Moral Force in the Rule of Law

Kalyani M. Jayasekera
Faculty of Legal Studies, South Asian University, Chanakyapuri, New Delhi 110021, India

Abstract

In this paper the author begins with an exposition of the doctrines in regard to concepts of rule of law and morals. Paul Tillich said "Morality is a valve-impregnated concept relating to certain normative patterns which aim at the argumentation of good and reduction of evil in individual and social life." That means moral is how we judge others. The author then attempts to analyze the views of jurists' (scholars') about moral force in the rule of law and how such views proved adequate therein.

KEYWORDS: Moral force, Rule of Law, Jurisprudence, Law, customs.

The Concept of Rule of Law is one of the prime western legal concepts and it is now a political ideal all over the democratic world. Rule of Law is about Democracy, more precisely about liberal constitutionalism. It was Professor A.V. Dicey who formulated the concept of rule of law in its legal sense, more than as a political ideal. People in positions of authority should exercise their power within a constraining framework of public norms rather than on the basis of their own preferences, their own ideology, or their own individual sense of right and wrong. On the other hand morality being the understanding of right or wrong is often the basis of all laws of the civilization, though there are different views in this regard. Therefore the rule of law and morals can be seen closely associating with each other. When someone is doing wrong, he may suffer guilt and when he does right thing he may get virtue – the laws enforce such principles in the legal system. The extent of moral force in the present democracies is a question at issue.

Professor A.V. Dicey says, "The Rule of law means, in the first place, the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government. Englishmen are ruled by the law, and by the law alone; a man may be punished for a breach of law, but he can be punished for nothing else. It means, again, equality before the law, or the equal subjection of all classes to the ordinary law courts; the 'rule of law' in this sense excludes the idea of any exemption of officials or others from the duty of obedience to the law which governs other citizens or from the jurisdiction of the ordinary tribunals; there can be with us nothing really corresponding to the 'administrative law' (*droit administratif*) or the 'administrative tribunals' (*tribunaux administratifs*) of France. The notion which lies at the bottom of the 'administrative law' known to foreign countries is, that affairs or disputes in which the Government or its servants are concerned are beyond the sphere of the civil courts and must be dealt with by special and more or less official bodies. This idea is utterly unknown to the law of England, and indeed is fundamentally inconsistent with our traditions and customs."

Aristotle said more than two thousand years ago, that "the rule of law is better than that of any individual." And Lord Chief Justice Coke quoting Bracton said in the case of Proclamations "The King himself ought not to be subject to man, but subject to God and the law, because the law makes him King". The rule of law in its modern sense owes a great deal to the late Professor AV Dicey. Professor Dicey's writings about the rule of law are of enduring significance. Doctor Mark Coorey in his article "the Rule of Law" emphasizes the essential characteristic of the rule of law. They are the supremacy of law, which means that all persons (individual and government) are subject to law, a concept of justice which emphasizes interpersonal adjudication, law based on standards, the importance of procedure, restrictions on the exercise of discretionary power, the doctrine of judicial precedent, the common law methodology, the rule that legislations should be prospective and not retrospective, an independent judiciary, the exercise by parliament of the legislative power and restrictions on exercise of legislative power by the executive and an underlying moral basis of all law.

Thus it should be noted that one specific character of rule of law is the underlying moral basis of all law. In this article I would like to discuss, how morals be a force in the rule of law. According to the natural law

jurist, Justinion “Law is the king of all moral and immoral affairs, which ought to be chief, the ruler and the leader of the noble and the base and thus the standard of what is just and unjust, the commander to animals naturally social of what they should do, the forbidder of what they should not do.” And other naturalist Pinder calls law as “the king of all, both morals and immortals.” St. Thomas Aquinas called such law (without moral content) a “perversion of law”. Natural law theory asserts that there is an essential connection between law and morality. This view is frequently summarized by the maxim: “an unjust law is not a true law”. It follows that if it is not true law we need not obey it. Thus from the times of the early European history the natural law has been concerned with the inseparable connection between morals and law. Therefore it is clear that scholars had found the influence of morals in the rule of law at that time too.

Basically, Positivism emphasizes the separation of law and morality. According to legal positivists, law is man-made, or “posited,” by the legislature. Natural law theorists may argue that if a law is not moral there is no obligation to obey it. Their arguments appeals to moral or religious principles. But positivists submitted that until a duly enacted law is changed, it remains law, and should be obeyed. Legal positivism regards law as a system of clearly defined rules; the law is defined by the social rules or practices that identify certain norms as laws. Jeremy Bentham proposed the Utilitarian principle, which means that the law should create “the greatest happiness of the greatest number”. Bentham had little time to contribute to the natural law. His pupil, Austin based himself on the notion that the law is the command of the sovereign backed by the threat of punishment. Thus the positivist school did not emphasize the moral force in the rule of law.

Pure theorist, Hans Kelsen states that there is no necessary connection between law and morals, and that law did not require moral validation to be legitimate. Thus in pure theory also we cannot find any recognition of the place of morals in the rule of law. For legal realists, Oliver Wendell Holmes in his book "The Common Law" in 1923 says, “If the law were merely a system of rules, we would not need lawyers conducting adversarial proceedings, because judges could just apply the rules. In fact, judges have discretion with which they can decide a case in a number of ways, and factors such as the judge’s temperament, or social class, or political ideology, may determine the outcome.” Thus legal realism also does not emphasize the moral influence in the rule of law. Historical school proposes that “the law is something which cannot be made consciously.” Hegel has said that “history is unfolding of human experience.” The historical school believes that historical method is most appropriative in realizing the idea of freedom. As such in this jurisprudential school also the moral force in rule of law was not recognized.

The Sociological jurisprudence regards law as social institution involving both the finding of law by experience and conscious making of the law in action. For the Scandinavian realists, law can be explained only in terms of observable facts, and the study of such facts. That is the science of law. Therefore law is true science like any other concerned with facts and events in the realm of causality. Lundstedt, citing in W. Friedman’s, Legal Theory stated Law is nothing but the very life of mankind in organized group and the conditions which make possible the peaceful co-existence of mass of individuals and social groups and the corporation for other ends than mere existence and progression. And Marxist theory concludes law as an instrument of domination and oppression. In this context Marxists also do not emphasize the moral force in the rule of law. The school of Critical Legal Studies points out that the law is politics. It does not have an existence outside ideological battles within the society. R. Unger also said critical legal studies movement is making the fundamental social changes. Thus in this context we cannot see any wide recognition by the established schools of moral force in the rule of law.

Having dealt with all the main jurisprudential propositions, we can concern ourselves with both Bentham and Austin with their view points about the morals force in rule of law. They were anxious to assert two simple facts. First, in the absence of an expressed constitutional or legal provision, it could not follow from the mere fact that a rule violated standards of morality that it was not a rule of law; and second, conversely, it could not follow from the mere fact that a rule was morally desirable that it was a rule of law. Hart says “rule of law must satisfy a moral minimum in order to be a law, but whether a system of rules which altogether failed to do this could be a legal system.” In this context final moral question is "Ought this rule of law to be obeyed?" Surely the truly liberal answer to any sinister use of the slogan "law is law" or of the distinction between law and morals is, "Very well, but that does not conclude the question. Law is not morality; do not let it supplant morality."

A rule of law may be said to exist though enforced or obeyed in only a minority of cases. But this could not be said of a legal system as a whole. Perhaps the differences with respect to laws taken separately and a legal system as a whole are also true of the connection between moral (or some other) conceptions of what law ought to be and law in this wider sense. Colleen Murphy in his article "Lon Fuller and the Moral Value of the Rule of Law" states that "the rule of law is only instrumentally morally valuable, valuable when and to the extent that a legal system is used to pursue morally valuable ends." But we can observe that the rule of law has no non-instrumental moral significance. The rule of law is fundamentally important and valuable, but my account here is insufficient to explaining its worth. Raz rightly states, "The rule of law is a political ideal . . . It is . . . just one of the virtues which a legal system may possess and by which it is to be judged".

The rule of law sets necessary conditions for any legal system. Significantly, Fuller's eight principles do also recognize the moral force in rule of law. The rule of law is an inherently moral or political ideal. For example, in Turkey, the decisions of the courts reflect that they interpret the rule of law in accordance with the thick ideal. But we may easily connect this ideal with the democratic society and say that it is defined according to the society's values. Then, we may ask what is inherently valuable within the idea of the rule of law. "The Rule of Law is an ideal designed to correct dangers of abuse that arise in general when political power is exercised, not dangers of abuse that arise from law in particular. Indeed the rule of law aims to correct abuses of power by insisting on a particular mode of the exercise of political power – namely, governance through law"

When international political context is considered, the absence of rule of law in a particular country will be indicated by its erosion of social values, corruption, untamed bureaucracy, inequality and in many other forms. According to Iulia Voina Motocs' 'Moral-Rule and Rule of Law in International Politics: Common Sense, Political Realism, Skepticism' discussed, there is an anti theoretical approach or cognitivism-wanting principles or theories, denying any dogmatic morals based on unique principles and proposing the morals of circumstances. The classic Realism states that the morals of the seventeenth and eighteenth centuries are the universal morals of sovereigns of the same aristocratic family. The morals of the nineteenth century are morals of the peoples and of the nation-states.

Therefore, it is necessary to conclude that though there are different views expressed by separate jurisprudential schools, one major fact remains true in the context of the current democracies – law, if not based on recognized morals and values of the civilization, it has no conscienability and lacks the force of the rule by the people. However, the development of these principles of democracy is such that the laws are now often weighed against the rights of the citizens. The rights of persons on the other hand are at the extended end of morals of the civilization.

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