"Rule of Law": Encouraging as well as Discouraging provisions in Bangladesh Constitution: Comments & Recommendations

* Md. Azad Hossain

The term "Rule of Law" is a fundamental element of the updated concept of constitutional supremacy and democracy. It is fully opposed to the concept of rule of man. As per this concept, the ruler and the ruled must be bound by the same law. No separate law can be enacted for the ruler. Edward Coke is the originator of the concept and it was developed by the prominent British writer Prof. A. V. Dicey.

This concept gradually developed through constant struggle against the powerful rulers. It is to be substantially noted that this concept is opposed to rule of man, arbitrary power, autocratic govt. and discretionary power because Dicey opines "Whenever there is discretion, there is room for arbitrariness".

Ø Reasons behind developing this concept:

a) In favor of this concept Bracton, a Judge of 13th century wrote- "The king himself ought to be subject to God and the Law because law makes him King"

b) Article 39 of Magna Carta (1215) is to be considered as the milestone in developing the concept of "Rule of Law" whereon it is said that "No free man might be arrested, imprisoned, dispossessed, outlawed or exiled or harassed without lawful justification.

c) The concept of "Rule of Law" has got special preference in "Kesavanand Bharathi Vs State of Kerala case 1973"

Ø Dicey's Theory of "Rule of Law":

As per the concept of Prof. Dicey, "Rule of Law" will denote the following points:

1) Supremacy of law or absence of arbitrary power
2) Equality before law &
3) Predominance of legal spirit.

Besides some criticism actually Dicey is the only praiseworthy for this positive theory.

Ø Encouraging provisions of "Rule of Law" in Bangladesh Constitution:

1. As the guiding star, the preamble of Bangladesh constitution encourages the concept of "Rule of Law" by its sacred pledge, whereon it is said - "it shall be a fundamental aim of the state to realize through democratic process a socialist society, free from exploitation, a society in which the "Rule of Law"..... will be secured for all citizens".

2. As per Article 2A of Bangladesh Constitution- The State religion of the Republic is Islam but other religions may be practiced in peace & harmony in the Republic.

* Student of 8th semester, Law Dept. IIUC
3. Article 27 ensures that all citizens are equal before law & are entitled to get equal protection of law.
4. Article 31 also ensures and encourages "Rule of Law" by mentioning to enjoy the protection of the law, life, liberty, body, reputation or property of any person.
5. 18 types of Fundamental Rights " have also been incorporated in Bangladesh Constitution and enforcing machinery for ensuring "Rule of Law" has also been enclosed in Article 44 & 102.
6. Article 7 & 26 impose limitation on the law makers which strongly bar the legislatures to pass any inconsonant law with the constitution.
7. Article 28 ensures "Rule of Law" by stating that " the state shall not discriminate against any citizen on grounds only of religion, race, caste or place of birth.
8. As per Article 7, 26, 102(2) Supreme Court enjoys judicial review power by which it can examine the legality or locus standi of the actions of both executive & legislative organs and can also declare any law as void which is opposed to Constitution as well as public policy.
9. Under Article 7(1), 11, 55, 56, 57, & 65(2) of the Constitution right to be governed by a representative body answerable to the people has been ensured.

0 Corrective or discouraging provisions in Bangladesh Constitution and Specific Relief Act 1877:

(1) Section 9 of the SR Act 1877 declares that if any person is dispossessed of immovable property without his consent or due process of law he can recover his possession by filing a suit. By infringing the principle of "Rule of Law" further it is said no suit shall be instituted against the govt.

(2) By neglecting the teachings of "Rule of Law" Article 33 of Bangladesh constitution enables the govt. to execute preventive detention in peace time which actually may be considered reasonable in time of emergency.

(3) Court or Tribunal is the competent authority to decide any case but Article 49 allows the President to grant pardons, reprieves and respite and to remit, suspend or commute any sentences which are also clear violation of "Rule of Law".

(4) By violating "Rule of Law" Article 51 ensures president's immunity i.e. the President shall not be answerable in any Court and no criminal proceeding shall be instituted against him.

(5) Article 70(1) is also opposed to "Rule of Law". As per this Article a person elected as a M.P at an election, which he was nominated as a candidate by a political party shall vacate his seat if he resigns or votes against that party in parliament. Article 32 ensures personal liberty but through this Article this liberty has been postponed.

(6) By mentioning the provisions on special privileges and immunities of MPs in Article 78 the moral teaching of "Rule of Law" has been neglected.

Justice ♦ 54
(7) Article 93 empowers the President to make ordinance at any time (i.e. in time of emergency or when the parliament is not in session). This power is the explicit violation of "Rule of Law". Because parliament is the sole place to legislate by the elected representatives.

(8) Article 141A enables the Honorable President to declare the state of emergency and also said if he is satisfied. By taking this opportunity he can autocratically declare the emergency which is opposed to "Rule of Law".

(9) During emergency the execution of fundamental Rights is kept inactive under Articles 141B & 141C . Which is the direct violation of "Rule of Law".

(10) The Special Powers Act 1974 (to be known as black laws) is one of the severe examples of the violation of "Rule of Law".

Comments and recommendations:

Bangladesh Constitution is contradictory to itself from the view points of "Rule of Law". The reason is that some of its provisions strongly suggested for the implementation of "Rule of Law" and some other provisions of the same constitution seriously discouraged the "Rule of Law" concept. Bangladesh govt. can make a superb example by eliminating all sorts of provisions which are responsible for the infringement of "Rule of Law".

By implementing the theory of checks & balances Bangladesh Constitution can attain a fruitful remedy in this regard. All enacted laws and the contradictory provisions of Bangladesh Constitution should be reformed for the purpose of ensuring "Rule of Law". The Special Powers Act 1974 should be abolished and all inconsonant provisions with "Rule of Law" should be erased. All executive, legislative & judicial functions should be performed as per due process of law. All elections i.e. General election to Union Parishad election must be held neutrally within the fixed time. No undue delay & lame excuse should be granted. No forcible interference among 3 organs of the state should be accepted, no ultra vires procedure should be approved. No autocratic decision can be performed. All forms of corruption, peculation, extortion must be erased and in that place "Rule of Law" supporting provisions must be inserted. Human Rights situation must be kept in normal range. Cross-firing, death in remand and all sorts of unlawful torturing must be abolished. No distinction should be made irrespective of caste, race, color, religion, sex etc. The supporters of the opposite parties must not be illegally tortured, killed, evicted, punished and defamed by the ruling class. Otherwise "Rule of Law" can never be confirmed.

At last, it can be conclusively said that if the govt. can give the promise of fulfilling my recommendations, I hope all citizens of our country can pass their life with peace, harmony and happiness. If the govt. takes my recommendations into consideration, I undoubtedly can say it that the fraternal and fiduciary relationship among the citizens must be increased enormously. Consequently "Rule of Law" must be established and developed throughout the country.