HEINONLINE

Citation:
Rohini Sen, The Indian Perspective on the International Rule of Law: Through the Lens of International Agreements on Free Trade, 46 Rev. BDI 382 (2013)

Content downloaded/printed from *HeinOnline*

Tue Feb 13 01:24:05 2018

-- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at http://heinonline.org/HOL/License

-- The search text of this PDF is generated from uncorrected OCR text.

-- To obtain permission to use this article beyond the scope of your HeinOnline license, please use:

Copyright Information

Use QR Code reader to send PDF to your smartphone or tablet device

REVUE BELGE DE DROIT INTERNATIONAL
2013/2 – Éditions BRUYLANT, Bruxelles

THE INDIAN PERSPECTIVE ON THE INTERNATIONAL RULE OF LAW: THROUGH THE LENS OF INTERNATIONAL AGREEMENTS ON FREE TRADE

BY

Rohini SEN*

ABSTRACT

The Constitution of India recognises the doctrine of rule of law as a central and characteristic feature of the Indian legal system. Through various judicial decisions juxtaposed with liberalisation measures, attempts have been made to cull out the relevance, impact and relationship of this doctrine to the Constitutional framework in India. This process has inevitably given rise to questions that ponder if rule of law is measured by consequentialist ethics or in the abstractum of statutory based deontological ethics. The amorphous nature of the Indian Constitution has attracted praise and in equal measures the progressive liberalisation context. This paper identifies and interprets the possible application of rule of raw concepts to international agreements, with specific focus on free trade and economic development. With increased liberalisation and in furtherance of efficient enforcement, it recognises the law creating capacities of civil societies and their ability to contribute to rule of law from a multi-stakeholder/actor perspective. Through a suggested shared governance model, it will be interesting to see how India reconciles its Constitutional practices and obligations to economic expansion in the form of "structural coupling" of key players.

RÉSUMÉ

La Constitution de l'Inde reconnaît la doctrine de l'État de droit comme une caractéristique centrale et intrinsèque du système légal indien. Un large panel de décisions juridiques ainsi qu'une dynamique de libéralisation accrue ont visé à établir la pertinence, l'impact et la relation de cette doctrine avec la Constitution indienne. Ce processus a inévitablement conduit à l'émergence de nombreuses questions quant à la possibilité de mesurer l'État de droit soit à travers une

* Rohini Sen is currently working as an Assistant Professor at the Jindal Global Law School where she teaches courses on International Law, Global Governance through law and has worked on conflict related research and projects. Ms. Sen has obtained an LL.M. in International Law from the University of Leeds (UK) in 2012 and an Undergraduate Degree in Law from Gujarat National Law University, India (batch of 2006-2011). Her areas of interest include public international law, humanitarian law and human rights, International Trade and Environmental law, disability and women's rights.

éthique conséquentialiste, soit, de façon abstraite, à travers une éthique déontologique basée sur les lois. La nature amorphe de la Constitution ainsi que le processus de libéralisation ont régulièrement été acclamé. Cet article identifie et interprète la possible application du concept d'État de droit aux accords internationaux avec une attention particulière pour les accords de libre échange et de développement économique. Cet article reconnaît le pouvoir créateur de normes de la société civile ainsi que sa capacité à contribuer à l'État de droit dans un processus où un large nombre d'acteurs sont impliqués. À travers un modèle de gouvernance partagée, il est intéressant de voir comment le modèle indien réconcilie les pratiques constitutionnelles et les obligations d'expansion économique sous la forme d'un « couplage structurel » d'acteurs principaux.

1. — Introduction

The concept of Rule of Law is enshrined in all democratic constitutions in recognition of its status as one of the most basic and prominent legal principles. However, the doctrine varies with regard to its application and transposition within legal systems. A value chart for rights, the Rule of Law stipulates the legislative processes to which national Parliaments must abide. The Constitution of India recognises the necessity of this doctrine as a central and characteristic feature of the Indian legal system. Various judicial decisions have attempted to cull out the relevance, impact and relationship of this doctrine to the Constitutional framework with moderate success, giving rise to questions such as — is rule of law measured by consequentialist ethics or is it measured in the abstractum of statutory based deontological ethics? These questions translate the discourses throughout the frame of this article, meandering their way into the understanding of the rule of law requirements in Indian legal and cultural context. While "equality" forms the backbone of rule of law, the dualist yet amorphous nature of the Indian Constitution has often attracted the criticism that it is nothing but a tool to maintain the status quo of the legal system. Rule of Law in India finds vivid and variant expressions in legal negotiations, implementations and engagements. This paper will attempt to identify and interpret the possible application of Rule of Law concepts to international agreements, with specific focus on free trade and economic development.

Over the past two decades, trade liberalisation has become an important part of the development strategy of many countries. Starting in the early 1990's India made sweeping trade reforms through massive overall reduction in tariffs and non-tariff barriers. Further steps toward financial liberalisation were initiated in the mid 90's through various financial sector reforms. Through increased domestic competition and improved efficiency, the remarkable benefits of this economic liberalisation have been widely documented. However, despite these measures and their success, they have not yet been translated into complete integration of the financial markets for the efficient functioning of the economic system. As a result, progress has

been only incremental given that poverty and informal economic activities remain high. Designed on a State-centric model, the Indian financial system has long been accused of ailing under corruption and of having close ties with the executive organ of the State. (1)

Against this backdrop, free trade agreements seem to incentivize flexibility, non-enforcement or selective enforcement of regulatory structures within the legal system. Despite being accused of weak/un-enforced labour and environmental protection laws, the free trade agreements have allowed India to develop a more liberal and comprehensive approach to trade and development. While the more extreme critics claim that "the liberal paradigm has destroyed the rule of law", this liberalisation may also be viewed as a new, substantive version to interpret the same. Instead of entirely equating Rule of Law with legality, this paper analyses the quality, form and expression of these concepts through the Constitutional lens in India's protection of basic rights, economic development and trade agreements. It touches upon the relevance of non-state actors in rule of law briefly in order to compound and redefine the role of the civil society in strengthening these legal structures and moral undertones when juxtaposed against the State in a liberalised environment.

Part one identifies the inter-relationship of labour rights and human rights using the U.N rule of law reference frame. It sets the general theme of the paper and establishes the context of the discussions in the subsequent parts. Part two examines the Indian democracy, its political growth and economic transitions in the decades post its independence. It synchronizes the global liberalisation movement to that of India in the early 90's and studies them in light of restrictive Indian practices, such as the License Raj, that incidentally emerged as hindrances to free trade. This section attempts to provide a clear road map of India's economic transitions along with the need for rule of in the context of overall development order to better understand the features of Indian rule of law as discussed in Part four of this article. Part three, in continuum, studies the role of the State in post liberalisation good governance. It delves into the free trade agreements signed by India in the recent years and juxtaposes them with the evolution of labour rights. The idea is to study the impact of such agreements on rule of law practices in the realm of labour standards — an area that has often been embroiled in controversies of inadequate observance. Part four discusses the Indian Constitution and judicial pronouncements in light of rule of law and scrutinizes the underlying debates within a democratic, socialist yet expanding economic system. It traces the

(1) Allen FRANKLIN, Rajesh CHAKRABARTI, Sankar DE, Jun QIAN, Meijun QIAN, "Law, Institutions and Finance in China and India", in *Emerging Giants: China and India in the World Economy*, 2008, pp. 125-183; see also, Bhijit V. BANERJEE, Shawn COLE, Esther DUFLO, "Banking Reform in India", in S.B. BOSWORTH and A. PANAGARIYA, *India Policy Forum*, Washington, DC: Vol. 1, National Council of Applied Economic Research, Brookings Institution, 2004, pp. 277-332.

evolution of rule of law within India and contemplates its interaction and struggle to stay relevant in a system that encourages India to frequently engage in free trade practices. The article concludes with a re-imagined role of the civil society and State in addressing these lacunae in the rule of law while envisioning a complexity that can be mitigated through the participation of multiple stakeholders and through adopting traces of legal pluralism.

2. — Labour Rights as Human Rights: The Rule of Law Lens

For the United Nations, the rule of law refers to 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. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency. (2)

The United Nations [hereinafter "U.N."] rule of law agenda operates on the supposition that these international norms and standards are implementable in most fields of international law and in course of this horizontal application, percolate vertically into municipal legislative systems of States. (3) Subsequently, the U.N. has created a structure that works in order to help observe the rule of law framework (4) as also enunciated in the preamble of the U.N Charter, at the national level through Constitutions or any other equivalent highest laws of the land. (5) This form of certainty, as exhibited by the U.N law making/law enforcement process, seems to be more crystallized than Hobbes' "social contract" theory. (6) It echoes Dicey's corollary which insists that the holders of public powers must justify that their use of

(2) United Nations, "Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies", S/2004/616, 12 October 2011.

(3) *Ibid.*

(4) *Ibid.*; "The U.N has created a rule of law framework through its inclusion in the agendas of the General Assembly and Security Council since 1992. Further, since 2006 while the General Assembly has adopted three resolutions to that effect (A/RES/61/39, A/RES/62/70, A/RES/63/128), the Security Council has included rule of law in several of its resolutions and thematic debates [(SC res. 1325, SC res. 1820, SC res. 1612, SC res. 1674) and (S/PRST/2003/15, S/PRST/2004/2, S/PRST/2004/32, S/PRST/2005/30, S/PRST/2006/28) respectively)".

(5) United Nations, S/2004/616, *op. cit.*, at fn. 3.

(6) Hobbes' social contract states that self-preservation and self-protection are inherent to man's nature and this has led to the formation of institutions governed by sovereign, subject to moral obligations imposed on them. See also John Rawls, "Justice as Fairness", 67 *Philosophical Review* 164, 1958. Reprinted in John Rawls, *Collected Papers*, Samuel Freeman (ed.), Harvard University Press, 1999, pp. 94-96.

power is legally valid (supremacy of law), not arbitrary (equality of law) or unjust (predominance of legal spirit). (7) However, when this translates into trade agreements and the observance of rule of law, inadvertently, the relationship between domestic labour laws and international obligations comes to fore. Interestingly, despite the unambiguous mandate of the U.N., the labour rights as human rights approach suffers from the fallacious assumption that power flows from human rights. This is obviously vested on the positivist assumption, as elucidated later, that human rights encapsulate an established standard (predominantly Western), and, if labour rights do not feature in these legal instruments, they are not included. This stance, which ignores the cultural "contaminations" and transformation, is often contested and finds support in historical disproval in certain jurisdictions. (8)

The problem with this approach is obvious in the developing economy context. In the words of Anthony Carty, the gamut of international human rights is entirely consistent with Western economic interests. (9) The black and white construction of trade, human rights and labour standards tends to mask the multi-dimensional metaphor that lies at its heart: that of the Savage-Victim-Savior paradigm (10) the three dimensional, black and white projection of the human rights corpus which clearly demarcates good from evil. (11) Here, the developing State is portrayed as a "savage" as and when it marginalizes rights and civil society. The deprived individual is the "victim" and the entire corpus of human rights and their observers are the "saviors". Thus the assumption is that a "good" State is cleansed by the act of internalising established human rights practices. The "evil" state through its cultural, social and other forms of deviation from the standards set by the "saviour" Western idealised human rights standards deprives its "victim" citizens of entitlements through these "savage" practices. (12) The Western "savour" thus emerges as one who "protects", "civilizes", "restrains" and "safeguards". However, this standardised format fails to take heed of a need for society based on particular values in order to improve — in other words, a set of culturally based norms and practices in which liberal thought is inherent. Applying the three dimensional approach to the Indian context (as a developing country template), one can easily identify the "role" India is slated to play while at the same time, recognising the fault lines of this

(7) Simon CHESTERMAN, "An International Rule of Law", 56 *American Journal of Comparative Law* 331, 2008. See also, A.V. DICEY, J.W.F. ALLISON (ed.), *The Law of the Constitution*, Oxford University Press, 2013.

(8) Anthony CARTY, "The Legislation of Human Rights Discourse in a Coercive International Legal Order", in Saladin MECKLED-GARCIA and Basak CALI (eds), *The Legalization Of Human Rights: Multidisciplinary Perspectives On Human Rights And Human Rights Law*, Routledge, 2006, p. 2.

(9) *Ibid.*, pp. 2-4.

(10) Makau MUTUA, "Savages, Victims and Saviors: The Metaphor of Human Rights", 42 *Harvard International Law Journal* 201, Winter 2001.

(11) *Ibid.*, p. 202.

(12) *Ibid.*

fictitious neutrality and universality. A cursory analysis reveals that the problems of domestic Indian labour laws are more in the realm of denial of social and cultural rights as opposed to a supposed deviation from the existing international benchmarks. This debate has long been a part of the role of the state versus free market economics. (13) This reflection of differential rights and their relevance in liberalisation is discussed at length in part four of this article.

Drawing from the rule of law requirements, observation and facilitation of equality is a key component to accurately determine the configurations of this rights based approach. In order to do so, it is necessary to understand the co-relation between labour rights and human rights, keeping in mind the free trade implications on labour standards and practices. As witnessed in legal literature, labour rights may be understood as human rights through three different approaches. (14)

— The instrumental approach, which strains the various strategies used by different groups across different jurisdictions which articulate labour rights as human rights. This approach has its roots in Marxist traditions (15) and is an important contextual framework in light of India's "socialist" (16) Constitution.

— The positivist approach, which posits only those rights found in international agreements as labour rights. As the name suggests, this approach relies on legal positivism to make this association and has been criticized for overlooking the socio-economic angle.

— The normative approach defines what a human right is and then proceeds to assess whether an identified labor right can fit this definition. The normative standards form the basis for determining whether a labor right is meeting those standards and argues that labor rights are stringent entitlements and this should be reflected in law. (17)

It is interesting to note that both the normative and positivist approach rely on established standards while the instrumental approach advocates for socialist expansion. However, there may be some truth to the proposition that rule of law demands a new language of labour and social rights as a response to this new phase of market expansion associated with globalisa-

(13) *Ibid.*; Anthony CARTY, *op. cit.*, at fn. 9, p. 5.

(14) Virginia MANTOUVALOU, "Are Labor Rights Human Rights?", 3 *European Labor Law Journal* 151, 2012, p. 3.

(15) *Ibid.*, p. 8.

(16) The Preamble of the Indian Constitution describes India as a sovereign, socialist, secular democratic republic. Parvinrai MULWANTRAI BAKSHI, Subhash C. KASHYAP, *The Constitution of India*, Universal Law Publishing, 1954.

(17) Virginia MANTOUVALOU, *op. cit.*, at fn. 15, p. 27; Makau MUTUA, *op. cit.*, at fn. 11, pp. 210-215.

tion in neoliberal times. (18) Against the backdrop of this tripartite legal template, this article delves into the effectiveness and potential for reform of the rule of law as ensconced in the Indian Constitution and legal system. The following sections will look at the evolution of the Indian democracy and its liberalisation post-independence in order to better understand this requirement.

3. — The Indian Democracy and Post-independence Liberalisation

Touted to be the one of the largest and stable democracies in the world, (19) India has been through a significant and monumental journey since acquiring Independence in 1947. India's bold choice of parliamentary democracy and universal franchise, despite high levels of poverty, illiteracy and informal economic activity has drawn both criticism and intrigue from the international community. (20) This new nation crystallized its ideals, goals and political policies through the efforts of the Constituent Assembly, giving birth to the Indian Constitution in 1950. However, despite the adoption of what is regarded by many as an excellent thesis of legal principles, (21) it is often alleged that the Indian democracy is largely rhetoric. (22) It would be of interest to note that this document fares very well in the rule of law checklist as propounded by Dicey. (23) It declares India to be a sovereign, secular republic and a parliamentary democracy. (24) It advocates for the separation of powers, equality before law, free press and judicial remedies to infringements of Constitutional or fundamental rights. However, India's post-colonial engagement with the rule of law has not progressed successfully. As a result of this, many constitutional goals and democratic aspirations have not been realised; particularly those on economic equality, equal access to justice and absolute judicial fairness. The hallmark of a successful democracy lies in the provision of a semblance of equality and securing basic rights to all those who reside within. Based on economic indicators, one can

(18) Judy Fudge, "The New Discourse of Labor Rights: From Social to Fundamental Rights?", 29 *Comparative Labor Law and Policy Journal* 1, 2007, p. 2.

(19) G. Ramachandra Reddy, *The Challenges of Governance in Indian Democracy*, A.P.H. Publishing, 2007, pp. 1-3.

(20) *Ibid.*

(21) Upendra Baxi, *The Rule of Law in India*, Vol. 3, *Revista Internacional de Derechos Humanos*, 2007, p. 7; Mukulika Banerjee, "India, The Next Superpower Democracy", *Ideas: Publications and Reports*, LSE, 2012, pp. 1-2.

(22) *Ibid.*, pp. 5-7.

(23) Simon Chesterman, *op. cit.*, at fn. 8.

(24) Parvinrai Mulwantrai Bakshi, Subhash C. Kashyap, *op. cit.*, at fn. 17. See also, Granville Austin, *Working a Democratic Constitution — The Indian Experience*, Oxford University Press, USA, 2003, pp. 3-9.

remark that this is an area in which India has visibly failed. However, it must also be cogently noted that

Indian democracy, in a span of six decades, has withstood numerous economic, political and social, challenges, including an 18-month long State of Emergency. (25) Therefore, to say that the "rule of law" is largely absent is to take a very one dimensional, formal economic view of this ever expanding system. While threats to the rule of law do subvert the notion of democracy, it would be erroneous to suggest that there exists an imperiled system of governance in the country.

In order to understand the econo-legal implications of rule of law in India the planned industrialisation of developed nations post-world war is a useful reference frame. This process was recognised as a doctrine to tackle economic backwardness in developing nations and relied on the notion that large-scale investments would catalyze the development of economic activities and therefore, lead to the sustained growth of domestic industries. (26) Countries such as India, where private initiatives were not suppressed, were looking to place the larger goal of development under the control of the central government and, as a result, trade restrictions were brought under the control and influence of the Centre as well. Tariffs were designed to protect domestic industries and at the same time enhance industrialisation as per the development policy. (27) However, this approach did not yield the necessary results and forced the transition to laissez-faire from this planned industrialisation of the 1980s. (28) Therefore, government control was dismantled and there began the nascent journey towards trade liberalisation in the absence of an overarching governmental presence.

Until the 1980s, India's post-independence policy, which was largely shaped by the 1951 Industries (Development and Regulation) Act, (29) was heavily protected by the "license raj" system. (30) This practice led to the stagnation of the Indian economy by preventing the expansion of existing industries while restricting and regulating the entry of new competitors/firms. (31) Finally, in the 1980s, the Indian government began to enact a series of reforms towards greater liberalisation and by 1991, most of India's

(25) *Ibid.*

(26) Paul ROSENSTEIN-RODAN, "Problems of Industrialization of Eastern and South Eastern Europe", 53 *The Economic Journal* 211, 1943; Sukhamoy CHAKRAVERTY, "Paul Rosenstein-Rodan: An Appreciation", 28 *Journal of Socio-Economics* 117, 1999.

(27) Upendra BAXI, Mukulika BANERJEE, *op. cit.*, at fn. 22.

(28) *Ibid.*

(29) Industries (Development and Regulation) Act 1951, Act No. 65 of 1951, 31st October 1951.

(30) Upendra BAXI, Mukulika BANERJEE, *op. cit.*, at fn. 22; Philippe AGHION, Robin BURGESS, Stephen REDDING, Fabrizio ZILIBOTTI, "The Unequal Effects of Liberalization: Evidence From Dismantling The License Raj In India", 98 *American Economic Review* 1, 2008.

(31) *Ibid.*

restrictive trade barriers were slashed. (32) But despite the nationwide labour regularity framework, the amending power of the Indian Constitution allowed the heterogeneity across Indian States to prevail over the standardised legal system — a practice that has severally raised its head in comprehension of the so-called "universal" understanding of human rights in trade. Finally, following the 1991 assassination of the then Indian Prime, Rajiv Gandhi, rising debt, oil price escalation due to the Gulf War and subsequent macroeconomic crisis led India to implement large scale liberalisation of the economy with immediate effect. (33) Tariff and non-tariff barriers fell as India opened itself up to the global trading system by becoming a member of the World Trade Organization [hereinafter "WTO"] on 1st January, 1995. (34)

This membership marked an onslaught of an interesting divergence. Viewed as a crucial step to poverty eradication, growth and development, mainstream economists and trade lawyers welcomed this approach. (35) However, critics of this school of thought are extremely wary and insist that liberalisation has the potential to exacerbate inequality, particularly in developing nations. (36) Despite its mandate focusing on pretensions to the contrary, both these theories seem to approach development from the one of the core underpinnings of rule of law — equality. However, while the former advocates development at the immediate expense of the informal economy, the latter, despite being mindful of the lower-level workforce, seems to inch towards a form of liberalisation stalemate whereby it prioritizes proper distribution of existing resources instead of embarking on economic ventures which would likely lead to greater levels of immediate unemployment. As a socialist nation, India's recent liberalising free trade agreements seem to lean towards the former, amidst allegations of echoing corporate interests. (37) It also seems to reflect the general rationale behind the international World Bank standards of openness indicators and trade liberalisation. (38) While openness to trade is undoubtedly a successful strategy to pursue, it is important to remember that trade, of any kind, is not a guarantee but an oppor-

(32) Kuldeep MATHUR, "Good Governance, State and Democracy", Paper to be presented at the Conference on *Beyond the Post Washington Consensus: Governance and the Public Domain in Contrasting Economies — The Cases of India and Canada*, Chandigarh, 2001, 12-14 February 2001.

(33) Dani RODRIK, Arvind SUBRAMANIAM, *From "Hindu Growth" to Productivity Surge: The Mystery of the Indian Growth Transition*, International Monetary Fund, 2004; Petia TOPALOVA, Amit KHANDELWAL, "Trade Liberalization and Firm Productivity: The Case of India", 93 *Review of Economics and Statistics* 995, 2011.

(34) Dani RODRIK, Arvind SUBRAMANIAM, *op. cit.*, at fn. 34, pp. 7-11.

(35) *Ibid.*

(36) Petia TOPALOVA, "Factor Immobility and Regional Impacts of Trade Liberalization: Evidence on Poverty From India", *IMF Working Paper*, WP/10/218, 2010.

(37) A Deloitte-FICCI White Paper, "India ASEAN Free Trade Agreement Implications for India's Economy", 2011, available at https://www.deloitte.com/assets/Dc.

(38) Wacziarg ROMAIN and Karen HORN WELCH, "Trade Liberalisation and Growth: New Evidence", 22 *The World Bank Economic Review* 187, 2008.

tunity. (39) Therefore, consequent increased levels of trade should not be used as an indicator to social progress which shields inequality, development disparity and differential market access.

Having stated that, it is important to consider how society can derive benefits from this trend of increased liberalisation and free trade? Recent research has indicated that the interaction between offsets of trade, labour concerns and financial institutions is a key element to design economic reforms, legal policies and trade practices. (40) This is primarily because markets are extremely robust and their invigoration is directly proportional to the creation of an environment in which all relevant legal rights are recognised, enforced and protected. (41) While developed countries can and often do take this requirement for granted (owing to free market capitalism, efficient European socialism, absence of informal economy); (42) developing nations, such as India, need to be very mindful of this engagement. It is interesting to note however that, deviations from rule of law (weak systems, politicised judiciary, questionable competence) may not seriously impede economic efficiency and growth. (43) For instance, the United States and China have performed exceedingly well in the development sector, despite rather questionable judicial structures and rule of law observance. (44) It has also been contended that minimising the rule of law requirements has allowed an efficient growth of the Chinese economic system. (45) In comparison, the robust judicial system of the United Kingdom could not stop it from ailing from decades of economic underperformance. (46) Crucial to elucidate this point is the fact that India, modeled heavily on the British legal system and multitudes of lawyers has been unable to echo China's success (a nation with a fairly young, modern legal system that has only recently opened up to Western contractual practices). (47)

However, this is oversimplifying the rule of law — economic development angle. The comprehensive explanation to these variations of practices finds root in causation rather than effect. To say that the rule of law is co-related to economic growth, which of course is inconclusive as witnessed in the aforementioned examples, is not the same as interlinking them through a cause and effect frame. It is possible that a weakened rule of law system often

(39) *Ibid.*

(40) Dani RODRIK, Arvind SUBRAMANIAM, *op. cit.*, at fn. 34; Petia TOPALOVA, *op. cit.*, at fn. 37.

(41) Richard. A. POSNER, "Creating a Legal Framework for Economic Development", 13 *The World Bank Research Observer* 1, 1998.

(42) Rachael E. GOODHUE, Gordon C. RAUSSER, Leo K. SIMON, "Privatization, Market Liberalization and Learning in Transition Economies", 80 *American Journal of Agricultural Economics* 724, 1998.

(43) *Ibid.*

(44) *Ibid.*, pp. 725-732.

(45) Richard. A. POSNER, *op. cit.*, at fn. 42.

(46) Paul ROSENSTEIN-RODAN, *op. cit.*, at fn. 27.

(47) *Ibid.*

overburdens the economy by redirecting capital to strengthening its lacunae. However, growth in the absence of a strong rule of law observance is not well explained through this lens. Cardozo makes a compelling argument that where the role of a legal system is often found to be devoid of philosophical thought (48) it consequently ends up enforcing "bad laws" in addition to contracts and rights. (49) This, in turn, reduces the efficiency of the system. Additionally, weak or fragmented societal structure contributes to the development of non-traditional implementation and extra-legal enforcement. (50) Some of these methods circumvent the law itself and put more pressure on the existing economy in an attempt to redress them. They are costly and indigenous substitutes (very similar to the communist "command-and-control" methods) (51) and the hidden cost generated by them act as a barrier against new entrants, complex transactions and integrated trade practices for fear of lack of enforcement against non-performance. (52) This concern is understood to be raised by both India (from a trade in services perspective) and EU (from a labour rights perspective) within their on-going free trade agreement Borrowing from the trade/human rights debate, the rule of law requirements hinges on this circular premise — a developing country cannot always afford good legal implantation/system/access; but, the absence of such a structure may hinder its economic ability to afford this very system. (53)

The other alternative available to India is inexpensive legal reform in the realm of implementation and impact assessment *vis-à-vis* the informal economy in order to assist in the creation of preconditions to operate efficient markets. (54) Given the customised economy, cultural encumbrances and population bursts, a rules-first strategy is likely to succeed more in India owing to the lower average costs. (55) China, with a similar economic structure and currently the most populous nation in the world (56) has done quite well through this approach of combining modern commerce and trade regulations simultaneously during its liberalisation period. (57) Therefore, India's

(48) Benjamin. N. CARDOZO, *The Nature Of The Judicial Process*, Yale University Press, 1921, 142 pp.

(49) Dani RODRIK, Arvind SUBRAMANIAM, *op. cit.*, at fn. 34, at pp. 6-9; Paul ROSENSTEIN-RODAN, *op. cit.*, at fn. 27.

(50) Richard. A. POSNER, *op. cit.*, at pp. 7-11; see also, Petia TOPALOVA, *op. cit.*, at fn. 37.

(51) Paul ROSENSTEIN-RODAN, *op. cit.*, at fn. 27.

(52) Jonathan R. HAY, A. SHLEIFER, "Private Enforcement of Public Laws: a Theory of Legal Reform", 88 *American Economic Review* 398, 1998. European Parliament, Directorate-General for External Policies, Policy Department, Workshop, Joint Press Statement, "The Long Road Towards an EU-India Free Trade Agreement, Fifth India-EU Summit", The Hague, 8 November 2004.

(53) Dani RODRIK, Arvind SUBRAMANIAM, *op. cit.*, at fn. 34.

(54) Paul ROSENSTEIN-RODAN, *op. cit.*, at fn. 27; Lorand BARTELS, "Human rights and sustainable development obligations in EU free trade agreements", *Research Paper* No. 24, University of Cambridge Faculty of Law Legal Studies, 2012.

(55) Richard. A. POSNER, *op. cit.*, at fn. 42, pp. 2-10.

(56) Dani RODRIK, Arvind SUBRAMANIAM, *op. cit.*, at fn. 34, pp. 3-7.

(57) *Ibid.*

adherence to rule of law ought to be measured on a rules first index. This is also because the Indian system ails from an increased lack of investment in judicial improvement (which does not, however, undermine the rising level of judicial activism). (58) Whilst judicial salaries are high and secure and come with several benefits, the penalties for venality, corruption or incompetence are often unenforceable for the very same reasons (coupled with long drawn out bureaucratic processes). (59) Therefore, the incentive to reduce corruption has to come through deterrence and discovery. At the end of the day, investments in reform and reforms themselves are contingent on the country's political will to implement them. For India, the dominant voices in this domain are political groups, corporate lobbies and a thin stream of civil society presence. Therefore, the manifestation of rule of law in trade practices is allegedly mostly subsumed by corrupt economic interests as opposed to legal observance. However, while it is possible to acquire economic development in the absence of good law, strategic investment in legal reform is beneficial to economic growth as well. This, in turn, can be utilised for more structured legal developments. (60) This is inconsonance to the question raised in part one about the perceived universality of human rights as opposed to cultural mantles. This duality will be discussed in the following section with references to India's Constitution and free trade practices.

4. — The Indian State, Good Governance and Free Trade: A Constitutional Layout

The facsimile of development has often seduced third world countries and propelled them to fashion themselves in the image of their Western counterparts, despite the process being replete with failures, the 2008 financial crisis being the most recent example. There apparently exists a new agenda of governance which derives legitimacy from the neo-liberal critique of previous activities of the State. (61) In line with globalisation, this new agenda echoes a form of realignment which encourages expansion of market autonomy and diminishing the control of state. (62) As per the World Bank's inference, failure of the state-led industrialisation model, as discussed in part one of

(58) Richard. A. Posner, *op. cit.*, at fn. 42, pp. 2-10; Parvinrai Mulwantrai Bakshi, Subhash C. Kashyap, *op. cit.*, at fn. 17, pp. 10-12.

(59) Gary. S. Becker and George J. Stigler, "Law Enforcement, Malfeasance, and the Compensation of Enforcers", 3 *Journal of Legal Studies* 1, 1974, "Transparency International, 'Corruption Perception Index", available at http://www.transparency.org/research/cpi/overview. P.N. Bhagwati, "Judicial activism In India", available at https://media.law.wisc.edu/s/c_420/4mdd4/gargoyle_17_1_3.pdf.

(60) Robert J. Barro, "Economic Growth in a Cross Section of Countries", 106 *Quarterly Journal of Economics* 407, 1991.

(61) Parvinrai Mulwantrai Bakshi and Subhash C. Kashyap, *op. cit.*, at fn. 17.

(62) *Ibid.*

this paper, were directly compounded by stifling of private sectors (such as license raj measures) and did not adequately reflect unique characteristics of a society. (63) So then, the new good governance discourse envisions a system that emphasizes:

— strong civil society institutions and presence;
— the need for creating an organised informal sector in order to harness entrepreneurial skills and community;
— democracy to foster successful socio-economic and legal development. (64)

In this discourse of economic liberalism and democracy, excessive state intervention is seen to be an indicator of bad governance. (65) However, it is crucial to remember that it is the State which bears the primary responsibility for implementing rule of law within its legal system. So, where does it put India in its emergent free trade practices? The Indian sub-continent is an agnostic follower of Frankel and Romer's suggested pathway — trade (in any form) raises income. (66) Despite the projection that developing countries can benefit from trade with developed nations through the economies of scale, (67) India seems to be lukewarm to engage in a free trade agreement with EU at the moment, with concerns that include complete alterations of global trade patterns and diminished attention to multilateral systems. (68) However, exhibiting interesting duality, India has been the centrifuge of regional trade agreements in the South Asian region, having signed several agreements with its SAARC (69) and ASEAN (70) counterparts. (71) In addition to trade co-operation, some of these agreements form a part of India's "Look East" strategy, created to engage and facilitate in greater economic integration among semi-similar economies. These negotiations revolve around a range of areas that include tariff concessions on trade in goods, services, customs cooperation, consumer protection, investments and other

(63) Jonathan R. HAY, A. SHLEIFER, *op. cit.*, at fn. 53.

(64) Paul ROSENSTEIN-RODAN, *op. cit.*, at fn. 27, p. 3.

(65) Rita ABRAHAMSEN, *Disciplining Democracy: Development Discourse and Good Governance in Africa*, Zed Books, 2000, p. 51.

(66) Jeffrey A. FRANKEL, David H. ROMER, "Trade and Growth: An Empirical Investigation", National Bureau of Economic Research, 1996, No. w5476.

(67) Grace V. CHOMO, "Free Trade Agreements Between Developing And Industrialized Countries: Comparing The U.S.-Jordan FTA With Mexico's Experience Under NAFTA", Office of Economics, U.S. International Trade Commission, 2002.

(68) Jo-Ann CRAWFORD, Roberto V. FIORENTINO, "The Changing Landscape of Regional Trade Agreements", *Discussion Paper* No. 8, World Trade Organization, 2005.

(69) South Asian Association for Regional Co-operation (SAARC) comprising of Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan and Sri Lanka.

(70) Association of Southeast Asian Nations (ASEAN).

(71) Paul ROSENSTEIN-RODAN, *op. cit.*, at fn. 27. Eg: BIMSTEC (Bangladesh, India, Myanmar, Sri Lanka, Thailand — Economic Co-operation), South Asian Free Trade Agreement (SAFTA), Comprehensive Economic Cooperation Agreement (CECA), a partial scope agreement with MERCOSUR *et al.*

possible texts of preferential agreements to name a few. (72) It is interesting to note that in addition to the South-Asian blocs, the India-Mercosur preferential trade agreement, in effect from January 2009, has been undergoing successive expansion in the number of products and tariff concessions as offered by each side. (73) This decisive progress towards the overall objective of trade liberalisation finds roots in India's proactive presence in the Doha Development Rounds of the WTO, despite the stalemate. (74) India's increasing economic importance and ability to mobilise has allowed it to emerge as a significant player, along with Brazil and China in these WTO negotiations. (75) Since the opening up of trade post Uruguay, India seems to have altered its earlier position and is aggressively pursuing market access demands as well. (76) Given its surplus of workforce, India has also emerged as a growing service provider and outsource destination, thereby contributing to the increase in global economic centres. (77) This is clearly reflected in the number of regional and preferential trade agreements India has signed in the recent past, predominantly in the South-Asian region. Further, with the formation of the G-20 coalition within the WTO (78) and the transformation of the old Quad group (79) into the G4, (80) India has gained currency as a powerful political player and negotiator in the trade plane. (81)

The nature of trade agreements in India is akin to contractual measures with another State/group of States, furthering their trade relationship. (82) As a means to dismantle tariff and non-tariff barriers (as well as non-economic barriers for all realms of national security), these agreements are designed to create an open system which caters to all parties the "spoils" of increased trade. Therefore, it should not come as a surprise that the most successful trade agreements signed by India are very comprehensive and complex in their attempt to balance "consideration" and trade gains. (83) Interestingly, India has plunged headfirst into regional trade agreements (which include

(72) A Deloitte-FICCI White Paper, *op. cit.*, at fn. 38.

(73) *Ibid.*

(74) *Ibid.*; Rajiv KUMAR and Swapna NAIR, "India: Strategies At The Doha Development Agenda — July And Beyond", Indian Council for Research on International Economic Relations, Working paper prepared for presentation at the 2009 World Trade Organization Forum, Geneva, 2009, pp. 1-5.

(75) University of Warwick, "The Multilateral Trade Regime: Which Way Forward?", World Trade Organization, Geneva, 2007.

(76) Rajiv KUMAR and Swapna NAIR, *op. cit.*, at fn. 75, pp. 6-13.

(77) University of Warwick, *op. cit.*, at fn. 76. *Ibid.*, p. 26.

(78) *Ibid.*

(79) Canada, the European Union, Japan and the USA.

(80) USA, European Union, India and Brazil.

(81) University of Warwick, *op. cit.*, at fn. 76, pp. 28-32.

(82) Randall PEERENBOOM (ed.), *Asian Discourses of Rule of Law: Theories and Implementation of Rule of Law in Twelve Asian Countries, France and the US*, London, Routledge, Curzon, 2004. Dani RODRIK, Arvind SUBRAMANIAM, *op. cit.*, at fn. 34.

(83) *Ibid.*

Free Trade Agreements and Comprehensive Economic Cooperation Agreements) [hereinafter "RTAs", "FTAs" and "CECAs" respectively] under the operative that these arrangements will act as constructive blocks towards trade liberalisation. (84) These agreements, bilateral or multi-lateral all focus on eradication of trade barriers in adherence to WTO rules, fair competition, equitable benefits, enforcement of the agreements, address issues of regional co-operation, enhancement of existing relations and provisions for additional co-operation in these regions. (85) These consortiums have a structured, concretive approach and allow expansion of trading business in the sub-continent. However, unlike the Europe Union, who has a legal lead in development of transnational legal guarantees of due process and human rights (86) which allows EU the theoretical luxury of doing business anywhere in the world (87) India has not ratified several labour rights conventions and protocol, limiting its human rights and trade prospects. (88) What are the implications of these mixtures of complete and limited obligations on the Indian legal system with reference to rule of law? The next section will study rule of law under the Indian Constitution and through judicial pronouncements in order to throw light on this question.

5. — Rule of Law under the Indian Constitution

The Constitution of India clearly articulates some of the basic postulates of rule of law such as equality, (89) judicial enforcement of basic rights, (90) absence of arbitrariness (91) and judicial review to rule of law. (92) The Constitution is crucial to this discussion, since, as the supreme law of the land, it provides legitimacy and authority to the executive branch as well. (93) Considered to be a part of the "basic structure" of the Indian Constitution, (94)

(84) Dani Rodrik, Arvind Subramaniam, *op. cit.*, at fn. 34.

(85) Parvinrai Mulwantrai Bakshi and Subhash C. Kashyap, *op. cit.*, at fn. 17; Dani Rodrik, Arvind Subramaniam, *op. cit.*, at fn. 34.

(86) Andrew Reding, "No Rule of Law, No Free Trade", *The Wall Street Journal Counterpoint*, 18 March 1993; Rachel J. Anderson, "Linking Rule of Law and Trade Liberalization in Jamaica", 7 *Berkeley Journal of African-American Law & Policy* 49, 2005.

(87) Having signed all the relevant conventions, denial of due process at the national level still allows them the opportunity to appeal to an international court where they are guaranteed of fair hearing. *Ibid.*

(88) Randall Peerenboom, *op. cit.*, at fn. 83.

(89) Constitution of India, Article 14.

(90) *Ibid.*, Article 32.

(91) Som Raj v. State of Haryana 1990, AIR 1176, 1990 SCR (1) 535.

(92) Constitution of India, Articles 15, 16, 19 and 20.

(93) Surya Deva, "Public Interest Litigation in India: A Critical Review", 28 *Civil Justice Quarterly* 19, 2008, p. 19.

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

the notion of rule of law is immune to destruction or amendment (95) even by the Constitution itself and pervades throughout the Indian legal system. The Supreme Court has crowned the rule of law as one of the most important aspects of the basic structure doctrine and this notion is reflected in all legal enactments that borrow power from the highest law of the land. (96)

Both formal and substantive, (97) the Indian conception of rule of law is sometimes held to be inadequate in actuality as against the Constitutional promises; an argument which has been raised in part one of this article. While the Constitution guarantees an absolute form of equality through fundamental rights (ideologically supplemented by the Directive Principles of state policy), divisive social structure and practices have made the observation of rule of law fall short in comparison. Having established a limited Government, the Constitution further demarcates the law making powers of each entity (Central and State) within this federal system. (98) Although it speaks of the notion of separation of powers and legislative validations, certain ratifications, such as FTAs, by the Executive do not require a parliamentary assent. (99) Interestingly, however, the Indian courts have long opined that executive action without the support of valid law is essentially void, particularly if it violates fundamental rights of its citizens. (100) This, when juxtaposed with FTAs, raises two fundamental questions.

1. Is there a need for an enabling provision for FTAs to come into force? (Despite the ability of the Executive to sign such agreements sans Legislative approval.)
2. If such agreements violate or affect human rights (labour, environmental or otherwise) are they concurrently in contravention to the provisions of the Constitution?

Whilst the former often ends up deriving legitimacy (and diluting legality) through political and corporate interests, the latter is woven into the fabric of Part III of the Constitution and, its operation needs to be culled out through judicial pronouncements. (101)

One of the primary objectives of the Indian Constitution has been the creation of an egalitarian society. (102) This goal has exhibited mixed develop-

(95) Constitution of India, Article 38.

(96) Kesavanda Bharti v. State of Kerala, AIR 1973 SC 1461.

(97) Granville AUSTIN, *op. cit.*, at fn. 25.

(98) Constitution of India, Articles 246, 248-254 read with Schedule IX.

(99) Upendra BAXI, Mukulika BANERJEE, *op. cit.*, at fn. 22.

(100) Kharak Singh v. State of UP, AIR 1963 SC 1295; Bijoe Emmanuel v. State of Kerala, AIR 1987 SC 748.

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

(102) Mahendra P. SINGH, *Shukla's Constitution of India*, Lucknow: Eastern Book Co., 11th Edition, 2008, preamble, p. 14.

ment (primary indicators being that of inequality and informal economy) and gained partial traction through judicial efforts and activism invalidating legislations that countermand this Article 14 requirement. (103) Of course, the veritable requirement to access to justice becomes relevant in this context. How powerful is enforcement of equality before law when the law financially alienates certain sections of the society from expensive legal recourses? As apart from the growth in ambiguity, Article 14 has aimed to crystallize the broader principle of reasonableness. As against bureaucratic underpinnings, the Supreme Court of India, the highest court of the land, makes the observation that "Article 14 strikes at arbitrariness in state action and ensures fairness and equality of treatment. The principle of reasonableness, which logically as well as philosophically, is an essential element of equality or non-arbitrariness pervades Article 14 like a brooding omnipresence." (104) In recognising the diversity of its law and citizenry, the Indian judiciary has succinctly stated that "equality is a dynamic concept with many aspects and dimensions and it cannot be "cribbed, cabined and confined" within traditional and doctrinaire limits. From a positivistic point of view, equality is antithetic to arbitrariness." (105) This not only serves to highlight the form of rule of law, but, it also strikes at the root of the positivist recognition of rights debate as dealt with in part one.

In yet another perspective, the underlying Constitutional conflict between liberalisations and socialism may be said to be reflected in Article 21 which, as under rule of law, guarantees the right to live "[...] with human dignity and all that goes along with it." (106) This sheds some light on question two and its substantive requirements. The ever-widening horizon of this Article has been understood by the judiciary to also contain right to health, (107) livelihood (108) and an unpolluted environment (109) — obligations India is obliged to observe under the aegis of trade agreements and violations by private entities as well. (110) This is further enhanced by the due process

(103) K. Kunhikoman v. State of Kerala, AIR 1962 SC 723S; Ameernnisa Begum v. Mehboob Begum, AIR 1952 SC 91. Ram Prasad v. State of Bihar, AIR 1953 SC 215.

(104) Maneka Gandhi v. Union of India, (1978) 1 SCC 248, 284.

(105) Royappa v. State, (1974) 4 SCC 3, 38.

(106) Munn v. Illinois, 94 US 113. Francis Coralie v. Union Territory of Delhi, AIR 1981 SC 746, 753.

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

(108) Olga Tellis v. Bombay Municipal Corporation, AIR 1986 SC 180. DTC Corporation v. DTC Mazdoor Congress, AIR 1991 SC 101.

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

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

requirement as interpreted by the Indian judiciary (111) and through creation of a substantive rule of law model which lays down that "any law or executive action which is not 'just, fair and reasonable' could be declared unconstitutional." (112) In addition to all of this, the independence of the judiciary, as prescribed by the Constitution is a well-established rule of law component; but, it has its drawbacks in failing to impose penal measures for failure of judicial officers and judges. (113)

In light of the aforementioned provisions, how does one reconcile a "socialist" democracy, rule of law and trade liberalisation practices? In the words of Justice H.R. Khanna, "Even in absence of Article 21 in the Constitution, the state has got no power to deprive a person of his life and liberty without the authority of law. Without such sanctity of life and liberty, the distinction between a lawless society and one governed by laws would cease to have any meaning..." (114) This implicit requirement mandates that the Government be accountable for all its acts, within and outside the domestic system in any manner that affects livelihood, population and good governance and thus, provides clarity on the first question — every act of the Executive will require direct, indirect, immediate or subsequent "authorization" by the Parliament in some form or the other.

The concept of the rule of law is diverse in its composition, comprehension and effect, whether it be through the meaning given by Dicey in his The Law of the Constitution or the definition as provided by Hayek in his Road to Serfdom and Constitution of liberty or the detailed exposition brought forth by Harry Jones in his The Rule of Law and the Welfare State. Despite the essential miscellany, there is, as observed by Justice Mathew, in his article The Welfare State, Rule of Law and Natural Justice, "substantial agreement is in juristic thought that the great purpose of the rule of law notion is the protection of the individual against arbitrary exercise of power, wherever it is *found*", (115) be it a private entity or the State itself. Thus, despite the difficulty to eradicate inequality, socio-economic disparity or use of discretionary powers in this new, globally integrated administrative age, rule of law has somehow found a way to develop, exist and be relevant in the legal systems. Be it through Dicey's theory or judicial vigours, the concept of rule of law has been reflected in all engagements from international executive actions to national, rights based systems.

(111) Maneka Gandhi v. Union of India, AIR 1978 SC 97.

(112) Mahendra P. Singh SINGH, *Shukla's Constitution of India*, Lucknow: Eastern Book Co., 11th Edition, 2008, para. 201-01.

(113) Union of India v. Raghubir Singh, 1989 AIR 1933, 1989 SCR (3) 316.

(114) ADM Jabalpur v. Shivakant Shukla, 1976 AIR 1207, 1976 SCR 172.

(115) Sukhdev v. Bhagatram, AIR 1975 SC 1331.

However there is no such thing a perfect system, and, within India, the rule of law faces staunch critique in the rule of person. (116) The rule of person recognizes individual bias in legal enforcement and notes that almost all fields are subjected to administrative discretion and interference — a reflection that pervades the concept of administrative law as well. (117) The Parliament is also known to enact laws opposed to personal liberty (118) as against Article 21 in certain cases and inequality (119) is prevalent in various aspects of the Constitutional machinery. Of course, the rule of person is invoked for greater State policy in addition to that of inherent bias in a system. Society is dynamic and therefore, so should be the need of the State to evolve in tandem with it. Rule of law is often accused of attempting to maintain status quo in the legal system (120) — an approach that best serves the humanist interests of free trade. The rule of law in the Indian society may not have achieved the entire intended Constitutional results but, it has upheld the same on various occasions through creative access to justice, remedies to human rights violations and judicial interventions, often supplemented by non-traditional methods that circumvent procedural absolutions and requirements. (121) Thus, there are several challenges to the creation of a robust rule of law environment in India such as increasing population, judicial inaction and delay, pervasive corruption (including bureaucracy, judiciary and members of the Parliament), (122) large scale socio-economic inequalities (despite active programs, schemes and provisions to combat them), regional conflicts, dispute over resources grass root anti-government movements (123) and lack of decisive, public allegiance. However, these challenges do not erode the rubric of constitutional mandate or the Government's efforts, outcomes and commitments.

6. — Conclusion

India' path to liberalisation has been an interesting graph of economic growth and political prowess. As discussed in the earlier sections, this strategy has added more dimensions to the development vs human rights debate. While India continues to embark on the free trade route and involve itself in more preferential trade agreements, it has to be mindful of the immediate impact on the informal economy and employment. As witnessed in

(116) Arvind Datar, *Commentary On The Constitution Of India*, Wadhwa and Company Nagpur 2007, at pp. 1-332; Randall Peerenboom (ed.), *op. cit.*, at fn. 83, pp. 30-32.

(117) *Ibid.*

(118) National Security Act, 1980, Act No. 65 of 1980, 27th December, 1980.

(119) Frank Anthony Employees' Union v. Union of India, 1987 AIR 311.

(120) V.N. Shukla, *The Constitution Of India*, Lucknow, Eastern Book Company, 2004.

(121) Randall Peerenboom, *op. cit.*, at fn. 83.

(122) Kuldeep Mathur, *op. cit.*, at fn. 33.

(123) Prakash Singh, *The Naxalite Movement in India*, New Delhi: Rupa & Co., 1999, p. 101.

the EU-India FTA negotiations, the incidental requirements of free trade practices are different across the globe, and, Europe lays special emphasis on rule of law requirements making it imperative on India to focus on labour standards and their observance. However, as stated earlier, a positivist connotation in the identification of labour rights and human rights is largely flawed and erroneous in the Indian context. In the absence of means adequately addressing the existing deficit, how can one balance the cultural "contamination" with basic rule of law requirements? The answer to this probably lies in an enhanced role for civil society.

In the context of liberalisation, free trade and Indian democratic practices, it is, perhaps time to reimagine the role of civil society for the creation of an efficient rule of law led system. Of course, this is on the assumption that rule of law indeed is an absolute standard and civil society is free from corrupt practices. This utopian assumption does not preclude the possibility that a strengthened civil society will manage to foster democratic practices and economic development by acting as an index and countervailing force in order to curb corruption and challenge authoritarian practices. (124) Additionally, civil society will serve the dual purpose of a vanguard of positive cultural indentations into a "standardized system". This purported role can be further extended into a trade system that is significantly divorced from the State in key aspects. In the absent of all pervasive State control, civil societies can be used to create and strengthen organisations and associations (125) which may undertake the distribution and provision of goods and services more efficiently than the State. (126) In line with the World Bank recommendations, the State should re-directits focus on establishment of a rule of law society and their executive enactment (in domestic laws and international agreements), allowing greater presence of private entities in the sphere of economic growth and trade. (127) In this manner, resource allocation will be proportionate and the State will be able to better perform its executive and legislative obligations. Subsequently, this vacuum created by the State must be filled with private initiatives, organisations and associations that take charge of basic services and provision of local, customised resources. (128) This, in turn will allow for multi-party participation, greater involvement of all key players and democratic practices and allow for the creation of efficient institutions. Analogous to civil society criticisms of exclusionary, closed door FTA negotiation processes, this suggestion rests on the contention that civil society operates on collaborative action, trust and network and is the

(124) Mahajan GURPREET, *Civil Society and its Avatars: What about Freedom and Democracy*, Vol. 34, Economic and Political Weekly, 2000, p. 1188-1196.

(125) Paul ROSENSTEIN-RODAN, *op. cit.*, at fn. 27, pp. 5-6; Mohapatra BISHNU, *Social Connectedness Civility and Democracy: A View from an Orrisan Village*, 1999, unpublished manuscript.

(126) *Ibid.*

(127) *Ibid.*

(128) Granville AUSTIN, *op. cit.*, at fn. 102.

successful template for a democratic model. (129) Therefore, social capital generated from these relationships can be reinvested as democratic, inclusive currencies for greater participation, strong democracy, good governance and efficient markets. This is, of course, a step towards establishing better rule of law through liberalised strategies.

This premise however is flawed in its assumption that the State has a redundant role in this integrating domain and in assuming that democratisation can take place in its absence. Whilst the development of parallel markets (to procure goods and services at a considerably lower cost than State-sponsored resources as well as to avoid high tax rates) may have weakened the role of the State, it is impossible to envision any situation where the State does not actively participate. Informal economy is not market friendly and this where civil society has to uncomfortably marry the State and consequently adopt its legal requirements. (130) The new good governance agenda has to imagine a situation where the civil society can actively support and promote the creation of community institutions, without limiting the powers of the State and despite being perceived as agencies of the government. (131) These institutions are to reflect a strain of law that combines the law of colonial society to that of diverse cultural, ethnic and religious communities as witnessed in modern day States and explained through a lens of legal pluralism. (132) In recognition of the law creating capacities of civil societies, these institutions will serve to understand rule of law from a multi-stakeholder/actor perspective where the governance will be shared between individuals and States at the local levels, creating a mode of accountability through people's movements. The law governing these institutions should not be measured against the standards of national legal systems. Instead, they should be treated as differential and developed laws that can, through the intricate understanding of regional practices, hasten the socio-economic processes in the local context and give birth to "structural coupling" (133) between the Constitutional ideals and rule of law enforcement. The idea behind this principle is efficient distribution of efforts and resources, ensuring basic rights and transmutation from local to global in keeping with India's growing international presence. Since India is looking to not only occupy a powerful position in the global market, but to also strengthen its democracy, eradicate inequality and raise average living standards, the observance of rule of law will play a critical role for India to realise these goals in tandem with the trade liberalization process. In order to achieve this, it may be nec-

(129) Dani RODRIK, Arvind SUBRAMANIAM, *op. cit.*, at fn. 34.

(130) Rudolph Susan HOEBER, "Civil Society and the Realm of Freedom", 35 *Economic and Political Weekly* 1762, 2000.

(131) Mahajan GURPREET, *op. cit.*, at fn. 128.

(132) Brian Z. TAMANAHA, "Understanding Legal Pluralism: Past to Present, Local to Global", 30 *Sydney Law Review* 375, 2008, p. 375.

(133) *Ibid.*

essary to better integrate international standards and domestic practices as a step towards the creation of a more diverse, "global" legal system. In an ever changing global context; this, perhaps, is the best way to ensure that liberalisation does not eradicate its rule of law components within any of the diverse legal systems.

DOSSIER SPÉCIAL

coordonné par

Olivier CORTEN

LES OBLIGATIONS INTERNATIONALES DE L'UNION EUROPÉENNE ET DE SES ÉTATS MEMBRES CONCERNANT LES RELATIONS ÉCONOMIQUES AVEC LES COLONIES ISRAÉLIENNES