

Dicey's Rule of Law: Perspectives and Relevance to a Just Legal Order

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Law may be defined as an assemblage of signs, declarative of volition, conceived or adopted by the sovereign in a state, concerning the conduct to be observed in a certain case by a certain person or class of persons who, in the case in question, are or are supposed to be subject to his powers. In this sense law may be defined as an ordering of human behavior through certain rules made by competent Sovereign Authority which has jurisdiction to do so within constitutional limits.

One of the basic principles of the English constitution is the rule of law. This doctrine is also accepted in the constitution of U.S.A. and in the constitution of India. 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 depend 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. Moreover, in a democratic form of Government, where desire of the people assumes vital significance the concept of 'Rule of Law' has assumed different dimensions and means that the holders of public powers must be able to justify publicly that the exercise of power is legally valid and socially just.

The basic concept of the 'Rule of Law' is not a well-defined concept. As it is a viable and dynamic concept, so like many other such concepts, is not capable of any exact definition. The term 'Rule of Law' can be used in two senses (1) formalistic sense,

(2) ideological sense. If used in the formalistic sense it refers to organized power as opposed to a rule made by one man only and if used in an ideological sense it represents an ethical code for the exercise of public power in any country. In this sense, it refers to the regulation of the relationship of the citizens and to the government. Although strategies of this code may differ from society to society depending on the societal needs at any given time, but its basic postulates are universal covering all space and time. These postulates include equality, freedom and accountability.

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 powers.¹

The 'rule of law' is of 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 the law over the pretensions of the executives. Professor A.V.Dicey later on 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 discretion there is room for arbitrariness.⁴

Though, the concept 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

¹ Massey, I.P. Conceptual objections against the Growth of Administrative Law, 5th Ed., Eastern Book Company, 34, Lalbagh, Lucknow.

² Halim, M.A., Rule of Law, Constitution.

³ Dicey, A.V. The Rule of Law : Its Nature and applications. Introduction to The Study of the Law of the Constitution, 8th Ed. Macmillan and Co. Limited Martins Streets, London, 1915

⁴ Dicey, A.V. Ibid, 198

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

Although like U.S.A., India also practices constitutional governance by rule of law. Be it legislature, executive or judiciary, all are creatures of the constitution of India 1950. Though it has become fashion to criticize Dicey's Theory of rule of law- the three Important things-absence of arbitrary power, guarantee of citizen's right and the equality before law over which he made emphasis, are universally recognized as the case of traditional theory of rule of law.

As we have seen, while the 'rule of law' pre-dated democratic regions, in modern times, the 'rule of law' has also been used either as a synonym for democratic government, or at least linked to it.⁶The argument being that pluralistic or multiparty democratic politics will be more likely to keep a government within bounds than would regimes that are not subject to these descriptions.

There are instances where a modern legal order has either been imposed upon, or adopted by, a society that operates at variance with the assumptions of the rule of law. The 'rule of law' is actually based on the assumption that particular leaders make mistakes. Therefore, they are not infallible, that since they are expected to rule in the interest of the public good and not merely their own personal interest, they should be held accountable for what they do.

In practice, most 'rule of law' systems recognize that large congeries of power are potentially dangerous and have sought to either divide power or at least balance off the various branches of government, and have also recognized that the executive in particular, ought to be accountable for what it does.

In practice, the operation of a rule of law assumes that public officials are aware of the legal limits on their power, and will for the most part accept limits. The evidence

⁵ Wake, H.W.R. Some Constitutional Principles- The Rule of Law, Administrative Law, 3rd Ed. Clarendon Press Oxford, 1971 6

⁶ Re Buchanan (1964) 65 SR (NSW) 9, 10, 'Every truly democratic system of Government rests upon the rule of law, and no system is truly democratic if it does not.'

shows that this is not always so and that even in established legal orders, the executive will sometimes manipulate the law to get round judicial rulings, though this is normally not so widespread or blatant as to undermine the legitimacy of the legal system as a whole but its corrosive effects on public sentiment towards the legal system ought not to be undermined.

Another assumption is that legitimacy comes from obeying the law, and in democratic systems by having attained power by free and fair elections, and also that the state recognizes a relatively autonomous civil society consisting of voluntary organizations e.g. clubs societies, professional associations, political parties trade unions and churches, which the state does not directly control and in operations of which it does not interfere.

It is further submitted that 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 and political rights but also creation of certain political, social, economical, educational and cultural conditions which are essential to the full development of his personality.

According to Davis, there are seven principal meanings of 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 Administration actions.⁷

So finally, it is humbly suggested 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. Sir Ivor

⁷ Thakker, C.K. Basic Constitutional Principles Administrative Law, 1st ed., Eastern Book Company, 34 Lalbagh, Lucknow 226001, India

Jennings rightly 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 exists, the other consequences of Rule of Law must follow."

Therefore it is suggested and what is needed for the very cause of the principle of democratic rule of law is-

1. To separate the judiciary immediately from the executive.
2. To appoint an ombudsman for the sake of transparency and democratic accountability,
3. To make Parliament effective and to let the law making body to do its business in cooperation with each other government and opposition.
4. 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.
5. To forge national unity and politics of consensus built around the basic values of the constitution, namely democracy, respect for each other, human rights, tolerance and communal harmony etc.

Thus we can say that the rule of law is the bedrock of democracy, and the primary responsibility of implementation of the rule of law lies with the Judiciary. This is now a basic feature of every constitution, which cannot be altered even by the exercise of new powers from Parliament. It is the significance of judicial review to ensure that democracy is inclusive and there is accountability of everyone who wields or exercises public power. As Edmund Burke said. "All persons in positions of power ought to be strongly and

lawfully impressed with an idea that "they act in trust" and must account for their conduct to one great master, to those in whom the political sovereignty rests, the people."⁸

Requirements of a just Legal order:

1. Thus to conclude we can say that rule of law requires a just legal order. A Just Legal System is mostly based on a constitution or similar document, which not only enshrines basic rights of individuals but also provides for the system of governance and the maintenance of an orderly society. Most legal systems have provisions which permit this attribute to be discarded in extreme circumstances, but it is important to note that these are exceptions and must be treated as such. When the exceptions become the rule as under certain autocratic regimes, the whole concept of rule of law is abandoned.
2. With regard to its own functioning a just legal order requires that individuals be subjected to as few constraints as possible, and that the province of the law does not extend beyond that which is absolutely essential for the maintenance of public security, the protection of individuals and the guarantee of basic rights. It also requires that there is a provision for judicial discretion.
3. Another basic attribute of a just legal system is that laws should serve a public purpose and should be legislated with the object of regulating general conducts, laws which are passed with the specific intent of penalizing a particular individual or group of individuals are unjust.
4. Promotion and maintenance of the Rule of Law requires an adequate and functioning legal system which can both meet the demands of a rapidly changing environment and ensure the protection of basic rights. This is major challenge which a number of world countries are facing. Although the constitutions adopted

⁸ J.S. Verma, "Ensuring Accountability and the Rule of Law: the Role of the Judiciary", A Speech delivered by him at the Inaugural Conference to the Asian Centre for Democratic Governance titles "Making Democracy work: Accountability and Trawpar.

5. by most countries are comprehensive and in line with internationally accepted norms, the problem is to ensure that the provisions of their constitutions, and the rights enshrined in them, are Upheld by the rule of Law.
6. The independence of the Judiciary is a key element of an effective legal system. Since the onset of political liberalization, judiciaries have begun to assert their independence in most part of the world. However, this needs to be institutionalized and checks and balances put in place to ensure that the judicial system is free from political interference issues such as the appointment of members of the judiciary, and the responsibilities of oversight bodies still need to be addressed in a number of countries like India, while the shortage of well-qualified and experienced candidates continues to limit legal professionalism.
7. Developing an effective and just legal system requires more than the Independence of the judiciary and the existence of appropriate legal expertise. A functioning court system is also central to the concept of Due Process. Among other things computerized record, keeping, access to reference documents and library facilities would greatly improve the functioning of the Court Systems.
8. Revision of Legislation is also essential for the maintenance of a just legal order. New constitutional provision need to be introduced into law. At the same time, the outdated law which remains on the statute Books needs to be removed or revised.
9. The establishment of independent watchdog bodies such as the office of the Ombudsman, anticorruption agencies, and human rights and electoral commission which report to parliament can be very helpful in promoting the Rule of Law. Such bodies provided that they function effectively, send signal that no-one is above the laws and that there is recourse in cases of abuse of the law.
10. Provision of information about rights and access to the legal system are also essential if rule of law is to prevail. Provision of legal aid, and developments of para-legal services and citizens advice centers, would greatly improve legal

11. Access in most countries, and there are some innovative experiences which could be built upon.

Thus ultimately we reach on the conclusion that 'The Rule of Law' provides the formal rules by which societies can be governed and also induces democratic behavior by providing redress and sanction in cases of abuse. In short by providing for the promotion and protection of human rights, governance by the will of the people, and countervailing forces to balance the power of the executive, the rule of law lays the cornerstone of democracy.

So governments, in Principle, should ensure that the rule of law predominates. In instances whereby the government is unable to do this. Its ability to govern is called into question. In instances in which the government itself violates the basic tenets of the rule of law, it cannot be said to govern lawfully. Democratic government which behaves in an unlawful manner will be voted out of office, while autocratic regimes tend to enter into an ever increasing spiral of repression in order to stay in order. The legacy of such brutal regimes is often a popular disregard for the rule of law, and a lack of trust in political and legal process.

The existence of a constitution, in which basic rights are enshrined and which is not subject to governmental manipulation, contributes greatly to a sense of security and predictability. However, if constitutions are to be effective, they need to be relevant to the needs of the people. They also need to be supported by legislation, and upheld by both the states and civil society. The mere existence of a constitution, however comprehensive, will do little to increase a stable environment for democracy and development unless people know and understand its provisions, have faith that their government will not overrule it, and believe that their rights as promulgated within it will indeed be upheld. Therefore, the existence of an independent judiciary and legislative, a free and competent press, and a vibrant civil society are all necessary to ensure that constitutional provisions are translated into reality.

The new concept of welfare state emerged as a reaction against the old gospel of *laissez faire* in 20th century. The welfare state believes in the common good. The

Common good requires maximum satisfaction of human wants with minimum of fraction. It is only through the concept of rule of law the welfare concept can be made meaningful. Therefore, it would be wrong to say that along with emergence of welfare state, rule of law disappeared.

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