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Rule of Law in India
(An ancient philosophy of Rule of Lord Rama)

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Introduction

The independent state and its Constitution were immediately preceded by a long history of colonial rule, which although problematical from the nationalist point of view, had the most lasting impression on the choices made by the Constituent Assembly. Instead of reverting to a pre-British institutional set up, the Constitution of 1950 borrowed heavily from the previous constitution—the Government of India Act, 1935 while designing the framework of governance for the state. Perhaps this was the most practical option available under the circumstances; or may be the influence of modernity had robbed the founders of their capacity to imagine an alternative course for the nation. Probably, there was no concept of 'nation' for the pre-colonial non-moderns to work with in the first place, and so it was only natural that their institutional frameworks of government would not be of much relevance for the new Indian state. Whatever may have been the actual case, the point is that the Constitution did not signify a radical departure from the colonial regime, at least as far as its preferred mode of government was concerned

Rule of Law has meant different things to different people at different times and has evoked sharply divergent reactions. To some legal historians it is 'the unqualified human good' whereas to others Rule of Law is "a device that enables the shrewd, the calculating, and the wealthy to manipulate its form to their own advantage". Professor Brian Tamanaha has described Rule of Law as "an exceedingly elusive notion giving rise to a rampant divergence of understandings and analogous to the notion of the Good in the sense that everyone is for it, but

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have contrasting convictions about what it is". Probably that prompted the constitutional historian, Sir Ivor Jennings, to characterize Rule of Law as 'an unruly horse'.

Rule of Law runs like a golden thread in the Indian Constitution. Part III of the Indian Constitution guarantees certain fundamental rights akin to a Bill of Rights. For example, Article 14 states "The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India". No fundamental right in the Indian Constitution is absolute. Reasonable restrictions can be imposed on the exercise of the various fundamental rights guaranteed under Article 19 but the primary requirement is that the restriction must be prescribed by law, not by administrative non-statutory instructions. Consequently freedom of speech and expression and freedom of the press cannot be restricted save by enacted law. Again, no tax can be levied or collected except by authority of law (Article 265). Article 300 A stipulates that no person can be deprived of his property save by authority of law.

Rule of Law notions have suffered much by two popularizing aphorisms: Rule of Law signifies "government of laws, not of men"; "Rule of Law is both, and at once, government of law and of men". If "men" is used inclusively as signifying all human beings, the slogans may signify secularity: not Divine authority but human power makes both government and law. This however poses the question whether constitutions and laws based on religion disqualify at the threshold from being Rule of Law societies. On a different plane, in the feminist practices of thought that inclusiveness remains always suspect. It identifies literally both these slogans as representing the government of, by, and for men. This raises the question concerning feminization of state and law in a postpatriarchal society. Likewise, the emerging critique on the platform of rights of peoples living with disability translates both "government" and "men" as affairs of dominance by all those temporarily able-ed. This raises the question of indifference to difference. I may not here pursue these, and related, questions for reasons of space save to say that all Rule of Law notions that ignore them remain ethically fractured. The Rule of Law message that those in power should somehow construct and respect constraints on their own power is surely an important one. But the importance of this sensible requirement is not clear enough. To be sure, rulers as well as ruled ought to remain bound by the law (conceived here as a going legal order, an order of legality) regardless of the privilege of power. But it is never clear enough whether they ought to do so instrumentally (that is in Max Weber's terms "purpose rational", even expedient rule following conduct) or intrinsically (legality as an ethical value and virtue.)

Instrumentalist compliance negotiates Rule of Law languages in ways that perfect pathways of many a hegemonic and rank tyrannical credential. To follow Rule of Law values because they define the "good", the right, and the "just" law and state conduct is to develop a governance ethic. It is at this stage that massive difficulties begin even when we may want to consider the Rule of Law tasks as those defining the "rule of *good law*". Elucidating "good" law entails "a complete social philosophy" which deprives the notion of "any useful function". As Joseph Raz14 acutely reminds us: "We have no need to be converted to rule of law in order to discover that to believe in it is also to believe that good should triumph". But the "good" that triumphs, as a "complete social philosophy", may be, and indeed has often been, defined in ways that perpetuate states of Radical Evil— complete social philosophies have justified, and remain capable of justifying, varieties of violent social exclusion. Is this the reason why contemporary post metaphysical approaches invite us to tasks of envisioning justice–qualities of the basic structure of society, economy, and polity, in ways that render otiose the Rule of Law languages.

In any response to this question**,** it may be useful to make a distinction between Rule of law as providing constraint-languages and facilitative languages. As constraint– languages, fully informed by the logics and languages of contemporary human rights, Rule of law speaks to what sovereign power and state conduct may not, after all, *do.* It is
now normatively well accepted that state actors may not as ways of governance practice genocide, ethnic cleansing, institutionalized apartheid, slavery/slave-like practices, and rape and other forms of abuse of women. Outside this, the Rule of law constraint languages stipulate/legislate the following general notions.

1. State powers ought to be differentiated; no single public authority ought to combine the roles of the judge, jury, and executioner.
2. Laws/decrees ought to remain in the public domain; that is, laws ought to be general, public, and ought to remain contestable political decisions.
3. Governance via undeclared emergencies remains violative of Rule of law values and illegitimate.
4. Constitutionally declared states of emergency may not constitute indefinite practices of governance and adjudicative power ought not to authorize gross, flagrant, ongoing, and massive violation of human rights and fundamental freedoms during the states of emergency.

5. The delegation of legislative powers to the executive ought always to respect some limits to arbitrary sovereign discretion.
6. Governance at all moments ought to remain limited by regard for human rights and fundamental freedoms.
7. Governance powers may be exercised only within the ambit of legislatively defined intent and purpose.
8. Towards these ends, the State and law ought not to resist, or to repeal powers of judicial review or engage in practices that adversely affect the independence of the legal profession.

These "oughts", far from constituting any fantastic wish-list, define the terrain of ongoing contests directed to inhibit unbridled state power and governance conduct. The question is not whether these "oughts" are necessary but whether they are *sufficient*. It is here that we enter the realms of the Rule of law facilitative languages which leave open a vast array of choices for the design and detail of governance structures and processes. These choices concern the processes of composing legitimate political authority, forms of political rule, obligations of those governed and of those who govern.

It is beyond the bounds of this essay to provide even a meagre sense of violence and violation embedded in the histories of rule of law in India. Not merely have the impoverished been forced to cheat their ways into meagre survival, "jurispathic" (to evoke Robert Cover's phrase) dimensions of the extant Indian ROL have continually worked new ways of their disenfranchisement. These stories of violent social exclusion may be told variously. I have recently narrated the institutionalisation of the "rape culture" in the context of Gujarat 2002 violence and violation.31 But it is to literature rather than to law that we must turn to realize the full horror of the betrayal of the Indian "Rule of Law". Mahasweta Devi's *Bashai Tudu* speaks to us about the constitutive ambiguities of the practices of militarized 'rule of law' governance and resistance in contemporary India. Rohintoon Mistry's *A Fine Balance* educates us in the constitutional misery of untouchables caught in the everescalating web of "constitutional" governance. These two paradigmatic literary classics abundantly invite us to pursue a distinctively Indian law and literature genre of study, outside which it remains almost impossible to grasp the lived atrocities of Indian ROL in practice.

These also make the vital point (with the remarkable Indian *Subaltern Studies* series) that the pathologies of governance are indeed normalizing modes of governance as a means of

controlling (to evoke Hannah Arendt's favourite phrase) "rightless" peoples. The jurispathic attributes of the Indian Rule of Law at work can be described best in terms of social reproduction of rightlessness. Indian judicial activism begins to make and mark a modest reversal.

The Indian story at least situates the significance of the forms of creationist South narratives for contemporary Rule of Law theory and practice. Time is surely at hand for constructions of multicultural (despite justified reservation that this term evokes) narratives of the Rule of Law precisely because it is being loudly said that "history" has now ended, and there remain on horizons *no* meaningful "alternatives" to global capitalism.

The authentic quest for renaissance of the Rule of Law has just begun its world historic career. ROL epistemic communities have choices to make. Our ways of ROL talk may either wholly abort or aid to a full birth some new ROL conceptions now struggling to find a voice through multitudinous spaces of people's struggles against global capitalism that presage alternatives to it.

We need after all, I believe, to place ourselves all over again under the tutelage of Michael Oakeshott.32 He reminds us, preciously, that far from being a "finished product" of humankind history, the Rule of Law discourse "remains an individual composition, a unity of particularity and generality, in which each component is what it is in virtue of what it contributes to the delineation of the whole". That virtue of the "whole" may not any longer legitimate Euro American narratology. Rather the task remains re-privileging other ways of telling ROL stories as a form of participative enterprise of myriad "subaltern" voices.

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