



Constitutionalism, The Rule of Law and the Indian Concept of Dharma: A Jurisprudential Confluence

* **Dr. Vivek Kumar Pathak**

Assistant Professor

Faculty of Law

Banaras Hindu University

Banaras

Pg:103-111

Abstract:

In modern day democracies, constitutionalism and the rule of law are the essential attributes for safeguarding the rights, liberties and freedoms of common people. These constitutional principles specify the limits of the powers of government and provides for institutional mechanism to keep the government within these limitations. The institutional mechanism of constitutionalism and rule of law operates through several principles like separation of powers, independence of judiciary, judicial review, accountable government, free and fair elections and fundamental rights etc. It is believed that the modern constitutional principles have their origine from Western political and legal philosophy and the concept of constitutionalism and rule of law in Indian Constitution are imported from Western constitutional thought. On the other hand, ancient Indian civilizational philosophy developed the concept of Dharma as the supreme moral and ethical authority to govern the Ruler and the ruled both. The concept of Dharma is the supreme manifestation of Indian civilization in the form of cosmic law and ethical code of conduct for all human beings

including the King. Under Indian concept of Dharma, the King was never considered as the supreme whereas He was recognized as an official tool to enforce Dharma by conducting the governance in accordance with established norms and standards of Dharma. In this backdrop, present paper explores the confluence of these modern democratic principles with ancient Indian concept of Dharma and argues that there is deep and pervasive connection in all these three concepts. The paper concludes the constitutionalism and rule of law in Indian Constitution are not exclusively of Western import but are the result of synthesis of Western modern institutional mechanism and ancient Indian civilizational insight. It also suggests that convergence of structural wisdom of Western constitutional and legal framework and Indian experience of profound ethical philosophy of Dharma may offer a way forward where the powers of government are limited, supremacy of law prevails and justice becomes the ultimate ethical goal of human civilization.

Key Words: Constitutionalism, Rule of Law, Dharma, Indian, Civilization, Western, Philosophy, Governance, Powers, Ruler, Ethical, Legal

1. INTRODUCTION: THE CONFLUENCE OF COSMIC, MORAL AND POSITIVE LEGAL ORDERS

It is believed that the jurisprudence of a nation is not a sudden creation of its legal system, constituent Assembly, the Constitution and constitutionalism.¹ It is the consistent evolution and transparent condensation and refinement of

¹ M.P. Jain, *Indian Constitutional Law* 4 (8th ed., LexisNexis, 2018).

normative standards, logical shaking, metaphysical development and social adaptations during centuries.² In present-day legal sermon, the 'constitutionalism' and the 'Rule of Law' are considered to have Western origine, borne exclusively in the receptacles of the Magna Carta, the Enlightenment, and Anglo-American political struggles.³ This West-centric understanding and narrative often ignores and discounts the deep-rooted, aboriginal legal and jurisprudential development of the civilizations other than Western despite the fact that these non-Western civilizational developments were also aimed at achieving identical standardized objectives like the restraints on arbitrary exercise of public power, the preservation of liberty and dignity of human beings, and the attainment and implementation of such a social and moral order that is based on objectivity and fairness.⁴ In Indian tradition, this vital, foundational and indigenous jurisprudential framework was provided by the gigantic ancient concept of *Dharma*.⁵ It worked as the supreme and unassailable cosmic and moral law that was identically applicable to the ruler and subjects both.⁶ The intersection and interplay of constitutionalism, the Rule of Law and Dharma creates deep and philosophical jurisprudential triad.⁷ The recent concept of constitutionalism provides for an institutional mechanism including rule of law, separation of powers in the form of checks and balances, judicial review, independence of judiciary, accountable government and fundamental rights etc. to make the concept of limited government as reality by imposing the restrictions over the powers of government. On the other hand, the concept of Dharma accomplished this objective by subjecting the sovereign (ruler) to the cosmic framework of decent ethical obligations.⁸ The Rule of Law commands that the law is the supreme and nobody irrespective of his status and rank is above to it⁹ and the classical Indian writings pronounce that the Dharma is the 'King of Kings'¹⁰ and it possess coercive and ethical magnificence to which even worldly power is subjected to. The present paper explores this convergence by comparing and contrasting the Constitutionalism and Rule of Law with the philosophical, ethical, pragmatic and realistic operationalization of Dharma in ancient Indian governance and administration.¹¹ Based on the comparative blend, the paper endeavours to establish that the Indian Constitution did not break-away our ancient rich heritage¹² but it reorganized and desacralized the fundamental principles of Dharma by transmuting an ancient duty-based cosmic and moral order into a right-respecting transformative democratic reality.¹³ It also establishes that modern Indian Constitutionalism originates its exclusive robust charisma from the eternal undercurrent of righteousness of Dharma and the persistence and endurance of Rule of Law is not merely a consequence of textual adoption of Indian Constitution in 1949 but it is

² A.V. Dicey, *Introduction to the Study of the Law of the Constitution* 183 (10th ed., Macmillan, 1959), available at: <https://ia801602.us.archive.org/2/items/lawofconstitutio00diceiala/lawofconstitutio00diceiala.pdf>.

³ Upendra Baxi, "The Myth and Reality of the Indian Constitution", 3 *Journal of the Indian Law Institute* 45, 47 (1971).

⁴ P.V. Kane, *History of Dharmasastra* Vol. II, 2 (Bhandarkar Oriental Research Institute, 1941), available at <https://archive.org/details/in.gov.ignca.5699/page/815/mode/2up>.

⁵ S. Radhakrishnan, *The Hindu View of Life* 45-48 (George Allen & Unwin, 1927), available at <https://www.vifindia.org/ebook/1927/hindu-view-of-life>.

⁶ Carl J. Friedrich, *Limited Government: A Comparison* 12 (Prentice-Hall, 1974), available at <https://archive.org/details/limitedgovernmen0000frie/page/n5/mode/2up>.

⁷ L.M. Singhvi, *Freedom on Trial* 67 (Vikas Publishing House, 1991), as cited in S G Shreejith, "aching Ancient Indian Jurisprudence in Our Time: A Heterodox Approach to Orthodoxies" *Sage Journal of Human Values*, Vol. 30, Issue 3, 2014, available at: <https://journals.sagepub.com/doi/10.1177/09716858241248227>.

⁸ Joseph Raz, "The Rule of Law and its Virtue", 93 *Law Quarterly Review* 195, 198 (1977), available at: https://www.academia.edu/32877685/What_is_the_Rule_of_Law.

⁹ A.V. Dicey, *Introduction to the Study of the Law of the Constitution* 183 (10th ed., Macmillan, 1959), available at: <https://ia801602.us.archive.org/2/items/lawofconstitutio00diceiala/lawofconstitutio00diceiala.pdf>.

¹⁰ *Brihadaranyaka Upanishad*, I.4.14., Julius Stone, *Human Law and Human Justice* 32 (Maitland Publications, 1966). Available at: <https://digitalcommons.law.buffalo.edu/cgi/viewcontent.cgi?article=2623&context>.

¹¹ Duncan M. Derrett, *Religion, Law and the State in India* 56 (Fabers & Fabers, 1968), Granville Austin, *The Indian Constitution: Cornerstone of a Nation* 21 (Oxford University Press, 1966).

¹² *Kesavananda Bharati v. State of Kerala*, AIR 1973 SC 1461.

¹³ B.N. Rau, *India's Constitution in the Making* 112 (Orient Longmans, 1960), available at: <https://archive.org/details/in.gov.ignca.29229/page/n75/mode/2up>. despotism.¹³

the reflection of civilizational consciousness that always rejects the arbitrariness and

2. CONSTITUTIONALISM: LIMITING POWER AND THE ETHOS OF GOVERNANCE

The concept of Constitutionalism is antithesis to arbitrariness in exercise public powers by the state authorities during conducting the affairs of the government.¹⁴ It is dogmatic political philosophy which asserts that the powers and authority of the government must be subject to certain constitutional limitations and the holders of public power are required to exercise these powers within the bounds of these limitations.¹⁵ A state may have a written Constitution even without the spirit and practice of constitutionalism¹⁶ since the institutional mechanism to prevent the concentration of unrestricted power, accountability of the holders of public power, independence of judiciary along with the power of judicial review and protection of fundamental rights and liberties of individuals are the key requirements for any legal and political system to manifest true spirit and practice of constitutionalism.¹⁷ According to the renowned legal scholar and constitutional expert K. C. Wheare, the constitutionalism refers to the governance in accordance with the basic constitutional principles rather than a mere dependence on self-motivated power structure. In the Western jurisprudence, the evolution of constitutionalism has been the transformation from its ancient organic models to contemporary mechanical systems.¹⁸ An eminent scholar of Anglo-American constitutional history, Charles McIlwain discloses that the concept of constitutionalism consists of two indispensable foundations, the limitations on governmental power and the protection of basic rights, liberties and freedoms of individuals.¹⁹ This dyad is architecturally maintained by the doctrine of separation of powers by preventing all the three organs of government from being authoritarian and thus not authorizing any single branch from exercising tyrannical control.²⁰ In American Legal System, the same philosophy was introduced and entrenched into the constitutional fabric by propounding the judicial review as the ultimate safeguard against legislative and executive overreach in the case of *Marbury v. Madison*.²¹ In the context of Indian Constitution, it seems that the constitutionalism is not merely a mechanical and structural arrangement but a profound transformative socio-political philosophy and it has consistently been held to be an essential part of the 'basic structure' of the Constitution by the Supreme Court of India and therefore it cannot be amended by any transient legislative majority.²² In the case *R.C. Poudyal v. Union of India*²³ of The Supreme Court emphasizes that the constitutionalism is a political philosophy based on ethical and moral standards that confines and controls the exercise of public power by different branches of government so as to preserve the fundamental constitutional values. Correspondingly, the apex Indian court reiterated in *I.R. Coelho v. State of Tamil Nadu*²⁴ that controlled power of different branches of government is the essence of the concept of constitutionalism and state cannot create a state of anarchy by exercising its constituent power to amend the Constitution. The Western theory of constitutionalism focuses exclusively on institutional checks and consequently it often overlooks the core ethical fetters which social, political and legal philosophy of ancient

¹⁴ K.C. Wheare, *Modern Constitutions* 137 (Oxford University Press, 1966).

¹⁵ Giovanni Sartori, "Constitutionalism: A Preliminary Discussion", 56(4) *American Political Science Review* 853, 855 (1962), available at: <https://www.studocu.com/in/document/tamil-nadu-national-law-university/bcomllbhons/1-constitutionalism-preliminary-discussion-by-sartori-1962/69768694?sid=a6b1080d-fe92-4df1-bdeb-efdd0199dd9b1786862640>.

¹⁶ Charles H. McIlwain, *Constitutionalism: Ancient and Modern* 24 (Cornell University Press, 1947), available at: <https://ia802909.us.archive.org/29/items/in.ernet.dli.2015.274969/2015.274969.Constitutionalism-Ancient.pdf>.

¹⁷ H.W.R. Wade, *Administrative Law* 23-25 (11th ed., Oxford University Press, 2014).

¹⁸ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), available at: <https://supreme.justia.com/cases/federal/us/5/>.

¹⁹ Upendra Baxi, *The Indian Supreme Court and Politics* 12 (Eastern Book Company, 1980), available at: <https://www.scribd.com/doc/59509883/Upendra-Baxi-the-Indian-Supreme-Court-and-Politics>.

²⁰ *Minerva Mills Ltd. v. Union of India*, AIR 1980 SC 1789.

²¹ *R.C. Poudyal v. Union of India*, AIR 1993 SC 1804.

²² *I.R. Coelho v. State of Tamil Nadu*, AIR 2007 SC 861.

²³ AIR 1993 SC 1804.

²⁴ AIR 2007 SC 861.

India imposed upon the powers of ruler.²⁵ It seems that while Western idea of constitutionalism insists mainly on external and institutional checks, the Indian theoretical framework of constitutionalism combines external structural limits with internal moral and spiritual restraints.²⁶ The absolute sovereignty of Parliament or the ruler was never recognized by ancient Indian thinkers. Their viewpoint was

that the governance is always regarded as a sacred trust controlled by superior principle that no temporal power including ruler could alter.

3. THE RULE OF LAW: FROM ANCIENT MORAL THOUGHT TO MODERN DEMOCRATIC IMPERATIVE

It is supposed that the concept of rule of law is the simulation of natural law as an historical ideal making a commanding appeal to be ruled by law and not by whims and wishes of ruler. Prof. (Dr.) I. P. Massey writes that *“the Rule of Law is the supreme manifestation of human civilisation and culture and a new lingua franca of global moral thought. It is an eternal value of constitutionalism and an inherent attribute of democracy and good governance.....It is understood as a doctrine of state political morality that concentrates in securing a correct balance between rights and power, between individuals and between individuals and the state in any free and civil society.”*²⁷ It suggests that rule of law is not the product of modern age but is an age-old concept that has kept evolving with the evolution of time and civilization. Early Greeks placed the concept of rule of law in their ‘right reason’²⁸ that must be the basis of all the actions on the part of state authorities. Aristotle located it in his ‘moral justice’²⁹, Thomas Aquinas and St. Augustine presented it in the form of ‘Laws of God’³⁰. Medieval philosophers like Hobbs, Lock and Rousseau developed the concept of rule of law in the form of ‘social contract’³¹ theory. Sir Edward Coke announces that the King must be under God and Law and thus justified the authority of law over the pretences of the ruler or the government. The modern scholars refer the concept of rule of law to mean clarity, rationality, efficiency, permanency and authority of law, and impartial justice. The ancient Indian Upanishadic philosophy holds that Dharma is the King of Kings and it is more authoritative and unbending.³² It means that rule of law is a higher law establishing certain idealistic standards that societies are to enumerate and develop. It stipulates some criteria on the basis of which the law and legal structure of administration of governance of any society may be evaluated.

In modern day legal and constitutional philosophy, the rule of law has become the foundation of democratic governance by claiming that the law is the supreme, all irrespective of their rank and status are subjected to its supreme authority and the known and established legal principles are required to be applied evenly and uniformly without any fear and favour.³³ The concept of rule of law was conceptually formalized by A. V. Dicey by theorizing its three distinct components as absolute supremacy of regular law, equality before law and the predominance of legal spirit proposing that the constitutional spirit arises from common law and judicial

²⁵ *State of Bihar v. Kameshwar Singh*, AIR 1952 SC 252.

²⁶ W. Friedman, *Legal Theory* 53 (5th ed., Columbia University Press, 1967), available at: <https://archive.org/details/dli.ernet.237309>

²⁷ I. P. Massey, *Administrative Law*, 21 (10th ed. Eastern Book Company, 2022)

²⁸ Greek philosophical concept of ‘Right Reason’ refers to the correct exercise of human intellect, logic and moral judgement to understand the natural order and live a virtuous life.

²⁹ Aristotle defines moral justice as the complete moral virtue being practiced in relation to other people. It involves treating equals equally and proportional fairness,

³⁰ Thomas Aquinas defined law as an ordinance of reason for the common good made by someone who cares for the community i.e. God. He organized the Laws of God into four types including eternal, natural, human and divine law.

³¹ The social contract theory explains why governments exist and how people move from wild state of nature to an organized society by trading some personal freedom for safety.

³² Brihadaranayak Upanishad, 1.4.14

³³ Lord Bingham, “The Rule of Law”, *The British Journal of Criminology*, Volume 50, Issue 6, November 2010, pp. 1202–1205, available at: <https://doi.org/10.1093/bjc/azq059>.

precedents.³⁴ The thesis of rule of law developed by Dicey seems essentially to be procedural that is intended to protect the common individual against the arbitrary exercise of power by extensive government.³⁵ The procedural sight of rule of law proposed by Dicey was further expanded by international jurists and legal thinkers.³⁶ Lon Fuller put forth the debate for proposing the 'inner morality of law' based on certain structural requirements such as generality, clarity and non-retroactivity which are necessary for a legal system to survive and function unaffectedly as per the wants of rule of law.³⁷ On the contrary, Joseph Raz supported a formalistic approach of rule of law and proclaim that rule of law is an influential asset like a sharp knife. It must be clear and predictable because it is not capable of guaranteeing substantive social, economic and political justice automatically.³⁸ The substantive and ideological connotation of rule of law (the thick model of rule of law) was developed by International Commission of Jurists known as Delhi Declaration, 1959 which pronounces that rule of law requires that the functions and powers of government are required to be so exercised so as to uphold the dignity of man as an individual. It requires not only the guarantee of certain civil and political rights but also the creation of certain social, economic, educational and cultural conditions which are essential for an individual to develop his personality to its full extent.³⁹ The framework suggested by Delhi Declaration identifies that the rule of law is to support the populace to fulfil their political as well as the socio-economic, educational, religious and cultural aspirations by safeguarding individual dignity together with procedural fairness.⁴⁰

Our Forefathers incorporated the concept of rule of law in Indian Constitution in a very profound and thoughtful way. It is deeply intertwined in the constitutional scheme, constitutional values, constitutional goals and the provisions of the Constitution of India and also reflected in its judicial interpretation by the apex Indian court.⁴¹ Article 14 serves as the primary text to establish this great principle by securing the guarantee of equality before law and equal protection of the laws.⁴² The concept of rule of law has kept evolving in India even after the commencement of Indian Constitution through the constitutional interpretation. In early decades of establishment of Indian Republic, the Supreme Court espoused somewhat formalistic approach as to interpretation of constitutional provisions incorporating the concept of rule of law. In *A. K. Gopalan v. State of Madras*⁴³ 'Procedure established by law' under Art. 21 was interpreted literally and strictly as a procedure enacted by competent legislature regardless of its fairness, justness and reasonableness.⁴⁴ This Formalistic narrow interpretation of rule of law resulted into the darkest episode of constitutional interpretation and the black spot on Indian constitutional jurisprudential history when in *ADM Jabalpur v. Shivkant Shukla*⁴⁵, the Supreme Court held that the emergency provisions themselves constitute rule of law and during emergency, the doors of courts are completely shut for challenging arbitrary detentions. However, the courageous and spirited dissent Justice H. R. Khanna remains the defining statement of substantive meaning and true nature of rule of law and it certainly paved the way forward for further positive development as to the interpretation and understanding to substantive and ideological meaning of rule of law in India. Consequently, the Supreme Court of India held that it is the

³⁴ Richard Fallon, "'The Rule of Law' as a Concept in Constitutional Discourse", *Columbia Law Review*, Vol. 97, No. 1, 1997, pp. 1-56, available at: <https://www.jstor.org/stable/27248395>.

³⁵ Lon L. Fuller, *The Morality of Law* 33-39 (Revised ed., Yale University Press, 1969), available at: https://www.scribd.com/document/677106332/Lon-L-Fuller-The-Morality-of-Law-Revised-Edition-The-Storrs-Lectures-Series-1969-libgen-lc#google_vignette.

³⁶ Joseph Raz, *The Authority of Law: Essays on Law and Morality* 211 (Clarendon Press, 1979) as reviewed by Patrica D. White, "Law and Moral Obligation", *The University of Chicago Law Review*, 1982, pp. 249-257, available at: <https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=4268&context=uclrev>.

³⁷ Delhi Congress of International Commission of Jurists, "The Declaration of Delhi", *Journal of the Indian Law Institute*, Vol. 1, No. 2 (Jan., 1959), pp. 207-218, available at: <https://www.jstor.org/stable/43949631>.

³⁸ Upendra Baxi, "The Rule of Law in India", 6 *Sur - International Journal on Human Rights* 6, 8 (2007), available at: <https://pdfs.semanticscholar.org/8116/e260886fc8c0ee60f8cbf9094e245463ace5.pdf>.

³⁹ H.M. Seervai, *Constitutional Law of India* 432 (4th ed., Universal Book Traders, 1993).

⁴⁰ The Constitution of India, 1950, Articles 14-18, 21, 25-28, 29, 30, 38, 39.

⁴¹ *A.K. Gopalan v. State of Madras*, AIR 1950 SC 27.

⁴² *ADM Jabalpur v. Shivkant Shukla*, AIR 1976 SC 1207.

⁴³ AIR 1950 SC 27.

⁴⁴ Rajeev Dhavan, *The Supreme Court of India: A Socio-Legal Critique of its Juristic Techniques* 89 (N.M. Tripathi, 1977), pp. 103-120, available at: <https://www.jstor.org/stable/43950623>.

⁴⁵ AIR 1976 SC 1207.

fundamental principle of a civilized society that a person cannot be deprived of his right to life and personal liberty without the authority of law and therefore, the rule of law is the antithesis of arbitrariness.⁴⁶ Further, the Supreme Court ousted formalistic approach to rule of law and held that it is not sufficient for any procedure to be 'procedure established by law' under Article 21 that it is enacted by the competent legislature but in addition, it must be permeated with the principles of natural justice for being just, fair and reasonable.⁴⁷ This new approach of Indian judiciary incorporated the American 'Substantive Due Process', Fuller's inner morality and ancient ethical concept of natural justice into Indian law. The declaration of Justice P. N. Bhagwati that arbitrariness is the absolute antithesis to equality and thus violative of Art. 14 established the principle that the rule of law must enthusiastically disapprove and nullify any unequal, unreasoned and arbitrary state action.⁴⁸

4. THE CONCEPT OF DHARMA: THE ETERNAL AXIS OF RIGHTEOUSNESS AND JUSTICE

The spirit of constitutionalism has been deep-rooted in Indian tradition. For understanding the profound pedigrees of Indian constitutionalism, one must have an academic insight in ancient concept of Dharma in addition to the appreciation to the modern statutory text.⁴⁹ Dharma is derived from Sanskrit root **dhṛ** that implies 'to uphold', 'to support' or 'to sustain' and is the foundational principle of the whole universe.⁵⁰ Unlike to common understanding, it is not only the dogmatic set of pious rites rather the galactic, cosmic and decent superglue that provides for certain spiritual, social and ethical values, ideals and norms for the society to adopt for its sustenance and preventing it from being dissolved into disorder and anarchy.⁵¹ Dharma sustains all living beings and society. It is so named because it has the capacity to uphold and sustain. Thus, anything that have the capacity to uphold and sustain is definitely Dharma.⁵²

In the long religious, cultural and literary history of our most ancient nation, thousands of years back, the Indian saints, philosophers and thinkers evolved a theory of religious, ethical, and moral law. The theory of ideal, religious, ethical, and moral norms was considered to be above and beyond the positive law and embodied the human values and ideals of higher law of nature and this theory of universal authority is known as 'Dharma'. It was developed with an objective to set up a harmonious social order by creating a balance between spiritual and material aspects of life of the people. This all the development of 'Dharma' by great Indian elders in the form of religious, ethical, and moral code of conduct is based on human experience and human conscience. An effort was made to build such an organized social life where everybody is to accomplish his/her ambition within the bounds and standards of social norms of ethics and morality. The unique and significant attribute of this concept of 'Dharma' was that the rights and duties of rulers, councillors and ministers as their associates, priests and the common people were governed by 'Dharma' itself. According to the concept of Dharma elucidated in Vedic and post-Vedic literature, it was the duty of the King to uphold the law and at the same time He was also subjected to law and Dharma. It is substantiated by the statement of Dr. S. Radhakrishnan in Constitutional Assembly Debates when he says that "Dharma righteousness is the king of kings. It is the ruler of both the people and the ruler themselves. It is the sovereignty of the law".⁵³

The Dharma was considered to be the supreme authority and the king was only next to the last authority with an obligation to enforce the law. According to Brihadaranyak Upanishad, "the dharma is the king of kings and nothing is superior to dharma. The dharma aided with the power of the king enables the weak to prevail over the strong. Even the king is subordinate to Dharma."⁵⁴ The concept of Dharma refers to righteousness, law and

⁴⁶ *E.P. Royappa v. State of Tamil Nadu*, AIR 1974 SC 555.

⁴⁷ *Maneka Gandhi v. Union of India*, AIR 1978 SC 597.

⁴⁸ *E.P. Royappa v. State of Tamil Nadu*, AIR 1974 SC 555.

⁴⁹ P.V. Kane, *History of Dharmasastra* Vol. II, 2 (Bhandarkar Oriental Research Institute, 1941).

⁵⁰ S. Radhakrishnan, *The Hindu View of Life* 45-48 (George Allen & Unwin, 1927).

⁵¹ Carl J. Friedrich, *Limited Government: A Comparison* 12 (Prentice-Hall, 1974)

⁵² *The Mahabharata*, Karna Parva, Chapter 69, Verse 58.

⁵³ S. Radhakrishnan, *Constituent Assembly of India Debates*, 20th January, 1947, available at: <https://indiankanoon.org/doc/1990637/>.

⁵⁴ Brihadaranyak Upanishad, 1.4.14

morality and it is true that no state can endure without these attributes of law.⁵⁵ The Dharma means right action in conformity with truth, ethics and morality.⁵⁶ The Dharma protects those who practices and upholds it and who do not uphold the Dharma and destroy it, they get destroyed with the passage of time.⁵⁷ It suggests that the concept of Dharma provided for checks and balances by subjecting the King under certain norms and duties to prevent him from being despotic tyrannical and arbitrary in performance of his duties, exercise of his powers and enjoyment of his rights and privileges. Thus ‘Dharma’ incorporates in its entire concept, the rule of law and natural justice.⁵⁸ It is significant to mention that the concept of Dharma was based on the understanding that the rights and duties are complimentary to each other and the rights are integrated with duties.

The viewpoint evolved by ancient Indian scholars in the form of Dharma seems to be the manifestation of natural law with religious fervour. It was developed with an objective to persuade the members of the society towards the path of personal brilliance, social harmony, national unity and a sense of common brotherhood. The ancient Indian scholars had the considerate understanding that inherent dignity and the worth of every individual deserve the appreciation, respect and protection and, therefore, they developed the ethical norms, moral standards and a code of conduct in the form of the concept of Dharma to recognize and respect the human dignity and the worth of every individual. It was believed that the adherence to the concept of Dharma by all, irrespective of their status and rank, in their deeds was indispensable for securing the dignity, wellbeing, happiness and all-round development of all the individuals and for establishing and maintaining the harmony, peace and fraternity in the society. The Supreme Court of India has referred to the concept of Dharma as the source of fundamental rights incorporated in our Constitution by observing that, “the fundamental rights represent the basic values cherished by the people of this country since the Vedic times and they are calculated to protect the dignity of the individual and create conditions in which every individual can develop his personality to the full extent”.⁵⁹

The civilizational concept of Dharma progressed through numerous coatings of ancient Indian text.⁶⁰ In the ancient most available text Rigveda, it works together with **Rta** as immutable cosmic order regulating both the natural happenings and temporal, worldly and physical actions.⁶¹ It is provided that anybody who interrupts **Rta** commits a cosmic wrong.⁶² During the period of Upanishads, the Dharma was recognized as unqualified truth and ultimate governing power. This identity of Dharma is asserted by articulating that Dharma is the supreme governing force over all temporal powers including the ruler.⁶³ In conventional legal text, Dharma is classified as *Sadhana Dhrama*⁶⁴, *Varnashrama Dharma*⁶⁵ and *Rajdharma*. *Rajdharma* was the most thoughtful display for Indian political and legal arena that refers to fundamental law governing the sovereign.⁶⁶ In Indian traditional literature, the Ruler was never recognized as the source of law rather he was an official tool responsible for enforcing Dharma.⁶⁷ It is prescribed that if the King predominates Dharma by applying his own whims and

⁵⁵ L.M. Singhvi, *Freedom on Trial*, at 85, as cited in Mukund Sharda and Basim Akhtar, “Concept of Dharma, Justice and Law: A Study”, *Bharati Law Review*, Jan-Mar, 2017, available at: <https://docs.manupatra.in/newslines/articles/Upload/50B727EC-6404-4C35-BB26-F6169BF31862.pdf>.

⁵⁶ S. Radhakrishnan, *The Hindu View of Life*, (Harper Collins Publishers, India, Edition 2015) at 66.

⁵⁷ *anu*, VII, 15

⁵⁸ M Shankar Dayal Sharma, “Convocation Address”, 6(1) *National Law School Journal*, 1994, available at: <https://repository.nls.ac.in/nlsj/vol6/iss1/2>.

⁵⁹ *Maneka Gandhi v. Union of India*, AIR 1978 SC 597 at 620

⁶⁰ P.V. Kane, *History of Dharmasastra*, Vol. II, 2 (Bhandarkar Oriental Research Institute, 1941).

⁶¹ J. Duncan M. Derrett, *The Essays in Classical and Modern Hindu Law* 12-15 (1st Indian ed. 1995, E.J. Brill, 1977), available at: <https://brill.com/display/title/5882>.

⁶² Rig Veda, IV.23.8-10.

⁶³ “He was not strong enough. He created still further the most excellent Dharma. This Dharma is the Ruler of the Ruler (King of Kings). Therefore, there is nothing higher than Dharma. Through Dharma, even a weak man hopes to prevail over a strong man, as though by appealing to a king. Verily, that which is Dharma is Truth.” -Briadaranayak Upanishad, 1.4.14.

⁶⁴ It refers to universal ethical values like truth and non-violence.

⁶⁵ Specific duties based on one's societal role and stages of life., Swami Gambhirananda (trans.), *Eight Upanisads: With the Commentary of Sankaracarya* 145-146 (Advaita Ashrama, 1989).

⁶⁶ Robert Lingat, *The Classical Law of India* 3-6 (J. Duncan M. Derrett trans., University of California Press, 1973).

⁶⁷ Justice M. Rama Jois, *Dharma: The Global Ethic* 29 (Bharatiya Vidya Bhavan, 1993).

fancies, he shall lose his acceptability and legitimacy.⁶⁸ The *Rajdharm* was to be executed by the King through his power of lawful punishment and force known as *Danda*.⁶⁹ But at the same time, it was also specified that the King did not possess the absolute power of *Danda*, whereas it was a two-edged sword regulated by *Dharma*⁷⁰ and if the King inflicts *Danda* unreasonably and discriminately, he will be destroyed by the same very force.⁷¹

The ancient Indian conception of *Dharma* seems to have profound philosophical and theoretic connotations with the modern concept of Rule of Law and Constitutionalism.⁷² The declaration of Upanishads that the *Dharma* protects the weak against strong by allowing him even to overcome the later is certainly the recognition of the core objectives of modern regime of fundamental rights and substantive equality.⁷³ The *Rajdharm* can be equated with the ancient fundamental law of the land when it pronounces that the powers of the sovereign are conditional and are possessed by him as a trust for welfare of the subjects.⁷⁴ Ancient Indian jurists like Sukra and Narada recognize the right of the subjects to overthrow the tyrant ruler if he violates the such trust which seems to pathway the social contract theory by John Lock and the right to revolution.⁷⁵ The Indian judiciary also recognizes this rich heritage when it take the assistance and patronage of the concept of *Dharma* for interpreting the constitutional provisions and constitutional values enshrined in Indian Constitution.⁷⁶ The Supreme Court of India has made an in-depth analysis of the concept of *Dharma* and held that *Dharma* embodies and signifies fundamental values of justice and righteousness that forms the foundation of rule of law and therefore, it must not be confused with religion.⁷⁷ The core principles of *Dharma* are aligned clearly with the constitutional values and constitutional goals set forth in the Constitution, fundamental rights and the Directive Principles of State Policy.⁷⁸ The interpretation of Art. 21 to encompass the protection of right to human dignity seems to be an effort of Indian judiciary to preserve the ancient Indian concept of *Atmatushti* i.e. inner satisfaction and conscience.⁷⁹ The constitutional goal envisioned in Part IV of Indian Constitution echoes the ancient ideal of *Yogakshema* implying inclusive welfare and safekeeping of general public.⁸⁰ The evolution of Public Interest Litigation as transformative justice seems to uphold *Dharma* by ensuring the access of justice to all including especially the poorest and most marginalized sections of population.⁸¹

5. CONCLUSION

The foregoing establishes the fact that the constitutionalism, the rule of law and the Indian concept of *Dharma* are intertwined with their deep-rooted linking. This profound linkage of modern concept of constitutionalism and rule of law and Indian indigenous concept of *Dharma* divulges that the concept of limited government and supremacy of law are not exclusive creations and developments of Western legal and political philosophy. Whereas Western jurisprudence institutionalized these fundamental principles of governance by developing a brilliant institutional mechanism to enforce checks and balance, the Indian civilization enumerated the same values and ideals through a deep and thoughtful ethical framework prioritizing duties together with rights. It may

⁶⁸ Kautilya, *The Arthashastra* 143 (L.N. Rangarajan trans., Penguin Books, 1992).

⁶⁹ *Manusmriti*, VII.30-31.

⁷⁰ Georg Bühler (trans.), *The Laws of Manu*, 25 *Sacred Books of the East* 222 (Clarendon Press, 1886).

⁷¹ *Manusmriti*, VII.19.

⁷² Upendra Baxi, "The Avatars of Indian Jurisprudence", 4 *Supreme Court Cases (Jour)* 11 (1995).

⁷³ Justice V.R. Krishna Iyer, *Law, Freedom and Change* 54 (Affiliated East-West Press, 1975).

⁷⁴ K.P. Jayaswal, *Hindu Polity: A Constitutional History of India in Hindu Times* 210 (3rd ed., Bangalore Printing & Publishing, 1955).

⁷⁵ *Sukraniti*, II.274-275; John Locke, *Two Treatises of Government* 385 (Peter Laslett ed., Cambridge University Press, 1988).

⁷⁶ Justice S.S. Dhavan, "The Indian Jurisprudence and its Relevance Today", 2 *All India Reporter (Jour)* 18, 22 (1970).

⁷⁷ *A.S. Narayana Deekshitulu v. State of Andhra Pradesh*, (1996) 9 SCC 545.

⁷⁸ *Aruna Roy v. Union of India*, AIR 2002 SC 3176.

⁷⁹ *Francis Coralie Mullin v. Administrator, Union Territory of Delhi*, AIR 1981 SC 746.

⁸⁰ *Paschim Banga Khet Mazdoor Samity v. State of West Bengal*, (1996) 4 SCC 37.

⁸¹ *S.P. Gupta v. Union of India*, AIR 1982 SC 149; Upendra Baxi, "Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India", 8 *Delhi Law Review* 91 (1982).

be submitted that the ideal of Rule of Law finds its ancient natural groundwork in *Dharma* that emphasizes on absolute truth and righteousness as ultimate authority for both the ruler and ruled. It seems that the Indian Constitution has magnificently synchronized these both philosophies by adopting external formal and structural safeguards through certain institutional mechanisms and tools from Western constitutional and legal philosophy and profound inner spiritual, moral and ethical civilizational standards of ancient Indian thought. This is reflected by the approach of Indian judiciary adopted in constitutional interpretation when the apex Indian court nullifies an arbitrary action or extends protection for human dignity or enforces the canons of social and economic justice by applying modern constitutional tools for fulfilling the promises of ancient concept of *Dharma*. Therefore, it may be argued that the concept of constitutionalism and rule of law in Indian Constitution are not entirely imported from Western civilization rather they are living reflection of Indian civilizational values that have constantly rejected arbitrary exercise of power for establishing everlasting righteousness. It is significant to note that modern constitutional frameworks are facing challenges of authoritarian and majoritarian shift, procedural hollowness and also of disobedience. The convergence of modern constitutional framework with the ancient civilizational concept of *Dharma* may provide an effective solution in the backdrop that the constitutionalism and rule of law cannot rely merely on systems of courts and legislative enactments whereas it requires constitutional as well collective popular morality. It may be suggested that convergence of structural wisdom of Western constitutional and legal framework and Indian experience of profound ethical philosophy of *Dharma* may offer a way forward where the powers of government are limited, supremacy of law prevails and justice becomes the ultimate ethical goal of human civilization.

⁸¹ *Paschim Banga Khet Mazdoor Samity v. State of West Bengal*, (1996) 4 SCC 37.

⁸² *S.P. Gupta v. Union of India*, AIR 1982 SC 149; Upendra Baxi, "Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India", 8 *Delhi Law Review* 91 (1982).