent or arbitrary force to effect compliance with the letter of the law. [34]It resorts to harsh means of social control and exhibits Authoritarianism.

Giving an example of the same, Nazi Germany was a police state, which empowered Gestapo to use harsh, violent and arbitrary means to ensure compliance with the letter of the law, without any regard to human rights and anti-arbitrariness in governmental action. Thus, a

[32] The Constitution of India, art.50
[33] AIR 1955 SC 549
[34] Police state, available at: https://www.cs.mcgill.ca/~rwest/wikispeedia/wpcd/wp/p/Police_state.htm (Visited on August 6, 2019)

police state is an instrument devised to maintain law and order, without taking into consideration the condition in which people endure their lives. On its absolute contrary, Rule of Law countries aim for a "Welfare State". A welfare state is committed to high ideals of justice, liberty and anti-arbitrariness.[35] Unlike a police state, a welfare state's end goal is to ensure social justice and not just compliance with the letter of the law through all possible means. It upholds the law and order of a country, provided, with some values while doing so. India, for example, is a welfare state and has the features of the same entailed in the Constitution of India. The Preamble of the Constitution enunciates a vision of inclusive development, thereby laying down the goals of socio-economic prosperity, liberty of thought, expression and belief, and secularism among other things.[36] The line of distinction between a Police State and Welfare State lies in the concern for its citizens, in addition to maintenance of law and order. While a Police State prioritises compliance to the letter of the law over the well-being of its subjects, a Welfare State pays a great deal of attention to ensure social justice to its subjects.

The bottom line being: a Rule by Law country will maul the rights of its citizens if the letter of the law requires for it to be done, while a Rule of Law country will respect the rights of its citizens in all circumstances, ensure justice to even the last man in the queue and capture the true spirit of law!

SUGGESTIONS AND CONCLUSION

The rationale behind the implementation of Rule by Law is to effect compliance with the law, but history tells us that Rule by Law regimes do not withstand for long and ultimately collapse. The Nazi regime in Germany, once so powerful, withered away with time due to its ineffective approach of Ruling by Law. Moreover, it proves to be self-defeating, citizens being ruled by law, frequently resort to rebellion, thereby jeopardising the law and order of the state. The key lies in acquiring the confidence of the citizens of any state, and that is done best by a Rule of Law regime. Providing citizens with justice at all fronts, makes them develop a sense of reverence towards the institutions of the government. This effects in upholding of law and order of any state with the minimum possible effort and maximum possible stability. The

[35] The Concept of Welfare, available at: https://shodhganga.inflibnet.ac.in/bitstream/10603/129421/9/09_chapter%204.pdf (Visited on August 7,2019)
[36] Supra note 20

confidence of the citizens of a country, in such a case, is restored in the machinery of the state, thereby effecting not just subservience, but also complaisance to the law!

However, fringe elements of any society cannot be dealt with the version Rule of Law that appears to be the mirror image of natural law. Thus, the concept of "Dynamic Positivism" needs to be introduced in the existing Rule of Law systems. Unlike pure positivism where law acts as a deterrent, dynamic positivism places law at a pedestal of a guide of the society, where it facilitates the alteration of social relations where they are unjust, irrational or unjust. [37]

The absence of law is not warranted in Rule of Law, neither is it to function as a terrorising deterrent; such as in Rule by Law. The concept of Rule of Law uses law as an instrument to organize the society in a just fashion. Thus, Rule of Law captures the true spirit of law by using law, a creation of the humankind, for the benefit of humankind!

[37] Justice Markandey Katju, Law in the Scientific Era: The Theory of Dynamic Positivism (1st Edition, 2000)