

SHORT ARTICLE**THE JUDICIARY ACTING AS THE GUARDIAN OF THE CONSTITUTION IN PRESERVING THE RULE OF LAW IN BANGLADESH**

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General Meaning - The general meaning of the 'Rule of Law' is that the ruler and the ruled must be bound by the same law.

Professor Dicey's doctrine of the rule of law - According to Professor A.V. Dicey, in Introduction to the Study of the Constitution (1885) the expression 'Rule of Law' included three distinct perceptions-

1. The absence of arbitrary power - No man is punishable except for a distinct breach of law, established in the ordinary legal manner before the ordinary courts.
2. Equality before the law - Every man, whatever his rank or condition, is subject to the ordinary law and the jurisdiction of the ordinary tribunals.
3. Supremacy of ordinary law - The general principles of the British Constitution- especially the liberties of the individuals, such as personal liberty, freedom of speech & public meeting-are the results of judicial decisions in particular cases.

Dicey's thesis has been criticized from many angles, but his emphasis on subjection of every person to the ordinary laws of the land, the absence of arbitrary power and legal protection for certain basic human rights remains the undisputed theme of the doctrine of rule of law.

According to Professor Wade rule of law connotes three ideas-

- (1) it expresses a preference for law & order within a community rather than anarchy, warfare and constant strife,
- (2) it expresses a legal doctrine of fundamental importance, namely, that government must be conducted according to law and that in disputed cases what the law requires is declared by judicial decisions and
- (3) it refers to a body of political opinions about what the declared rules of law should provide in matters both of substance and procedure.

Rule of law in modern sense: The concept is now intended to imply that the law should conform to certain minimum standards of justice both

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substantive & procedural. It is the subordination of all authorities, legislative, executive and others to certain principles which would generally be accepted as characteristic of law, such as, the ideas of the fundamentals principles of justice, moral principles fairness and due process. It implies respect for the supreme value and dignity of the individual.

Law is both an instrument of social control and social change. Like all other human institutions, it is never static but dynamic. With the changing pattern of human relations resulting from technological change changing the productive forces of economy, Dicey's concept Rule of Law has undergone great changes with such adaptation and expansion as were necessary to meet new changed circumstances. In this context the International Commission of Jurists and other international bodies undertook the task of defining the requirements of the law and elaborated the principles of Rule of Law, human rights at the Congresses and Conferences held from time to time from which there emerged the new dynamic concept of Rule of Law which embraces a broader conception of justice than the mere application of legal rules.

Declaration of Delhi - A congress was held in New Delhi in 1959, where representatives of no fewer than 53 country's judges, lawyers & teachers of law affirmed in a formal declaration their recognition that rule of law is a dynamic concept which should be employed not only to safeguard and advance the civil & political rights of the individual in a free society, but also to establish certain social, economic, educational & cultural conditions under which his legitimate aspirations and dignity may be realised. 'Rule of law' according to that declaration relates to:

1. the legislature - there is a right to representative and responsible government and there are certain minimum standards or principles for the law; including those contained in the Universal Declaration and the European Convention; in particular, freedom of religious belief, assembly & association & the absence of retroactive penal laws;
2. the executive - especially that delegated legislation should be subject to independent judicial control & that a citizen who is wronged should have a remedy against the State or Government;
3. the criminal Process - a fair trial involves such elements as certainty of criminal law, the presumption of innocence, reasonable rules relating to arrest, accusation and detention pending trial, the giving of notice and provision for legal advice, public trial, right of appeal and absence of cruel or unusual punishment;

4. the judiciary and the legal profession - this requires the independence of the judiciary and proper grounds and procedure for removal of judges and imposes a responsibility upon an organized autonomous legal profession.

Bangladesh Law:

Bangladesh having written constitution there are two kinds of law (1) Constitutional law i.e. the law relating to & having its source in the written constitution made by the Constitutional Assembly & (2) Ordinary law made by the Legislative Assembly (i.e. parliament) in the ordinary process of legislation.

Bangladesh Constitution:

Bangladesh has been characterized in the Constitution as a unitary, independent & sovereign republic to be known as the People's Republic of Bangladesh & is governed by a written constitution which determines the framework & functions of the organs of the Government, distribution of powers between those organs, the principles governing the operations of these organs and relationship between them & the citizens.

Its Characteristics:

Constitution of Bangladesh states 'rule of law' as one of the objectives to be attained. The Constitution proclaims sovereignty derived from the people & is the supreme law of the Republic and if any other law is inconsistent with it, that other law shall be void to the extent of the inconsistency (Article- 7). It incorporates entrenched Bill of Rights known as the 'Fundamental Rights' & any law inconsistent with those rights passed by the legislature shall be void to the extent of the inconsistency (Article-26).

Provisions for ensuring Rule of Law in Bangladesh Constitution:

The rule of law is a basic feature of the Constitution of Bangladesh. To attain this fundamental aim of the State, the Constitution has made substantive provisions for the establishment of a polity where every functionary of the State must justify its action with reference to law.

It has been pledged in the preamble to the Constitution of Bangladesh that-"it shall be a fundamental, aim of the state to realize through the democratic process a socialist society, free from exploitation-a society in which the rule of law, fundamental human rights & freedom, equality and justice, political, economic & social, will be secured for all citizens".

Fundamental Rights & Protection under the Constitution:

Part III of the constitution of Bangladesh enumerates certain fundamental rights. Article 26-47A deal with 18 fundamental rights. All these rights are civil & political in nature. some of these rights cover a very wide area & are general in nature: -

- equality before law & equal protection of law (Article-27)
- prohibition of non-discrimination on grounds of religion, race, caste, sex or place of birth (Article-28)
- equality of opportunity in public employment (Article-29)
- right to protection of law (Article-31)
- right to life and personal liberty (Article-32)
- safeguards as to arrest and detention (Article-33)
- prohibition of forced labour (Article-34)
- protection in respect of trial & punishment (Article-35)
- freedom from punishment under ex-post facto legislation (Article-35 (1))

Some of the fundamental rights deal with specific rights: -

- freedom of movement & residence (Article-36)
- freedom of assembly (Article-37)
- freedom of association (Article- (38)
- freedom of thought and conscience (Article-39 (1))
- freedom of speech and expression (Article-39 (2))
- freedom of the press (Article-39 (2))
- freedom of profession or occupation (Article-40)
- freedom of religion (Article-41),
- religious safeguards in educational institutions (Article-41 (2))
- right to property (Article-42)
- right to protection of home and correspondence (Article-43)

Law does not mean anything that parliament may pass. Articles 27 & 31 have taken care of the qualitative aspects of law.

Article 27 states:

“All citizens are equal before law and are entitled to equal protection of law”.

Article 31 provides:

“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”.

Role of the Judiciary:

The judiciary occupies a very important position in the political system of a democratic country. It is everywhere one of the three principal organs of government and is closely associated with the other two organs of government and with the rights and duties of the governed. According to the resolution of the International Commission of Jurists as well as the Universal Declaration on the Independence of Justice it was unanimously held at Montreal in 1983, that an independent judiciary is an indispensable requisite of a free society under Rule of Law. The maintenance of independence and impartiality of the judiciary both in letter and spirit is a basic condition of the operation of Rule of Law, and as such, ensuring the liberty of the people and human progress. Such independence implies freedom from interference by the executive or legislature with the exercise of the judicial functions but does not mean that the judges are entitled to act in an arbitrary manner.

Its Structure:

An independent and impartial judiciary is however a pre-condition to rule of law. Constitutional provisions will be mere moral precepts yielding no result unless there is machinery for enforcement of those provisions and faithful enforcement of those provisions is not possible in absence of an independent and impartial judiciary. The Administration of Justice is the responsibility of the judiciary, which comprises the Supreme Court, the Appellate Division & the High Court Division at the highest level followed by a hierarchy of civil & criminal courts at the district level; and finally, village courts in rural areas, conciliatory courts in municipal areas. The Supreme Court is located in Dhaka. The Courts of District and Sessions Judge, Additional District & Sessions Judge, Joint District Judge & Assistant Sessions Judge deal with both civil & criminal cases. The Courts of District Magistrate, Additional District Magistrate, Magistrate of First, Second and Third Class deal with criminal cases only. The Metropolitan Magistracy functioning in four metropolitan cities of the country also deals with criminal cases.

Enforcement of Fundamental Rights:

Eighteen fundamental rights have been guaranteed in the Constitution and constitutional arrangement for their effective enforcement has been ensured in Articles 44 & 102. The Supreme Court of Bangladesh is responsible for enforcing the fundamental rights conferred by the

constitution (Article-44). Under Article 102 the High Division of the Supreme Court is empowered to give such directions or orders to any person or authority as may be appropriate for the enforcement of any of the fundamental rights. The Supreme Court is thus constituted as the protector and guarantor of fundamental rights and it is the constitutional responsibility of the Supreme Court to protect them in case of infringement. Thus for enforcement of rights pertaining to human security under the constitution, one has to go the High Court Division of the Supreme Court of Bangladesh.

Instances of Constitutionalism:

There is no express provision in the constitution for conferment of the state's judicial power on the judiciary. On reviewing the Preamble, Arts. 7, 26(I) and 108, the Supreme Court held in *Jamil Haq vs. Bangladesh* 34(1982) DLR (AD) 125-that full judicial power has been conferred by the constitution on the supreme judiciary as an independent organ of the state.

The superior courts in our country have very liberally construed the locus stands of an, aggrieved person and vigorously protected citizen's rights guaranteed under the constitution.

In the *Berubari case (Kazi Mukhlesur Rahman vs. State)*, 26(1974) DLR (SC) 44, the Appellate Division held:

The fact that the appellant is not a resident of the southern half of south Berubari union no.12 or of the adjacent enclaves involved in the Delhi Treaty need not stand in the way of his claim to be heard in the case. We heard him in view of the constitutional issue of grave importance raised in the instant case involving an international treaty affecting the territory of Bangladesh and his complaint to an impending threat to his certain fundamental rights guaranteed by the constitution, namely to move freely throughout the territory of Bangladesh, to reside and settle in any place therein as well as his right of franchise. Evidently, these rights attached to a citizen are not local. They pervade and extend to every inch of the territory of Bangladesh stretching up to the continental shelf.

In Dr. Mohiuddin Farooque vs. Bangladesh (17) 1997 BLD (AD) I-it was held that a writ petition is maintainable in case of a violation of any fundamental right of the citizens, affecting particularly the weak and downtrodden or deprived section of the community, or if there is a public cause involving public wrong or public injury of any member of the public or an organization, whether being a sufferer himself/itself or not may become a person aggrieved if it is for the realization of the objectives and purposes of the constitution.

It was held in **Sajeda Parvin vs. Government of Bangladesh** that a rule issued in habeas corpus matter was wrongly discharged as anfructuous on the ground that the order of, detention has already expired, because, it was not the order but the factum of detention is in issue in a habeas corpus matter. The High Court has powers wider than the one under section 491 of the Code of Criminal Procedure and can grant ad-interim bail in a pending writ proceeding, as it did in **Bangladesh vs. Ahmed Nazir 27(1997) DLR (AD) 41**.

In State vs. Deputy Commissioner & others 45. (1993) DLR 643- where a boy of 12 was not released even after his acquittal and languished literally under fetters for 12 years the High, Court Division issued a suo moto rule on the basis of a newspaper report. The victim who had been tried in violation of the Children Act, 1974 was freed.

The Supreme Court has also jealously protected freedom of press. The Government's refusal to authenticate the declaration in respect of a daily newspaper was struck down when there was no valid ground for the refusal. When the relevant documents of a weekly newspaper and its printing matters were seized for alleged illegal authentication of the declaration by the Additional District Magistrate, instead of the District Magistrate, the court found in **Waliul Bari Chowdhury vs. District Magistrate, Kushtia and others 45 (1993) DLR 643** that the cancellation of the authentication was done mala fide after a long lapse of time in respect of the publication of the criticisms of a few actions of the District Magistrate in the weekly. The printing press was released and the publication of the weekly was allowed. **In Hamidul Huq Chowdhury vs. Bangladesh.34 (1982) DLR 190** it was held that "the law that singled out a printing establishment for taking over was violative of the freedom of press.

It was held by the Supreme Court in Saleemullah vs. State-

Freedom of press being recognized in our constitution, a court is to suffer criticism made against it, and only in exceptional cases of bad faith or ill motive, it will resort to law of contempt.

Conclusion:

The foregoing discussion about the judiciary in a democratic state, where human dignity is protected in terms of the UN Human Rights Declaration, shows that they have been substantially provided in Bangladesh. The problem with us, like many other developing countries, is not so much with providing the basic formulation of the principles of Rule of Law, but the real problem is to translate them into reality in the life of the people, but that does not mean that we are going to abandon our

'adherence to' on lose faith in, Rule of law. Development in reality means economic growth and social change and the legal institution like an independent, enlightened and courageous judiciary, in our experience, is an indispensable instrument to achieve peaceful transition from a traditional rural society to a modern industrial society, and our courts pretty obviously have a job of formidable proportion on their hands to strike a balance between the private interest, public need and thereby to maintain its creative role to mould the system of justice to respond to the aspiration and needs of the common man keeping in view the promotional role of an welfare state.

Let objective reasons shape all of our state activities, under Rule of Law, so as to strike the balance between authority of the state and fundamentals human rights of the citizen by proper and prompt application and enforcement of the law on which rest the peaceful and civilized existence of the society.

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