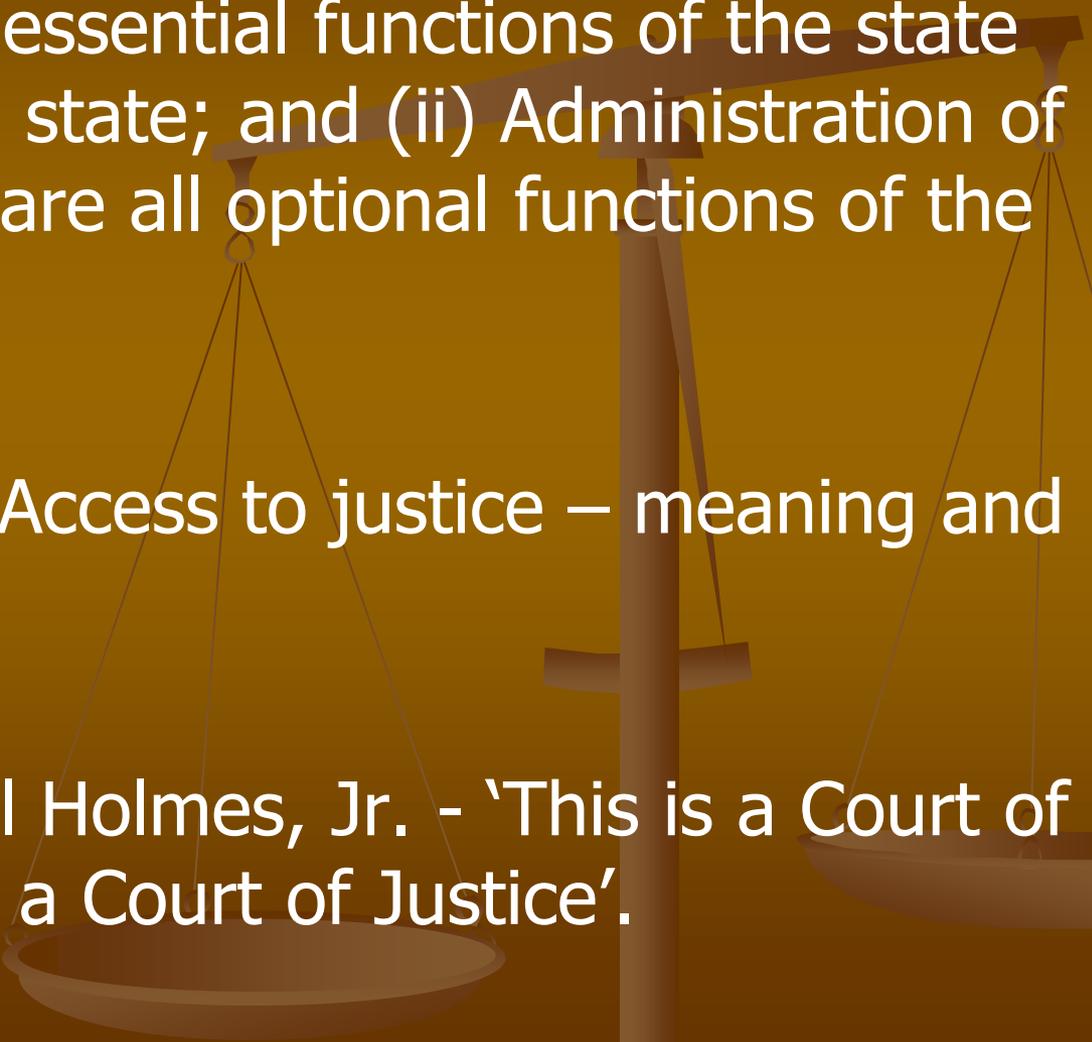


Access to Justice and Rule of Law

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8th November, 2018

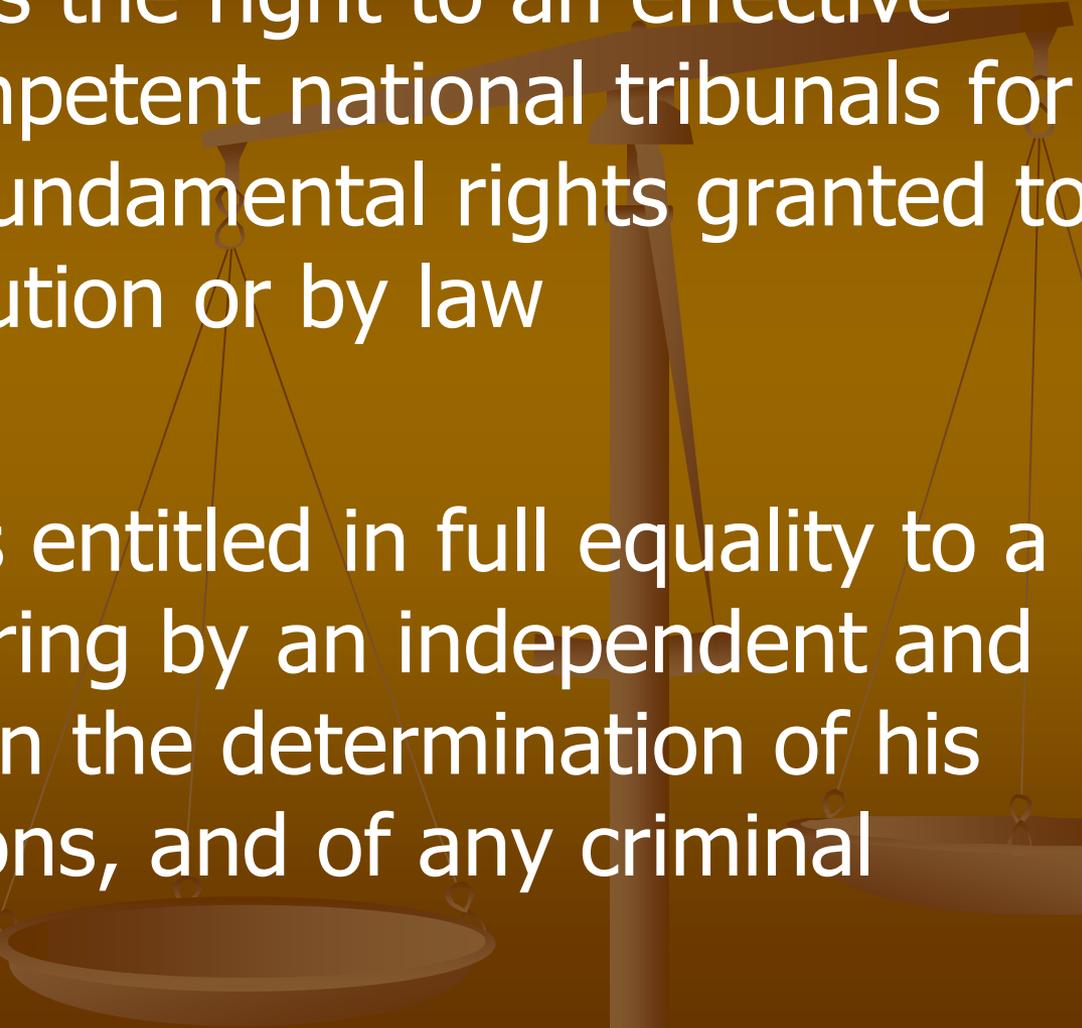


Access to justice



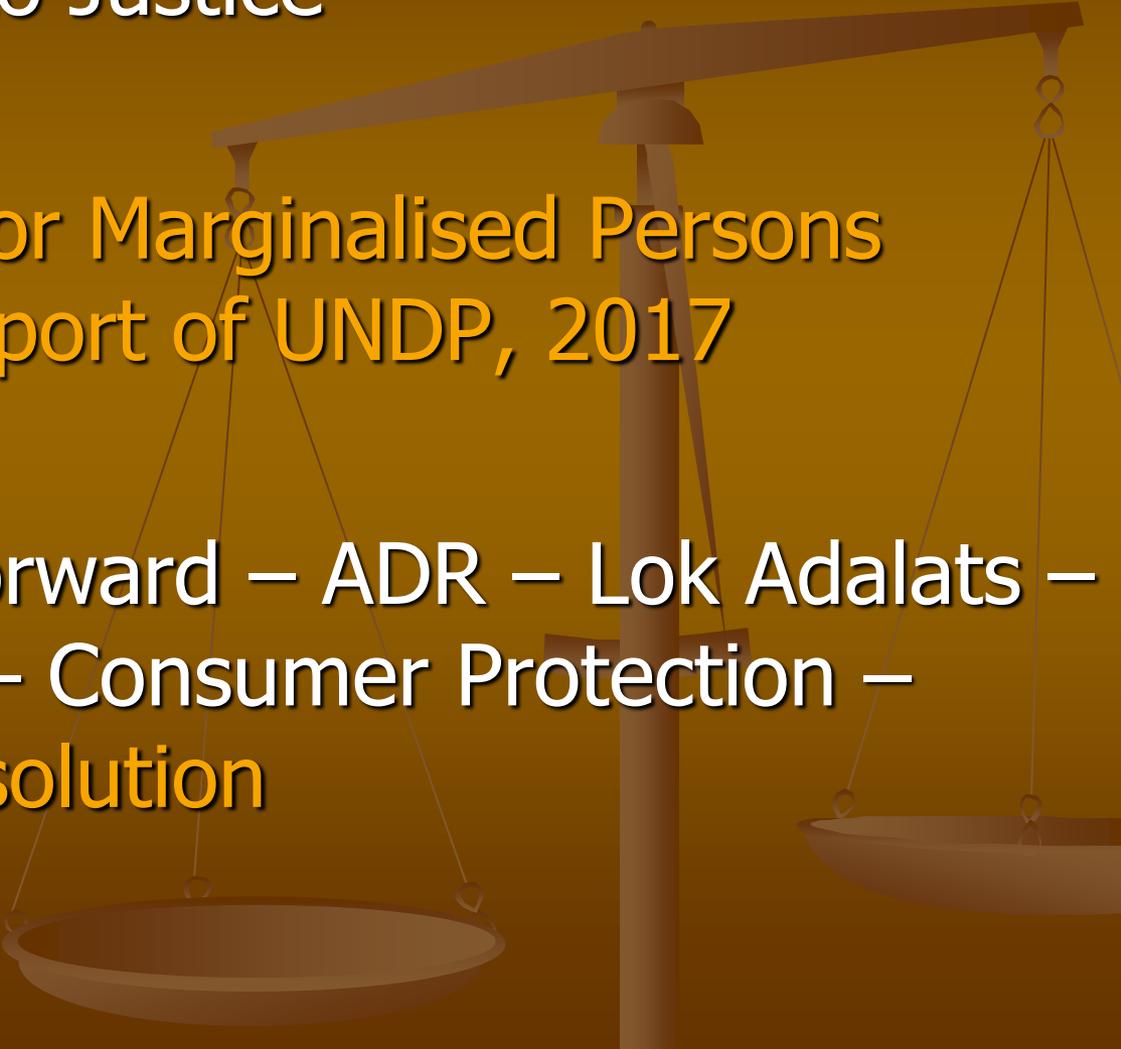
- John Locke – Social contract theory – Constitution as social contract – The essential functions of the state are (i) Security of the state; and (ii) Administration of justice. Rest of them are all optional functions of the state
- Access to courts and Access to justice – meaning and implications
- Justice Oliver Wendell Holmes, Jr. - 'This is a Court of Law, young man, not a Court of Justice'.

Universal Declaration of Human Rights, 1948

- Art.8: Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted to him by the Constitution or by law
 - Art.10: Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations, and of any criminal charge against him
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Anita Kushwaha v. Pushap Sudan, [Transfer petition 1343 of 2008
decided in 2016]

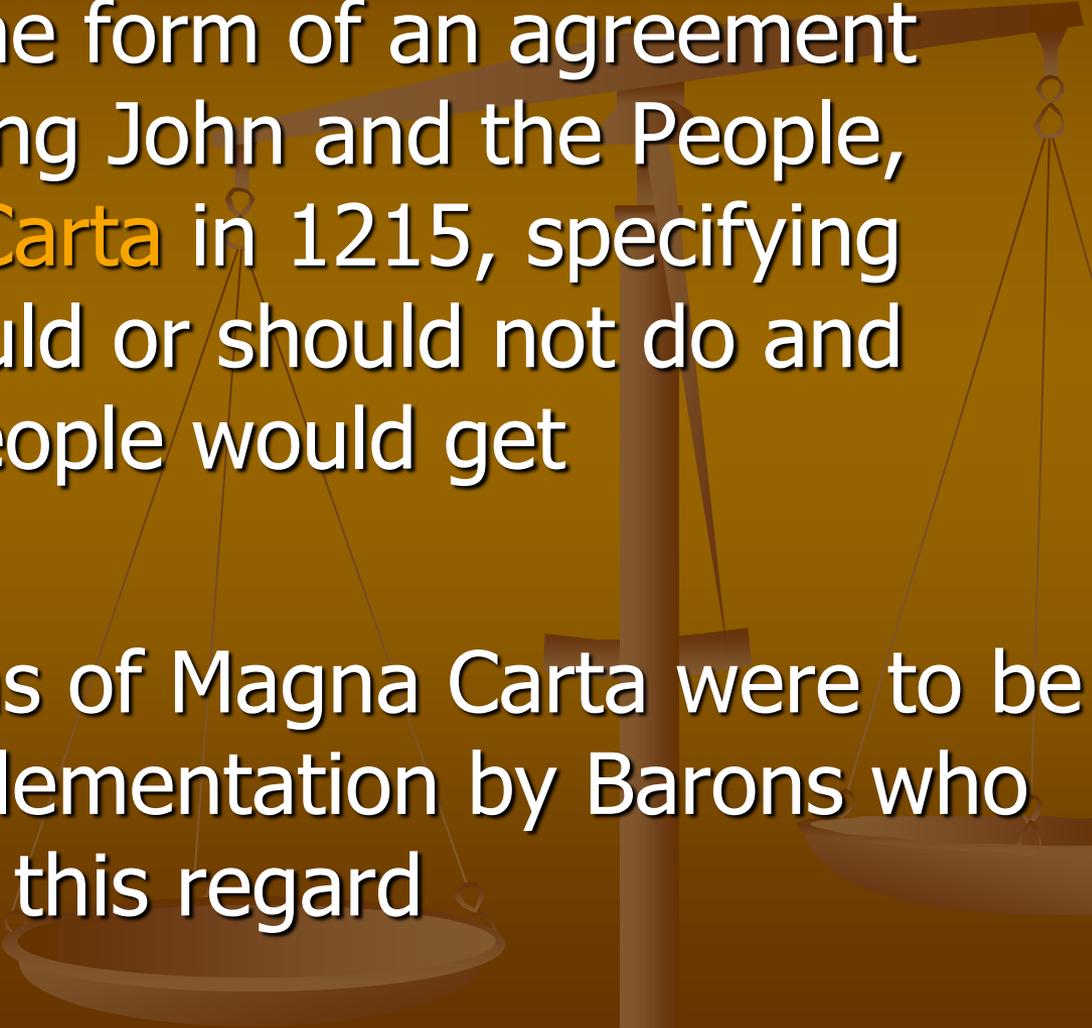
- Supreme Court laid emphasis on following four main facets that constitute the essence of Access to Justice:
 - i) The State must provide an effective adjudicatory mechanism;
 - ii) The mechanism so provided must be reasonably accessible in terms of distance;
 - iii) The process of adjudication must be speedy; and
 - iv) The litigant's access to the adjudicatory process must be affordable.
 - The Constitution Bench of the Supreme Court comprising of Chief Justice of India T.S. Thakur, Justices Fakkir Mohamed Ibrahim Kalifulla, A.K. Sikri, S.A. Bobde, and R. Banumathi, held that access to Justice is a Fundamental Right guaranteed to citizens by Articles 14 and 21 of the Constitution of India.
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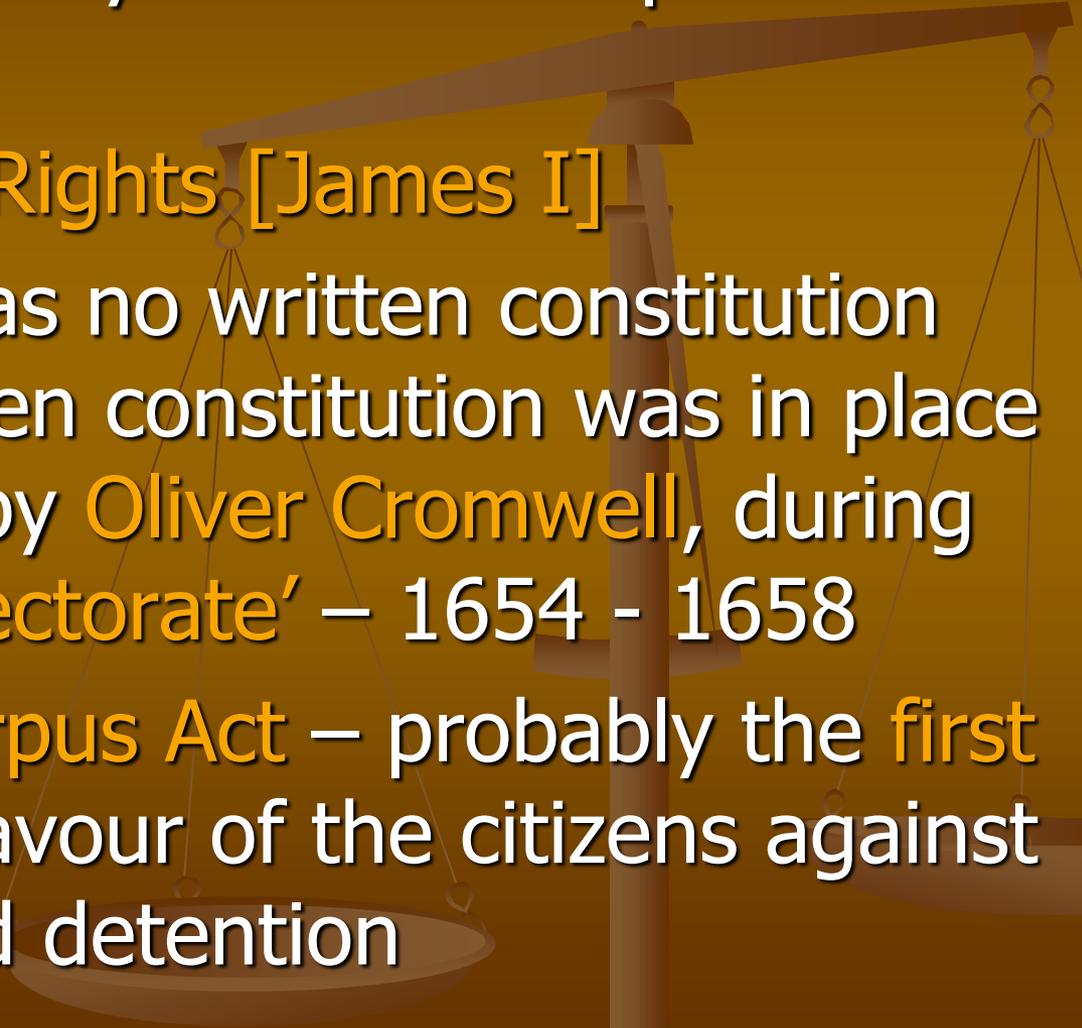
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- Daksh - Access to Justice Survey – 2016 – first survey on Access to Justice
 - Access to Justice for Marginalised Persons [A2J Project] - Report of UNDP, 2017
 - What is the way forward – ADR – Lok Adalats – Gram Nyayalayas – Consumer Protection – Online Dispute Resolution

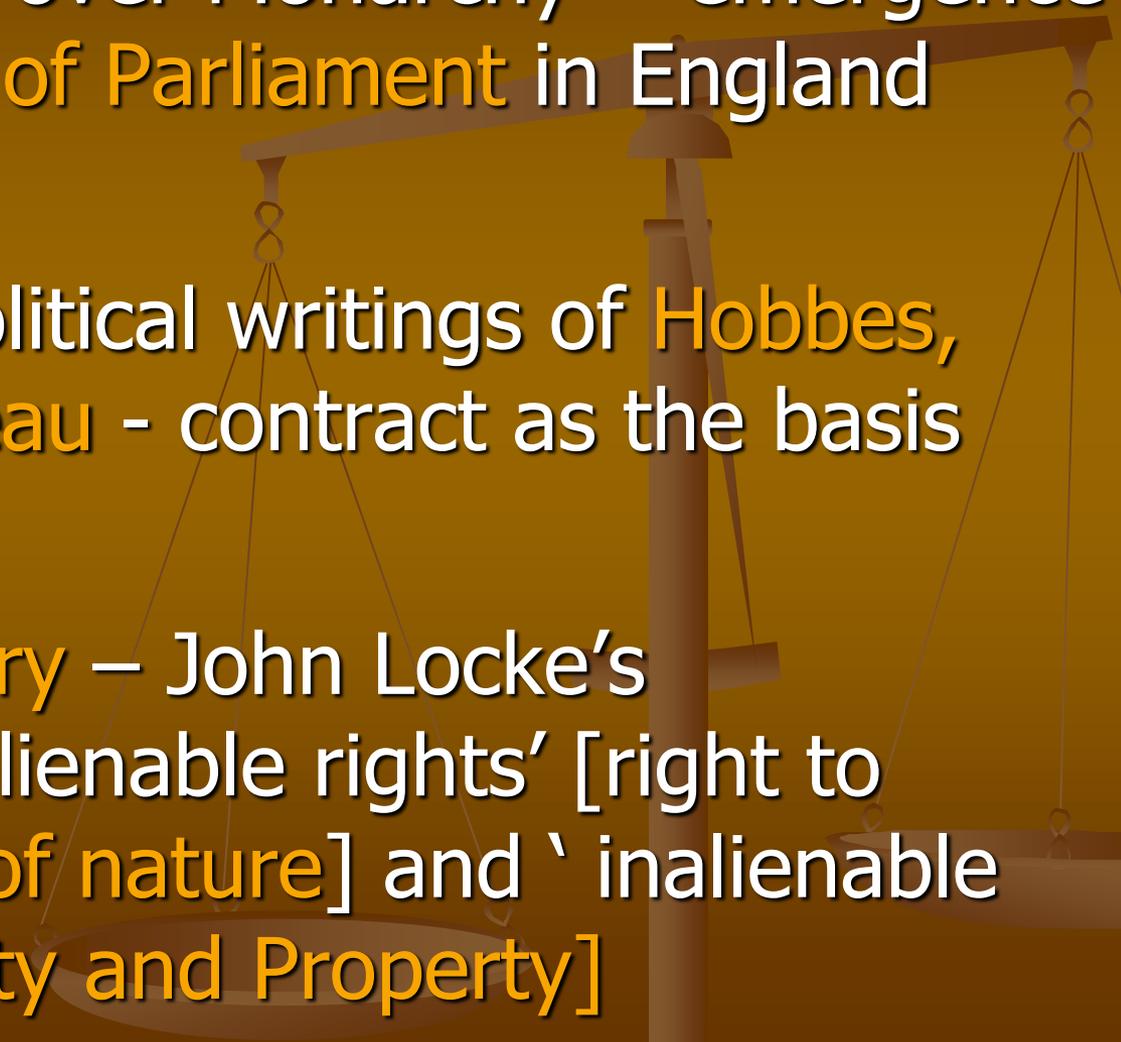
Rule of Law - Introduction

- Rule of Law between ancient times and modern times – A steady development from 'duty based society' to 'right based society' - T. H. Green's observation [Lectures on Political Obligation]
- Main distinction between right and duty based societies is their reliance on values as well as the internalization of those values by both the governors and governed or the king and his subjects on one side [Raja dharma] & reliance on laws and legal institutions on the other

Evolution

- The foundations for the principles of Rule of Law were laid in the form of an agreement signed between King John and the People, called the **Magna Carta** in 1215, specifying what the king should or should not do and what protection people would get
 - However, the terms of Magna Carta were to be supervised for implementation by Barons who ultimately failed in this regard
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- The developments during the period [1600 – 1688] and subsequent developments contributed immensely to the concept of Rule of Law
 - 1628 – Petition of Rights [James I]
 - Though England has no written constitution now, the first written constitution was in place and implemented by Oliver Cromwell, during the period of 'Protectorate' – 1654 - 1658
 - 1679 – Habeas Corpus Act – probably the first statutory right in favour of the citizens against arbitrary arrest and detention

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- 1688 – **Glorious Revolution** [popularly called as the **Bloodless Revolution**] marked the victory of oppressed people over Monarchy - emergence of the **High Court of Parliament** in England
 - Contribution of political writings of **Hobbes, Locke and Rousseau** - contract as the basis
 - **Natural right theory** – John Locke's classification as 'alienable rights' [right to **interpret the law of nature**] and 'inalienable rights' [**Life, Liberty and Property**]

- 
- Bill of Rights 1688, Act of Settlement, 1701, Representation of Peoples Act, and its amendments, the Crown Proceedings Act, 1947 and many more laid a solid basis for the evolution of the principles of Rule of Law
 - 1789 – First Written Constitution of the modern world – the U. S Constitution – 1692 Bill of Rights [first ten amendments] enhanced the strength of the principles of Rule of Law
 - All these developments clearly established the supremacy of law in a civilized society

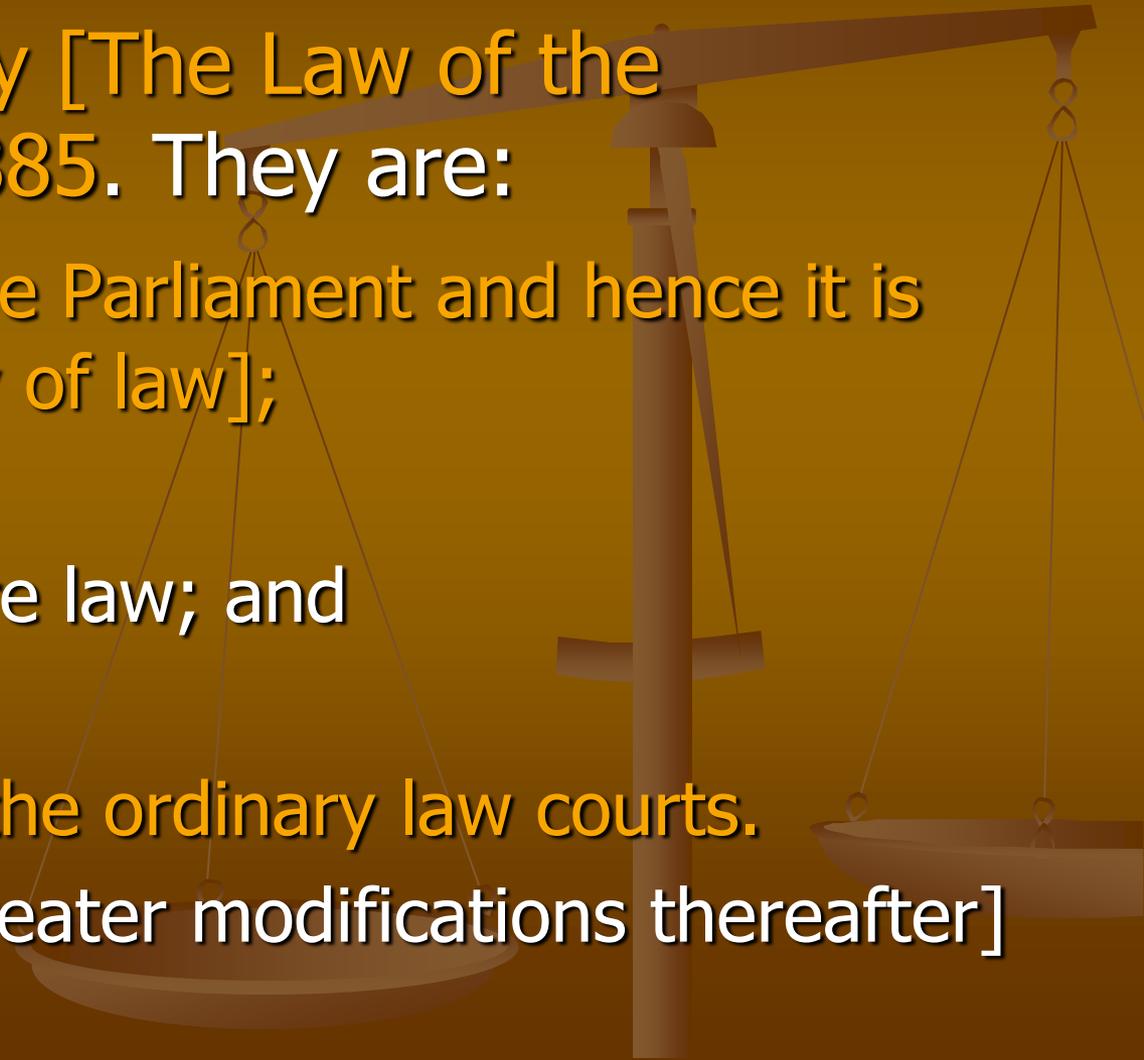
■ The broad principles that were established through these developments were crystallised in to the principles of 'Rule of Law' for the first time by A. V. Dicey [The Law of the Constitution] in 1885. They are:

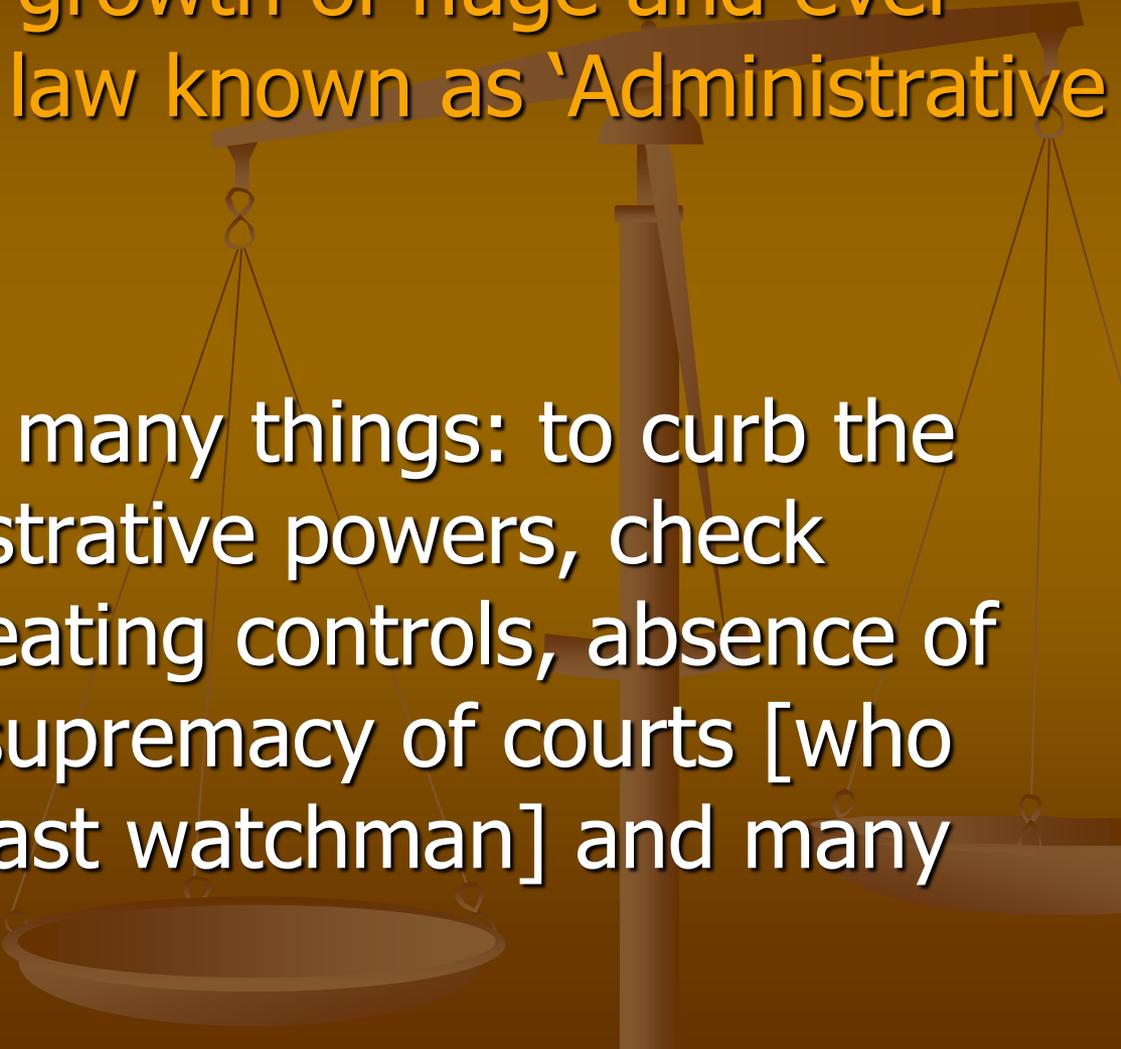
1. Law is made by the Parliament and hence it is supreme [supremacy of law];

2. All are equal before law; and

3. All are subject to the ordinary law courts.

[It has undergone greater modifications thereafter]



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- The significance of the concept of Rule of Law can be seen in the growth of huge and ever growing branch of law known as 'Administrative Law'
 - Rule of law means many things: to curb the increase in administrative powers, check arbitrariness by creating controls, absence of arbitrary powers, supremacy of courts [who should watch the last watchman] and many other dimensions

20th Century Developments in UK

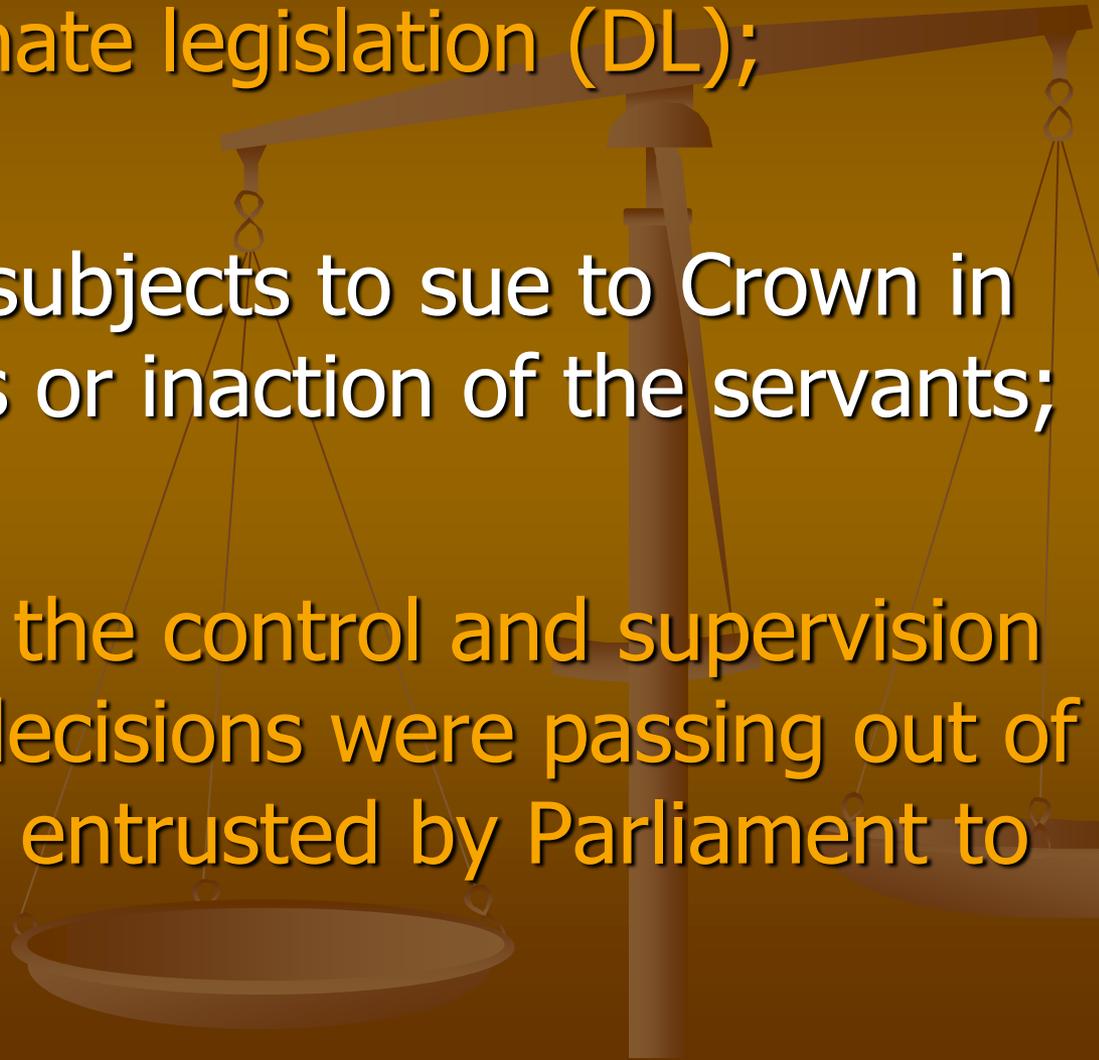
- 1929- Lord Hewart's book on **The New Despotism** made scathing attack on the expansion of administrative powers both in the field of legislation and adjudication – resulting in misuse of power – **bureaucracy had become the real rulers of UK**
- **Committee on Ministers' Powers (Donoughmore Committee)** was constituted in 1929 to consider powers of delegated legislation and quasi-judicial powers and suggest safeguards

■ Report in 1932 – three main defects in A.L:

1. Inadequate provision for publication and control of subordinate legislation (DL);

2. Inability of the subjects to sue to Crown in tort for the actions or inaction of the servants;

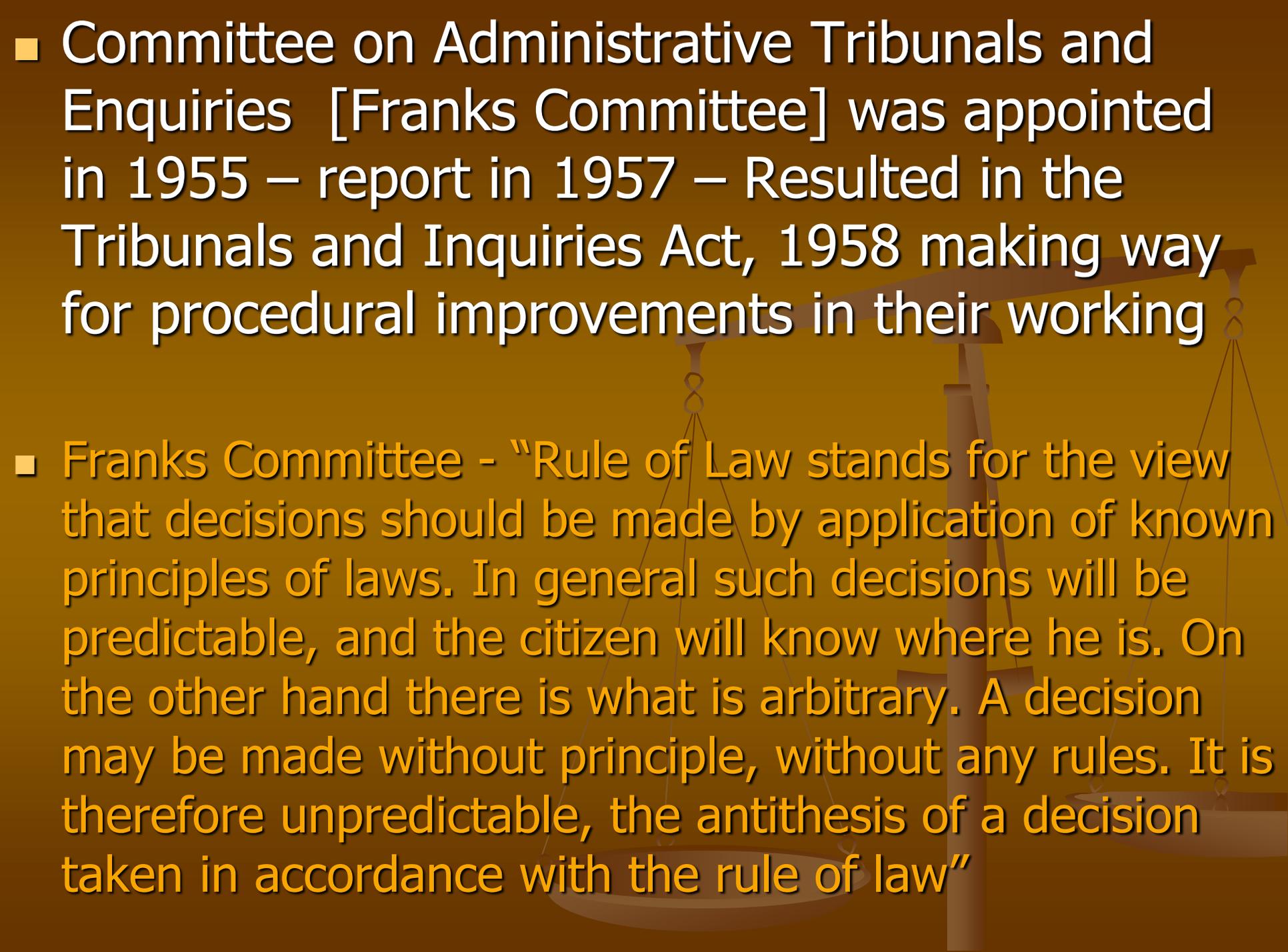
3. extent to which the control and supervision of administrative decisions were passing out of regular courts and entrusted by Parliament to specialist tribunals

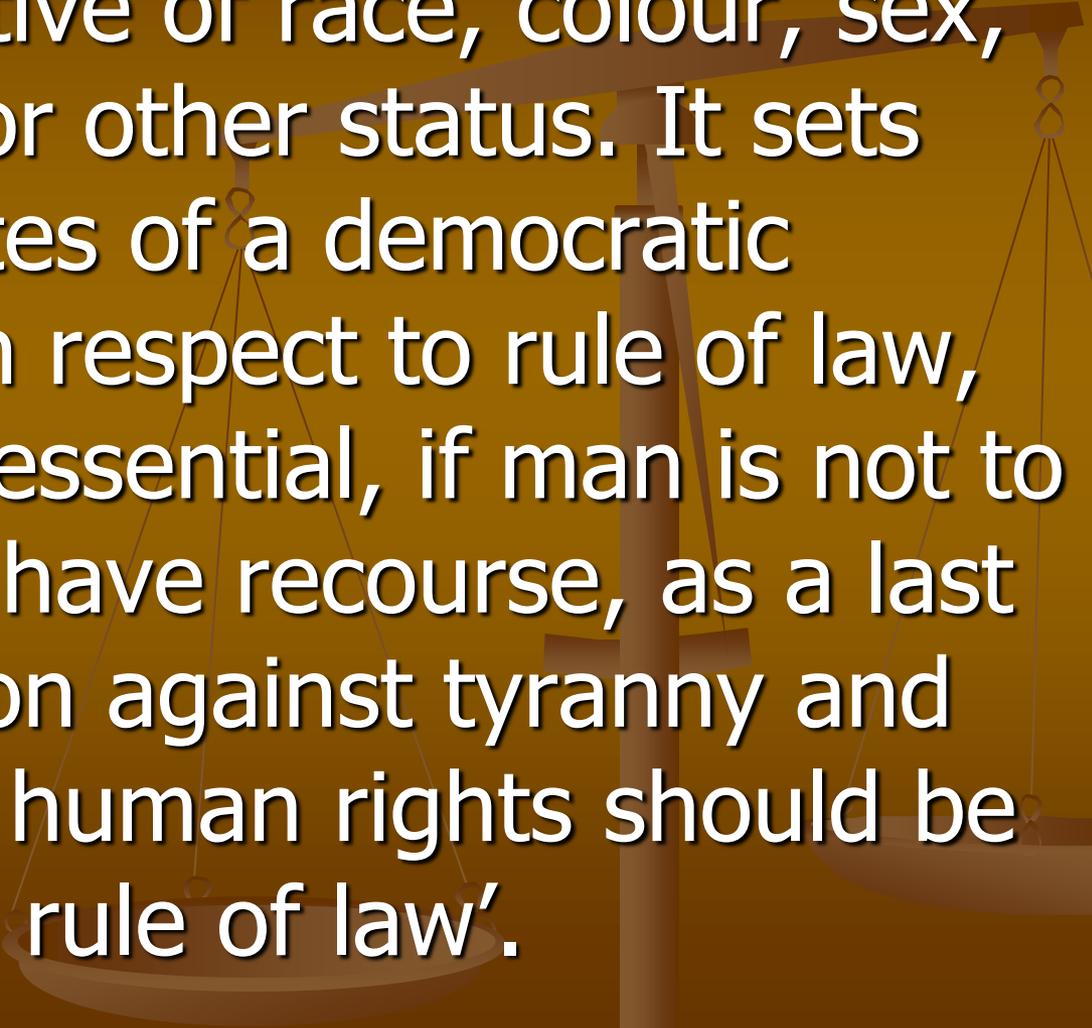


■ Impact:

1. **Statutory Instruments Act** was enacted in **1946** to streamline subordinate legislation – rules for making subordinate legislation and for **publication – laying procedures**

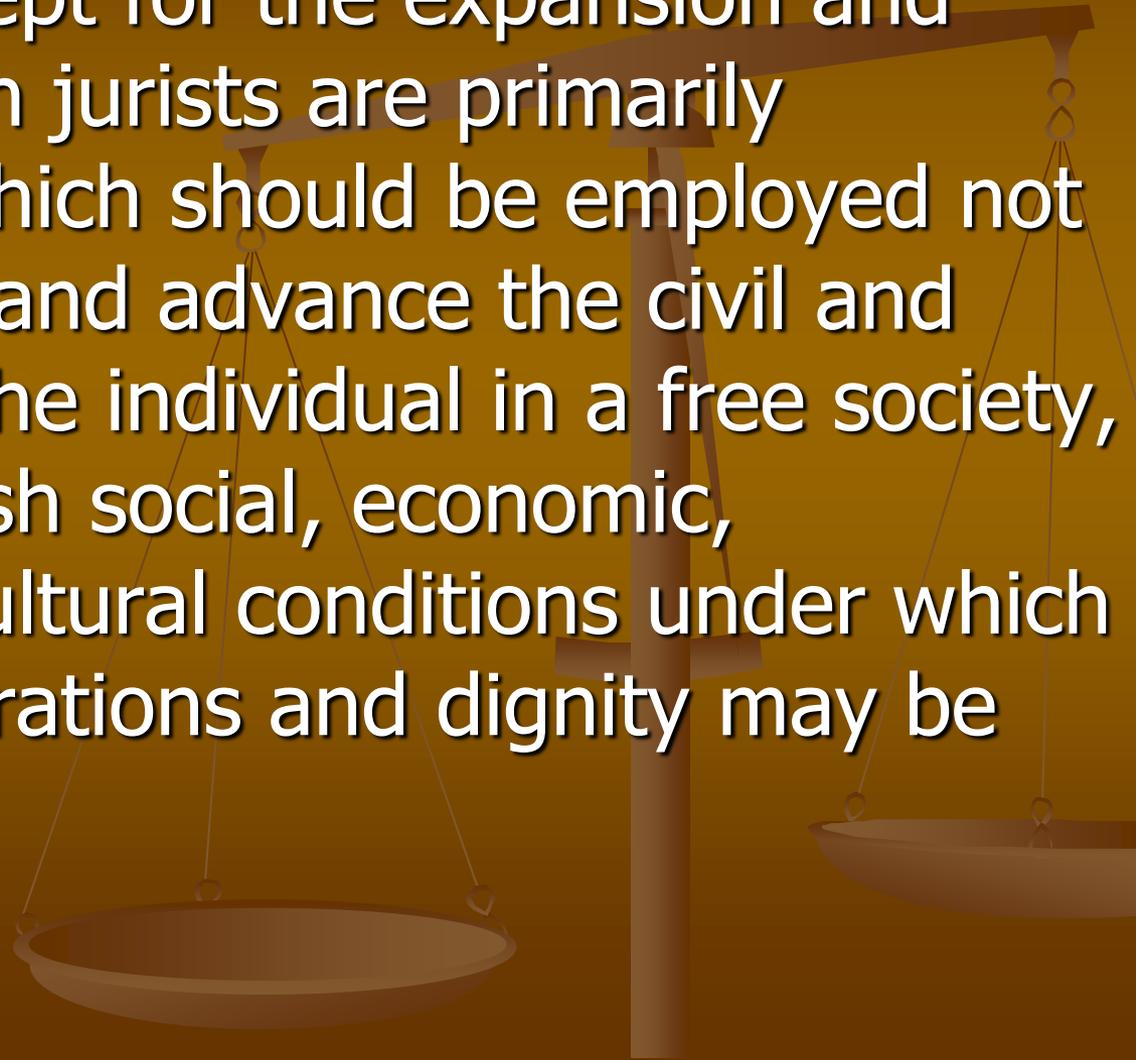
2. **Crown Proceedings Act** was enacted in 1947 to liberalize the law relating to civil proceedings against the Crown – [king can do no wrong] – In India – Entry 8 of List III of the Schedule VII provides for 'actionable wrong' – nothing is done so far either by centre or any state

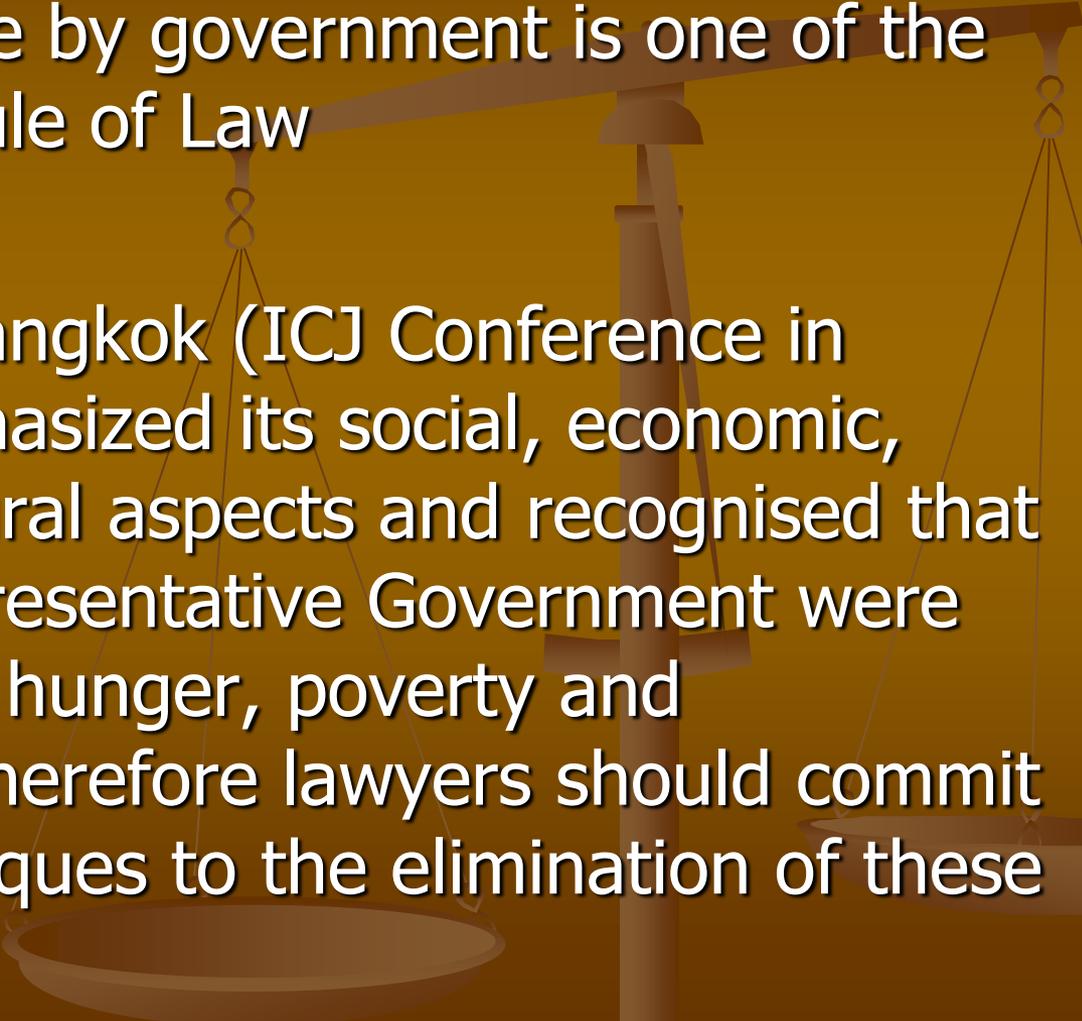
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- Committee on Administrative Tribunals and Enquiries [Franks Committee] was appointed in 1955 – report in 1957 – Resulted in the Tribunals and Inquiries Act, 1958 making way for procedural improvements in their working
 - Franks Committee - “Rule of Law stands for the view that decisions should be made by application of known principles of laws. In general such decisions will be predictable, and the citizen will know where he is. On the other hand there is what is arbitrary. A decision may be made without principle, without any rules. It is therefore unpredictable, the antithesis of a decision taken in accordance with the rule of law”

- The UDHR, 1948, sets out the common standards that should apply to human society, irrespective of race, colour, sex, language, birth or other status. It sets forth the attributes of a democratic system and, with respect to rule of law, states that 'It is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law'.
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- The International Commission of Jurists recognised from the outset that Rule of Law embraced a broader conception of justice than the mere application of legal rules whatever they might happen to be in any particular state at any given time. It has also been the aim to emphasise the lawyer's social responsibility to contribute to the promotion and understanding of the Rule of Law.
 - The ICJ's first International Congress, held in Athens in 1955, there emerged the new dynamic concept of Rule of Law.

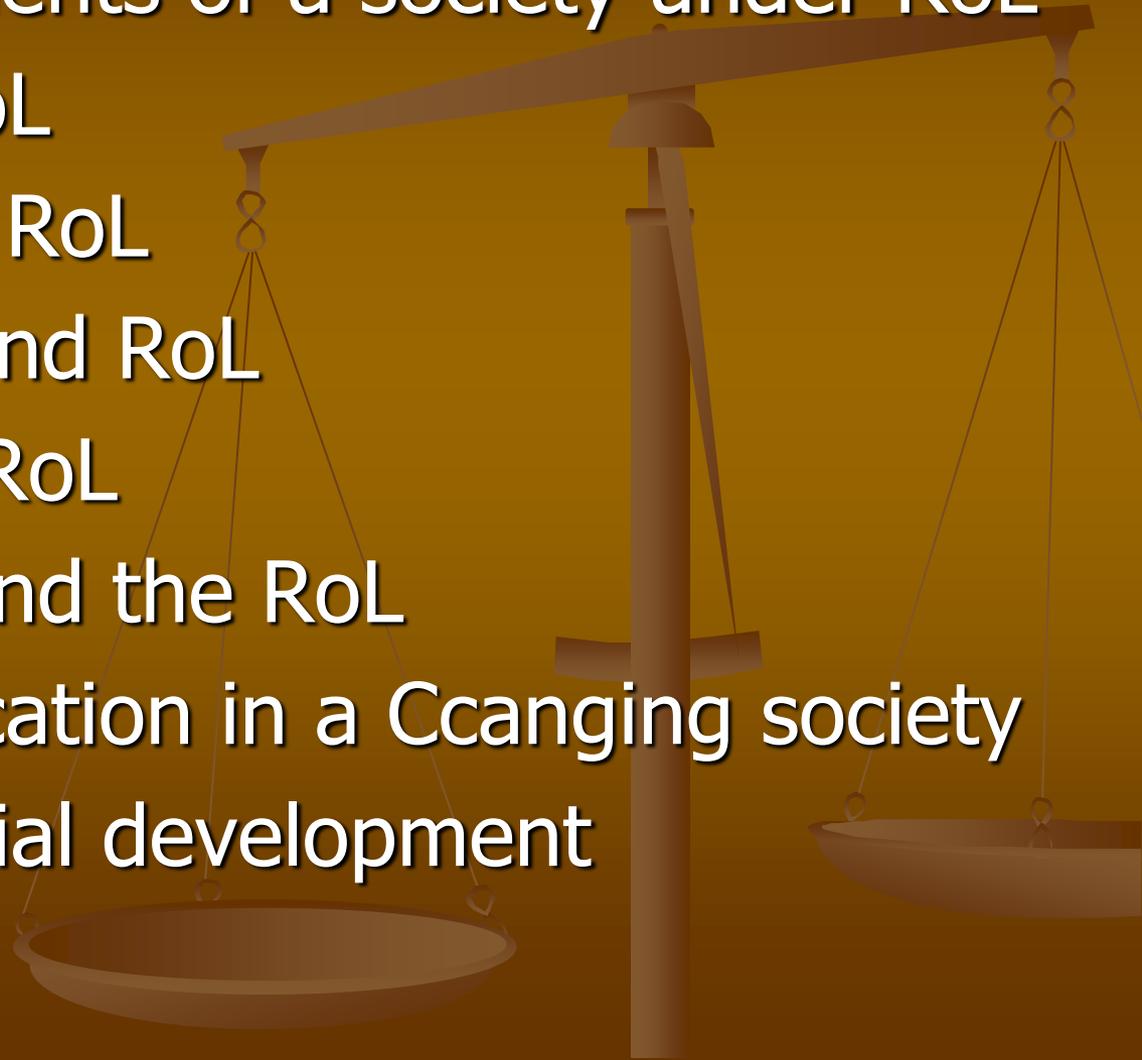
- The Declaration of Delhi in January 1959 at the ICJ's Congress 'recognised that the Rule of Law is a dynamic concept for the expansion and fulfillment of which jurists are primarily responsible and which should be employed not only to safeguard and advance the civil and political rights of the individual in a free society, but also to establish social, economic, educational and cultural conditions under which his legitimate aspirations and dignity may be realised'



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- At the International Congress of Jurists held in Rio de Janeiro, in December 1962, it was emphasized that 'the protection of the individual from unlawful or excessive interference by government is one of the foundations of the Rule of Law
 - The Declaration of Bangkok (ICJ Conference in February 1965) emphasized its social, economic, educational and cultural aspects and recognised that Rule of Law and Representative Government were often endangered by hunger, poverty and unemployment and therefore lawyers should commit their skills and techniques to the elimination of these evils.

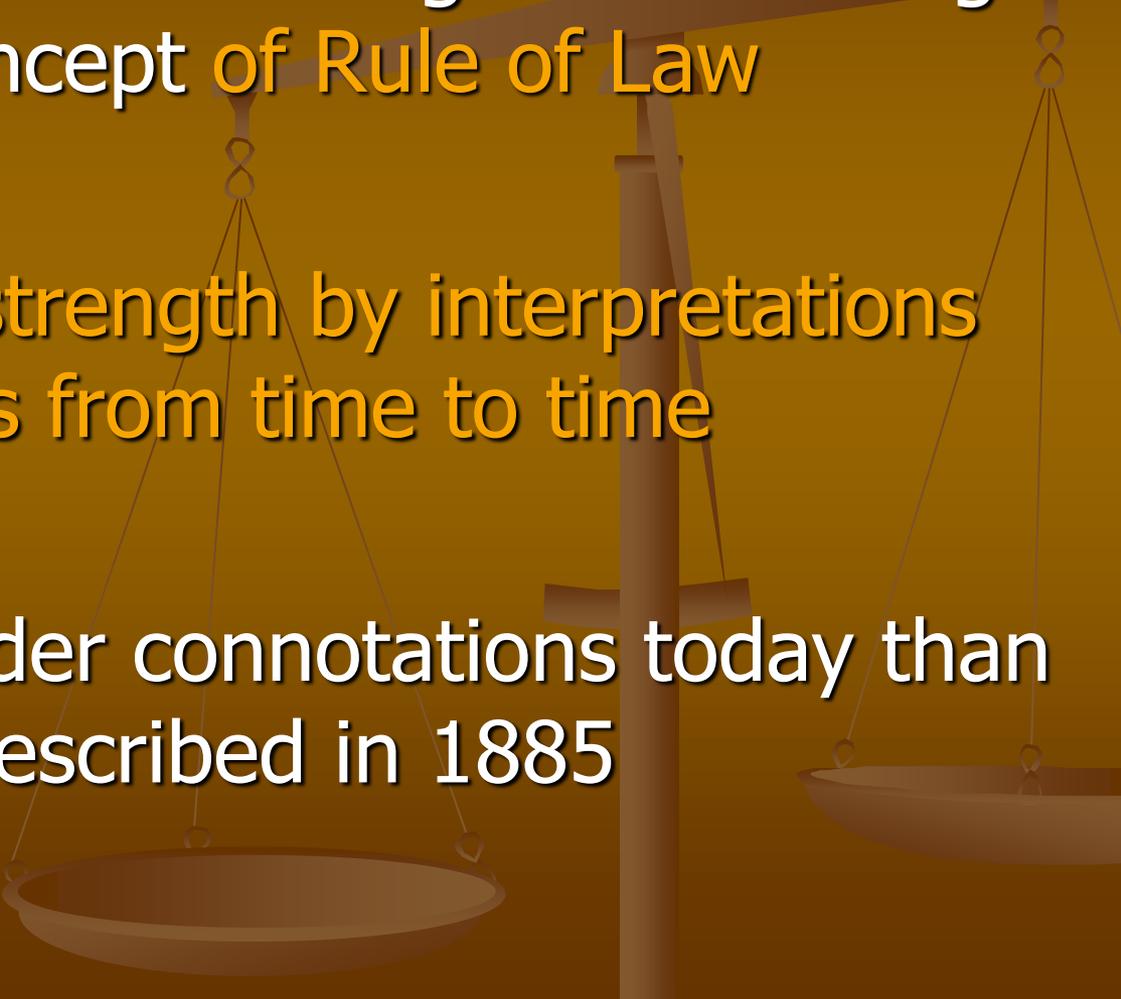
All these developments led to the following principles of Rule of Law under these Chapters:

- Essential requirements of a society under RoL
- Legislature and RoL
- Executive and the RoL
- Criminal process and RoL
- Judiciary and the RoL
- Legal profession and the RoL
- Role of Legal Education in a Changing society
- Economic and Social development



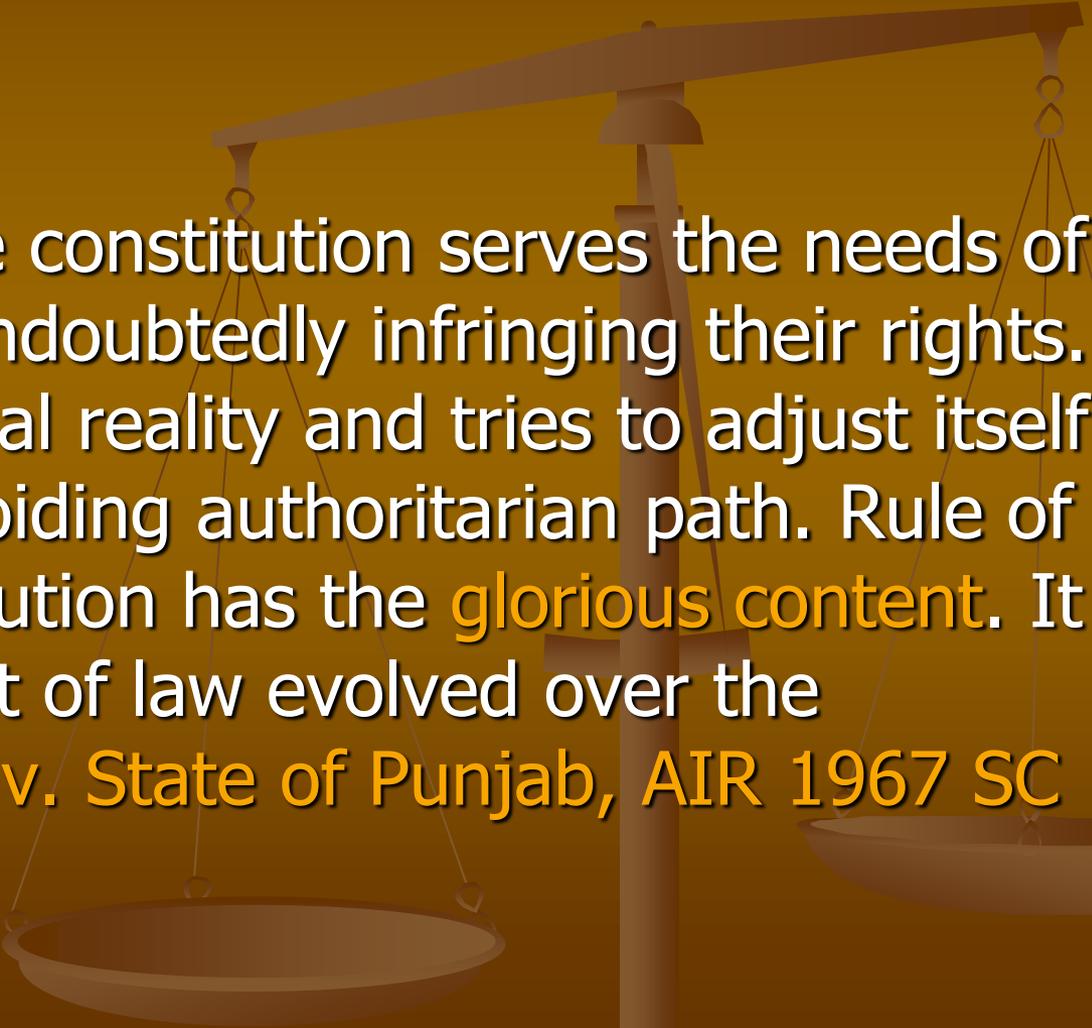
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- The International Commission of Jurists, having consultative status with the UN, published a report in 1961 (**Whyatt Report**) recommending the creating of Ombudsman type institutions in UK based on the Scandinavian experience
 - Created the same in the name of **Parliamentary Commissioner** by an Act of Parliament – **India's Lokpal and Lokayuktas Act, 2013**
 - Public accountability, transparency, disclosure and similar concepts gave more powers in the hands of the individuals [RTI Act, 2005]

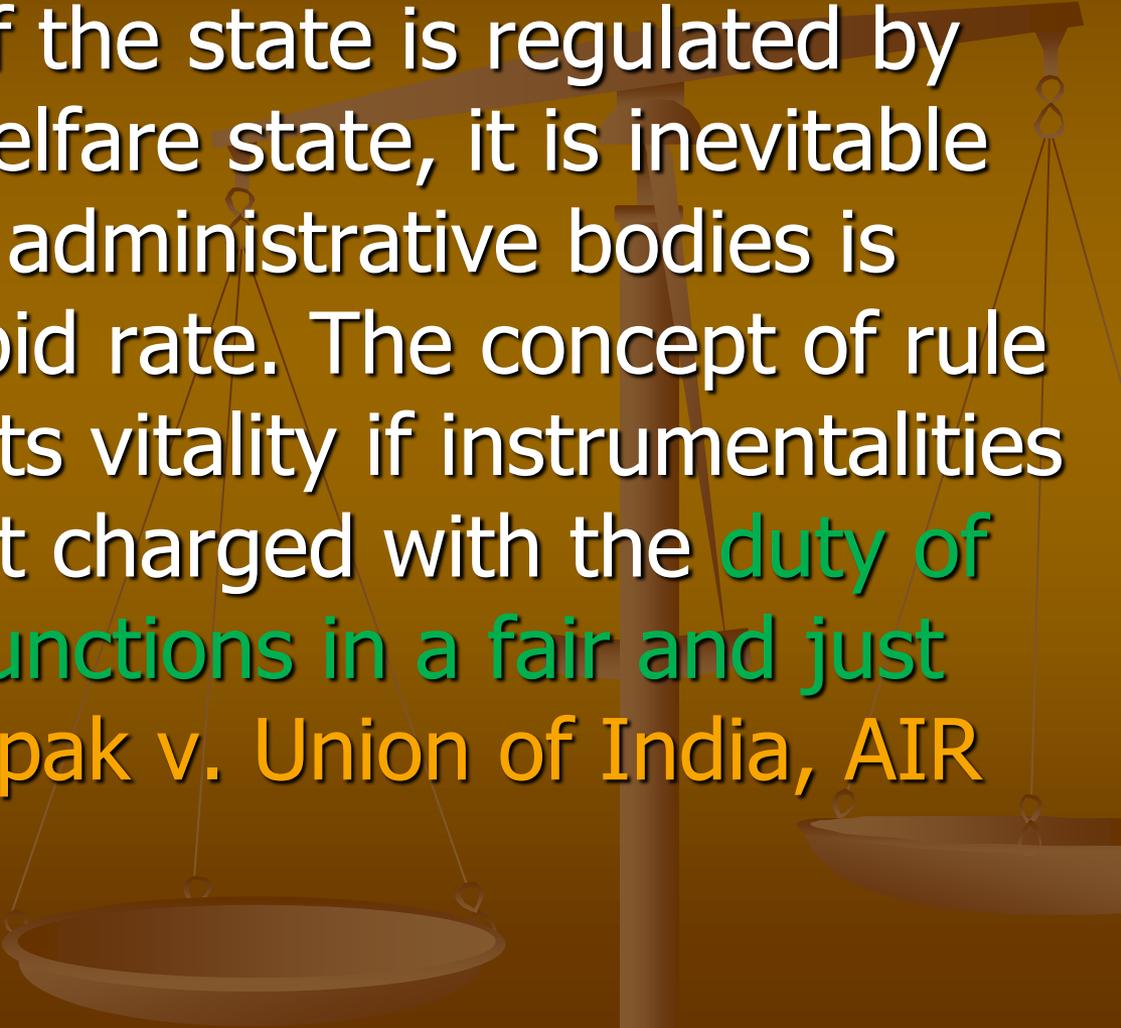
Concept of Rule of Law

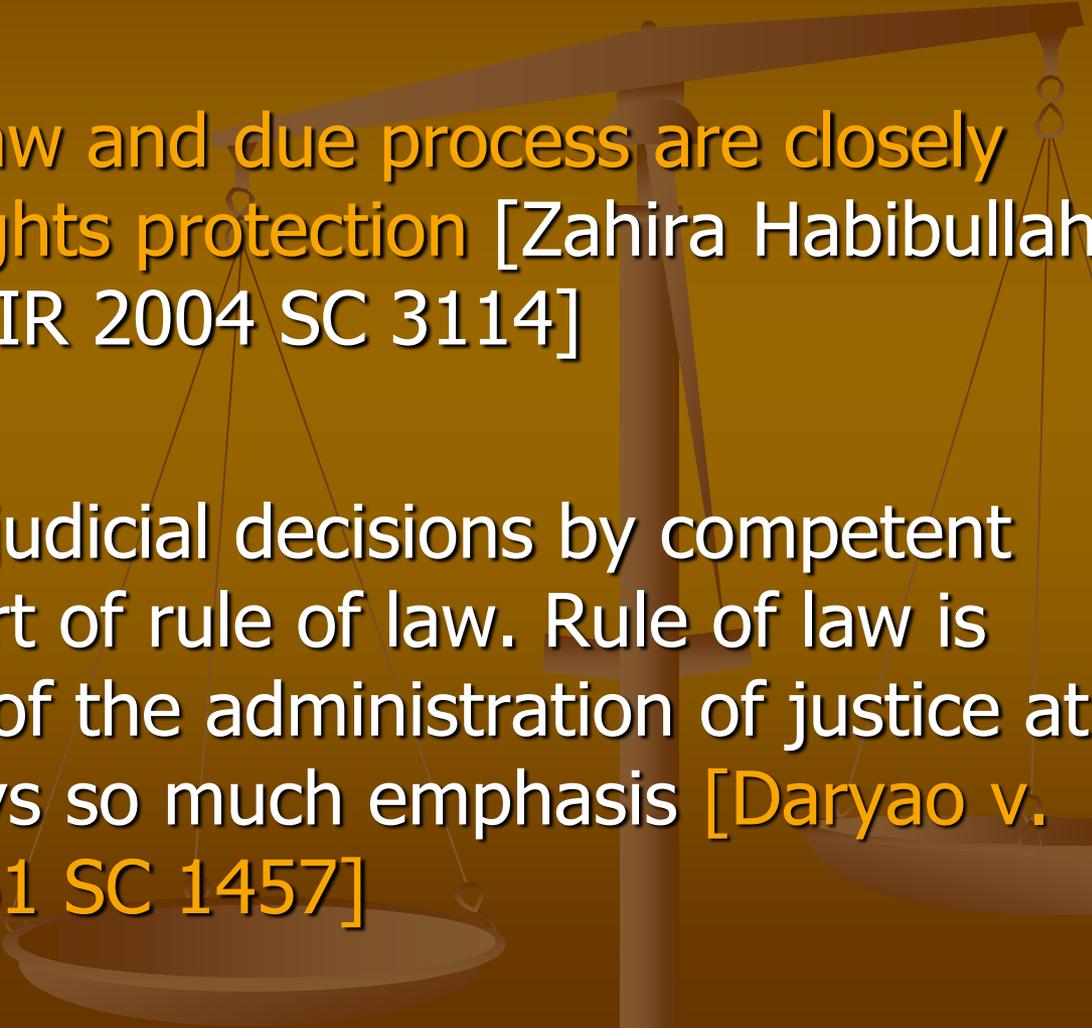
- The experiences gained through various stages have led to the concept of Rule of Law
 - Rule of law gains strength by interpretations given by the courts from time to time
 - Rule of law has wider connotations today than what A. V. Dicey described in 1885
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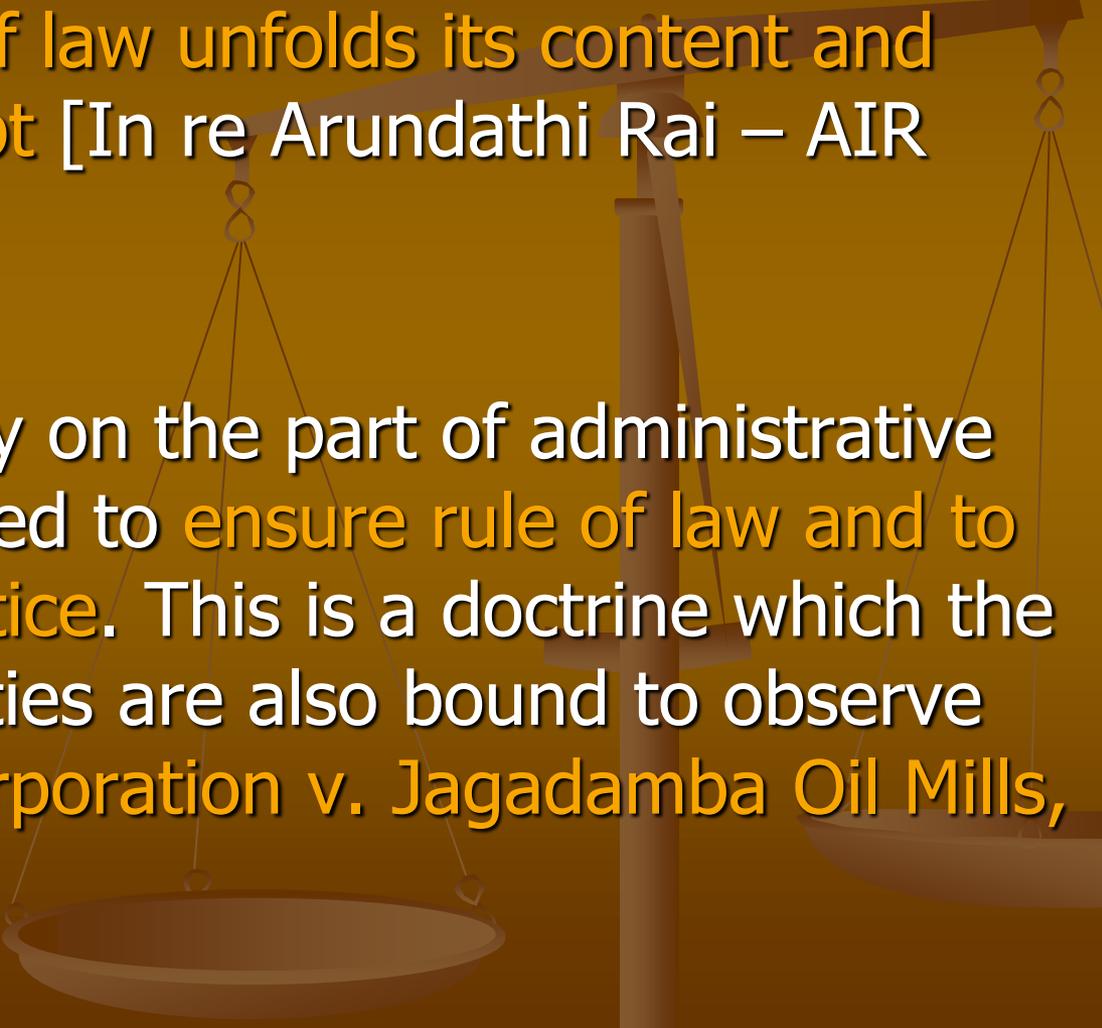
Rule of Law in India

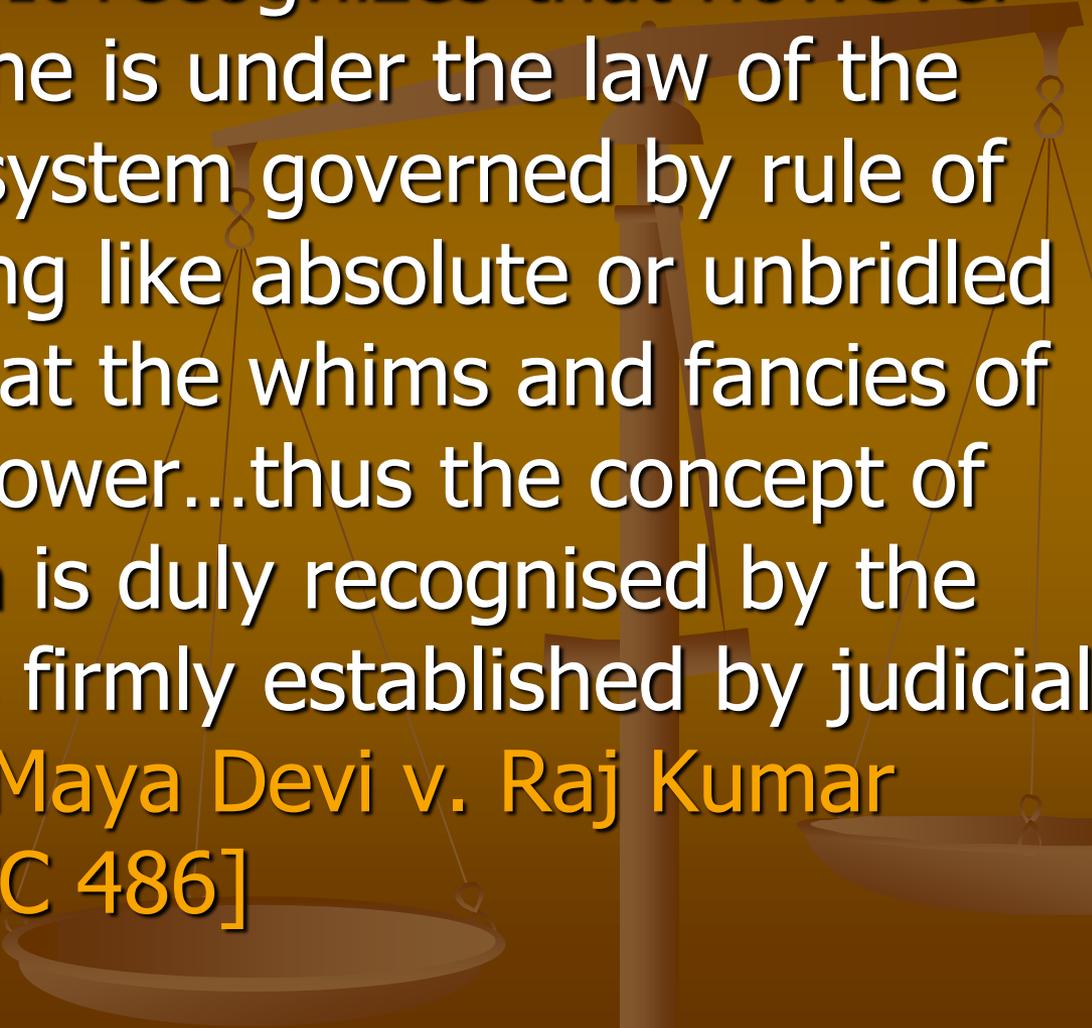
- The Constitution of India, though no specific reference has been made to 'rule of law' has a number of provisions that protect the rights and liberties of individuals, limit the powers of the authorities and empower the legislatures to make appropriate laws through which the objectives of the Constitution can be translated into action to benefit every one – **Articles 14, 19, 20, 21, 22, 32, 226, 323A, 323B** etc seek to promote the principles of rule of law in one form or the other

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- Rule of law is the antithesis of arbitrariness ... Rule of law is now accepted norm of all civilized societies [Justice Khanna – ADM Jabalpur v. S. Shukla, AIR 1976 SC 1207]
 - Rule of law under the constitution serves the needs of the people without undoubtedly infringing their rights. It recognises the social reality and tries to adjust itself from time to time avoiding authoritarian path. Rule of law under the constitution has the **glorious content**. It embodies the concept of law evolved over the centuries [Golaknath v. State of Punjab, AIR 1967 SC 1643]

- Under the Indian Constitution, rule of law pervade over the entire field of administration and every organ of the state is regulated by rule of law. In a welfare state, it is inevitable that jurisdiction of administrative bodies is increasing by a rapid rate. The concept of rule of law would lose its vitality if instrumentalities of the state are not charged with the **duty of discharging their functions in a fair and just manner** [A. K. Kraipak v. Union of India, AIR 1970 SC 150]
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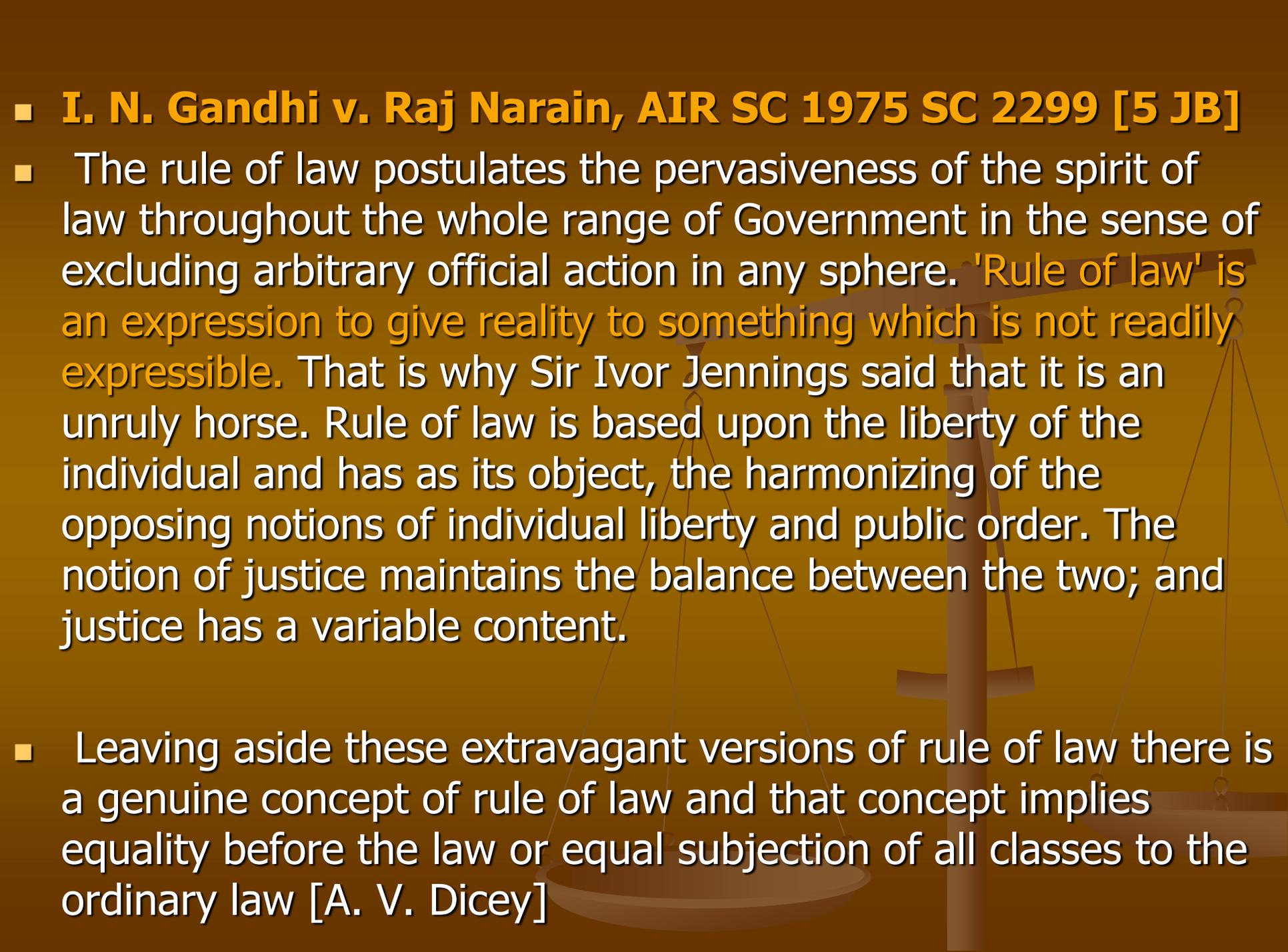
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- Rule of law requires that any abuse of power by public authority should be subject to control by courts [**State of Punjab v. Khanchand, AIR 1974 SC 543**]
 - Principles of rule of law and due process are closely linked with human rights protection [**Zahira Habibullah v. State of Gujarat, AIR 2004 SC 3114**]
 - Binding character of judicial decisions by competent courts is essential part of rule of law. Rule of law is obviously such basis of the administration of justice at which constitution lays so much emphasis [**Daryao v. State of U.P, AIR 1961 SC 1457**]

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- Rule of law is basic rule of governance of any civilized polity. The scheme of the Constitution of India is based on this concept of rule of law...it is only through the courts that rule of law unfolds its content and establishes its concept [In re Arundathi Rai – AIR 2002 SC 1375]
 - Obligation to act fairly on the part of administrative authorities was evolved to ensure rule of law and to prevent failure of justice. This is a doctrine which the quasi-judicial authorities are also bound to observe [Haryana Finance Corporation v. Jagadamba Oil Mills, AIR 2002 SC 834]

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- Our constitution envisages a rule of law and not a rule of men. It recognizes that however high one may be, he is under the law of the constitution...in a system governed by rule of law, there is nothing like absolute or unbridled power exercisable at the whims and fancies of the repository of power...thus the concept of rule of law in India is duly recognised by the Constitution and is firmly established by judicial pronouncements [Maya Devi v. Raj Kumar Batra, (2010) 9 SCC 486]

Supreme Court's observation on Rule of Law

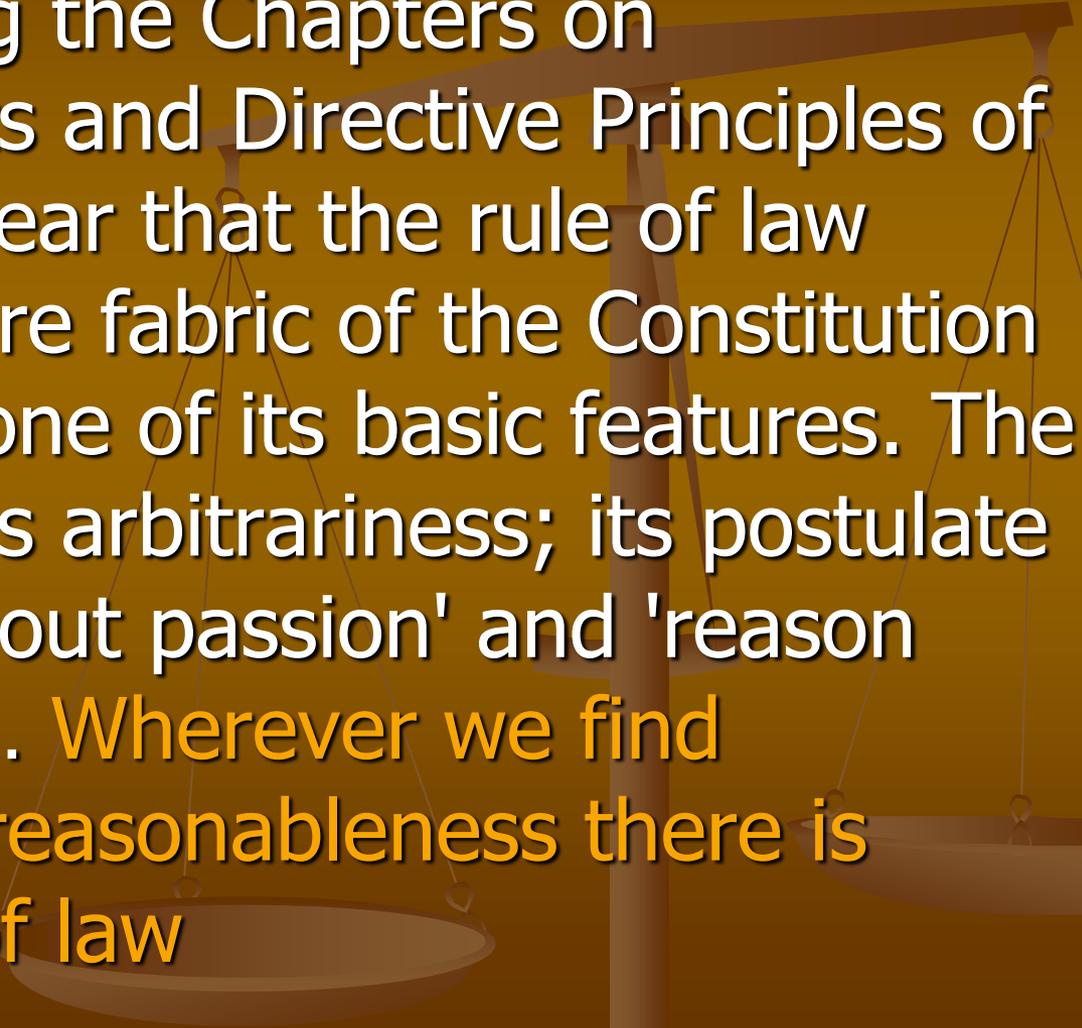
- **Epuru Sudhakar v. Government of Andhra Pradesh, AIR 2006 SC 3385 (1)** - Justice S. H. Kapadia observed that “the supreme quality of the Rule of Law is **fairness and legal certainty**. The principle of legality occupies a central place in the Rule of Law. Every prerogative has to be subject to the Rule of Law. ... Rule of Law principles comprise a requirement of **'Government according to law'**”. The ethos of 'government according to law' requires the prerogatives to be exercised in a manner which is consistent with the basic principle of fairness and certainty... **In each case, the Rule of Law should be the overarching constitutional justification for judicial review.**

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- **I. N. Gandhi v. Raj Narain, AIR SC 1975 SC 2299 [5 JB]**
 - The rule of law postulates the pervasiveness of the spirit of law throughout the whole range of Government in the sense of excluding arbitrary official action in any sphere. 'Rule of law' is an expression to give reality to something which is not readily expressible. That is why Sir Ivor Jennings said that it is an unruly horse. Rule of law is based upon the liberty of the individual and has as its object, the harmonizing of the opposing notions of individual liberty and public order. The notion of justice maintains the balance between the two; and justice has a variable content.
 - Leaving aside these extravagant versions of rule of law there is a genuine concept of rule of law and that concept implies equality before the law or equal subjection of all classes to the ordinary law [A. V. Dicey]

- **S. P. Gupta v. Union of India, AIR 1982 SC 149 (7 JB)**
We would regard the first proposition as correctly setting out the nature and purpose of the judicial function, as it is essential to the **maintenance of the rule of law** that every organ of the State must act within the limits of its power and carry out the duty imposed upon it by the Constitution or the law. ... If there is one principle which runs through the entire fabric of the Constitution, it is the principle of the **rule of law** and under the Constitution, it is the judiciary which is entrusted with the task of keeping every organ of the State within the limits of the law and thereby making the rule of law meaningful and effective. It is to aid the judiciary in this task that the power of judicial review has been conferred upon the judiciary and it is by exercising this power which constitutes one of the most potent weapons in armory of the law, that the judiciary seeks to protect the citizen against violation of his constitutional, or legal rights or misuse of abuse of power by the State or its officers.

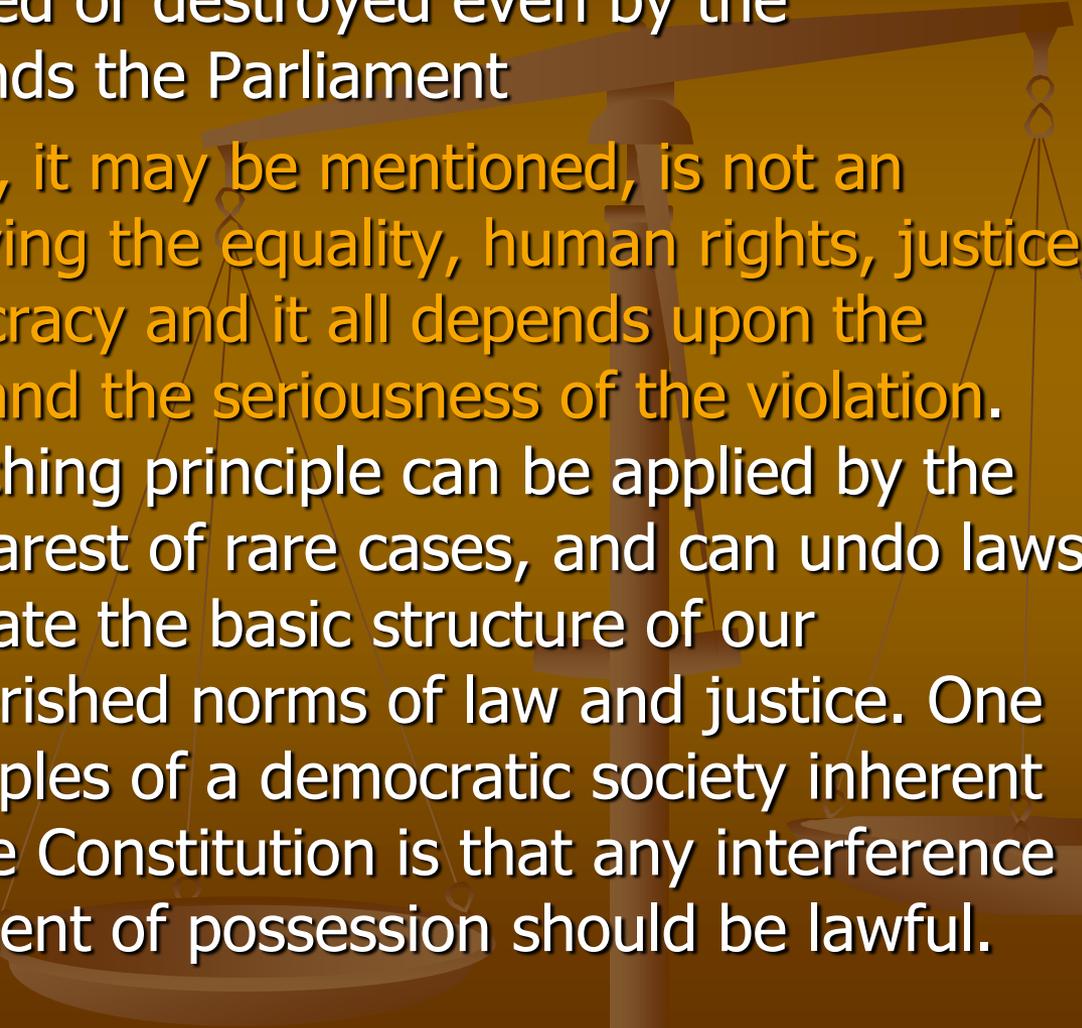
■ Bachan Singh v. State of Punjab, AIR 1982 SC 1325

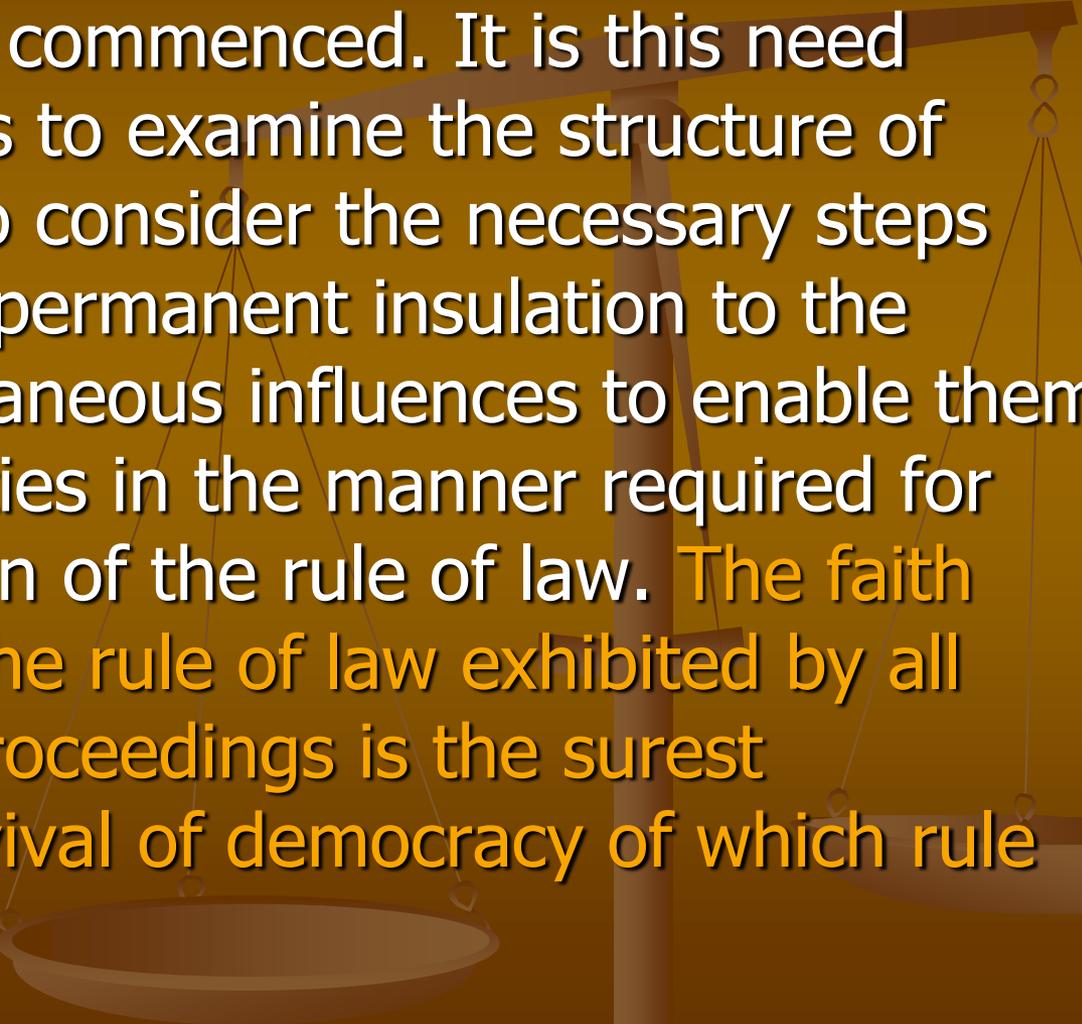
■ Now if we look at the various constitutional provisions including the Chapters on Fundamental Rights and Directive Principles of State Policy, it is clear that the rule of law permeates the entire fabric of the Constitution and indeed forms one of its basic features. The rule of law excludes arbitrariness; its postulate is 'intelligence without passion' and 'reason freed from desire'... **Wherever we find arbitrariness or unreasonableness there is denial of the rule of law**



■ DTC v. DTC Mazdoor Union, AIR 1991 SC 101 (5JB)

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

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- **K. T. Plantation Pvt. Ltd. v. State of Karnataka, AIR 2011 SC3430 (5JB)**
 - Rule of law as a concept finds no place in our Constitution, but has been characterized as a basic feature of our Constitution which cannot be abrogated or destroyed even by the Parliament and in fact binds the Parliament
 - Rule of law as a principle, it may be mentioned, is not an absolute means of achieving the equality, human rights, justice, freedom and even democracy and it all depends upon the nature of the legislation and the seriousness of the violation. Rule of law as an overarching principle can be applied by the constitutional courts, in rarest of rare cases, and can undo laws which are tyrannical, violate the basic structure of our Constitution, and our cherished norms of law and justice. One of the fundamental principles of a democratic society inherent in all the provisions of the Constitution is that any interference with the peaceful enjoyment of possession should be lawful.

- **Vineet Narain v. Union of India, AIR 1998 SC 889 [3 JB]** - This experience revealed to us the need for the insulation of these agencies from any extraneous influence to ensure the continuance of the good work they have commenced. It is this need which has impelled us to examine the structure of these agencies and to consider the necessary steps which would provide permanent insulation to the agencies against extraneous influences to enable them to discharge their duties in the manner required for proper implementation of the rule of law. **The faith and commitment to the rule of law exhibited by all concerned in these proceedings is the surest guarantee of the survival of democracy of which rule of law is the bedrock.**
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- **Dr. D.C. Wadhwa and Ors.v. State of Bihar and Ors. (1987 (1) S.C.R. 798)** Chief Justice Bhagwati, "The rule of law constitutes the core of our Constitution of India and it is the essence of the rule of law that the exercise of the power by the State whether it be the Legislature or the Executive or any other authority should be within the constitutional limitations and if any practice is adopted by the Executive which is in flagrant and systematic violation of its constitutional limitations, petitioner No. 1 as a member of the public would have sufficient interest to challenge such practice by filing a writ petition and it would be the constitutional duty of this Court to entertain the writ petition and adjudicate upon the validity of such practice."

■ **National Human Rights Commission v. State of Arunachal Pradesh, AIR 1996 SC 1234 [DB]**

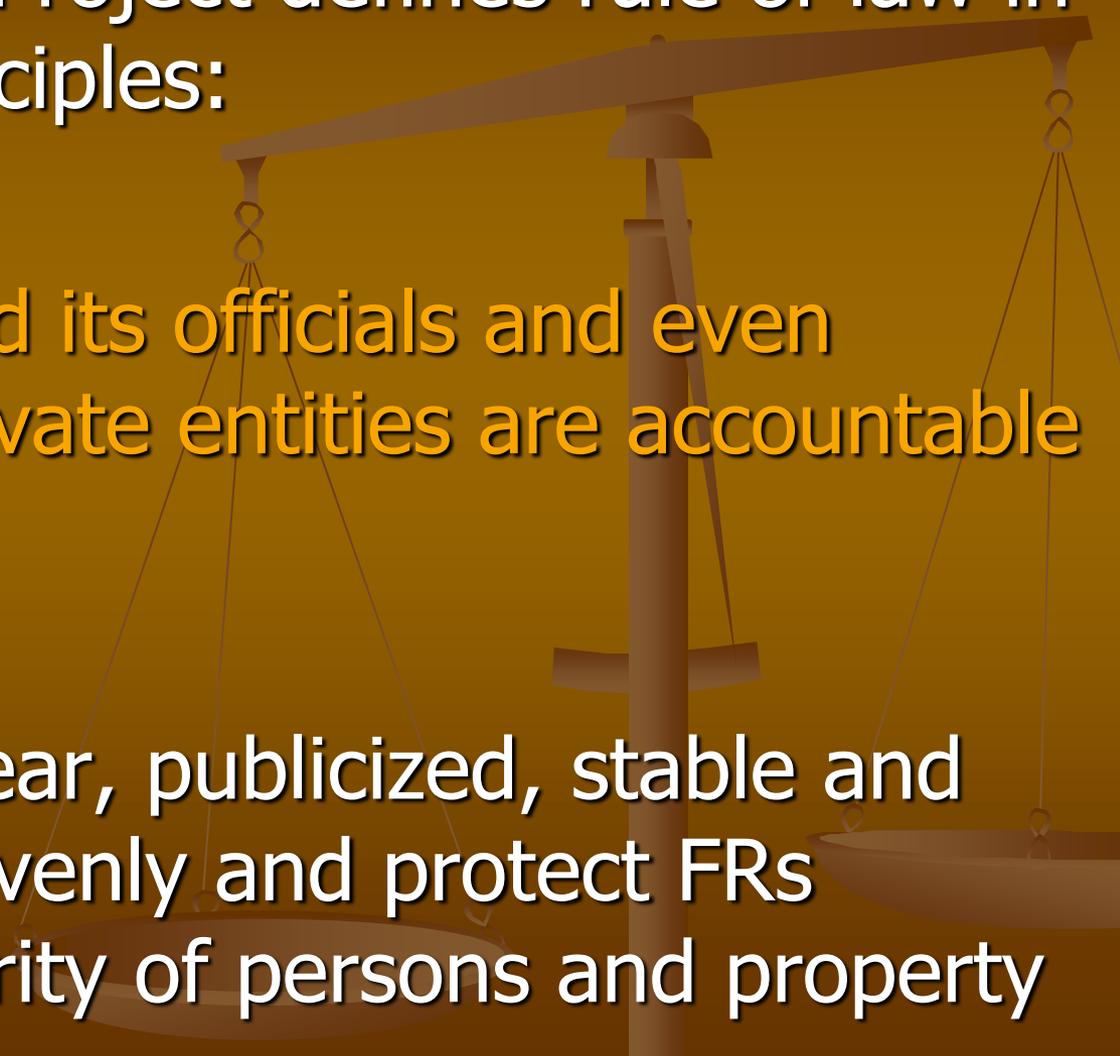
We are a country governed by the Rule of Law. Our Constitution confers certain rights on every human-being and certain other rights on citizens. Every person is entitled to equality before the law and equal protection of the laws. So also, no person can be deprived of his life or personal liberty except according to procedure established by law. Thus the State is bound to protect the life and liberty of every human-being, be he a citizen or otherwise, and it cannot permit anybody or group of persons, e. g., the AAPSU, to threaten the Chakmas to leave the State, failing which they would be forced to do so. No State Government worth the name can tolerate such threats by one group of persons to another group of persons; it is duty bound to protect the threatened group from such assaults and if it fails to do so, it will fail to perform its Constitutional as well as statutory obligations.

Evolution into an International Principle

- The world Justice Project defines rule of law in four universal principles:

1. Government and its officials and even individuals and private entities are accountable under law;

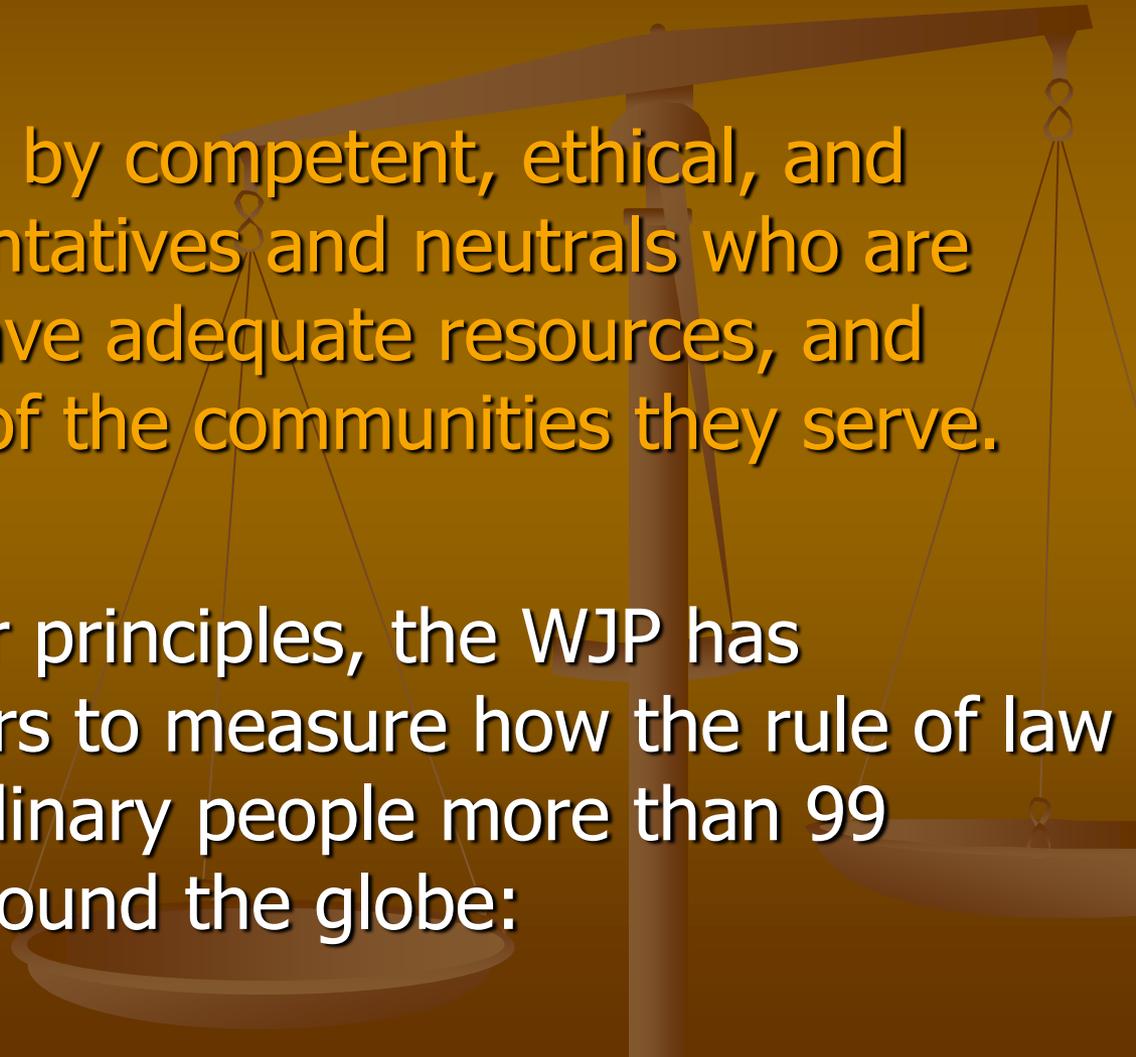
2. The laws are clear, publicized, stable and just; are applied evenly and protect FRs including the security of persons and property



3. the process by which the laws are enacted, administered and enforced is accessible, fair and efficient

4. justice is delivered by competent, ethical, and independent representatives and neutrals who are sufficient number, have adequate resources, and reflect the make-up of the communities they serve.

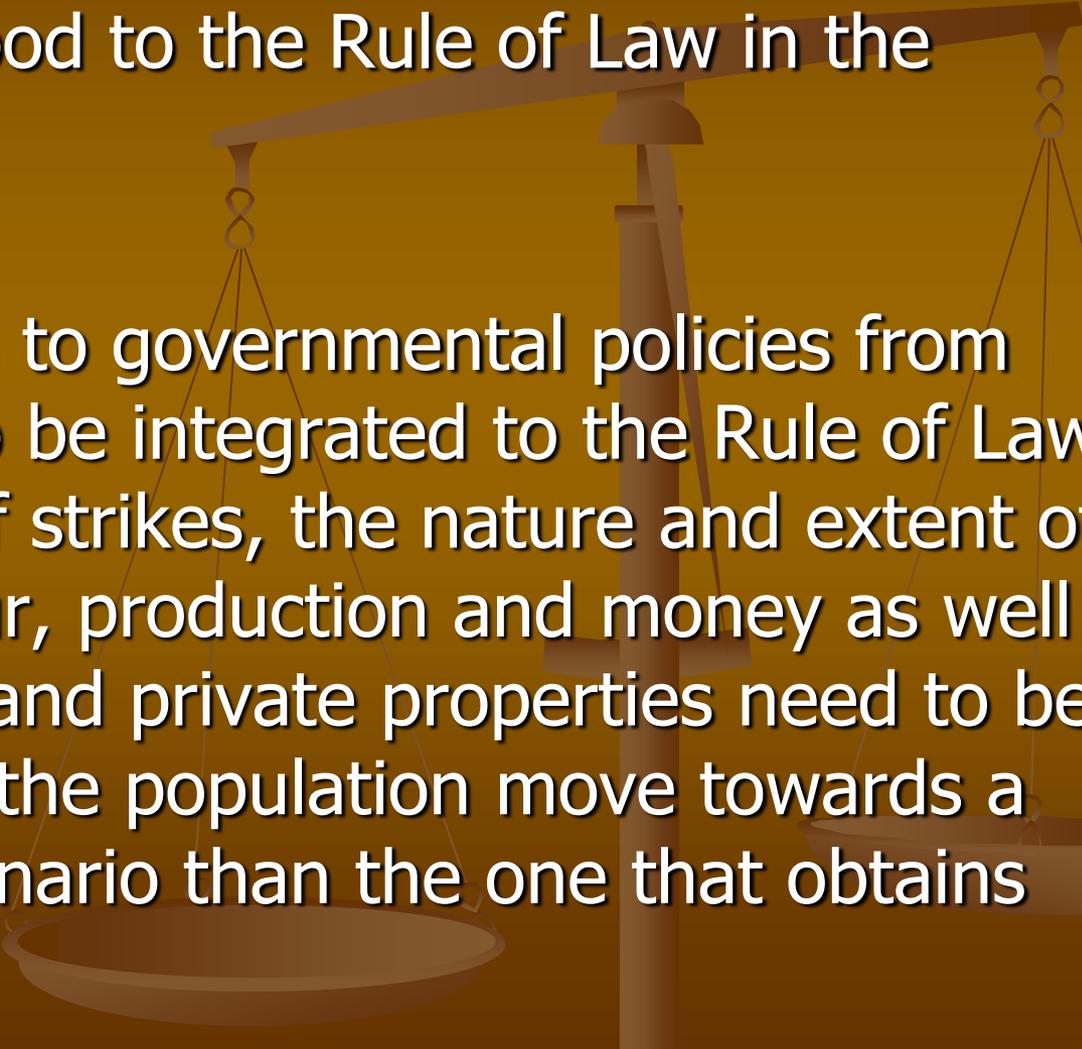
Along with these four principles, the WJP has developed nine factors to measure how the rule of law is experienced by ordinary people more than 99 different countries around the globe:



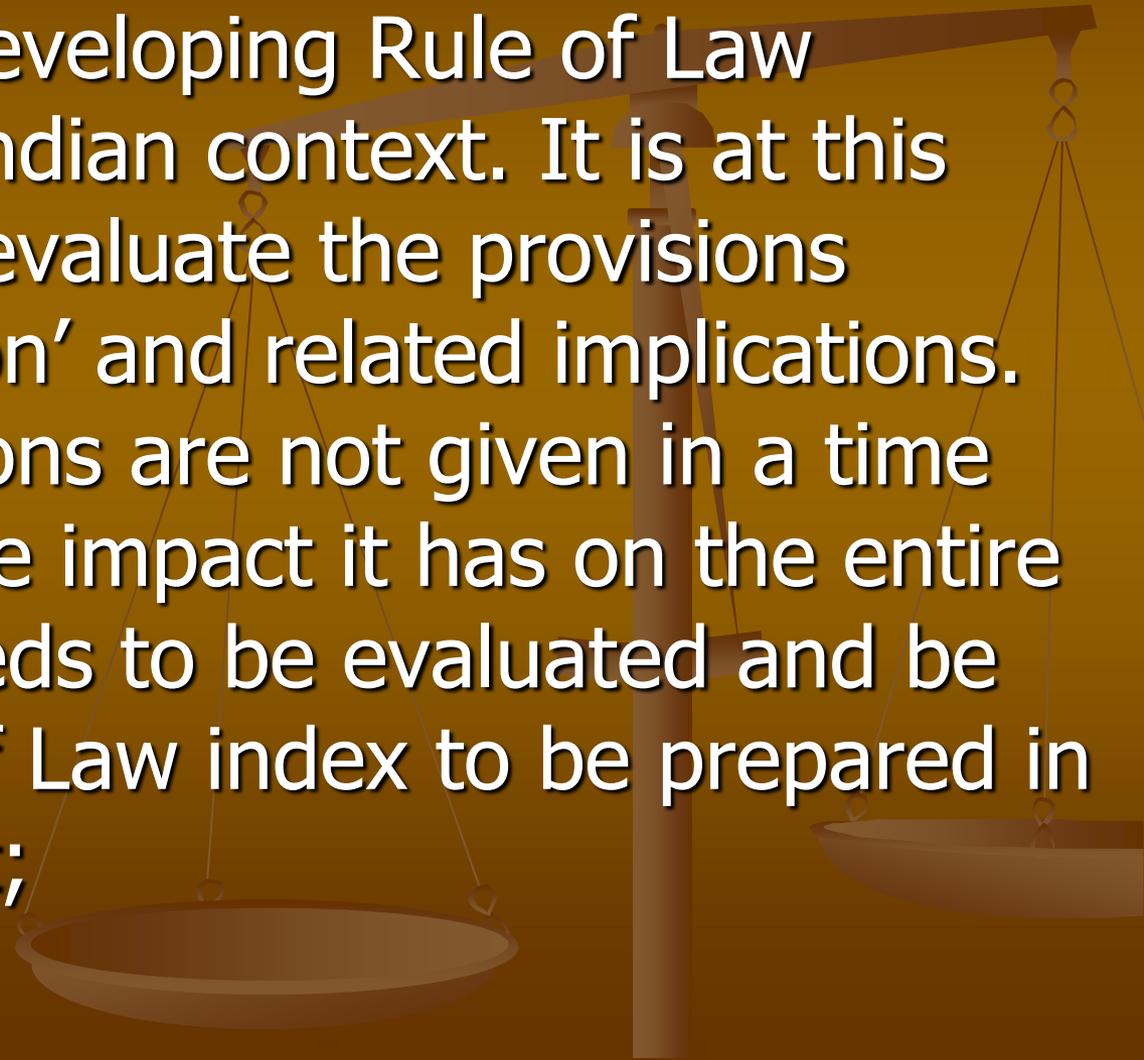
Nine Factors

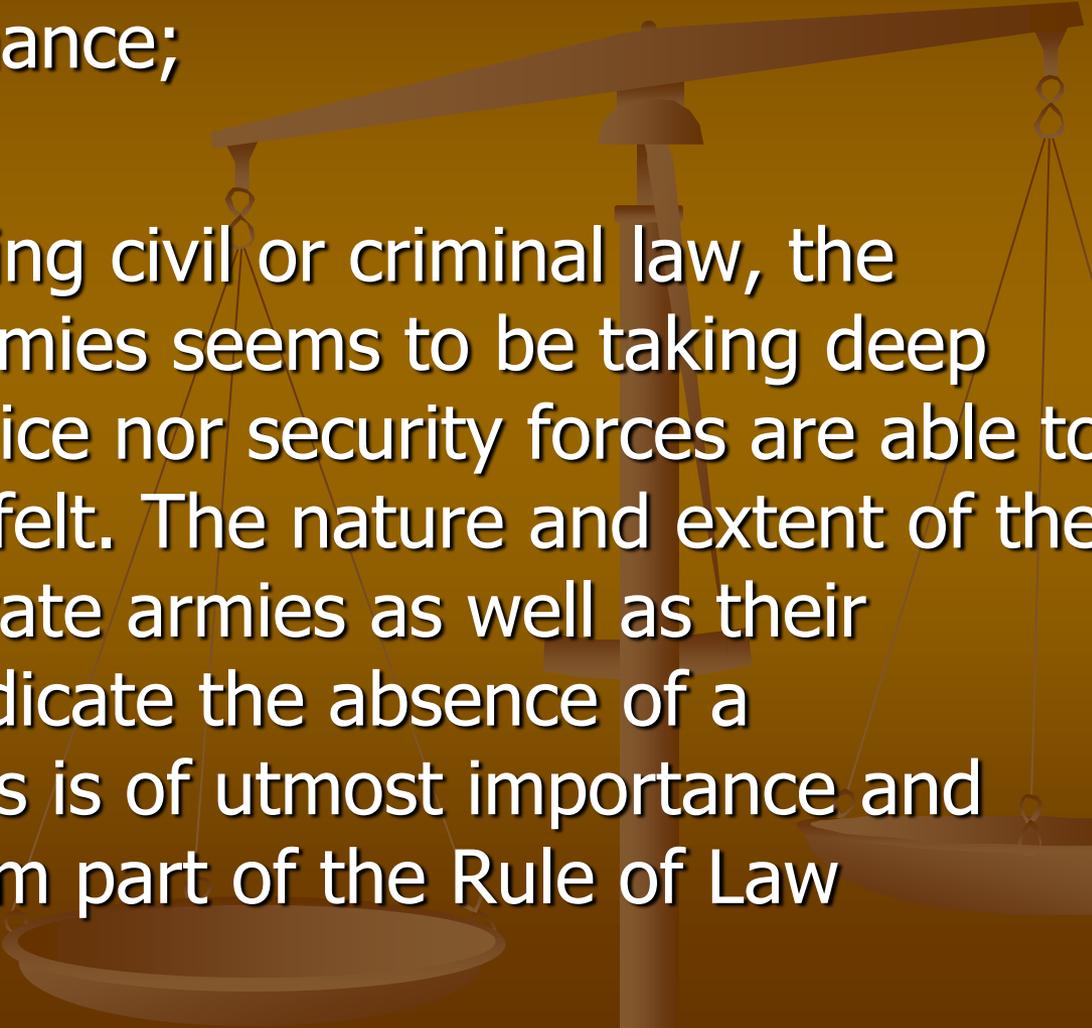
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- Absence of corruption
 - Fundamental rights
 - Regulatory enforcement
 - Criminal justice
 - Constraints on governmental power
 - Open government
 - Order and security
 - Civil justice
 - Informal justice

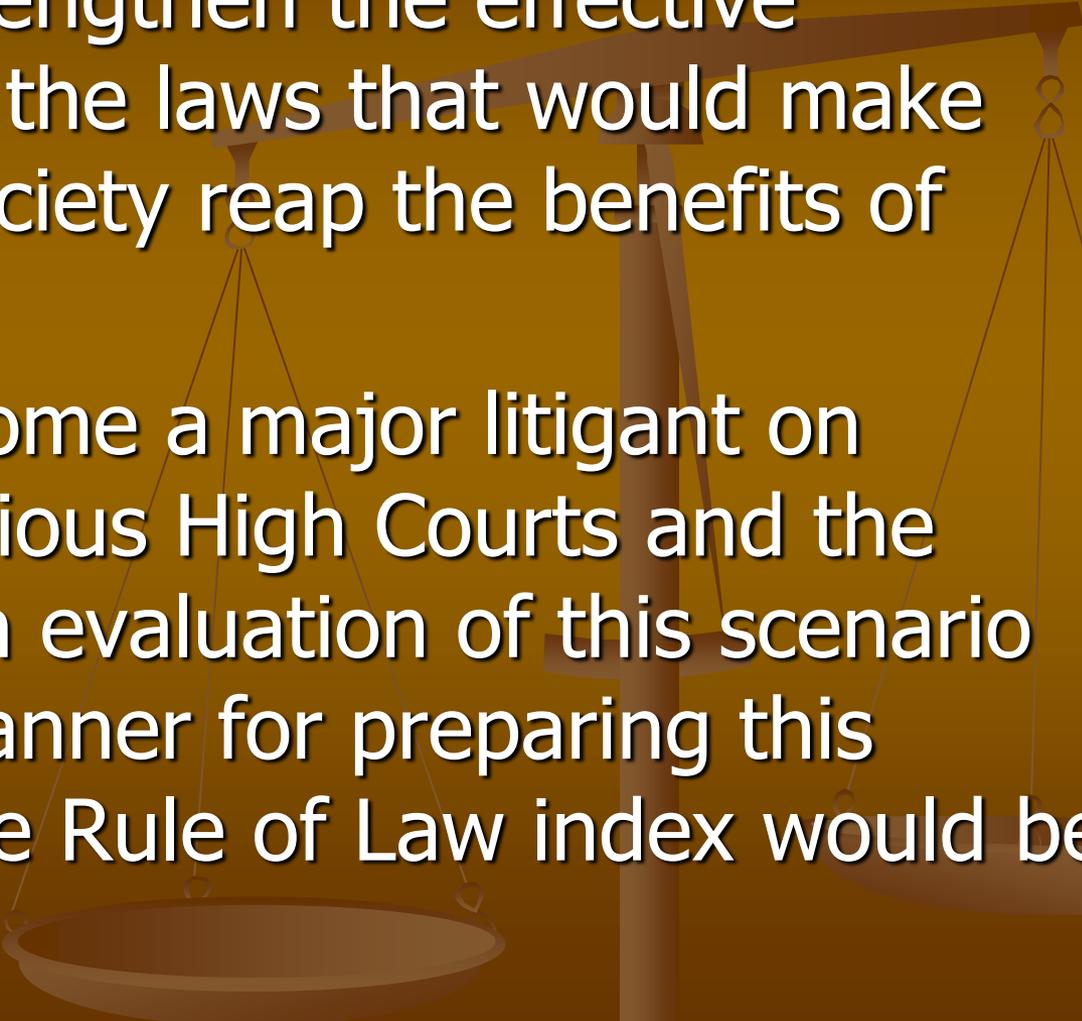
- In the first place the WJP focuses its attention exclusively on governance with an emphasis on the rights of the individuals. There is absolutely no mention whatsoever about the subjects of such government as well as the obligations and duties imposed on the citizens. Mention should be made to Part IVA of the Indian Constitution. Although not originally provided for, a set of 11 fundamental duties have been imposed on every citizen by two constitutional amendments made in 1978 and 1985 respectively. To what extent these fundamental duties have been received by the citizens in realising Rule of Law in India richly deserves to be part of the Index to be prepared for India. Though this may turn out to be little tricky in capturing the impact, if done will certainly change the equation between the governor and the governed for better. Any Rule of Law Index that excludes the obligations of the citizens from the effective functioning of the government would be incomplete;

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- In the discharge of governmental functions as well as delivery of welfare measures, techniques of measurement for evaluating the nature and extent of 'record keeping', maintenance and 'retrieval system' would certainly do good to the Rule of Law in the Indian context;
 - The peoples' reaction to governmental policies from time to time needs to be integrated to the Rule of Law index. The number of strikes, the nature and extent of loss in terms of labour, production and money as well as damage to public and private properties need to be appreciated to make the population move towards a better rule of law scenario than the one that obtains now;

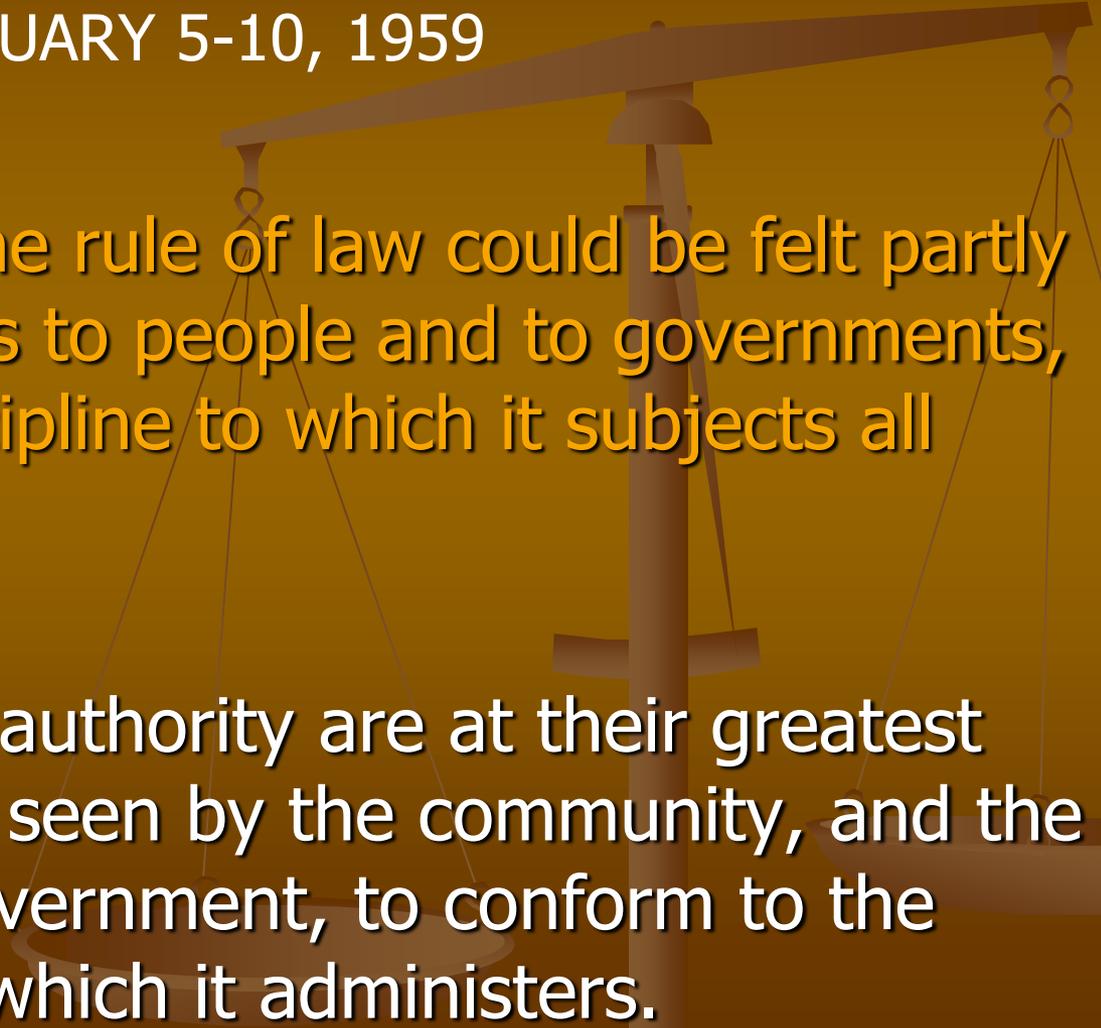
- Techniques to evaluate all the civil servants in terms of their day today functioning, their accountability to law etc need to be taken into consideration in developing Rule of Law indicators in the Indian context. It is at this level, one should evaluate the provisions relating to 'sanction' and related implications. When such sanctions are not given in a time bound manner, the impact it has on the entire administration needs to be evaluated and be part of the Rule of Law index to be prepared in the Indian context;

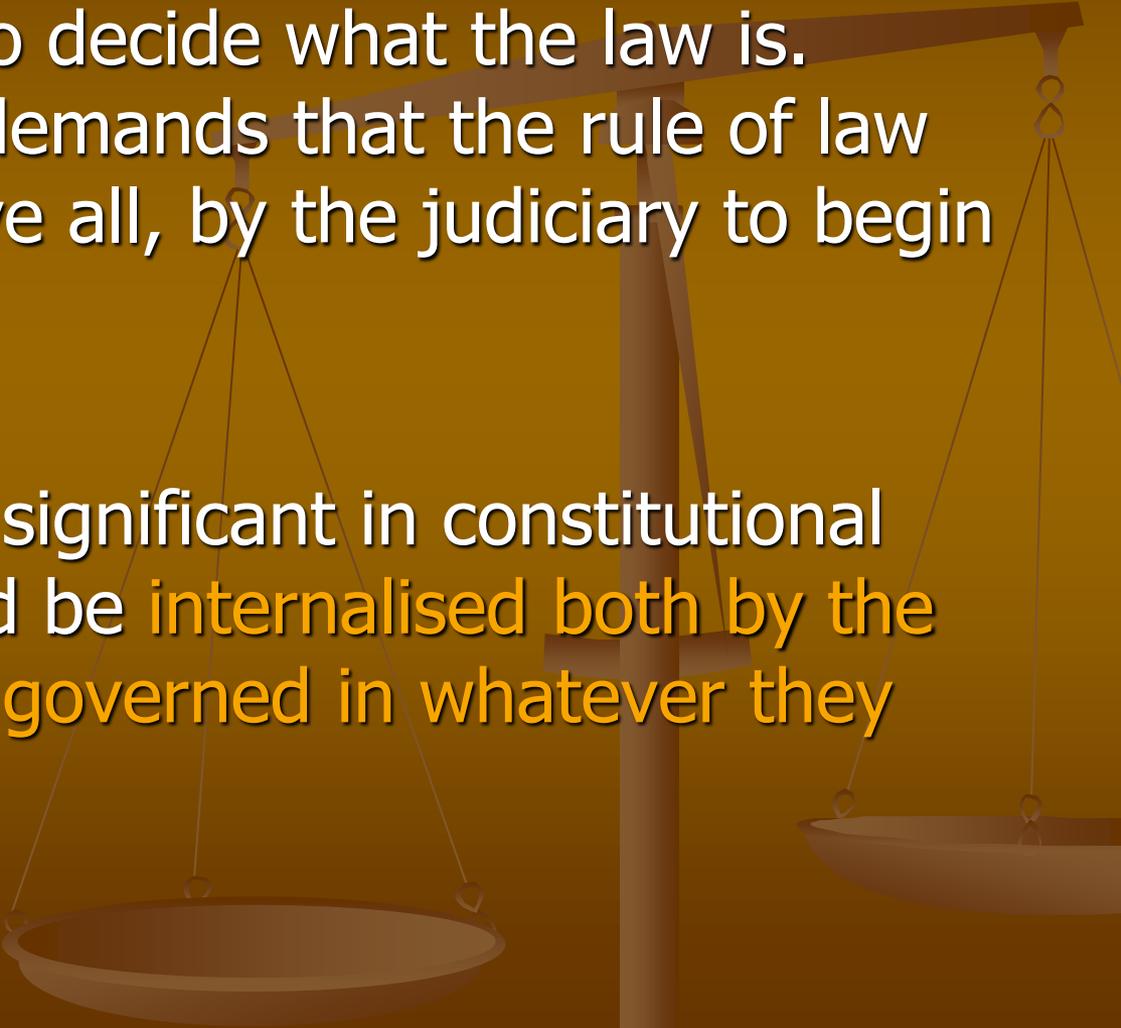


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- Every year the CAG provides information relating to the money that have been spent and the loss caused to the exchequer need to be probed and integrated as an essential Rule of Law tool to enforce accountability at all levels of governance;
 - In many cases involving civil or criminal law, the reliance on private armies seems to be taking deep roots. Neither the police nor security forces are able to make their presence felt. The nature and extent of the presence of such private armies as well as their functioning clearly indicate the absence of a meaningful state. This is of utmost importance and should essentially form part of the Rule of Law Indicators;

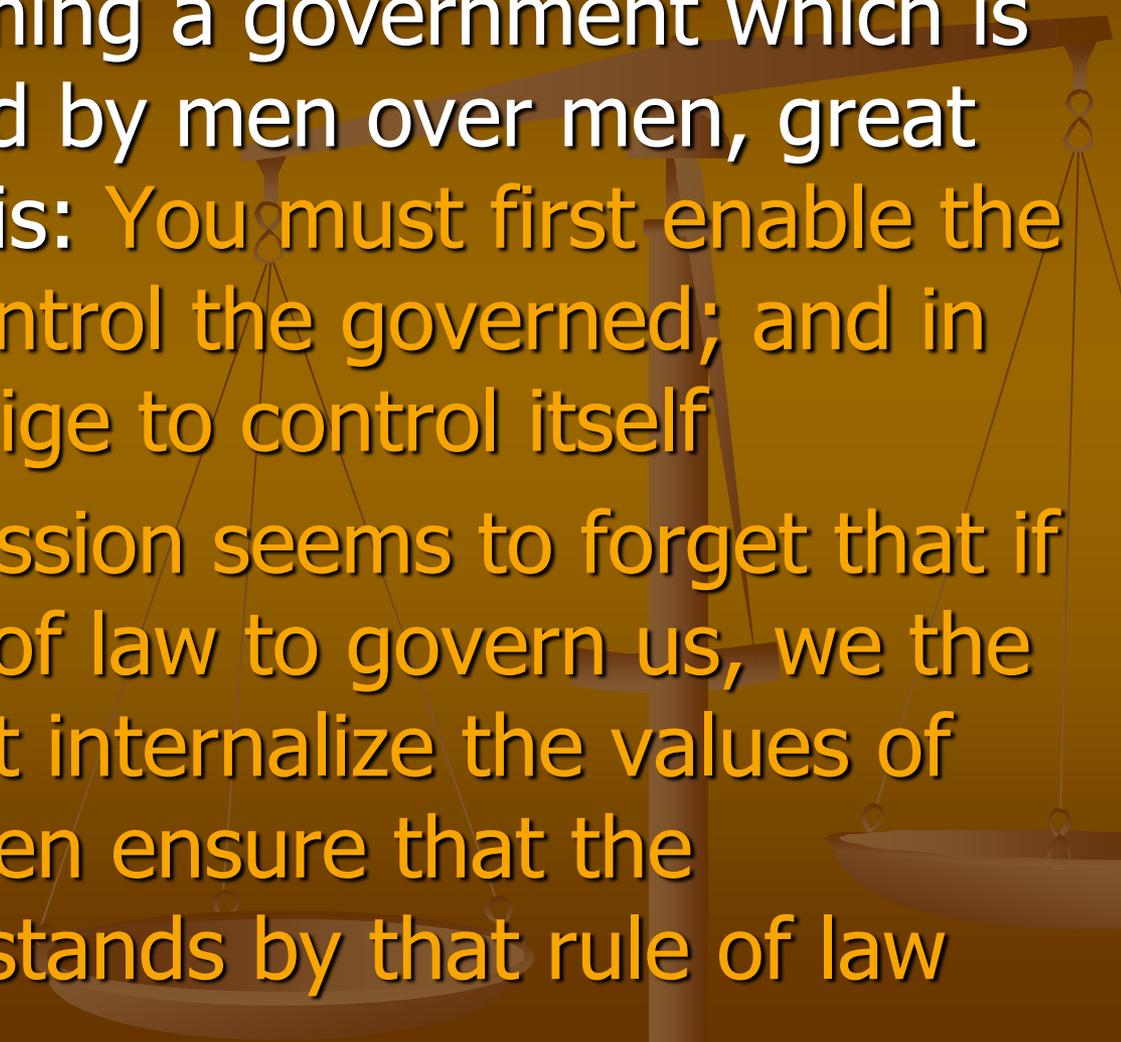
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- In India, like many other countries, there is a vast gap between the laws and their implementation. Measuring these aspects would certainly strengthen the effective implementation of the laws that would make everyone in the society reap the benefits of Rule of Law
 - The State has become a major litigant on appeals before various High Courts and the Supreme Court. An evaluation of this scenario in a perceptible manner for preparing this component into the Rule of Law index would be appropriate;

Concluding observation...

- Delhi Declaration - THE RULE OF LAW IN A FREE SOCIETY - A REPORT ON THE INTERNATIONAL CONGRESS OF JURISTS, NEW DELHI, INDIA, JANUARY 5-10, 1959
 - The significance of the rule of law could be felt partly in the power it denies to people and to governments, and partly in the discipline to which it subjects all authority.
 - Judicial prestige and authority are at their greatest when the judiciary is seen by the community, and the other branches of government, to conform to the discipline of the law which it administers.
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- It depends upon public confidence in lawfully constituted authority. The judiciary claims the ultimate capacity to decide what the law is. Public confidence demands that the rule of law be respected, above all, by the judiciary to begin with...
 - Rule of Law, to be significant in constitutional governance, should be internalised both by the governors and the governed in whatever they do!

James Madison – Federalist Paper No. 51 [1788]

- If men were angels, no government would be necessary. In framing a government which is to be administered by men over men, great difficulty lies in this: You must first enable the government to control the governed; and in the next place oblige to control itself
 - The present discussion seems to forget that if we want the rule of law to govern us, we the people should first internalize the values of rule of law and then ensure that the government also stands by that rule of law
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