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Interpreting 'procedure established by law' with 'rule of law': a comparitive view of Irish, Japanese and Indian Constitution

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Introduction

Rule of law is the supreme manifestation of human civilization and culture. It is an eternal value of constitutionalism and inherent attribute of democracy and good governance. Rule of law has become an integral part of global moral thought, E.P. Thompson described 'Rule of law' to be 'an unqualified human good' and 'a cultural achievement of universal significance' faithfulness to Rule of law guarantees liberty, equality of opportunity, fairness and a well-functioning society in the face of those who, through ambition for power or wealth, would seek to impose their will on the less powerful. It is actually faith and commitment to rule of law that determines the growth and development of any democratic civilized society. As and if the faith in rule of law diminishes the social, political and economic fabric of society gets adversely affected. We are reminded of what Jawaharlal Nehru while addressing International Congress of Jurists[1] on Jan 5, 1959 said, "Rule of law seems to me synonymous with the maintenance of civilized existence." Rule of law denotes a way of life and commitment to certain principles and values. Aptly describing the notion of Rule of law the former Attorney General of India, Soli J.Sorbajee[2] says. "It is the priceless inheritance of our civilization" According to him "Rule of law symbolizes an enlightened civilized society's efforts and quest to combine that degree of liberty without which law is tyranny with that degree of law without which liberty becomes license."'Democracy may be described as a system of the people, for the people and by the people; it is 'rule of law which makes democracy of the people for the people and by the people in the sense'.

Rule of law: as emerged

The term 'Rule of Law' is derived from the French phrase 'la principe de legalite' meaning the principle of legality and a government governing on the principle of law and justice not the arbitrariness of the ruler. It has its traces in every stage of human development. In India, Upanishad's Raj-Dharma, Ashok's Dharma Chakra or Akbar's Deen-e-Elahi or Plato or Aristotle in Egypt or Religious text of the Holy Bible, Geeta or Quran all have reflected Rule of Law in one way or another. The formal inception of the concept of 'Rule of Law' goes back to November 3, 1608 at West Minister Hall. At that wintry morning, hot discussion was going on between Sir Edward coke and James I. The King-James I was bent on establishing his absolute power chaining the divine right of the king. Parliament and Royal Courts of Justice stood in his way. James I claimed that -"since the judges were but his delegates, he could take any case he choose, remove it from the jurisdiction of the courts and decide it in his royal person." To this Chief Justice Coke answered, "In the presence and with the clear consent of all the judges, that the king of his only cannot adjudicate any case……..but that it ought to be determined and adjudicated in same Court of Justice, according to law and customs of England." To this the King replied, "That he thought that the law was founded upon the reasons and that he and others had reasons as well as the judges." That followed the stirring and courage's reply of Coke, which sends a thrill of pride in every lawyer and even judge even after so many years. He said "It was God who had endowed his majesty with excellence science and great endowments of nature; but his Majesty was not learned in the laws of his realm in England and causes which concerns the life or inheritance or goods or fortunes of his subjects are not to be decided by natural reason but by artificial reason and judgment of law, which law is an act which require long study and experience. That Brocton said that the king should not be under no man but should be under God and Law." These words lead to the great evolution of Rule of law in UK. To an extent these courageous words leads to Glorious Revolution and Act to settlement (1701) which secured Rule of law in and out in England and inspired the world.

Rule of law: as doctrined by Dicey, Wade & Finnis

Prof. Albert Venn Dicey later developed on this concept in the course of his lectures at Oxford University. Dicey was an individualist; he wrote about the concept of Rule of law in 1885 through his book 'The Law of The Constitution'. This doctrine promulgates the notions of rule of law, which has certain limits subject to political - social and economic era of that time. Dicey's notion of rule of law yet forms the basic ingredients of rule of law till date. He attributed three meanings to the said doctrine. The First principle (Supremacy of Law) recognizes a cardinal rule of democracy that every government is subject to law and law is not subject to government. It rightly opposes arbitrary and unfettered discretion to the government authorities, which has tendency to interfere with rights of citizen. Dicey's First

[1]Mani, Rama (2009). 'Exploring the rule of law in theory and practice', Civil War and Rule of Law. PP 21-45. Sachar, Rajinder (2008). 'Indian Democracy and the rule of law', Citizen's Rights and Rule of Law: Problems and prospects, Essays in Memory of Justice J C Shah. PP 111-120

[2]See, Soli J. Sorabjee's Lecture at Brandeis University, Massachusetts, April 14th 2010. http://www.brandeis.edu/programs/southasianstudies/pdfs/rule%20of%20law%20full%20text.pdf

Principle of the absence of wide discretionary power in the hands of government officials. The Second Principle (Equality before Law) is equally important in a system wedded to democratic polity. It is based on the well known, "However high you may be, Law is above you and all are equal before law." Dicey states that there must be equality before law and equal subjection of all classes to the ordinary law of the land administered by ordinary law courts. He added that in England all person were subject to one and the same law, and there were no extraordinary tribunals or special courts for officers of the Government and other authorities. That is why he criticized French legal system of Droit Administer if in which there were separate administrative tribunal for deciding cases between the official of the state and the citizens. According to him exemption of civil servants from the jurisdiction of ordinary court of law and providing them with special tribunals was negation of equality The Third principle (Predominance of Legal Spirit) put emphasis on the role of the judiciary in enforcing individual rights and personal freedoms respective of their inclusion in the constitution. Dicey feared that mere declaration of such rights in any statue would be futile, if they could not be enforced. He further added that constitution is not the source but the consequence of the right of the individual, thus Dicey emphasized that the right would be secure more adequately, if they were enforceable in the court of law than mere declaration of those rights in the document, as in later case they can be ignored, curtailed or trampled upon.Dicey's thesis 'Rule of law' proved to be an effective instrument in conferring the administrative authorities within their limits. As Mathew J.[3] Stated "if it is contrary to the rule of law that discretionary authorities should be given to the government departments or public officers than there is no rule of law."

Moderating the Dicey's meaning in the present day context; Prof. Wade[4] includes, under rule of law- effective control of and proper publicity for delegated legislation particularly when it imposes penalties that should as far as practicable be defined; every man should be responsible to, the ordinary laws whether he be a private citizen are public official, the private mans right should be determined by impartial and independent tribunals and fundamental private rights are safeguards by ordinary laws of England." The consent of the governed is a value that is basic to our understanding of a tree and democratic society. Yet democracy in any real sense of the word cannot exist without Rule of law. It is that the law that creates the framework within which the 'Sovereign Will' is to be ascertained and implemented. They must allow for the participation of and accountability to, the people through public Intuitions created under the consultation. Equally however a system of government cannot survive through adherence to the law alone". John Finnis[5] says that by 'rule of law' is meant a system in which

i. Its rules are prospective,
ii. Possible to comply with,
iii. Promulgated,
iv. Clear,
v. Coherent with each other,
vi. Sufficiently stable,
vii. The making of decrees and orders in guided by rules that are themselves promulgated, clear stable and relatively general,
viii. Those who administer rules are accountable for their over compliance with rules relating to their activities and who perform these consistently and in accordance with law.

'Rule of law is a dominant legitimate slogan in the world today. It is perhaps the only universally shared well in modern world in which the most evident lesson is how divided we are culturally economically and politically. Indian Supreme Court in Shri Ram Krishna Dalmia v. Shri Justice S. R. Tendolkar Case[6] said, "First that rule of law provides that the law is supreme over the acts of both government and private persons. There is, in short one law for all. Second we explained that The Rule of Law requires that creation and maintenance of an actual order of positive laws which preserves and embodies the more general principle of normative order. A third aspect of the rule of law is that the exercise of public power must find its ultimate source in a legal note. The constitutionalism principle bears considerable similarity to the rule of law although they are not identical. Simply put, the constitutionalism principle requires that all government action should comply with the constitution. The rule of law principle requires that all government action must comply with law, including the constitution."

Procedure established by law and rule of law

Rule of law has always been attributed with the notions of equality. In Indira Gandhi v. Raj Narain,[7] however it was contended that Article 14 - Right to Equality itself is not the 'basic structure' (Chandrachud J)[8] but it was strongly rejected by (Mathew J. and Beg J)[9] Article 14 itself assumes the principle of equality in both famous themes - 'equality before law' and 'equal protection of laws', where the former is British in origin and Negative in nature whereas the later has its routes from American constitutional system while Positive in nature. Both are the shell and the kernel, the skin and the core of the principle and practice of equality. The inter linkage between principle behind rule of law and principle of equality determine democracy and constitutionalism. Keshvanand Bharti v. State of Kerala[10] has unanimously rejected the idea of fundamental rights as a limitation over the amending power of the parliament, yet the able court reaffirmed its faith in the core structure of the constitution must be in any way destroyed by so called amendment power. As observed by noted Indian Jurist Durga Das Basu,[11] "…..it would result in a 'wild goose chase' for the litigants, the Bar as well as the Bench, for each judge would be free to pursue what he thinks to be core of the particular provision." So the 'wild goose chase' formula to identify the core structure of Constitution of India has been a remarkable task for researchers of Constitutional Law. The question is often asked to what extent the notion of Equality and Rule of Law has been the core structure of the Indian Constitution. Difference of judicial opinions, country's polity and right based jurisprudential movements has been playing an instrumental role in widening or tightening of the core structure of the constitution which might be something that constitution makers have not intended ever. The judiciary has been changing their roles simultaneously in ultra liberal interpretations, which is ideally reflected in shift of opinion from A. K. Gopalan (1950) to Maneka Gandhi (1975) case.

[3]K.Mathew J. Sukhdev v. Bhagatram AIR 1975 SC133 (para 23).
[4]Professor E.C.S.Wade, Constitutional and Administrative Law (2006), Prentice Hall (UK).
[5]John Finnis, Natural Law and Natural Rights, The Authority of Law in the predicament of Contemporary Social Theory, (1984),1 Notre Dame J. of Law, Ethics and Public Policy, Page 115, 136.
[6]AIR 1958 SC 538.
[7]AIR 1975 SC 2299 (Para 332).
[8]Ibid (para 239).
[9]Ibid(para 333-336); (para 477).
[10]AIR 1973 SC 1461
[11]Durga Das Basu, Comparative Constitutional Law, 3rd Edition, 2014, Equality and Rule of Law, Page 221, Lexisnexis India

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Earlier Indian Courts have been very passive and timidious in matters of extra ordinary judicial review, adhering strictly on the lines of statutory construction and often ignoring the organic nature and need of the Constitution; which is it's Progressive Interpretation. In Post Emergency era, Indian Supreme Court has transformed its above-mentioned outlook into a brave courageous spirited judiciary. Before that the approach of the Supreme Court was to interpret the Constitution as a Statute, mandated under Article 367(1) which asserts, "unless the context otherwise requires, the General Clauses Act, 1897, shall subject to any adaption and modification that may be made therein under Article 372, apply for the interpretation of this constitution as it applies for the interpretation of this constitution as it applies for the interpretation of an act of the legislature of Dominion of India."As per the mandate of Article 367(1), the judiciary had evolved the responsibility of finding out the 'intention of legislature' and in case of the constitution, 'the intention of the Constituent Assembly of India'. Thus in case of any ambiguity of meaning of the words in the stature or constitution, intention of its crafters is paramount. While looking into the intention, a judge looks into the meaning and discussion regarding use of any particular term in the statute. At least when a particular alternative is specifically rejected by the constituent assembly, the fact would be vitally important in interpreting the provision, which was eventually adopted, after rejecting the alternative.[12] With respect to interpretation of Article 21 above-mentioned approach has played very vital role, at least in Pre- Emergency Period. The early interpretation of Article 21 in A. K. Gopalan v. State of Madras[13] was reflective of conservation and literal interpretation of 'procedure established by law'. In Gopalan case, the view expressed by Kania C.J., "since the constituent assembly extensively discussed and deliberately dropped the use of the expression, 'due process of law' and instead adopted the expression 'procedure established by law' under Article 21, the concept of due process could not be imported into the article".[14]

The crafters of Constitution of India were influenced with the Constitution of Eire, 1937, Article 40(4) a, "No citizen shall be deprived of his personal liberty, save in accordance with law." The judiciary in Ireland have always interpreted the term, 'in accordance with law' with limited and literal sense. In reference case of Article 26 Case,[15] Irish judiciary has reaffirmed the literal meaning of the term and resorted that it will not include 'fair play in action' or 'natural justice.' The European Court of Human Rights, Strasbourg (ECHR), on 10th September 2010 in McFarlane v. Ireland,[16] had questioned a complaint against Ireland, of the violation of Article 40(4)a of Irish Constitution and Article 34 of the Convention for the Protection of Human Rights and Fundamental Rights. An Irish National, Mr. Brendan McFarlane, made the complaint of the violation of Human Rights and absence of Natural Justice and Unreasonableness, against Irish constitutional system which applied the liberal interpretation of Article 40(4)a only including substantive due process and specifically excluding procedural due process. The ECHR reviewed several judgments like McFarlane v. State,[17] Ivor Sweetman v. The DPP, the Minister of Justice, Equality and Law Reforms and the Attorney General[18] and ensured that Irish Constitutional System should also provide mechanism for Natural Justice and ensure Human Rights against any arbitrariness and unreasonableness. Similarly in Ryan v. Attorney General,[19] Kenny J. has remarked, " None of the personal rights of the citizen are unlimited: their exercise may be regulated by the Oireacht as when the common good requires this which involves a balancing exercise between affording rights to citizen; but not letting those rights be abused." Expanding the theory of personal liberty within the purview of Natural Justice, in the case of Northampton Co. Council v. ABF,[20] the Court observed that, "the natural law is of universal application and applies to all human beings- citizen and non-citizen alike. These rights are recognized by the Constitution and the Courts created under it as antecedent and superior to all positive law."

Internationally, Japanese Constitution, 1946 has also used the term, 'procedure established by law' with regard to right to life and personal liberty under Article 31 which states, "No person shall be deprived of his life and personal liberty, nor shall any other criminal penalty be imposed, except according to procedure established by law."In A. K. Gopalan v. State of Madras,[21] the judgment draws a comparative analysis of Japanese Constitution- Article 31 and Constitution of India- Article 21, while forming their opinion in this case, Mukherjea J[22] concluded that because the framers of Japanese Constitution were American, they employed a cautious approach in incorporating Due Process of law clause under this Japanese Constitutional adventure. The Japanese Constitution restored its belief in non-application of Nature Justice while interpreting Right to life and personal liberty. 'State made Law' without any application of 'Natural Justice' will be applicable regarding life and personal liberty under Japanese Constitution. However, bare reading of Japanese constitution and relevant judgments propounded by Japanese Judiciary from time to time has been very different from what Article 31 intends. Japanese Judiciary has been instrumental in interpreting fundamental rights particularly Article 31 which accommodates fair play in action and natural justice as an illustration in case of Nakamuen v. Japan[23] and Yoshida v. Japan,[24] the supreme court of Japan used the interpretation of other fundamental rights under Japanese Constitution to ensure natural justice is supplemented within article 31, even if under literal interpretation the article excludes it. Article 32 of the same guarantees right to access to courts; Article 33 and Article 34 provides right to a charge at a criminal proceeding; Article 37 provides right to speedy and public trial by an impartial tribunal and full opportunity to examine witness and Article 38 ensures right not to be convicted only on the accused's own conviction. The combined effect of Article 32,33,34,37 and 38 provides a natural rights regime and protected the fair play in actions regarding violation of right to life and personal liberty guaranteed in Article 31. Article 31 instructs 'procedure established by law' as a restriction against right to life and personal liberty in Japan, which establishes the substantive due process, and for procedural safeguards the Courts were guided by the mandate of article 32,33,34,37 and 38 of Japanese Constitution. However, while drafting the constitution of India the Constituent Assembly in India though influenced by Article 31 of Japanese Constitution but ignored the presence of aforementioned articles (article 32,33,34,37 and

[12]Wanchoo J., GolakNath v. State of Punjab, AIR 1967 SC 1643 (Paragraph 92).

[13]AIR 1950 SCR 88.

[14]*Ibid,* Paragraph 296.

[15](1942) IR 112.

[16]Application No. 31333/06: September 10th 2010.

[17](2006) IESC 11

[18](2005) IEHC 435

[19](1965) IR 294

[20](1982) ILRM 164

[21](1950) SCR 88

[22]Ibid, paragraph 58.

[23](1962);Itoh& Beer, Constitutional cases of Japan, 1961-1970, pp 78, et seq.

[24](1967);ibid, pp 799.

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38) which completes the protection regime of both substantive and procedural due process while interpreting 'procedure established by law'. Perhaps unavailability of Japanese case laws and comparative study between Indian and Japanese jurisprudence made the Constituent Assembly while drafting the Constitution and Supreme Court of India in A.K Gopalan while interpreting Article 21, believed that 'procedure established by law' will be enough to protect right to life and personal liberty in India as it is doing in Japan's and Eire's polity.

Acknowledgments

None.

Conflicts of interest

None.