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RULE OF LAW IN BANGLADESH: THEORY AND PRACTICE

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Abstract: The rule of law is expected to be the guiding principle of governance since it is the foundation of good governance. This paper thus examines how the concept has suffered in the hands of the government officials using doctrinal and analytical synthesis of events. It is absolutely sure that unless the political leadership in the country see itself as a creation of the law and must thus be guided by the law, the rule of law would continue to suffer in their hands. Also, the judiciary must be accorded absolute autonomy from the other arms of the government. Therefore, this article analyses theoretical foundation of the rule of law and attempts to examine the prevailing situation of Bangladesh.

Introduction

The Rule of Law, in its most basic form, is the principle that no one is above the law. The rule follows logically from the idea that truth, and therefore law, based upon fundamental principles which can be discovered, but which cannot be created through an act of will. The most important application of the rule of law is the principle that governmental authority is legitimately exercised only in accordance with written, publicly disclosed laws adopted and enforced in accordance with established procedural steps that are referred to as due process. The principle is intended to be a safeguard against arbitrary governance, whether by a totalitarian leader or by mob rule. Thus, the rule of law is hostile both to dictatorship and to anarchy.

No freeman shall be taken imprisoned or diseased or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers or by the law of the land.

-Article e 39, Magna Carta (1215)

The rule of law requires the government to exercise its power in accordance with well-established and clearly written rules, regulations, and legal principles.

The rule of law also requires the government to exercise its authority under the law. This requirement is sometimes explained with the phrase "no one is above the law". The rule of law is a concept explain in classical time. In Greece Aristotle wrote that "law should be the final sovereign; and personal rule, whether it be exercised by a single person or a body of persons, should be sovereign in only those matters which law is unable, owing to the difficulty of framing general rules for all contingencies."¹

Definition of Rule of Law

The term 'Rule of Law' is derived from the French phrase 'La Principe de Legality' (the principle of legality) which refers to a government based on Principles of law and not of men. In this sense the concept of 'La Principe de Legality' was opposed to arbitrary powers². In the thirteenth century Bract on, a judge in the reign of Henry III wrote –'The king himself ought to be subject to God and the law, because law makes him king'.

The rule of law is an ambiguous term that can mean different things in different contexts. In one context the term means rule according to law. No individual can be ordered by the government to pay civil damages or suffer criminal punishment except in strict accordance with well-established and clearly defined laws and procedures. In a second context the term means rule under law. No branch of government is above the law, and no public official may act arbitrarily or unilaterally outside the law. In a third context the term means rule according to a higher law. No written law may be enforced by the government unless it conforms with certain unwritten, universal principles of fairness, morality, and justice that transcend human legal systems.

Recent attempt to formalize its meaning have drawn on this rich history of diverse understanding.

Today, the concept of the rule of the law is embedded in the Charter of the United Nations. In its preamble, one of the aims of the UN is "to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained". A primary purpose of the organization is "to maintain international peace and security... and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international dispute or situations which might lead to a breach of the peace." The Universal Declaration of Human Rights of 1948, the historic international recognition that all human beings have fundamental rights and freedoms, recognize that "...it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law..."³

For the UN, the Secretary-General defines the rule of law as "a principle of government in which all persons, institutions and entities, public and private, including the state itself, are accountable to laws that are publicly

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promulgated, equally enforced and independently adjudicated, and which are consistent with international human right norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.”⁴

Dicey's Theory of Rule of Law

According to Dicey, the rule of law is one of the fundamental principles of the English constitution gives three meanings of the concept of rule of law.

Absence of Arbitrary Power or Supremacy of Law

Dicey states that rule of law means the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power or wide discretionary power. According to him Englishmen were ruled by the law and by the law alone; a man with us may be punished for breach of law, but can be punished for nothing else. In this sense the rule of law is contrasted with every system of government based on the exercise by person in authority of wide arbitrary or discretionary powers of constraint.

Equality before Law

Rule of law, the second principle, means the equality of law or equal subjection of all classes to the ordinary law of the land administered by the ordinary law courts. In this sense, rule of law conveys that no man is above the law; that officials like private citizens are under a duty to obey the same law, and there can be no Special court or administrative tribunal for the state officials.

Constitution is the Result of the Ordinary Law of the Land

The rule of law indicates that the general principles of the constitution are the result of judicial decision of the courts in England. Right such as right to speak in public, freedom to organize a public meeting and right to vote are guaranteed by a written constitution in most countries but in England, it is not so. Those rights are the result of judicial decisions in cases which have actually arisen among the parties. The consequences of the rights of every individual are the source but the constitution is not. Therefore, Dicey emphasized the importance of the role of the courts of law as grantors of liberty.⁵

Criticism of Dicey's Theory of Rule of Law

Dicey developed the contents of his thesis by peeping from a foggy England into a sunny France. several attacks have been mounted against Dicey's

theory of rule of law. As to his first principle he says that there would be no arbitrary or discretionary power. But even in Dicey's lifetime there were both arbitrary and discretionary power in Britain.

Dicey says that there should be equality before law and all are amenable to ordinary courts of the land⁶. But this principle has many exceptions because equality before law is not possible in every case. The king or the head of the state in other countries are immune from both criminal and civil action; judges are immune from personal responsibility for their official acts even if they might have acted beyond their jurisdiction but not knowingly.

Dicey says that there should be no separate administrative courts. In fact Dicey misunderstood the real nature. The French system in many respect proved to be more effective in controlling the administrative powers than the common law system. As regards his third principle, Dicey says that the fundamental right and liberties emanate from judicial decisions. But this is one-sided view. Because in England people have got many rights through the law of parliament and charters issued by the monarchs. Various public authorities, the Crown, the House of Parliament, the court, the administrative authorities have powers and duties and most of these are determined by statutes and not by the courts.

So it is from the above discussion that the abolition of discretionary power is not possible fully and also equality before law is not possible in every case. His third principle was abandoned since most other countries in the world have a bill of rights on some description. So the concept of rule of law as propounded by Dicey needs modification.

Though it has become a fashion to criticize Dicey's theory of rule of law- the three important things absence of arbitrary power, guarantee of citizens right and the equality before law over which he made emphasis are universally recognized as the core of traditional theory of rule of law.

Characteristics of Rule of Law

The relevance of the Rule of Law is demonstrated by application of the following principles in practice.

- The separation of powers between the legislature, the executive and the judiciary.
- The law is made by representatives of the people in an open and transparent way.
- The law and its administration is subject to open and free criticism by the people, who may assemble without fear.
- The law is applied equally and fairly, so that no one is above the law.

- The law is capable of being known to everyone, so that everyone can comply.
- No one is subject to any action by any government agency other than in accordance with the law and the model litigant rules, no one is subject to any torture.
- The judicial system is independent, impartial, open and transparent and provides a fair and prompt trial.⁷
- All people are presumed to be innocent until proven otherwise and are entitled to remain silent and are not required to incriminate themselves.
- No one can be prosecuted, civilly or criminally, for any offence not known to the law when committed.
- No one is subject adversely to a retrospective change of the law.

History of Rule of Law

The notion of the “rule of law” stems from many traditions and continents and is intertwined with the evolution of the history of law itself. The Code of Hammourabi, promulgated by the King of Babylon around 1760 BC, is one of the first examples of the codification of law, presented to the public and applying to the acts of the ruler. In the Arab world, a rich tradition of Islamic law embraced the notion of the supremacy of law. Core principles of holding government authority to account and placing the wishes of the populace before the rulers, can be found amid the main moral and philosophical traditions across the Asian continent, including in Confucianism. In the Anglo-American context, the Magna Carta of 1215 was a seminal document, emphasizing the importance of the independence of the judiciary and the role of judicial process as fundamental characteristics of the rule of law. In continental Europe notions of rule of law focused on the nature of the State, particularly on the role of constitutionalism. Aristotle said more than two thousand years ago, “The rule of law is better than that of any individual.”⁸

The Rule of law in the Constitution of Bangladesh

In fact, the term ‘rule of law’ is well placed in the constitution of Bangladesh. its preamble states the ‘rule of law’ as one of the objectives to be attained. The preamble, *inter alia*, says “.....it shall be a fundamental aim of the state to realise through the democratic process a socialist society, free from exposition –a society in which the rule of law, fundamental human rights and freedom, equality and justice, political, economic and social, will be secured all citizens.”⁹

In accordance with the above pledge, the following positive provisions for rule of law have been incorporated in the constitution:

Firstly: Article 27 guarantees that all citizens are equal before law and are entitled to equal protection of law. Article 27, therefore, forbids discrimination in law or in State actions.

Secondly: Article 31 guarantees that to enjoy the protection of the law, and to be treated in accordance with law, and only in accordance with law, is the inalienable right of every citizen, wherever he may be, and of every other person for the time being within Bangladesh, and in particular no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law. Article 31 imports the concept of due process, both substantive and procedural, and thus prohibits arbitrary or unreasonable law and State action.

Thirdly: around 18 fundamental rights have been guaranteed in Part III of the Constitution and constitutional arrangement for their effective enforcement has been ensured in Article 44 (right to move to the High Court) and 102 (power of the High Court to take appropriate action upon application).

Fourthly: Article 7 and 26 impose limitation on Parliament that no law which is inconsistent with any provision of the Constitution can be passed. Article 7(2) confirms that if any other law is inconsistent with the Constitution that other law shall, to the extent of the consistency, be void.

Fifthly: In accordance with Article 7, 26 and 102(2) of the Constitution, the Supreme Court exercises the power of judicial review whereby it can examine the extent and legality of the actions of both the executive and legislature and can declare any of their actions void if they go beyond their limit.

Sixthly: the people’s right to be governed by a representative body answerable to them has, directly and indirectly, been ensured under Article 7(1) [all power belong to the people, Article 11 (The Republic shall be a democracy where, among others, fundamental human rights shall be guaranteed), Article 55 (Cabinet), Article 56 (Ministers), 57 (tenure of the office of the Prime Minister), and Article 65(2) [composition of Parliament] of the Constitution.

Rule of Law in the context of Bangladesh

Developed countries and international organizations have spent more than a billion dollars over the last twenty years trying to build the rule of law in countries transitioning to democracy or attempting to escape underdevelopment. The rule of law is deemed an essential component of democracy.

In the modern world state is an indispensable institution for ordered society and the necessity of the government cannot be gainsaid. At the beginning of the last century, people felt the presence of government only in post office and police. But with the passage of time, tremendous advancement of technology and the emerging concept of welfare State, there has been vast

expansion of the role of the government. Today the functions of the government are, to say the least, all pervasive. From cradle to grave a man comes face to face with one or more statutes covering every aspect of life and all these statutes confer enormous discretionary power on the public functionaries. Every power and every discretion granted in favor of the governmental authorities makes a corresponding incursion on the freedom of individuals. Existence of unfettered and uncontrolled power of the government must have disastrous effect on the rights and liberty of the people.¹⁰

Today we see extreme abuse of power by the law enforcing agencies. Maintaining law and order is one of the fundamental duties and responsibilities of the law enforcing agencies. But for the ruling parties are using this power with their own shake. They use this to power to varnish opposition parties to hold power for next time or may be forever.

There are some positive provisions in the Constitution for ensuring the rule of law; there are also some provisions which are against the concept of rule of law. If the provisions of our Constitution which are against the concept of rule of law, are not amended, and in the present economic situation of the common people, who are very poor, if a meaningful legal aid scheme is not undertaken to ensure access to justice to all people, the rule of law in Bangladesh will be meaningless.

Conclusion

Above discussion clearly shows that the present condition of rule of law in Bangladesh is alarming. However, the proposed measures for overcoming the shortcomings of rule of law are not final but these are fundamental. Independent and unambiguous policy for rule of law is a must for overcoming the vagueness and anomalies in rule of law. After all, government should be committed to ensure the security of life and property of the people, protection of individual rights and the dissention of justice on the basis of the equality and fairness. On the other hand, the opposition, civil society and social groups and organizations also have the moral obligations to help and cooperate with the government in this regard.

Notes & References:

- ¹ Article 39, Magna Carta (1215).
- ² <http://unpan1.un.org/intradoc/groups/public/documents/UNPAN/UNPAN012077.pdf> visited on 01-01-15
- ³ Preamble of United Nations.
- ⁴ (Report of the Secretary-General: The Rule of law and transitional justice in conflict and post-conflict societies" (2004).
- ⁵ Explanation of the first principle of Dicey theory.
- ⁶ Second principle of rule of law.
- ⁷ <http://www.unrol.org.pdf> visited on 04-01-15.
- ⁸ <http://www.kaagojcom.pdf> visited on 08-01-15.
- ⁹ <http://www.kaagojcom.pdf> visited on 08-01-15.
- ¹⁰ <http://wifibd.wordpress.com/.../rule-of-law>. visited on 15-01-15.