

RULE OF LAW IN BANGLADESH: AN OVERVIEW

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ABSTRACT:

"No free man shall be taken or imprisoned or disseised or exiled or in any way destroyed nor will we go or send for him, except under a lawful judgement of his peers and by the law of the land".

--MAGNA CARTA

This paper is a presentation of the concept of rule of law, Dicey's theory of 'Rule of Law', rule of law in true and modern sense and rule of law in Bangladesh. In Bangladesh context I have discussed the provisions for ensuring rule of law in Bangladesh constitution. I also have discussed the provisions of the constitution, which are contrary to the concept of rule of law in Bangladesh. It has been also identified the difficulties of application of rule of law in Bangladesh.

INTRODUCTION

One of the basic principles of the English constitution is the rule of law. This doctrine is accepted in the constitution of U.S.A. and also in the constitution of Bangladesh. Now a days rule of law is one of the most discussed subjects of developing countries. Developed countries and donor agencies always instruct the developing countries for sustainable development and good governance. Actually sustainable development and good governance mostly depends on the proper application of rule of law. Laws are made for the welfare of the people, to bring a balance in society, a harmony between the

conflicting forces in society. One of the prime objects of making laws is to maintain law and order in society, a peaceful environment for the progress of the people. In true and real sense there is no rule of law in Bangladesh today. Law in Bangladesh follows a course of selective and discretionary application. Institution and procedures required for ensuring rule of law also are no effective in the country.

CONCEPT OF THE RULE OF LAW

The term 'Rule of Law' is derived from the French phrase 'La Principe de Legality' (the principle of legality) which referse 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 powers.¹

The rule of law is old origin. In thirteenth century Bracton, 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."*²

Edward Coke is said to be the originator of this concept, when he said that the king must be under God and law and thus vindicated the supremacy of law over the pretensions of the executives. Professor A.V. Dicey later developed on this concept in his classic book 'The Law Of The Constitution.' published in the year 1885.³ Dicey's concept of the rule of law contemplated the absence of wide powers in the hands of government officials. According to him wherever there is desecration there is room for arbitrainess.⁴

The rule of law is a viable and dynamic concept and like many other such concepts, is not capable of any exact definition. Its simplest meaning is that everything must be done according to law, but in that sense it gives little comfort unless it also means that the law must not give the government too

much power. The rule of law is opposed to the rule of arbitrary power.⁵ The primary meaning of rule of law is that the ruler and the ruled must be subject to law and no one is above the law and hence accountable under the law. It implies the supremacy of law and the recognition that the law to be law can not be capricious.

DICEY'S THEORY OF RULE OF LAW

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

1. Absence of Arbitrary Power or Supremacy of Law

Explain the first principle, 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.⁶ 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.

2. Equality Before Law

Rule of law, in 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.⁸

3. Constitution is the result of the ordinary law of the land

The rule of law lastly means that the general principles of the constitution are the result of judicial decision of the courts in England. In many countries right such as right to personal liberty, freedom from arrest, freedom to hold public meeting are guaranteed by a written constitution; in England, it is not so. Those rights are the result of judicial decisions in concrete cases which have actually arisen between the parties. The constitution is not the source but the consequence of the rights of the individuals. Thus, Dicey emphasized the role of the courts of law as grantors of liberty.

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.⁹ 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.¹⁰

Preventive detention, emergency situation, compulsory acquisition of goods and properties, direct enforcement of administrative decision etc. are the best example of exercise of arbitrary power. Again there is a distinction between arbitrary power and discretionary power which Dicey failed to trace.¹¹

The **second principle** of rule of law Dicey says that there should be equality before law and all are amenable to ordinary courts of the land. 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.¹²

Again, Dicey says that there should be no separate administrative courts as in French '*Droit Administratif*.' In fact Dicey misunderstood the real nature of the French '*Droit administratif*.' The French system in many respect proved to be more effective in controlling the administrative powers than the common law system.¹³

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 statute not by the courts.¹⁴

So it has been clear 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 criticise 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.

RULE OF LAW IN TRUE AND MODERN SENSE

Today Dicey's theory of rule of law cannot be accepted in its totality. The modern concept of the rule of law is fairly wide and therefore sets up an ideal for any government to achieve. This concept was developed by the

International Commission of Jurists. Known as Delhi Declaration, 1959 which was later on confirmed at logos in 1961. According to this formulation---

"the rule of law implies that the functions of the government in a free society should be so exercised as to create conditions in which the dignity of man as an individual is upheld. This dignity requires not only the recognition of certain civil or political rights but also creation of certain political, social, economical, educational and cultural conditions which are essential to the full development of his personality".¹⁵

According to Davis, there are seven principal meanings of the term 'Rule of law: (1) law and order; (2) fixed rules; (3) elimination of discretion; (4) due process of law or fairness; (5) natural law or observance of the principles of natural justice; (6) preference for judges and ordinary courts of law to executive authorities and administrative tribunals; and (7) Judicial review of administrative actions.¹⁶

So finally it may correctly be said that rule of law does not mean and cannot mean any government under any law. It means the rule by a democratic law- a law which is passed in a democratically elected parliament after adequate debate and discussion. Likewise, Sir Ivor Jennings says -

"In proper sense rule of law implies a democratic system, a constitutional government where criticism of the government is not only permissible but also a positive merit and where parties based on competing politics or interests are not only allowed but encouraged. Where this exist the other consequences of rule of law must follow".¹⁷

RULE OF LAW AND THE CONSTITUTION OF BANGLADESH

The rule of law is a basic feature of the constitution of Bangladesh. It has been pledged in the preamble to the constitution of Bangladesh that -

"It shall be fundamental aim of the state to realise through the democratic process a socialist society, free from exploitation - a society in which the rule of law, fundamental human rights and freedom, equality and justice, political economic and social, will be secured for all citizens."

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

Article 27 guarantees that all citizens are equal before law and are entitled to equal protection of law. Article 31 guarantees that to enjoy the protection of the law, and to be treated in accordance with law, is the inalienable right of every citizen, wherever he may be and of every other person for the time being with in 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.¹⁸ fundamental rights have been guaranteed in the constitutional arrangement for their effective enforcement has been ensured in Articles 44 and 102. Article 7 and 26 impose limitation on the legislature that no law which is inconsistent with any provision of the constitution can be passed. In accordance with Article 7, 26 and 102(2) of the constitution the supreme court exercise the power of judicial review whereby it can examine the extent and legality of the actions of both executive and legislative and can declare any of their actions void if they do anything beyond their constitutional limits. Right to be governed by a representative body answerable to the people have been ensured under Articles 7(1), 11, 55, 56, 57 and 65(2) of the constitution.¹⁸ All these provisions of constitution are effective for ensuring rule of law in Bangladesh. But facts on the ground tell a different story altogether.

RULE OF LAW IN BANGLADESH

Laws, rules and procedures framed under them exist to cover every walk of our national life, though there may be parities in number and shortcomings in scope. Our constitution contain plethora of laws while institutions like courts, ministries and departments have been set up to dispense justice and

decisions in accordance with the present state of the rule of law reveals the riddle of having a body of law and at the same time not having it. It is like a person who is brain dead. Some aspects of the rule of law in our society and polity should be mentioned as under:

First, access to law as well as equality before it, are reserved for only those who are privileged. For the rest of the population, more or less the Hobbsian law of nature prevails. They are the helpless victims of an unjust society that sets great store by privileges.

Second, all government in this country since the fall of Ershad have claimed that there is independence of judiciary. The claim is only partially true, while the higher courts enjoy a certain measure of independence, the lower courts are under the direct control of the law ministry. The judges look up to the Ministry for everything in fact they are obliged to. The principle of separation of judiciary from executive is being violated in two ways -

1. Magistrates are performing dual function of both executive and judiciary which is not desirable in the interest of justice.
2. The service of district and session judges, their transfer, promotion etc. are controlled not by the supreme court but by the law ministry.

Third, The government of Bangladesh continued to use the Special Power Act of 1974 and section 54 of the criminal code which allow for arbitrary arrest and preventive detention, to harass political opponents and other citizens by detaining them without formal charges.

Fourth, The very principle that law should take its own course requires that in investigation and preparation and submission of the charge sheet, the investigating agency should be free from, encumbrances influences and threats of all kinds. Unfortunately, that situation does not obtain in today's Bangladesh. In recent years a large number of political killings have taken

place. The national dailies have carried the stories of all the gruesome murders and the whole nation has been out raged. What is however deplorable is that in most of these highly publicized cases the culprits have not been brought to justice. The reason is not far to seek. It is the interference by high ups in the political ladder.

Fifth, Another aspect of rule of law relates to the limits of law making power of the parliament itself. Our constitution quite rightly declares the people as the repository of all power and they use it through their elected representatives. However, the question arises whether the parliament can make laws curbing the democratic rights the people, which are generally considered as unreasonable. The special power Act of 1974 the public safety Act passed former Awami Liege Government etc. which are used to put political opponents behind the bars, deserve special mention, so, the question arises can such pieces of legislation promote rule of law? Obviously, not.

One the other hand the government always with a view to avoiding debates make laws by ordinances and later gets them appointed under the sweeping power of article 70 of the constitution.¹⁹

Sixth, Rule of law postulates intelligence without passion and reason free from desire in any decision regarding matters concerned with governance. In our society, the principle is being ignored on many grounds as quotas for political activists by the name of honor to freedom fighters, special provision for individual security etc.

Seventh, Police is no doubt a very powerful institution for the endorsement of the rule of law. But in Bangladesh, the police has never been friendly with the public. The police serve the government and enjoys, in exchanges, the freedom to act arbitrarily and in the material interests of its own members.

Eighth, Ordinance making power can be supported only in emergency situation like national crisis, national calamity severe economic deflection etc. demanding for immediate legislative actions. But article 93 of the constitution allows the president to promulgate ordinances anytime during the recesses of parliament session.

On the other hand Article 141(A) empowers the president to declare emergency whenever he wishes. By declaring emergency in peace time the government can suspend fundamental rights and suppress the opposition movement. This amounts to avowed arbitrary exercise of power on the part of the government which is contradictory to the concept of rule of law.²⁰

Ninth, Another disgusting aspect of our judicial system is that there is the charge of corruption against our judiciary. Moreover, justices oftener than not, a costly commodity in our country. The poor people could not reach before the judges only because of mobility to meet the charge required for going through the complicated process of litigation. Thus, they prefer injustice than fatigue.

Tenth, In order to provide quick relief and avoid lengthy proceedings of litigation providing for the creation of Administrative Tribunal particularly for service matters which needs special treatment and experience is not undemocratic something.

But this tribunal has been kept outside the writ jurisdiction of the High Court Division under article 102(5). Also it has been kept out of the supervisory jurisdiction of the High Court Division. This provision has therefore, been contradictory to the concept of integrated judicial system and also contrary to the concept of independence judiciary.²¹

OBSERVATION

The above discussion makes it clear that though there are some positive provisions for ensuring rule of law in Bangladesh Constitution, they are being outweighed by the negative provisions. Though our constitution provides for 18 fundamental rights for citizens, these remain meaningless vision to the masses because due to poverty and absence of proper legal aid the poor people cannot realize them.²² It also clear that the application of the principle of the rule of law is merely a farce in our country. However, prospects for establishing society purely based on the democratic principle of the rule of law is not totally absent from the polity. We have a constitutional government elected through a free and fair election. But what is needed for the very cause of the principle of democratic rule of law is-

- To separate the judiciary immediately from the executive ;
- To appoint an ombudsman for the sake of transparency and democratic accountability ;
- To make the parliament effective and to let the law making body to do its due business in cooperation with each other government and opposition;
- To reform the law enforcing agencies and police force to rid them out of corruption and to free them from political influence so that they could truly maintain the rule of law;
- To forge national unity and politics of consensus built around the basic values of the constitution, namely democracy, respect for each others human rights, tolerance, communal harmony etc.

CONCLUSION

Above discussions clearly shows that the present condition of rule of law in Bangladesh is not satisfactory. However, the proposed measures for overcoming the shortcomings of rule of law also are not final but these are fundamental. Independent and particular policy for rule of law is a must for overcoming the ambiguity and anomalies in rule of law. After all, government must 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 extreme, the opposition, civil society and social groups and organizations also have the moral obligations to help and cooperate with the government in this juncture.

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