

Decolonizing the Concept of Rule of Law in the Context of Cultural Diversity and Belt and Road Initiative

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Abstract

It would not be unreasonable to argue that very little is left unsaid regarding the rule of law. Thousands of books and research works are published across the globe, arguing a multitude of theories and concepts in this regard. Academia worldwide has tiresomely grappled with defining the rule of law and establishing its conceptual framework, including the function's scope, but without much success. Colonization of this concept by the Western scholarship is one of the serious problems faced by the essence of the rule of law. Western academia essentially connects the rule of law with liberal democracy as its motherly creator. It believes that rule of law walks in lockstep with liberal democracy; hence, it argues that no other than liberal democracy can nurture the rule of law. Due to this reason, in many, academia has been sharply divided between sections appreciating it as a boon to liberal democracy and suspecting its congenital relation with it. Certain scholars claim that the rule of law is an offspring of Western liberalism. However, some view that the rule of law and liberal democracy do not necessarily walk in lockstep. Certain critics have pointed out that the Western approach overlooks the cultural component of the rule of law. Going further ahead, they contend that the concept of the rule of law is often deceitfully used by Western democracy as an instrument of encouraging influence on those having different political systems. Consequently, the concept of the rule of law, particularly in its connotation presented by Western scholars, has faced many critics, comments, and views. As a result, it has become academically vague, functionally deluded, and politically dubious. This article intends to examine the contending arguments and cultural elements of the rule of law for promoting the approach of decolonizing the concept.

Keywords: Rule of law, Colonization, BRI, Western liberalism.

I. Introduction

Legally, the concept of rule of law has become obscured, if not corrupted. It has often been used as a universal element of liberal democracy. Often, a conclusion is fallaciously and maliciously drawn that countries having no liberal democracy as a political system, lack the rule of law. Impliedly and arguably, it suggests that such countries are authoritarian or despotic. In this context, the concept of the rule of law is taken from the Western doctrines of constitutionalism and human rights. Furthermore, the rule of law, as often defined as a universal characteristic

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element of liberal democracy, is used as a justification for interference by Western countries in developing Asian, African, and Latin American countries, as well as those countries with a political system not similar to liberal democracy. This biased and parochial interpretation of the rule of law dismisses the recognition of socialism as a democratic system and socio-economic development as a human right.

Therefore, it is the right time for academics from developing countries to begin demystifying the concept of rule of law and decolonizing it from Euro-centric domination. Legal scholars from developing countries must determine the true, workable, and realistic meaning of the rule of law. Generally, inequality in the distribution of income and wealth is a serious problem in all developing countries. The disparity is sometimes even worse than poverty. Poverty is generally defined as a condition of lacking wealth, whereas the condition of deprivation of rights and social exclusion, collectively seen as the condition of subordination, are the causes of poverty. Socio-economic development is an instrument of curing deprivation of rights and social exclusion, but not curing the lack of wealth—wealth is a material substance. The rule of law, from a socialist perspective, is a mechanism to distribute rights of development to people equally, rather than merely a political mechanism ensuring fair and free voting.

The rule of law, as a tool for ensuring development rights imposes a systematic obligation on government and political actors to guarantee that every citizen has the right to (a) adequate nutritious food and standard (happy) life, (b) employment and earnings, (c) education for building the capability of higher productivity, (d) proper and adequate medical care, and (e) several other facilities necessary for a dignified life, including participation in decision making. This notion of the rule of law leads us to conclude that it interfaces with development and functions in tandem with development. From this point of view, the rule of law is not an abstract concept embodying legalism but an objective mechanism to empower people to enjoy their development rights.

What follows from the above is that, it is gravely problematic to define the rule of law in a scholarly backdrop established by the Western philosophy and principles of liberal democracy. Western scholarship takes the rule of law in multi-pronged uses and multi-faceted relevance, ranging from governance system, to political accountability, financial ethics and economic equality to open market or neo-liberalism and the fairness of procedures related to police power concerning law and order. Indeed, the concept is so broadly defined that it has become entangled in an overly mystic and exclusive academic discourse. Too many books have been written on it. Too many meanings are imposed upon it, rendering it largely incapable of being categorically defined. Therefore, defining the rule of law within this academic context is incomplete and futile, as it invariably leads us to liberalist scholastic discourse.

II. Rule of Law in South Asian and Western Democracies

Let us refer to a metaphor to describe the difficulties in defining the rule of law. In South Asia, there is a culture of playing an eccentric flute (*binabaja*) supposedly to lure snakes and make them dance to the rhythm of the music. Popular folk stories believe that snakes are attracted to the music of this typical flute, and cannot resist following the way the snake charmer is playing the flute.¹ The truth, however, differs. Scientifically, it is argued that snakes lack any sense of hearing

¹ The flute is called '*binda*'. A community of snake charmers (*saperu*), whose job is to capture snakes and tame them for

at all. The belief that the flute music used by captors to entice snakes is nothing but a fallacy of appeal to ‘ignorance’ or ‘superstition’.

The rule of law situation, at least in South Asia, is hardly different from common people’s belief about snakes and the *binbaja*. The beliefs in so-called democracies in South Asia and many other countries are not different than the folk’s belief of captivating snakes with *binabaja*. In that given situation, the condition of the rule of law in these countries is self-explanatory.

Not just in developing countries, but the rule of law is also poor in developed countries like America, where, for instance, only one percent of the population possesses more wealth than the remaining 99 percent. American democracy is hypocritical in that sense. It is economically characterized by acute income disparity among its population, and the system of laws and policies fully institutionalizes inequality.² The economic inequality is truly gruesome in size and impacts both. A report shows, “An average American believes that the richest fifth owns 59% of the wealth and the bottom 40% of the population owns only 9%. The reality is strikingly different and inappropriate. The top 20 percent of US households own more than 84 percent of the wealth. The Walton family, for example, is wealthier than 42 percent of American families combined.”³ Given the severe income inequality, what significance may the rule of law have in the lives of general people? The grotesque income inequality situation helps us conclude that the rule of law, even in neoliberalist-developed democracy, is nothing but the *outer teeth of elephants*. The government is hardly unaccountable for what is going on to most people.

Despite the grotesque situation of inequality, some liberal democratic countries unscrupulously use the concept of rule of law as a tool of devaluing the political values and systems of other countries they dislike. They have used the rule of law as a vehicle or excuse to export laws, policies, and liberal values of politics to the developing countries—they unscrupulously make transplantation of their laws a precondition for development assistance under the guise of promoting the rule of law. This coercion establishes the laws of ‘developed countries’, as the foundation of the rule of law in developing countries. Moreover, the liberal parliamentary law-making process is wrongly sold to the developing countries as an indispensable feature of democracy, necessary for the development of the rule of law. The theory of legal transplant is then justified by applying a false logic that borrowing a developed country’s legal system would establish a structural framework for the rule of law, thereby promoting a functional system of democracy.

If one looks from this point of view, they would have no other option but to take it for granted that the legal systems of the liberal democratic countries inherently embed the structural framework of the rule of law. This theory implicitly holds that states have to transform into a political

enjoyment of people, play the flute with a belief that listening to the music snakes appear in sight. The community keep snakes into baskets and make travel to markets and village for the enjoyment of people and collect money as a part of their livelihood.

² For the first time in this report series, Allianz calculated each country’s wealth Gini coefficient—a measure of inequality in which 0 is perfect equality and 100 would mean perfect inequality, or one person owning all the wealth. It is found that the U.S. had the most wealth inequality, with a score of 80.56, showing the most concentration of overall wealth in the hands of the proportionately fewest people.” See, Erik Sherman, ‘America Is the Richest, and Most Unequal, Country’, *Fortune*, available at <http://fortune.com/2015/09/30/america-wealth-inequality>, accessed on 4 August 2022.

³ Scientific American, ‘Economic Inequality: Far Worse than You Think’, *Scientific American*, available at <https://www.scientificamerican.com/article/economic-inequality-it-s-far-worse-than-you-think>, accessed on 4 August 2018.

system called 'liberal democracy' if they want to foster a culture of governance based on the rule of law. To decline doing so is seen as a refusal to accept democratic values, consequentially, implying disobedience to the rule of law. However, this definition is not only unacceptable but also disguisedly colonial and imperialistic. The decolonization of the concept is therefore, vital.

Western liberal countries also employ the rule of law as a pre-condition for diplomatic relations, development assistance and the transfer of technology. They relentlessly advocate, through diplomatic channels and other means, that the transplant of their laws and judicial system, including their concept of independence of courts, is the safest and most convenient way to establish and foster a culture of the rule of law in developing countries. This notion is, in fact, nothing but an implicit arrogance of the Western countries. The assertion that only the legal systems of 'developed countries' are developed and progressive, infinitely implants a psyche in politicians and professional masses in the developing countries that the indigenous or native legal systems, cultures, and institutions are rudimentary and traditional. This psychology which presents Western concepts as modern versus global south as traditional is used by Western intellect to establish a monopoly in the knowledge system. As a yoke of post-1945 colonialism, this theory meticulously overrules the significance of the social episteme of the developing societies.

The social episteme plays a crucial role in shaping the structure and values of a society's laws and legal institutions. It is equally significant for shaping the democratic values of that society. The concept of social episteme meticulously rejects the usefulness of foreign laws and their values in the governance and relations among members of society. The theory that the epistemic values of the society inevitably determine the natures of laws and legal institutions is factually and logically valid. It symmetrically rejects the plea that the transplant of laws and legal institutions from the so-called developed societies help to foster a culture of the rule of law in developing societies.⁴ Based on this theory, it can reasonably be arguable that the consolidation of the culture of the rule of law in any society is not contingent upon the import of laws and legal institutions from Western developed countries.

The social episteme, consisting of a set of fundamental values of human relations in the given society, is the sole determinant of the scope, framework, and function of the rule of law in every society. Therefore, the rule of law is largely a matter of the legal culture of the given society. Access to litigation, for instance, in western society, is a component of the rule of law. However, Asian societies do not prefer litigation; there is a widespread belief among common people in Asia that litigation sparks discordance and breaks the harmony of society. Most Asian societies including those in Africa are not inclined to accept litigation as a requisite of the rule of law. Embracing the practice of reconciliation without hesitation is not only a favored means of dispute settlement in Asia but also a deeply embedded legal culture.

The concept of settling disputes by the way of reconciliation is the means of culturally enhancing the norms of societal harmony. The social episteme of most Asian societies regards the practice of resolving disputes through the participation of parties themselves as a means to achieve

⁴ Benny Simon Tabalujan, *Legal Development in Developing Countries-The Role of Legal Culture*, 2001; Franz von Benda-Beckmann, 'Scape Goat and magic Charm: Law in development Theory and Practice', *Journal of Legal Pluralism*, volume 28, 1989, p. 129; Galit A. Sarfaty, 'Measuring Justice: Internal Conflict over World Bank's Empirical Approach to Human Rights' in Kamari Clarke & Mark Goodale (eds), *Mirrors of Justice: Law and Power in the Post-Cold Era*, Cambridge University Press, 2009.

lasting solutions. The concept of the rule of law in the Asian social episteme rejects the validity of principles that emphasizes the involvement of a third party as a decider in the dispute settlement process. In Western societies, the origin and practice of litigation and judgment in disputes by a third party, called the judge, owes to its power-based hierarchical structure. Conversely, Asian societies prefer to engage family and village elders in resolving disputes. The Asian societies preferred the *vinculum prudence* approach over *vinculum juris*. The principle of *vinculum prudence* takes righteousness prevailing over the political authority of law. This notion of understanding the rule of law in Western societies is absent. Cultural influence—the influence of culture on the functionality of the rule of law and culture as a source of its principles—is undeniable in Asian cultural settings.

In some countries, particularly in America, the concept of the rule of law is used as a sole indicator to judge the functional appropriateness of the doctrine of separation of power, which requires organs of the State remain in their right place or within their respective defined boundary. From this perspective, the concept of the rule of law can be defined as an instrument of constitutionalism and nothing else. Generally, principles of constitutionalism urge that placing the organs of the State in their respective jurisdictions is the main function of the rule of law. It is argued that the doctrine of the separation of power is formulated to materialize the purpose of establishing and preserving the liberty of individuals. For this, the division of the government into the legislature, executive, and judiciary is not only desirable but also indispensable. Each branch is assigned to carry out its constitutionally designated functions, thus restraining each from infringing upon the other's jurisdiction. Each organ has some power to maintain a check on the powers of others. The government is thus placed within a defined scheme known as the rule of law.⁵

However, the theory of equal protection of law raises a serious skepticism about the separation of power connotation of the rule of law. In the context of the equal protection of law theory, the doctrine of separation of power does not define an important question: whose equality is equally protected? Since people are not equal in society, how does the principle of equal protection operate fairly? Since all state organs are dominated by the society's political and economic elites, how can the deprived sections enjoy the same protection of the law? The so-called separation of power doctrine lacks an answer to this question. The belief in the doctrine is not a reality, therefore. The Eurocentric notion of liberal thoughts has falsely constructed this belief in scholars of developing countries. The equal protection of the law is merely a myth in a society where citizens suffer from acute inequality economically, politically, and socially.

The rule of law, in that perspective, is a tool demanding equality in the treatment of individuals in all public domains. The equality of treatment is a necessity for people rather than the formality of the governance. The concept of equality, based on equal protection of the law, is guided by the principle of happiness of people, both culturally and materialistically. Why does an individual look for equal protection of the law? The simple fact is that they want to enjoy an un-encroached, free and happier life. This assertion follows that the law is necessary to serve the people by fulfilling their needs but not to impose constraints on the meaningful enjoyment of opportunity for creativity and productivity of intellect or talent and excellence.

Happiness is promoted by enabling each individual to enjoy creativity, intellect, persistence

⁵ M.J.C. Vile, *Constitutionalism and the Separation of Powers*, Liberty Fund Inc., Indianapolis, 2nd edition, 1967, pp. 1-23.

and productivity. No law, therefore, exists in isolation or ignorance of development endeavors of the state or society to foster individual creativity, intellect, persistence and productivity. Understandably, the purposes of law and State's development efforts are by no means different, therefore—law and development, looking from this vantage point—interface and interplay. Indeed, the main function of the law is to equally distribute opportunities and advantages to development endeavors that are necessary to lead to the happiness of people. The rule of law, in this sense, is a framework to keep the government conscious of its duty to offer equal protection of law to every citizen.

In societies, the risks of discrimination loom large—often circumstances generate such risks pushing individuals to marginalization. Protecting people from adverse impacts of such negatively resulting circumstances is an equally important objective of law. Enabling individuals to enjoy development opportunities as well as protecting people from deprivations and social exclusion are two-pronged objectives of the law. When the law fulfills these two fundamental objectives, it is said to establish the condition of rule of law in society. James McClellan, concurring to this thought, says, “The America of 1787 inherited from medieval England the concept of rule of law, sometimes expressed as ‘a government of laws, not of men.’”⁶ This fundamental principle of the British version of rule of law can be traced back to the principle in English history that the King needs to guarantee his obedience to the English laws because he is not above the laws since he has been created by the law.

This principle led to the signing of Magna Carta in the year 1215, which obliged King John to pay his obedience to the laws.⁷ According to this doctrine, no one is above the law and this principle applies to the kings as well as the legislative bodies. On this ground, Edward Coke resisted the attempts of King James I to interpret the law in a way that would place him above it. He equally resisted Acts of Parliament that contravened the principle of common law. He argued, citing Bracton as an authority that, ‘*the king must be under the law*’.⁸ This doctrine introduced the milestone of rule of law under the common law system. However, the concept it grounded on was basically political in nature. The concept of rule of law in this premise rested on a need of preventing the abuse of power. Explicably, the rule of law was conceptualized as a system of *sanction* or barrier upon power. The British societal episteme, consisting of its history of unending conflicts for power between the King and the Parliament, has played a vital role in evolving this unique concept of rule of law. The cultural influence over the meaning and connotation of rule of law is evident .

One very important fact of history unfolds in the said British theory of the rule of law. The abundance of historical annals unfurls that the Western societies struggled hard to come out of brutal and despotic regimes of Kings, who deemed that their authorities were neither given by the people nor were limited. The monarchs in Europe invariably claimed that their authority was endowed to them by divine power, thus claiming that they were not required to be accountable to the people. This historical perspective demanded the rise of such theories as they would place kings under the law, so that they along with their subordinates would be prevented from abusing authority. The same theory does not, however, apply universally, at least in societies

⁶ James McClellan, *Liberty, Order, and Justice: An Introduction to the Constitutional Principles of American Government*, Liberty Fund Inc., Indianapolis, 3rd ed. 2000, pp. 374-454.

⁷ ‘Online Library of Liberty’, available at <http://oll.libertyfund.org/pages/rule-of-law-us-constitutionalism>, accessed on 4 August 2018.

⁸ Ibid.

where, historically, governance is controlled by popular will. Conceptually, two important theories of rule of law arise, at this juncture. One, the rule of law is crucial and indispensable to keep the rulers under the authority of laws so that they are amenable to the popular system of government. Another, the rule of law is crucial and indispensable to enable people to enjoy the best possible happiness of life and prevent circumstances that might lead people to a state of marginalization. The second theory draws more relevance in the Asian societies, which are rigorously transforming from traditionalism into modernity.

Development concerns of the rule of law are prime in developing societies. Most people in developing societies are deprived of opportunities for development and many circumstances pose constraints for people to come out and enjoy development opportunities. The absence of capability to benefit from competition, access to markets and productivity destroy persistence of people to grapple for betterment. The state must come out in this situation to uplift the person. The obligation of the state at this particular juncture is to *recognize and protect their rights* to acquire the capability to enhance their productivity. It leads us to argue that having been able to obtain a productive education is the fundamental right of everyone which offers capability to the individual in order to compete with others in the markets. They then, must obtain resources to produce. The role of law is again vital at this point. The state must guarantee everyone that they have access to resources—means of production, such as land, or skill or employment. Once individuals can produce and enjoy a better life, they must begin contributing to strengthening the state's mechanisms of governance and service delivery. They have to then pay taxes. This duty of individuals is also a matter of law. Both these rights and duties are inevitably related to development as primary concern of law. Having the law to function materializing these goals and advantages is what can be defined as the *rule of law* in the developing societies.

The present world is, however, inseparably connected globally. Both the problems and prospects of development are not unrelated and unsolvable. Countries' markets are open to each other and their achievements are shareable. The markets are complementary and capable of benefiting all stakeholders. Internationalism and globalization are two undeniable propensities or characteristics of the modern trade and development paradigms. Protectionism in trade is, therefore, decried and free-zones of trade are promoted. From the vantage point of modern trade, the development put forward by the Belt and Road Initiative introduces a new concept of the rule of international law vis-à-vis the policy of protectionism in trade. Preventing access to markets or imposing high customs and trade tariffs is a violation of this rule of international law.

International law is fundamentally concerned with the principle of respecting the national sovereignty and independence of nations. The principle of independence of the nation includes such rights that grant freedom to it choosing its political, economic, social, legal and administrative system of governance. The instrument of protectionism indirectly, but effectively, declines to affirm the indispensability of this principle. Placing one state under strict rules of access to another's markets implies the execution of the principle of discriminatory treatment to the national sovereignty of another. The very primary foundation of the *Belt and Road Initiative* is, therefore, laid down on the principle of respect and protection of the national sovereignty and independence of partnering nations. This very foundation provides the *Belt and Road Initiative* with a moral ground of standing which requires States to follow international laws in their relations. Looking from this point of view, the following policy agenda of BRI are found enhancing the *rule of law* both nationally and internationally.

BRI promotes or encourages activities of exchange and communication among people from

partnering countries emphatically. The policy of engaged communication among people embeds freedom of free communication beyond national arrangement or affairs. Freedom of an individual to make a choice of their pursuit within and without national border is a fundamental salience of the rule of law. Increased participation of people in international affairs through education, research, discourses, and several philanthropic activities is one of the major characters of inclusive globalization. The communication among, on the other hand, is facilitated and managed by laws enabling people to enjoy their rights, the protection of life and property, irrespective of their nationality. Every individual, while he/she is traveling, residing or carrying business, in any part of the world is protected by laws without discrimination. The rule of international law is, therefore, a paramount character of BRI.

Development policies coordination or integration is guided by the principle of inclusive globalization, which urges two important principles being in practice. One, it calls for ending discriminatory policies and principles now in force in partnering, which provides differential treatment of nationals or nations. The strategy of development and financial policies integration contributes to (a) open access to markets without discriminatory regulatory mechanisms and rules, (b) ending protectionism in trade, and (c) promotes persistence of economic engagement among nations. With no doubt, this development under BRI will tremendously rationalize the international law from financial or economic perspectives, thus enhancing the strength of the *rule of international law*.

Underdeveloped countries would be able to obtain required financial resources for their infrastructure development under BRI. Economic development is vital for any nation to acquire competency and efficiency to interact and cooperate in the international forum. The position of a nation in the international community and an individual in the society is hardly different without adequate development attainment. The opportunity unleashed by BRI to underdeveloped countries through its investment policy is one of the most significant aspects of the rule of law. No nation can protect or defend its national sovereignty without its socio-economic development competence.

The concept of BRI development model brings internationalism as one of the fundamental constituents of the rule of law within a nation and beyond. Since development is deemed a prerequisite of a better governance in the society, no rule of law can be achieved without having people provided with adequate services and facilities. In view of this thought, the following indicators constitute indispensable elements of the rule of law, among others:

A sound and workable system of law guarantees rights providing a threshold of basic development of everyone. These rights unavoidably comprise of (a) full protection to the physical integrity of individual, (b) full recognition of the individual personhood of individual, (c) freedom of pursuing profession of choice, within the bound of law, (d) uncontained access to education for enhancing creativity, persistence, intellect and productivity, and (e) guarantee of access to means of support and enhancement of standard of life either in the form of means of production, or skill or employment. No system of law failing to ensure these rights can provide a basis of the rule of law. These rights are essential for an uplifting vector of an individual's life, which constitute the indicators of development. A state of development with these rights imbibed fully in the legal system does establish the first and foremost indicator of the rule of law.

The system of a law obliging the State to recognize and protect these rights is another indicator of the rule of law. The State's obligation in this regard inherits a political philosophy of people

as the masters of the nation. It implies that the government does not rule the society because of its authority to rule, it does rule because it has undertaken an obligation to protect people and enhance the vector of their lives. The rule of law should be seen more from the perspective of how much the government has been able to comply with its obligations.

Freedom of communicating and solving the problems of livelihood and upliftment of life with fellow-people, the officials of the government and development agencies is another indicator of the rule of law. The people, individually or collectively, have rights to voice their concerns, put demands, seek information, suggest improvements, and participate in the process of implementing projects. Wider the participation of people, better the system of rule of law or vice-a-versa. The interplay of law and development is, therefore, another vital indicator of the rule of law.

This notion of rule of law bifurcates rights between source or input rights and accomplishment or output rights. The source right is fundamental for building the capability of an individual to enjoy many other rights. A person grappling with food and residence cannot effectively participate in the society's political process. Their basic needs ought to be addressed initially. Rights pertaining to socio-economic upliftment of individuals constitute source or input rights whereas the political rights are outcomes. When an individual obtains capability, he/she can enjoy civil and political rights. The rule of law requires the State to pay full attention to these rights. Most legal systems from the Western jurisdictions take civil and political rights as predominant rights, whereas the economic, social and development rights as basic needs. This approach is fundamentally wrong and is concerned to justify the paramouncy of liberalism.

The theory of interplay of law and development defines happiness of people as the final goal of the State. It implies that both law and justice are the instruments of human development—happiness and peace. Looking from this point of view, the concept of rule of law must emphasize justice as an instrumentality of development.

These indicators of the rule of law are consonantly attached with BRI as a new development model which underlines development enhancing the happiness and peace is a right of people, not the privilege of the government. Liberalism believes that individual development is determined by their own competency. But no human being develops without generous support and assistance of the State. BRI brings a new perspective to the development pursuit. It believes that every human being in the world should be able to share a common destiny.

III. The Notion of Rule of Law in the Western Jurisprudence

With its core meaning, the Western concept of rule of law is a mechanism to prevent the government from encroaching upon an individual's protected sphere, the sum-total of the condition of an individual's autonomy. There is no disagreement of any to this core meaning. The autonomy constitutes individual personality consisting of some inherent human liberties. This notion of the rule of law asserts individual liberty as the core essence of the rule of law and, as such, forms a mechanism of democracy. The concept of the rule of law, in this paradigm, comprises some essential postulates. First, the law is a fundamental mechanism of protecting individual liberty, which, in turn, makes democracy, a political regime of society, effectively functional. Second, the system of governance must be guided by the law with a sense that no one is above the law, including the lawmakers—the legislative body as well as the judiciary. Third, the

system of law is a logical consequence determined by the need to protect an individual's liberty. This notion of the rule of law represents a typical epistemic reality of European societies, which have seen the political chaos and anarchy of medieval Europe. It is natural that the European notion of the rule of law focuses on political character and overlooks the economic and social development of general people as the inevitable indicator. The welfare and dignity of the people do not surface as an element of the concept of Euro-American law.

The protracted history of absolutism is a justification for the emergence of this notion of the rule of law in Europe. Louis the XIVth, the Emperor of France, declared, *I am the State*. What he meant by this is that *he did not want him to be in a place of accountability to people*. Arguing that he was a divine representative in the earth, he was neither accountable to the people nor was he accountable to the welfare of citizens.⁹ The King is the State incarnate: *L'Etat, cest moi*. This meant that when the King acts, he acts not on his own behalf but on that of the French State; when he amasses glory and becomes the *Grand Monarch*, it is not the king but the French state that achieves the *glory and grandeur*.¹⁰ This notion of regime suggested that the king was above or beyond the law. He was neither bound to follow the law nor was he capable of being questioned. This form of absolutism rendered the common people in Europe as the puppets or slaves of the King. Their liberties were scraped and they had no privilege to live a dignified life. This history of absolutism was the cause of giving overarching importance to the civil and political rights in Europe. The situation in Asia is, however, quite different.

In Asia, the emperor wielded unlimited powers, but they never believed and behaved in a way that would cease popular support of the people. Some of them were brutal and atrocious and killed people causing big harm. But that was not an outcome of a belief that they, themselves were God. The kings in Asia generally kept themselves attached to the general masses. The belief of them sent by God to serve not rule the people was common.

The history of Britain was not different than that of France. Before *Magna Carta* was written and adopted in 1215, as an instrument of restraining kings from exercising unlimited powers, the British kings ruled their subjects atrociously and brutally. Though Britain had evolved the comprehensive administrative system, the King's power was not only ill-defined and uncertain but also unlimited and absolutist.¹¹ King John and his predecessors had ruled using the principle of *vis et voluntas*, or *force and will*.¹² Under the principle of *force and will*, they claimed arbitrary powers to take a decision and often justified such decisions on the basis that the king was above the law. For them, the power they had was the power endowed upon as sovereign kings, so that no common people could expect them to be accountable to them. This theory was never rejected in Britain, but it was interpreted in a new way that the King can do no wrong.

Conceivably, the idea of protecting individual liberty emerged out of the need of placing the powers of monarchs under the law. The grant of freedom and liberty to individuals was deemed to be an effective tool preventing monarchs from being arbitrary and despotic. A theory was then developed, placing the monarchs under the laws made by the body called the Parliament. The theory propounded that nobody, including the King, was above the law, because the liberty

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

¹⁰ *Ibid*, pp. 303, 304.

¹¹ Lord Macaulay, *Miscellaneous and Speeches*, London, Longmans, Green and Co., 1989.

¹² Ralph Turner, *King John: England's Evil King?*, UK History Press. Stroud, 2009, p. 149.

of people was sacrosanct. The theory implies the inviolability of the people's liberty. However, this theory did obtain recognition and protection not because the people were deemed as equal human beings as the king. The theory obtained the recognition and protection because the liberty of people would be an instrument of restraining monarchs from enjoying unlimited powers.

It follows that the concept of law in the Western jurisprudence is founded not on an affirmative notion of enabling people as equal members of the society as aristocrats. Rather, the law is the instrument restraining kings from encroaching upon the lives of people. The concept of rule of law, as it has been implicit in the discourse here, is basically founded on the need of preventing rulers from enjoying powers above or beyond the law. In this sense, the concept of rule of law under the western jurisprudence is a *brake against the unlimited powers of the State*, evolved out of despotic and authoritarian rules of tyrant monarchs, historically. The concept has obviously a negative element as the driving force. In contrast, the positive or affirmative element emphasizing access of people to welfare and dignity is the primary driving force behind the recognition of the rule of law as a mechanism of good governance.

IV. The Notion of Rule of Law in Oriental Societies

Unlike the western jurisprudence, the concept of rule of law in oriental societies is primarily grounded in the need of empowering people to have access to service provided by the State. Confucius, an ancient Chinese philosopher, has widely reflected this aspect of the rule of law. According to Guoji Qin, a Chinese scholar, *Ren*, *Li* and *Dao*, represent the fundamental values of Confucianism that provide a philosophical foundation for the concept of rule of law in the Chinese society.¹³ According to him, to love all men is the basic meaning of *Ren* which is possible to attain by surrendering to *Li*, the rules of propriety against individual arrogance or belief of self-importance.¹⁴ *Ren* with *Li* establishes the foundation for rule of law under Confucianism. *Ren*'s love for humankind with *Li* as rules or procedures of propriety provides the milestone for the social order, where each human individual respects the *being* of other human individuals. *Dao* is the path of duty. The rule of law from these *three* concepts is the path for social order, in which one human being is obliged to love another human being with the propriety of procedures. Implicitly, the concept of the rule of law in Confucianism is guided by a *notion of duty* but not by the notion of right. This has been a fundamental difference between Western and Eastern concept of rule of law. To respect the law in all conditions is the fundamental notion of the rule of law, thus implying that it is not liberty but *righteousness* and social harmony, based on proper roles or obligations, which are the symbols of an ideal society.

Chinese society, like most other oriental societies, was founded on the notion of interdependence of people with each other and social harmony. The concepts of *Ren*, *Li*, and *Dao*, together, embedded a concept of *virtue* as a guiding principle of human life and social order. In contrast to the western jurisprudence, ethics and morality constitute an underlying principle of the rule of law under Confucianism. It means that the law is not an exclusive choice to regulate society. For Confucius, people ruled by law may not have a sense of humbleness or shame, because it isn't a civilized way to guide people by force of law or by compulsion. For him, the law is merely

¹³ Guoji Qin, 'The Thinking Way of Confucianism and the Rule of Law,' *Journal of Politics and Law*, Vol.1, No. 1, March 2008, pp. 68-74.

¹⁴ Ibid.

a supplementary tool of morality. This conviction ultimately led Confucius to emphasize the practice of *self-cultivation*. Liberalism, conversely, stressing on individual rights for the purpose of defending or protecting self seems inconsistent to societies where the individual is deemed to foster collectivism.

As pointed out by Guoji Qin, there are two distinguishing pictures of Confucianism and liberalism. The former stresses on the need of restraining *oneself and practicing Ren* for the aim of Greater Harmony, while the latter stresses on the need of restraining the ruler's power and the aim at the realization of individual rights.¹⁵

As described by Chunli Qu, Confucius was materially poor in his youth.¹⁶ It might have been the reason that he is said to have had a deeper concern for the poor and disposed. He has not criticized wealth or physical comforts, nor has he encouraged or admired the path of the pursuit of wealth. He has noted in Analects that "riches and rank are what every man craves; yet if the only way to obtain them goes against his principles, he should desist from such a pursuit."¹⁷ The happiness of people was the major concern for Confucius and for this he suggested that each individual and each government should strive for that. Most importantly, he underlined that education would make the crucial difference between success and failure in a ruler and so he opened the first private school in China.¹⁸

Kautilya, a famous ancient *guru* in Magadha (also believed to be the advisor of Chandragupta Maurya, the first King of Mauryan Empire) during the Empire of Emperor Ashoka, emphasized the rule of law as an instrument of the welfare of people, incorruptible governance and accountability of rulers to people. He said, "Just as it is difficult to know if a fish swimming in water is also drinking the water, it is difficult to detect if officers appointed for carrying out works are stealing the State's wealth."¹⁹ His famous book *Arthashastra* has argued that the rule of law (*Dharmasutra*) is an instrument of curbing corruption and fostering accountability of the king to people as a part of the general governance system, which refers to a body of norms to uphold by all, the rulers and the ruled alike.

For Kautilya, it is an unavoidable duty of the government to preserve order in the society. The order includes both social as well as security, in the sense of preventing and punishing criminal activity. He emphasizes *dharmas* (a system comprising ethics, morality, and law as inherently coexisting regimes of rules) as a primary tool for keeping upright. He said, "The ultimate source of all law is *dharmas*." He appealed pursuing the concept of *dharmas*, for the honor of the people in the State and duty of the Government to protect human dignity. The duty of the king is to follow his *rajadharma* (to rule people for their happiness and protect them from disorder and injustice). Protection of human dignity and maintenance of social order, therefore, meant the rule of law in the South Asian value system.²⁰

¹⁵ Ibid, p. 71.

¹⁶ Chunli Qu, *The Life of Confucius, 644* (Sun Haichen trans.), Foreign Language Press, Beijing, 1996.

¹⁷ The Analects of Confucius XVII (Simon Leys, trans.), W.W. Norton & Company 1997, pp. 4-5.

¹⁸ Carolyn R. Wah, 'The Teachings of Confucius: A Basis and Justification for Alternative Non-Military Civilian Service', *Law and Religion*, available at <http://lawandreligion.com/sites/law-religion/files/Confucius-Wah.pdf>, accessed on 4 August 2018.

¹⁹ Kautilya, *Arthashastra*, 2.9.33 (Classical Text in Sanskrit).

²⁰ Akshya Ranade, 'Arthashastra: An Insight in Kautilyan Views on Law and Justice', *Youth Ki Awaaz*, available at <https://www.youthkiawaaz.com/2011/12/arthashastra-an-insight-in-kautilyan-views-on-law-and-justice/>, accessed

In *Rig Veda*, a Hindu holy scripture, it is prescribed that the State has obligations to protect and preserve freedoms of individuals against violence, want, exploitation, disease and unnatural death. The foremost duty of the rulers is to keep people away from these vices. A ruler failing to abide by these duties does not deserve respect and obedience of people.²¹

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

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

A. Limited Government

According to the Western perception, the Government, to satisfy the rule of law requirement, ought to be strictly limited. It means that the Government must leave most affairs for the open market and people themselves. It is true that the government must be limited, but the limited government should not be equated to unlimited deregulation as advocated by neoliberalism and arbitrary liberalism. The concept of limited government, as an important theory of pro-people good governance, entrusts the government with duties that make it amenable to the people for three fundamental objectives. *First*, the concept of limited government, in contrast to the classical Western jurisprudential dogmatism, defines development as the right of people not the privilege of the government. This theory states that there is no separate or independent will or aspiration of the State besides the collective will of people. This theory also implies that governance is nothing but a system of facilitating development affairs and preserving social order. *Second*, the concept of limited government implies a system of accountability of the State officials, institutions and policies to carry out welfare services to the people and arrange facilities for increased progress in people's standard of life, leading to happiness. This theory is founded on the historical principle of oriental societies that the rulers are the servants of the people. *Third*, the concept of limited government implies that the leadership of the State must be directly connected with the people, so that people's participation in development affairs is mandatory.

Obviously, there are two major distinctions between the Western classical jurisprudence and oriental philosophy of the rule of law. The limited government in the Western jurisprudence connotes the state of increased deregulation, thus clearing the way for unlimited or arbitrary liberalism or neoliberalism. This theory has become imminently popular in the wake of the rise

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²¹ Sangroula, (n 555), Ch., Hindu Philosophy.

of the post-Cold War neo-liberalism.²² The theory transfers State's power to a limited group of corporatist capitalists, multinationals, and financiers. The World Bank and International Monetary Fund are the launching vehicles of this theory.²³ The scientific development model, on the other hand, promoted by China urges for a bigger role of public domain emphasizing the balance between economic growth and people's happiness, the development endeavors and environment and development and culture. The theory of scientific development calls for the happiness of the people as the masters of the country.²⁴ Pursuant to the scientific development model, the concept of limited government demands for wider participation of people both in development endeavors and governance. The autonomy for the local government administration and development is a most crucial element of the people's participation. The concept requires wider devolution of powers to the local government bodies. In addition, the system of law enforced by the government must be enacted for the purpose of achieving goals of happiness of the people through balanced and sustainable development and better social order.

The better social order places liberties of people in a safer state and prevents risks of encroachment by fellow citizens and State officials. The arbitrary laws are, therefore, rejected by the concept of rule of law. The state of arbitrariness in-laws occurs when such laws are absent of ethical or moral justification. Fulfilling the requirement of the due process in the implementation of the law is not enough to ensure application of the rule of law. The Fault line of the Western jurisprudence lies on its perception that the rule of law can be materialized if laws are enforced applying the due process of law. This theory is advocated emphatically by American and European scholars. Both the popular legitimacy and soundness of the contents of law are unavoidable elements of the rule of law. Fundamentally, the legitimacy of the law is derived from the *moral injunction adhered to by the given society*.

Some theorists have pertinently drawn a distinction between the rule of law and what they call rule by law.²⁵ They acclaim one and condemn the other. The rule of law is acclaimed because it places the laws above politics. They argue that such laws must always stand above every powerful person and agency in the government. The reason is that the sovereignty of the nation resides on the people, thus making the people as the sovereign power of the country. The moral injunction of the society is formed by the people's general opinions which is called *public opinion*. Obviously, no law can derive legitimacy without being consonant to the public opinion. The Western jurisprudence, however, defines that law is an instrument of political authority and has nothing to do with the moral injunction of the society. Another serious fault line of the Western jurisprudence on the rule of law appears at this point. The rule of law concept in the Western jurisprudence takes the law as a tool of political power and thus allows the State to subordinate people.²⁶ It means that the State uses the law to control its citizens but tries never to allow the law to be used by people to control the State. The perception about the limited government nurtured by the Western jurisprudence is fundamentally erroneous, thus. The true perception about the

²² Noam Chomsky says, "It is not New, it is Not Liberalism". According to him, neo-liberal politicians are hypocrites who prioritize corporate finance over both taxpayers' wellbeing and their own economic principles"; Chomsky on Neoliberalism: 'Profit Goes to Apple and Microsoft, Not to The Taxpayer,' *Videa*, *Mint Press News*, September 15, 2016 available at <https://kitoconnell.com/2016/09/15/chomsky-neoliberalism-profit-goes-apple-microsoft-not-taxpayer/>, accessed on 4 August 2018.

²³ Joseph E. Stiglitz, *Globalization and Its Discontents*, W.W. Norton, 2002.

²⁴ Li Junru, *What Do You Know about the Communist Party of China*, Foreign Language Press, Beijing, 2011.

²⁵ Brian Tamanaha, *On the Rule of Law: History, Politics, Theory*, Cambridge University Press, Cambridge, 2004, p. 3.

²⁶ *Ibid.*

concept consists of (a) the main responsibility of the government is to ensure happiness of the people by achieving balanced and sustainable development, (b) make the State function pursuant to a theory that people are the sovereign masters of the country, so that they subordinate the State, (c) participation of people in the development endeavors and governance is not only desirable but a sovereign right of the people and (d) the laws of a society must be amenable to the public opinion.

B. Prohibition on Corruption

Corruption spoils the entire system of governance. Corruption undermines moral injunction and challenges the sovereign authority of people. Corruption connotes the rise of a state where the State may gradually be led to overturn the legitimacy of the moral authority of the society. The most serious impact of corruption falls on the enjoyment of human rights by general people. It fully distorts the system of the law, making it ineffective, unfair and arbitrary. When moral authority is violated, the instrument of law remains nothing but a tool for legalizing the abuse or misuse of power. If the significance of law is destroyed, by defiling the moral authority of the society, then the decision of the ruler is imposed, as if it were the law. Consequently, the public revenue is robbed, thus affecting the development endeavors rampantly. The rising corruption generates benefits to the political and economic elites of the society, thus severely pushing the marginalized or poor community into the worst condition of life—deprivation and social exclusion. The concept of limited government is set aside in such a situation.

The rule of law in such a state is vital as an instrument to protect the system of limited government and public authority—the moral injunction or public opinion. Corruption can be checked only by the system of law and the corrupt officials can be brought to the notice of justice only by consolidated public opinion. Limiting the government by increased participation of people and making the State institutions accountable to their responsibility is the very first step to check or control corruption. Experiences show, however, that prevention and control of corruption in a society with liberal political structure is almost impossible because the tendency of liberalism is marked by avoiding the role of people in the political process and decision making. State power, for instance, in America and other liberal democratic countries in Europe has been exclusively enjoyed by a smaller segment of the society.²⁷ The social class system is a major determinant of the participation of the people in the political process. Studies have found that people belonging to higher or elite classes participate more in politics.²⁸ But in liberal capitalist societies, the social classes are meticulously preserved, because the economy of the State is fully controlled by the capitalist class. Corruption is deceitfully legitimized in such societies. The political democracy without social equality is a place where corruption breeds unchecked. American people are victims of this situation. Corruption at the policy-making level is the common form of corruption in such societies.

Dispersal of the State power by massive devolution at the local level both horizontally and vertically as well as by introducing a system of collective responsibility is seen as a more reliable

²⁷ Jerrold R. Rusk, 'Political Participation in America,' *The American Political Science Review*, volume 70:2, 1976, pp. 583-591.

²⁸ Sidney Verba and Norman H. Nie, *Participation in America: Political Democracy and Social Equality*, Harper and Row, New York, 1972.

check-in corruption. China is an example.²⁹ Three important characteristics in China suggest a contrast to American society in a matter of corruption control. *First*, the distribution of power in China is massively distributed among various committees in the structure of the pyramid and the central committee being the center of collective responsibility. Each local committee is responsible for decisions and mistakes and wrongs are reprimanded. The participation of people in the political process is thus wider nationwide. Local governments are horizontally responsible to the local communist party committee and vertically to the upper-level government. *Second*, the concentration of wealth with some people and some companies in China is effectively checked by giving a dominant role to the public economy. The State power is thus not possible to be captured by a few capitalist corporations. Third, the social morality against corruption is high, in view of culture emphasizing propriety and harmony.

It is, however, always difficult to put corruption in the precise definition. There has been a tendency of taking corruption as a means of gaining private and illegal advantages by public officials who have a responsibility to implement public policy and services to people. The illegal private gain by the public officials is committed at the expense of both the common good and of those who work sincerely for the public good. It is a crime against both the common people as well as honest employees. An act of corruption is a product of the unethical practices within governance. Corruption impacts everyone, even the person who is involved in corruption. It creates a system whereby money and politics or public authority come into the nexus and the nexus creates illegal and immoral access to public services.

Kofi Annan, the former Secretary General of the United Nations, has described corruption as “insidious plague that has a wide range of corrosive effects on societies.”³⁰ He added, “It diverts funds intended for development, undermines the ability of governments to provide basic services, feeds inequalities and injustice, and discourages foreign aid investment.”³¹ This definition relates corruption as an evil to the development of society. When a State is controlled by people belonging to the so-called higher social class, the plight of the working class through policy corruption, embezzlement of the public fund and pillaging of the national assets is seen as normal. It leads us to infer that the root of the corruption lies in the political system itself. The institutionalized corruption in countries like India, Nepal, Bangladesh, and Pakistan in South Asia received practices in inheritance from the liberalism transplanted by British colonialism. Migdal says, “Colonialism created state structures that were simultaneously strong in terms of commanding the obedience of their subjects yet weakly embedded in society.”³² In Mann’s terms, colonial states possessed *despotic* power while lacking *infrastructural* power.³³ Reno, Jalal and Callaghy argue, the fracturing or decentralization of colonial state power that came with decolonization meant local elites were able to capture control of colonial institutions and exercise discretion in their use. In other words, with independence, state structures distinctive to imperial rule were captured by interests and redeployed towards narrow ethnic, institutional or personal ends.³⁴ The

²⁹ Information Office of the State Council of the People's Republic of China December 2010, Beijing, ‘White Paper on China's Efforts to Combat Corruption and Build a Clean Government’, *United Nations*, 2010, available at <http://unpan1.un.org/intradoc/groups/public/documents/apcity/unpan043696.pdf>, accessed on 4 August 2018.

³⁰ *United Nations Convention Against Corruption*, 31 October 2003, UNGA A/Res/58/422.

³¹ *Ibid.*

³² ‘Colonial Rule, Decolonization, and Corruption in India’, *Commonwealth & Comparative Politics*, Vol.53, No. 4, 2015 available at <http://dx.doi.org/10.1080/14662043.2015.1089002>, accessed on 5 August 2018.

³³ *Ibid.*

³⁴ *Ibid.*

massive corruption in South Asia is obviously *an offspring of the British liberalism* that came with colonialism.

The rule of law, as a means of limited government characterized by a nature of development custodian, is the cornerstone of a responsible government because it renders the government to function for the people's welfare and progress without taking resort to coercion or arbitrary power. Of course, the government exercises legitimate coercion in a reasonable manner, as means of checks and balances, so that development opportunities of people are not defiled, and the practices of corruption are prevented.

Impunity to abuse of power is the main reason behind flourishing corruption. The abuse of power, on the other hand, emerges when the powers of the State organs are politically corrupted and unmonitored. In liberalism, the parliament is tirelessly fluttered as an institution of people and it is sacrosanct. However, we have seen that, in so-called liberal parliaments across the world, people who are enjoying power are elites, political power-mongers, criminals and psychopaths. In America, for instance, the Congress passes the law influenced by the lobby of interest groups—it does not make law for the benefit of the people.³⁵ In India, around 40 members have a criminal record. In Nepal, the Parliamentarians are engaged in selling licenses and contracts. Subhash Wostey, a columnist in a daily newspaper, writes, “Politicians in power and their coterie are among the leading perpetrators of corrupt practices. Genuine and formidable political will, unwavering social resolve and an autonomous entity operating under efficient legal frameworks are key to fighting corruption. Politically manipulated state organs with limited jurisdiction and lack of genuine political resolve at the highest level seem to partly explain Nepal's chronic suffering.”³⁶

Absolute power is the main source of corruption. How is it possible to have absolute power in liberal democratic states? The answer is adequately given above. Absolutism in such countries is implicit but effective as the smaller group of elites or political coterie captures powers in the name of democracy. The separation of power remains largely a showy-teeth. The concept of rule of law requires institutions of State to function under the authority of law, and the acts of corruption are made punishable. This doctrine is, however, diminished by means of policy corruption and white-collar legislation that implicitly enable the political coterie to legalize their improper decisions and acts. The main thrust of rule of law in this sense is to prevent impunity—any public official is under the law and their abuse of power and corrupt acts are subject to criminal liability. The Chinese, Malaysian and Singaporean systems have shown courage to the practice of impunity effectively. Addressing the problem of impunity in corruption is thus a major goal of the rule of law.³⁷

Publicized and stable laws are equally important elements of rule of law. For an accountable government, having laws made and published, as well as publicized, is a precondition. This element makes the system of governance transparent, and, thus, transparency is a key element of a state that believes in rule of law.

³⁵ Richard A. Smith, ‘Interest Group Influence in the U. S. Congress’, *Legislative Studies Quarterly*, volume 20:1, 1995, pp. 89-139.

³⁶ Subhash Wostey, ‘Catch the Corrupt, Nepal's New Leaders Have a Duty and Opportunity To Redefine And Wipe Out Corruption’, *The Kathmandu Post*, 8 April 2018, available at <http://kathmandupost.ekantipur.com/news/2018-04-08/catch-the-corrupt.html>, accessed on 5 April 2018.

³⁷ Robert Klitgaard, *Controlling Corruption*, University of California Press, Berkeley CA, 1988.

C. Law and Order or State of Security

Law and order and state of security are other components of rule of law. The protection of the life of people from crime, anarchy and natural calamities is a prime responsibility of the government. The government has been put into place by people to provide security in their lives. As a matter of fact, any government that fails to ensure better law and order and dependable security of people's life is condemned as a violator of the principle of rule of law. A government that fails to provide law and order in the society or fails to provide the security of people's life is either marred by corruption or is despotic or irresponsible. In this sense, the rule of law is a concept of good governance. The concept of good governance recognizes or emphasizes that the nation, institution or enterprise must operate for the benefit of people, with an obligation of accountability.³⁸

The concept of good governance believes that leaders are entrusted with the authority to deliver benefits to their citizens. In short, governments must be *epitomized by predictable, open and enlightened policy-making*; a bureaucracy imbued with a professional ethos; an executive arm of government must be accountable for its actions, and a strong civil society participating in public affairs should flourish, and all must behaving under the rule of law."³⁹ In this sense, the United Nations defines the rule of law as a principle of governance in which all persons, institutions, and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards.⁴⁰ At a bare minimum level, good governance with accountability and transparency is a foundation for peace and stability, without which greater aims of all of the societies cannot be achieved.

D. Protection of Fundamental Rights

Human individuals have two basic attributes of a dignified life. First, every individual must have a comfortable and well-improved vector of life, economically. This attribute requires that basic human needs are addressed adequately, and everyone is given all opportunities to maximize their economic well-being. Second, every individual's protected sphere (consolidated state of liberties) is fully safeguarded by law. Attainment of these two attributes is defined as a state of protection of fundamental rights or human rights of individuals. The goal of governance is to ensure the happiness of people, which is generally measured by indicators of the level of protection of fundamental rights of citizens. Fundamental rights and rule of law reinforce each other. As noted by the UN Secretary-General, in 2004, there is no rule of law within societies if human rights are not protected and *vice-a-versa*; human rights cannot be protected in societies without a strong rule of law. The rule of law is the implementation mechanism for human rights, turning them from a principle into a reality.⁴¹

³⁸ 'Good Governance & the Rule of Law', *United Nations Council for International Business*, 2015 available at [http://www.uscib.org/docs/Governance% 20and%20the%20Rule%20of%20Law.pdf](http://www.uscib.org/docs/Governance%20and%20the%20Rule%20of%20Law.pdf), accessed on 4 August 2018.

³⁹ 'Governance: The World Bank's Experience', *World Bank*, 1994, p. 1.

⁴⁰ Report of the Secretary-General, 'The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies', *United Nations*, 2004.

⁴¹ 'United Nations and Rule of Law: Report on Rule of Law and Human Rights', *United Nations*, UN Doc. A/59/2005.

E. Open government

The concept of open government connotes a transparent system of governance. It implies basically three cardinal attributes that makes a government an open government. First, the government has its basic structure established based on the doctrine of separation of power and check and balance. Second, the law-making process of the State is defined and transparent. Third, the executive government is accountable to the Constitution and laws made by the legislative body. The existence of these three attributes, *inter alia*, in a state connotes that the State is run in accordance with rule of law.

F. Access to Justice

The concept of rule of law requires that every individual has access to the administration of justice which is essentially fair and impartial. The fairness and impartiality of justice requires the existence of a functional system of the judiciary with defined procedures of trial or hearing. It also requires that persons are guaranteed with the representation of legal professionals in all stages of trial or hearing. Other rights of persons included within this scheme are that (a) the trial or hearing is conducted by competent judicial officials in public; (b) the use of law retrospectively is declined; (c) no person is tried in a case more than once, and (d) no person is punished for an act which is not a crime under law at the time of commission. The rule of law, in this sense, requires unreserved operation of the principle of equality before the law, which, in turn, requires above all that a person cannot be punished without having given an opportunity of a fair trial in accordance with law.

In other words, a legal system under the rule of law has defined processes which give people, regardless of their socio-economic status, equal access to the rights they are entitled to under the law. These rights include: (a) equality before the law; in the criminal trial, the process should be the same for all, regardless of their status in society or the crime they are accused with;⁴² (b) that an individual, regardless of their status in society, can challenge a law which is unconstitutional in the highest court of the State; and (c) includes being able to challenge the decision of a government agency on equal footing. For equality before the law to exist, the government must follow certain rules when dealing with an individual because the resources of the government far outstrip those of most, if not all, individuals.⁴³ Access to justice, *inter alia*, includes right to representation by legal counsel and free legal aid if the person is unable to hire a legal counsel. Speedy trial and safeguard of other procedural rights of accused constitute equally important constituents of rule of law. No state can flout the principle of *due process of law*, which means that the judicial proceedings must be defined by categorical procedures established by the law. In addition, the publication of the decision of the court also comprises the right to access to justice.

The aforementioned normative standards or guidelines of the rule of law are coined by the World Justice Project, which encourages advocates and followers of the rule of law to depart from conventional and politically embedded concept to the concept of collectively consisting of above mentioned normative guidelines, which contribute or assist to establish the rule of law as a cardinal principle of the welfare and human rights-based system of governance. Having

⁴² Rule of Law Institute of Australia, 'Human Rights and Rule of Law', *Rule of Law*, available at <https://www.ruleoflaw.org.au/education/case-studies/human-rights/>, accessed on 4 August 2018.

⁴³ Ibid.

these indicators or normative guidelines present in the system of governance makes it sure that the State institutions and officials carry out their functions with full respect to and compliance with basic human rights, and are fully accountable to people. The compliance of these guidelines provides the State a solid ground to justify that it has a culture of respecting the rule of law.⁴⁴ Notwithstanding these cardinal indicators laid down, the Justice Project has failed to see the corruptible inside of the so-called liberal democracy. It fails how the elite class of the society is able to capture the State machinery for capitalist gain at the cost of the lives of the majority of people. The abundance of examples regarding income disparity gap in American society and other countries has been given in the previous chapters.

The so-called liberal democracy is not, by any means and sense, a cardinal requirement for, or the foundation of, the rule of law. The rule of law is an instrument of people to make the government work for their benefits, which specifically includes two components. They are the security of life and the dignity of life. Security involves both the physical and welfare safety of life. The dignity of life includes an adequate standard of living and happiness. Looking at these components, the successes achieved by China, Malaysia, South Korea, Cuba, and Singapore are exemplary ones. As a matter of fact, these countries can have a distinction of respecting the rule of law in practice. On the contrary, the situation in America, U.K., and other democratic countries, including India, is grim.

The situation of other South Asian as well as Central Asian countries is still in a big deficit of development level. Unemployment of youth is phenomenal, thus leading a big part of the valid workforce to migrate for work, thus causing serious hurdles for development in the countries of their origin. The problem of corruption is massive, too. The consumption capacity is too low because of low spending capacity. Lack of nutritious food-intake is causing serious health hazards in the bigger population. The economic development at rapid rate is thus an inevitable precondition for addressing these problems in developing countries, specifically in South Asia. Unfortunately, 43 percent of the world population lives in South Asia. The *Belt and Road Initiative*, at the juncture, shows a bigger relevance in order to promote the situation of rule of law in South Asia. Having said that, it is necessary to realize that economic and social development has an unavoidable interface with the rule of law—in this context, no one can deny that the BRI can have an immense impact to stimulate the process of transforming the system of governance in participating nations.

The relevance of the *Belt and Road Initiative* in reforming the governance system in States can be encapsulated along with the following justifications or reasoning:

- The BRI does stimulate economic growth patterns through achieving enhanced infrastructure networks in relation to transportation, markets and production systems. The steady economic growth is important to uplift people from deprivation and social exclusion. The success in uplifting people from the poverty trap will foster an environment conducive for increased capacity promoting higher productivity. This will, in turn, ensure added security and dignity of people.
- Most developing countries are lagging in economic development for lack of investment ability required for infrastructure building, modernization of production systems and efficient linking with markets. The BRI provides an opportunity for investment in

⁴⁴ Juan Carolos Protero and Alexander Ponce Juan, 'World Justice Project Rule of Law Index', *World Justice Project*, 2010.

countries having resource deficits or constraints for development. The BRI's relevance to development from this perspective is huge.

- Most importantly, BRI urges for integration of the financial policies and rationalization of laws among participating countries. Cooperation among the promotion of the rule of law is thus, big. The inter-country rationalization of the laws and policies can significantly contribute to reform and standardize the system of laws, and make them more productively functional. One important possibility of the BRI in the field of law is its role to increasingly connect laws with development necessities, thus transforming laws from abstract legal precepts to pragmatic instruments of protecting peoples' rights to development.
- The BRI's emphasis on people to people communication is big. The increased people to people communication is expected to bring interactions of multiple jurisdictions of the law into practice, thus providing a possibility of learning from one another. The people to people contacts may immensely contribute to reform the legal and judicial system of the partner countries.

The BRI approach departs from the World Bank approach of transplanting laws and policies from developed Western countries into developing countries. Non-interference in legal and judicial systems from each other is one of the features of the BRI, which, in fact, provides a tremendous impetus to learn from each other voluntarily. The BRI countries, therefore, have a better prospect of adopting above mentioned *rule of law guidelines* as the BRI policies on the rule of law. Of these guidelines, the principle of the limited government is by far the most important indicator, because it offers a base for the implementation the other indicators; and, considering the importance of the limited government, the rule of law constitutes the most important milestone for people's welfare and happiness driven political and legal culture in the society. The following statement of Arthur Chaskalson, the former president of the Constitutional Court of South Africa, is worthy to mention at this juncture:

“To be truly effective the rule of law needs to form part of the legal and political culture of the country. I cannot stress enough the importance of such a culture, which, if respected, is the greatest protection against injustice. Hence, the importance of mainstreaming as emphasized by the world justice forum. Ultimately, the struggle for a better virtue of the rule of law is that it provides space for such contestation to take place.”⁴⁵

The principle of the limited government connotes something different than we have so far been habitual to understand. Conventionally, the concept implies a political culture of elected government within a specified interval of time and participation of people to exercise their right to franchise. Progressively speaking, however, the principle of the limited government, as has been widely discussed above, means a system of government bearing no unlimited power of decision in the State affairs. In contrast, the system of the government is accountable to wishes, aspiration, and convenience of people in the sense that the economic and social well-being of the people is the primary goal of the government institutions.

To reiterate, the government does bear no special goals and wishes other than the collective goals or wishes of the people. The principle of the limited government thus implies categorically as

⁴⁵ Remarks at the World Justice Forum I, *World Justice Project*, Vienna, July 2008.

follows. (a) The State institutions are fully obligated to work out and implement the framework of the development projects that are necessary to build the capacity of individuals so that they can exercise their fundamental rights guaranteed by the Constitution. From this vantage point, the principle of limited government is an instrument as well as process and end to empower people to exercise their fundamental rights, which, in turn, renders the State institutions accountable to the people. This notion, however, has been facing several challenges in many countries. In Nepal, for instance, the Supreme Court of Nepal in *Hari Prasad Nepal vs. the Government of Nepal* held that the Prime Minister of Nepal can exercise their prerogative to dissolve the Parliament without giving any political justification and, hence, the Supreme Court cannot test the constitutionality of such act of Prime Minister by entering into a judicial scrutiny of the issue of political legitimacy of the act.⁴⁶ The interpretation of the Court introduced a principle that the Prime Minister is above the will of people. The Supreme Court gave precedence to the prerogative of the Prime Minister to dissolve the Parliament and ignored the fundamental rule of the liberal constitutionalism that holds a principle that parliament must be allowed, as a general rule, working to the fullest of its tenure.⁴⁷ (b) The principle of limited government is supposed to condemn arbitrariness in decision making by the institutions of the State. The institutions of the State and its officials are accountable to the mistakes and wrongs incurred by their decisions against laws. Through the ban or restriction on arbitrariness on decision making, the rule of law empowers law-abiding citizens to raise their voices against arbitrary decision of, and corruption committed by, the State institutions or officials. With help of this mechanism, the principle of limited government fosters a culture of participation of law-abiding citizens in matters of preventing impunity and corruption. (c) The meaning of the limited government has obtained more pragmatic appreciation in recent years. It is viewed that laws that are accepted by the general population through their free choice or voluntary appreciation may have enhanced legitimacy and effectiveness in application. This principle implies that the legitimacy of laws is not established through the power of the State. It is an emerging thought that the system of laws functions not as an instrument of containing people from exercising their choices and preferences, but it works as an instrument of people to render the State behave in a proper way in its dealing with them. (d) The principle of limited government has an inseparable linkage with the economic and social development of the general population. The general people's rights to have an economically better vector of life and secured sphere of liberties are two aspects. In this sense, the principle of limited government has two facets. Economically, the government has accountability to foster a better standard of people's life.

The government of the People's Republic of China's efforts to rescue over 500 million people from poverty over the last 30 years is an example in this regard. Politically, the government is obliged to secure full respect to the protected sphere of individuals' freedom and liberties. Both these aspects are administered by the help of sound laws enacted by people through their representatives or deputies. The Republic of Nepal's efforts to establish peace through making a Constitution by a popularly elected Constituent Assembly is the best example. These aspects of an individual's development involve inalienable rights, which are defined as human rights. The limited government, as an instrument of socio-economic and political development, is an

⁴⁶ Yubaraj Sangroula, 'No Extension or Non-amendment? The Supreme Court's Originalist Approach to Interpreting the Tenure of the Constituent Assembly' in Buddhi Karki & Rohan Edrisinha (eds.) *Participatory Constitution Making in Nepal: Issues of Process and Substance*, United Nations Development Programme (UNDP), 2014, Kathmandu, pp.89-107.

⁴⁷ Ibid.

instrument of the rule of law to protect and preserve a condition of human rights.

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

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

A State institution is administered by a human being, who is generally wise and good. As a matter of fact, an institution becomes arbitrary by actions of individuals administering the institution but not by the institution's structure. The Oriental society, therefore, links ethics and morality as essential components for the effectiveness of the rule of law. The Western society categorically rules-out this principle. The principle of limited government is, therefore, a principle of law and its functioning in close harmony with public morality. However, the principle of law is not attainable without sound law, and the concept of sound law automatically invites roles of ethics and morality. The concept of rule of law is thus not unattached with the principle of ethics and morality.

V. Two Approaches on the Rule of Law

The discussion above does reflect on the existence of two approaches on the rule of law. The one can be called the *Thin Definition Approach* and another as the *Thick Definition Approach*. According to the first, the rule of law can be defined as a body of formal procedural rules that establishes a uniformity and equality in functions of the government. The separation of powers among the vital organs of the State is the shape of the rule of law under this approach. This approach believes that the prospect of the application of rule of law is grim or un-existing if the given State fails to follow the principle of the separation of power. According to the second approach, however, the rule of law can be defined as the concept or principle of a transparent, accountable and responsive governance system—a thicker definition of the rule of law.

The transparency, accountability, and responsiveness of the governance are basically determined by the success of the government agencies to secure adequate development in the socio-economic vector of people's life, on the one hand, and the success of guaranteeing and protecting the basic freedoms and liberties of the people, on the other. The principle of rule of law, in this sense, is an instrument of socio-economic and political wellbeing and development of individual citizens.

In the generic sense, the rule of law is a body of legal principles that advocate that the laws

of the State should govern the nation, as opposed to the rule of individuals. As such, the rule of law principle rejects a classical cliché of the Western legal-centralist jurists that the rulers or government officials are exempted from obligations to abide by laws.⁴⁸ The rule of law concept also rejects a political theory that law is an instrument of state power to coerce people to abide by its arbitrary laws and decisions. Albert V. Dicey is the main proponent of this theory.⁴⁹ For him, the rule of law means three main ideas. First, it is a state of absence of arbitrary power or the state of the supremacy of law. According to him, the rule of law means the absolute supremacy of law implying that no man is punishable or can lawfully be made to suffer in body or goods before the courts of the land except for a distinct breach of law established in the ordinary legal manner.⁵⁰ Second, it is a state of equality before the law. In this principle, it means the equality of law or equal subjection of all classes of people to the ordinary law of the land, which is administered by the ordinary law courts.⁵¹ Third, it is a principle that the constitution is the result of the ordinary law of the land. He argues that in many countries, rights such as the right to personal liberty, freedom, arrest etc. are provided by the written Constitution of a Country.⁵²

But in England, these rights are a result of the judicial decisions or the result of the conflict between the parties. For them, the constitution is not the source but the consequence of the rights of the individuals. Dicey's ideas are largely obsolete in the present time. The modern concept of the rule of law is wider and pragmatic than what Dicey propounded focusing on the British system. The Delhi Declaration, 1959, which was later confirmed at Logos in 1961, has formulated some additional principles of the rule of law. The declaration emphasized the rule of law as an instrument of creating congenial conditions for human dignity. It holds that the dignity of a human being requires not only the recognition of certain civil or political rights but also social, economic, educational and cultural rights which are essential to the full development of their personality.⁵³

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

⁴⁸ This theory was immensely advocated by British jurist John Austin. For him, the sovereign, the monarch or the body of the State that was authorised to exercise the sovereign power of the State, was immune from the laws it made. For him, the law was merely an instrument of the rulers to subject the general population to its political will. This theory was drawn from the early Roman Byzantine rulers and the theories of Thomas Hobbes and many other Western Philosophers. For more information in this regard See, Robert Higgs, 'Fear: The Foundation of Every Government's Power, Independent Institute', *Independent*, available at <http://www.independent.org/publications/article.asp?id=1510>, accessed on 4 August 2018; Robert Higgs, *Crisis and Leviathan: Critical Episodes in the Growth of American Government*, Oxford University Press, New York, 1987.

⁴⁹ A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, McMillan and Co. Indianapolis: Liberty Classics, London, 1982 (1885), pp. 27-32, 110.

⁵⁰ Ibid.

⁵¹ Ibid.

⁵² Ibid.

⁵³ 'Origin and Concept of Rule of Law', *Law Teacher*, available at <https://www.lawteacher.net/free-law-essays/administrative-law/origin-and-concept-of-rule-of-law-administrative-law-essay.php#ftn13>, accessed on 4 August 2018.

As it follows from the discussion, the rule of law can be considered as having four universal principles. They are: (a) Constraints on Government Powers- lacking absolute power is a factor to promote rule of law; (b) Absence of corruption—absence of corruption promotes prospect of equality and fairness in accessibility to resources and ethically moral-cultural structure of the society; (c) Open Government—open government enables transparency of government functions, and (d) Protection of fundamental rights—protection of fundamental rights restrains government to encroach upon liberties of individuals.⁵⁴

VI. Democracy and Rule of Law: Not Necessarily in Lockstep

The rule of law and democracy (Western liberalism) are portrayed as mutually reinforcing concepts and mechanisms. However, the modern science of both politics and economy suggest that the rule of law need not necessarily march as a precondition in lockstep with the so-called democracy (liberalism) as it has been argued by the western political philosophy. The so-called liberal rights that include the right to exercise a franchise to elect the government in the span of a certain interval has preferably and emphatically been defined as a democracy by the Western political philosophy and argued that the liberal democracy is a key postulate for the socio-economic development of society.⁵⁵ Initially argued by John Rawls, this theory has been proved wrong and obsolete by our times, particularly in the context of trends manifested by the models of economic development in Asia and Middle-East. Many countries in Asia and the Middle East have declined to adopt the liberal democracy as their political system but many of them have been able to score highest in ranking in terms of rule of law and economic development.⁵⁶

These nations have achieved a functional legal system and have been able to maintain fairness and impartiality in the system of administration of justice. Singapore's legal system, for instance, is regularly ranked as one of the best practices in the world. It was in the top 99th percentile on the World Bank rule of law index in 1996, and in the 93rd percentile in 2002.⁵⁷ The US ranked in the 91st and 92nd percentile in 1996 and 2002 respectively.⁵⁸ Some academicians have argued that Singapore, and even more clearly Hong Kong, show that liberal democracy is not a precondition for a rational or functionally competent legal system.⁵⁹ The primary role of law in Singapore is said to strengthen the state through ensuring stability and to facilitate economic growth. The welfare and facilities of the people are the primary concern of the law as well as the government. Undoubtedly, many decisions are made by the State and political actors, primarily the cabinet headed by the prime minister, and the so-called check and balance suggested by the doctrine of Separation of Power are unconcerned. The civil society is limited and generally characterized by a corporatist relationship between the state business, labor unions, and society. The administrative law unequivocally emphasizes the element of government efficiency rather than on the discourse

⁵⁴ Brain.Z. Tamanaha, 'History and Elements of Rule of law', *Singapore Journal of Legal Studies*, 2012, pp. 232-247.

⁵⁵ John Rawls, 'Theories of Justice and Fairness', *Stanford Encyclopaedia of Philosophy* available at <https://plato.stanford.edu/entries/rawls/>, accessed on 4 August 2018.

⁵⁶ Ibid.

⁵⁷ Ibid.

⁵⁸ Ibid.

⁵⁹ Randall Peeren Boom, 'Rule of Law and Democracy: Lesson for China from Asian Experiences', *Social Science Research Network*, available at <http://ssrn.com/abstract=1300882>, accessed on 4 August 2018.

of individual rights.⁶⁰ While individual rights are constitutionally guaranteed,⁶¹ they are not interpreted along liberal lines. The example of Singapore, thus, shows that the so-called liberal democracy and rule of law are not lockstep. It can very candidly be argued that no political system or ideology constitutes a precondition for the application and growth of the rule of law. What is essential for application and growth of the rule of law is the existence of a properly and adequately structured legal system, and such a legal system is possible to develop having a precise concept of law.

Hong Kong, an integral part of PRC with a distinct political and legal system, is another example. The system of law it has been practicing is widely considered to be an example of the rule of law. Even after the handover of it to PRC, the legal system continues to score high on the World Bank's rule of law index,⁶² though the political system it works under is not a system that fully matches the attributes of so-called liberal democracy.

Among Arab countries, Oman, Qatar, Bahrain, Kuwait, and the United Arab Emirates are in the top ranking in the World Bank rule of law index but have a zero ranking on polity—i.e. democratic system. Guatemala, Kenya and Papua New Guinea, for example, all score highly on democracy but poorly on rule of law ranking (below the 25th percentile on World Bank Rule of Law Index). Some other countries including the Philippines received as high as 8-10 percentile in democratic polity but at below the 15th percentile in rule of law. These examples also manifest that liberal democracy is not a precondition for the development or consolidation of the rule of law. PRC does not have a system of a multi-party system with regular elections for framing the Parliament, but its economic achievements and efforts to prevent corruption are globally acclaimed.⁶³

VII. Economic Development, Democracy, and Rule of Law

The state of poverty, as opposed to the definition of World Bank (WB) and International Monetary Fund (IMF), is an outcome of the deprivation of rights to economic development, social exclusion and lack of access to development opportunities and resources. Deficit on these three indicators or elements pushes individuals into a trap of socio-economic subordination, which implies a state of diminished or deprived vector of life. This argument helps us to reasonably conclude that poverty results when a person has been prevented from enhancing their capacity to compete equally in the market. The state of poverty, therefore, is a violation of the principle of equality.⁶⁴

The state of poverty, as an outcome of subordination, establishes the absence of rule of law or human rights. Several empirical studies have shown that democracy, rule of law and GDP of

⁶⁰ Melanie Chew, 'Human Rights in Singapore: Perceptions and Problems,' *Asian Survey*, volume 34:1, 1994, pp. 933-948.

⁶¹ Eugene K. B. Tan, 'Law and Values in Governance: The Singapore Way' *Hong Kong Law Journal*, volume 30:1, 2000, pp. 91-119.

⁶² 'World Justice Project Rule of Law Index 2017–2018', *World Justice Project*, available at https://worldjusticeproject.org/sites/default/files/documents/WJP-ROLI-2018-June-Online-Edition_0.pdf, accessed on 5 August 2018.

⁶³ Ibid.

⁶⁴ Thomas Pogge, 'Severe Poverty as Human Rights Violation', in *Freedom from Poverty as a Human Right Who Owes What to the Very Poor?*, Oxford University Press, 2007, pp. 11-15.

people interact and contribute to strengthening the operation of each other. While democracy may not necessarily ensure rise or growth of economic development, the economic development, on the other hand, does significantly contribute to the increased participation of people in the State's affairs and politics. The increased economic development of a person enhances the prospect of an individual's participation in politics with added strength or quality.⁶⁵ The increased popularity and commitment of the People's Republic of China in recent years justifies the vitality of this theory.⁶⁶

The role of economic development in fostering the rule of law and human rights culture is seen as crucial. The transition of South Korea, Malaysia, Thailand, and some other countries as well show that the transition to the consolidation of rule of law came only after economic growth reached a relatively high level. Efforts of China in the last some years to protect and promote human rights of common people through enhancing their productivity and capacity to compete in the market is marked by the similar tendency. Rescue of millions of people from absolute poverty over the last few years is a categorical example. In China, the number of poor people between 1978 and 2015 fell from 250 million to 55.75 million.⁶⁷ In contrast, some countries that attempted to democratize at lower levels without adequate economic development in the past failed to achieve the same, many times reverting to authoritarianism.

Indonesia is a typical example. India practiced democracy since 1947 but failed to usher into a well-off society economically; and democracy turned largely to be a mockery, at least for the vast number of common people.⁶⁸ Thailand went through numerous cycles of democratic elections followed by military-led coups—there were some Seventeen coups till 2005.⁶⁹ The last coup swept away both Thaksin and the much heralded 1992 constitution. South Korea, after a successful election in the 1960s, returned to authoritarian rule. The Philippines' experiment is not successful either. In South Asia, General Zia reclaimed power in Bangladesh in 1975 when the democratically elected government was viewed as unable to address the promises of rapid development. General Zia was eliminated by General Ershad in 1982. Nepal restored to Multiparty democracy in 1990 but soon after it fell in the trap of bloody conflict, thus giving rise to the absolute monarchy in 2004 by which the multiparty democracy was suspended, and the 1990 Constitution was scrapped. The Constituent Assembly election was held in 2008 without succeeding in making the constitution and leading to the second election of the Constituent Assembly in 2013. The new constitution is now in enforcement but without stability in political

⁶⁵ Rigobon and Rodrick found that while democracy and rule of law are both related to higher GDP levels the impact of rule of law is much stronger. See, C. Roberto Rigobon and Dani Rodrick, 'Rule of Law, Democracy, Openness and Income: Estimating the Interrelationship', *Economics of Transition*, volume 13:533, 2005.

⁶⁶ See Speech of Foreign Minister Wang Yi. In his opening speech to the delegates of the South-South Human Rights Conference, held in Beijing on 7 and 8 December 2017, he said. "*China's experience shows that human rights can be protected in more than one way. Countries can find their own models of human rights protection in light of their national conditions and people's needs. The key factor contributing to China's remarkable achievements in its human rights endeavors is its firm commitment to a human rights development path with Chinese characteristics.*" This statement implies that the characteristic of economic development is indispensably connected with figuring out the way for development of human rights. See, 'South-South Human Rights Forum', *China.Org*, available at http://p.china.org.cn/node_8001790.htm, accessed on 4 August 2018.

⁶⁷ Huang Chengwei, 'Ending poverty in China: Lessons for other countries and the challenges still ahead', *World Bank*, available at <https://blogs.worldbank.org/eastasiapacific/ending-poverty-in-china-lessons-for-other-countries-and-challenges-still-ahead>, accessed on 4 August 2018.

⁶⁸ Milan Vaishnav, *The Merits of Money and Muscle: Essays on Criminality, Elections and Democracy in India*, Degree of Doctor of Philosophy, Columbia University, 2012.

⁶⁹ Ukrist Pathmanand, 'A Different Coup d'état?', *Journal of Contemporary Asia*, volume 38:1, 2002, pp. 124-142.

power. These examples show that economic development is a precondition for any political system to work with stability and promote a culture of rule of law.

The situation in Nepal along with other South Asian countries have adequately shown that the so-called democratic elections are not the foundation for the political stability in a situation of low levels of GDP and the weak governance of institutions. The emphasis only on so-called democratic political stability only contributes to limp along with low levels of economic development, pressing social order cum problems, and massive discontent over the political system. This is exactly what Nepal is experiencing right now, even after having a government support of two/third majority in Parliament. This problem is seen as serious in the Philippines, Indonesia, India, Cambodia, Bangladesh and Pakistan, besides Nepal. As Robert Pinkney points out, what is remarkable is that almost all third world countries have had at least nominally pluralist political systems at some time in their history, while the majority did not (or could not) build on these to establish durable forms of democracy.⁷⁰

Elections that are considered important elements of sustaining democracy and resolving the conflict, but they have largely failed to serve the same objective. In the Philippines, for instance, Joseph Estradewas impeached though he had come to power with popular votes. He was allegedly linked to illegal payoffs from gambling lords. In South Korea, president Rohwas impeached on a charge of illegal campaigning and corruption. He was later reinstated but his attempt to replace several cabinet members without following constitutional procedures gave rise to complaints of heavy-handedness. The presidential election in Indonesia featured two military men in 2004. In India, the voter threw out the BJP, despite the growth rate of 8 percent opting instead for the Congress party led by Sonia Gandhi, the widow of the former PM Rajiv Gandhi. The family patronage is a feature of politics in India. The elections are often marred by the deaths of people in stampedes and bomb blasts.⁷¹

In Nepal, the problems go beyond the messy elections. In 2001 the King, Queen and the entire family was massacred, allegedly in a designed conspiracy hatched under Indo-West game plan to contain China and provoke unrest in China's Tibet. In October 2002, the new king dismissed the Prime Minister and his cabinet on the ground of incompetence, after he dissolved the parliament and was unable to hold an election. Citing the dissatisfaction with the governance and lack of progress in addressing communist insurgency, the King dissolved the government and assumed power in February 2005. Nonetheless, following the massive demonstration and popular movement, the dissolved parliament was reconvened in 2007. Nepal has now its new Constitution and several elections, but the stability is still unachieved and economic development is severely affected.

Liberal democracy's proponents often argue, in the face of poor economic performance, massive demonstrations and calls for change and elections marred by violence and vote-buying, that democracy is inevitable for economic development and the rule of law.⁷² They often argue that democracy has gone messy in the economically poor countries, but they have not yet tried to argue for another election as a solution to messy democracy. Worst of all comes from the World

⁷⁰ Robert Pinkney, *Democracy in the Third World*, Lynne Rienner Publishers, Boulder Co., 2nd edition, 2004, p. 65.

⁷¹ 'Asia: The Greatest Show on Earth: India's Election', *Economist*, available at <https://www.economist.com/asia/2004/04/15/the-greatest-show-on-earth>, accessed on 4 August 2018.

⁷² Anthony Lawrence, 'Nobody Said Democracy is a Tea Party', *South China Morning Post*, available at <https://www.scmp.com/article/4249/anthony-lawrence>, accessed on 4 August 2018.

Bank and International Monetary Fund when they prescribe so-called liberal democracy and human rights as preconditions for financial support or investment in these countries. Joseph Stiglitz, a Nobel laureate, has viewed that globalization has not been able to push the economic development of the developing countries. Liberalization policies have been implemented too fast in the wrong order and often using inadequate—or plainly wrong—economic analysis.⁷³ As a consequence, he argues, we now face terrible results, including increases in destitution and social conflict, and generalized frustration. He says the culprits are the IMF and its *market fundamentalists*,⁷⁴ the *Washington Consensus*, and *the US Treasury*. Human rights and rule of law concepts have been used as political instruments of Western powers to meddle in affairs of developing countries and that constitute one of the sources of continual political instability in many developing countries. Based on the preceding deliberations, some important conclusions can be drawn up.

First, attempts to democratize countries with values and principles of the Western liberal democracy at low levels of GDP, both in the past and more recently, are flatly unyielding, both economically and politically. To ignore the need for rapid economic development for rescuing people from a crisis of poverty is nothing but a folly. Far from inspiration, for instance, India is generally seen as a warning of what happens when countries move to accept liberal democracy as a panacea for socio-economic and political problems. Compared with China, India is poorer, politically less stable and generally perceived as a more corrupt, chaotic and poorly governed nation. Despite such anomalies, scholars often wonder how India has managed to sustain democracy. Part of the explanation seems to be that the state is too weak to overcome the various centers of powers and no single group is sufficiently powerful to dominate the others. This encourages us to ask a question, is India, with the about 40 percent criminally booked representatives, still a democracy?

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

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

Fourth, the cultural setting of the society plays a crucially important role in application and compliance of rule of law both positively and negatively. One of the remarkable features of Asian societies is that they are culturally liberal and accommodative. Some remarkably important issues which need greater focus are that Asia never demonstrated interest or willingness to colonize other parts of the world. Tolerance and harmony are practiced as milestones of the cultural setting of the Asian societies. As a matter of fact, all Asian societies possess remarkably worthy concepts of laws. All Asian societies had sound, ethically enriched and pro-human rights

⁷³ Stiglitz (n 23).

⁷⁴ Ibid.

laws in the past that were largely destroyed by the colonial rules and the transplant of alien legal and judicial systems. Today's Asia is thus standing largely on a paradox. Most countries have remarkably good concepts and principles of laws but are ruled by bad or unrealistic laws. India has even today been ruled by British legal system, which is not only unfamiliar to people's socio-cultural setting but also inconsistent to the concepts and principles of laws and justice that have been evolved by a very long civilization. Arguably, Asian nations' failure to foster a better situation of human rights and rule of law can thus be attributable to the imposition of laws and political system by the colonial rulers. The transplant of the political system and laws is one of the reasons causing detriment in smooth development of the rule of law in South Asia.

This argument can be supported by several facts. The Asian societies, for instance, generally have fewer political prisoners than in the Western countries. Culturally, citizens in Asia enjoy greater freedom of speech, association, and assembly; and the media is subject to fewer restrictions. While Euro-American media is described to be freer, one should not forget that it has been fully controlled by capitalist corporations. While courts in the western societies are said to enjoy greater independence, they are marred largely by racism.⁷⁵ Most importantly, the constant rise of GDP in Asia has resulted in a better situation of independence of Courts. In general, Asian societies have significantly changed. Yet, many Asian countries, due to implanted liberal democracies with lower levels of GDP, have shown an exacerbated situation of independence of courts. The confidence of people over the system of justice and the judiciary itself in such countries is seen as poor. The legal system in many Asian countries is dysfunctional and the volume of pending cases is enormous. India, Pakistan, and Bangladesh are typical examples. India alone has over 30 million pending cases.⁷⁶ The British colony left India with the complete destruction of the indigenous mechanisms and processes of dispute settlement.

VIII. The Relationship between Human Rights and Rule of Law and the Influence of Western Powerful Countries

The international human rights movement has heightened the attention towards rule of law in the recent past. However, the movement has encountered several conceptual, normative and political changes. The claim of the universality of human rights has been attacked by critics who emphasize the greater role of culture in society. In contrast, the concept of rule of law appears to be widely accepted by people from different ideological persuasions. All ideologists such as libertarians, liberal and communitarian democrats, soft authoritarians, socialists and even Marxists find important values in the rule of law. It is, therefore, obvious that the concept of rule of law is seen as competent to contribute, providing a solid foundation for acceptance of the universality of human rights which otherwise may have a shaky foundation. The use of the human rights movement, often by the Western powers, as an excuse to intervene in affairs of sovereign States has also brought it into the grip of crisis. In this situation, the rule of law, as suggested by de

⁷⁵ Nichole Griffith, 'Racism in the Criminal Justice System (US)', *California Polytechnic State University*, 2012, available at <http://digitalcommons.calpoly.edu/cgi/viewcontent.cgi?article=1080&context=socssp>, accessed on 04/08/2018.

⁷⁶ Ankit Panda, '30 million Pending Cases: Fixing India's Overburdened Judiciary', *The Diplomat*, 26 April 2016, available at <https://thediplomat.com/2016/04/30-million-pending-cases-fixing-indias-overburdened-judiciary/>, accessed on 4 August 2018.

Mello, can be a fruitful principle to guide the world toward agreements⁷⁷ of spreading the culture of human rights within the system of governance. It is necessary to understand, at this point, that the system of Asian values has no anomaly and dissonance with human rights. The problem, in fact, lies in the attempt of the Western developed countries to impose human rights as a tool for changing the political regime of other countries.

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

A long line of economists, legal scholars, and development agencies, from Max Weber to Douglas North and the World Bank, have invariably argued that the rule of law is necessary for countries to promote and sustain economic growth. It helps to protect property rights and provides necessary predictability and certainty to do business. The economic growth, as well as overall development efforts, are indispensable for rescuing people who still form one-fourth of the world population and are living below the international poverty line of \$581, an annual per capita income.⁷⁸ Around 800 million people are still living in a state of lacking adequate nourishment and one billion people are living without safe water to drink.⁷⁹ Two billion people are suffering from inadequate sanitation and around 800 million are lacking access to basic health care.⁸⁰ In such a grotesque situation of human lives, the urgency of economic growth is self-evident.⁸¹ Achieving the rule of law as a primary thrust of the governance is thus vital for addressing the problem of poverty as well as other forms of sufferings.

Looking against the perspective, looming inequality in distribution of income and wealth, the rule of law, which forms an indispensable instrument of good governance and economic development, is expected to put its all thrust on the need of humanizing the legal system, so that it can protect people from injustice. Doing so is possible only by rendering the legal system unfailingly function to protect the best interests of people regarding socio-economic happiness and access to welfare services. Preventing corruption is an equally important role of law, looking from the vantage point of rule of law. The role of the rule of law in consolidating the effectiveness of law promoting good governance and economic development is omnipotent. The role of rule of law is also vital for achieving a balance between development endeavors and ambience of the natural environment. To enact and implement laws furthering social order and harmony among people in better shape is also inevitable, which the rule of law fulfills through the equitable distribution of equality in wealth, income and opportunities to development. The primary goal of the rule of law is, therefore, founded on its role of promoting better social order and happiness of people. Otherwise, the risk of society plunging into a disorder and chaos go severe.

⁷⁷ 'Sergio Vieira De Mello Address At The Closing Meeting Of The 59th Session Of The Commission On Human Rights', *United Nations High Commissioner for Refugees*, 25 April 2003, available at <http://www.unhchr.ch/hurricane/hurricane.nsf>, accessed on 2 April 2018.

⁷⁸ Thomas W. Pogge, Priorities of Global Justice, *Global Justice*, volume 6:7, 2001.

⁷⁹ Ibid.

⁸⁰ Ibid.

⁸¹ Ibid.

However, we have seen such events leading many State regimes towards a situation of collapse. Haiti, Kosovo, Afghanistan, Iraq, Libya and lately Syria are some examples of this. Conflicts and anarchy in these countries led to a state of complete breakdown of the legal and judicial system, proving to be immensely costly for human lives. The rule of law coming to a breakdown is just natural in a situation of anarchy or conflict, which generates spiraling chaos. Most of these countries arrived in this situation due to stratagems of external forces playing unlimited roles of transplanting their system of governance, laws and policies of mitigating situations. Gaining the reign of these countries in their hands, the alien powers blatantly and indiscreetly transplanted their political institutions laws in these countries. The transplant of alien institutions and laws, in consequence, resulted in massive failures consolidating the rule of law. The looming chaos in these societies shows that importation of political institutions and systems of law and justice does work—it cannot import the rule of law as such. What is transplanted, therefore, is a circumstance richly pays off to intensify chaos. Conceivably, people in these countries have now witnessed deeper skepticism on rule of law and human rights movements.

Nepal's experiences are not happy either. After cessation of the decade long Maoist insurgency, the country was besieged by foreign non-governmental organizations as well as alien game players. Indeed, the stratagems of outsider game makers virtually swayed the politics of Nepal. They had been able to penetrate the policy making bodies of the political parties and the State agencies. They had also been able to plant native intellectuals to serve their interests. Foreign Non-governmental Organizations (FNGOs) flooded in every part of Nepali society. They were busy in drafting laws, suggesting ideas for the Constitution, and what the federal structure of Nepal should be like, and so on. Most importantly, they were busy destroying the cognitive ability and culture of Nepali society. They selected the best intellectuals of the country, bribed them with money and stooged them to propagate those ideas they intended to instill in Nepali minds.

It was witnessed that destroying indigenous ideas leading to changes was the main goal of the game players. For that, *first* they hit on the cognitive culture of Nepal; *second*, they isolated the countries' brain; *third*, they threw indigenous think-tanks and universities out as scraps; *fourth*, they bribed some public intellectuals who had closer links with political leaders; *fifth*, they divided Nepalese society applying the concept of ethnic identity, regionalism and religion; *sixth*, they funded for building groups or organizations based on said division; *seventh*, they built movement and political agitations; *eighth*, they consolidated activities to influence the Constitution making process; and, *ninth*, they are now supporting activities of Nepal's disintegration.

The FNGOs, (details of them is discussed elsewhere) did their best to destroy indigenous notions and values on human rights. In the field of women's movement, children rights movement, elderly rights movement, movement of dalit people and marginalized people's movement, they fumed ideas of enmity to certain other groups of people instead of challenging the wrong or defective values. In the past, some Nepalese civil society members had done marvelous works. The FNGOs usurped these fields and utilized it as an effective platform to convert people into Christianity and destroy the cultural cohesion ambience of Nepalese society. Nepalese had a culture of living in harmony, respecting cultural practices of each other, without causing any harms to each other. The concept and culture of religious conversions fully lacked in Nepal, in the past. The alien NGOs, however, planted ideas of ethnic identity as a human right and instilled a poison of cleavages in the minds of harmoniously coexisting communities. With these unbecoming events swaying the Nepalese society, the rule of anarchy began to unfold. As a matter of fact, the prospect of rule of law consolidating suffered heavily in Nepal. Obviously, the

problem of rule of law in Nepal is not associated with indigenous cultural values. Vast bulk of Nepalese cultural values exists consistent with the fundamental connotations of rule of law. The failure in consolidating rule of law in Nepal is associated with the governance policies driven by the FNGOs and donor agencies. They played a crucial role in supplanting Nepalese governance values and developments, evolved over the last many years, by the Western values and principles of rule of law and governance—which can be depicted as a part of cultural hegemony.

The impact of the transplant of the alien system on indigenous legal system is not confined to these countries alone. The impact has actually spilled over to the entire region and at times worldwide. The preceding discussion establishes that the rule of law is vital for each country, but it cannot be imported like material commodities from outside. The rule of law as a concept and system of values can grow indigenously and play a role in promoting good governance, by ensuring effective functions of the law. One of the prime outputs of rule of law is to ensure socio-political stability in the country, thus helping in consolidation of peace and prosperity within the nation. The regional and international peace, on the other hand, is contingent upon peace within the boundary of the country. The rule of law, therefore, has a vital role in ensuring peace within and without the border of the nation.

As highlighted by a UN press release, the rule of law may help to prevent wars from occurring in the first place.⁸² It can also provide guidelines for how war is carried out, limiting some of the worst atrocities associated with military conflicts. It offers the possibility of holding those who have committed acts of aggression and have violated the humanitarian laws of war, accountable. The importance of rule of law as a civilized system of governance is thus omnipotent from both the national and international perspective. However, the so-called soft influence strategy of the Western countries has seriously disrupted the ambience necessary for consolidation of the rule of law in most developing countries.

Regretfully, post 9/11 exaggerated concerns over terrorism have created more problems regarding rule of law around the globe. The violation of basic rights has seen gross occurrence across the world. Exacerbated religious and racial tensions have been heightened towards further worse situations. The people holding Islamic faith have become indiscriminate target of the Western war against terrorism all over the world. The policies and strategies adopted to curb terrorism have failed to reduce the problem; the problem has rather been ramified beyond limits. The Western polices of soft influence as well as war against terrorism both have grossly failed to foster a situation of international peace.

Notwithstanding this very unbecoming context, the rule of law has drawn added attention of people to the rule of law all over the world. Under the scheme of wars against terrorism, activities of Illegal and improper modes of detaining, torturing and punishing people have gone to the extent of destroying even basic norms of human rights. For this purpose, some countries, the U.S in particular, have promulgated stiffer national defense and anti-terrorist laws and under these laws, the anti-terrorist campaign has obtained a shape of war. The campaign against terrorism has indiscreetly launched a war on a way of life—on democracy, human rights, and rule of law and *ergo* on civilization itself. As rightly pointed out by Kofi Annan, the terrorist attacks on the United States struck at everything stands for; peace, freedom, tolerance, human rights... the very idea of a united human family, all our efforts to create a truly international society based on rule

⁸² Press Release, Message of the UN High Commissioner for Human Rights on Human Rights Day, *United Nations*.

of law.⁸³ Undoubtedly, terrorism is unacceptable to any human being in any part of the world; it is an attack on very fabric of human civilization and humanity at large. But the questions as to who a terrorist is and who is a protector are inexhaustibly debatable. The problem of terrorism has been used as an excuse by some countries to attack regimes of others who are not liked by them. Iraq was victimized grossly followed by Libya, and now lately Syria is being victimized. Who generated terrorists? This question has not had discussion so far, however. Who gives arms to terrorists? This question is not debated elaborately, either. What caused terrorists to rise? People across the world know the answer to this question, but INGOs and donor agencies have fully diverted the attention of the people. The war against cognition is, however, bigger than against the terrorism itself. To kill the creative cognition of people across the world, the Human rights movement has indiscreetly been used as a tool by too many INGOs. Example is the Tikapur incident in Nepal. An armed mob killed unarmed police personnel and a baby. Information on incident was brutally suppressed by worldwide dissemination of a fake report, which claimed Nepal's government was suppressing peaceful protest. The so-called human rights movement of INGOs is human rights instrument as quick justifications for abrupt and unlimited interventions of some powerful countries for regime change. These affairs amply show that both human rights and rule of law today have become victims of ill-design and political chauvinism—an attitude of arrogance of some neoliberalist capitalist countries.

IX. Asian Values, Human Rights and Rule of Law

Debates over Asian values or values in Asia have raised a wide range of issues.⁸⁴ The main point of contention is whether roots of Asian culture such as Hinduism, Confucianism, Buddhism, and Islam are compatible with liberal democracy and human rights, or not? Some other issues in the discussion are associated with matters of relationship between rights, responsibilities and duties and how to weigh rights against competing interests or claims. The balance of an individual's *needs* against the *interest of a group and society* is an equally important issue in the debate surrounding Asian values.

We need to very plainly make it clear that the question as to whether Asian values are compatible with liberal democracy or human rights is an utterly misleading one and fully impertinent also. The blanket argument to begin with is 'Europe-America' does not constitute universalism, neither European product determine universalism. Plainly, the question is sparked by an implicit and sub-conscious acceptance of a principle that presupposes the *liberal democracy* as a universal concept and value regarding the political system. It also wrongly claims that human rights consist of *liberal democratic values*, as foundations. This question also presupposes supremacy or superiority of the Western civilization and values, both in politics and economy, which is hardly acceptable to those civilizations such as Chinese and South Asian that are evolved for hundreds of years, even before the rise of the western civilization itself. No doubt, the Asian argument holding that culture and the concept of rule of law are inseparable, consciously refuses to accept the implicit construct or narrative of the West that *liberal democracy* signifies civilization and root of human rights. The

⁸³ Press Release, Secretary-General Urges Assembly to Respond to 11 September Attacks by Reaffirming Rule of Law, *United Nations*, 24 September 2001.

⁸⁴ 'Report of the Regional Meeting for Asia of The World Conference on Human Rights', *United Nations World Conference on Human rights*, 1993, U.N Doc. A/CONF.157/ASRM/8.

theory that holds the concept of human rights, democracy, and rule of law as essentially Western products is wrong and unfounded. The root of this thinking goes to self-portrayed recognition that the European knowledge system represents 'modernity' and Oriental knowledge system the 'tradition'. This dichotomy was imposed and instilled in the minds of millions by colonialism, which justified itself as a movement to civilize Asians and Africans. Kipling's poem *White Man's Burden* is an example of European racial arrogance and vanity. Oriental system had unleashed a tremendous volume of knowledge 3000 years before.

Another major area of discussion relates to the situation of imbalance in economic development in different regions in Asia. What exactly does the term *Asia* represent? Asia is widely scattered in vast territories and consists of innumerable languages with varying roots, civilizations, religions and ethnicities. In this context, the question relates to the *fundamentals of orientalism*. But there are some intrinsic and inherent values that provide fundamentals of orientalism. Exhaustive discussion in this regard is not possible here. However, a few to mention are (a) the Asian value system believes on harmony and collective life versus individualism, that is why extended family is taken as a core of the Asian value system; (b) the Asian value system keeps religion and State separately, and it does not believe in conversion of religious faith; (c) the value of tolerance is another Asian fundamental, which for instance allows atheists and theists to live together without discrimination; (d) the principle of coexistence is another fundamental of the Asian value; and (e) the duty of the State but not the right is a basis of governance which the Asian fundamental of politics lies on, which is why it is the Government's duty is to ensure happiness of the people. These values are, however, grossly affected by colonialism and imperialism. The 1884-85 Berlin Conference of colonial powers had outlined how to civilize people in colonies, which impliedly meant to destroy Asian, African and Latin American values and civilizations.

The widening gap in the distribution of wealth between the rich and poor, both within the country and among the countries, has produced a fault line that runs along the North-South, the developed and developing country axis. The economic imbalance is bigger even within Asia itself. These differences sometimes make it difficult to fully grasp what Asian values exactly mean. However, Asia is connected by history and many other factors. In our times, Hinduism, Buddhism and Confucianism are major civilizational foundations to connect Asians. These civilizations are largely non-competing and non-contradicting.. The common thrust of all Asian countries is now to bolster their economies and turn Asia into a developed territory.

In this regard, there are efforts taking place to bring Asia together. The Bangkok Declaration, for instance, called for international cooperation to narrow the gap and eliminate poverty in Asia. The declaration rightly held that the faultline poses the major obstacle to the full enjoyment of rights. Even more explicit was the Vienna declaration, which said:

*"The World Conference on Human Rights reaffirms that least developed countries committed to the process of democratization and economic reforms, many of which are in Africa, should be supported by the international community to succeed in their transition to democracy and economic development."*⁸⁵

Hence, having not a single code of conduct for governing Asians, does not imply that Asia must transplant laws and institutions from Europe. Without any dispute, Asia has a very long history of pro-human rights values. The most spectacular guidelines in this regard are found in

⁸⁵ *Vienna Declaration and Program of Action*, U.N. World Conference on Human Rights, 1993, U.N.Doc.A/CONF.157/23.

all Asian traditions. The *Rig Veda*, the Hindu scripture of laws, ethics, and morality, refers to five freedoms of citizens—freedom against violence, absence of want, diseases, exploitation, and early or unnatural death—as primary concerns of the State. Buddhism preaches for *Karuna* (filial piety).⁸⁶ Discrimination in the distribution of wealth is rejected by all civilizations; hence, income disparities are unacceptable to both the Western and Eastern societies.

However, the Western *modus operandi* of the rule of law has failed to materialize the value of equality in the distribution of wealth, income and development advantages. The overarching emphasis on *civil and political rights*, neglecting the economic and social rights, has resulted in massively growing income inequality among people within the nation as well as among nations. Thus, rights have been misleadingly categorized as negative and positive rights. This dichotomy was ill-designedly and calculatedly adopted to immunize the developed countries from accountability to assist poor countries and to immunize the national governments from the obligation to enforce, respect, protect and fulfill the rights relating to economic development and social transformation of the working-class people.

This notion of jurisprudence that *civil and political rights subordinate the economic, social and development rights* is completely alien to Asian values. Under Asian values, the duty of both individual citizens and the State is emphasized. It is meant that every individual together with the State is obliged to work for the greater and common interests of all. It is clear from Buddhist teaching that *everyone's betterment is everyone's happiness* ('*sarbhajanahitaya sarbahajansukhaya*'—in Sanskrit). In Hinduism, it is said, *may everyone be happy. May everyone be free of sufferings*.⁸⁷ In China, Confucius famously remarked that there is *pleasure or happiness in a simple and plain lifestyle* provided that it conforms to ethical norms; such a life is preferable to wealth and status obtained immorally.⁸⁸

In Asia, all traditions in their historical annals have widely reflected on inherence and inalienability of the *worth of a human person*. A person can be condemned for their sin or crime, but his worth as a person is always inalienable. This is a collective notion of Asian values. This value allows the State to condemn the offender and subject him/her to punishment, but it prevents the offender from being turned into a slave of their crime. The protection of the worth of a human person is profoundly ingrained in the ancient Hindu, Buddhist, Confucian and Taoist scriptures. Neither a State or, society nor an individual has immunity to treat the worth of human person degradingly. These traditions have condemned the state of poverty in unequivocal terms as a serious violation of the worth of a human being. In many scriptures, scattered from Hindu *Vedas*⁸⁹ to commentaries, the South Asian *pundits* have unequivocally emphasized the need of ensuring the well-being of every human individual. They have reiterated the following *Sanskrit* hymns: *lokaasamastasukhinobhaabanantu* (May all the world (people) be happy and comfortable), *yathAnaHsarvbAmijagatayaxmahumsumanaa Sat* (Through which our this world may stay free from diseases and in unfriendly ambience), *Swastirmanushbebhya, urovamjigadhubheShayamsammastUaVipate, saMchatushpateh* (Human be happy, may the herbs grow high, may the two-legged be happy and

⁸⁶ Sangroula (n 555)1st Ch.

⁸⁷ For more detail, 'Sri NV Raghuram', *NV Raghuram Blog*, available at <http://nvrghuram.blogspot.com/2009/04/sarve-bhavantu-sukhinah.html>, accessed on 04/08/2018.

⁸⁸ Lau, D. *Confucius: The Analects*. London, Penguin Books, 1979, p.88.

⁸⁹ *Vedas* are main texts of establishing Hindu tradition of philosophy. These are considered sacred documents written about 3 to 4 thousand before Christian era. Written poetic verses, these documents discuss on every aspect of human life, including the system of governance, duties of the king and his officials, wealth and means and methods of earning wealth and so on.

may the four-legged be happy), *VazakaandhanarvanaVarani Nam* (Long live the kind-hearted people, divine celestial power, and the cowherds).⁹⁰

The message from the hymns is perfectly clear that human welfare and protection is the prime concern of the State or society. To elucidate further, these hymns in *Veda* refer to the need of preserving the ambience of freedom against violence, diseases, wants, unnatural death and exploitation. Cruelty is a form of violence. The want of livelihood exposes persons to cruelty. The state of poverty is, therefore, a state of cruelty, thus essentially violating the worth of a human person. The prime concern of the rule of law under the Asian values is to preserve the *worth of a human being*.

Generally, as described by *Vedic* scriptures, the very first goal of life is the attainment of *pleasure*, in its assorted material and abstract form, implying justification of claims to food, housing, clothing, art, music, and dance.⁹¹ Human beings, as recognized by the hymns of *Vedas* in relation to the meaning of life, are naturally inclined to pursue pleasure, but they need to be attained appropriately and in their proper setting. Hence, abuse of pleasure is not only discouraged ethically, but also condemned as an unacceptable *karma* (doing or action). The accumulation of powers and wealth are outcomes of the lust, the *Vedas* have described.

This theory in *Veda* obligates States to carry out duties of properly distributing *wealth* among all members of the society. Persons who hold the powers are rulers and they are denied the right to accumulate wealth. The wealth and power cannot be set in one place as they, if combined, are tantamount to corruption.⁹² The rule of law is thus taken as a vital instrument to place rulers out of wealth and the people who hold wealth out of political power. This cardinal principle established by the ancient Hindu scriptures, in fact, connotes a precise sense of the rule of law.

Another equally important goal of life is to achieve *material success*. Human beings are inclined to enjoy pleasure, wealth and power as valid means of improving and giving a sense of accomplishment in their lives. Nevertheless, the need for human beings to maintain self-discipline use of resources is an inherent virtue of life. According to the South Asian philosophy on the meaning of life, maintaining a strict balance between the acquisition of means (wealth), the manner of use (power or claims) and the enjoyment of them (virtues) is the most important goal of life.⁹³ To achieve a *moral harmony* in life with the material means of comfort and pleasure is another equally important goal of life. Similarly, to achieve a balance between desire (pleasure), means (power and wealth), on the one hand, and ethics, on the other, is the third goal of life. The achievement of all these three goals is called *purusartha* (true accomplishment of life).⁹⁴ Moral harmony is taken as a system to regulate desires for pleasure and success but also sparks our

⁹⁰ For more detail, 'Adobe of God Shiva on the Internet', *Shaivism*, available at www.shaivism.org, accessed on 4 August 2018.

⁹¹ James Fieser, 'Great Issues in Philosophy', *UT Martin*, available at www.utm.edu/staff/jfieser/120, accessed on 6 August 2018; Karl Britton, *Philosophy and the Meaning of Life*, Cambridge University Press, Cambridge, 1969; John Cottingham, *On the Meaning of Life*, Routledge, London, 2003; Milton K. Munitz, *Does Life Have a Meaning?*, Prometheus Books, New York, 1993.

⁹² Kautilya who is also known as Chanakya has elaborately discussed this issue repeatedly in his treatise known as "*Arthashastra*".

⁹³ Mithun Howladar, 'Impact of Puruṣārthas in modern life: An observation', *International Journal of Sanskrit Research*, volume 3:3, 2017, pp. 70-73.

⁹⁴ *Ibid.*

social responsibility towards other people.⁹⁵

The concept of moral harmony constitutes the foundation for the recognition and protection of human rights. The State is, therefore, obliged to recognize and protect access to pleasure and happiness of people as the basic need as well as an inalienable right. The failure to protect this right results in the *violation of the worth of a human being*. The South Asian philosophical tradition in this way brings welfare of people, in the form of material pleasure and happiness, as an inalienable right of people. The pleasure and happiness, and the moral values of life are taken as three important pillars of the *rule of law culturally* in South Asia.

Daoism, an ancient Chinese philosophy, is equally important in this respect. According to Daoist teachings, human beings should live, in accord with the flow of nature; no one should aggressively go against it.⁹⁶ The message is just plain and intelligible. One should accumulate wealth only to that extent which is necessary for their decent living. The salience of this philosophy is that the accumulation of wealth unnaturally will deprive others' lives and thus violates the rules of nature. The accumulation of wealth is un-virtuous because it deprives others of an opportunity for a similar decent life.

The Buddha's teachings on values of life are simple. He begins with describing *four noble truths of life*—(a) life is suffering, (b) source of suffering is desire, (c) cure of suffering is the elimination of desire, and (d) so that each person has to follow eightfold paths to enrich the life which emphasizes cultivation of proper or right understanding, thought, speech, action, livelihood, effort, mindfulness and concentration.⁹⁷ Pursuing these teachings lead persons to a state of *Nirvana* (enhanced spiritual enlightenment). Hence, to achieve *nirvana* is the ultimate value of life. The achievement of *nirvana* transforms individuals from "I" to "We". Hence, *sarvajananahitaya sarvajanasukhaya* (everybody's comfort will bring about everybody's happiness).⁹⁸

Islamic thought on life is very precise and unequivocal too. It says, life is a great gift of *Allah* and so it is to be cherished and protected always. Islam, therefore, talks of *alms*, a system of compulsory contribution to charity by those who have the means to support those having no resources.⁹⁹ Islam and terrorism have no connection, in any form. The violence which some people are engaged in, is an outcome of the conspiratorial design of the Western power bloc to divide the world and exhort hegemony.¹⁰⁰

To encapsulate features of all these Asian traditions unequivocally assert that (a) poverty is neither an outcome of pre-determined destiny, nor a bad luck, nor a condemnation of God. Poverty is an outcome of unethical or un-virtuous acts of State or society. Poverty is a condemnation of

⁹⁵ James Fieser, 'Great Issues in Philosophy', *UT Martin*, available at www.utm.edu/staff/jfieser/120, accessed on 6 August 2018.

⁹⁶ Ibid.

⁹⁷ Miko Matsuoka, 'Buddhist Concept of Human being from Viewpoint of the Soka Gakkai', *Seminar Paper on Buddhism: Non-violence and Peace, Centre for Buddhist Studies*, University of Madras, 16-17th December 2010 available at www.iop.org.jp/0515/matsuoka.pdf, accessed on 6 August 2018.

⁹⁸ Yubaraj Sangroula (n 970).

⁹⁹ A. Majid Katme, 'Sanctity of human life is basic concept in Islam', *Society for Protection of the Unborn Children*, available at www.spuc.org.uk/about/muslim-division/euthanasia, accessed on 6 August 2018.

¹⁰⁰ Garry Leech, 'Islamic Extremism is a Product of Western Imperialism', *Counter Punch*, 30 March 2016, *Counter Punch*, available at <https://www.counterpunch.org/2016/03/30/islamic-extremism-is-a-product-of-western-imperialism/>, accessed on 6 August 2018.

a worth of a human being. (b) Every human life is a gift of nature. The natural resources are worth consuming equally. The act of accumulating wealth by some in the manner of depriving others is an act of lust for wealth and selfish pleasure. The pleasure of one in deprivation of another is an immoral and condemnable act. (c) Resources and wealth are products of nature and no one can claim special and exclusive privileges to enjoy them. The State's laws and policies that permit unnecessary aggregation of wealth should be treated as immoral and illegitimate and thereby command no legitimacy. (d) Every human individual has a genuine claim for a comfortable and dignified life and this principle allows everyone to have access to resources that are necessary for their decent survival and pursuit of happiness.

Ancient Asian traditions have understood the value of the rule of law as an instrument of happiness and the notion of happiness is not only limited to the material pleasure of life but also to spiritual or moral happiness. Under Asian values, the meaning of happiness is spiritually deeper and intellectually pervasive. It is based on the need for harmony between morality, ethics, and virtues, on the one hand, and the need for the balance between material well-being and nature on the other. The fundamentally important notion of the rule of law in connection with the development, in the sense of happiness, is that the State ought to legally and morally restrain only a few persons from aggregating wealth to the disadvantage of more people. The Chinese policy of keeping the private partnership in economic development under public domain thus justified culturally and ethically. Neoliberalism is immoral and culturally unacceptable to Asian societies.

These values under Asian philosophies reject the principles of unlimited or distorted capitalism that allow unlimited and unrestrained amassing of wealth by a limited number of people within the nation and a few countries around the globe. Hence, the neo-liberalism and absolutist capitalism practiced by some western countries are perceivably inconsistent with the principles of rule of law. The concept of rule of law is essentially associated with material and spiritual happiness of people, but not with the so-called liberal political system. For the Asian values or system of Asian values, the rule of law is an underlying notion of development for the happiness of people.

To conclude this part, we can see that the concept of BRI is closely linked to the Asian value system, which seems more inspired by the Chinese traditional principles of *Jen*—which provides a basis for States' relations. Confucius explained *Jen*, as a concept representing the highest perfection of goodness. He urged people to strive for achieving the highest form of perfection.¹⁰¹ Harmony is the soul of Chinese philosophy, which is reflected in the Chinese pictograph character of *Jen* which is composed of two symbols, that of a man and the number two. These two symbols collectively connote that human beings must live among their peers.

Confucius used this idea as a metaphor in the relation of the States, implying that no State can live in isolation. Each nation must follow a basic idea of living together by understanding each other.¹⁰² One of the fundamental philosophical underpinnings of Confucius's *Jen's pacifism*. It implies a notion of attitude emphasizing living together with an understanding of each other's existence and works together for everyone's benefit. BRI manifests pacifism as its fundamental and underlying principle. Living together with each other's benefit is defined in international

¹⁰¹ D. Howard Smith, *Confucius*, Charles Scribner's Sons, New York, 1973, p. 74.

¹⁰² Bennett B. Sims, *Confucius*, Franklin Watts, London, 1968, p 84.

relations as mutuality. Mutuality, together with other principles of *panchaseel* constitutes the core foundation of the *rule of international law* which is enormously manifested in the BRI. Hence, the allegations that BRI is a disruptive transition are unfounded. Similarly, the claim that it is strategically encircling is baseless either. Moreover, the assertion that China is pushing people into debt trap is equally baseless. The culture of rule of international law is rich in the BRI model of development.

X. Equality: A Salience of Development and Justice within BRI

The system of Asian values or cultures takes equality as a salience of development and justice. These values constitute a general framework for the practical application of the doctrine of the rule of law, both nationally and internationally. The major Asian traditions, as elucidated hereinbefore, have emphasized the necessity of complying with some normative and corrective theories of justice to foster ambience of the rule of law needed for enhancing a rational paradigm of development in the society. The system of Asian traditions plainly suggests that the concept of justice underlies *equality* as an indispensable normative guideline about treatment of one human being by another. Amartya Sen, one of the Nobel Laureates in economics, has elaborately discussed this in his seminal book *Idea of Justice*.

It is a categorical imperative for the State and society, thus, to render their laws and policies to unconditionally fulfill the requirement of *equality* in the treatment of people as a manifestation of the rule of law. The social contract between the citizens and State stands as another equally important justification for the endorsement of *equality* as the normative guideline of the concept of justice.¹⁰³ Since *equality* stands as a benchmark of rationality in the treatment of people in a civilized society, it is but natural to require that all normative values attached to the concept of justice should be rationally justified with the help of equality. The precepts of laws must, therefore, be based on the *notion of equality* and as such this principle requires departure from the classical theories of law developed by the early Roman legal system, the medieval European legal systems and the theories of the 19th and 20th century European jurists.

The concept that the precepts of law are an instrument of State to regulate people's behavior only represents a classical *Eurocentric* theory of law.¹⁰⁴ This theory recognizes that legal system is an instrument of the State to enforce its will on the people. From the theory it follows that the legality or legitimacy of the legal system is unfailingly contingent upon the political will of the State and is essentially backed by the system of coercive consequence in case of their violation. The Asian concepts or theories of law, however, do not endorse this theory about the law. The laws are recognized by the oriental societies as morally and ethically acclaimed normative guidelines to be followed by the State while dispensing justice and carrying out welfare services

¹⁰³ 'Equality' as an aspiration of the Social Contract theory constitutes a basis for 'system of just and reasonable distribution of opportunities and advantages'. Philosophically, 'equality in treatment with worth of human person' is an axiom, a priori, in which the State's obligation to 'proper distribution of resources' is founded. Equality thus embodies salience of what Immanuel Kant said 'categorical imperative'.

¹⁰⁴ Definitions of law essentially associating with the concept of 'State' as an indispensable representative of the people emerged in post medieval Europe. Roman law was largely a body of rules based on works of jurists. Early common law was also developed by the customary practices of people themselves. The Normans however converted common laws into prescriptive rules. Oriental laws, however, were a body of principles worked out by experts, and the State was free to pick up such principles to apply. The king had no power to declare rules of law.

to the people.

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

Equality as one of the salient features of the modern governance system which requires the State to comply with human rights doctrines¹⁰⁵ and instruments for obtaining the legitimacy of the legal system. In this broader dimension, the notion of rule of law has three connotations: (a) the body of normative values, establishing and justifying the rationality of the laws and policies;¹⁰⁶ (b) the rule of law is the ultimate goal of human rights, and (c) the rule of law implies a body of indicators and principles for judging the fair and impartial function of the system of governance¹⁰⁷.

However, these three elements are not achievable without development, ensuring human material and moral needs. International relations over the past, particularly in the context of the Cold War and an unlimited Western leverage on the development process, has witnessed adverse condition, as a monopoly of the Western countries and international organizations remained limitlessly pervasive. This unwanted feature of the international relations lets colonialism continue in disguise and keeps the world divided between rich and poor and powerful and the less powerful. The prospect of the rule of law both at the national and international level was thus fully ruled out. Examining the components of the BRI, against the Cold War perspective, it can be argued that 'BRI' is a boon for the rise of a new world order based on the *rule of international law*, the United Nations' Charter in particular.

The BRI linkages the rule of law with development and, hence, opens venues for burgeoning potential in individuals' lives—every individual is empowered by the principle of equality in development opportunities. Economically, the BRI is the potential of having a massive impact on the macroeconomic sphere, which produces more opportunities for the individual to boost up their socio-economic growth. In the micro-economic sphere, the BRI opens connectivity of individuals within the border and beyond, thus providing huge economic endeavors. The prospect of the BRI fostering equality among citizens is immensely big.

The rule of law promotes equality in the treatment among individuals which, in turn, initiates

¹⁰⁵ Human rights are universal and inherent and necessarily constitute 'the indicators of rationality' of State's laws and behaviours. Human rights are not justified only because they are 'inherent to human being', but also because they 'entangle right and duty correlativity' as a salience and are of capable of being implemented by 'institutions of States.'

¹⁰⁶ As a body of normative values of justice, the rule of law provides theoretical or doctrinal justification to the laws and policies adopted by the State. Viewing from this perspective, equality would be an instrument pursuing people, with full satisfaction, to approve 'laws and policies' adopted by the State. A non-discriminatory law would be 'rational' law viewing from this aspect.

¹⁰⁷ System of governance is evaluated as fair delivery of services. The government policy of decentralization is considered and impartial because it devolves power to people and empower people to participate in governance policy. A special hospital for disabled people can be justified because it provides a special service for them. The rule of law is a benchmark in all these projects.

and fosters a rational competition among citizens, thus enhancing their productive capacity in all spheres. Enhancement of the vector of an individual's life is not possible only by an arbitrary action of the State. The concept of equality as the underlying goal of the rule of law establishes a favorable condition for a rational competition. The State's obligation to recognize and protect the right to the threshold development¹⁰⁸ is, hence, indispensable, unavoidable and absolute in order to render this competition fair and worthy. Having these rights guaranteed and fully enforced, individuals from weaker and marginalized segments are set in motion for competitiveness based on equality. The same principle applies in relation to the development of a nation. No underdeveloped or developing country can achieve economic development without being equal in terms of accessibility to markets, investment and modern or improved technology. The BRI is dedicated to addressing these lapses hindering the development efforts of nations having *resource-constraint*.

This theory implicitly, but firmly, argues that unlimited and unconstrained capitalism with open markets, unregulated privatization, and unregulated consumerism is not only morally unacceptable but also legally ill-yielding. In this way, the system of Asian values inexplicably requires the importance of attaching moral justification for the operation of principle relating to the rule of law. The Euro-American values of the rule of law, however, embrace centrality of laws, which are defined as political products. The concept of BRI model of development is thus not consonant with the notion of the rule of law, as has been advocated by the neo-liberalists, is baseless. Explicably, this allegation is symbolic of the desire for keeping the situation intact for unregulated competition among nations as well as people.

XI. How Should the Rule of Law Founded on the BRI Model be defined?

The primary reason advanced for the importance of the rule of law in the Western political values is that it is inherently necessary to support the establishment and sustainability of democracy. Since the 1950s, when the colonial era began to crumble, and newly independent nations began to emerge in all regions, search for right formulas of self-governance, the rule of law and negative impacts of the colonial legal system enforced by the formal regimes became intensified. It brought an unending debate on a range of issues of development and the rule of law among intellectuals from the developing countries. One of the threads of debate argued that *the transplantation of the Western liberalism and the legal system* should not be taken as the rule of law.

The Western intellectuals and law scholars, the Washington consensus-based international organizations, and the neoliberalist-capitalist governments emphasized the need for continuity of transplanting laws from the former colonies. They argued that the sustainability of democracy was fully contingent upon the laws fashioned by the colonial masters. In this context, they also claimed that the systems of laws transplanted by the colonial rulers were the harbingers of the rule of law in these newly freed countries. These arguments were sharply rejected by most intellectuals in the Asian countries, particularly by those that adopted the socialist system. The intellectuals from these countries argued that the right to self-determination of the newly freed

¹⁰⁸ These rights are five types. 1. Right to the protection of physical integrity of every individual. 2. Right to the protection of personhood of each individual. 3. Right to the freedom of choice in profession and cultural values. 4. Right to the competent education for building capacity for higher and efficient productivity. 5. Right to economic entrepreneurship.

socialist countries has had the privilege to discard the colonial, legal and judicial institutions. Even the countries that preferred to follow liberal political structure substantially reformed the legal and judicial system.

The pressure for the continuity of the colonial legal system from the Western countries and former colonial powers prolonged relentlessly. The pressure became rigorous in the recent past, particularly in the wake of the 1997-98 financial crisis. Indiscreetly, the Western experts kept insistently prescribing for the transplantation of the western laws and policies in Asia as a medicine to the failing economy and a part of the necessary menu of reforms despite their knowledge that the Asian financial crisis had occurred due to the imposition of neoliberalism. Surprisingly, though, the Western economists kept persisting to prescribe the *cause of the disease*, as a medicine to cure the disease.

They argued that the transplant of the Western laws would introduce the *rule of law in Asia*. Their argument was that the rule of law notion backed by the Western countries would attract more direct investment. They opined that without assurances being provided to potential investors that their money and their deals would be protected by a system of law convenient for them, they would not be investing in developing countries.¹⁰⁹ The hidden objective was, however, to exert influence into the system of governance itself. The current *global consensus* promoted by Washington is that foreign direct investment and flows of capital from outside are necessary for growth and progress of every country.¹¹⁰ This argument necessarily follows that countries aspiring to economically develop must follow the laws, policies and the political institutions as well as the guidelines of the Western developed countries and international organizations like the World Bank and International Monetary Fund. This assertion implies that the notion of the rule of law practiced by the Western nations is a precondition of modern economic life.¹¹¹ The Western notion of the rule of law, however, cannot be accepted as a universal principle of development. One main reason behind the disapproval is that it underlies the interest or motif of political influence through the transplant of a system of law and its implementation mechanisms.

BRI is a safe alternative to that mischievous design. It does not urge us to follow the system of law designed or practiced by any other country. The investment under this initiative comes through negotiation between investors and recipients within a scheme of integrated financial policies or laws. The *Initiative* promotes countries to rationalize and integrate their development and financial policies, including laws. Such laws and policies are acceptable to all, thus ruling out a risk of imposition of the laws and policies of any country. The rule of law is to be created this way by the evolution of fair and pro-human rights laws in the given country, which has been inspired to implement the BRI model of development.

It is plain from the discussion above that the notion of rule of law practiced by the Western countries evokes serious skepticism in Asia. Its advocacy as a panacea for every problem in Asia is categorically unacceptable. As vast literature in this regard has shown in Asia, there are three main sources of skepticism about the rule of law preached by the western scholars and State authorities. First, the plainest criticism is that the virtue of the Western rule of law has been oversold politically. If the rule of law is supposed to be the guarantor of democracy and

¹⁰⁹ Barry M. Hager, "The Rule of Law: Defining it and Defending it in the Asian Context", *Mansfield Centre for Pacific Affairs with Funding from the Starr Foundation*, 2000, p 1.

¹¹⁰ Ibid.

¹¹¹ Ibid.

consistent free-market economic policies, then, as critics have observed, the disparity of wealth among citizens in America and Europe would not have been so desperate and acute.¹¹² As to democracy, the ongoing racial discrimination in the United States is enough ground to suspect the rationality of the argument. As for free-market economics, the critics have noted that such episodes as the 1998 bailout of Long-Term Credit Management, (the U.S. hedge fund) by the U.S. financial regulatory community looked more like *crony capitalism* than unfettered free markets at work.¹¹³

The second criticism is that the notion of western rule of law is viewed as a *cloak for the imposition of economic hegemony* by the United States. The U.S. model of the rule of law is being aggressively sold in all countries, everywhere today.¹¹⁴ IMF and WB work as an instrument of U.S. rule of law commodity, as Joseph Stiglitz suggested in his renowned book *Globalization and Its Discontents*. In the context of the end of the cold war, the perceived victory of the U.S Capitalist model over the Soviet Communist Model for managing an economy has remarkably grown during the past decade. But this turned out to be otherwise.¹¹⁵

Third, a broader philosophical critique of the Western rule of law is that it reflects the American bent for legalism, litigiousness, and neo-liberalism. In the context of Asian values, it is frequently said that the rule of law in American iteration relies too heavily on rules and does not sufficiently trust the capacities of *wise persons*.¹¹⁶ The Confucian tradition, in particular, is cited as a counter-example of good governance.

However, the following assertions of the Western scholars on the rule of law are not fully unacceptable for Asian values. *First*, the rule of law embraces a component of constitutionalism. This implies that there must be some fundamental statements to be endorsed by the State as shared values of the society. The constitution is the standard document of the shared values. The Constitution is intended to be the highest form of law to which all other laws and governmental actions must confirm, as Professor John Moore had written.¹¹⁷ *Second*, Asian values have no objection to the principle that the rule of law is the percept that law governs the government. *Third*, the independence of the judiciary is a core component of the rule of law. There is no objection to this principle either. However, this principle is often confounded by American analysts with the tripartite system of government articulated by Montesquieu.¹¹⁸ This analysis is not out of criticism in Asia. The standard for the independence of judiciary set forth by the American system cannot be a universal standard.

The context in the given country largely determines the *modus operandi* of the functions of the judiciary. The contestation among academicians concerning rule of law and its fundamental characteristics is wider. Some academicians believe that rule of law has a strictly formal procedural character and not a substantial one.¹¹⁹ The purpose of the rule of law is not only to establish the

¹¹² Ibid

¹¹³ Ibid.

¹¹⁴ Ibid.

¹¹⁵ Ibid.

¹¹⁶ Ibid.

¹¹⁷ John N. Moore, *The Rule of Law: An Overview*, Paper presented at the first U.S./Soviet Conference on 'The Rule of Law', Moscow and Leningrad, 19-23 March 1990.

¹¹⁸ Hager (n 109), p 18.

¹¹⁹ P. Craig, 'Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework', *Public Law*, 1997, pp.

just law but also to check, on what condition a society is governed by law and not by the whims of a man.¹²⁰ It is true that it requires autonomy of human beings, but not as a central political value—otherwise, the rule of law would only be valid for liberal societies.

In the light of these criticisms, it is obvious that the BRI model of development must be able to evolve a system of *dispute settlement* along with a model of economic and financial laws. The integration of the financial and development policies should not mean that one country surrenders to the laws and policies of another country. For creating a sound system of *the rule of law*, the BRI countries must work out a system of law together to be followed by all countries. This implies that a framework of the international law to guide the laws and policies of the BRI countries should be evolved by consensus. This international law would form the foundation of the rule of law in BRI countries.

XII. The Relevance of the Cultural Elements in Rule of Law

Culturally diverse views on the rule of law date from antiquity. The city of Athens sentenced Socrates to death for religious heresy and corrupting the youths 2500 years ago. Plato implored Socrates to run away from the prison and save the life from arbitrary law enforcement procedures. Socrates, however, refused to flee away from the jail. The *Laws*, he argued, would come and tell him that by escaping, he would break his agreement with them and undermine the stability of the State.¹²¹ It was, in fact, the virtues of ethics and morality, he was afraid of, which had been ingrained in cultural life. The understanding of Socrates about the law was obviously guided by the ethical and moral values. The cultural relevance of the rule of law is very spectacular in this episode.

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

From the cultural perspective, the concept of rule of law is viewed as an instrument for addressing several problems in the society. As such, it intends to curb the problem of corruption, because the corruption destroys the moral virtues of the society. The rule of law culturally, therefore, fosters norms and values of social harmony and avoids division amongst the population, thus preventing conflicts. The cultural perspective thus defines the rule of law as a body of norms that are necessary for the governance as dictated by the necessity of harmony among people. This theory is protected by the BRI because the framework provided by it clearly specifies that the development cooperation does not bring any risks or elements that can negatively impact on sovereignty and national independence of partner countries. Oriental countries are culturally

467-487.

¹²⁰ Francesco Viola, 'The Rule of Law in Legal Pluralism', in T. Gizbert-Studnicki and J. Stelmach, *Law and Legal Cultures in the 21st Century, Diversity and Unity*, 23rd IVR World Congress, 1-6 August, 2007, pp.105-131.

¹²¹ Amir N. Licht, Chanan Goldschmidt, Shalom H. Schwartz, 'Culture rules: The Foundations of the Rule of Law and Other Norms of Governance', *Journal of Comparative Economics*, volume 35, 2007, pp. 659-668.

diverse, though the fundamental philosophy is shared by all. As a matter of fact, the BRI is supposed to foster a theory of 'let a hundred flowers blossom' in the garden.

One of the fundamental cultural tenets of Orientalism is that it abhorrently condemns the vice of bribe. In South Asia, Kautilya, in his famous book *Arthashastra*, has said that like no one can see how fishes drink water when swimming in the water, nobody knows how corrupt government officials extort the State's treasury when they are managing it. Better governance is that which prevents bribes and extortion of the State treasury. The cultural perspective of the rule of law, as an instrument of curbing corruption and fostering rulers or administrators' accountability as the part of a general governance system, refers to a body of governance norms regulating the system of government that is friendly to the welfare of people and their wellbeing. The concept of rule of law is supposed to have been embedded in social institutions (culture) that legitimize individual expression of their own preference and emphasize the moral equality of individuals. To materialize these norms, the more specific norm of governance is enacted that prevents the State's officials to indulge in bribes and if they do indulge then definitely get punished.

Defining culture in the context of the rule of law includes elements such as shared values and beliefs. The shared values, in turn, include rules of economy and psychology practiced by the given society. These elements in broad sociological terms are called epistemes of the society. The rule of law follows the episteme. This hypothesis rejects a cliché that the rule of law can be a mechanical system to be followed by every society in similar patterns. The cultural setting of the society generally includes a dimension that concerns the desirable relation between the individual and the group. This component is known as *embeddedness*. This refers to a cultural emphasis on the person as embedded in the group and committed to maintaining *the status quo*, propriety and restraint of actions or inclination that might disrupt the group to achieve solidarity or living within the traditional border. The opposite pole of autonomy, on the other hand, describes cultures in which the person is viewed as an autonomous, bounded entity who finds meaning in his or her own uniqueness.¹²²

The second core component of culture relates to egalitarianism versus hierarchical structure. This dimension concerns the ideal way to elicit cooperative and productive activity in the society. But hierarchy refers to a cultural emphasis on carrying out the given role within a setting of the society which is structured into a setup of legitimately unequal distribution of power and resources. Ten principles of egalitarianism, on the other hand, emphasize the necessity of ending the selfish interests of individuals for the benefit equally shared by all. The principle of egalitarianism seeks to foster an ambiance of the welfare of everyone in the society in a form that is also morally justified.¹²³ Another equally important component of culture concerns with individual autonomy on one hand and harmony on the other. Individual autonomy refers to a cultural emphasis on achieving excellence through active self-assertion to master, change and to exploit the natural and social environment. The harmony, on the other hand, refers to an emphasis on accepting the social and physical world as it is trying to comprehend and fit in rather than to change and exploit it.¹²⁴ The precept of the rule of law cannot be considered valid if it separates or detaches from these cultural dimensions adopted by the given society.

¹²² Ibid, p.4.

¹²³ Ibid.

¹²⁴ Ibid.

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

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

No doubt that the concept of the rule of law has always been emphasized by the Asian traditions. The following principles are always accepted and practiced historically in Asia: (a) In the system of governance, the officials of whatsoever position are accountable under the law; (b) the laws are published, publicized, clear, stable, fair and capable of protecting citizens' rights and protecting from discrimination; (c) the rule of law provides a process by which laws enacted by the Government obtain legitimacy to govern people and the government; and (d) the enforcement of law is carried out by being guided by a process, and such enforcement is transparent and carried out by competent authorities. Substantially, however, the rule of law is concerned with establishing a system of equality and fairness in the distribution of advantages to people. This goal requires a functional system of administration and administration of justice rooted in fairness and impartiality. However, the procedures and mechanisms applied by the society may be relatively cultured. For instance, the Asian value system cannot accept the primacy and predominance of litigation; it prefers mediation and reconciliation instead. The number of rape cases ending in apology and heavy compensation by offenders to victims in Japan is an example.¹²⁵

The rule of law principle is guided by a cultural norm of Asia, as in the early Greek system, that the system of governance and the structure of democracy and its mechanisms are established for the sake of people's protection and well-being. As a matter of fact, in Asia, it is a culturally embedded idea that the State as a government institution is supposed to represent the collective will or wisdom of the people so that it does not have its own innate goals and interests. The history of Asian civilization significantly differs with that of Europe at this point. In Europe, the rulers were considered as sovereign and the people as subjects. It is evident from Louis XIV's

¹²⁵ Yubaraj Sangroula, *Criminal Justice System: Comparative of Study of the Criminal Justice of Nepal, China, India, UK, and USA*, Sahayatra Publication, Kathmandu, 2018.

claim of 'I am the State'. In early Rome, however, Cicero emphasized justice, rights, equality, and fairness as an underlying component of the law. Agreed with the assertions of Cicero, it was believed that the State should represent the collective will of people and, hence, it should not enact evil laws.

Law as a means of regulating the governance is understood as an instrument of people to make sure that the government does not go beyond the general will of the people. The State in this sense must manifest the popular behavior of people, which was so strongly argued by all Asian philosophers like Confucius, Lao, Buddha, Krishna, and Kautilya. All these oriental philosophers unequivocally argued that the system of governance is a tool for safeguarding the security and dignity of people's life without discrimination of any kind. The element of equality and fairness in treatment are always vital components of Asian culture. The system of democracy is merely a mechanism for people to express their voices and interests before the system of governance. Obviously, democracy cannot have a pre-fixed or universally determined structure.

The structure of democracy is devised by the people within the purview of the social episteme. It is, therefore, argued that liberal democracy may be a component of the rule of law in Europe, but it cannot be claimed as a universal component of the rule of law, equally applicable in all parts of the globe. Asian societies have their distinct ways of representing people. The effectiveness and legitimacy of democracy should, therefore, be sought from its functionality and ability to represent the people's voice rather than a formal procedural structure of the system.

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

This discussion leads us to argue against the doctrine of transplant of law and institutions of the system of justice. It, in turn, follows that the concept of rule of law respects the cultural or epistemic characters of the law. The borrowing of law as a means of promoting the idea of rule of law is thus unacceptable both in principle and practice. The failure of the transplant is manifested by most African nations. They underwent changes to liberal democracy in the wake of the post-colonial era, but most of them were engulfed into civil war subsequently, and many such nations ended with a military dictatorship.

Asian culture has an underlying understanding of the rule of law as a tree, with firm roots in the ground, whereas for the Euro-American construction has been more a procedural system or mechanism of political governance. In Asia, the emphasis is given to the culture of the rule of law, but in Europe and America a body of procedures for governance. With its roots in culture, the Asian concept of the rule of law refers to the application of the shared values and norms of

the society to the government. As such, the rule of law is believed to represent the shared rules of economy and psychology practiced by the society. It promotes harmony and egalitarianism against individualism. Since it has its roots in cultural values, in Asia, the rule of law puts emphasis on the observance of obligation and duties. Both the State and citizens have been moved by a sense of duties to each other. To restrain or prevent the unequal distribution of advantages is considered as a duty or obligation of both the State and citizen. In this background, Human rights and rule of law maintain an interface with the economic and social development of the society as well as citizens. Balancing the interests of the individual and societal development is thus a prime concern of the rule of law as well as the good governance which can be the core message of rule of law in Asia.

XIII. Human Rights and Development Interface in the Context of BRI

Human Rights cannot be taken as a political component; rather the concept of human rights promotes fundamental or inherent rights of human beings for promoting a culture that treats human beings as equal irrespective of their differences in wealth, nationality, society, genetic origin and so on. However, human rights have faced political insinuations particularly by the intellectual and political domination of the Western world which has affected the rights of human beings towards development. Some latest statistics reveal that about 800 million people still live in poverty. Most countries in the south are still struggling to rise as developing countries and are still not able to cope with the problem of massive poverty and the ensuing effect on people's lives. The developed countries have refused to accept their legal and moral obligation to uplift the life standard of the people in the developing and underdeveloped countries, most of which in the past remained colonies of the developed countries from the north. As a matter of fact, international human rights law has made a very little impact in addressing the acute problem of economic deprivation, social exclusion, and denial of access to development opportunity to the poor people of the south.

The imposition of the generation theory of human rights by some intellectuals from the north, which are devastatingly degrading the vitality of economic, social and development rights, has emphasized the exclusive importance of so-called liberal rights that are known as civil and political rights. The approach adopted by the generation theory to define economic, social and development rights as vague and unenforceable rights as well as defined as aspirations rather than claims have deprived poor people of the south to enjoy development rights as human rights. This approach of human rights, fostered by countries and intellectuals from the north has thus significantly contributed to a prolonged state of poverty in developing and underdeveloped countries and has been the reason for continuous deprivation, social exclusion, and absence of access to development opportunity. The approach adopted by countries and intellectuals in the north should, therefore, be changed if a new world is to be imagined sharing a common destiny of the people.

Peace and prosperity of the world as outlined by the United Nations' Charter depends on equal access to Human Rights. Poverty constitutes one of the main causes of conflict among the people and nations. The emergence of a world community sharing the resources and leap with peace and prosperity demands to revisit the existing economic world order. Connectivity of people and nation with the generosity of sharing resources and voluntariness and preparedness for economic cooperation among nations is a pre-condition for building a community of shared future for

all mankind and human rights governance. This in-turn requires connectivity in infrastructure, knowledge, policies and wealth for development. As a matter of fact, in the modern era, it is necessary for nations, particularly from the global south, to come out giving up their pride and prejudices to build infrastructure, knowledge and digital connectivity as well as promoting people to people linkages for development and shared destiny of the people across the world. It is the global south that therefore must take advantage of the cooperation and responsibility for it, that particularly goes to emerging economies from the global south. It is thus their obligation to assist smaller economies to flourish and build a sustainable and peaceful global south.

Poverty and deprivation are forms of latent violence and hence pose a threat to human dignity. To quote Dietrich Bonhoeffer, “In Germany during the World War II, we have for once learned to see the greatest events of the world history from below, from the perspective of outcast, the suspects, the maltreated, the powerless, the oppressed, and the reviled—in short, from perspective of those who suffer.”¹²⁶ Martin Luther King Jr. declared, in the same spirit, that man's inhumanity to man is not only perpetrated by the vitriolic actions of those who are bad. It is also perpetrated by vitiating inactions of those who are good.¹²⁷ A huge human population in the world still lives in violence caused by deprivation and ensuing social exclusion. The contemporary world order is discriminatory, unjust and unfair to those who are deprived and disenfranchised, which is a condition of human rights violation. This argument suggests that poverty is an outcome of deprivation and social exclusion can be defined as a human rights violation.

However, the so-called democracy practiced by the Western countries and followed by the most countries freed from colonial yoke after the Second World War has disastrously failed to understand this reality. Liberalism, neo-liberalism particularly, rejects the principle of State's regulation of markets and allows the few wealthy to control the resources in the name of market freedom. The Western capitalism institutionalizes disparity among people, thus leading to a state of subordination of a vast population by minimal number of wealthy elites. The Western liberalism recognizes political rights as a foundation of civilized society because, according to its proponents, political rights empowers people to put control over government through an adult franchise held at an interval of a certain period. The economic, social and development rights are considered secondary rights serving the people's basic needs. Liberalism, thus, fails to understand development as a right of people for prosperity and happiness. The so-called democracy practiced by the Western nations and others has failed to serve the people for many reasons, thus essentially and institutionally violating people's rights of living with the dignity of life and means of material well-being of people.

The liberal democracy suffers from a *puzzling paradox*. This system gives no option for people but to vote for non-democratic forces and places the majority of people under the rule of a minority. Elites with non-democratic political ambitions exploit the system power, thus obtaining control on sources of wealth and institutions of finance, such as banks. They create corporations and amass wealth in acute discrimination against the working class. The so-called liberal democracy uses excessive propaganda outweighing a totalitarian regime to gain and preserve support for capitalist policies and programs to sustain elites' monopoly on resources and wealth. The so-called regular elections lead to a short-lived government, compelling its actors to indulge in

¹²⁶ Dietrich Bonhoeffer, 1995, 'A Letter to Family and Conspirators' in Geoffrey B. Kelly and F. Burton Selson, (eds.), *Dietrich Bonhoeffer: A Testament of Freedom*, Harper, San-Francisco, pp.482-486.

¹²⁷ Nicholas D. Kristof, 'The American Witness', *The New York Times*, 2 March 2005.

corruption or favor the corporations for regaining power in the government. On the other hand, the short-lived government is bound to put emphasis on short-term goals and safer issues, generally taking up the populist issues.

Most disastrously, the chance of liberal democracy being exploited by anti-democratic forces such as criminals and corrupt people is immense because they buy votes and secure their presence in a body that enacts laws to govern the people. In our lifetime, we have seen the victory of a rich person like President Donald Trump and the proscription of a person like Bernie Sanders in US. Once they get voted in, they make it sure that the policies of their choice or favor are enacted as laws. Even if they are not voted in, they are still able to get their votes transformed into laws. Such policies are taken as palatable because of immense lobbying and media's savvy campaign on strength of wealth. In US, most laws are lobbied by big corporations and the Media are fully controlled by such corporations. Unfortunately, the rich people or corporations can advertise and campaign for elections, thus getting elitism and oligarchy voted in rather than people's representatives.

The advertisement of democracy is used as a tool for fooling people. Deluding people from reality by using means of false information is a real powerful machine of liberalism. By using this machine, people are intentionally and deliberately confused by concepts such as economic preferences and political preferences; for instance, free markets versus communism as an economic preference and liberal vs. authoritarianism as a political preference.¹²⁸ The issues debated in elections are confusing and unrelated with the reality of lives of the majority of people. The elections are contested on the grounds of issues which pertain foreign policies and defence strategies. The American presidential office is not won or defeated based on the problems of American people. Rather the election concentrates on what China, Russia and India are doing. The election, in essence, is a real farce.

Democracies may, ironically perhaps, create a more effective military and the people are forced to fight wars, not willingly.¹²⁹ Most pathetically, the so-called liberalism is illiberal to the rich only. The so-called liberalism subject socialists to hatred and communists to criminal liability. Working-class people are suspected as communists, they are inherently pushed back. They are taxed, and the rich are exempted. The United States of America, which is propagandized as a country of freedom and liberty, has banned the communist party to participate in the elections. The Communist Control Act (68 Stat.775,50 U.S.C. 841-844) is a piece of legislation enacted by the federal legislation of U.S. and signed into law by President Dwight Eisenhower in on 24 August 1954. This law not only banned the communists to participate in politics but outlawed the Communist Party of United States and provided for the prosecution of those who professed communist ideology.¹³⁰

This Act declared, "The Communist Party of the United States, though purportedly a political party, is, in fact, an instrumentality of a conspiracy to overthrow the Government of the United States." The Act went on to charge that the party's "role as the agency of a hostile foreign power

¹²⁸ Anup Shah, 'Democracy', *Global Issues*, available at <http://www.globalissues.org/article/761/democracy>, accessed on 3 May 2018.

¹²⁹ Ibid.

¹³⁰ Gerhard Peters, John Woolley and T. John, 'Statement by the President Upon Signing the Communist Control Act of 1954', *The American Presidency Project*, University of California, 24 August 1954.

renders its existence as clear and continuing danger to the security of the United States.”¹³¹ America adopted the Internal Security Act in 1950, of which intention was to condemn communism and criminally prosecute communists. This introduced penalties for anyone belonging to a group calling for the violent overthrow of the American government. The 1954 Act went one step further by removing the rights, privileges, and immunities of attendant upon legal bodies created under the jurisdiction of the laws of the United States from the Communist Party.¹³² Evidently, the liberal democracy has no strength to tolerate opposition. It is the most intolerant system.

The liberal democracy is, in fact, a system to protect the ruling class of the society against the working class. Naturally, amassing wealth has been defined as a fundamental right and anything or any action that opposes the practice of amassing wealth is condemned as a violation of individual liberty and thus penalized. In this kind of political structure, the right of general people to development is considered, though not in explicit terms, as a threat to the privileges of the capitalist class. The inherent trouble lies in the philosophical understanding of liberalism that the working class is seen as an opposition from the perspective of binary theory. Like dark being opposite of light, the working class is considered contrary to the wealthy class. This fundamental underlying principle fails to recognize equality in access to wealth and its resources and the right of an individual to economic and social development. The Western philosophy or understanding of human rights is thus largely based on hypocrisy.

Development is an inherent right of every individual. The concept of rights to development rejects discrimination and subordination. Since discrimination and subordination are outcomes of *socio-economic deprivations*, the development is an instrument freeing people from deprivation. As a matter of fact, development is essentially an interface of human rights. The concept of human rights is, however, understood only in a limited sense of political or civil freedom or liberty. This notion of human rights detaches development from its interface, thus misleading the understanding of development as well as human rights.

The economic, social and political developments are, therefore, issues of human rights. The law of any society that fails to embody the rights to economic, social and political development as human rights, fails to hold the moral basis of legality. Human dignity is protected from economic, social and political development by offering adequate economic and social security to every individual. Hence, the issues of economic and social security, provide content to the law and provide principal ground for its legality. The contemporary world driven by the primacy of the liberal rights as advocated by intellectuals and governments from developed countries has abjectly failed to foster a situation of shared prosperity by all human beings. However, we must not be confused by the reality that economic and social development as human rights are the ultimate goals of human dignity and security, whereas political rights are tools of governance to ensure that economic and social developments are fully secure.

However, the practice of liberal democracy to detach political rights from human, economic rights and social development has generated a serious dichotomy about the understanding of human rights. This dichotomy is intentionally produced to condemn other political systems that do not follow the attributes of liberalism. This dichotomy has been used as a tool of conspiratorial international politics, which negates development rights as a scheme of establishing the precedence

¹³¹ Ibid.

¹³² Ibid.

of liberal rights and, thereby, applying a political game nurtures intellectual biases towards rights concerning economic and social development, thus creating a legitimized condition of poverty.

As countless records show, the liberal, developed countries tend persistently to deny recognizing the need of the enforcement of the economic, social and development rights as claims of individuals, and they are also rejecting the plea of the justifiability of such rights. These fundamental human rights of individuals are often defined as aspirations rather than legally ascertainable claims. The programmatic nature of economic and social rights is not a sole justification for placing them in a peripheral status. But there are many factors behind pushing such rights as equally important human rights by the developed countries. Europe, for instance, did not have to encounter the problem of enforcement of such rights because it did not have a problem of resource constraints. It did not have poverty as a massive problem either. Most European countries that practised colonization of Asia, Africa and South America had amassed wealth through plundering the resources of the countries from these continents.

The problem of poverty in these parts of the globe was hardly a matter of concern for them because they dishonestly believed that the poverty plaguing these parts of the world was not an outcome of their plunder, they, in fact, believed that the people of these parts were barbarians and savages. For them, the poverty of Asia and Africa was an outcome of ignorance or savagery of people in these parts. As a matter of fact, they manifested a very biased attitude to the *economic and social rights* from the very early time of efforts for drafting the *International Bill of Human Rights*. This compels us to argue that the people of poor and colonized parts of the world were never considered equal to the people of the so-called civilized west. The concept of equality and the necessity of shared prosperity of all human beings could not, therefore, be the agenda of Western developed countries.

The European Social Charter (ESC) was adopted by the Council of Europe in 1961, a decade after the European Convention for the Protection of Human Rights (ECHR) whereas the charter of Fundamental Freedoms was adopted as early as in 1950. When the ESC was adopted, it was envisioned to provide a backbone and framework for the protection of fundamental economic and social rights in Europe. In the spirit of recognizing the indivisibility between civil and political rights and economic and social, the drafters of the ESC viewed it as the necessary counterpart to the rights protected under the European Convention for the Protection of Human Rights and Fundamental Freedoms. In practice, however, ESC has been marginalized and has failed to elevate its status to equal footing with the European Convention for Human Rights.¹³³

The developed countries, indeed, have meticulously ignored the significance of economic and social rights. Philip Alston has accurately described the position. He says, "ESC turned out to be the poor little stepsister of the ECHR".¹³⁴ The reason was that Western capitalist intellectuals and politicians were utterly skeptical to offer equal status to ESC because they considered recognition and protection of such rights would establish a ground for breeding and justifying socialism.

As a matter of fact, ESC rights were considered as non-litigating rights by developed nations.

¹³³ Melissa Khemani, 'Economic and Social Rights', *Georgetown Law Centre*, 2009 available at <http://ssrn.com/abstract=1606110>, accessed on 15 November 2017.

¹³⁴ Philip Alston, 'Assessing the Strengths and Weaknesses of the European Charter's Supervisory System, Centre for Human Rights and Global Justice', Working Paper, *Economic, Social and Cultural Rights Series* NYU School of Law, No. 6, 2005, pp. 2-5.

This excuse put forward by the developed countries is copied by most developing countries to skip their accountability of addressing the problem of looming poverty. Countries like the UK and USA continue to question the value of a complaint and adjudication procedure about the economic, social and development rights. They put forward an argument that these are not fit for enforcement because of their so-called *vagueness*.¹³⁵ In developing countries, non-recognition of ESC rights immunises political leaders and bureaucrats from responsibility of working for benefits of poor people. The revenue of the nation can then be diverted to procure their luxuries. The influence of the Western countries on the emphasis of liberal rights is massive in developing countries, taken as an effective strategy for containing the rise of communism. In Nepal, a couple of thousand NGOs are exclusively working for Civil and Political Rights, whereas only few are engaged in discussing ESC rights.

However, this trend is now rejected by courts of many developing countries¹³⁶ and regional bodies, including the African Human Rights Court,¹³⁷ the Inter-American Commission of Human Rights,¹³⁸ the Inter-American Court of Human Rights,¹³⁹ the European Committee of Social Rights,¹⁴⁰ the European Court of Human Rights.¹⁴¹ Yet, the recognition and protection of economic, social and development rights is not at equal footing with civil and political rights. The persistent denial on the part of the developed nations to give equal status to the economic, social and development rights implicitly suggests that politicians and government bodies are still reluctant to account themselves for the grotesque state of poverty crushing the lives of millions of people in the world.

The non-empathetic attitude of the governments of the developed countries is reflected even in the recent discussions at the United Nations regarding the optional protocol to establish a complaints mechanism to the International Covenant on Economic, Social and Cultural Rights. Though a Working Group established to consider the optional protocol heard from several experts suggested that economic and social rights now must be justiciable,¹⁴² the recommendation

¹³⁵ Aoife Nolan, et al., 'The Justiciability of Social and Economic Rights: An Updated Appraisal', *Human Rights Centre*, Queen's University Belfast, 2007, available at <http://ssrn.com/abstract=1434944>, accessed on 15 November 2017.

¹³⁶ Jurisdictions accepting justiciability of economic and social rights include, *inter alia*, South Africa, The Philippines, India, Bangladesh, Colombia, Finland, Kenya, Hungary, Switzerland, Argentina.

¹³⁷ *Purohit and Moor v. Gambia*, Communication 241/200. Decided at 33rd ordinary Session of the African Commission, 15-29 May 2003 (dealing with the right to health of mental health patients); *SERAC and CESR v. Nigeria*, African Commission on Human Rights, Case No. 155/96, Decision made at 30th ordinary Session, Banjul, The Gambia, from 13th -27th October 2001 (dealing with the right to health and implied rights to food and housing).

¹³⁸ *Argentina: Jehovah's Witness, Case 2137*, Inter-AM. C.H.R. 43, OEA/ser. L/V/II.47, Doc 13 Rev.1 (1979) (Annual Report 1978) (dealing with the right to education); *Jorge Odor Miranda et al. v. El Salvador*, Inter-American Commission on Human Rights, Case 12.249, Report No. 29/01, OEA/Ser. L/V/II.111 Doc. 20 rev. at 284 (2000) (admissibility decision dealing with economic, social and cultural standards enshrined in OAS Charter).

¹³⁹ *The Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Inter-American Court of Human Rights Series C, No. 79, 31 2001 (Involving the Right to Property); *Delcia Yean and Violeta Bosica v. Dominican Republic*, Inter-American Commission on Human Rights, Report 28/01, Case 12. 189, 7 December, 2005 (Involving the Rights of Child).

¹⁴⁰ *International Association Autism-Europe (IAAE) v. France*, Complaint No. 13/2002, 7 November 2003, (dealing with the education rights of persons with Autism); *Internationaal Federation of Human Rights (FIDH) v. France*, Complaint No. 14/2003, 8 September 2004 (involving, *inter alia*, the right to medical assistance of non-nationals).

¹⁴¹ For a list of decisions of regional bodies on economic and social rights: See, A. Nolan et al., 'Leading cases on Economic, Social and Cultural Rights', *Summaries- Working Paper No. 2'*, COHRE Geneva, 2005.

¹⁴² For additional information on progress in this regard; See, Report from the First Session of the Open-Ended Working Group to consider options for an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (2004) E/CN.4/2004/44; Report of the Second Session, 2005. E/CN.4/2005/52.

to that effect was unable to obtain support of the developed countries. The developed powerful countries such as the U.S, UK, Canada, and Australia showed less favorable to the idea of the optional protocol. The draft of the protocol prepared by the Working Group was altered by such countries to ensure limitations on the scope and application of the suggested complaint procedure.¹⁴³

Canada, for instance, continued to question the merits of a communication procedure for economic, social and cultural rights even after voting and kept expressing its concerns about the potential of undue interference by an international body. It also raised concerns about the absence of a clear definition for many economic, social and cultural rights as well as for clear criteria for judging compliance.¹⁴⁴ After new mandate to the Working Group, the first meeting of the group was held on 7 July 2007. At this meeting, the support for the comprehensive complaint procedure was seen comparatively stronger. However, a significant number of nations, through their delegations, continued to argue in favor of a provision allowing for an '*ala carte*' or choice by states upon ratification as to which rights or aspects of rights the complaint procedure would cover. The US delegation argued that ICESCR, unlike the ICCPR, does not require States to provide legal remedies. In contrast, NGOs and states who favored the comprehensive optional protocol stressed that all social and economic rights, and all components of these rights, are subject to a requirement of effective remedies. The stand taken by powerful countries was a serious backward step in terms of effective protection of international human rights and promoting sustainable development and building a global community of human being for a shared future and human rights-based governance.

The rejection of the comprehensive complaint procedure shows that the developed countries are not yet prepared to take the death of millions of people, occurring due to hunger, lack of medicines and shelters, as a grave problem. The security and dignity of poor people are still at stake. The argument that these vital rights are merely aspirations but not claims can have the following implications:¹⁴⁵

- Continuity of *regressive status quo*, which forces millions of people to live in poverty with grotesque inhuman conditions;
- The developed countries are exempted from accountability to corrupt practices and wrong policies that cause poverty;
- The concept of good governance is limited in scope to political rights, and
- The concept of justice has no relevance to the necessity of rescuing millions of people from the hardship of lives caused by poverty and deprivation.

The state of enforceability of economic, social and development rights, as seen from the preceding discussion, is grossly neglected. By doing so, governments have failed to underline the importance of the principle that highlights the need of enforcing economic, social and development rights along with effective remedies. The principle is vividly described by Justice

¹⁴³ 'Human Rights Council's Resolution 2006/3', *Office of the United Nations High Commissioner for Human Rights*, para 2. available at http://www.ohchr.org/english/issues/escr/docs/res2006_3.pdf, accessed on 4 August 2018.

¹⁴⁴ UN Press Release, 'Action on Resolution on Working group on Optional protocol to the International Covenant on Economic, Social and Cultural Rights', *United Nations*, 29 June 2006.

¹⁴⁵ Aoife Nolan (n 135).

Yacoob of the South African Constitutional Court in his description of the plight of Irene Grootboom¹⁴⁶ and her family, living under plastic in the Wallacedene Sports Field. He writes: "The case brings home the harsh reality that the Constitution's promise of dignity and equality for all remains for many a distant dream".¹⁴⁷

XIV. Generation Theory of Human Rights and the Plight of Poor People

The concept of rights has two dimensions. *First*, some rights are concerned with promoting the capacity of individuals to interact with their fellow human beings in relation to their person, property, contract and so on. Their rights concerning persons, include freedom to interact with the State and the society, liberty to enjoy freedoms and to be treated equally as well as fairly and impartially. Their liberty also includes a guarantee from the State and fellow individuals to be treated with dignity. The Western jurisprudence defines such rights as liberal rights, and places higher importance to such rights, though mistakenly. *Second*, another category of rights is mostly concerned with basic needs and security against hunger and perils, such as natural disasters. Rights such as rights to standard living and rights to better or convenient life fall within this spectrum. Besides, the rights to food, health, housing, education and so on are some important rights falling within this spectrum. These rights are often defined as rights to development and are given less importance by the Western jurisprudence. These two varieties of rights are categorized and discussed as output rights and source rights. This categorization is considered important from the point of view of the interplay of law and development.

The recognition of the so-called liberal rights in isolation of the rights to development yields nothing but an illusion.¹⁴⁸ The notion of rights under the rubric of liberal rights, generally with mere political implication, bears no fruit at all; this is true at least in developing societies. The rights to development¹⁴⁹ for socio-economic transformation of people are, in fact, the undeniable precondition for the enjoyment of so-called liberal or political rights. The so-called generation theory of rights is the main reason behind the division—liberal and non-liberal rights. The main objective of the generation theory is to produce an ambiance of a hierarchy of rights in which the political rights can subordinate the economic rights and social development rights. In fact,

¹⁴⁶ *Government of the Republic of South Africa v. Grootboom, South Africa v. Grootboom*, 2001 (1) SA 46 (CC), 2001(1) SA 46.

¹⁴⁷ *Ibid*, para 2.

¹⁴⁸ According to Marxist critics, the formal liberal rights are rights of bourgeois democracies. Criticizing the capitalist notion of rights and freedoms, the Marxist critics hold that 'the liberal capitalism takes human rights as purely formal—at most procedural—and thus are illusions (See, Georg Klaus and Manfred Buhr (eds.), *Philosophisches Woerterbuch*, VEB Bibliographic Institute, Leipzig, 1974, p. 780. According to them, in a capitalist society, the working class lacks the economic means and intellectual formation to enforce its rights. Thus, workers are victims of "the shell game" (See, Roche, Jean; Apulia, André, *Public Freedoms*, Editions Dalloz, 1997, p. 11). Marxist critics argue that formal equality and legality mask *de facto* substantive inequalities. Thus, according to Marx, eliminating class differences is the first step to ending inequality and attaining the full realization of all persons.

¹⁴⁹ What is right to 'development'? Many definitions are available. Some are abstract and academic. Others are 'too concrete' and relate the right to development as 'access to modern technology'. The worthy way to understand the right to development is to avoid purposeless academic debate. The *UN Declaration on the Right to Development*, 1986, is an important document to refer for any discourse on the right to development. The declaration describes *development* as a 'comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free, and meaningful participation in development and their fair distribution of benefits resulting therefrom (See, *Declaration on the Right to Development*, 4 December 1986, UNGA A/Res/41/128).

this approach is mainly responsible for disregarding development rights, thus accounting for perpetuating a grotesque situation of deprivation of millions of people across the developing countries. This approach is mainly responsible for weaker or neglected enforcement of the rights under the International Covenant on Economic, Social and Cultural Rights, 1966.

The gross injustice encompassing the massive population in the world basically results because of the absence of the enforcement of the rights guaranteed under the said Covenant. The prevailing state of poverty resulting out of deprivation, access to resources and development opportunities and social exclusion, exists due to unjust and degrading categorization of the development rights as the second-class rights. This dichotomy is one of the vital reasons behind too many deaths occurring because of poverty. This approach of dividing rights and placing them into generations, with a perceived hierarchy of one over another, is liked both by the developed countries and the governments of some developing countries, where corruption exists like a plague. The international organizations backed by the western developed countries also like this division because they too want to skip from the obligation to such deaths. The principle of the interface of justice and development encourages us to argue that the wrong concept held by a section of the western jurisprudence contributes to prolongation of poverty and violation of human rights in the developing countries. That has been meticulously hatched to avoid accountability to the deaths of millions of people as an outcome of the wrong policies of the developed countries and the corrupt and unethical leadership of many developing countries. The grotesque hypocrisy of the international organizations like International Monetary Fund, World Bank, and Asian Development Bank is equally responsible.

A new economic world order that respects the equality of people across the world is a dream of globalization, which rejects colonialism and supremacy of some States over other states. The peace and prosperity in the world are contingent upon such globalization only, and globalization calls for the connectivity of the world, in terms of people to people communication, a fair-trade deal and the improvement of the infrastructures in the developing countries. Cooperation among people and nations for economic development is thus pivotal in addressing the gross problem of poverty across the world. Only that way, it would be possible to flourish respect, protection and promotion of human rights. As aspired by the preamble of the UN Charter, the elimination of wars and violence cannot be achieved without eradicating the causes of poverty, the deprivation, and social exclusion. Thus, it is an era to build a globalized world based on a community of shared future.

Peace and prosperity of the world as outlined by the UN Charter is fully contingent upon fair and unconstrained access to Human Rights. The past has abundantly shown us that poverty is mainly responsible for unleashing conflicts between the people and nations. The emergence of a world community sharing the resources and leap with peace and prosperity is, therefore, an urgent need of the world. A new economic world order has to emerge for this. Connectivity of people and nations with the generosity of sharing resources and voluntariness and preparedness for economic cooperation among nations is a precondition for building a community of shared future for mankind and human rights governance. This in-turn requires connectivity in infrastructure, knowledge, policies and wealth for development. As a matter of fact, in the modern era, it is necessary for nations, particularly from the global south, to come out giving up their pride and prejudices to build infrastructure knowledge and digital connectivity as well as promoting people to people linkages for development and shared destiny of the people across the world. It is suggested that it is the global south that must take advantage of the cooperation.

The responsibility in this matter particularly goes to emerging economies from the global south. It is thus their obligation to assist smaller economies to flourish and build a sustainable and peaceful global south. The nations emerging as a leading economy in the South must make the world feel that the era of fear for hegemony and colonialism has vanished. The success of the emerging economies to build this trust is a prelude for the realization of the building of a global community of shared future with better human rights governance.

XV. Analysis and Conclusion

The concept of rule of law is widely discussed in legal literature. However, the dissemination of the concept largely adopts a western approach. The idea of human rights and rule of law are intertwined. Human rights also adopt a western approach wherein the rights are divided into generations and focused on civil and political rights over economic, social, cultural and development rights. Eastern philosophies enriched with diverse concepts like *dharma*, *Ren* among others. Overlooking these rich concepts, the western scholars give a parochial interpretation of rule of law, human rights and democracy. Consequently, colonization imposed civil and common legal systems around the world. In modern times, through International Financial Institutions namely, IMF and World Bank are promoting western legal systems. To the contrary, BRI does not play any role in legal transplantations and legal political interference in the country of operation. Therefore, it is imperative in present times, to decolonize the significant ideas of human rights, rule of law and democracy by deconstructing their true implications as per Asian values.