

Diceyan Rule of Law: A Swaddled Notion of Islamic Legacy

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1.1 INTRODUCTION

John Locke said:

The end of the law is, not to abolish or restrain, but to preserve and enlarge freedom. For, in all the states, where there is no law there is no freedom. For liberty is to be free from restraint and violence from others; which cannot be where there is no law: and is not, as we are told, a liberty for every man to do what he lists. (For who could be free when every other man's humour might domineer over him?) But a liberty to dispose, and order as he lists, his person, actions, possessions, and his whole property, within the allowance of those laws under which he is, and therein not to be the subject of the arbitrary will of another, but freely follow his own.(1)

The phrase 'rule of law' is derived from the French expression *la principe de legalite* (the principle of legality). It demands that a government must be structured on the principles of law so as to mitigate arbitrary powers.(2) In some ways, the concept of rule of law dates back to the old concept delivered by Coke and Dicey. There is a perception that Sir Edward Coke was the initiator of this notion of the rule of law in England. Coke said that the authority of king is not supreme but subject to God and law and in this way he declared the authority of law supreme as compared to executive authority.(3)

Locke has its own assessment in reference with Islamic and Biblical discourses as Matar said that:

Although the passage shows that Locke did not equate Qur'anic and Biblical revelations, and indeed favoured the latter, it demonstrates his willingness to treat Muslims and Christians as sincere seekers of God. It also shows his comparative approach to religious believers—he approached the Muslim community with the same critical judgement he would the Christian. Throughout his writing career, Locke retained the 17th century prejudice against the Islamic creed but, significantly, he discarded the prejudice against Muslims. He drew a sharp line between theology and believers in order to mark the crucial divide between persecution and toleration. And essential to toleration was the recognition that all men, Muslims and Christians

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alike, were error-prone and that judgement on their error did not lie with them but with God.(4)

However, the major concern of this article is to equate the Islamic as well as Diceyan concept of rule of law. In order to understand these diverse conceptions, the article has been structured in four parts. Part II critically analyses the Diceyan notion of rule of law. Part III carefully examines whether the Diceyan theory of rule of law is an Islamic legacy? Part IV concludes the article and summarizes key arguments.

1.2 Diceyan Notion of Rule of Law:

Magna Carta 1215 known as the first formal great charter of freedoms or the constitution of liberties in England states that “no free man shall be taken or imprisoned or diseased or exiled or in any way destroyed, nor will we go and send for him, except under a lawful judgment of his peers and by the law of the land”.(5) In the late 19th century, A.V. Dicey promoted this dictum of rule of law in series of lectures delivered at Oxford University. Dicey was strongly against the investiture of wide discretionary powers in the hands of executive authorities and in his opinion “wherever there is discretion there is room for arbitrariness”.(6) Dicey builds up the idea of Sir Edward Coke in his book ‘The Law of the Constitution’ written in 1885. Dicey’s concept of the rule of law is based on three fundamental principles:

- 1) Supremacy of Law;
- 2) Equality before Law;
- 3) Predominance of Legal spirit.

In his first principle, Dicey emphasized the need for the supremacy of law which mitigates the abuse of power. He noted that “no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land”.(7) The principle is about the removal of wide discretionary powers from the English legal system and the supremacy of law and law alone.(8)

The second principle pertains to the equality before law. According to Dicey, when we consider “rule of law” as the guiding principle, it requires that all citizens including public officials are equal and no one is above the law. He added that every man whatever his rank, position or status is subject to the ordinary law and ordinary courts of the land and no preferential treatment will be given to any person, as all are equal in the eyes of law. Dicey made critical comments about the ‘*Droit Administratif*’ in France. He argued that the dual system of courts in France which creates disparity by treating public servants and citizens on different legal frameworks negate the principle of equality. During Dicey’s period, many

administrative tribunals were established in England, which clearly defied his discourse of the rule of law. Dicey strongly criticised the French concept of 'Droit Administratif' but Dickenson considers Dicey's approach as unreasonable. He said that the French administrative system is better than the common law system as it is functioning well because of the nature of control of powers of the administrative authorities. He added that the 'conseild'Etat' (the council of state) is no doubt a part of executive but practically a court.(9)

In the third principle, Dicey observed that majority of the British constitution has been developed by the judgments of the English courts. He explained that the cases, which were presented before the court for the determination of individual rights and these decisions of the courts developed the British constitution. Therefore, in a way, Dicey declares that the English courts are the protector and guarantor of the rights of individuals.(10)

The Diceyan concept is different from the modern concept in a number of ways. The Diceyan notion provides a strong basis for the concept of Rule of Law but is unable to fulfill the requirements for its application in a contemporary society. Dicey's three fundamental principles are narrow in their function. However, the scope of this article is limited to the first two principles of Dicey and therefore the modern concept of rule of law is intentionally avoided to be discussed here.

1.3 Is Diceyan Concept of Rule of Law A Swaddled Notion of Islamic Legacy?

Law and Justice are indispensable elements of an Islamic society. The basic object of Islamic Justice system is to provide congenial environment to ensure all the fundamental rights, right to life and protection of properties of mankind without any kind of interventions. Quran says, Doing justice is near to observance of duty that is prayer, fasting and giving of Zakat etc. As;

And when ye judge between man and man that ye judge with justice:
Verily how excellent is the teaching which He giveth you! for Allah is
He who heareth and seeth all things.(11)

Therefore, the Islamic concept of rule of law emphasizes on observance of supremacy of law and equality before law in its true letter and spirit. In an Islamic society no one is above the law and everyone from common man to the Ammer-ul-Momaneen (the king) is equal in the eyes of law. Therefore, they are equally punishable for any distinct breach of law before the ordinary courts of law and does not matter how high the rank or social status of any person in the society. The beauty of Islamic justice system is that no one can claim any sort of legal immunity. On many occasions such

practices were strongly condemned and discouraged by Prophet Muhammad ﷺ himself.(12) For example once a woman who belonged to a famous tribe of *Bani Makhzum* (one of the richest and influential tribe of Arab) stole and the Prophet ordered that her hand amputated. However, some leading people pleaded on her behalf but Prophet Muhammad ﷺ strongly condemned and said,

The people before you were destroyed because they used to inflict the legal punishments on the poor and forgive the rich. By Him in Whose Hand my soul is! If Fatima (the daughter of the Prophet) did that (i.e. stole), I would cut off her hands.(13)

However, the concept of rule of law in UK as interpreted by Prof. A. V. Dicey pose certain serious questions as certain immunities granted to the Crown and the ministers are defying clearly the implementation of the notion. It is presumed that “the king can do no wrong” which means the king is above the law and not answerable to the courts on any distinct breach of law.(14) Whereas, in Islam, the Qazi (Judge of the court) is bound to treat all the individuals equal regardless of any rank, riches or status of any person in the society.

On prerogative of mercy, the western legal system vests the right on the head of the state to pardon whoever he so wishes, for example in modern democratic set up the appeals of mercy lies with sovereign head of the state but in Islam the right only vests with the person whose right is infringed. Therefore, the Islamic approach is more human centric as compared to the western approach.

In Islam the Qazi is under obligation to decide the case while relying on just witnesses as per the following verse:

O ye who believe! stand out firmly for justice, as witnesses to Allah, even as against yourselves, or your parents, or your kin, and whether it be (against) rich or poor: for Allah can best protect both. Follow not the lusts (of your hearts), lest ye swerve, and if ye distort (justice) or decline to do justice, verily Allah is well-acquainted with all that ye do.(15)

Unlike the western concept of sovereignty, in Islam sovereignty goes to God over the entire universe which is not shared with anyone and man is the subordinate of God on this earth. On one hand, it is the duty of Qazi's (the judge) to observe God made laws and if some law is repugnant to it must be declared null and void as well as to check the validity of man-made laws. On the other hand, the Islamic concept of rule of law requires that the Muslims are bound to obey the enacted laws does not matter how these are

enacted except if any law disobeys God or His commandments is not necessary to follow. As Prophet ﷺ said,

Whether they like it or not, it is obligatory on the faithful to listen and to obey their rulers except when they be ordered to commit a sin. If they are ordered so, they should neither listen nor obey.(16)

In another Ahadith Prophet ﷺ again said,

It is your duty to listen and obey your rulers whether you are in difficulty or at ease, whether willingly or unwillingly and even when you do not receive what is your right.(17)

In western justice system the concept of *Audi Alteram Partem* (no-one should be condemned unheard) is considered as one of the important and famous principles of natural justice which was already enunciated in Islam a 1400 years ago.

As far as the matter of the appointment of judges in Islam is concerned, Ammer-ul-Momaneen must be very much cautious to appoint them amongst the best one. For example, Hazrat Ali (May God be pleased with him) gave orders to Governor Malik Ushtar for the selection of Qazi as follows:

Select the wisest person in the land for administration of justice between the people. He should be a person for whom this task is not hard and litigating parties should not be able to prevail upon his views. He should not persist in his mistake and should not be incapable of returning to truth where he recognizes it. He should not be covetous. He should not consider a matter superfluously in arriving at a decision and should give very deep thought to it in case of doubt. Above all, he should depend on reason and should not be annoyed by the lengthy explanations put forth by the parties. He should be more patient than anyone else in bringing truth to light and when the real position becomes crystal clear his judgment should be explicit and decisive. He should be a person who is not elated by the praise of people and who is not influenced by the words of deceitful persons and such persons are rare.(18)

In Islam the justice is blind. However, the immunities provided to the Crown and ministers are posing some serious questions on the justice system of Great Britain and which is clearly against the interpretations given by Prof. A. V Dicey. As the ancient scholars were having a different view in respect of the Crown as expressed by Bracton,

[T]he King must not be under man but under God and under the Law, because the Law makes the King . . . for there is no Rex where will rules rather than Lex . . . if he brakes the Law his punishment must be left to God . . . for the King cannot be sued or punished.(19)

Whereas another view by Ulpian in 228 A.D. was somewhat different who said that “the Prince is not bound by the law”.(20) After that a great lawyer of thirteenth century explained that it is commendable of the dignity of the monarch that the king should recognize that he is under an obligation to obey the laws of the land.(21) Therefore, the rights were granted to the people of Great Britain gradually as mentioned in the great charter Magna Carta 1215 which was given by King John who was actually hesitant to grant such rights but on the pressure of the people was forced to do that. Section 39 of the Magna Carta asserts that,

No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we [the King] proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land.(22)

Then for almost four centuries these primitive ideas of rule of law did not receive further development until the 17th and 18th centuries. However, in Europe the medieval thoughts take a new turn and contributed substantial philosophical contributions to the perception of the rule of law. The philosophers like John Locke, Jean-Jacques Rousseau, and Count Montesquieu, brought a different legal foundation for executive authority and the rule of law.(23) For example, Locke states that,

[A]ll the power the government has, being only for the good of society, as it ought not to be arbitrary and at pleasure, so it ought to be exercised by established and promulgated laws; that both the people may know their duty, and be safe and secure within the limits of the law; and the rulers too kept within their bounds . . .(24)

In 17th century, a struggle amongst Crown and Parliament steered to the elimination of “Divine Right of Kings” and to an agreement among Parliament and common lawyers. Particularly, Sir Edward Coke promoted the rule of the common law as an objective, guaranteeing the key element to independence, establishing a restraint to the authority of the ruler, and warranting the security of individual liberty and human rights. Sir Edward Coke said that the common law “is the surest sanctuary that a man can take, and the strongest fortress to protect the weakest of all,” and the common

law as an objective empowers each person to be free, secure his life, integrity, private life and norms.(25)

In 19th century Prof. A.V. Dicey got benefit of this evolution and presented the theory of rule of law which later on developed by Friedrich von Hayek who said that,

[T]he government in all its actions is bound by rules fixed and announced beforehand—rules which may be possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances and to plan one's individual affairs on the basis of this knowledge. The goals of substantive equality and distributive justice are inconsistent with the rule of law.(26)

Dicey and Hayek expounded the notion of rule of law which clearly negates the arbitrary powers of the Crown and the government officials. They defy certain immunities to the Crown and the parliamentarians. The Diceyan interpretations are rigid enough as this ideal theory as per his perception is not practically enforced in UK from the very first day. However, it is impossible to impose his notion of rule of law in the present or future coming days.

1.4 Conclusion:

The Diceyan idea of Rule of law is measured as juristic work as well as a key basis of English legal structure. Diceyan interpretation of three fundamentals of his rule of law theory is not much successful even in his own times although received a substantial prominence in England. Actually, it did not integrate in any legal system of the world except Islam as his two fundamental principles of rule of law i.e. supremacy of law and equality before law were not very much successful in British legal system although attracted a considerable attention at that time. On the one hand, Dicey interpreted first two principles of his theory as per his own perception which bounds the powers of the king under certain obligations which was practically not possible as in the UK as it is presumed that the “the King can do no wrong” which clearly provides immunity to the King from the tortious liabilities as well as civil suits which practically followed by the courts as well. Moreover, the parliamentarians, ministers and various officials enjoy certain immunities which defy the Diceyan interpretation of his rule of law theory. In addition, there is a vague concept of judicial review in Great Britain which curtails the authority of the courts to declare null and void the unlawful acts of the executive as well as the legislature

resultantly compromising the rule of law although the concept of judicial review was originated in UK in Dr. Bonham's case in 1610.(27)

However, after going through an extensive study on this concept, it seems that these two Diceyan principles are borrowed from Islamic justice system and these principles best fit in an Islamic system rather than British legal system as in Islam no immunities are granted even to the Ammer-ul-Momaneen i.e. the King and he is subject to ordinary law of the land like an ordinary man. Therefore, the Diceyan concept of rule of law is a swaddled notion of Islamic legacy. However, this research suggests further study on this issue in order to elaborate this important topic in more comprehensive way.

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