
CAN THE RULE OF LAW BE COMPROMISED IN FAVOUR OF LEGAL FUNCTIONALISM?

Tanya Vig, Jindal Global Law School

Dicey quoted in *The Law of The Constitution* that “two features have at all times characterised the political institutions of England, the supremacy of the Parliament and the rule of the Law”¹ establishing the legal authority of the parliament, and laying down the principle of equality before law. While parliamentary supremacy binds the courts to the laws made by the Parliament, Rule of Law ensures that adequate safeguards are in place to protect personal freedoms while all organs of the state act as per the powers assigned to them under the Constitutional provisions, and statutes. On analysing these principles within the Indian context, Dicey’s emphasis on legal equality and opposition to arbitrariness aligns with the Indian Preamble’s commitment to securing “justice, liberty, equality, and fraternity” for all citizens, as these ideals inherently demand governance through predictable, non-discriminatory legal processes. While the Indian Preamble doesn't explicitly mention "Rule of Law," its principles are implicit in the commitments to justice, equality, liberty, and fraternity.² The formalist approach views law as an internally coherent system that should operate independently of external political or social pressures.

However, significant divergences exist. India's Preamble envisions the country seeking social change and futuristic goals, while Dicey's conception primarily preserves existing liberties. The Indian Constitution establishes constitutional supremacy rather than parliamentary supremacy, and emphasises substantive equality beyond Dicey's formal equality. In *Kesavananda Bharati v. State of Kerala*³ (1973), the Court recognised Rule of Law as part of the "basic structure" and contextualised it within India's transformative constitutional vision. However, very few cases have addressed the principle which stands contrary to legal formalism i.e., legal functionalism. Essentially, legal functionalism aims to prioritise social utility and views law as an instrument to do so. This requires the law to conform with prevailing socio-political conditions, which poses the risk of Rule of Law not being followed. According to

¹ Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution*, Liberty Fund, (1885).

² INDIA CONST., Preamble

³ *Kesavananda Bharati v State of Kerala*, 1973 4 SCC 225

functionalist theorists like Pound, “The legitimacy of legal principles derives not from their internal logical consistency, but from their efficacy in harmonising competing social interests.”⁴

The key question which usually follows is that of how much legal functionalism can be favoured over Rule of Law, and up to what extent. The Supreme Court attempted to answer this question in *NCT of Delhi v. Union of India*⁵, by departing from a strictly literal approach in interpreting Article 239-AA (4). The court, while not addressing legal functionalism, did coin the term "**constitutional pragmatism.**"

In most cases, which have held extreme importance in the development of the Indian jurisprudence, the underlying aim of the judiciary has always been to ensure the State's interests are well balanced with the individual's. Thus, these cases present an ambiguous front in this continuing dialogue between principled adherence to Rule of Law and Legal Functionalism exercised by the judiciary. These developments raise a critical question ‘Has Legal Functionalism become a convenient facade for political expediency and evasion of Rule of Law?’ In this paper, I am going to address the evolution of both, Rule of Law and Legal functionalism, through the aforementioned landmark judgments in an attempt to answer this questions.

The Evolution of Rule of Law

The interplay between Rule of Law and legal functionalism manifests across all three organs of the state. Parliament employs exceptional legislation like Unlawful Activities Prevention Act (UAPA) that challenges traditional Rule of Law constraints, the Executive exercises extraordinary powers through ordinances and administrative discretion, and the Judiciary oscillates between activism and restraint. This institutional behaviour is exemplified in landmark judgments like *ADM Jabalpur v Shivkant Shukla* and *KS Puttaswamy v UOI*, which trace the evolution of the Court's differing opinions based on the socio-political nature of the country.

The case which established Rule of Law as a principle which can't be overridden in any circumstance, irrespective of violation of fundamental rights, is that of *ADM Jabalpur v*

⁴ Roscoe Pound, *A Survey of Social Interests*, Vol. 57 Harvard Law Review, (1943)

⁵ State (NCT of Delhi) v Union of India, 2020 12 SCC 259

Shivkant Shukla.⁶ The court addressed the question on whether individuals could approach the Court under Article 226 in case of violation of Fundamental Rights during the proclamation of Emergency under article 359(1) of the Constitution. The majority was 4:1, barring individuals from filing writ petitions under Article 226 to challenge detentions, effectively suspending judicial review under the Maintenance of Internal Security Act (MISA), thus suspending the *locus standi* of all individuals.

Additionally the Court held that “*the Constitution is the mandate. The Constitution is the rule of law. No one can rise above the rule of law in the Constitution.*” However, the majority did not only establish the Constitution as supreme, but also gave unchecked power to the executive by holding that even mala fide or illegal detentions under MISA could not be challenged.⁷ By denying the Right to Approach the Court, the Right to a Fair and Free Trial which is the foundational basis of the principles of natural justice was violated. Additionally, the majority chose to view ‘law’ under Article 21 as only statutory thereby reducing it to procedural law, instead of natural law.

Lastly, Rule of Law as a basic feature of the constitution was not recognised, which led to its suspension during the State Emergency. This case shows the extreme position the courts took in the favour of the state’s interest and going to the extent of fully suspending the Rule of Law by suspending fundamental rights, choosing institutional self-restraint, and allowing executive dominance.

Justice Khanna was the single dissenting judge, where his contention was against the very action of handing certain powers to the State which inevitably would lead to a violation of the individuals’ fundamental rights, stating “*Such a construct is contrary to the basic foundation of the Rule of Law which imposes restraints upon the powers vested in the modern State when it deals with the liberties of the individual. The power of the Court to issue a writ of habeas corpus is a precious and undeniable feature of the Rule of Law.*”⁸

Conversely in *KS Puttaswamy v UOI*, the court overruled *ADM Jabalpur* by establishing individual liberty as an inviolable right and establishing the Right to Privacy as a fundamental right. Justice Mukherjee stated “*Life and personal liberty are not creations of the Constitution.*

⁶ ADM, Jabalpur v. Shivkant Shukla, 1976 2 SCC 521

⁷ ADM, Jabalpur v. Shivkant Shukla, 1976 2 SCC 521

⁸ ADM, Jabalpur v. Shivkant Shukla, 1976 2 SCC 521

These rights are recognised by the Constitution as inhering in each individual as an intrinsic and inseparable part of the human element which dwells within.” Thus, upholding the Rule of Law.

Applying Dicey’s Rule of Law

Dicey’s ideas of Rule of Law consist of Supremacy of Law, Equality before Law, and Predominance of Legal Spirit, and its application to these 2 cases show whether Rule of Law has prevailed over legal functionalism.

In *ADM Jabalpur v Shivkant Shukla* the court epitomised a more state-centric reading of reading the constitution, allowing the State to override Fundamental Rights guaranteed under the constitution and giving more privilege to the State by supporting its interests. By interpreting ‘law’ under Article 21 as purely statutory, the Court reduced Rule of Law to a procedural formality, and, ironically, undermined substantive justice by treating rights as conditional grants rather than inherent principles. The very act of prioritising State interests and reducing the legality of Article 21 goes against the first idea of Supremacy of the Law.

The court also granted the Executive the ‘power to operate beyond the Judiciary’s power of scrutiny’⁹, i.e., relaxing their power of Judicial Review by disallowing individuals to approach the Courts to challenge unlawful detention made by the State machinery.

While Rule of Law is supposed to ensure equality before the law, and strict reading of the provisions of the law to ‘restrict arbitrary distribution of power and control’¹⁰, *ADM Jabalpur* created a disturbing legal vacuum where detained persons existed outside the protection of law. The Court's assertion that Article 21 rights could be suspended during Emergency effectively created two classes of citizens: those with rights and those without, thus going against the Principle of Equality Before Law.

In this case the court accomplished the opposite of what the intended purpose of Rule of Law was by granting the power to unlawfully detain individuals.

Lastly, the third principle of Rule of Law which ensures Predominance of the Legal Spirit, wherein absolute supremacy or predominance of regular law is exercised as opposed to the

⁹ Amy Street, *Judicial Review and the Rule of Law Who is in Control?* Vol. 60 The Constitution Society, (2013)

¹⁰ Upasana Bohra, *The Rule of Law* SSRN Electronic Journal SSRN Electronic Journal, (2021)

influence of arbitrary power¹¹, was completely abandoned in *ADM Jabalpur* by disregarding constitutionalism. By denying judicial review of even malicious detentions, the Court abandoned its responsibility to prevent arbitrary exercise of state power and allowed Executive to operate without legal constraints.

Conversely, *Puttaswamy* prioritised predominance of the legal spirit by interpreting the law substantially in favour of individual rights and to uphold principles of natural justice. The Court recognised that certain fundamental principles constrain what the state can legitimately do, even through constitutional mechanisms. This judgment also realigned Indian jurisprudence with natural law principles, recognising rights as pre-constitutional and inherent. Thus, upholding the Supremacy of Law and overruling *ADM Jabalpur v Shivkant Shukla*.

Puttaswamy reinforced equality before law by declaring privacy a universal right and by holding that “*The right to privacy is protected as an intrinsic part of the right to life and personal liberty under Article 21 and as a part of the freedoms guaranteed by Part III of the Constitution*”¹²

The two differing opinions, 40 years apart, show the evolution of the Judiciary on their stance on Rule of Law. On analysing these two cases it can be observed that Rule of Law which essentially emphasises the importance of following the law as it is stated to prevent arbitrary use of power by the State, has been interpreted in two different ways based on the legal know how of the two benches. *ADM Jabalpur* interpreted it narrowly, treating law as a tool of state authority during the State emergency while *Puttaswamy* viewed Rule of Law as grounded in constitutional morality, justice, and individual dignity. The extent to which Rule of Law can be compromised in favour of legal functionalism is extremely blur given that the judiciary has not acknowledged this in theory. However, the very act of going against the Rule of Law, as seen in *ADM Jabalpur*, is dangerous to the country’s democracy and citizens rights. To compromise this, is to go against the structure of the Constitution and against the intent of the framers of the Constitution.

Legal functionalism can be seen as a subjective approach to the application of law to ensure that legal interpretation can be adapted to the socio-political context. While the purpose behind

¹¹ T.R.S. Allan, *Legislative Supremacy and the Rule of Law: Democracy and Constitutionalism*. Vol. 44, No. 1 The Cambridge Law Journal, pp 111, (1985)

¹² Justice K S Puttaswamy v. Union of India, 2019 1 SCC 1.

using legal functionalism which adjudicating cases is to serve societal needs and ensure the law is dynamic, the slope to the powers being misconstrued as arbitrary is very slippery.

To understand the Indian Judiciary's stance on functionalism, it's important to analyse the case of *NCT Delhi v UOI*. The issue in this case revolved around the interpretation of Article 239AA in relation to Delhi's status as a Union Territory. The court, while not directly addressing the importance of legal functionalism and its relevance in the Indian judiciary, did coin the term '*constitutional pragmatism*.' The court defined it by viewing it as an "*exposition of judicial sensibility to the functionalism of the Constitution*"¹³ The court realised the importance of viewing the Constitution as a living document whose spirit must also be recognised to ensure that "*popular will of the people isn't lost in the constitution's semantics*."¹⁴ The court neither explicitly focused on legal functionalism nor addressed the glaring question on the relation between Rule of Law and legal functionalism, but did go beyond the textual formalism in favour of a more distinct approach to constitutional adjudication.

This conceptual framework recognises that the Constitution is a living document that needs to be interpreted with purpose in order to meet changing demands for governance while upholding core constitutional principles. By doing this, the Court established that constitutional interpretation must take into account *a teleological understanding* of constitutional provisions in their institutional and social context.

The purported benefits of the functionalist approach which include liberal interpretation from the bench and judicial creativity, choosing substantive justice and constitutional vitality, and giving less importance to legal fiction are very appealing. However, this also creates grey area for not only the Judiciary, but also the Executive and Legislature to abuse their power in functionalism. This can clearly be seen in the infamous case of *Romilla Thapar v UOI*¹⁵

Can functionalism Undermine Justice?

While Rule of Law ensures that the text is abided by strictly, Legal functionalism allows for the courts to interpret the law and use judicial creativity. This approach, while enabling adaptability, can result in Courts being complicit in violating fundamental rights and going

¹³ State (NCT of Delhi) v. Union of India, 2020 12 SCC 259

¹⁴ State (NCT of Delhi) v. Union of India, 2020 12 SCC 259

¹⁵ Romila Thapar v. Union of India, 2018 10 SCC

against the principles of the constitution and separation of powers. Consequently, functionalism can become a tool for constitutional transgressions.

Romila Thapar v UOI

This case revolves around the detention of 5 activists under the UAPA Act after which Romila Thapar filed a PIL seeking a Special Investigation Team (SIT) citing unlawful arrest by the State Police. She contended that “there was no evidentiary link between the persons arrested or raided and the FIR, the activists had no history of indulging in any violence or instigating any violence”¹⁶, so the use of UAPA was clearly *malafide*, and “additionally the sections under UAPA were added to the FIR without due authorisation from the respective authority.”¹⁷ Despite weak evidence, the police claimed a link to the banned CPI(M) and invoked UAPA on grounds of national security.

When laws which allow preventive detention and give uncontrolled power are enacted, the executive and the state machinery have the unquestioned authority to arrest anyone who dissents or acts against state policy. Adding functionalism to the mix creates a scenario of providing unwarranted power to the organs of the state. The prioritisation of the outcome of the case which was to keep the activists detained is clearly visible which has led to the breakdown of Rule of Law completely. There were lapses in following the Criminal Procedure Code, and there was insufficient evidentiary link and unreliable witnesses. Despite this, the Court rejected the creation of a SIT on the grounds that evidence produced by the Maharashtra police was enough. However Justice Chandrachud, the only dissenting judge, concluded that “there was a need to constitute a SIT to conduct a Court monitored investigation as sufficient doubt had been cast on the impartiality of the Maharashtra Police.”¹⁸

This case exemplifies the hazards inherent in expansive functionalist jurisprudence when applied to security legislation. Rejecting the plea for a Special Investigation Team (SIT) ignores law enforcement's procedural infractions as well as the lack of proof linking the activists to the claimed offenses. This ruling not only compromises fundamental liberties but also gives the

¹⁶ Mayur Suresh, *The Slow Erosion of Fundamental Rights: How Romila Thapar v. Union of India Highlights What Is Wrong with the UAPA*, 212 SSRN Electronic Journal, (2019)

¹⁷ Mayur Suresh, *The Slow Erosion of Fundamental Rights: How Romila Thapar v. Union of India Highlights What Is Wrong with the UAPA*, 212 SSRN Electronic Journal, (2019)

¹⁸ *Romila Thapar v. Union of India*, 2018 10 SCC

government more room to potentially abuse its power

The subordination of procedural scrutiny to outcome-oriented jurisprudence creates a dangerous situation wherein both the legislative framework, one which gives excessive power to the Executive, and judicial interpretation, that of functionalism, combine to circumvent constitutional safeguards.

There exists an alternative where if this case is viewed from the lens of legal formalism and rule of law, the Fundamental Rights of the activists could have been protected. It's important to note that Rule of Law aims to protect citizens from arbitrary use of power by any organ of the state in an attempt to protect individual's Fundamental Rights.

If the bench had taken a more formalist approach while deciding the case, the judges would have:

1. Prioritised the Fundamental Rights of the detained activists
2. Ensured that procedure established by law was followed, including the provisions of the CrPC
3. Allowed relaxations in the unlawful detention.

Application of Rule of Law

1. Supremacy of Law

The court, in taking a formalist approach, ought to have scrutinised the applicability of the UAPA Provisions in the FIR, in light of being added without the required authorisation as per the statute.

Additionally, the State police failed to establish enough evidence, which wasn't contested by the court. In an attempt to uphold the Supremacy of Law, the court should have acknowledged it as 'weak' evidence, which wasn't enough to keep the activists detained. Lastly, the detention should have been challenged as arbitrary and an attempt by the executive to exercise their power ultra vires.

2. Equality Before Law

The protection of the activists' rights: Article 14, 19, 21 would have been one of the top most priorities for the court. The court cannot choose when to protect the rights of citizens and when not to, this poses the risk of arbitrary usage by the Judiciary and can be used to favour the Executive. Same procedural rights must be afforded to all citizens irrespective of the external considerations.

3. Predominance of The Legal Spirit

This principle would have required the Court to recognise its constitutional duty as guardian of individual liberty against state encroachment, and not be used as tool of the State to further its political agenda. Upholding the legal spirit requires that the Court, in its duty to preserve constitutional values, ensures that individual rights are not subordinated to the expediencies of the executive.

Thus, through *Romila Thapar v UOI*¹⁹, legal functionalism can be viewed as a vehicle to further Executive propaganda whether it is political or not. Additionally, when we view other functions of the judiciary which allows for interpretation, amendments, or modifications of statutes, there is a constant risk of authoritarian rule if the organs of the state enable each other to legitimise their overreach.

Extent of Compromising Rule of Law

Compromising the Rule of Law in any way or compromising any one of the three elements necessarily undermines the entire framework which works to protect constitutionalism. While the Constitution has procedural safeguards to ensure that Fundamental Rights aren't violated, and if they are, it is done by procedure established law, rule of law goes beyond the function of simply ensuring Fundamental rights are protected.

Before coming to the question of what extent can Rule of Law be compromised to, I believe that both Rule of Law and legal functionalism can exist parallelly in the Indian judiciary. However, this is only possible if legal functionalism is operating within the bounds of Rule of Law's Supremacy of Law, Equality before Law, and Predominance of Legal Spirit. Examples

¹⁹Romila Thapar v. Union of India, 2018 10 SCC

of such would be instances where the courts use functionalist reasoning to advance constitutional values without disregarding procedural safeguards or statutory laws, as was done in *Kesavananda Bharati v. State of Kerala*, *KS Puttaswamy v UOI*, and also in *Maneka Gandhi v UOI*.

Additionally, functionalism can be used to help interpret the law where it is silent on certain topics. However, it's important to establish a difference between interpretation of the law on the lines of legal functionalism and creating a legal fiction. While interpreting a law or statute to fill in the existing legal gaps, the court should first view the issue from a formalist lens, to ensure the intention of the constitution framers is carried on. However, if the issue requires compromising the principles of Rule of Law, the constitutionality and the foundations of the legal statutes come under scrutiny. Rule of Law represents a non-negotiable core of the constitution, and I propose that if it is being compromised, all 3 principles which come under Rule of Law, cannot be abrogated at once. If departing from the foundational principle of Rule of Law, the case must arise in times of national crises or rarest of the rare cases, such as public health crises, external threat to sovereignty, etc. Even in such cases, Fundamental Rights cannot be abrogated, as established in *KS Puttaswamy v UOI*, and every individual must retain the right to approach court.

Another suggestion to preserve the Rule of Law is any structural modification to the application of The Rule of Law should happen through Article 368 which allows for the procedure of Constitutional amendments. This gives every organ of the state an opportunity to review whether the amendment which will allow a different interpretation of the law is valid as per the Rule of Law. Where a more flexible or adaptive legal framework is sought, the appropriate course is legislative amendment through democratic processes.

Thus, the extent to which Rule of Law can be compromised seems extremely quantitative to analyse, what must be kept in mind, if it is being compromised is that the outcome of the actions shouldn't result in the violation of Fundamental Right via irregular procedures or a wrongful interpretation of the statute.

Lastly, the judiciary must draw a threshold to ensure that if it is applying Legal functionalism, it applies it within the framework of the Rule of Law. This area of the law remains ambiguous

with the judiciary's slight mention of "constitutional pragmatism" in *State v UOI*.²⁰ With the increase in functionalist approach towards cases which involve socio-political issues, and to uphold the dynamic feature of the constitution, the judiciary must also evolve its outlook on certain jurisprudential aspects of the law, including legal functionalism.

²⁰ State (NCT of Delhi) v. Union of India, 2020 12 SCC 259