

MODERN CHALLENGES TO THE RULE OF LAW

University of Oxford, 1st November 2019

GOPAL SUBRAMANIAM

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INTRODUCTION

1. At the present moment, constitutions and democratic polities across the globe are being confronted with serious and seemingly existential threats. So widespread is the alarm that a cacophony of newspapers and opinion columns attest to it daily. And so numerous are the efforts to describe and name the problems confronting us that a survey of the scholarship on the subject published earlier this year likens them to a veritable ‘conceptual bazaar’.²
2. On a stroll through this conceptual bazaar, one encounters a vast array of ideas and nomenclatures to diagnose the present condition. Here is a sampling: ‘rule of law backsliding’³, ‘autocratic legalism’⁴, ‘abusive constitutionalism’⁵, ‘constitutional retrogression’⁶, ‘constitutional rot’⁷ and ‘democratic erosion’. The list goes on. What unites these formulations is their shared sense that the very foundations of modern democratic constitutions are in unprecedented danger.
3. The robustness of democracy is evident in certain countries like New Zealand, Ireland and Uruguay. But there is a reverse trend across most the world. There is deepening of authoritarianism in numerous democratic states.

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² Tom Gerald Daly, *Democratic Decay: Conceptualising an Emerging Research Field*, 11 (1) HAGUE JOURNAL OF RULE OF LAW 9 (2019).

³ L Pech & KL Scheppele, *Illiberalism Within: Rule of Law Backsliding in the EU*, 19(3) CAMBRIDGE YEARBOOK OF EUROPEAN LEGAL STUDIES (2017).

⁴ Kim Lane Scheppele, *Autocratic Legalism*, 85 UNIVERSITY OF CHICAGO LAW REVIEW 545 (2018).

⁵ David Landau, *Abusive Constitutionalism*, 47 UC DAVIS LAW REVIEW 189 (2013).

⁶ Aziz Huq & Tom Ginsburg, *How To Lose A Constitutional Democracy*, 65 UCLA LAW REVIEW 78 (2018).

⁷ Jack Balkin, *Constitutional Rot* in Cass Sunstein (ed), *CAN IT HAPPEN HERE?: AUTHORITARIANISM IN AMERICA* (2018).

4. I do not propose to catalogue each country that faces a threat to rule of law. Challenges to the rule of law, no doubt, abound. **What is significant is the way forward.** To pave our way through the woods, it is enough to set out the template that contemporary problems take, and I will do so shortly.
5. Over the course of this talk, I will try to persuade you that many of **the problems confronting democracy and the rule of law today are not so intractable as they may first seem.** Some of the challenges confronting us are of a perennial nature and endemic to the democratic form. Others, though they appear unique to our times and wholly unprecedented, are not. Still others, though they are uniquely modern, are ignored though they can be easily addressed.
6. With a sense of history, a dispassionate assessment of the problems plaguing the polity in question, some attention paid to improving the mechanics of judicial institutions, and the creative use of the public law toolkit, much progress can be made – by lawyers and citizens working concertedly – towards dismantling, brick by brick, challenges that may seem insurmountable.

DEMOCRACY & ITS CONNECTION TO THE RULE OF LAW & LIBERAL CONSTITUTIONALISM

7. Let me begin with the connection between democracy and the rule of law. While the rule of law may not necessarily presume democratic government, democratic constitutionalism today always and necessarily presumes the existence of the rule of law. **Democracy itself envisages the rule of law. A challenge to the rule of law, it follows, means that democracy is in danger.** Without the rule of law, there is no democracy. And in modern times, we are committed to liberal democracy.
8. It may be useful to clarify what I mean by the terms ‘democracy’, ‘rule of law’ and ‘liberalism’, before I proceed further. By ‘**democracy**’, I mean a government that is democratic both in form and in substance. Along with periodic elections,

democracy requires the recognition of rights, typically codified by a Constitution which sets out to assure that the government acts with due regard for them.

9. Of course, in its historical sense, the term '**rule of law**' meant no more than the maxim "*non sub homine sed sub deo et lege*" conveyed – government of the people must proceed "not under man, but under God and the law".
10. Along with Parliamentary sovereignty, **Dicey** takes the rule of law to be the foundation of the unwritten constitution of the United Kingdom. It was, in Dicey's view, a respect for the Rule of Law which distinguished the civilized and orderly state from the lawless and chaotic one.
11. But modern accounts of the rule of law – such as Lord Bingham's excellent and lucid list of rule of law *desiderata*⁸ – go considerably further than simply requiring governance by laws as opposed to monarchical caprice. They take in substantive and indispensable features of democracy. In this sense, the rule of law is a necessary pre-condition to realizing democracy.
12. To **Tom Bingham**, rule of law meant "*that all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts.*" Here is Bingham's eight-point list:

First: "the law must be accessible and so far as possible intelligible, clear and predictable." [**Legal Certainty**]

Second: "questions of legal right and liability should ordinarily be resolved by application of the law and not the exercise of discretion." [**Law, not Discretion**]

⁸ Lord Bingham, *Rule of Law*, 66 CAMBRIDGE LAW JOURNAL 67 (2007).

Third: “the laws of the land should apply equally to all, save to the extent that objective differences justify differentiation.” [**Equality before the Law**]

Fourth: “the law must afford adequate protection of fundamental human rights.” [**Rights Guarantees**]

Fifth: “means must be provided for resolving, without prohibitive cost or inordinate delay, bona fide civil disputes which the parties themselves are unable to resolve.” [**Access to Justice & to the Courts**]

Sixth: “ministers and public officers at all levels must exercise the powers conferred on them reasonably, in good faith, for the purpose for which the powers were conferred and without exceeding the limits of such powers.” [**Government Servants exercising Limited Powers in Good Faith**]

Seventh: “adjudicative procedures provided by the state should be fair.” [**Fairness in Adjudication**]

Eighth: “the rule of law requires compliance by the state with its obligations in international law, the law which whether deriving from treaty or international custom and practice governs the conduct of nations.” [**Observance of International Law**]

13. In contemporary times, some take a very cynical view of the idea, a view I cannot share. Rachel Kleinfeld Belton alleges that:

“Like a product sold on late-night television, the rule of law is touted as able to accomplish everything from improving human rights to enabling economic growth to helping to win the war on terror. The rule of law is deemed an essential component of democracy and free markets. The North Atlantic Treaty Organization (NATO) demands that all new members demonstrate their commitment to

it, and the European Union (EU) requires its existence before a country can even begin negotiating for accession. Building the rule of law is a strategic objective of the U.S. Agency for International Development (USAID), a growth field for the World Bank, and a rhetorical trope for politicians worldwide...”

My intention is that the rule of law be understood substantively.

14. As to the term '**liberalism**': I am an unabashed liberal constitutionalist and my position has always been that the role of the State is purely that of an enabler of constitutional goals and no more. It cannot be that power is usurped for personal purposes or in pursuance of ideological goals. Indeed, the term 'liberal' has often been misunderstood as indicating the 'Left'. To me, as Princeton Professor Kim Scheppele puts it, "*I use the term 'liberal' as a description of a family of political philosophies*" and **liberalism in this sense "has as its normative touchstone legitimation through democratic means"**.⁹
15. The **hollowing out of democratic organs and the repression of civil society** is indeed something which we have seen in Hungary, for example. This is deeply concerning. Holding minimally credible elections is not a passport to democracy. Regular elections are unquestionable and inseparable from democracy. But **democracy can function only when there is a commitment to certain core liberal tenets such as respect for individual autonomy, for judicial independence, for the protection of minority rights, and for the freedom of the press. When any of these are violated, democracy becomes illiberal.**
16. Scheppele correctly says that a **true democracy must be a self-sustaining system where genuine electoral competition continues and where government is not held by one political party or group.** The desire to abolish future elections or minimise them are indeed utterly illiberal and anti-democratic ideas. The hampering of institutional pre-requisites for free and fair elections, the

⁹ Kim Lane Scheppele, *Autocratic Legalism*, 85 UNIVERSITY OF CHICAGO LAW REVIEW 545 (2018) at p. 558-9.

distorting of the press, and the effort to render the judiciary a mere spectator will all have the most serious and damaging effects on democracy. Such actions, regrettably, are possible even under the stewardship of the very wise and the pure when they base their decisions on subjective ideology over objective principle. When any judiciary admires heads of government, the admiration personally can be wonderful, but it is dangerous for it to influence decision making.

17. Any challenge to the rule of law, in my view, leads directly to democratic decay. There is a clear definable proposition – the more the rule of law is weakened, the faster democracy decays.

PERENNIAL CHALLENGES TO THE RULE OF LAW

18. **Many challenges to the rule of law are not unique to today.** The guarantee of liberty has always walked alongside the necessity to preserve it against arbitrary action. Today, the courts are tasked with ensuring that we are guarded from arbitrary government action and abuses of power, just as they have been for decades before. And in ensuring that the courts perform this function suitably, it has always been necessary that the State's institutions be set up to prevent trespass into the judiciary's independence. As I will explain in due course, this remains critical today.
19. **At the heart of these threats to the rule of law is the spectre of arbitrary powers arising from government unrestrained by laws.** As early as in the 4th Century BCE, Plato argued in favour of checks on power, firm "*in the belief that salvation, or ruin, for a State hangs upon nothing so much as this. For wherever in a State the law is subservient and impotent, over that State I see ruin impending; but wherever the law is lord over the magistrates [Rulers], and the magistrates are servants to the law, there I descry salvation and all the blessings that the gods bestow on States*"¹⁰

¹⁰ PLATO, THE LAWS (RG Bury tr, William Heinemann Ltd., 1961) at p. 293.

20. Adding to Plato's warning against absolute and unchecked authority, his student Aristotle wrote:

"Now, absolute monarchy, or the arbitrary rule of a sovereign over all citizens, in a city which consists of equals, is thought by some to be quite contrary to nature... That is why it is thought to be just that among equals everyone be ruled as well as rule, and therefore that all should have their turn..."

21. Aristotle warned us against the subjectivity of executive discretion. Decisions were just only where they were based on clear and dispassionate principles that applied equally to all exercises of power:

"...And the rule of law, it is argued, is preferable to that of any individual; On the same principle, even if it be better for certain individuals to govern, they should be made only guardians and ministers of the law.

...

Therefore he who bids the law rule may be deemed to bid God and Reason alone rule, but he who bids man rule adds an element of the beast; for desire is a wild beast, and passion perverts the minds of rulers, even when they are the best of men. The law is reason unaffected by desire".¹¹

22. Aristotle's sentiment found utterance in the Supreme Court of India, which held:

*"...it is important to emphasize that **the absence of arbitrary power is the first essential of the rule of law upon which our whole constitutional system is based.** In a system governed by rule of law, discretion, when conferred upon executive authorities, must be confined within clearly defined limits. The rule of law from this point of view means that decisions should be made by the application of known principles and rules and, in general, such decisions should be predictable and the citizen should know where he is. If a decision is taken without any principle or without any rule*

¹¹ Ricardo Gosalbo-Bono, *The Significance of the Rule of Law and Its Implications for the European Union and the United States*, 72 UNIVERSITY OF PITTSBURGH LAW REVIEW 72 (2010) at p. 232

*it is unpredictable and such a decision is the antithesis of a decision taken in accordance with the rule of law.*¹²

23. The powers of the State are, in principle, individually specified and policed by Constitutions and laws made under them. Arguments about the nature and limits of these powers can give rise to conflict. There can be disorder. But who solves them? **Institutions under the Constitution are intended to solve them, and the judicial arm is the last bastion for the defence of the rule of law and the democratic form.**
24. The fundamental principles appear to be perennial and consistent over time. Of course, the contexts are different, the ruled and the rulers are different too. **The challenge to the rule of law arises from the question of how seriously rulers understand the substantive premises of governance.**

UNIQUELY MODERN CHALLENGES TO THE RULE OF LAW I: DEMOCRATIC BACKSLIDING & CONSTITUTIONAL REGRESSION

25. I began by referring to the great deal of attention that has been paid to theorizing and building a conceptual understanding of modern challenges to democracy. I will introduce three of these concepts presently, and use others as I proceed further.
26. Political scientists, sociologists, philosophers and scholars in international relations seem preoccupied in search of a theory to explain ‘**democratic deterioration**’, a trend prevalent all over the world, whether it is the United States or Europe, Venezuela or elsewhere.
27. The concepts of **populism** and **militant democracy** are also becoming useful. For public lawyers and political scientists, there is what is called the **global**

¹² *SG Jaishingani v. Union of India & Ors.* 1967 SCR (2) 703.

democratic recession and it has transformed a peripheral preoccupation in these areas of study into a central subject.

28. **Many of the stories of democratic decay and erosion of the rule of law begin in the same way, as if they are all variations on a theme: with the voting in of a new charismatic leadership on the promise of a break from politics as business-as-usual.** Returning to Scheppele:

“By now, we know the pattern: A constitutional democracy, flawed but in reasonably good standing, is hit by a transformative election. A charismatic new leader comes to power, propelled by the growing impatience that the electorate feels with things as they are. The leader promises to sweep away the dysfunctions of partisanship, gridlock, bureaucracy. He claims to call things by their right names and to speak the unspeakable. He rails against entrenched power, entrenched people, entrenched structure. He rallies the people by assuring them that the state belongs to them, only them. He wins an upset victory over the establishment forces and starts a constitutional revolution. Around the world, liberal constitutionalism is taking a hit from charismatic leaders like these whose signature promise is to not play by the old rules.”³

29. Another recurring shorthand for the various crises faced by democracies is ‘**democratic backsliding**’. As Nancy Bermeo, whose work is an instant classic on the subject, correctly recognises, there is usually little effort to explain the term. She defines it as “*the state-led debilitation or elimination of any of the political institutions that sustain an existing democracy*”.

30. Unlike in the past, where democratic backsliding took place as an upheaval, through regime change in a direct, open and therefore clearly diagnosable way, today’s democratic backsliding is ‘gradual’ and thus far harder to diagnose or correct. Bermeo describes the contrast thus:

“Where backsliding involves rapid and radical change across a broad range of institutions, it leads to outright democratic

³ Kim Lane Scheppele, *Autocratic Legalism*, 85 UNIVERSITY OF CHICAGO LAW REVIEW 545 (2018).

breakdown and to regimes that are unambiguously authoritarian. Where backsliding takes the form of gradual changes across a more circumscribed set of institutions, it is less likely to lead to all-out regime change and more likely to yield political systems that are ambiguously democratic or hybrid. Democratic backsliding can thus constitute democratic breakdown or simply the serious weakening of existing democratic institutions for undefined ends. When backsliding yields situations that are fluid and ill-defined, taking action to defend democracy becomes particularly difficult.”

31. The gradual and creeping quality of democratic backsliding today brings to mind **Derek Parfit**, one of my favourites, who actually spoke about **transformation** and cellular transformation. Parfit rightly pointed out that there can never be a line between replacement of one cell and replacement of all cells. It is an absolutely valid point: the line at which one thing transforms into another is extremely difficult to perceive. (Parfit referred to substitution with Greta Garbo’s cells.)¹⁴
32. There is a palpable fear of abuse of constitutionalism which means no more than the use of mechanisms of constitutional change to erode the democratic order in many places across the globe. This is what Jan-Werner Müller termed as ‘**constitutional capture**’¹⁵ and it is perfectly possible for a gradual slide into authoritarianism to follow.
33. In fact, the reason why contemporary challenges to democracy feel so different to what came before is that democratic processes and institutions are being turned against themselves to achieve undemocratic ends. In the present moment, creeping authoritarianism is keeping up appearances: the façade of a liberal, democratic and constitutional state operating under laws is maintained, while the

¹⁴ DEREK PARFIT, REASONS & PERSONS (1984) at Chapter 11.

¹⁵ J-W Müller, *Protecting the rule of law (and democracy!) in the EU: the idea of a Copenhagen commission* in: Ciosa C, Kochenov D (eds) REINFORCING RULE OF LAW OVERSIGHT IN THE EUROPEAN UNION (Cambridge University Press, 2016).

substantive fulfilment and underlying objectives of these norms of governance is systematically frustrated.

Bermeo explains this as follows: “We now face forms of democratic backsliding that are legitimated through the very institutions that democracy promoters have prioritized: national elections, voting majorities in legislatures and courts, and the “rule” of the laws that majorities produce.”¹⁶

And as Scheppele says, “[s]ome constitutional democracies are being deliberately hijacked by a set of legally clever autocrats, who use constitutionalism and democracy to destroy both.”¹⁷

34. The idea of gradual democratic backsliding in contrast to overt regime change has been articulated in comparative constitutional law scholarship in recent years. The most successful effort to do so is in Aziz Huq and Tom Ginsburg’s 2018 article titled ‘*How To Lose A Constitutional Democracy*’. Huq and Ginsburg set up the concept of ‘**constitutional retrogression**’ in contrast to wholesale ‘*authoritarian reversion*’ in the following way:

“[Constitutional regression is] distinct from authoritarian reversion for three reasons: first, it occurs slowly; second, it involves different mechanisms; and third, its modal endpoint is quasi-authoritarianism (although a further slide to authoritarianism is possible...). **Because retrogression occurs piecemeal, it necessarily involves many incremental changes to legal regimes and institutions. Each of these changes may be innocuous or even defensible in isolation. It is only by their cumulative, interactive effect that retrogression occurs.**”¹⁸

35. Huq and Ginsburg identify **five ‘pathways’ to constitutional regression**.

These are:

- (i) constitutional amendment;

¹⁶ Nancy Bermeo, *On Democratic Backsliding*, *Journal of Democracy*, 27(1), 5–19 (2016).

¹⁷ Kim Lane Scheppele, *Autocratic Legalism*, 85 *UNIVERSITY OF CHICAGO LAW REVIEW* 545 (2018).

¹⁸ Aziz Huq & Tom Ginsburg, *How To Lose A Constitutional Democracy*, 65 *UCLA LAW REVIEW* 78 (2018) at p. 97.

- (ii) the elimination of institutional checks;
- (iii) the centralization and politicization of executive power;
- (iv) the contraction or distortion of a shared public sphere; and
- (v) the elimination of political competition.¹⁹

36. Understanding the methods by which constitutional regression takes place brings us to an important insight: it is through the use of the law – indeed, through the use of constitutions, which are the supreme laws of the realms in which they operate, that the rule of the law is being undone today.

SOME THOUGHTS ABOUT CONSTITUTIONAL POWERS RESERVED FOR EXTRAORDINARY CIRCUMSTANCES

37. In common law legal systems with a commitment to judicial precedent, an understanding of what came before is indispensable to addressing the challenges that confront us. In this spirit, I will consider, briefly and selectively, some features of an important idea. The delineation of exceptional circumstances which justify departures from constitutional procedures and practices has been a preoccupation of scholars in political philosophy and the law.

38. This exercise will be fruitful for another, more specific reason: One way to examine the state of a given polity's commitment to the rule of law is to consider how emergencies and exceptional circumstances are triggered today in contrast with other places and times. Of course, all modern constitutions include powers to answer to extraordinary circumstances – but the frequency and lack of care with which executives and majorities in Parliament invoke and exercise these powers is a revealing indicator of the ill health of the rule of law today.

39. In particular, I propose to consider the concept of the 'reason of State'. The concept presupposes that the State is a group agent. It also presupposes that the

¹⁹ *Id.* at p. 123-143.

State has the powers of acting *sui generis*. Studying the ‘reason of State’ allows us to understand how the State – as agent and *sui generis* actor – performs and relates to modern constitutions. Constitutions are “*predicated upon the ideal of a depersonalised politics in which rules and procedures are relied upon to institutionalise politics and reduce the human factor to a minimum in the hope of taming the excesses that arise from practice of politics...*”²⁰. I do find that this is pointed out by Sheldon Wolin in ‘*Politics and Vision: Continuity and Innovation in Western Political Thought*’ (2004).

40. Historically, the position was clear: the safety of the people was the supreme law. Cicero’s treatise *The Laws* takes that phrase – ‘*salus populi suprema lex esto*’ – to be an element of the ideal Constitution for a republic. The corollary of course is that all else must yield to public safety. The idea of using force against citizens – or sanctioning such use – without there being the need for a fastidious adherence to normal legal rules was a form of ‘last decree’ known to us since antiquity – and since the Roman republics in particular.
41. Our conceptions of states and constitutions have travelled a great deal since Cicero. But in many ways, the type of power referred to by Cicero, later euphemised as ‘reasons of State’ still remains with us. Philip Bobbit’s book *The Shield of Achilles: War, Peace & the Course of History* (2002) offers an excellent historical reconstruction of this idea and traces its use across Europe. In Italy, it was referred to as ‘*ragione di stato*’. In France, it became ‘*raison d’etat*’ which reflected the emergence of the kingly State. In Germany, it became ‘*staats raison*’.
42. The danger with these extraordinary powers is that by lifting the duty to comply with ordinary laws, the State can use the invocation of public safety to act in its own interest. This potential for the abuse of the power is vast and realized in the modern day. Often enough, today’s governments use their powers to contain

²⁰ Wolin’s thesis is thus usefully summarized in THOMAS POOLE, REASON OF STATE: LAW, PREROGATIVE & EMPIRE (2015) at p.8.

- threats to public safety in ways that threaten Constitutions and democracy. Justifications highlight cynical concerns of political expediency.
43. In modern constitutional discourse, exceptional powers can be plotted along a spectrum. At the extreme, there are **emergency powers**. Emergencies can be both *de jure* emergencies and also *de facto* emergencies.
44. But there is also a vast constellation of more routine and less dramatic ideas that the State invokes in a similar spirit in courts and in public debate. With the invocation of exceptions (usually including national security, national integrity and patriotism), executives and political majorities are able to create havens of immunity that are hard to pierce. The field for judicial review – for courts to act in defence of citizens – is greatly narrowed. Courts are told to keep their hands off. They are reminded of how terribly unmanageable public interest considerations and ‘political questions’ are and that they have no expertise in respect of either type of consideration.
45. Unsurprisingly then, **when the most drastic of these powers – the power to impose emergency – is applied, Courts are less rather than more inclined to review them**. This logic has settled into doctrine across countries – in India for example, there is the language of the ‘judicial imponderable’²¹ which justifies limiting judicial review of executive action to proclaim emergencies in Indian states to extremely narrow grounds.
46. It is useful to remark on the idea of **judicial deference** at this stage. An excessive commitment to this idea can serve to defeat the rule of law. Lord Sumption in the *Lord Carlile* case²² suggested that judicial deference has often attracted criticism because of its “*overtones of cringing abstention in the face of superior status*”.
47. **In a society based on the rule of law and the separation of powers, we cannot deny the significance of the courts and our judges must not shrink**

²¹ *S. R. Bommai v. Union of India*, [1994] 2 SCR 644.

²² *R (on the application of Lord Carlile of Berriew QC and others) v. Secretary of State for the Home Department*, [2014] UKSC 60.

from their duty. As Lord Hoffman said in the *Prolife Alliance* case²³, neither ‘servility’ nor ‘gracious concession’ are warranted when a question for the courts arises. And such questions may well include questions about which of the three arms of government has ‘decision making power’:

*“My Lords, although the word “deference” is now very popular in describing the relationship between the judicial and the other branches of government, I do not think that its overtones of servility, or perhaps gracious concession, are appropriate to describe what is happening. In a society based upon the rule of law and the separation of powers, it is necessary to decide which branch of government has in any particular instance the decision-making power and what the legal limits of that power are. That is a question of law and must therefore be decided by the courts.”*²⁴

48. However, as Lady Hale said in her Sir David Williams Lecture recently, “*...Deference is not the same as non-justiciability. Each case is judged in its own context...*”.²⁵ I also admire her forthrightness when she says that appeals to the doctrine of separation of powers or to the greater democratic legitimacy of decision makers aren’t of any great help in deciding questions of deference.
49. Beverly McLachlin, J., who also spoke about the limits of the deference principle, said:

*“...Care must be taken not to extend the notion of deference too far.... Parliament has its role: to choose the appropriate response to social problems within the limiting framework of the Constitution but the Courts have also a role to determine objectively and impartially whether Parliament’s choice falls within the limiting framework of the Constitution. The Courts are no more permitted to abdicate their responsibility than is Parliament...”*²⁶

²³ *R v. British Broadcasting Corporation, ex p Prolife Alliance*, [2003] UKHL 23

²⁴ *Id.*, at paragraph 75.

²⁵ Lady Hale, President of The Supreme Court, *Principle and Pragmatism in Public Law*, Sir David Williams Lecture 2019 (18 October 2019).

²⁶ *RJR-MacDonald Inc and Imperial Tobacco Ltd v The Attorney General of Canada*, [1995] 3 S.C.R. 199, 127

50. **Judicial review is an important check on State power and a feature that all substantive visions of the rule of law and democratic constitutionalism include.** In general, efforts to denude courts of their powers to protect must be resisted with the greatest vigour. These questions – of the maintainability of citizens’ challenges to unjust laws and improper exercise of executive power, whether it is used to proclaim emergencies or to achieve a more quotidian end – often arise as technical and doctrinal questions. So, civic education and a mobilized citizenry are a *sine qua non* to arresting the erosion of the rule of law. A concomitant of this prescription is that lawyers and scholars working to solve these issues are under a duty to make these technical niceties surrounding how courts, parliamentary majorities and muscular executives act intelligible to the citizens not steeped in the language of the law.
51. The language of a ‘**state of exception**’, made familiar to us by Carl Schmitt, is another threat to any form of democratic constitutional behaviour. Though less imbued with legal specificity than that of ‘emergency’, the ‘state of exception’ invokes alarm and the spectre of anarchy. Existential threats and crises such as the dismantling or death of a constitution come to mind. Citizens will let their guards down, and governments are empowered to act with greater impunity from public scrutiny and censure than their actions justify.
52. The *Belmarsh* case²⁷ is a good example of how governments respond to exceptional situations and invoke them to enable derogation from ordinary rigours of the law. In the wake of 9/11, foreign nationals were detained without charge or trial as suspected terrorists. Obviously, such an action deals a grievous injury to basic fundamental rights. The power to derogate from certain obligations in times of exception must always be kept tightly restrained.

²⁷ *A v. Secretary of State for the Home Department* [2004] UKHL 56.

53. Correctly, the Law Lords quashed the detention orders in the *Belmarsh* case²⁸. A declaration of incompatibility was issued under the Human Rights Act. It is a judgment which clearly questioned the ‘reason of State’ but more importantly, enabled the rule of law and legality to prevail when it came to the question of differential treatment of foreigners.
54. Let me now turn to a third and final specie of the case justifying departures from normal constitutional behaviour. The ‘**prerogative**’ and its improper use invokes the image of tyrannical monarchs. For the English, the expression recalls Stuart Kings and abuses of political power. For everyone, the history of prerogative powers and the manner in which executive power which does not require parliamentary consent can be abused offers great lessons. The 267 proclamations issued during the reign of James I and enforced by the Court of Star Chamber should not be forgotten.
55. In 1583, Sir Thomas Smith, then Secretary of State to Queen Elizabeth, wrote that “*The most high and absolute power of the realm of England consisteth in the Parliament.*”²⁹ Smith argued in favour of a legislature that could enact and repeal any law, and whose supremacy was democratically legitimate as “*every Englishman [was] intended to be there present...of what pre-eminence, state, dignity or quality soever he be, from the Prince (be he the King or Queen) to the lowest person of England, [a]nd the consent of the Parliament [was] taken to be every man’s consent.*”³⁰
56. Recognizing the people as source of all power, and pushing back against a show of brute force of the executive, Lady Hale, speaking for eleven justices of the Supreme Court, said:

“42. The sovereignty of Parliament would, however, be undermined as the foundational principle of our constitution if the executive

²⁸ *Id.*

²⁹ SIR THOMAS SMITH, *DE REPUBLICA ANGLORUM, A DISCOURSE ON THE COMMONWEALTH OF ENGLAND* (Cambridge University Press, 1906) at p. 48.

³⁰ *Id.*, at p. 49.

could, through the use of the prerogative, prevent Parliament from exercising its legislative authority for as long as it pleased.”³¹

57. **The use of the Courts to give legal shape to the prerogative of Cabinets on specious grounds is a rising phenomenon.** In the polarised and populist political public sphere of today, judges who uphold the rule of law – and act against parliamentary majorities and charismatic leaders – run the risk of being subjected to the wildest of criticism. Indeed, there must be very little juridical confusion in the context of politically fraught cases. Court rulings that are clear and decisive – and expressed in terms intelligible to engaged citizens – offer a powerful route to preserving their credibility and, above all, their moral stature in contemporary times.
58. **A critical way in which courts work to uphold the rule of law is by demanding of state action the basic requirement of legality.** The rule of law is located in the Constitution and in the supremacy of the Constitution and, in the case of countries which don't have a written Constitution, in fundamental principles of substantive and procedural legality.
59. It is heartening that in past years, **through creative use of comparative precedent, constitutional courts are moving closer to the ideal of legality. The Indian Supreme Court is a good example of this phenomenon.** Unlike England, India has a written Constitution with a bill of rights. The Constitution of India has always enabled growth by reference to comparative jurisprudence and international conventions to give citizen-centric readings of rights.
60. In majority and concurring opinions marked by very powerful learning in *KS Puttaswamy v. Union of India (I)*³², the 9 Judges of the Supreme Court of India not only upheld the right to privacy but also, in no unmistakable terms, established a very interesting connection based on development and freedom. Chandrachud, J. quoted Amartya Sen from his book *Development as Freedom (1999)*. He also referred to a judgment of the South African Constitutional Court in *Minister of*

³¹ *R (on the application of Miller) v. The Prime Minister* [2019] UKSC 41.

³² (2017) 10 SCC 1.

*Health v. Treatment Action Campaign*³³ where it was held that the Government failed the test of reasonableness in preventing feasible ARV programmes. The Court said that the Constitution recognised the right to privacy because it was an incident of liberty. It was the protection of life itself. Indeed, in the judgment of Chandrachud, J., the depth of his understanding of Maslow's pyramid is very remarkable.

61. Nariman, J. in the Prologue to his opinion said, “...*The importance of the present matter is such that for whichever way it is decided it will have huge repercussions for the democratic republic that we call Bharat i.e. India....*”.

62. Nariman, J. also said that human liberties must endure despite majoritarianism:

“...Statutory law can be made and also unmade by a simple parliamentary majority. In short, the ruling party can at will do away with any or all of the protections contained in the statutes mentioned hereinabove. Fundamental rights on the other hand are contained in the Constitution so that there would be rights that the citizens of this country may enjoy despite the governments that they may elect. This is all the more so when a particular fundamental right like privacy of the individual is an inalienable right which inheres in the individual because he is a human being....”.

63. In a very analytical discourse, Nariman, J. then proceeded to describe the right to privacy as involving three components, namely, repose, sanctuary and intimate decision. He also relied on Mill's exposition of the importance of liberty to human individuality.

64. Simpler defences of the ideal of legality exist: Unreasonable laws are no laws at all. In *Oposa v. Factorian*³⁴, the Supreme Court of Philippines in 1993 described the right to a balanced and healthy environment as a basic right which predated all governments and constitutions. It is a matter of great happiness that South

³³ (2002) 5 SA 721 (CC).

³⁴ 224 SCRA 792.

Asian courts have taken the issue of climate change as a substantive principle of legality.

65. Many pending cases in international and domestic fora will put this ideal of rule of law to the test. For example, in May 2019, eight residents of the Torres Strait Islands in Australia announced that they would bring a human rights challenge against the Government of Australia. The residents had inhabited the region for thousands of years, making theirs one of the oldest continuous cultures. They were threatened by climate change. The contention was that the Government had not done enough. They relied on the International Convention on Civil & Political Rights of 1966. They relied on Article 27 (the right to culture), Article 17 (the protection of family and home life) and Article 6 (the right to life). By virtue of a General Comment on Article 6 issued by the UN Human Rights Committee in 2018, the meaning of the right to life included an assurance against environmental degradation. It also imposed an obligation on States to preserve the environment and protect against pollution and climate change. The matter is now before the United National Human Rights Committee and it will consider the question. A substantive view of the rule of law requires that the meaning of our laws and the scope of our rights must evolve progressively.

CONSTITUTIONALISM AS LIMITED POWERS & THE ROLE OF THE COURTS

66. A word now on constitutionalism. We have Hume's theory that a constitution is an arrangement – in both institutional and normative terms – which codifies the aspiration of a people to balance between authority and liberty.³⁵ There can be no doubt that the balance is much easily projected but difficult to realise. Nevertheless, the Indian Constitution, the British Constitution, the American Constitution as well as constitutions which govern so many other countries are all united by a single recurring feature: they are all sworn to the preservation of

³⁵ Davide Hume, *Essay: Of the Origin of Government* in DAVID HUME, *ESSAYS: POLITICAL, MORAL AND LITERARY* (Indianapolis: Liberty Fund, ed. Eugene J. Miller, 1985), at p. 40.

the rule of law. They are born out of a need to make sure that the world is not turned upside down, that brute force does not reign.

67. Edmund Burke's speech, one of his greatest, comes to mind in this context. He said on the Nawab of Arcot's death that, "*...fraud, injustice, oppression, speculation entered in India are crimes of the same blood, family and caste with those that are born in England....*". Burke insisted that the Company must govern upon British colonies with principles imbued with the spirit of equity, the spirit of justice, the spirit of safety and the spirit of lenity. No claim to arbitrary power could ever be legitimate. His admonition rings true even today.
68. One factor about present times which must be borne in mind is that **modern trade and international commerce have brought about a more pliant acquiescence to the downplaying of constitutional rights and protections.** David Hume's philosophical analysis of society saw the Glorious Revolution of 1688-89 as a fundamentally constitutional moment because it secured liberty, stability and prosperity. What is significant is that unless and until there is liberty, stability and prosperity may not result. They do have a close alliance.
69. Liberty is the most precious jewel under the sun but the question asked throughout history is: how best to preserve it? The arms of the State are long and wide. They would not easily admit to wrongdoing. It is the fundamental nature of the discourse in a State and the manner in which society looks at the State that will ultimately make the difference. **The State and the institutions that make it up ought not to be regarded in a spirit of blind, grateful co-operation but with an inquisitive and relentless mistrust of power, a concerted effort to seek constitutional justification at all points of time.**
70. It is important to bear in mind that the State owes an obligation to provide not only the institutions and services necessary for a free, safe and prosperous people but also the means to check failures or refusals by institutions to perform their functions. The **role of rights-based litigation** in the context of government is

to increase the security of the rule of law guarantees. Rights judicialise. Rights contain certain strict minimum standards. It must not change. It is important that they must be enforced because rights can easily vanish into *arcana imperii*.

71. The language of “rule of law” understood as a mechanical exercise of legal compliance is capable of being appropriated to any agenda – and put in service of any amount of cynicism. Even in the hands of benign and well-meaning judges, learned in the law and committed to justice, a lack of vigilance can prove fatal to the rule of law and to constitutional supremacy.
72. Having said this, compromises will be inevitable: a balance needs to be struck between power, and the *bona fide* use of it by parliamentary majorities and strong executives, and the need to hold governments to the ideals of republicanism and rule of law.
73. Fundamental philosophical and legal disputes must be subjected to the sunlight of both inquisitorial discourse in the judges’ mind but more importantly, must be visible as a product of great creativity and clarity to citizenry. In the classical exposition of the value of judicial review, Marshall, J. began in *Marbury v. Madison*³⁶ with the idea that “*It is emphatically the province and duty of the Judicial Department to say what the law is*”. The legal profession in every constitutional democracy must work actively to protect and enable the judiciary to keep and protect its province. Judicial review is an essential feature of constitutional democracy. Marshall, J. correctly opined that failing to admit this proposition would amount to according the arm immunized from judicial review “*a practical and real omnipotence*”:

“This doctrine ... would declare, that if the legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the legislature a practical and real omnipotence, with the same breath which professes to restrict their powers within narrow limits.”

³⁶ *Marbury v. Madison*, 5 U.S. 137.

A robust system of judicial review and a combative judiciary are, without doubt, the arrow's point of any project for the preservation of democracy. It is in this regard that the UK Supreme Court has delivered on its duties in the recent *Prorogation case*.³⁷

VIRTUE & THE RULE OF LAW

74. Separation of powers is critical to ensuring Constitutions survive our present moment. In relation to the judiciary, the underlying logic is that judges who are not sequestered from executive power would become complicit in the abuses that the executive was prone to indulging in. As Plato and Aristotle were laying the foundations of western democracy, their contemporary, the Vedic scholar *Katyayana* cautioned that “members of a court should not connive with the king when he begins to act unjustly” for “Judges who agree with the king when he proceeds in an unjust manner become parties to the sin flowing from such unjust decision.”³⁸
75. In 1748, Montesquieu added that separation of functions between the three arms of government was necessary to assure citizens liberty. He said:

*“there is no liberty, if the judicial power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with all the violence of an oppressor”*³⁹.

76. Only an independent judicial branch could guard against the abuse of power. Both *Katyayana* and Montesquieu understood this, as did Lord Griffith when he held:

³⁷ *R (on the application of Miller) v. The Prime Minister*, [2019] UKSC 41.

³⁸ PV Kane (tr), *Katyayana Smriti on Vyavahara (Law and Procedure)* (Oriental Book Agency, 1933).

³⁹ Ricardo Gosalbo-Bono, *The Significance of the Rule of Law and Its Implications for the European Union and the United States*, (2010) UNIVERSITY OF PITTSBURGH LAW REVIEW 72(229) at p. 239.

“...the judiciary accept a responsibility for the maintenance of the rule of law that embraces a willingness to oversee executive action and to refuse to countenance behaviour that threatens either basic human rights or the rule of law.”⁴⁰

77. With Britain’s global expansion, India remained a focal point. The Empire embraced populations which were neither white, nor Anglo Saxon, nor Protestant. The East India Company obtained a charter from Queen Elizabeth giving it exclusive rights to trade with the East Indies. Many histories have been written of this period, but I mention this period to note its contribution to setting up the law and legal institutions that still prevail in India today. The partnership between the State and the Company established the Supreme Court in Bengal. Subsequently, High Courts which established under subsequent Charters. An objective constitutional historian would fail in his duty if he did not pay a tribute to the numerous judges appointed then who established firmly the foundations for both the legal profession and an independent judiciary.
78. Even as there is agreement on the need for judicial independence and the sequestration of the judicial arm from interference and pressures from the other two, the means by which to credibly assure judicial independence remain elusive.
79. The rule of law requires controlled discretion, but no constitutional or legal device has yet been discovered to remove areas of law in which men clothed in power – whether official or judicial – can act on their own instinct. Accepted wisdom agrees – among legal positivists of whom HLA Hart who worked here at Oxford and interpretivists such as Ronald Dworkin alike – that ‘open texture’⁴¹, the incapacity to formulate perfectly comprehensive rules and the room for discretion are endemic features of the law.
80. Whether discretion is granted by the constitution to high functionaries or is the product of the limits of legal language, **the best protection we can offer to the**

⁴⁰ *R v. Horseferry Road Magistrates’ Court ex p. Bennett* [1994] 1 AC 42 at 62.

⁴¹ HLA HART, *THE CONCEPT OF LAW* (1961) at Chapter 7.

rule of law is ensuring virtuous men and women are appointed to judicial offices. This effort is all the more significant given that our present moment of constitutional regression aligns with weakening judicial review and, occasionally, is advanced by the complicity of judges and courts – whether by action or silence. For these reasons, the growing body of scholarship in jurisprudence and legal philosophy emphasising the need for virtue in adjudication must be commended.⁴² Indeed, judges themselves are beginning to publicly acknowledge the moral and value-based character of their work, and convenings such as the UN Judicial Group on Strengthening of Judicial Integrity, which released the Bangalore Principles of Judicial Conduct in 2002, are producing ‘principles’ and charters of ‘values’ that should guide judicial behaviour.⁴³

81. **The rule of law requires not only decent lawyers and independent Judges, but also public scrutiny.** But self-interest and executive pressures can lure any man into the crevices of private-interest-government. The desire to duck under the radar and the desire to not be involved in any combative and vigorous questioning of the powers that be in the court room come, naturally, in the face of polarised and populist governments. Judicial courage is another of the virtues that we must prioritise in selecting and judging our judges.

In general, every effort must be made to educate citizens of democracies of the significance of the judicial appointments process to democracy, and the need for constant vigilance over the work of courts.

82. Some important comments need to be made on the effect of the individual judge’s approach to his work upon the rule of law. **The Judiciary must see its power as**

⁴² See, for e.g., Amalia Amaya, *Virtuous Adjudication; or the Relevance of Judicial Character to Legal Interpretation*, 40(1) STATUTE LAW REVIEW 87–95 (2019).

⁴³ See, for e.g., ‘The Bangalore Principles of Judicial Conduct’ (The Hague: UN Judicial Group on Strengthening of Judicial Integrity, 2002); ‘Judicial Ethics Report 2009-2010: Judicial Ethics, Principles, Values and Qualities’ (Europe: Working Group European Network of Councils for the Judiciary, 2009); ‘Magna Carta of Judges (Fundamental Principles)’ (Brussels: Consultative Council of European Judges, 2010).

sacred and as requiring to be exercised on the basis of reason alone. It must tread with great humility in all circumstances. The phonetics of power do not sit well with judges. Judges must be conscious that there are cases of difficult nature; cases which seem to arise in relation to one subject-matter while impacting others not on the radar. **I have come to believe that the danger of using Judicial Power for an ‘extraneous purpose’ whether willingly or unwillingly is no longer an impossible danger.**

83. **A judge must not only be a judge but look the part in every respect: in his carriage, in his commitment to learning, in his respect for the bar and the litigant and in the self-awareness and helplessness of being – like all men – fallible.**

84. For the rule of law to be maintained, it must be acknowledged that judicial reputation is influenced by the public’s perception of their actions. The Judiciary must not be perceived as acting in a sphere of happy coexistence with the Executive. I am afraid that judges’ functions and happinesses may have to be kept separate. Tough political questions which are legal questions need to be answered by the Courts. A shining example of this is the UK Supreme Court delivering the recent judgment on the Prorogation of Parliament. The decision is marked by lucidity, directness and a clear statement of legal principles of what is unlawful and void. Behind such a decision lie many hours of study and craftsmanship which remind of Hemingway’s depth of effort to write so simply.

THE INDISPENSABILITY OF CIVIC EDUCATION

85. Jack Balkin rightly tells us that ‘constitutional crisis’ and ‘constitutional rot’; are different.⁴⁴ If there is a challenge, if there is a weakening of rule of law structures, we are no longer in a state of constitutional crisis, we are in a state of constitutional rot. If public faith in the rule of law institutions and all institutions

⁴⁴ Jack Balkin, *Constitutional Rot* in Cass Sunstein (ed), *CAN IT HAPPEN HERE?: AUTHORITARIANISM IN AMERICA* (2018).

including Parliament is eroded, the willingness of political actors to violate the rules of the political system will only increase, increasing in turn support for anti-system political parties.

86. In other words, it can be argued that democracy is no longer the relevant game in town. The rise of far right populist parties even in the most liberal European countries are all indications of change happening all over the world which must cause concern. Rule of law is meant to deal with situations which not only involve individual conflicts *inter se* or conflicts with State, but most importantly, with conflicts about the validity of State action. As a result, we must remember that the affection or disaffection of a citizen with the Constitution is not always through politics, it is actually through the institution of an independent judiciary.
87. We must consider citizens in two critical respects: that of political literacy and electoral accountability. It is important to bear in mind that political literacy is vital to the health of any political democracy. If the public and media is bought out and civil society organisations are intimidated, there can be no doubt that the electorate itself can be manipulated leading opposition parties into a state of absolute rubble and lack of understanding. Can we not change this? Can we not improve it by way of civic education and commitment to essential values of civility and constitutional maintenance?
88. Electoral accountability is not achieved by those in power through self-positioning but is through the strengthening of national institutions and regulatory bodies. The moment regulatory bodies and national institutions are weakened, then government's arrangements themselves evade accountability and transparency.
89. What is the way forward? We must translate concepts into real action in small blocks, and not rely on protests alone to effect change. The first and constant blocks of effort must be civic engagement and appeal to reason. Sometimes, this can make all the difference. It is that positivism which inspired Nelson Mandela and he is one of the most shining examples of contemporary world history. The

Reconciliation Commission of Desmond Tutu, the brilliant Judges who adorned the South African Constitutional Court, many of whom still adorn that Court, are very inspiring examples. We live in difficult times but more difficult the time is greater must be the quality of Judges. Judges are not merely the managerial personnel to keep citizens at bay, free from questioning the validity or invalidity of governmental action. They are meant to be interrogators of authority.

90. This is indeed a very, very heavy task but it is a task which is the crying of hour in all jurisdictions. In very careful research published by Huq and Ginsburg, it is interesting to note that over the past three decades, the proportion of US citizens who say they believe it would be “a good or a very good thing for the Army to rule” has spiked from 1 in 16 to 1 in 6. Amongst rich young Americans, the proportion of those look favourably on military rule is more than 1 in 3.

CHARTING NEW PATHS THROUGH THE WOODS: A PSYCHOLOGICAL APPROACH TO THE RULE OF LAW

91. Yesterday’s newspapers carried an important piece of news about the resignation of the Culture Secretary, Nicky Morgan. Her statement was:

“The clear impact on my family and other sacrifices involved in, and the abuse for, doing the job of a modern MP can only be justified if, ultimately, Parliament does what it is supposed to do – represent those we serve in all areas of policy, respect votes cast by the electorate and make decisions in the overall national interest...”

The fact that five ladies quit and, as *The Times* said, “reflected concerns of parliamentarians over rising levels of abuse”.... are also points to be taken note of.

92. Evidently, the challenge of the rule of law is not simply in protecting and maintaining justice institutions. It also involves all constitutional institutions where work must happen with some degree of clarity and smoothness.

93. Undoubtedly, the language of the rule of law has been the subject of much attention in Anglo-American history and international law, but we are dealing with present day challenges.
94. While human behavioural diversity is natural, never should we forget what was described in a very interesting summation by Dan Dennett who recently wrote *From Bacteria to Bach and Back* (2017) that culture was itself so important from an evolutionary perspective. Dennett writes about how technology will bring transparency to both people and organisations whether they want it or not and its explosive impact. This is a time of immense creativity. New life forms will be created and just as many may be destroyed. I had the great pleasure to meet Dennett at Tufts University and we remain eternal optimists. In the final result, a balance will be found.
95. In today's world, we have various possibilities of intrusions into our lives by the use of smartphones, by the use of malware and by agencies – governmental and corporate – which specialize in this. It is indeed true that in a world of technology, artificial intelligence can be used both for good and for completely subversive purposes. Thus, the ability of any State to act through the medium of the law is important. But how is this ability realized in the face of modern challenges except by independent judges? Judges are expected to be constrained by the ethos of their profession, their legal training and ultimately by their strength of character. But this is all well in the theory.
96. These are challenging times. But that does not mean that there no answers. Partial answers can be found in two important principles of modern psychology. One is what I believe as evolutionary psychology: we have to understand that there must be a certain degree of combination of the biological approach with the cognitive approach. We must understand that we are products of natural selection. Obviously, my suggestion is if rule of law is viewed as a measure of self-worth and self-respect as a starting point, then treating the other person through the same binary perspective with the assistance of cognitive psychology, we could

make a start even in modern times making rule of law not subject to possibilities of untranslatability. In some sense, the brain is a computer designed by natural selection to extract information from the environment. The same brain must now recognise the dangers of careless living and the importance of reinforcement of fundamental principles of human existence. Even though these cognitive programmes in the human brain are adaptations, we must not forget that rule of law still offers us the hope of survival and continued existence.

97. My suggestion is that we may have to review the adversarial and interrogative construct we apply in public discourse and adopt a dialogical construct when it comes to safeguarding and improving the health of constitutional institutions. Nevertheless, in functioning, some institutions - such as the judiciary in the Courts - are intended to be interrogatory, while those in Parliament and other institutions of public life and public space must consider the alternative dialogical mode. This must continue.
98. What I am arguing is merely that there must be adaptation to context, and show sensitivity to the demands of the institutional context and eschew arbitrariness and rigidity in our behaviour. This comes with sustained education and through raising of consciousness to the farthest extent possible. The wonderful Professor Mary Beard of Cambridge University who acted with such dignity about what happened to her at the Heathrow Airport, is an excellent example.
99. We must bear in mind that our input systems must now have a different meaning along with visuals and speech. There must be a relaxation to allow the rule of law as a positive possibility to enter and offer even neuroscientific solutions to sadness and unhappiness, both individual and societal. Indeed, Carruthers' outline and trusting that minds working together can be computational problem solving devices, the question is how are we going to deal with this challenge to the rule of law in the present day world. That can be done only by means of a combination of cognitive as well as evolutionary principles. Indeed, none of us

have time to learn from *ab initio* all solutions, but definitely, we have time to look at what the fundamental principles of positive living are.

100. Rule of law is not merely a restraint against arbitrariness. It has been viewed too traditionally. Perhaps we need to view the rule of law more in the terms of traditional celebratory accounts of its potential. Perhaps we must treat it as a saviour concept which is likely to provoke a discourse in moderation, to find solutions, to lessen the anger which usually is a silent companion of arbitrariness and to look at the possibilities to answer present concerns of constitutional retrogression. The rule of law is itself capable of being merged with adaptationism.
101. Adaptation involves cultivating awareness and more importantly the ability to make a common pursuit of a better world without abandoning in any manner one's unique genetic capabilities or individuality. Rule of law, understood as adaptation, requires a certain degree of reverse engineering the systems and institutions we live with so that it is internalised as a way of life. It needs to be a part of existential mould. It is then that we might find answers – very interesting answers – to our present concerns when we know that no philosophy is full or no culture can give all answers.
102. The study of the past yields clues. But to live in and with the present requires new explanatory adaptationism. I do hope that Oxford in the months and years to come will use evolutionary psychology along with neuroscience and see that progress on the issue of defending and deepening the rule of law requires an astute understanding and application of the tools and insights of positive and moral psychology.
103. I do urge all of you that our work in protecting rule of law must be bound by a culture of honour. Our ability to speak about the importance of the rule of law and defend the need for the independence of the legal profession only signifies or mirrors the independence of the human mind.

***UNIQUELY MODERN CHALLENGES TO THE RULE OF LAW II: PERVASIVE
ECONOMIC INEQUALITY***

104. As a general matter, we must all begin with a deep concern for the vast socioeconomic inequalities that mark the world today if we are concerned with addressing the health of democracy. Economic inequality makes citizens impervious to the benefits of democracy. The ability to accept authoritarian rule is easier. Authoritarian reversion - a wholesale rapid collapse into authoritarianism - can only be prevented by the rule of law being firm. This in turn implies an independent legal profession and, more importantly in my view, independent judiciary. The independence of a judiciary is demonstrated only when it is at arm's length and keeps away its personal admiration for people in authority. Personal philosophies of Judges should never influence their decision making because the Constitution is in some sense a creative canvas. The importance of the Constitution is the punctuation marks and full stops are visible, but the values in relation to the exercise of power are often not visible, they vary from a case to case. This is why the stability, predictability and integrity of law and legal institutions alone can enable democratic engagement. The fear and coercion which may be subtly experienced by people, can be undone only by Courts and by rule of law institutions.
105. As I draw attention to the need to address chronic and rising economic inequalities, I must make clear that we cannot afford to devalue civil and political rights. For democracy to succeed, we must remember Joseph Schumpeter's statement that meaningful elections with a genuine possibility of alteration in power are necessary to democracy.⁴⁵ Democracy must be a system in which parties can lose. No independent country which has, after the coming into force of a rights charter, secured first generation rights, must never allow them to be put at risk. Thus, elections, speech, association rights and rule of law may be

⁴⁵ JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM AND DEMOCRACY (1942) at p. 269.

conceptually separate but they are utterly dependent on each other. Rule of law is meant to safeguard all rights.

106. Let us remember that democracy which exists without a deep commitment to rule of law is very fragile. One such country, Indonesia, has been viewed having a high democratic pedigree even though with thin rule of law support. This leads to great danger. To enable sound administration, constitutional rights to speech and association are important. They must encourage political competition. But how can one have political competition without a free media? What happens when a media does not have the ability to organise and offer policy proposals, criticise leaders, secure freedom from official intimidation?

UNIQUELY MODERN CHALLENGES TO THE RULE OF LAW III: PRACTICAL CONSTRAINTS ON ACHIEVING JUST OUTCOMES – COST, ACCESS & TRIBUNALISATION

107. We are presented today with challenges previously absent from discussions on the Rule of Law. These challenges are not philosophical or legal; they are economic and logistical. Yet, they threaten the foundations of the Rule of Law in ways that are terrifying to contemplate.
108. Assume for a moment a system where all power is checked by law, where all ministers and MPs strive to function in accordance with the Constitution, where the Courts are independent, where impartial judges stand committed to protect the liberty of the individual. Assume further that the electorate is informed, that the people understand their place in the Constitution, that they hold their representatives to account. Theoretically, our system is perfect, destined to ensure that the Rule of Law prevails. The Cabinet was accountable to Parliament. Parliament was accountable to the people. Both were bound by the Constitution, which in turn was guarded by a Supreme Court.

109. And thus, despite fulfilling each requirement posed by every conception of the Rule of Law, a seemingly “perfect” system can fail. The Independence of Courts is irrelevant. After all, delayed justice can be no justice at all.
110. For India, the threat comes from delays. In the courts of England and Wales, the threat is posed by a lack of resources. Accessing courts is expensive, legal aid is scarce, and funds available to address these concerns are simply insufficient.
111. To resolve these challenges, we need decisive action. Nevertheless, this action cannot come at the cost of changing the quality of justice delivered. Solutions of this kind will prove chimerical. Ultimately, they will have the result of eroding rather than improving the rule of law. One such modern challenge to the rule of law is the growing phenomenon of the tribunalisation of areas within the province of the courts.
112. Tribunalisation was purportedly introduced for quick remedies to legal disputes. It suffers from two serious design infirmities. First, a retired civil servant or technocrat is brought in as a ‘Judge’, minimising the rigorous professional training required to serve as a judge. Second, judges sitting in courts are appointed to tribunals after they have retired.
113. In my view, the complete restoration of the jurisdiction of all tribunals to the courts of judicature will not only greater adherence to the rule of law by men trained in its application, but also inspire confidence in any foreign investor.
114. Lost in our efforts to achieve consensus on legal checks to power and perfect answers to perennial questions, we have ignored growing institutional threats to the Rule of Law. These threats, I would argue, are more serious and more immediate than any our Constitutions have faced before. A guarantee of liberty is of little consequence for a person if he has to wait ten years to secure it. Judicial checks on executive power are of little relevance if high costs prevent a person from moving the courts. There is no justice in acquitting a person who has spent

years in custody; there is no equality if money prevents one from exercising his constitutional rights.

115. The challenge of ensuring that the institutions of government protect and promote the Rule of Law are significant. But unless we address the practical constraints on our courts – constraints that prevent them from discharging their constitutional duty – we risk setting centuries of incremental advancement towards more perfect democracies to naught. The risk is of constitutional regression on a massive scale.
116. This class of problems are, happily, tractable ones. Turning our attention to resolving these problems would set us on the path towards securing something of the promise of the rule of law.

CONCLUSION

117. History tells us that that progress has never been linear, and that ideal forms are guiding stars rather than destinations. The rule of law has been seen as ‘impossible’⁴⁶ or as an ‘essentially contestable concept’⁴⁷. Equally, the perfect democracy does not exist. As a result, battles over the rule of law are inevitable and, as with any ideal, the walk towards a more democratic form of government will always continue. Each successive generation of citizens and lawyers must work work towards righting the balance in favour of moral, institutional and popular progress. That is the best we can do.
118. Let me conclude by saying that the way forward in addressing challenges to the rule of law today is brick-by-brick and incremental. There is no swift remedy to the current moment, but we do not have the luxury of pessimism today. We must take comfort in the fact that some of the challenges that the rule of law faces

⁴⁶ Timothy Endicott, *The Impossibility of the Rule of Law*, 19 OXFORD JOURNAL OF LEGAL STUDIES 1 (1999); MARTIN LOUGHLIN, FOUNDATIONS OF PUBLIC LAW (2010) at p. 337.

⁴⁷ Richard H. Fallon, Jr., “*The Rule of Law*” as a Concept in Constitutional Discourse, 97 COLUMBIA LAW REVIEW 1 (1997).

today can be answered by paying attention to logistics and economics, and direct our efforts to addressing these.

119. As for the uniquely modern challenge posed by gradual democratic backsliding and constitutional retrogression, we must re-dedicate ourselves to the defence and improvement of the judiciary and prime for battles in the last bastion of the rights of the people.
120. Finally, we would do well to remember that our constitutions contain moral commitments, as the Dworkinians put it.⁴⁸ Equally, the Rule of Law has moral content, it is not a value-neutral or purely procedural idea. It demands much more than mechanical adherence to a rulebook. And so the maintenance of the rule of law demands, in turn, virtue in its administrators and defenders. Governments, judges and lawyers are all implicated in ensuring its survival or allowing its decline. We must pay attention to the quality of our judges, and resist the growing tendency to treat the judiciary as managers who protect government against robust interrogation.

⁴⁸ See, e.g., RONALD DWORKIN, *A MATTER OF PRINCIPLE* (1985) at p. 11-13.