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## FOREWORD BY EDITOR-IN CHIEF

*Prof. (Dr.) Yubaraj Sangroula*

## FEATURE ARTICLE

Cultural Dimension of Rule of Law and Social Episteme

*Prof. (Dr.) Yubaraj Sangroula*

## ARTICLES

Belt and Road Initiative and Nepal's Economic Perspective: Regionality and Specificity

*Ashish Adhikari*

Unwholesome Tendencies in the Judicial Appointment - A Nepali Perspective

*Bishal Khanal*

Tax Regime in Nepal - Implications on Human Rights

*Dagan Omwesiga*

Assessing Social Impacts of Slum Displacement on Women's Lives: A Case Study of Three Resettlement Colonies in Delhi, India.

*Dr. Deeksha Bajpai and Dr. Upma Gautam*

Analyzing Hindu Women's Right to Property in Bangladesh: Absolute Interest versus Limited Interest

*Ferdousi Begum*

Making WTO Dispute Settlement System Useful for LDCs

*Prof. (Dr.) Kumar Ingnam*

Religion and State: Revisions Needed in Sri Lankan Constitutional Implications

*Nishandey Ratnam*

Personal Law and Property Rights of Hindu Woman in India - the Need for Codification

*Sindhu Thulaseedharan*

## LEGISLATIVE COMMENT

Assessing Impacts of Banks and Financial Institutions Act in the Development of Financial Sector

*Ram Sharan Pokharel*

## STUDENT ARTICLES

Sexual Orientation and Gender Identities: An Analysis of the Contemporary Laws and Literature

*Dhruba Yonzon*

Rohingya's Genocide: Human Rights and Politics

*Prachi Tomar and Aditya Pandey*

Comparative Study on Anumana and Inference of Hindu and Western Philosophy

*Nikhil Dongol*

## CASE COMMENT

An Analysis of Principle of Erga Omnes Partes with Special Reference to the Case of Belgium v. Senegal, 2012

*Prajwol Bickram Rana*



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# Cultural Dimension of Rule of Law and Social Episteme

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## Abstract

*Rule of Law, despite being subject to wide attention and acceptance without any dispute, has enough ground to be critically analyzed from dimension and dynamism of the cultural practice of every concerned country adhering to the norm. Since social episteme of the country is perfectly and variably unique to each other, no exact notion regarding rule of law can be imported and exported like a business commodity. Thus, this paper, in detail, sheds ideas on difference of rule of law in oriental and occidental jurisprudence. Deeming the harmonious society with stable peace as final outcome of rule of law, this very paper builds an alternatively concrete insight on rule of law that befits the change of time and essence of divergent societies.*

## Definition and Concept

It would not be unreasonable to argue in the very inception that a very few is left unsaid in matter of rule of law. Thousands of books and research works are published on rule of law across the globe. Academia across the world has tiresomely grappled to define the rule of law and has established its scope of function but without much success. The academia involved in the study of the rule of law has been sharply divided into sections of those appreciating it as a boon of democratic system and those who are skeptical of its contribution in fostering democracy. Certain sections of the academia have expressed that democracy and rule of law do not walk in lockstep.

Critics have also pointed out that the concept of rule of law practiced by western countries is unconcerned with cultural component, and is tantamount of being used as an instrument of spreading influence of western liberal democracy in other countries to the sharp detriment of local institutions of governance in such countries. Consequently, the concept of rule of law has faced plethora of comments and views and has become, as a result, academically vague, functionally deluded and politically dubious. Legally, the concept has become additionally confounded. Therefore, it is right time for the academicians from Asia and developing countries from other parts of the globe to begin demystifying the concept of rule of law by offering the pragmatic meaning and scope of function. In that problematic backdrop, it is, therefore, hard, if not impossible, to define rule of law precisely and meaningfully. It is especially so, as pointed out before, due to its multi-pronged uses and multi-faceted relevance, ranging from the system of governance to the political accountability. It also encompasses the

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financial ethics, the access to equality in matter of the development opportunities, the fairness and impartiality in the system of justice as well as establishment of a system of dependable law and order. As the existing scenario shows, the concept of rule of law is described by using multi-disciplinary approaches. Indeed, the concept is defined so widely that it has virtually been forced to plunge into a glitch of overarching mystic and scholastic discourse. Too many books have been written on it. Too many meanings have been given to it. It has been made largely incapable of being categorically defined. It implies that any definition of rule of law is not out of debate within the scholastic problem.

In South Asia, there is a culture of playing flute music to lure snakes to come out of holes and to make them dance in the rhythm of the music. There has been a popular folk belief that snakes are fond of typical flute music, so they cannot resist being attracted to the snake charmers.<sup>1</sup> The truth is, however, different. Snakes have no organ of hearing. The belief that the flute music used by captors does entice snakes is nothing but a fallacy of appeal to ignorance or superstition. The situation of rule of law is nothing much different than, at least in South Asia, the common people's appeal to ignorance about liking of music by snakes. The belief on so-called democracy in South Asia as well as many other countries is no better than folk's belief on snakes' charm to the flute music. The situation of so-called liberal democracy in these countries is similar to the snake charmers' game of 'flute music and snake-dance'.

Even in developing countries like the United States of America, the situation is worrying. In America, for instance, only one percent of the population possess more wealth than the other 99 percent combined. The situation of democracy in America is hypocritical if looked at from the wealth distribution point of view. The democratic system of America is economically characterized by a state of systematic discrimination among population, which is fully institutionalized by the prevailing laws and policies practiced by the American Government.<sup>2</sup> The economic inequality in America is gruesome. A report presents, 'The average American believes that the richest fifth own 59% of the wealth and that the bottom 40% own 9%. The reality is strikingly different. The top 20% of US households own more than 84% of the wealth, and the bottom 40% combine for a paltry 0.3%. The Walton family, for example, has more wealth than 42% of American families combined.'<sup>3</sup> What significance the

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<sup>1</sup> The flute is called '*been*'. A community of snake charmers (*sapera*), whose job is to capture snakes and tame them for enjoyment of people, play the flute with a belief that listening to the music snakes appear in sight. The community keeps snakes in baskets and travel to markets and villages for the enjoyment of people and collect money as a part of their livelihood.

<sup>2</sup> For the first time in this report series, Allianz calculated each country's wealth Gini coefficient—a measure of inequality in which 0 is perfect equality and 100 would mean perfect inequality, or one person owning all the wealth. It is found that the U.S. had the most wealth inequality, with a score of 80.56, showing the most concentration of overall wealth in the hands of the proportionately fewest people. See, Erik Sherman, 'America Is the Richest, and Most Unequal, Country', *Fortune* (30 September 2015) available at <http://fortune.com/2015/09/30/america-wealth-inequality>, accessed on 29 December 2017.

<sup>3</sup> See Nicholas Fitz, 'Economic Inequality: It's Far Worse Than You Think', *Scientific American*, 31 March 2015 available at <https://www.scientificamerican.com/article/economic-inequality-it-s-far-worse-than-you-think>, accessed on 29 December 2017.

concept of rule of law may have to people in such a situation? In most developed new-liberalist nations, the rule of law is nothing but the tusk of an elephant, which has no role in grinding the food. In such countries despite their wealthy economy and the educational and infrastructural development, the Governments are unaccountable to the vast majority of people.

However, the powerful countries have unscrupulously used rule of law as an instrument of justifying their influence or interference in affairs of other countries. The rule of law has been used as vehicle of exporting laws and policies practiced by them in economically struggling developing countries. The transplantation of law under the facet of rule of law has often been made a precondition for allowing their companies to invest in such countries. These countries also use rule of law as a condition for development assistance and transfer of technologies. They advocate relentlessly through diplomatic as well as other means that the transplant of their laws and judicial systems, including their concept of independence of courts, is the safest and convenient way of establishing and fostering the culture of rule of law in developing countries. The arrogance of the western countries in recognizing only their laws as being developed and progressive in nature and function does impose a psychology among the political and professional masses in developing countries that the indigenous or native legal rules and institutions are rudimentary and dysfunctional. This theory meticulously overrules the significance of episteme that plays so crucial a role to shape the structure and values of the laws and legal institutions of a given society. The episteme rejects the theory of usefulness of the transplantation of laws and values from other societies. The theory that the laws and legal institutions of the society underlie the epistemic values and realities rejects the plea that the transplantation of laws and legal institutions from the so-called developed societies contributes in fostering a culture of rule of law in the developing societies.<sup>4</sup> Based on this theory, it is arguable that the growth of the culture of rule of law in any society is not determined by the import of the western laws and legal institutions.

The definition of the rule of law is thus determined by the episteme of the society too. Access to litigation, for instance, in the western society is a component of the rule of law. The Asian societies, however, do not prefer litigation; there is a widespread belief among common people that litigation sparks discordance and disharmony in the society. The practice of reconciliation as a favored means of dispute settlement is considered to play vital role in enhancing the norms of societal harmony. The rule of law in the Asian culture thus rejects the principle of 'judgment of third parties' in disputes; it prefers mediation between the parties as desired way of settling

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<sup>4</sup> Benny Simon Tabalujan, 'Legal Development in Developing Countries - the Role of Legal Culture', SSRN, 30 April 2001 available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=268564](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=268564), accessed on 30 December 2017; Also See, Franz von Benda-Beckmann, 'Scape-Goat and Magic Charm: Law in Development Theory and Practice', vol. 21, no. 28, *Journal of Legal Pluralism and Unofficial Law* p. 129, 1989; Galit A. Sarfaty, 'Measuring Justice: Internal Conflict over World Bank's Empirical Approach to Human Rights', in Kamari Clarke & Mark Goodale (eds), *Mirrors of Justice: Law and Power in the Post-Cold Era*, Cambridge University Press, 2009.

disputes. The rule of law culture in Asia is founded on adjustment of conflicts by the conscience of the parties themselves. This notion of understanding is dissimilar to that of the western societies.

In countries, particularly in USA and some European countries, the concept of rule of law is used as an indicator to judge the effectiveness in function of the doctrine of separation of power to keep the organs of State in their right place. From this perspective, the concept of rule of law can be defined as an important instrument of constitutionalism. Placing the organs of State in their respective jurisdictions tightly is understood as rule of law in the constitutional law. The doctrine of the separation of powers is, particularly, formulated as a means to materialize the purpose of establishing and preserving every individual's protected sphere, the sum-total of individual freedom and liberty that constitutes personality of individual. For this, it is believed that the division of the Government into legislature, executive and judiciary is not only desirable but also indispensable. Each of these three branches is assigned with carrying out its specific functions, thus restraining themselves from encroaching upon other's jurisdiction. However, each organ has some power to maintain a check over the others. Yet, no single group of people will be able to control the machinery of the State. The Government placed within this scheme is believed to function within the ambit of rule of law.<sup>5</sup>

The regime of law is considered public affair and thus it is supposed to operate indiscriminately—a system of law is supposed to provide equal protection of law to every citizen irrespective of their perceived or imposed differences. The concept of rule of law, in that perspective, is a tool of equality in treatment of individuals in all public domains. Addressing risk of discrimination that negatively affects lives of citizens is what the rule of law is concerned. Concurring to this idea, James McClellan says, 'The America of 1787 inherited from medieval England the concept of rule of law, sometimes expressed as 'a Government of laws, not of men.'<sup>6</sup> This fundamental principle of the British version of rule of law can be traced back to the principle in English history that the King needs to guarantee his obedience to the English laws because he is not above the laws since he has been created by the law. This principle led to the signing of Magna Charta in the year 1215 AD, which obliged King John to guarantee his obedience to the laws.<sup>7</sup> According to this doctrine, no one is above the law and this principle applies to kings as well as the legislative bodies. Edward Coke resisted attempts of King James I to interpret the law. He equally resisted Acts of Parliament that contravened the common law. He argued, citing Brocton as an authority that 'the king must be under the law.'<sup>8</sup> This doctrine introduced the milestone of rule of law under the common law system.

<sup>5</sup> See M.J.C. Vile, *Constitutionalism and the Separation of Powers*, 2<sup>nd</sup> edition, Liberty Fund Inc., Indianapolis, 1998, pp. 1-23.

<sup>6</sup> James McClellan, *Liberty, Order, and Justice: An Introduction to the Constitutional Principles of American Government*, 3<sup>rd</sup> edition, Liberty Fund Inc., Indianapolis, 2000, pp. 347-354.

<sup>7</sup> See 'Rule of Law & US Constitutionalism', *Online Library of Liberty* available at <http://oll.libertyfund.org/pages/rule-of-law-us-constitutionalism>, accessed on 25 November 2017.

<sup>8</sup> Ibid.

## Notion of Rule of Law in the Western Jurisprudence

Within the sense of its core meaning, the Western concept of rule of law is a mechanism to prevent the Government from encroaching upon individual's protected sphere, the sum-total of the condition of individual's autonomy. The autonomy constitutes a regime of individual personality comprising some inherent human liberties. This notion of the rule of law asserts that to protect individual liberty is the essence of the rule of law and as such, it is a mechanism of democracy. In this paradigm, the concept of rule of law comprises some essential postulations. First, law is a fundamental mechanism of protecting individual liberty, which, in turn, makes democracy, a political regime of society, effectively functional. Second, the system of governance must be guided by the law with a sense that no one is above the law, including the lawmakers—the legislative body and the judiciary. Third, the system of law is a logical consequence determined by the need of protecting individual liberty. This seemingly parochial ambience of rule of law is an outcome of the typical epistemic reality of the European medieval political chaos. Obviously, the relevance of the concept of European rule of law in economic and social development of general people is obscured or ignored. The issue of welfare and dignity of the people does not surface in the concept of European rule of law.

The history of absolutism in Europe provides a justification for having such a notion of rule of law. Louis the XIV, the Emperor of France, declared that 'he was the State', and thus was not accountable to anyone except to the God. Arguing that he was divine representative in the earth, he was neither accountable to the people nor was he responsible to the welfare of citizens.<sup>9</sup> The king is the state incarnate: *L'Etat, cest moi*. This meant that when the king acts, he acts not on his own behalf but on that of the French state; when he amasses glory, and becomes the Grand Monarch, it is not the king but the French state that achieves glory and grandeur.<sup>10</sup> This notion of regime meant that the king was above or beyond the law. He was neither bound to follow the law nor was he capable of being questioned. This form of absolutism rendered the common people as puppets or slaves of the king. Their liberties were scraped and they were not privileged to live a dignified life. This history emerged as a vital cause for overarching importance to the civil and political rights in Europe, whereas the situation of Asia is different. In Asia, the emperor wielded unlimited powers but they never believed and behaved that they could be stronger without popular support of the people. Thus, they always kept themselves attached with the general masses for their loyalty.

The history of Britain was not different from that of France. Before Magna Carta was introduced in 1215, as an instrument of restraining kings from the exercise of unlimited powers, the British Kings ruled their subjects absolutely and brutally. Though Britain had evolved comprehensive administrative system, the nature of the

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<sup>9</sup> See generally Herbert H. Rowen, 'Louis XIV and Absolutism', in John C. Rule, *Louis XIV And the Craft of Kingship* (ed), State University Press, Ohio, 1969, pp. 302-317.

<sup>10</sup> Ibid.

King's power was not only ill-defined and uncertain but also unlimited and absolutist in nature. King John and his predecessors had ruled using the principle of *vis et voluntas*, or 'force and will'.<sup>11</sup> They could take arbitrary decisions often justified on the basis that a king was above the law. They argued that their powers were the powers of the sovereign kings so that no common people could expect kings to be accountable to them. The influence of the principle that law is above the king was later on redefined as king can make no wrong.

The need of protecting individual liberty emerged out of unlimited evils of monarchical absolutism in Europe. The grant of freedom and liberty to individuals was considered as a tool to prevent monarchs from exercising their powers without approval of the body which is called 'the parliament.' This theory propounded that nobody, including the king, was above the law, because the liberty of people was unfringeable under any pretext. This theory definitely implies that the non-violability of the people's liberty obtained a recognition and protection not because the people were considered as equal human beings. The recognition and protection of the non-violability of the individual liberty obtained legitimacy or justification because the liberty of people was seen as the only instrument of restraining monarchs to enjoy unlimited powers. Obviously, the concept of law in the Western jurisprudence is not founded on affirmative notion of enabling people as equal members of the society as the aristocrats. The law has been treated as an instrument to restrain kings from encroaching upon lives of people. The concept of rule of law, as it has been implicit in the discourse here, is founded on the need of preventing rulers from enjoying powers above or beyond the law. In this sense, the concept of rule of law under the western jurisprudence is a brake against the unlimited powers of the State. The concept obviously has a negative element as the strong driving force within it. In contrast, the positive or affirmative element emphasizing access of people to the welfare and dignity is the primary driving force of the recognition of the rule of law as a mechanism of good governance.

### Notion of Rule of Law in Oriental Societies

Unlike the western jurisprudence, the concept of rule of law in oriental societies is primarily grounded on the need of empowering people to access services provided by the State in matters of wellbeing and development. Confucius, an ancient Chinese philosopher, has widely reflected on the concept of rule of law. As pointed out by Guojin Qin, a Chinese scholar, 'Ren', 'Li' and 'Dao', represent the fundamental values of Confucianism.<sup>12</sup> According to him, to love all men is the basic meaning of *Ren*. This can be achieved by surrendering to *Li*, the rules of propriety against individual arrogance or belief of self-importance.<sup>13</sup> *Ren* with *Li* establishes a foundation for

<sup>11</sup> Ralph Turner, *King John: England's Evil King?*, History Press, Stroud, UK, 2009, p. 149.

<sup>12</sup> Guojin Qin, 'The Thinking Way of Confucianism and the Rule of Law,' vol. 1, no. 1, *Journal of Politics and Law* p. 68, 2008, pp. 68-74.

<sup>13</sup> *Ibid.*

rule of law under Confucianism. *Ren* as love to humankind with *Li* as rules or procedures of propriety provide a milestone for the better social order, where each human individual respects the 'being' of other human individual. *Dao* is path of duty. The rule of law from these three concepts is a path for social order in which one human being is obliged to love another human being with propriety of procedures. Implicitly, the concept of rule of law in Confucianism is guided by a notion of duty to respect law in all conditions, thus implying that it is not the liberty but righteousness and social harmony, based on proper roles or obligations, that are the symbols of an ideal society. The Chinese society like most other oriental societies was founded on the notion of interdependence of people with each other and spirit of social harmony. The concepts of *Ren*, *Li* and *Dao*, together, imbed a concept of virtue as a guiding principle of human life and social order. Contrary to the western jurisprudence, ethics and morality constitute an underlying principle of the rule of law under Confucianism. In fact, law is not an exclusive choice of regulating society. For Confucius, people ruled by law may not have sense of humbleness or shame, because it is not a civilized way to guide people by force of law. For Confucius, law is a supplementary tool of morality. It was the reason that Confucius emphasized the practice of self-cultivation. It is thus quite different from liberalism, which stresses on individual rights for the purpose of oneself. As pointed out by Qin, there are two distinguishing pictures between Confucianism and liberalism. The former stresses the restraining of oneself and practice *Ren* for the aim of Great Harmony, while the latter stresses the restraining of ruler's power and aims at the realization of individual rights.<sup>14</sup>

As described by Chunli Qu, Confucius was materially poor in his youth.<sup>15</sup> It might have been the reason, he is said to have concern for the poor and disposed. Confucius has not criticized wealth or physical comforts, nor has he encouraged or admired the path of the pursuit of wealth. He has noted in Analects that 'riches and rank are what every man craves; yet if the only way to obtain them goes against his principles, he should desist from such a pursuit.'<sup>16</sup> Happiness of people was the major concern for Confucius and for the same; he suggested that each individual and each Government should strive for that. Most importantly, he underlined that education would make crucial difference between success and failure for a ruler and so he opened the first private school in China.<sup>17</sup>

Kautilya, a famous ancient *guru* in Magadha Empire under King Ashoka in present India, emphasized the rule of law as an instrument of welfare of people, incorruptible governance and accountability of rulers to the people. He said, 'Just as it is difficult to know if a fish swimming in water is also drinking the water, it is difficult to detect

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<sup>14</sup> Ibid, p. 71.

<sup>15</sup> Chunli Qu (Sun Haichen tr), *The Life of Confucius*, Foreign Language Press, Beijing, 1996.

<sup>16</sup> Simon Leys (tr), *The Analects of Confucius*, W.W. Norton & Company, New York, 1997, pp. 4-5.

<sup>17</sup> Carolyn R. Wah, 'The Teachings of Confucius: A Basis and Justification for Alternative Non-Military Civilian Service' available at <http://lawandreligion.com/sites/law-religion/files/Confucius-Wah.pdf>, accessed on 25 November 2017.



if officers appointed for carrying out works are stealing the king's wealth.<sup>18</sup> His famous book *Arthashastra* has argued that rule of law (*Dharmasutra*), is an instrument of curbing corruption and fostering accountability of the king to people as part of the general governance system, which refers to a body of norms to uphold by all, the rulers and the ruled. For Kautilya, it is an essential obligation of the Government to preserve order in the society. The order included both social as well as order in the sense of preventing and punishing criminal activity. He has abundantly emphasized the importance of '*dharmā*' (a system comprising ethics, morality and law as inherently coexisting regimes of rules). He said, 'the ultimate source of all law is *dharmā*'. Under the concept of '*dharmā*', he appealed for honour of the people in the State and duty of the Government to protect human dignity. The duty of the king is to follow his '*rajdharmā*' (to rule people for their happiness and protect them from disorder and injustice). Protection of human dignity and maintenance of social order, therefore, meant the rule of law in the South Asian value system.<sup>19</sup>

In *Rig Veda*, a Hindu holy scripture, it is prescribed that the State has obligations to protect and preserve freedoms of individuals against violence, want, exploitation disease and unnatural death. The foremost duty of the rulers is to keep people away from these vices. A ruler failing to abide by these duties is not appropriate to deserve respect and obedience of people.<sup>20</sup>

The oriental perspective of the rule of law reflects the essentiality of the ethical and moral disposition of law. In this paradigm, the concept of rule of law rejects clichés of the western belief that the condition of rule in accordance with law suffices the requirements of rule of law. The oriental perspective demands that the law applicable in the society must be founded on principles of legitimacy determined by the interdependence of law with ethics and morality. This argument asserts that no rule of law can be materialized if the law is founded in disregard of the ethical and moral grounds.

Viewing from this perspective or paradigm, the understanding of the rule of law ranges from an indicator of accountable governance to an ethical and moral justification of the system of law that grants access to the people in welfare and dignity. The concept of rule of law in this sense constitutes of norms that render the system of governance to work, under accountability, to people as well as for the happiness of them. The concept of rule of law, in the sense of accountability to, and happiness of, people consists of the following normative principles, which are well described by the Justice Project.

*Limited Government:* The Government to satisfy the requirement of the rule of law

<sup>18</sup> *Arthashastra* is a Classical Text in Sanskrit. Kautilya, *Arthashastra*.

<sup>19</sup> Akshya Ranade, 'Arthashastra: An Insight in Kautilyan Views on Law and Justice', 2011, *Youth ki Awaaz*; available at <https://www.youthkiawaaz.com/2011/12/arthashastra-an-insight-in-kautilyan-views-on-law-and-justice/>, accessed on 25 November 2017.

<sup>20</sup> See generally Yubaraj Sangroula, *Jurisprudence: The Philosophy of Law*, Loquitur Publication, New Delhi, 2010, Chapter on Hindu Philosophy.

must be limited. It implies that the Government must function in accordance with the aspiration of people for their happiness. Moreover, the concept of limited Government demands participation of people in the system of governance. The autonomy for the local Government administration and development is most crucial element of the people's participation in the system of governance. The concept of limited Government thus requires wider devolution of powers to the local Government bodies. In addition, the system of laws the Government enforces must be enacted for achieving the goal of better social order. The better social order places liberties of people in a safer state and thus prevents risks of encroachment by the State agencies as well as the fellow-citizens. The arbitrary laws are, therefore, rejected by the concept of rule of law. The state of arbitrariness in laws occurs when such laws are absent of ethical or moral justification. Fulfilling the requirement of due process in implementation of law is not enough as it has been advocated by the notion of rule of law being practiced in America and Europe. The popular legitimacy and soundness of the contents of law is equally mandatory for realization of the rule of law in practice. Some theorists have pertinently drawn a distinction between the rule of law and what they call rule *by* law.<sup>21</sup> These theorists acclaim one and condemn the other. The rule of law is acclaimed because it is believed to place law above politics. Proponents of rule of law argue that the law must always stand above every powerful person and agency in the Government. The rule by law, in contrast, connotes the instrumental use of law as a tool of political power.<sup>22</sup> It means that the state uses law to control its citizens but tries never to allow law to be used to control the state. Only the law that controls the Government can be said to have contents that meet justification or rationality of 'being law' as such a law protects people against arbitrary decision of the Government.

*Prohibition on corruption:* Corruption spoils the entire system of governance. The most serious impact of corruption falls on the enjoyment of human rights by general people. Corruption fully distorts the system of the law, thus making it ineffective and unfair and arbitrary. The significance of law is destroyed and the decision of the ruler is imposed. The public revenue is robbed, thus affecting the development endeavors. Corruption benefits the political and economic elites of the society, thus pushing the marginalized or poor community into worse conditions of life. The rule of law in such a state is vital as an instrument to protect the system of governance in favor of the public. The corruption impunity is checked by the law and the corrupt officials have to be brought to the notice of justice. However, it is not easy to define as to what constitutes corruption. Most people prefer to define it as the private and illegal gain obtained by public officials with responsibility to implement public policy and services to people.

The illegal private gain by the public officials is committed at the expense of both the common good and of those who do not 'cheat the system.' In this sense, corruption

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<sup>21</sup> Brian Z. Tamanaha, *On the Rule of Law: History, Politics, Theory*, Cambridge University Press, Cambridge, 2004, p. 3.

<sup>22</sup> Ibid.

may be viewed as an unethical practice within the regime of governance. Corruption impacts everyone, even the person who is involved in corruption. It creates a system whereby money and politics or public authority come into connection and create an illegal and immoral access to public services for some people in disadvantage of others. Kofi Annan, a former Secretary General of the United Nations, described corruption as ‘insidious plague that has a wide range of corrosive effects on societies.’ He added, ‘Corruption hurts the poor disproportionately by diverting funds intended for development, undermining a Government's ability to provide basic services, feeding inequality and injustice, and discouraging foreign investment and aid.’<sup>23</sup> The rule of law is considered the cornerstone of a responsible Government because it is believed to ensure the state, which possesses the means of legitimate coercion, to exercise its power in a reasonable and not an arbitrary fashion. The exercise of legitimate coercion in a reasonable manner is necessary to maintain check and balance in place so that the opportunities for the abuse of state power are minimized or prevented. Absolutism and impunity to abuse of power are main reasons behind the corruption. The abuse of power, on the other hand, emerges when powers of the State organs are not divided and the system of check and balance is not put into place. Given the absence of separation of powers, a state can intervene effectively in all aspects of life of people. Absolute power is thus the main source of corruption. The concept of rule of law requires institutions of State to function under the authority of law, thus the acts of corruption are made punishable. The main thrust of rule of law in this sense is to prevent impunity—any public official is under law and his/her abuse of power and corrupt acts are subject to criminal liability. The rule of law is thus cornerstone of the prevention of corruption.<sup>24</sup>

Publicized and stable laws are equally important element of rule of law. To be an accountable Government, having the laws made and published as well as publicized is a precondition. This element makes the system of governance transparent. Transparency is a key element of a state that believes on rule of law.

*Law and order or state of security:* Law and order or state of security are other components of rule of law. The protection of life of people from crime, anarchy and natural calamities is a prime responsibility of the Government. The Government has been put into place by people to provide security in and to their lives. As a matter of fact, any Government that fails to ensure better law and order and dependable security of people’s lives is considered to be discarding the principle of rule of law. A Government that fails to provide law and order in the society or fails to provide the security of people’s life is either marred by corruption or is despotic or irresponsible. In this sense, the rule of law is a concept of good governance. The concept of good

<sup>23</sup> The Secretary-General, ‘Statement on the Adoption by The General Assembly of The United Nations Convention Against Corruption’, 31 October 2003, *United Nations Office on Drugs and Crime* available at <http://www.unodc.org/unodc/en/treaties/CAC/background/secretary-general-speech.html>, accessed on 26 November 2017; In his Foreword to the 2004 United Nations Convention Against Corruption, the then UN Secretary-General, Kofi Annan attributes those atrocities to the widespread problem of corruption. United Nations Office on Drugs and Crime, *United Nations Convention Against Corruption*, United Nations, New York, 2004, p. iii.

<sup>24</sup> See generally Robert Klitgaard, *Controlling Corruption*, University of California Press, Berkeley CA, 1988.

governance recognizes or emphasizes that the nation, institution or enterprise must operate for the benefit of people, with an obligation of accountability.<sup>25</sup> The concept of good governance believes that leaders are entrusted with authority to deliver benefits to their citizens. In short, Governments must be 'epitomized by predictable, open and enlightened policy making; a bureaucracy imbued with a professional ethos; an executive arm of Government accountable for its actions; a strong civil society participating in public affairs; and every agent complying to the rule of law.'<sup>26</sup> In this sense, the United Nations defines the rule of law as 'a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards.'<sup>27</sup> At a bare minimum, good governance with accountability and transparency is a foundation for peace and stability, without which all of societies' greater aims cannot be achieved.

*Protection of fundamental rights:* Human individual has two basic attributes of dignified life. First, every individual must have comfortable and well-improved vector of life economically. This attribute requires that basic human needs are addressed adequately, and an individual is given all opportunities to maximize his/her economic well-being. Second, every individual's protected sphere (consolidated state of liberties) is fully safeguarded by law. Attainment of these two attributes is defined as a state of protection of fundamental rights or human rights of individual. The ultimate goal of governance is to ensure happiness of people, which is generally measured by indicator of level of protection of fundamental rights of citizens. Fundamental rights and rule of law reinforce each other. As noted by UN Secretary General, in 2004, there is no rule of law within societies if human rights are not protected and vice versa; human rights cannot be protected in societies without a strong rule of law. The rule of law is the implementation mechanism for human rights, turning them from a principle into a reality.<sup>28</sup>

*Open Government:* The concept of open Government connotes a transparent system of governance. It implies, basically, three cardinal attributes that make a Government an open Government. First, the Government has its basic structure established based on the doctrine of separation of power and check and balance. Second, the law-making process of the State is defined and transparent. Third, the executive Government is

<sup>25</sup> See 'Good Governance & the Rule of Law: Business Priorities for the UN Sustainable Development Goals', January 2015, *United States Council for International Business* available at <http://www.uscib.org/docs/Governance%20and%20the%20Rule%20of%20Law.pdf>, accessed on 26 November 2017.

<sup>26</sup> World Bank, *Governance - the World Bank's Experience*, The World Bank, Washington, D.C., 1994, p. 1.

<sup>27</sup> See UN Secretary-General, 'The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the Secretary-General', 2004, *United Nations* available at <https://www.un.org/ruleoflaw/blog/document/the-rule-of-law-and-transitional-justice-in-conflict-and-post-conflict-societies-report-of-the-secretary-general/>, accessed on 26 November 2017.

<sup>28</sup> 'United Nations and Rule of Law: Rule of Law and human Rights', *United Nations* available at <https://www.un.org/ruleoflaw/rule-of-law-and-human-rights/>, accessed on 26 November 2017.

accountable to the Constitution and laws made by the legislative body. Existence of these three attributes, *inter alia*, in a state connotes that the State is run in accordance with rule of law.

*Access to Justice:* The concept of rule of law requires that every individual has access to the administration of justice which is essentially fair and impartial. The fairness and impartiality of justice requires existence of functional system of judiciary with defined procedures of trial or hearing. It also requires that persons are guaranteed representation of legal professionals in all stages and aspects of trial or hearing. Other rights of persons included within this scheme are that (a) the trial or hearing is conducted by competent judicial officials in public; (b) the use of law retrospectively is declined; (c) no person is tried in a case more than once, and (d) no person is punished for an act which is not a crime under law at the time of commission. The rule of law, in this sense, requires unreserved operation of the principle of equality before the law, which in turn requires above all that a person cannot be punished without having given an opportunity of fair trial in accordance with law. In other words, a legal system under the rule of law has defined processes which give people, regardless of their status, equal access to the rights they are entitled to under the law. These rights include: (a) Equality before the law in the criminal trial process which means that all individuals are entitled, regardless of their status in society or the crime they are accused with, to the presumption of innocence and the opportunity to put their case before an independent and impartial court;<sup>29</sup> (b) Equality before the law in that an individual, regardless of their status in society, can challenge a law which is unconstitutional in the highest court of the State; and (c) Equality before the law includes being able to challenge the decision of a Government agency on equal footing. For equality before the law to exist, the Government must follow certain rules when dealing with an individual, because the resources of the Government far outmatch those of most, if not all, individuals.<sup>30</sup> Access to justice, *inter alia*, includes right to representation by legal counsel and free legal aid, if the person is unable to hire a legal counsel. Speedy trial and safeguard of other procedural rights of accused constitute equally important constituent of rule of law. No state can flout the principle of 'due process of law', which means that the judicial proceedings must be defined by categorical procedures established by the law. In addition, the publication of the decision of the court also comprises the right to access to justice.

The aforementioned normative standards or guidelines of the rule of law, as coined by the World Justice Project, encourage advocates and followers of the rule of law to depart from conventional politically imbedded concept. Instead, it attempts to frame a concept, which collectively consists of the abovementioned normative guidelines that contribute or assist to establish the rule of law as a cardinal principle of the welfare and human rights-based system of governance. Having these indicators or

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<sup>29</sup> 'Human Rights and the Rule of Law: Does the rule of law support human rights?', *Rule of Law Institute of Australia* available at <https://www.ruleoflaw.org.au/education/case-studies/human-rights/>, accessed on 26 November 2017.

<sup>30</sup> *Ibid.*

normative guidelines present in the system of governance ensures that the State institutions and officials carry out their functions with full respect to and compliance with basic human rights and are fully accountable to people. The compliance of these guidelines provides the State a solid ground to justify that it has a culture of respecting rule of law.<sup>31</sup> The so-called liberal democracy is thus not a cardinal requirement for existence of the culture of rule of law. Among these guidelines, the principle of the limited Government is by and far the most important indicator because the indicator of the limited Government makes implementation of all other indicators feasible in practice. Considering from notion of the limited Government, the rule of law constitutes a milestone for emergence and consolidation of the people's welfare and happiness oriented political and legal culture in the society. The following statement of Arthur Chaskalson, the former president of the Constitutional Court of South Africa, is worth mentioning at this juncture.

To be truly effective the rule of law needs to form part of the legal and political culture of the country. I cannot stress enough the importance of such a culture, which, if respected, is the greatest protection against injustice. Hence, the importance of main streaming emphasized by the world justice forum. Ultimately, the struggle for a better virtue of the rule of law is that it provides space for such contestation to take place.<sup>32</sup>

The principle of the limited Government connotes something different to that we have been conventionally used to understand. Conventionally, the concept of limited Government implies a political culture of 'elected Government within a specified interval of time' and participation of people to control the Government by exercise of their right to franchise. Progressively speaking, the principle of the limited Government means a system of Government that bears no unlimited power of decision making in course of the State affairs. In contrary, the system of the Government is accountable to wishes, aspiration and convenience of people in the sense that the economic and social wellbeing of the people is the primary goal of the Government institutions and they bear no special goals and wishes other than that of the collective goals and wishes of the people. The principle of the limited Government thus implies categorically as described below:

- (a) The State institutions are fully obligated to work and implement a framework of the development that is necessary to build capacity in individuals, so that they are able to exercise their fundamental rights that are generally guaranteed by the Constitution of the State. To view from this perspective, the principle of limited Government is an instrument as well as process and end to empower people to exercise their fundamental rights, which, in turn, render the State institutions accountable to the people. This notion of the limited Government

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<sup>31</sup> Juan Carlos Botero & Alejandro Ponce, 'Measuring the Rule of Law', working paper, World Justice Project, 2010.

<sup>32</sup> Remarks at the World Justice Forum I, Vienna, July 2008.

has faced a number of challenges in many countries. In Nepal, for instance, the Supreme Court of Nepal in *Hari Prasad Nepal vs. the Government of Nepal* held that the Prime Minister of Nepal can exercise his/her prerogative to dissolve the Parliament without giving any political justification. Hence, the Supreme Court cannot test the constitutionality of such an act of Prime Minister by entering into a judicial scrutiny of the issue of political legitimacy of the act. The interpretation of the Court introduced a principle that the Prime Minister is above the will of people. The Supreme Court gave precedence to the prerogative of the Prime Minister to dissolve the Parliament and ignored the fundamental rule of constitutionalism that the Parliament must be allowed, as a rule, to work to the fullest of its tenure.<sup>33</sup>

- (b) The principle of limited Government condemns arbitrariness in decision making by the institutions of the State. The institutions of the State and its officials are accountable to the mistakes and wrongs incurred by their decisions against laws. Through the ban or restriction on arbitrariness on decision-making, the rule of law empowers law-abiding citizens to raise their voices against arbitrary decision of, and corruption committed by, the State institutions or officials. By this mechanism, the principle of limited Government fosters a culture of participation of law-abiding citizens in matters of preventing the state of impunity and corruption.
- (c) The meaning of the limited Government has obtained more pragmatic appreciation in recent years. Pragmatically, it is viewed that laws that are accepted by the general population through their free choice or voluntary appreciation may have enhanced legitimacy and effectiveness in application. This principle implies that the legitimacy of laws is not established through power of the State. It is an emerging thought that the system of laws functions not as an instrument of containing people from exercising their choices and preferences but it works as an instrument of people to render the State behave in proper way in its dealing with them. The principle of limited Government, therefore, is an instrument of subjecting the State institutions and decisions to take people as the master of the nation.
- (d) The principle of limited Government has inseparable linkage with the economic and social development of general population. The general people's rights to have economically a better vector of life and secured sphere of liberties are two aspects of development.

In this sense, the principle of the limited Government has two aspects. Economically, the Government has accountability to foster a better standard of people's life. The Government of People's Republic of China's efforts to rescue over 500 million people

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<sup>33</sup> See generally Yubaraj Sangroula, 'No Extension or Non-amendment? The Supreme Court's Originalist Approach to Interpreting the Tenure of the Constituent Assembly' in Buddhi Karki & Rohan Edrisinha (eds) *Participatory Constitution Making in Nepal: Issues of Process and Substance*, United Nations Development Programme (UNDP), Kathmandu, 2014, pp.89-107.

from poverty over the last 30 years is an exemplary practice of the implementation of the rule of law. Politically, the Government is obliged to secure full respect to the protected sphere of individuals' freedom and liberties. Both these aspects are administered by help of sound laws enacted by people through their representatives or deputies. The Republic of Nepal's efforts to establish peace through making a Constitution by popularly elected Constituent Assembly is the best example. These aspects of individual's development involve inalienable rights, which are defined as human rights. The principle of limited Government, as an instrument of socio-economic and political development, is an instrument of the rule to law to protect and preserve a condition of human rights.

The concept of rule of law with primacy of the attribute of the limited Government has essential bearing to the people's right to life, implying an accountability of the Government to ensure security and dignity of each individual within its jurisdiction. Obviously, the concept of human rights is a mechanism of ensuring socio-economic development as well as protecting freedom of individual from arbitrariness of the Government institutions and officials.

The mechanism of fairness and impartiality in the criminal proceeding is the most pivotal guarantee against arbitrariness of the decision of the Government institutions and officials. It is where the rule of law has to play a crucial role. It subjects the State's prosecution to discharge the burden of proof for prosecution and sentencing for criminal liability. In this sense, the rule of law is an instrument to put the brake on power of the State institutions by the power of laws made by the State's legislative agency. The difference of understanding about the rule of law in the Eastern and Western societies at this juncture is wider. The western societies generally believe that the State institutions are necessarily an anti-thesis to individual's freedom and liberties. The oriental societies, however, believe that the appropriateness of the State's institutions is generally determined by their actions but not by their institutional structure.

A State institution is administered by a human being, who is generally wise and good. In fact, an institution is arbitrary basically by actions of individuals administering the institution. The oriental society, therefore, makes a linkage between ethics and morality as an essential component for the effectiveness of the rule of law whereas the western society categorically rules out the belief on this cardinal principle. The principle of limited Government is, therefore, a principle of law and its functioning in close harmony with public morality. However, the principle of limited Government as a matter of law is not attainable without sound law, and the concept of sound law automatically invites roles of ethics and morality. The concept of rule of law is thus not unattached with the principle of ethics and morality.

## **Two Approaches of the Description of the Rule of Law**

The discussion above does reflect on existence of two approaches about description of the rule of law. The one can be called '*Thin Definition Approach*' and another as '*Thick Definition Approach*'. According to the first one, the rule of law can be defined



as a body of 'formal procedural rules' that establishes uniformity and equality in functions of the Government. The separation of powers among the vital organs of the State is the categorical shape of the rule of law, in this approach. This approach believes that the prospect of the application of rule of law is grim or un-existing if the given State fails to acquire the separation of power to have its application in theory as well as practice. According to the second approach, however, the rule of law can be defined as a concept or principle of transparent, accountable and responsive governance system. The transparency, accountability and responsiveness of the governance system is determined by the success of the Government agencies to secure adequate development in the socio-economic vector of people's life in the one hand and the success in guaranteeing and protecting the basic freedoms and liberties of the people on the other. The principle of rule of law, in this sense, is an instrument of socio-economic and political wellbeing and development of individual citizens.

In generic sense, the rule of law is a body of legal principles that advocate that laws should govern a nation, as opposed to the rule of individuals. As such, the rule of law rejects a classical cliché of the western legal-centralist jurists that the rulers or Government officials are exempted from obligations to abide by laws.<sup>34</sup> The rule of law concept also rejects a political theory that law is an instrument of state power to coerce people to abide by its arbitrary laws and decisions. Albert V. Dicey is the main proponent of this theory.<sup>35</sup> For him, the rule of law means three main ideas. First, it is a state of absence of arbitrary power or the state of supremacy of law. According to him, the rule of law means the absolute supremacy of law implying that no human is punishable or can lawfully be made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the courts of the land. Second, it is a state of equality before law. In this principle, it means the equality of law or equal subjection of all classes of people to the ordinary law of the land, which is administered by the ordinary law courts. Third, it is a principle that the constitution is the result of the ordinary law of the land. He argues that in many countries, rights such as right to personal liberty, freedom, arrest etc. are provided by the written Constitution of a Country. But in England these rights are a result of the judicial decisions that are the result of the conflict between the parties. For him, the constitution is not the source but the consequence of the rights of the individuals. Dicey's ideas are largely obsolete to the present time. The modern concept of the rule of law is wider and pragmatic than Dicey's dogmatic explanation. The Delhi Declaration, 1959, which was later confirmed at Logos in 1961, has formulated some

<sup>34</sup> British Jurist John Austin immensely advocated this theory. For him, the sovereign, the monarch or the body of the State that was authorised to exercise the sovereign power of the State, was immune from the laws it made. For him, the law was merely an instrument of the rulers to subject the general population to its political will. This theory was drawn from the early Roman Byzantine rulers and the theories of Thomas Hobbes and many other Western Philosophers. For more information in this regard see, Robert Higgs, 'Fear: The Foundation of Every Government's Power', 17 may 2005, *Independent Institute* available at <http://www.independent.org/publications/article.asp?id=1510>, accessed on 18 December 2017; Also see, Robert, Higgs, *Crisis and Leviathan: Critical Episodes in the Growth of American Government*, Oxford University Press, New York, 1987.

<sup>35</sup> See A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, McMillan and Co., London, 1915, pp. 27-32, 110.

precise notions of the rule of law. This declaration has emphasized the role of the rule of law as an instrument of creating conditions in which the dignity of human beings is upheld. The dignity of human being requires not only the recognition of certain civil or political rights but also creation of certain political, social, economic, educational and cultural conditions which are essential to the full development of his/her personality.<sup>36</sup>

Furthermore, the concept of rule of law in the western society emphasizes the element of prohibition on absolutism in political power by which the European societies were gravely affected during and after medieval era. The modern principle of rule of law, however, has added relevance to building a rational society with emphasis on building welfare-based system of governance. Here, institutions of Government are required to be accountable to the welfare and socio-economic development of general people through operation of schemes of equality in distribution of resources, the inclusivity of people in development endeavors and balance between development endeavors and natural environment.

As it follows from the discussion above, the rule of law can be defined as a concept having four universal principles. They are: (a) Constrains on Government Powers—lack of absolute power is a factor to promote rule of law; (b) Absence of corruption—absence of corruption promotes prospect of equality and fairness in accessibility to resources and *ethico-moral* cultural structure of the society; (c) Open Government—open Government enables transparency of Government functions; and (d) Protection of fundamental rights—protection of fundamental rights restrains Government to encroach upon liberties of individuals.<sup>37</sup>

## Democracy and Rule of Law do not Go Lockstep

Rule of law and democracy tend to be mutually reinforcing. However, the rule of law need not necessarily march in lockstep with the so-called democracy as it has been defined by the western political philosophy. The protection of so-called liberal rights that includes the right to exercise a franchise to elect the Government in span of certain interval has been defined as democracy by the western political philosophy and it has emphatically been argued by advocates of the liberal democracy that the so-called liberal democracy is a key benchmark for the socio-economic development of society.<sup>38</sup> Initially argued by John Rawls, this theory has been proved wrong and obsolete by trends of development manifested in achievements of economic development in Asia and Mid-East. Many countries in Asia and Middle East have refused to adopt the so-called liberal democracy as their political system but many of

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<sup>36</sup> See 'Origin and Concept of Rule of Law', *Law Teacher* available at <https://www.lawteacher.net/free-law-essays/administrative-law/origin-and-concept-of-rule-of-law-administrative-law-essay.php#ftn13>, accessed on 18 December 2017.

<sup>37</sup> Brain Z. Tamanaha, 'History and Elements of Rule of Law', *Singapore Journal of Legal Studies* p. 232, 2012.

<sup>38</sup> Refer to theories of justice and fairness by John Rawls on Stanford Encyclopaedia of Philosophy. 'John Rawls', 25 March 2008, *Stanford Encyclopedia of Philosophy* available at <https://plato.stanford.edu/entries/rawls/>, accessed on 18 December 2017.

them have been able to score highest in ranking in terms of rule of law and economic development.<sup>39</sup>

Despite the limitation on liberal democracy, these nations have achieved a fairly functional legal system and have been able to maintain fairness and impartiality in the system of administration of justice. Singapore's legal system, for instance, is regularly ranked as one of the best in the world. It was in the top 99<sup>th</sup> percentile on the World Bank rule of law index in 1996, and in 93<sup>rd</sup> percentile in 2002. By way of broad comparison, the US was in the ranking in the 91<sup>st</sup> and 92<sup>nd</sup> percentile in 1996 and 2002 respectively.<sup>40</sup> As argued by some academicians, Singapore and even more clearly Hong Kong show that liberal democracy is not a pre-condition for a rational or functionally competent legal system. The primary role of law in Singapore is said to strengthen the state through ensuring stability and facilitate economic growth. In Singapore, many decisions are left to the State and political actors, primarily the cabinet headed by the prime minister. The civil society is limited and generally characterized by a corporatist relationship between the state business, labor, unions and society. Moreover, the administrative law of Singapore tends to emphasize Government efficiency rather than protection of individual rights. While individual rights are constitutionally guaranteed, they are not interpreted along liberal lines. The example of Singapore, thus, shows that the so-called liberal democracy and rule of law are not lockstep. It can very candidly be argued that no political system or ideology constitutes a precondition for the application and growth of rule of law. What is essential for application and growth of the rule of law is the existence of a properly and adequately structured legal system, and such legal system is possible to develop with a precise concept of law.

Hong Kong, an integral part of PRC with a distinct political and legal system, is another example. The system of law that it has been practicing is widely considered to be an example of rule of law. Even after the handover of it to PRC, the legal system continues to score high on the World Bank's rule of law index though the political system it works under is not a system that fully matches the attributes of so-called liberal democracy.

Among Arab countries Oman, Qatar, Bahrain, Kuwait and United Arab Emirates are in the top ranking in the World Bank rule of law index but have a zero ranking on polity—i.e. democratic system. Guatemala, Kenya and Papua New Guinea, for example, all score highly on democracy but poorly on rule of law ranking (below the 25<sup>th</sup> percentile on World Bank Rule of Law Index). Some other countries including the Philippines received as high as 8-10 percentile in democratic polity but at below the 15<sup>th</sup> percentile in rule of law. These examples also manifest that liberal democracy is not a precondition for rule of law. PRC does not have a system of multi-party system with regular elections for framing the parliament but still its economic achievements and efforts to prevent corruption are globally acclaimed.

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<sup>39</sup> Randall Peerenboom, 'Rule of Law and Democracy: Lesson for China from Asian Experiences', *SSRN*, 16 November 2008 available at <http://ssrn.com/abstract=1300882>, accessed on 18 December 2017.

<sup>40</sup> *Ibid.*

## Economic Development, Democracy and Rule of Law

The state of poverty, as opposed to the definition of World Bank (WB) and International Monetary Fund (IMF), is an outcome of deprivation from the rights to economic development, social exclusion and absence of access to development opportunities and resources. These three indicators or elements push individuals into a trap of the socio-economic subordination, which implies a state of diminished or deprived vector of life. This argument helps us to reasonably conclude that poverty results when person has been prevented from enhancing his/her capacity to compete equally in the market. The state of poverty, therefore, is a violation of the principle of equality.<sup>41</sup>

The state of poverty as an outcome of subordination seemingly establishes a state of absence of rule of law or human rights. A number of empirical studies have shown that democracy, rule of law and GDP of people do interact and contribute to strengthen the operation of each other. While democracy may not necessarily ensure rise or growth of economic development, the economic development, on the other hand, does significantly contribute to the increased participation of people in State's affairs and politics. The increased economic development of person enhances the prospect of individual's participation in politics with added strength or quality.<sup>42</sup> The increased popularity and commitment of the People's Republic of China in recent years justifies the vitality of this theory.<sup>43</sup>

The role of economic development in fostering rule of law and human rights culture is seen crucial. The transition of South Korea, Malaysia, Thailand and some other countries as well show that the transition to the consolidation of rule of law came only after economic growth reached to a relatively high level. Efforts of China in the last few years to protect and promote human rights of common people by enhancing their productivity and capacity to compete in the market is marked by the similar tendencies. Rescue of millions of people from absolute poverty over the last few years is a categorical example. In China, the number of poor people in between 1978 and 2015 fell from 250 million to 55.75 million.<sup>44</sup> In contrast, some countries that

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<sup>41</sup> See Thomas Pogge, 'Severe Poverty as Human Rights Violation', in Thomas Pogge (ed), *Freedom from Poverty as a Human Right: Who Owes What to the Very Poor?*, Oxford University Press, 2007, pp. 11-55.

<sup>42</sup> Rigobon & Rodrick (2005) found that while democracy and rule of law are both related to higher GDP levels the impact of rule of law is much stronger. See, Roberto Rigobon & Dani Rodrik, 'Rule of Law, Democracy, Openness and Income: Estimating the Interrelationship', vol. 13, no. 3, *Economics of Transition* p. 533, 2005.

<sup>43</sup> Speech of Foreign Minister Wang Yi in his opening speech to the delegates of the South-South Human Rights Conference, held in Beijing on 7 and 8 December 2017 where he said, 'China's experience shows that human rights can be protected in more than one way. Countries can find their own models of human rights protection in light of their national conditions and people's needs. The key factor contributing to China's remarkable achievements in its human rights endeavors is its firm commitment to a human rights development path with Chinese characteristics.' This statement implies that the characteristic of economic development is indispensably connected with figuring out the way for development of human rights. See, *South-South Human Rights Forum* available at [http://p.china.org.cn/node\\_8001790.htm](http://p.china.org.cn/node_8001790.htm), assessed on 25 December 2017.

<sup>44</sup> Chengwei Huang, 'Ending poverty in China: Lessons for other countries and the challenges still ahead', 14 October 2016, *the World Bank* available at <https://blogs.worldbank.org/eastasiapacific/ending-poverty-in-china-lessons-for-other-countries-and-challenges-still-ahead>, accessed on 25 December 2017.

attempted to democratize at lower levels without adequate economic development failed in the past to achieve the same, often times reverting to authoritarianism. Indonesia is a typical example. India practiced democracy since 1947 but failed to usher transformation of the society into economically and democracy a well-off society but turned largely to be a mockery, at least for the vast number of common people.<sup>45</sup> Thailand went through numerous cycles of democratic elections followed by military led coups—there were some Seventeen coups till 2005.

The last coup swept away both the former Prime Minister, Thaksin Sinawatra and the much heralded 1992 constitution. South Korea after successful election in 1960s returned to authoritarian rule. The Philippines' experiment is not successful either. In South Asia, General Zia reclaimed power in Bangladesh in 1975 when the democratically elected Government was viewed unable to address the promises of rapid development. General Zia was eliminated by General Ershad in 1982. Nepal restored Multiparty democracy in 1990 and soon after it fell in trap of bloody conflict, thus giving rise to the absolute monarchy in 2004 by which the multiparty democracy was suspended and the 1990's Constitution was scrapped. The Constituent Assembly election was held in 2008 without succeeding in making a constitution and leading to second election of the Constituent Assembly in 2013. The new constitution is now in enforcement but without stability in political power. These examples show that economic development is a precondition for any political system to work with stability and to promote a culture of rule of law.

The situation in Nepal along with other South Asian countries have adequately shown that the so-called democratic elections are not the foundation for the political stability in a situation of low levels of GDP and the weak governance institutions. The emphasis only on so-called democratic political stability only contributes to limp along with low levels of economic development, pressing social order problems, and massive discontent over the political system. This problem is seen serious in the Philippines, Indonesia, India, Cambodia, Bangladesh, Pakistan and Nepal. As Pinkney points out, what is remarkable is that almost all third world countries have had at least nominally pluralist political system at some time in their history, and the majority on these did not (or could not) build to establish durable forms of democracy.<sup>46</sup>

Elections, that are considered to be important elements of sustaining democracy and resolving conflict, have largely failed to serve the same objectives. In the Philippines, for instance, Joseph Estrade was impeached though he had come to power with popular votes. He was allegedly linked to illegal payoffs from gambling lords. In South Korea, president Roh was impeached on charge of illegal campaigning and corruption. He was later on reinstated but his attempt to replace several cabinet members without

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<sup>45</sup> Milan Vaishnav, 'The Merits of Money and 'Muscle': Essays on Criminality, Elections and Democracy in India', Ph.D. thesis, Columbia University, 2012.

<sup>46</sup> Robert Pinkney, *Democracy in the Third World*, 2<sup>nd</sup> edition, Lynne Rienner Publishers, Boulder CO, 2004, p. 65.

following constitutional procedures gave rise to complaints to heavy handedness. The presidential election in Indonesia featured two military men in 2004. In India, the voters threw out the BJP despite the growth rate of 8%, opting instead for the congress party led by Sonia Gandhi, the widow of the former PM Rajib Gandhi. The family patronage is a feature of politics in India with regard to this party. The elections are often marred by the deaths of people in stampede and bomb blasts.<sup>47</sup>

In Nepal, the problems go beyond the messy elections. In 2001, the King, Queen and the entire family members were massacred, allegedly in a designed conspiracy hatched under Indo-West game plan to contain China and provoke unrest in China's Tibet. In October 2002, the new king dismissed the Prime Minister and his cabinet for incompetence after they dissolved the parliament and were subsequently unable to hold election because of the ongoing insurgency. While stopping short of reestablishing parliament, the king in June 2004 reinstated the most recently elected prime minister who formed a four-party coalition Government, which the King subsequently tasked with paving the way for election to be held in spring 2005. Citing the dissatisfaction with the governance and lack of progress in addressing communist insurgency, the King dissolved the Government and assumed the power in February 2005. Following massive demonstration and popular movement, parliament was reconvened in 2007. Nepal, now, has a new Constitution but even so and several elections later, the stability is still unachieved and economic development is severely affected.

Democracy proponents often argue in the face of poor economic performance, massive demonstrations and calls for change and elections marred by violence and vote-buying that democracy is inevitable for economic development and the rule of law.<sup>48</sup> They often argue that democracy in the economically poor countries has gone messy but they are not tired to argue for another election as a solution of messy democracy. Worst of all comes from World Bank and International Monetary Fund when they prescribe so-called liberal democracy and human rights as preconditions for financial support or investment in these countries. Joseph Stiglitz, a Nobel laureate, has viewed that globalization has not been able to push the economic development of the developing countries. Liberalization policies have been implemented too fast in the wrong order and often using inadequate—or plainly wrong—economic analysis. As a consequence, he argues, we now face terrible results, including increases in destitution and social conflict, and generalized frustration. He says, the culprits are the IMF and its 'market fundamentalists', the 'Washington Consensus', and the US Treasury.<sup>49</sup> Human rights and rule of law concepts have been used as political instruments of Western powers to meddle in affairs of developing countries which constitute one of the sources of continual political instability in many developing countries. Based on the preceding deliberations, some important conclusions can be drawn up.

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<sup>47</sup> 'India's Election: The Greatest Show on Earth' *the Economist*, 15 April 2004 available at <https://www.economist.com/asia/2004/04/15/the-greatest-show-on-earth>, accessed on 27 December 2017.

<sup>48</sup> Anthony Lawrence, 'Nobody Said Democracy is a Tea Party', *South China Morning Post*, 27 March 2004.

<sup>49</sup> See Joseph Stiglitz, *Globalization and Discontents*, W.W. Norton, New York, 2002.

First, attempts to democratize countries with values and principles of the western liberal democracy at low levels of GDP, both in the past and more recently, are unyielding both economically and politically. Ignoring the need of rapid economic development in order to rescue people from crisis of poverty is nothing but a folly. Far from inspiration, for instance, India is generally seen as a warning of what happens when countries move to accept liberal democracy as a panacea of socio-economic and political problems. Compared to China, India is poorer, less politically stable and generally perceived as more corrupt, chaotic and poorly governed nation. Despite such anomalies, scholars often wonder how India has managed to sustain democracy. Part of the explanation seems to be that the state is too weak to overcome the various centers of powers and no single group is sufficiently powerful to dominate the others. This encourages us to ask a question, is India, with the rate of around 30 percent criminally booked representatives, still a democracy?

Second, the argument above leads us to opine that human rights, rule of law and democracy are not commodities to export or import. The ultimate goal of human rights as well as rule of law is to foster conditions for desired economic development and cultural transformation of people. No State can improve condition of human rights and rule of law in ignorance of the State's responsibility to commit itself to economic and social transformation of people's lives.

Third, while concepts of human rights and rule of law are universal, they cannot be implemented alike in countries with different economic, political and cultural settings or development levels. However, as it has been repeatedly argued, neither human rights nor rule of law have stamp of a particular political system as it has mostly been argued by western intellectual thoughts. The protection of human rights is possible in any system if rule of law has been a primary thrust of the Government.

Fourth, the cultural setting of the society plays crucially important role in application and compliance of rule of law both positively and negatively. One of the remarkable features of the Asian societies is that they are culturally liberal and accommodative. Some remarkably important issues need greater focus, which include the fact that Asia never demonstrated interest or willingness to colonize other parts of the world. Tolerance and harmony are practiced as milestones of cultural setting of the Asian societies. As a matter of fact, all Asian societies possess remarkably worthy concepts of laws. All Asian societies had sound, ethically enriched and pro-human rights laws in the past that were largely destroyed by the colonial rules and the transplant of their legal and judicial systems. Today's Asia is thus standing largely on a paradox. Most countries have remarkably good concepts and principles of laws but are ruled by bad or unrealistic laws. India has even today been ruled by British legal system, which is not only unfamiliar to people's socio-cultural setting but also inconsistent to the concepts and principles of laws and justice that have been evolved by a very long civilization. Arguably, Asian nations' failure to foster a better situation of human rights and rule of law can thus go attributable to the imposition of laws and political system by the colonial rulers. The transplantation of the political system and laws is one of the reasons causing detriment in smooth development of the rule of law.

This argument can be supported by number of facts. The Asian societies, for instance, generally have few political prisoners than in so-called civilized and democratic societies in West. Culturally, citizens in Asia enjoy greater freedom of speech, association and assembly; and the media is subject to fewer restrictions. While Euro-American media is described freer, one should not forget that it has been fully controlled by the capitalist corporations. While courts in the western societies are said to enjoy greater independence, they are marred largely by racism.<sup>50</sup> Most importantly, the constant rise of GDP in Asia has resulted into a better situation of independence of Courts. In general, the Asian societies have been significantly changed. Yet, many Asian countries, due to implanted liberal democracies with lower levels of GDP, have shown an exacerbated situation of independence of courts. The confidence of people over the system of justice and the judiciary itself in such countries is seen poor. The legal system in many Asian countries is dysfunctional and the volume of pending cases is enormous. India, Pakistan and Bangladesh are typical examples. India alone has over 30 million pending cases.<sup>51</sup>

### **Relationship of Human Rights and Rule of Law and the of Influence of Western Powerful Countries**

The international human rights movement has heightened the attention towards rule of law in recent past. However, the movement has encountered number of conceptual, normative and political changes. The movement's claim to universality of human rights has been attacked by critics who emphasize the greater role of culture in society. In contrast, the concept of rule of law appears to be widely accepted by people from different ideological persuasions. All religious faith holders such as libertarians, liberal and communitarian democrats, soft authoritarians, socialists and even Marxists find some important values in the rule of law. It is, therefore, obvious that the concept of rule of law is seen competent to contribute in providing a solid foundation for acceptance of the universality of human rights which otherwise may have a shaky foundation. The use of human rights movement often by the western powers as an excuse to intervene in affairs of sovereign States has also brought it into a state of crisis. In this situation, the rule of law, as suggested by H. Mello, can be a fruitful principle to guide the world toward agreements<sup>52</sup> of spreading the culture of human rights within the system of governance. It is necessary to understand at this point that the system of Asian values has no conflict with human rights. The problem in fact lies on attempt of imposition of human rights by other countries as a tool of

<sup>50</sup> Nichole Griffith, 'Racism in the Criminal Justice System', June 2012, *California Polytechnic State University* available at <http://digitalcommons.calpoly.edu/cgi/viewcontent.cgi?article=1080&context=socssp>, accessed on 25 December 2017.

<sup>51</sup> See Ankit Panda, '30 Million Pending Cases: Fixing India's Overburdened Judiciary', *the Diplomat*, 26 April 2016 available at <https://thediplomat.com/2016/04/30-million-pending-cases-fixing-indias-overburdened-judiciary/> accessed on 25 December 2017.

<sup>52</sup> Economic and Social Council, Third Committee, 33<sup>rd</sup> Meeting (AM), "We all Know, Instinctively, when Rights are being Violated," High Commissioner tells Third Committee", 4 November 2002, *United Nations* available at <https://www.un.org/press/en/2002/gashc3712.doc.htm>, accessed on 25 December 2017.



changing the political regime of the countries.

Since the rule of law is vital for preventing corruption and other financial irregularities, it is naturally vital for fostering a condition of good governance which, in turn, is a milestone for protection and promotion of human rights. The human rights and development have an interface, and the good governance is a launching pad for the both of them. In this perspective, the rule of law is the major determinant of the better condition for the protection of human rights.

Long lines of economists, legal scholars and development agencies, from Max Weber to Douglas North and the World Bank, have invariably argued that the rule of law is necessary in countries to promote and sustain economic growth. It helps to protect property rights and provides necessary predictability and certainty to do business. The economic growth and overall development efforts are indispensable for rescuing people, who still form one fourth of the world population and are living below the international poverty line demarked as an annual per capita income of less than \$581. Around 800 million people are living in a state of lacking of adequate nourishment and one billion people are living without safe water to drink. Two billion people are suffering from inadequate sanitation and around 800 million are lacking access to basic health care. In such a grotesque situation of human lives, the urgency of economic growth is self-evident.<sup>53</sup> Achieving the rule of law as a primary thrust of the governance is thus vital for addressing the problem of poverty as well as other forms of sufferings.

Since rule of law is integral part of the good governance and economic development, it has to put a thrust on need of humanizing the legal system. The humanization of the legal system is vital for rendering the legal system functional, also, to protect the interests of people for socio-economic happiness and to achieve balance in interests of people. It is also vital for achieving balance between development endeavors and sustainability of natural environment. To introduce and implement laws that are capable of achieving better social order and harmony among people through distribution of equality in opportunities to development and equity-based justice is then the primary goal of the rule of law. Otherwise, the risk of society to plunge into a disorder and chaos is severe.

As in Haiti, Kosovo, Afghanistan, Iraq and lately in Syria, the collapse of the State regimes and the system of laws and justice is costly for human lives. The breakdown of the rule of law in these countries has necessarily led these societies into chaos. When external forces have played roles in breakdown of the regimes in these countries and have indiscreetly stepped up to transplant their laws or/and political institutions, the scheme of consolidation and institutionalization of the rule of law has suffered severely. The situation observed in these countries have played roles in building deeper skepticism regarding human rights movement as well as the concept of rule

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<sup>53</sup> Thomas Pogge, 'Priorities of Global Justice', vol. 32, no. 1-2, *Metaphilosophy* p. 6, January 2001, pp. 6-7.

of law not because they are contrary to the system of Asian values but because they are mischievously used by the western countries in their vested interests. The impact of the breakdown of the regimes or system of laws is not confined to these countries alone. The impact has spilled over to the entire region and sometimes to the whole globe. This argument establishes that the rule of law is vital for each country but it cannot be imposed by outsiders. The rule of law can grow indigenously and can play role in protecting and maintaining geopolitical stability and global peace. As highlighted by the UN press release, the rule of law may help to prevent wars from occurring in the first place. It can also provide guidelines for how war is carried out limiting some of the worst atrocities associated with military conflicts. It offers possibility of holding those accountable who have committed acts of aggression and violate humanitarian laws of war. The importance of rule of law as a civilized system of governance is thus crucial both from national and international perspective.

Post 9/11, concerns over terrorism have also drawn sharp attention on the rule of law because the practice of holding terrorists accountable through applying stringent means and modalities of capturing and punishing has been forcefully legitimized in some countries. For this purpose, these countries, the USA in particular, has meted out through promulgation of stiffer national defense and anti-terrorist laws. The anti-terrorist campaign has been given a shape of war on terrorism and it has indiscreetly been characterized as a war on way of life—on democracy, human rights and rule of law—and *ergo* on civilization itself. The following statement of Kofi Annan, the former UN General Secretary, has depicted the situation precisely. ‘The terrorist attacks on the United States struck at everything: peace, freedom, tolerance, human rights... the very idea of a united human family, all our efforts to create a true international society based on rule of law.’<sup>54</sup> No doubt, terrorism is unacceptable to any human being; it is an attack on civilization and humanity at large. But the questions as to ‘who is terrorist and who is protector’ are inexhaustibly debatable. The problem of terrorism has been an excuse for some countries to attack on regimes not liked by them. Iraq was victimized followed by Libya, and lately Syria. Human rights have been used as a justification for abrupt and unlimited intervention for regime change. It amply shows that both human rights and rule of law today have become victims of ill-design and political chauvinism of some powerful countries for their ill-motives.

### Asian Values, Human Rights and Rule of Law

Debates over Asian values or values in Asia have raised a wide range of issues.<sup>55</sup> The main point of contention is whether roots of the Asian culture such as Hinduism, Confucianism, Buddhism and Islam are compatible with liberal democracy and

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<sup>54</sup> Secretary-General, ‘Secretary-General urges Assembly to respond to 11 September Attacks by reaffirming Rule of Law’, 24 September 2001, *United Nations* available at <https://www.un.org/press/en/2001/sgsm7965.doc.htm>, accessed on 25 December 2017.

<sup>55</sup> ‘Final Declaration of the Regional Meeting for Asia of the World Conference on Human Rights’, *Asia-Pacific Human rights Information Center* available at [https://www.hurights.or.jp/archives/other\\_documents/section1/1993/04/final-declaration-of-the-regional-meeting-for-asia-of-the-world-conference-on-human-rights.html](https://www.hurights.or.jp/archives/other_documents/section1/1993/04/final-declaration-of-the-regional-meeting-for-asia-of-the-world-conference-on-human-rights.html), accessed on 25 December 2017.

human rights? Some other issues in discussion relate to the relationship between rights, responsibilities and duties and how to weigh rights against competing interest or claims. The balance of needs of individual against the interest of group and society is equally important issue of debate.

The main point that whether the Asian values are compatible with liberal democracy or human rights is a misleading question in itself. The question presupposes universality of liberal democracy and claims that human rights fundamentally consist of liberal democratic values. This question also presupposes a state of supremacy or superiority of the western civilization and values, which can hardly be acceptable to those civilizations that have evolved for hundreds of years, since even before the rise of the western civilization itself. The Asian argument of the inseparable relationship between culture and the concept of rule of law, however, refuses to accept the implicit construct of the west that every society ought to accept the principle that human rights, democracy and rule of law are essentially western in product. This principle contains a kind of biasness about human rights in favor of western liberal political system.

Another major area of contention relates to imbalance in economic development in different regions of the globe. The widening gap in distribution of wealth between the rich and poor both within the country and among the countries has produced a fault line that run along the North-South, the developed and developing country axis. Emphasizing the right to development, the Bangkok declaration called for an international cooperation to narrow down the gap and to eliminate poverty. The declaration rightly said that the Fault line is the major obstacle to the full enjoyment of rights. Even more explicit was the Vienna declaration, which said:

The World Conference on Human Rights reaffirms that least developed countries committed the process of democratization and economic reforms many of which are in Africa should be supported by the international community to succeed in their transition to democracy and economic development.<sup>56</sup>

Asia has very long history of pro-human rights values. The most spectacular guidelines in this regard are found in all Asian traditions. The *Rig Veda*, the Hindu scripture of laws, ethics and morality, refers to five freedoms of citizens; they are freedom against violence, absence or want, diseases, exploitation and early or unnatural death as the primary concerns of the State. Buddhism preaches for *karuna* (filial piety).<sup>57</sup> Discrimination in distribution of wealth is rejected by all civilizations; hence, income disparities are unacceptable to both the Western and Eastern societies. However, the Western *modus operandi* of the rule of law has failed to materialize the value of equality in distribution of wealth and development advantages.

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<sup>56</sup> 'Vienna Declaration and Program of Action', UN World Conference on Human Rights, 25 June 1993, UN Doc A/CONF.157/23.

<sup>57</sup> See Yubaraj Sangroula, *Jurisprudence: The Philosophy of Law*, Kathmandu School of Law, Kathmandu, 2010, 1<sup>st</sup> Chapter.

The overarching emphasis on civil and political rights neglecting the economic and social rights has resulted in massively growing disparity among people within the nation and among nations as well. Thus, rights have been misleadingly categorized as negative and positive rights. This dichotomy was ill designed and adopted to immune the developed countries from accountability of assisting poor countries and to immune the national Governments from obligation to enforce, respect, protect and fulfill rights relating to economic development and social transformation of the people. This notion of right is alien to the Asian values. Under Asian values, the duty of both individuals and State is emphasized. It is meant that every individual together with the State is obliged to work for the greater and common interests of all. It is clear from the Buddhist assertion that ‘everyone’s betterment is everyone’s happiness (*sarbhajana hitaya sarbajan sukhaya*—in Sanskrit). In Hinduism, it is said, ‘May everyone be happy. May everyone be free of sufferings.’<sup>58</sup> In China, Confucius famously remarks that there is pleasure or happiness in a simple, plain lifestyle, provided it conforms to ethical norms; such a life is preferable to wealth and status obtained immorally.<sup>59</sup>

In Asia, all the traditions in their historical annals have widely reflected on inalienability of the ‘worth of human person.’ A person can be condemned for his/her sin or crime and subjected to punishment, but his worth of person is always inalienable. This is a collective notion of Asian values. This value allows an offender to be condemned to punishment but it prevents the offender from being turned into a slave for his/her crime. The protection of the worth of human person is profoundly engrained in the ancient Hindu, Buddhist, Confucian and Daoist scriptures. Neither a State, society, nor an individual has immunity under these traditions to treat the worth of human person degradingly. These traditions have condemned the state of poverty in unequivocal terms as a serious violation of the worth of human person. In many scriptures, scattered from Hindu *Vedas*<sup>60</sup> to commentaries, the South Asian *pundits* have unequivocally emphasized the need of ensuring the wellbeing of every human individual. They have reiterated the following Sanskrita hymns: ‘*lokaḥ samastāḥ sukḥino bhavantu*’ (May all the world (people) be happy and comfortable); *yathā Ana Hsarvā Amijagatayācmahumsumanaa Sat* (through which this world stays free from diseases and unfriendly ambience), *Swastirmanushebhya, urovaṃjigadhubheShayamsamnastUaVipate, saMchatuḥpateḥ* (Human be happy, may the herbs grow high, may the two legged be happy and may the four legged be happy), *VazakaandhanarvanaVarani Nam* (Long live the kind hearted people, divine celestial power and the cowherds).<sup>61</sup> The message from the hymns is clear that human welfare and protection is the prime concern of the State or society. To elucidate further, these hymns in *Veda* refer to the need of

<sup>58</sup> See ‘Sarve Bhavantu Sukhinah’, 10 April 2009, *Sri Nv Raghuram* available at <http://nvrghuram.blogspot.com/2009/04/sarve-bhavantu-sukhinah.html>, accessed on 4 January 2018.

<sup>59</sup> D. C. Lau (tr), *Confucius: The Analects*, Penguin Books, London, 1979, p.88.

<sup>60</sup> *Vedas* are main texts of establishing Hindu tradition of philosophy. These are considered sacred documents written about 3 to 4 thousand before Christian era. Written poetic verses, these documents discuss on every aspect of human life, including the system of governance, duties of the king and his officials, wealth and means and methods of earning wealth and so on.

<sup>61</sup> See *Shaivism* available at [www.shaivism.org](http://www.shaivism.org), accessed on 4 January 2018.

preserving ambience of 'freedom against violence, diseases, wants, unnatural death and exploitation'. Cruelty is a form of violence. The want of livelihood exposes persons to cruelty. The state of poverty is, therefore, a state of cruelty, thus essentially violating the 'worth of human person'. The prime concern of the rule of law under Asian values is thus to preserve the worth of human person.

Generally, as described by *Vedic* scriptures, the very first goal of life is the attainment of *pleasure*, in its assorted material and abstract form, implying justification of claims to food, housing, clothing, art, music and dance.<sup>62</sup> Human beings, as recognized by hymns of *Vedas* in the context of the meaning of life, are naturally inclined to pursue pleasures, but they need to be attained appropriately and in their proper setting. Abuse of pleasure is not only discouraged but also condemned as an unacceptable *karma* (doing or action). The *Vedas* have described that the accumulation of powers and wealth are outcomes of the lust. This theory obviously indicates towards the duty of the State or society to properly distribute 'wealth' among all members of the society. Most importantly, the persons who hold powers are rulers and they are denied of the right to accumulate wealth. The wealth and power cannot be set in one place as they, if combined, are tantamount to corruption.<sup>63</sup> The rule of law is thus taken as a vital instrument to place rulers out of wealth and the people who hold wealth out of political power.

Another equally important goal of life is to achieve *material success*. Human beings are inclined to enjoy, like pleasure, wealth and power as a valid means of improving and giving a sense of accomplishment to the life. Nevertheless, the need for human beings to maintain discipline is an inherent virtue of life. According to the South Asian philosophy revealed from *Vedas* on the meaning of life, to maintain a strict balance between the acquisitions of means (wealth), the manner of use (power or claims) and the enjoyment of them (virtues) is the most important goal of life. To achieve a *moral harmony* in life with material means of comfort and pleasure is another equally important goal of life. Similarly, to achieve a balance between desire (pleasure), means (power and wealth), on the one hand, and ethics, on the other, is the third goal of life. The achievement of all these three goals is called '*purasartha*' (true accomplishment of life). The moral harmony is taken as a system to regulate desires for pleasure and success, but also sparks our social responsibility towards other people.<sup>64</sup> The concept of moral harmony constitutes the foundation for recognition and protection of human rights. The State is, therefore, obliged to recognize and protect access to pleasure and happiness of people as a basic need as well as an inalienable right of people, and the failure to do so is the violation of the worth of human person. The

<sup>62</sup> James Fieser, *Great Issues in Philosophy*, available at <http://springerhistory.weebly.com/uploads/2/2/0/7/22079454/great-issues.pdf>, accessed on 4 January 2018; Also See, Karl Britton, *Philosophy and the Meaning of Life*, Cambridge University Press, Cambridge, 1969; John Cottingham, *On the Meaning of Life*, Routledge, London, 2003; Milton K. Munitz, *Does Life Have a Meaning?*, Prometheus Books, New York, 1993.

<sup>63</sup> Kautilya who is also known as Chanakya has elaborately discussed this issue repeatedly in his treatise known as *Arthashastra*.

<sup>64</sup> James Fieser (n 62).

South Asian philosophical tradition in this way brings welfare of people, in the form of material pleasure and happiness, as an inalienable right of people to pleasure and happiness and the moral values of life, which are taken as three important pillars of the rule of law culturally.

Daoism, an ancient Chinese philosophy, is equally important in this respect. According to Daoist teachings, human beings should live in accord with the flow of nature; no one should aggressively go against it.<sup>65</sup> The message is just plain and intelligible. One should accumulate wealth only to that extent which is necessary for his/her decent living. The salience of this philosophy is that the accumulation of wealth unnaturally will deprive others' lives and thus violates the rules of nature. The accumulation of wealth is unvirtuous because it deprives others from an opportunity to the similar decent life.

Buddha's teachings about values of life are simple. He begins with describing 'four noble truths' of life—(a) life is 'suffering', (b) source of suffering is desire, (c) cure of suffering is the elimination of desire, and (d) so that each person has to follow eight paths to enrich the life which emphasize cultivation of proper or right understanding, thought, speech, action, livelihood, effort, mindfulness and concentration.<sup>66</sup> Pursuing these teachings will lead persons to a state of *Nirvana* (enhanced spiritual enlightenment). Hence, to achieve *Nirvana* is the ultimate value of life. The achievement of '*nirvana*' transforms individual from 'I' to 'We'. Hence, '*sarvajana hitaya sarvajana sukhabaya*' (everybody's comfort will bring about everybody's happiness).<sup>67</sup>

Islamic thought on life is very precise and unequivocal at the same time. It says, life is a great gift of *Allah* and so it is to be cherished and protected always. Islam, therefore, talks of 'alms', a system of compulsory contribution of charity by those who have means to support those having no resources.<sup>68</sup>

To encapsulate, all these Asian traditions unequivocally assert that (a) poverty is neither an outcome of pre-determined destiny, nor a bad luck, nor a condemnation of the God. Poverty is an outcome of unethical or unvirtuous acts of State or society. Poverty is a condemnation of worth of human person. (b) Every human life is a gift of nature. The natural resources are worth consuming equally. The act of accumulating wealth by some in a manner depriving others is an act of lust for wealth and selfish pleasure. The pleasure of one in deprivation of another is an immoral and condemnable act. (c) Resources and wealth are products of nature and no one

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<sup>65</sup> Ibid.

<sup>66</sup> Miko Matsuoka, 'Buddhist Concept of Human Being from Viewpoint of the Philosophy of Soka Gakkai', vol. 15, *the Journal of Oriental Studies*, 2005.

<sup>67</sup> See Sangroula (n 20).

<sup>68</sup> See Dr. A. MajidKatme, 'Sanctity of human life is basic concept in Islam' available at [www.spuc.org.uk/about/muslim-division/euthanasia](http://www.spuc.org.uk/about/muslim-division/euthanasia), accessed on 4 January 2018; 'Value of Life', *Al-Islam* available at <https://www.al-islam.org/islamic-bioethics-general-scheme-mohammad-ali-shomali/part-1-value-life>, accessed on 4 January 2018; '5 Pillars of Islam', *the Deen Show with Eddie* available at <http://www.thedeenshow.com/5-pillars-of-islam/>, accessed on 4 January 2018.

can claim special and exclusive privileges to enjoy them. The State's laws and policies that permit unnecessary aggregation of wealth should be treated as immoral and illegitimate and thereby command no legitimacy. (d) Every human individual has genuine claim for comfortable and dignified life and this principle allows everyone an access to resources that is necessary for his/her decent survival and pursuit of happiness.

Ancient Asian traditions have understood the value of the rule of law as an instrument of happiness and the notion of happiness is not only limited to material pleasure of life but also to spiritual or moral happiness. Under Asian values, the meaning of happiness is spiritually deeper and intellectually pervasive. It is based on the need to achieve harmony between morality, ethics and virtues, on the one hand, and the need to balance between material well-being and nature on the other. Fundamentally, important notion of the rule of law in connection with the development, in the sense of happiness, is that the State ought to legally and morally restrain only a few persons from aggregating wealth to the disadvantage of more people. These values under Asian philosophies reject the principles of unlimited or distorted capitalism that allow unlimited and unrestrained amassing of wealth by a limited number of people within the nation and a few countries in the globe. Hence, the neo-liberalism and absolutist capitalism practiced by some western countries is perceivably inconsistent to the principles of rule of law. The concept of rule of law is essentially associated with material and spiritual happiness of people but not with so-called liberal political system. For the Asian values or system of Asian values, the rule of law is an underlying notion of development for happiness of people.

### **Equality: a Salience of Development and Justice**

The system of Asian values or cultures takes equality as a salience of development and justice, which constitutes a framework for the practical application of the doctrine of rule of law. The major Asian traditions, as elucidated herein before, have emphasized necessity in complying with some normative and corrective theories of justice in order to foster the ambience of rule of law for the purpose of enhancing the prospect of rational development in the society. In this sense, the system of Asian traditions suggests plainly that the concept of justice essentially underlies 'equality' as an indispensable normative guideline for the treatment of one human being by another. Amaratya Sen, one of the Nobel Laureate in economics, has elaborately discussed in this regard in his seminal book, *The Idea of Justice*. It is a categorically imperative for the State and society, thus, to ensure their laws and policies unconditionally fulfill the requirement of equality in the treatment of people as a manifestation of the rule of law. The social contract between the citizens and State stands as another equally important justification for the endorsement of equality as a normative guideline of the concept of justice.<sup>69</sup> Since equality stands as benchmark of rationality in the treatment of

<sup>69</sup> 'Equality' as an aspiration of the Social Contract theory constitutes a basis for 'system of just and reasonable distribution of opportunities and advantages'. Philosophically, the 'equality in treatment to worth of human person' is an axiom, a priori, in which the State's obligation to 'proper distribution of resources' is founded. Equality thus embodies salience of what Immanuel Kant said 'categorical imperative.

people in a civilized society, it is natural to require that all normative values attached to the concept of justice should be rationally justified with the help of equality. The percepts of laws must, therefore, be based on the 'notion of equality' and as such this principle requires departure from the classical theories of law developed by the early Roman legal system, the medieval European legal systems and the theories of the 19<sup>th</sup> and 20<sup>th</sup> century European jurists.

The concept that the percepts of laws are instruments of State to regulate people's behaviors represents a classical 'Eurocentric' theory about law.<sup>70</sup> This theory recognizes the legal system as an instrument of the State to enforce its will on the people. It follows from this theory that the legality or legitimacy of the legal system is unfailingly contingent upon the political will of the State and is essentially backed by the system of coercive consequence in case of their violation. The Asian concepts or theories of law, however, do not recognize this theory about law; they have declined to emphasize the 'coercive' elements as the driving force behind the law.

The laws are recognized, by the oriental societies, as morally and ethically acclaimed normative guidelines to be followed by the State while dispensing justice and carrying out welfare services to the people. The State is an entity that is considered always vulnerable to commit abuse of power. This fact puts emphasis on the role of laws to regulate the State's administration for the benefit of the people. Explicably, the belief or dependence on the concept that law that defines it as an instrument of State to regulate people implicitly subordinates 'people's autonomy and freedoms to the mercy of the State. The principle of State's unlimited authority or prerogatives in matters of development endeavors sprouts out of this mistaken conception about law which is not acceptable to the traditional notion of the law in oriental societies. This notion is rejected by the modern theories of rule of law and human rights in Europe too.

'Equality' is one of the salient features of the modern governance system that requires the State to comply with human rights doctrines<sup>71</sup> and instruments for obtaining the legitimacy to the legal system. In this broader dimension, the notion of rule of law has three connotations: (a) the body of normative values establishing and justifying the rationality of the laws and policies;<sup>72</sup> (b) the rule of law is the ultimate goal of

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<sup>70</sup> Definitions of law essentially associating with the concept of 'State' as an indispensable representative of the people emerged in post medieval Europe. Roman law was largely a body of rules based on works of jurists. Early common law was also developed by the customary practices of people themselves. The Normans however converted common laws into prescriptive rules. Oriental laws however were a body of principles worked out by experts, and the State was free to pick up such principles to apply. The king had no power to declare rules of law. See Sangroula (n 20).

<sup>71</sup> Human rights are universal and inherent and necessarily constitute 'the indicators of rationality' of State's laws and behaviours. Human rights are not justified only because they are 'inherent to human being', but also because they 'entangle right and duty correlativity' as a salience and are of capable of being implemented by 'institutions of States.'

<sup>72</sup> As a body normative values of justice, the rule of law provides theoretical or doctrinal justification to the laws and policies adopted by the State. Viewing from this perspective, equality would be an instrument pursuing people, with full satisfaction, to approve 'laws and policies' adopted by the State. A non-discriminatory law would be 'rational' law viewing from this aspect.



human rights;<sup>73</sup> and (c) the rule of law implies a body of indicators and principles for judging the fair and impartial function of the system of governance<sup>74</sup>.

The concept that links the rule of law with development opens avenues for burgeoning potential in individuals' lives—every individual is empowered by the principle of equality to have access to the development opportunities, thus fostering both the material and cognitive enhancement in the individual's vector of life. The rule of law promotes equality in the treatment, which, in turn, initiates and fosters a rational competition among citizens, thus enhancing their productive capacity. Achieving enhancement in the vector of individual's life is not possible by an arbitrary action of the State. The concept of equality as an underlying goal of the rule of law sets a rational competition in sound motion for all people. State's obligation to recognize and protect rights of development threshold<sup>75</sup> is indispensable, unavoidable and absolute to render this competition fair and worthy. Having these rights guaranteed and fully enforced, individuals from weaker and marginalized segments are set in motion for competitiveness based on equality. This theory thus firmly argues that unlimited and unconstrained capitalism with open markets, unregulated privatization and unregulated consumerism are not only morally unacceptable but also legally ill-yielding. In this way, the system of Asian values explicably attaches moral justification for operation of the principle of rule of law. The Euro-American values of rule of law, however, embrace centrality of laws, which are defined as political products.

### **How should the 'Rule of Law' then be defined?**

The primary reason advanced for the importance of the rule of law in the Western political values is that the rule of law is inherently necessary to support the establishment and sustainability of democracy. Since the 1950s, when the colonial era began to crumble and new independent nations began to emerge in all regions, search for the right formulas for self-governance and the rule of law by avoiding negative impacts of the legal system enforced by the formal regimes intensified. It brought an unending debate in these regards among intellectuals from the developing countries. The western intellectuals and law scholars, the Washington consensus-based international organizations and the Governments emphasized the need of continuity of the laws transplanted from the former colonies. They argued that sustainability of democracy was fully contingent upon the laws fashioned by the colonial masters. In this context,

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<sup>73</sup> To achieve perfect function of law with the sense of equality in treatment of all human individuals is the ultimate goal of human rights regime. An individual exercises his/her claims, powers, privileges and immunities in order to assert his/her worth of human person equally respected and protected.

<sup>74</sup> System of governance is evaluated as fair delivery of services. The government policy of decentralization is considered impartial because it devolves power to people and empower people to participate in governance policy. A special hospital for disabled people can be justified because it provides a special service for them. The rule of law is a benchmark in all these projects.

<sup>75</sup> These rights are five in types: 1. Right to the protection of physical integrity of every individual. 2. Right to the protection of personhood of each individual. 3. Right to the freedom of choice in profession and cultural values. 4. Right to the competent education for building capacity for higher and efficient productivity. 5. Right to economic entrepreneurship.

they also claimed that the systems of laws transplanted by the colonial rulers were the harbingers of the rule of law in these newly freed countries. These arguments were rejected by the majority of intellectuals in the Asian countries, particularly by those that adopted socialist system. The intellectuals from these countries argued that the right to self-determination also included privilege of the newly freed socialist countries to discard the colonial legal and judicial institutions.

Even the countries, which preferred to follow liberal political structure substantially, reformed the legal and judicial system as required by their local contexts and cultural characteristics. The pressure of the Western countries or former colonized powers to accept effectiveness of their legal systems to foster the rule of law culture continued however. The pressure rigorously renewed in the recent past. Particularly in the wake of 1997-98's financial crisis, the Western experts prescribed to Asia the rule of law, in the spirit of the transplantation of the western laws and policies, as a part of the necessary menu of action and reforms needed to support sound, market-based economies capable of sustained growth. A sub-rationale of this argument on behalf of the rule of law notion backed by the Western scholars was that no foreign direct investment could be attracted without assurances being provided to potential investors that their money and their deals would be protected by the system of laws convenient for them. The hidden objective was, however, to exert influence into the system of governance itself. The current global 'consensus' promoted by Washington is that foreign direct investment and flows of capital from outside are necessary for growth and progress of every country. This argument necessarily follows that countries aspiring to economically develop must follow the guidelines given by the Western developed countries and international organizations like World Bank and International Monetary Fund. This assertion implies that the notion of rule of law practiced by the Western nations is necessary for modern economic life.<sup>76</sup> This argument, however, cannot be accepted as a universal principle of development. One main reason behind the disapproval of the Western notion of the rule of law is that it underlies interest or motif of political influence through the transplantation of system of law and its implementation mechanism.

It is plain from the discussion above that the notion of rule of law practiced by the Western countries suffers from skepticism in Asia. Its propagation as a panacea of every problem in Asia is categorically unacceptable. As much of the literature has shown, in Asia, there are three main sources of skepticism about the rule of law preached by the western scholars and State authorities. First, the plainest criticism is that the virtue of the Western rule of law has been oversold politically. If the rule of law had been supposed to be the guarantor of democracy and consistent free market economic policies, then, as critics have observed, the disparity of wealth among citizens in America and Europe would not have been so desperate and acute. As to democracy, the ongoing racial discrimination in the United States is enough ground to suspect

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<sup>76</sup> Barry M. Hager, 'The Rule of Law: Defining it and Defending it in the Asian Context', in *The Rule of Law: Perspectives from the Pacific Rim with a Foreword by Jerome A. Cohen*, The Mansfield Center for Pacific Affairs with Funding from the Starr Foundation, 2000, p. 1.

the rationality of argument. As for free market economics, the critics have noted that episodes such as the 1998 bailout of Long-Term Credit Management, (the U.S. hedge fund) by the U.S. financial regulatory community looked more like ‘crony capitalism’ than unfettered free markets at work.<sup>77</sup>

Second criticism is that the notion of western rule of law is viewed as a cloak for the imposition of economic hegemony by the United States. The U.S. model of rule of law is being aggressively sold to all countries everywhere today. IMF and WB work as instruments of U.S. rule of law commodity, as Joseph Stiglitz suggests in his renowned book, *Globalization and its Discontents*. In the context of the end of cold war and the perceived victory of the U.S Capitalist model over the Soviet Communist Model for managing an economy, this campaign has remarkably grown during the past decade.<sup>78</sup>

Third, a broader philosophical critique of the rule of law is that it is the reflection of the American bent for legalism and litigiousness. In the context of Asian values, it is frequently said that the rule of law in its American iteration relies too heavily on rules and does not sufficiently trust the capacities of ‘wise man’ or wise persons.<sup>79</sup> The Confucian tradition in particular is cited as a counter example of good governance.

However, the following assertions of the Western scholars on rule of law are not fully unacceptable for the Asian values: First, rule of law embraces a component of constitutionalism. This implies that there must be some fundamental statements to be endorsed by the State as shared values of the society. The constitution is the standard document of the shared values. The Constitution is intended to be the highest form of law to which all other laws and Governmental actions must conform, as Professor John Moore had written.<sup>80</sup> Second, the Asian values have no objection to the principle that the rule of law is the percept that law governs the Government. Third, the independence of judiciary is a core component of the rule of law. There is no objection to this principle either. However, this principle is often confounded by American analysts with the tripartite system of Government articulated by Montesquieu.<sup>81</sup> This analysis is not out of criticism in Asia. The standard for the independence of judiciary set forth by the American system cannot be a universal standard. The context largely determines the *modus operandi* of the functions of the judiciary. The contest among academics concerning rule of law and its fundamental characteristics is wider. Some academics believe that rule of law has a strictly formal procedural character and not a substantial one.<sup>82</sup> The purpose of rule of law is not

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<sup>77</sup> Ibid.

<sup>78</sup> Ibid, p. 2.

<sup>79</sup> Ibid, p. 3.

<sup>80</sup> John N. Moore, ‘The Rule of Law: An Overview’, *Seminar on the Rule of Law*, Moscow & Leningrad, 19-23 March 1990.

<sup>81</sup> Hager (n 76), p. 18.

<sup>82</sup> See generally Paul P. Craig, ‘Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework’, *Public Law*, 1997, pp. 467-487.

to establish the just law but to ensure the conditions where a society is governed by law and not by the whims of humans.<sup>83</sup> It is true that it requires autonomy of human beings, but not as a central political value—otherwise the rule of law would only be valid for liberal societies.

### How far Cultural Elements are Relevant in Rule of Law?

Culturally diverse views on the rule of law date from antiquity. The city of Athens sentenced Socrates to death for religious heresy and corrupting the youths 2500 years ago. Plato implored Socrates to run away from the prison and save the life from arbitrary law enforcement procedures. Socrates, however, refused to flee away from the jail. The ‘Laws,’ he argued, would come and tell him that by escaping he would break his agreement with them and undermine the stability of the State.<sup>84</sup> It was in fact the virtues of ethics and morality he was afraid of, which had been engrained in cultural life.

Even before this event, Confucius in China ridiculed the system of law as a means for establishing social order. In his views, not the law and justice but righteousness and social harmony determined by duties of individuals would constitute the foundations of social order or the establishment of an ideal society. During the same period, Buddha in Nepal renounced his kingdom for the search of peace and *Nirvana* convinced that the kingdom and its laws were unable to answer the causes of sufferings.

From the cultural perspective, the concept of rule of law is viewed as an instrument of addressing number of problems in the society. As such, it intends to curb the problem of corruption, because corruption destroys the moral virtues of the society. The rule of law culturally, therefore, fosters the norms and values of social harmony and avoids division of population, thus preventing conflicts. The cultural perspective thus defines rule of law as a body of norms that are necessary for the governance as dictated by the necessity of harmony among people.

Bribe has been abhorrently condemned by all cultural values that have been documented in Asia. In South Asia, Kautilya, in his famous book, *Arthashastra*, has said that, just as no one can see how fishes drink water when swimming, nobody knows how corrupt Government official extort the State’s treasury when they are managing the State’s treasury. A better governance is that which prevents vices of bribes and extortion of the State treasury by the State officials. The cultural perspective of rule of law, as an instrument of curbing corruption and fostering rulers’ or administrators’ accountability as part of a general governance system, refers to a body of governance norms regulating the system of Government that is friendly to the welfare of people and their well-being. The concept of rule of law is supposed to have been embedded

<sup>83</sup> Francesco Viola, ‘The Rule of Law in Legal Pluralism’, in T. Gizbert-Studnicki and J. Stelmach (eds), *Law and Legal Cultures in the 21<sup>st</sup> Century, Diversity and Unity*, 23<sup>rd</sup> IVR World Congress, 2007, pp. 105-131.

<sup>84</sup> Amir N. Licht, Chanan Goldschmidt & Shalom Schwartz, ‘Culture Rules: The Foundations of the Rule of Law and Other Norms of Governance’, vol. 35, no. 4, *Journal of Comparative Economics*, 2007, pp. 659-668.

in social institutions (culture) that legitimize individuals' expression of their own preference and emphasizes the moral equality of individuals. To materialize these norms, more specific norms of governance ought to be enacted that prevent the State officials to indulge in bribes, and if they do, they definitely get punished.

Defining culture in the context of rule of law includes elements such as shared values and beliefs. The shared values, in turn, include rules of economy and psychology practiced by the given society. These elements in broad sociological terms are called episteme of the society. The rule of law follows the episteme. This hypothesis rejects a cliché that the rule of law can be a mechanical system to be followed by every society in same or similar patterns. The cultural setting of the society generally includes a dimension that concerns the desirable relation between individual and the group. This component is known as 'embeddedness.' This refers to a cultural emphasis on the person as embedded in the group and committed to maintaining *status quo*, propriety and restraint of actions or inclination that might disrupt the group to achieve solidarity or living within traditional border. The opposite poll of autonomy, on the other hand, describes cultures in which the person is viewed as an autonomous and bounded entity who finds meaning in his or her own uniqueness.<sup>85</sup>

The second core component of culture relates to egalitarianism versus hierarchical structure. This dimension concerns the ideal way to elicit cooperative and productive activity in the society. Hierarchy refers to a cultural emphasis on carrying out the given role within a setting of the society, which is structured into a set-up of legitimately unequal distribution of power and resources. The principle of egalitarianism, on the other hand, emphasizes the necessity of ending selfish interests of individuals for the benefits equally shared by all. The principle of egalitarianism seeks to foster an ambience of welfare of everyone in the society, which is also morally justified.<sup>86</sup> Another equally important component of culture concerns with individual autonomy on the one hand and the harmony on the other. The individual autonomy refers to a cultural emphasis on achieving excellence through active self-assertion in order to master, change and exploit the natural and social environment. The harmony, on the other hand, refers to an emphasis on accepting the social and physical world as it is trying to comprehend and fit in rather than to change and exploit it.<sup>87</sup> The precept of rule of law cannot be considered valid if it separates or detaches from these cultural dimensions adopted by the given society.

## Conclusion

The discussion above underscores importance of rule of law as instrument of harmonious and stable governance which is vital for peace and prosperity in the society and the socio-economic development of each and all members of the society.

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<sup>85</sup> Ibid.

<sup>86</sup> Ibid.

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From this point of view, there is no need to be skeptical to define rule of law as an instrument of people's economic and social development for both materialistic and spiritual happiness. The discussion has attempted to establish that the rule of law is not an offspring of so-called liberal democracy. Rather, it is a principle imbedded in culture as wisdom of limited Government for better freedom of people. The principle of the limited Government manifestly establishes a norm that the Government institutions and its authorities are accountable to the welfare and happiness of the people. The principle of equality underlies the concept of rule of law, and the goal of equality is attained through making categorically specific norms and standards to rule of the society that are referred to as laws. The precept of rule of law, therefore, means that 'the Government rules the society and the laws govern the Government'.

Debates, confusions and complexities in proper understanding of the rule of law are abundant. The Western scholars are prone to emphasize the procedural aspect of the rule of law and thus tend to decline its appearance in other systems which have different procedural rules of governance. This notion of the rule of law is refused by the system of Asian values that emphasizes the substance rather than procedures. The system of Asian values has given overarching higher importance to the moral standard or the element of righteousness as the core substance of the concept of rule of law.

No doubt that the precept of rule of law has always been emphasized by the Asian traditions. The following principles are always accepted and practiced historically in Asia: (a) In the system of governance, the officials of whatsoever position are accountable under the law; (b) the laws are published, publicized, clear, stable, fair and capable of protecting citizens' rights and protecting from discrimination; (c) the rule of law provides a process by which laws enacted by the Government obtain legitimacy to govern people and the Government; and (d) the enforcement of law is carried out by being guided by a process, and such enforcement is transparent and carried out by competent authorities. Substantially, however, the rule of law is concerned with establishing a system of equality and fairness in distribution of advantages to people. This goal requires a functional system of administration and administration of justice rooted on fairness and impartiality. However, the procedures and mechanisms applied by the society may be fully relative, culturally. For instance, the Asian values system cannot accept the primacy and predominance of litigation; it prefers mediation and reconciliation instead. The number of rape cases ending in apology and heavy compensation by offenders to victims in Japan is an example.<sup>88</sup>

The rule of law principle is guided by a cultural norm of Asia, as in early Greek system, that the system of governance and the structure of democracy and its mechanisms are established for the sake of people's protection and wellbeing. As a matter of fact, in Asia it is culturally embedded idea that the State as a governance institution is supposed to represent the collective will or wisdom of the people, so that it does not

<sup>88</sup> See generally, Yubaraj Sangroula, *Criminal Justice System: Comparative of Study of the Criminal Justice of Nepal with Reference to China, Japan, India, UK and USA*, Sahayatra Publication, Kathmandu, 2018.

have its own innate goal and interests. The history of Asian civilization significantly differs with that of Europe at this point. In Europe, the rulers were considered as sovereign and the people as subjects. It is evident from Louis XIV's claim that 'I am the State'. In early Greek, however, Cicero emphasized justice, rights, equality, and fairness as underlying components of law. Consenting with the assertions of Cicero, it was believed that the State should represent the collective will of people and, hence, it should not enact evil laws.

Law as means of regulating the governance is understood as an instrument of people to ensure that the Government does not go beyond the general will of people. The State in this sense must manifest the popular behavior, which was argued by all Asian philosophers like Confucius, Lao, Buddha, Krishna and Kautilya. All these oriental philosophers unequivocally argued that the system of governance is a tool of safeguarding the security and dignity of people's life without discrimination of any kind. The element of equality and fairness in treatment is always a vital component of Asian culture. The system of democracy is merely a mechanism for people for people to express their voices and interests before the system of governance. Obviously, the democracy cannot have a pre-fixed or universally determined structure. The structure of democracy is devised by the people under the prevailing episteme of the society. It is argued, therefore, that liberal democracy may be a component of rule of law in Europe, but it cannot be claimed as a universal component of the rule of law equally applicable in all parts of the globe. The Asian societies have their distinct ways of representing people. The effectiveness and legitimacy of democracy should, hence, be sought from its functionality and ability to represent the people's voice rather than from a formal procedural structure of the system.

It is an undeniably true fact that every society has its own unique and idiosyncratic concept of law, but sometimes it is possible that a society may have a sound system of concept of laws but not a good system of law, and *vice versa*. The colonial rule in Asian countries largely destroyed the indigenous or native system of law and imposed its own laws. In some countries, even after independence, the colonial system of law remains in operation. India, Bangladesh, Pakistan and Sri Lanka are examples. Their legal systems are structurally sound and procedurally precise. However, the people are ignorant about the underlying reasons or factors for the rise of these bodies of laws because they were originated in societies to which the people of these countries are not familiar culturally. These countries have thus good structure of laws, but they lack a good concept of law. Nepal is the contrast. Nepal was not colonized. As a matter of fact, it has been able to continue with its native system of law, which is culturally embedded. It has thus sound concept of law and justice but it failed to structure a sound system of laws.

This discussion leads us to argue against the doctrine of transplant of laws and institutions of the system of justice. It, in turn, follows that the concept of rule of law respects the cultural or epistemic characters of the law. The borrowing of law as a means of promoting the idea of rule of law is thus unacceptable both in principle and practice. The failure of the transplant is manifested in most African nations. They

underwent changes to liberal democracy in the wake of post-colonial era, but most of them were engulfed by civil war subsequently, and many such nations ended with military dictatorship.

The Asian culture has an underlying understanding of rule of law as a tree, with firm roots on the ground, whereas for the Euro-American construction, it has more been a procedural system or mechanism of political governance. In Asia, the emphasis is given to the culture of rule of law but in Europe and America, a body of procedures for governance is highlighted. With its roots in culture, the Asian concept of the rule of law refers to the application of the shared values and norms of the society to the governance. As such, the rule of law is believed to represent the shared rules of economy and psychology practiced by the society. It promotes harmony and egalitarianism against individualism. Since it has its roots in cultural values, in Asia the rule of law puts emphasis on observance of obligation and duties. Both the State and citizens have been moved by a sense of duties to each other. To restrain or prevent unequal distribution of advantages is considered as a duty or obligation of both the State and citizen. In this background, Human Rights and rule of law maintain an interface with economic and social development of the society as well as citizens. Balancing the interests of the individual and societal development is thus a prime concern of the rule of law as well as good governance, which can be the core message of rule of law in Asia.