

## RULE OF LAW AND STATE

\* AKANKSHA SHAHI<sup>1</sup>

### WHY IS LAW NECESSARY

Law is necessary in the society as a control mechanism. Since, society has so many variables, what is one man's right may be another man's wrong, According to Prof. H.L.A. Hart, "Man needs to be regulated by laws as he does not live in isolation. Man lives in a community and must therefore be regulated."

If there was no system of law to have power over how people control their lives then there would be a society to live in. People would be free to make decisions based solely on their principles, they would be free to steal, murder, damage, trespass, terrorize what or whomever they wanted when it suited them, and nothing would be done about it. Hence, it would be disastrous, if not impossible to base a society solely on such principles.

Law is essential in the society. Law is there to guide the society towards happiness and harmony. It helps to restore the balance in the society and bring justice to the victimized. The greatest thing about law is that all are equal before it. No man is more powerful than the other in the eyes of the law. Law helps to regulate the behaviour of the people. It prevents us from descending into anarchy.

Law is dynamic. It is constantly adapting to the changing times so as to close all the loopholes that may be left due to human error. Our Preamble states the ideals of Justice, Liberty, Sovereignty, Fraternity and Equality which constitute the basic foundation of Our Constitution. However, without law these ideals will be constantly shattered. There will be nothing to protect these ideals.

The three reasons why laws are important are that law lessens uncertainty, inefficiency and that the laws of society progress society by solving the problem of stasis.

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<sup>1</sup> LL.M,2019-20,CHANAKYA NATIONAL LAW UNIVERSITY, PATNA

## DICEY'S CONCEPT OF RULE OF LAW

The "rule of law," a concept deeply rooted in the history and development of law in England and English-speaking North America, means the "supremacy of law." Government officers, like ordinary citizens, are subject to and must abide by the law; no one is above the law.

Ideas about the rule of law have been central to political and legal thought since at least the 4th century BCE, when Aristotle distinguished "the rule of law" from "that of any individual." In the 18th century the French political philosopher Montesquieu elaborated a doctrine of the rule of law that contrasted the legitimate authority of monarchs with the notion of autocrats. It has since profoundly influenced Western liberal thought.

Montesquieu wants to capture the "spirit of the law" and submit them to a scientific analysis. Montesquieu distinguishes the various positive laws and the universal law of which the first are only special cases: the law (positive) means a rule established to ensure the security and freedom, rule appears as an extended specification, as an expression of human reason .

Following Montesquieu's approach, in the year 1885, A.V. Dicey on observing the UK model laid down three principles to be arising out of Rule of Law<sup>2</sup>.

- Supremacy of Law,
- Equality before the law and
- Predominance of Legal Spirit

Although the general idea of a rule-based state is as old as the Romans, the specific phrase "the Rule of Law" was first popularized only in the last half of the nineteenth century by A.V. Dicey, Vinerian Professor of English law at Oxford from 1882 to 1909. In the first edition of his immensely influential and often reprinted Introduction to the Study of the Law of the

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<sup>2</sup> A.V. Dicey, The Law of the Constitution: 1 (Oxford Edition of Dicey, 2013)

Constitution, Dicey confidently declared: "Two features have at all times since the Norman Conquest characterized the political institutions of England."

As Dicey defined it, the Rule of Law had three meanings in England: (1) no one can be made to suffer punishment or to pay damages for any conduct not definitely forbidden by law (2) everyone's legal rights and liabilities are determined by the ordinary courts of the realm and (3) everyone's individual rights are derived from the ordinary law of the land, not from a written constitution, so that the English Constitution is the product of the ordinary functioning of the courts and not the source of the courts' jurisdiction. Dicey's formulation was highly specific. The Rule of Law was not a cultural attribute common to the West, but rather it was local to England, a distinctive product of English history and legal institutions. Dicey's Rule of Law distinguished the English legal system from the French across the English Channel, where *droit administratif* meant separate laws and courts for government officials, as well as from the Americans across the Atlantic Ocean, where written state and federal constitutions reigned supreme<sup>3</sup>.

#### **CO-RELATION OF CONCEPT OF EQUALITY (Article 14) AND PROHIBITION AGAINST DISCRIMINATION (Article 15 ) WITH RULE OF LAW:**

Article 14 states that the State shall not deny to any person Equality before the law or the equal protection of laws within the territory of India. If this term is closely looked then it appears that in essence both terms mean 'Equal Justice'. The Right to Equality is conferred on every person and not merely on citizens. It was held in *State of West Bengal v. Anwar Ali Sarkar*<sup>4</sup> that 'law' in Article 14 is not confined to the law enacted by legislature but includes any order or notification. Such an interpretation makes the protection provided in Article 14 complete available to every person. Seervai says,

*"If all men were created equal and remained throughout their lives, then the same laws would apply to all men"*<sup>5</sup>.

Equal protection of the laws must mean the protection of equal laws for all persons similarly situated. The Constitution emphasis upon the principle of Equality as basis to the Constitution.

<sup>3</sup> John V. Orth, Exporting the Rule of Law, 24 N.C.J. INT'L L. & COM. REG. 71, 82 (1998).

(August 8, 2019 6:00PM) [https://heionline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/macq4&section=4](https://heionline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/macq4&section=4)

<sup>4</sup> AIR 1952 SCR 284.

<sup>5</sup> H. M. Seervai, Constitutional Law of India.

This means that even a Constitutional amendment offending the Right to Equality will be declared invalid. Neither parliament nor any state legislature can transgress the principle of Equality, which has also been observed by Supreme Court in *Keshav Nand Bharti v. State of Kerala*<sup>6</sup>. This principle has been reiterated by the Supreme Court in *M.G. Badappanavar And Anr. Etc vs State of Karnataka And Ors*<sup>7</sup> case in the following words

“Equality is a basic feature of the Constitution of India and any treatment of equals unequally or unequal as equal will be violation of the basic structure of the Constitution of India”<sup>8</sup>.

The Right to Equality has been declared by the Supreme Court as the basic feature of the Constitution. It is rightly observed by the Supreme Court in relation to Right to Equality in *M. Nagaraj v. Union of India*<sup>9</sup> “there can be no justice without the equality”.

The Constitution is wedded to the concept of Equality. The Preamble to the Constitution emphasizes upon the principle of Equality of basic to the Constitution. This means that even a Constitutional amendment offending the Right to Equality will be declared invalid.

Over the last several years the courts have been unfolded the vast potentialities of Article 14 as a restraint on the legislative power of the Legislature as well as administrative power of the Administration. Article 14 bars discrimination and prohibits discriminatory laws. Article 14 is now proving as a bulwark against any arbitrary or discriminatory state action. In *Menaka Gandhi vs. Union of India*<sup>10</sup> the Supreme Court declared that Article 14 strikes against arbitrariness. Also in the case of *Bachan Singh v. State of Punjab*<sup>11</sup> Justice Bhagwati has emphasized that rule of law excludes arbitrariness and unreasonableness.

Yet another case is of *Yusuf Khan Alias Dilip Kumar and Ors. v. Manohar Joshi and Ors*<sup>12</sup>. in which the Supreme Court laid down the proposition that it is the duty of the state to preserve and protect the law and the constitution and that it cannot permit any violent act which may negate

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<sup>6</sup> Keshav Nand Bharti v. State of Kerala AIR 1973 SC 1461

<sup>7</sup> 2001 2 SCC 666

<sup>8</sup> M.G. Badappanavar v. State of Karnataka AIR 2001 SC 260

<sup>9</sup> M. Nagaraj v. Union of India AIR 2007 SC 71

<sup>10</sup> 1978 SCR (2) 621

<sup>11</sup> (1980) 2 SCC 684

<sup>12</sup> (2000) 2 SCC 696

the rule of law. Hence, it is quite evident that the concept of rule of law is gaining importance and attention and judicial efforts are made to make it more strong.

The horizons of Equality as embodied in Article 14 have been expanding as a result of the judicial pronouncements and Article 14 has now come to have a highly activist magnitude.

In the case of *Indra Sawhney v. UOI*<sup>13</sup> the right to equality is also recognized as one of basic features of Indian constitution. Article 14 applies to all person and is not limited to citizens. A corporation, which is a juristic person, is also entailed to the benefit of this article. This concept implied equality for equals and aims at striking down hostile discrimination or oppression of inequality. In the case of *Ramesh Prasad v. State of Bihar*, AIR 1978 SC 327 It is to be noted that aim of both the concept, ‘ Equality before law’ and ‘ Equal protection of the law’ is the equal Justice.

## **RULE OF LAW AND JUDICIARY**

The ultimate responsibility for maintaining a rule of law system therefore rests with the judiciary. Another meaning of rule of law highlights the independence of the judiciary and the supremacy of courts. It is rightly reiterated by the Supreme Court in the case *Union of India v. Raghubir Singh*<sup>14</sup> that it is not a matter of doubt that a considerable degree that governs the lives of the people and regulates the State functions flows from the decision of the superior courts.

The popular habeas corpus case, *ADM Jabalpur v. Shivakant Shukla*<sup>15</sup> is one of the most important cases when it comes to rule of law. In this case, the question before the court was ‘whether there was any rule of law in India apart from Article 21’. This was in the context of suspension of enforcement of Articles 14, 21 and 22 during the proclamation of an emergency. The answer to the majority of the bench was in negative for the question of law. However, Justice H.R. Khanna dissented from the majority opinion and observed that:

*“Even in absence of Article 21 in the Constitution, the state has got no power to deprive a person of his life and liberty without the authority of law. Without such sanctity of life and liberty, the*

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<sup>13</sup> 1992 Supp 2 SCR 454

<sup>14</sup> 1989 SCR (3) 316

<sup>15</sup> A D M Jabalpur v. Shivkanth Shukla, AIR 1976 SC 1207, para 154

*distinction between a lawless society and one governed by laws would cease to have any meaning...Rule of Law is now the accepted norm of all civilized societies”*

In *Chief Settlement Commr. Punjab v. Om Prakash*<sup>16</sup>, it was observed by the Supreme Court that, “In our constitutional system, the central and most characteristic feature is the concept of rule of law which means, in the present context, the authority of law courts to test all administrative action by the standard of legality. The administrative or executive action that does not meet the standard will be set aside if the aggrieved person brings the matter into notice.”

Most famously in the case of *Kesavananda Bharati v. State of Kerala*<sup>17</sup> the Supreme Court held that the Rule of Law is an essential part of the basic structure of the constitution and as such cannot be amended by any Act of Parliament, thereby showing how the law is superior to all other authority of men.

The Supreme Court observed in *Som Raj v. State of Haryana*<sup>18</sup> that the absence of arbitrary power is the primary postulate of Rule of Law upon which the whole constitutional edifice is dependant.

## **INTER-RELATIONSHIP BETWEEN STATE AND RULE OF LAW**

It is difficult to say whether the State had a singular origin or it evolved as a single process. The history of human civilization reveals that men as social beings tended to live in larger groups under a common authority for the purpose of regulating their interests *inter-se* as also for the adjustments of relations between it and similar other groups. The State evolved from a simple to a more complex form with extension of its activities. Eventually, the strong political society in turn contributed to the formation of a modern governmental state. The main factors which contributed to the evolution of the State include sociability of man, kinship, religion and industry. The war also led to the growth of a social organizational form of larger group called the State for the sake of protection and self-preservation of its people.

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<sup>16</sup> 1968 SCR (3) 655

<sup>17</sup> AIR 1973 SC 1461

<sup>18</sup> 1990 AIR 1176

## DEFINITION OF STATE

The expression 'State' is derived from the latin term '*status*', which means 'standing'; i.e. position of a person or a body of persons. It is difficult to give a precise definition of State because different political thinkers and jurists have defined it in different ways. Some of the generally accepted definitions of the State as given by eminent Jurists are as follows:

**Holland** – According to Holland a “*State is a numerous assemblage of human beings, generally occupying a certain territory amongst whom the will of the majority or of an ascertainable class of persons is, by the strength of such majority or class made to prevail against any of their member who oppose it.*”

**Salmond** – defines State as “*an association of human beings established for the attainment of certain ends by certain means.*”<sup>19</sup> The State is a society of men established for the maintenance of peace and justice within a definite territory by way of force. It therefore, follows that the central authority of political society which is called the State must be powerful enough to command obedience of its subjects and must be able to withstand external aggression.

## INTER-RELATIONSHIP BETWEEN STATE AND RULE OF LAW

Jurists have always expressed divergent views about the relationship between the state and the Rule of law. Freeman theory propounded in this regard. According to one view, the state is superior to law because it creates law while the other view holds that law precedes the state. There is yet another view which suggests that the law and state are all the same looked from the point of view of the functions they perform.

**Law as a product of State** - English jurist Austin and Bentham have expressed a view that law is a product of the State. However, the sovereign himself is not bound by the law which is binding on his subjects. He has unbridled power to repeal, abrogate or annul the laws so enacted. Hegel also supported this view and opined that law is a product of the state. The Nazi and Fascist rulers treated law as the creation of State the ruler was above law.

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<sup>19</sup> P.F. Fitzgerald: Salmond on Jurisprudence (12<sup>th</sup> ed.), p. 132

**State and law are one and the same** - Kelson opined that in fact law in the state are the two sides of the same coin. He observed, "*when we think of the abstract rules we speak of the law, when we consider the institutions which the rulers create, we speak of the State.*"

The foregoing analysis makes it abundantly clear that law and state are intimately inter-linked. The question as to which of the two is supreme has to be answered in context of the polity of the State concerned. Thus in England, the Supremacy of the state is evident from the fact that law is considered to be a command of the sovereign who is above and beyond law. But in India, it is not so. Even the *Upnishads* have reiterated more than ones that "Law is the King of Kings" and no one, not even the King is above law. The code of Manu has also acknowledged the supremacy of law over the ruler and expected the King to follow the tenets of Dharma, i.e. the law and governance of his subjects.

The modern Indian polity also upholds the supremacy of law as a constitutional mandate. The Supreme Court has Time and again upheld the Supremacy of the constitution to strengthen rule of law. Thus in *I.M.Singh v. Borobubu Singh*<sup>20</sup>, the apex court observed: "no one in this country is above law and governance is not of men but of the rule of law which permits no one to claim to be above law."

The expression 'State' as defined in Article 12 of the Constitution includes the Parliament, the Government of India and the state government, legislatures of States, local bodies even the judiciary<sup>21</sup>. The constitution is supreme and above all these institutions<sup>22</sup>.

### **WHY RULE OF LAW AND NOT RULE OF MEN**

The opposite of rule of law is rule of person. This commonly phrased opposition is put in different ways: 'the rule of law, not man' 'a government of laws, not men' 'law is reason, man is passion' 'law is objective, man is subjective'.

The inspiration underlying this idea is that to live under the rule of law is not to be subject to the unpredictable vagaries of other individuals—whether monarchs, judges, government officials or

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<sup>20</sup> 1994 AIR 505

<sup>21</sup> A.R. Antulay v. R.S. Nayak, AIR 1988 SC 153

<sup>22</sup> Dr. N. V. Paranjape, Studies in Jurisprudence and Legal theory, Central Law Agency (8<sup>th</sup> ed. 2016)

fellow citizens. It is to be shielded from the familiar human weaknesses of bias, passion, prejudice, error, ignorance or whim. This sense of the rule of law is grounded upon fear and distrust of others. Aristotle's words on this still resonate today:<sup>23</sup>

*“And the rule of law, it is argued, is preferable to that of any individual... Therefore he who bids the law rule may be deemed to bid God and Reason alone rule, but he who bids man rule adds an element of the beast; for desire is a wild beast, and passion perverts the minds of rulers, even when they are the best of men. The law is reason unaffected by desire.”<sup>24</sup>*

. The indeterminacy of law and language suggest that this opening can never be shut completely. The standard solution to this problem is to identify the judiciary, the legal experts, as the special guardians of the law.

### **Law is Rex:**

Rule of law is opposed to rule of man. It does not and is not capable of being defined precisely. King in England was an institution which was law, Rex was Lex. This view was upheld by majority (7:5) in *R v Hampden*<sup>25</sup> famously known as Ship money case. Chief Coke was removed from the post of Chief Justice of the King's Bench. He was one amongst five who upheld 'Lex is rex' and majority held 'rex is lex', Act of settlement, 1701 restored 'lex is rex'. Rule of law is composite name for 'lex is rex'. Law is king of kings. All power flows out of law and merges in law. The clamour for rule of law can be seen in what Professor A.V. Dicey wrote in 1885. The idea includes justice, liberty, equality and fraternity in a democratic republic which is sovereign, socialist and secular. There can be no better enumeration of rule of law than what is in the Preamble to the Indian Constitution.

Absence of arbitrary powers, supremacy of law, equality before law and individual liberties are that rule of law stands for. Article 14, 19, 21, 32 and 226 are wherein rule of law stands spread over the Indian Constitution. Article 15 deals with Prohibition of Discrimination in Indian Constitution.

The concept of equality before the law is equivalent to the second element of the concept of the

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<sup>23</sup> Aristotle, *Politics*, ed. by Stephen Everson, (Cambridge: Cambridge University Press, 1988) vol. 3 at 78.

<sup>24</sup> John Walter Jones, *The Law and Legal Theory of the Greeks* (Oxford: Clarendon Press, 1956) at 7 [quoting Plato].

<sup>25</sup> (1637) 3 State Tr 826

‘rule of law’ propounded by A.D. Dicey, the British jurist. But certain exceptions to it are, the president of India, state governors, Public servants, Judges, Foreign diplomats, etc., who enjoy immunities, protections, and special privileges.

Article 15 prohibits discrimination on the grounds of religion, race, caste, sex or place of birth. Article 15 says that the state shall not discriminate against only of religion, race, sex, place of birth or any of them.

Article 15 (1) and (2) prohibit the state from discriminating any citizen on ground of any religion, race, caste, sex, place of birth or any of them.

It provides that there shall be no restriction on any person on any of the above bases to access and use the public places such as shops, restaurants, hotels, places of public entertainment etc. or use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public. Under Article 15 (3) & (4), the government can make special provisions for women & children and for a group of citizens who are economically and socially backward.

Justice in rule of law means giving due to everybody and keeping the balance even in ‘haves’ and ‘have nots’ Social Economic and Political. Its main impact is in what is known as ‘distributive justice’ or ‘administration of justice’, justice according to law, natural justice, legal justice, civil justice, criminal justice. The purpose is keep all in themselves.

#### **Protection from arbitrary acts:**

Rule of law aims to protect not only economically, socially, physically, or educationally backward, weak from affluent class, it also saves well to do classes from injustice of these weak when they unite to cause injustice to the person of other class. It is class that does atrocities on another even if that other is otherwise powerful left alone. Mass destroying singles. Rule of law protects such individuals also.

‘**Equality**’ is in article 14. Equality before law and Equal Protection of law are aims of equality. Equality means like should be treated alike. And unlike, unlike. Unequals cannot be treated equally, classification is permissible. Class legislation is prohibited. Classification must be reasonable. It should be based on ‘intelligence differentia’ those in class and those left out of that

class. This should have nexus with object sought to be achieved. Equality is ‘anti thesis of arbitrariness’

**‘Liberty’** Concept of liberty is in Article 21. No person shall be deprived of his life or personal liberty except according to procedure established by laws.

**‘Fraternity’** Abolition of untouchability, title, guarantee to access to public places, temples, right to education, uniform civil codes are examples wherein fraternity has been ensured.

**‘Article 32 and 226’** Judicial review is the basic feature of Constitution. It is complete check on arbitrary power. All courts and tribunals are under judicial scrutiny through power of judicial review. This would not have been in ‘rule of law’ concept of Dicey but is definitely an essential feature of rule of law in India.

## **RULE OF LAW AND RULE BY JUDGE**

The judge becomes the law personified. This occurs when a judge undergoes extensive training in legal knowledge and in the craft of judging—indoctrinated into and internalizing the law—and when a judge takes a solemn oath to decide cases according to the law. In the ideal, the judge must be unbiased, neutral between the parties, free of passion, prejudice and arbitrariness, loyal to the law alone. Thus, we see common declarations that the judge is the mouthpiece of the law, or the judge speaks the law, or the judge has no will. Final say in the interpretation and application of the law properly rests with the judiciary because no other government official undergoes this requisite transformation in which the subjective individual is replaced with the objective judge.

Although ‘the rule of law, not man’ ideal applies to all government officials, it is the special preserve of judges for these reasons. Judges are the ones whose specific task is to insure that other government officials are held to the law. The ultimate responsibility for maintaining a rule of law system therefore rests with the judiciary. Several conditions must hold if judges are to accomplish this. There must be a well-developed legal tradition, a rich body of legal knowledge and a robust legal profession that embodies and advocates the value of legality.

The danger of this strain of the rule of law is that the rule of law might become rule by judges. Whenever judges have final say over the interpretation and application of law, they will determine the implications of law in concrete situations. The old saying, ‘The judge speaks the law’—paints the person of the judge as invisible, with the law alone speaking through the mouth of the judge. But this saying can just as easily be turned around to this: ‘The law is what the judge says it is’. As every lawyer knows, the law can be manipulated in the hands of a skilled judge to achieve desired results.

Law cannot but speak through people. Judges must be individuals who possess judgment, wisdom and character, or the law will be dull-minded, vicious and oblivious to its consequences. It was Aristotle who first insisted that the character and orientation of the judge is the essential component of the rule of law<sup>26</sup>.

## CONCLUSION AND SUGGESTIONS

The main characteristic of the concept of rule of law is 'equality'. One of the threats to the Rule of Law is the indeterminacy problem that the critical legal theorists highlight. Their argument is that every law has gaps that judges and administrators must fill in during interpretation and implementation in specific fact scenarios. The law is almost never completely clear and determinate, and when judges and administrators interpret and implement that law, they are influenced by their personal choices, making the Rule of Law merely the rule of men. This criticism, while it appears grave, has been tackled in theory and practice. As Aristotle pointed out thousands of years ago, judges need to use reason to ensure that their personal choices do not come in the way of correct decision-making. The modern legal system makes an effort to reduce the impact of these personal choices through various procedural safeguards such as public hearings, requirement of written and reasoned orders and the need to follow principles of natural justice. While the influence of personal choices can never be ruled out completely, the requirement of applying legal reasoning and certain procedures does reduce the possibility of personal prejudices significantly. As discussed earlier, the Rule of Law can never rule out the involvement of men; by its very nature, it is the Rule of Law and men. one needs to reduce the

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<sup>26</sup> Brian Z. Tamanaha (2012) The History And Elements Of The Rule Of Law Singapore Journal of Legal Studies 232–247

influence of passion and promote reason in all decision-making. The Rule of Law only demands that society is not subject to tyranny because of the arbitrary personal choices of men. As long as systems claiming to comply with the Rule of Law implement measures to reduce this arbitrary exercise of power, the indeterminacy issue can be tackled.

India is the largest democracy in the world. The essence of a democratic government lies in the conduct of free & fair elections. The parliament tried to mold this basic essence towards their end so that they could have the prerogative to validate an invalid election. One could only imagine and fear the imagination that this regressive amendment would have brought to the Indian Democracy. Besides, what is the meaning of Democracy i.e. for the people, by the people & of the people if there are no free & fair elections.

Law has its limits, and so does the Rule of Law, conceptually, normatively and practically. However, that does not mean one should abandon the Rule of Law. Efforts should be made to iron out the deficiencies without being seduced by the magic surrounding the phrase "Rule of Law". Rule of Law may not be an answer to all the social ills of modern societies, but it is a minimal requirement for any society.

All citizens, as well as the government and its officials, should be treated equally by the law. In the contemporary world, the Rule of Law cannot be circumscribed by the limitations of the thin theories. Due to the universal acceptance of certain human rights, the Rule of Law needs to include measures to protect basic fundamental rights of citizens such as equality, freedom of expression and association. The inclusion or exclusion of such rights do not affect the character of the Rule of Law.

Lawyers must be participants in the criminal law system, in establishing property ownership, in facilitating commercial transactions, in seeking recovery for injuries and in handling major disputes. Lawyers must advise individuals, civic groups, corporate actors and government officials in legal affairs. And in many societies, lawyers occupy leading positions in business and government, bringing into these positions their legal acumen and their respect for legality. In addition, the judiciary must enjoy independence, with institutional arrangements that protect the judiciary from interference by others.