The following is the transcript of the keynote address delivered by former Judge of the Supreme Court, Justice Rohinton Fali Nariman on "Constitutional underpinnings of the Rule of Law" at the inauguration of D.M. Harish School of Law, Mumbai on January 14, 2022. The speech, available here on video, has been transcribed by The Leaflet's intern, Rajesh Kumar, a first year student of the National Law University, Delhi. The sub-headings have been provided by The Leaflet's editorial team for the convenience of the readers.

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Good evening to you all dignitaries. Ladies and gentlemen.

The rule of law has not come down like manna from heaven. It has involved centuries of struggle. First between an absolute monarch and elected members of parliament. And in its second phase between the elected members of parliament, and the other so-called branches of government. But to begin at the beginning, we must go back in Anglo-Saxon jurisprudence to the year 1066. 1066 happens to be the year in which two cataclysmic events took place. One was Halley's Comet passed over England and most of the world, which it does every 76 years. The second was the victory of William of Normandy over King Harald in England, thereby ushering in a new dynasty of Norman rulers. Originally they had Anglo-Saxon rulers, now Norman rulers came in. With Norman rulers came a more brutal and ineffective series of laws together with a monarch absolutist in the manner in which he executed.

The Magna Carta

William the Conqueror came and died, and his son William Rufus (William II) happened to be more ruthless than him. Fortunately for England, he also died in a hunting accident in 1100. That led to the youngest son, Henry I, taking over. Henry I Coronation Charter is perhaps the first important document that we have in English constitutional law, which established the rule of law. The Coronation Charter was a charter by which the Nobles bargained with Henry I and made him lie down the fact that excessive taxes would not be collected, justice would be tempered with Mercy General, and that most importantly Charter Clause number 13, which said that we will go back to the laws and the manner of their execution of the saintly Edward, the Confessor, who was there before Norman rule. So, Henry I Coronation Chatter, therefore, laid down what in modern terms could be called very fundamental rudiments of the rule of law. What followed from this Charter was various other monarchs who came in until we come to perhaps, one of the most despised monarchs in English history, the Plantagenet King, John. Now, John had a running battle with his Nobles as a result of which he was ultimately forced to Runnymede, which is a place midway between London and Windsor to sign what was called the Magna Carta. Now why it is called The Magna Carta is to distinguish it from a Forest Charter of the same time. The Forest Charter granted all persons, unlike the Magna Carta, which granted only free men, which was ten or twenty percent of the population of the time.

The Forest Charter granted rights in the Royal forests to the common man such as the collection of forest produce. The Magna Carta was signed, however, between the Barons of the Lords and King John and what Baron's were able to risk from him, was contained in 63 Clauses. We are concerned today with the famous Clauses 39 and 40 which lay down the rudiments of the rule of law.

Clause 39 stated specifically that no free man shall be arrested or detained otherwise in the courts of Law and by trial, by his peers, or by the law of the land. Clause 40 said no free man shall be sold delayed or denied justice. Clause 61 which was since dropped, was an interesting Clause because that was a clause that showed the distrust the Barons had of this terrible monarch. Clause 61 said that if for some reason being John were not enforced the chatter, then twenty-five Barons would be at liberty to go against the King's property, but not against the King's person. Magna Carta was signed in June 1215 and was a document in Latin not in Norman French. The idea perhaps being that the Pope should ultimately sanction it. Far from sanctioning it, Innocent III was one of the extremely strong medieval Popes who annealed it in August of that year. King John died of dysentery soon after it in 1216.

Young son, Henry III, at age nine had to take over the realm. Fortunately, for the rule of law, Henry III decided in favor of the Magna Carta. In 1225 he had printed its copies and circulated them in the kingdom. This went on into the reign of his son, Edward I, and in 1297, he had put Magna Carta Clause 39 and 40 into a statute of parliament where it remains. So today we have the ancient Clause 39 and 40 embodied as Clause 29 of the 1297 statute, which continues in England.

Moving a little forward from this, we come to Edward III. He was another extremely powerful monarch. Not only did he also reprint Magna Carta, but he made some small changes as well. And one of the interesting changes that he made was that in Clause 39, instead of trial by your peers, what was substituted was due process of law. A very interesting phrase that is crept into the US Constitution, but did not ultimately find its way in our constitution.

So from 1354 onwards, we find that the Magna Carta of 1215 embodied the rule of law contained in England against absolutist monarchs giving Parliament certain rights so that Parliament could speak on behalf of the person who elected the members of parliament. We now come to another absolutist monarchy, Charles I who was the second Stuart king. England was ruled by many dynasties, none of which were English. So you first had the Norman French and after the Battle of Bosworth field in 1485, you had the Tudors and after the Tudors, you had the Stewart. Of course, finally, the house of Hanover which continues today, which is German and all this took place for the reason that you had to have protested monarchs ruling England, after the disastrous rathe of Queen Mary I who tried to bring back Roman Catholicism. So you would much rather dig up somewhere for some protested King, though he didn't know English George I for example, and bring him to the throne. Then put a Stuart Monarch on the throne if he happens to be Catholic. But coming back to Magna Carta and coming back to

the rule of law. We find that the next important English document is 1628 The Petition of Right. Now, this Petition of Right was against Charles I who was another absolutist monarch and the idea was that forced loans could not be taken from the people by the king and arbitrary imprisonment made if forced loans were not given. Charles I, of course, paid for his sins with his head. And he was executed on a sinister day: 30th January 1649. Now 30th January conjures of to other very Sinister events. One is the accession of Hitler as chancellor of Germany in 1933 on the same day and one is the assassination of our beloved father of the Nation on 30th January in 1948.

Moving on to Charles II now, who was the son of Charles I, we find that he was the Monarch who married Catherine of Braganza and has a direct connection with Bombay where this school is set up. Because in 1662, Catherine of Braganza brought with her apart from various other things, the islands of Bombay as Dowry which was then handed over to Charles I and who later handed them over for 10 pounds to the East India Company.

Habeas Corpus

But during Charles II's reign in 1679, we had a very important measure passed by parliament, which was the Habeas Corpus Act. And this ensured that the writ of habeas corpus would be given by the king's bench all over the realm to enforce the rights of the Magna Carta. This act ought never to have been passed. It got through the Lord's 57:55 only because Lord Grey first as a joke, but then thereafter seeing that the joke would have ramifications counted one, extremely fact, Lord is ten Lords and therefore got to the figure of 57. Otherwise, it was in fact, not passed by 55 to whatever else it was. I was never very strong in mathematics. So by accident of history, we have this famous Habeas Corpus Act of 1679 yet another important document in the evolution of the rule of law in English constitutional law.

And finally, of course, with the expulsion of James II was the Catholic Monarch who suddenly gave birth to a male heir and was expelled in the Glorious Revolution of 1688. Glorious. Why? Because not a shot was fired. James slunk off to France and William, that is his son-in-law took over as William III, together with his protester daughter, Mary II. Now, 1689 marks another watershed. Because of this Bill of Rights, so to speak, was passed by parliament where various constitutional guarantees as we know them today in our fundamental rights chapter were granted including things such as no excessive fines or bails and no cruel and unusual punishment.

Separation of powers

From this, we move 100 years forward to the first great constitutional document known perhaps to mankind, the US Constitution of 1789. Now, this constitution makes landmark strides in the rule of law, for this reason, for the first time you have a practical application of Montesquieu's doctrine of separation of powers. Power is now diffused between various branches of government so that if the place of one absolutist monarch or an equally absolutist Parliament if you put it that way, you have power now distributed among Congress who is to make laws, among the executive who is to execute these laws, and among the Judiciary in which cases between states and states,

or states and individuals are to be fought out. And ultimately their decree is to be enforced by the executive. The Original US Constitution didn't contain the Bill of Rights that came only by Amendment. And the first 11 amendments incorporated important freedoms which we take almost for granted today. The very first amendment Incorporated the right to free speech and press. The fourth amendment was equally important in that searches and seizures, which were illegal and without a warrant were interdicted. The fifth extremely important amendment dealt specifically with life, liberty, and property not being taken away except by due process of law which phrase, as I have told you a little earlier, was found in the statute of Edward III in 1354. And the Eighth Amendment equally bodily lifted from the 1689 Bill of Rights the interdict against cruel and unusual punishments.

Socialism and Secularism

Now, all this ultimately leads to our Constitution, which was promulgated in 1950 after shaking off the colonial era to which we were subject. The preamble to our constitution is like a mini Constitution because it gives you the values and principles of our Constitution and the rule of law, therefore, that is contained therein.

The Preamble begins with the words - We, the people of India are now going to give to ourselves a constitution in which India is a Sovereign, Democratic, Republic. Each word is pregnant with meaning. India is now Sovereign in the sense that it governs itself. It is no longer a colony of another superpower situated abroad. It is democratic in the sense that you have Universal adult suffrage by which governments are then elected to govern the people. And this is done using free and fair elections, which are then handed over by Part 15, so, to speak of the Constitution, to an independent Election Commission of India. The Safeguard given is that the chief election commissioner who may be flanked by other Election Commission has a fixed tenure and cannot be removed except by impeachment. So, Sovereign and Democratic show us that we now govern ourselves through the ballot and that the ballot must be free and fair in terms of elections. The fact that we are a republic again shows us that we are not a monarchy indeed we have shaken off autocratic monarchical rule but we are now a republic meaning that we are Republican in the American sense of the Montesquieu doctrine of the separation of powers and the diffusion of powers. So as not to waste too much power in any one constitutional Authority.

Interestingly, the two words added by the 42nd Amendment namely socialist and secular were proposed by Professor KT Shah in the constituent assembly. Dr. Ambedkar said, no it wasn't necessary to have either Socialist or Secular because socialism was a Creed, which you could find in any case in the directive principles of State policy and secular ofcourse our constitution was. So he found it unnecessary at the time.

However, now that we have these two words, they are both pregnant with meaning. Socialist in its broad sense denotes a government for the people, by the people. So in the broad sense, you are governing for the people, as a whole who you will of course treat with equal respect.

You also have apart from this, the concept of secularism. Now, you are a secular state in two senses. Once the state itself has no religion and second the state does not in any manner look upon one religion with favor and another which is favored in short. All religions are to be treated. Like, this is a very, very important concept in today's millennia. And a little more will be said about it a little later. Then, of course, you have the great Justice Clause that there must be justice social-economic, and political. Political justice was delivered almost at one stroke by adding Universal adult suffrage. Economic Justice is how the teeming millions who are so poor in this country are to be pulled up by the bootstraps.

And of course, social justice is the justice of those who traditionally have been downtrodden such as our Harijans. All of which are contained in various provisions and articles in our constitution. Most importantly after Justice, we have the concept of Liberty. Now Liberty is extremely important because not only is the liberty of thought and expression, but it is also Liberty of belief, faith, and worship, adding strength to the word secular. So that is what distinguishes this democracy from other so-called democracies is the fact that you have freedom of speech and expression.

And that everybody is entitled to profess whichever faith in religious terms, one chooses. Apart from this, you also then have equality of status and opportunity. Equality of status is the age-old concept, the Magna Carta concept of everybody being equal before the law. Bracton, very early in the 1200s had said, as a matter of legal commentary, let the king himself be under the vows of both Lord and God because the law itself made him. So it is in this sense that everybody is equal before the law, which is stretched out in our fundamental rights chapter. And finally, you have the cardinal and extremely important principle of fraternity. Now fraternity denotes something positive. There's a positive ring to it. That is all men are brothers, all persons whatever caste creed, etc, are brothers and sisters. And this alone will ensure the unity and integrity of the nation.

Rule of Law

So having done with the Preamble, we find that the rule of law embodied in it is very clear. The rule of law is much more than just Clauses 39 and 40 of the Magna Carta. The rule of law or the rule of the constitution in this country would therefore require power to be diffused among the great branches of government and the individual citizen given certain freedoms.

And for this, we go straight away to the fundamental rights chapter or Chapter 3 of The Constitution of India. It begins with the definition of State in Article 12, but Article 13 is the key to this chapter because Article 13 fleshes out in no uncertain terms the doctrine of judicial review. Now judicial review in the United States has to be established by case law. There was no Article 13. As a matter of fact, in the similar decision of Marbury versus Madison, you find that William Marbury was a Justice of the Peace, who has been given a commission by the Adams Administration which commission has not physically been delivered to him so that he could not, therefore, take Oaths and sit as a Justice of the Peace. He, therefore, petition, the Supreme Court directly and said look, there is the Judiciary Act of 1789, the 13th section of

which specifically states that you the Supreme Court can give me the writ of mandamus that I am asking for namely I'm asking for a writ commanding, the authorities to hand over my commission.

Now, Chief Justice Marshall was the first person who as Secretary of State of the Adams Administration signed that commission. So it was improper for him to have taken up the case in the first instance. But he took it up to establish what according to him, very early in his chief justice year, the doctrine of judicial review. So he did this by doing one other amazing thing. He could also have construed the 13th section of the Judiciary act, as it stood stating that the writ of mandamus would apply only in the Appellate and not original jurisdiction of the Supreme court because it followed upon a clause confirming appellate jurisdiction. He did no such thing. He was very anxious to lay this down as a doctrine. So what did he do? He pitted Section 13 against Article 3 of the Constitution, which is the supreme law under Article 6. Said that the two don't Square because Article 3 made it known that the only original jurisdiction of the Supreme Court would be in cases involving States ambassadors and the like it short not between states and individuals.

And therefore what he did was to strike down Section 13 saying, it is unconstitutional because it violates Article 3 of the Constitution of India. Now all this laid down what is known in our constitutional law as judicial review. Having all this before them the founding fathers, thought it important to lay down in an article of the Constitution explicitly. That all laws that are made by legislators and or by the executive must conform to the fundamental rights chapter of the Constitution, otherwise, they are to be declared void. So with this voidness, comes a very, very important concept of the rule of law that it is the judiciary who sits as the ultimate arbiter, even of laws made by the legislature.

And if those laws do not conform to the constitution, then they will be struck down as being invalid. Now, often we are told and we have been reminded quite often, even in the recent past that look you judges are not elected representatives. You are appointed. How then can you take it into your keen, so to speak to anneal laws made by a legislature which consists of elected representatives? Fortunately for us, the answer to that question is in the Constitution itself, and we don't need to answer. But these heads keep rearing themselves from time to time and have to be scorched by the courts clearly stating that look in our constitutional law it is the higher Judiciary consisting of the Supreme Court and the High courts who ultimately are the arbiters, who decide and who decide that laws if they are unconstitutional.

We have gone much further than just this. And we have laid down in the seminal decision of the Kesavananda Bharati case of 13 honorable judges. The fact that the constitution itself, if it is amending contrary to what we call its basic structure or the principles contained in the provisions as fleshed out from the preamble, the Constitutional Amendment itself would be liable to be struck down. Now, the justification for all this comes really from a very interesting paper number 78 of the Federalist Papers. The Federalist Papers were written by three great Americans. One Justice John Jay happened to be their first Chief Justice, he wrote five of them. Two by the father of their Constitution, James Madison was the fourth president of the United States

and the bulk of them by Alexander Hamilton who was the first Secretary of the Treasury in the Washington administration. Now, Hamilton's paper number 78, deals specifically with the judiciary. And 78 tells us that whereas the legislature has the purse and the executive the sword.

The Judiciary by its very nature is the weakest branch of government. And the least likely to upset the political rights of the people, for the reason that it hath neither force nor will but only judgment. And even for judgment, ultimately, it has to depend upon the executive arm to enforce those judgments. So the rationale given by Alexander Hamilton for the US Constitution holds good today as well. Unelected judges are the best arbiters between the citizen and the state and thus, one State against another state. For the reason that ultimately they go by judgment, not by force, or by will, and are therefore the least harmful of the three so-called institutions of government.

Equal protection of the laws

Coming back to the fundamental rights chapter. We now find that Article 14 tells us that all persons are equal before the law, something that Magna Carta told us long back and also adds that the laws will equally protect. You have equal protection of the laws as well.

What is the meaning of the equal protection of the laws? This comes out well in an early American case: Yik Wo versus Hopkins. It's a judgment of Justice Matthew speaking for a unanimous US Supreme Court in 1886 and the case involved Chinese laundrymen. Now, Chinese laundrymen were aliens in the sense that they were not US citizens. So, the first question that arose was whether they had any rights at all and whether the Fourteenth Amendment would apply to them. The answer given was, you don't have to be a citizen, so long as you have a person and they are persons, therefore, the Fourteenth Amendment would apply. Second, the law laid down that so far as San Francisco was concerned all laundrymen have to take out licenses. And those licenses could only be given to structures in which those laundries were contained, provided they were made of bricks. If they were made of wood, no license could be granted. The Chinese laundrymen came forward with the case stating that every single Chinese laundryman happened to have laundry in wooden structures and there were some 300 odds as opposed to 80 odds of competing Americans. The court ultimately said that the equal protection of the laws means the protection of equal laws. And if the law is administered unequally, then the law itself would be struck down. This is a very important doctrine so far as the rule of law was concerned. So the protection of equal laws, therefore, means that when you actually make the law neutral on its face, but de facto hitting out at one group. Then you will look at the defect and say that the protection of equal laws has been denied.

We now move on to the other great articles of the fundamental rights chapter, Article 17 which abolishes untouchability. I told you that that was a promise that was made in the very beginning. And that is how you achieve social justice, which is set out in our great Preamble. So, Article 17 not only outlaws untouchability but makes it an offense that is punishable by law.

Article 18 equally states that nobody can receive titles and it's important here in the context of all persons, therefore, to be equal before the law.

Recent hate speeches and the silence

We now come to the seven freedoms contained in Article 19. Article 19 contains the difference between democracies like ours and dictatorships that are veiled as democracies. Article 19(1)(a) contains the single most important and cherished human right which is the right to freedom of speech and expression. Now, unfortunately of late, we have had in this country young persons, students, stand-up comedians and the like, all being booked for freely criticizing the government of the day under sedition laws which are really colonial in nature and have no place under our constitution. On the other end, you have persons giving hate speech, what is called fighting words in Chaplinsky v. New Hampshire or hate speech actually calling for the genocide of an entire section.

And we find the great reluctance of the authorities to book these people. It was heartening to note at least that a little later, the vice president of the country in a speech said that heat speech is unconstitutional. Not only is it unconstitutional, it happens to be a criminal act. It is criminalized in Section 153A and Section 505c of the Indian penal code.

Unfortunately, in practice though, a person can be given up to three years imprisonment. This never really happens because there are no minimum sentences prescribed. If we really want to strengthen the rule of law as contained in our constitution I would strongly suggest that Parliament amend these provisions to provide minimum sentences so that the act is deterrence for others who make hate speeches.

Deplorable endorsement of hate speech

We also have, unfortunately, the other higher echelons of the ruling party, not only being silent with hate speech but almost endorsing it. We heard the other day from the very head of the party. A juxtaposition of a Mughal Emperor known for being a bigot, namely, Aurangzeb as against Shivaji who was known to be a secular leader. Now, if as a matter of fact, fraternity is a cardinal value in our Constitution, and you want to engage persons in brotherhood, I would have thought that you should have chosen a Mughal Emperor such as Babur or his grandson Akbar. Akbar was famous for being perhaps one of the most secular rulers that any nation has ever known at any point in time and he took after his grandfather, Babur. Interestedly at this point, I want you to read or I read out to you a letter written by Babur to his son Humanyun one year before he died on 11 January 1529 telling his son as to how to rule Hindustan, which he had conquered, so to speak after the Battle of Panipat. He says,

“Oh my son! The realm of Hindustan is full of diverse creeds. Praise be to God … that He has granted unto thee the empire of it. It is but proper that you, with heart cleansed of all religious bigotry, should dispense justice according to the tenets of each community. And in particular refrain from the sacrifice of cow, for that way lies the conquest of the hearts of the people of

Hindustan; and the subjects of the realm will, through royal favour, be devoted to thee.

And the temples and abodes of worship of every community under the imperial sway, you should not damage. Dispense justice so that the sovereign may be happy with the subjects and likewise the subjects with their sovereign. The progress of Islam is better by the sword of kindness, not by the sword of oppression. "Ignore the disputations of Shias and Sunnis; for therein is the weakness of Islam…" And bring together the subjects with different beliefs in the manner of the Four Elements, so that the body-politic may be immune from the various ailments. And remember the deeds of Hazrat Taimur Sahib Qiran (Lord of the conjunction) so that you may become mature in matters of Government. And on us is but the duty to advise.``

His grandson carried all this into practice. His grandson, in fact, held the famous Ibadat Khanna in 1575 where persons from all the religions of the world were present and who debated freely before the emperor. The emperor not only acknowledged but further the cause of every religious faith so much so that many religious faiths said that they had exclusively somehow the other got to the emperor and converted. The emperor finally, of course, came with Din-i Ilahi which failed because it was too eclectic, it had no priesthood, etc, but the idea was fantastic. The idea was to try and bring together mankind as a common whole which custom has divided.

So when you have Article 19(1)(a) being administered as it is being administered today, there is a big red signal that is put up so far as the rule of law is concerned. It is time to do away completely with the Sedition laws and allow free speech so long as ultimately, it does not exhort somebody to violence and end up as being hate speech. Apart from Article 19, you also have great freedoms in Article 20 and Article 21 which harken back to Magna Carta - that is that no person shall in any manner, find his life curtailed or denied except by procedure established by law.

In Article 22, you have the two great safeguards of having a lawyer of your choice. The moment you are arrested and being produced before a magistrate, within 24 hours of your arrest. These various freedoms including the great freedoms that you now find in Article 25 where every person has the right to freely profess every religious faith that he or she chooses and the cultural rights of the citizens of India, which are all contained in Article 29, which perhaps is an article which exists only in our constitution. I have not found any other. It says every section of the people has the right, and it's an absolute right, it is not subjected to any reasonable restrictions. So this absolute right is now given to persons to preserve their culture in its widest sense. Most important of all is Article 32 which again is a unique feature of our constitution alone. Article 32, makes it clear that it is a fundamental right of every citizen of this country to move the Supreme Court so that their fundamental rights be enforced. It's a remarkable article. You can either do this or go to the High Courts under article 226 and the judiciary, therefore, is set up as being the person or the institution, which ultimately gives a person the right to his fundamental rights.

The judiciary itself is set up as an independent body under Article 124 where the government of the day has to consult the Chief Justice, which in practice means the judges appointing themselves today, so that government interference is removed and it's with this independent Judiciary, ultimately, therefore, that the rule of law is ultimately maintained.

Article 144

Another important article is Article 144 that says all authorities civil and judicial shall act in aid of the Supreme Court. Now, this is something that is explicitly laid down given the history of both the United States and India. So far as our history is concerned, we had a judge called John Peter Grand, an English judge, who in 1829 because Governor Malcolm refused thrice to execute a writ, lock his court up and set sail for England. He did so because of the ultimate weakness of the Judiciary as was pointed out in Hamilton's paper because ultimately you have to rely upon the executive to enforce your orders. Now not only did he set sail but he came back but this time as a chastened person and came back with two other judges. So that in their words, “a wild elephant puts it between to tame ones”. The wild elephant ultimately landed up in Calcutta to great public acclaim and was loved by the Indian people. Equally, at around the same time, Chief Justice Marshall went out of his way to decide a particular case in favor of a cleric called Wooster (Wooster vs Georgia). The state of Georgia had entered into a treaty with the Cherokee Indians, which he did not somehow or the other honor. Wooster was required to take out the license of George's laws that went to the Georgia Supreme Court. The Supreme Court said, yes, you must take out this license, the US Supreme Court, reversed Chief Justice Marshall said that as and when you happen to be on Cherokee land it is Cherokee Indian law that applies or not Georgia law. Andrew Jackson, who was the president at the time, cocked a snook at the Supreme Court and said Marshal has laid down his judgment, let him enforce it.

Today, such things are almost unthinkable. Why do I say almost? Because we've also had the Sabarimala case, which all of you must be familiar with, despite five learned judges of the Supreme Court, having laid down that women between the ages of 10 and 50 can enter, no women were allowed to enter. Most unfortunately, the Supreme Court itself said this judgment by way of a review petition, something unheard of, to a bench of nine judges to be decided along with other matters, and thereby Sabarimala is now gone into limbo. So we find that whatever we take for granted in terms of constitutional rule of law cannot ever be taken for granted. It is very important to remember that eternal vigilance is necessary not only for liberty but for liberty enforced by courts, which is the rule of law of this country. I end on this note and I thank you all very much. I wish the DM Harish School of Law all the very best in the future.

Thank you all.