Rule Of Law: A Modus Vivendi Or An Imaginary Relationship

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1. Introduction

Human individual is a determined being that natural and social determinants coalesce in a manner to set up multifarious influences, to greater or smaller extent upon personal structure. Many years ago, with a precious scrutiny, some anthropologists like Kardiner (Kardiner et al., 1945: 24-35) and Linton (1945: 129) persuasively argued that personality structure is an accomplishment of social structure. Apart from anthropological studies, the history of civilization reveals us the same opinion that all civilisation process is a combination of a series of artefact constraints in a way to shape peculiar desiderata of given civilisation and consequentially found up personalities corresponding with natural instincts and drives of human being and of concomitant with past beliefs or other cultural traits (Freud, 1964). Since, human being is not a blue print of external stimuli, but human personality is a yielded outcome of interactive work of impulses, external drives and human mind, operates to that extent to whom assessment. When we scrutinise human societies, which are modelled either in a simple form, devoid of systematic pressure apparatus held by statecraft and all

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its constellations, or more complicated pressure technologies of civilisation, human individual is configured by manifold effects of impulses, stimuli and pre-established cultural patterns which establish modes of thinking and performing human conduct.

Despite the social science approach, philosophy is a great achievement to humanize the natural and socio-political surroundings of human being that domesticates constraints emerged wherewith. Philosophy is, therefore, a conduit to give either emancipation or a consolation to circumscribed human being against the conditions, in which he launches into manifestations in the spheres of thought and action. Such manifestations include acts not only to utter a philosophical discourse in which to somehow interpret the question about how one fulfils his or her personal life, but also to establish ethical choices under the headlight of her or his conceivable interest. Hence, human beings may make claim from body politic which they are subjected to or participate in as citizens. The rule of law is a ubiquitous politico-legal realm in the modern society that supposedly or actually recognises freedom of citizens to express legitimate demands and claims with a view to safeguarding their beings as persons and their assets. Therefore, human beings are capable of putting forward such claims as prerequisites for a political community, established with legal provisions in a manner tolerant to citizens' action. As a matter of fact, the political regimes, legitimised by religious beliefs, are less appropriate for such claims and demands. On the contrary, the rule of law is a peculiar politico-legal realm that is capable of achieving legitimacy through human-made secular norms and values wherever religious legitimisation is inadequate or inefficient. Since the earliest beginning of the rule of law, when the *isonomia* principle had been held by Cleisthenes in 510 BC, it has required citizen's equality before law and the law is more or less democratically established through the consent of citizens (Fornara and Samons II, 1990: 38-47). Thus, the rule of law debate at the modern (and post-modern) age appears to follow the same itinerary in the milieu of lack or inefficiency of religiously bounded legitimating ideas.

2. Procedural Rule of Law

Contrary to the social science approaches, liberal philosophers are inclined to think that human being is a constructive monad of the political society that has a volition and reason to enter into contractual relationship, from family to political compacts through sober and reciprocal deliberations. According to John Locke (1964:

119-124), human aggregates have a pre-political life where they enjoys their natural liberties, comprising life, liberty and property that is what must determine the minimal limits of legal and political immunity before any established political system. Natural liberty of man is to be free from external powers even though superior sovereign bodies avowedly perform such compulsions, furnished under the banner of legislative authorization, at the expense of the three innate liberties. According to Locke, the only true government is the one that depends on a compact among human beings, aiming to make civil laws in order to avoid actual or probable conflicts, which may arise within social aggregation. Therefore, the Lockean liberalism opened a new way to settle a *raison d'etre* of political society that legitimises political sovereignty by means of equality before law and the indispensable rights of individual.

The Lockean political philosophy depends on a peculiar state of mind, aimed to diversify political and legal domains in which immunity of personal freedom and property rights might be secured as the first order principle. Contrary to the posterior development of legal theories, especially the command theory, The Lockean individual is a ubiquitously legal person, as long as he is citizen in full enjoyment of the legal rights and privileges (Locke, 1966:179). According to Locke's (1966: 180-192) phraseology, social compact through voluntary deliberation of constitutive individuals aims no more than protection of inborn rights, endowed by nature, and therefore, the government is necessary to legislate civil laws in favour of liberties, to administer justice and to execute due sanctions. Those desiderata delineate public sphere that is delimited by all-inclusive immunity of three individual liberties, i.e. life, liberty and property. However, the legislative power is supreme, but it cannot surpass pre-given limits which was initially furnished by delegation of individuals. In effect, it presupposes that all individuals are equals as a bearer of liberties, in equality including the entitlement to property ownership. Consequently, the Lockean political society is likely to be a joint-stock company within which each citizen is a shareholder, whose initial power is warranted to deserve his private interests[1].

1 Corollary of this point of view that society is modelled as marketplace what sets citizens to the inclusive set of contacting dealers, for example buyers or sellers. Some contemporary legal philosophers overtly (Fuller, 1969: 24; Nozick, 1974) or tacitly (Hayek, 1977: 35-54; Leoni, 1961) expressed same idea, despite their philosophical starting points are a bit different. New contractrarian philosopher John Rawls reached same conclusion as ideal of fair contract that he assumed an original position instead of Lockean state of nature. Apart from

The liberal rule of law principle is a constellation of *laissez faire* assumptions that fits procedural justice of legally ordered society in so much as it accommodates a congenial state of affairs in the market society. A. V. Dicey (1915: 183-199), the famous British constitutional lawyer, depicts the three basic principles of the rule of law: 1. Every due punishment and redress to civil wrongs can only be sentenced when a distinct breach of law is assigned before ordinary courts and in ordinary legal manner (i.e. due procedure) of established laws of country. 2. Every human being, whatever his rank or condition, is subject to the ordinary law of realm and amenable to the jurisdictions of ordinary tribunals. 3. Predominance of legal spirit must be necessary characteristic of the political realm that means, as Dicey alleged for English institutions, the constitution is pervaded by rule of law. Moreover, the three principles pertaining to the rule of law must necessarily be complemented with the systems of individual rights and freedoms that may only reside in the constitution of country, as a common denominator of government and those governed by it. In effect, the rule of law needs an institutional implementation wherefore courts are key factor. Whilst writing about laws and legal provisions, Dicey (1915: 192) meant that the rule of law was viable only under judicial legislation, especially judge-made constitution. To the extent that the rule of law is complementary to liberal democracy, it however needs some restrictions on the legislative function of parliament by way of judicial review on the constitutionality of legislative acts. Therefore, the rule of law becomes a choice in favour of liberalism when democracy is used in such an excessive way as to violate liberal limits.

Dicey's book on the law of constitution was first published in 1885, followed by another famous treatise on law and public opinion in 1905. The second book sheds light on another aspect of English legal development in that legislation and collectivism gradually displaced liberalism and preponderance of judge made law (Dicey, 1905). Dicey diversified the 19th century British legislation in the

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equality before, Locke (1966: 131-137), who was philosopher of small property capitalism, expressed sensible distrust for unequal landed property. Therefore he considered that private property was equitable because is depended on labour. Contrary to Locke, Rawls (1971: 60) overtly expressed that his principles of justice stemmed from approval of property and income inequality: "The first statement of the two principles reads as follows. First: each person is to have equal right to the most extensive basic liberty compatible with a similar liberty for others. Second: social and economic inequalities are to be arranged so that they both (a) reasonably expected to be to everyone's advantage, and (b) attached to position and offers to all."

three elementary phases that the first period was Tory's legislative quiescence and *codiphobia* of parliament from the early beginning of 19th century up to 1830's, the second stage was Whig's liberal, Benthamite and Social Darwinist legislation policy between circa 1830 and 1870, and finally unbridled collectivist legislation after 1870. The third stage is characterised by social legislation in favour of working class people, targeting the welfare of masses instead of *laissez faire* liberalism. With regard to Dicey's sublime opinions upon English legal institutions set out in his first book, there is very serious contradiction between two of his treatises that it would be disguised by the author. Thus, he complains in the "Introduction," entrenched eighth edition, that is "the ancient veneration for the rule of law has in England suffered the last thirty years a marked decline" (Dicey, 1915: xxxviii). His main reason for such a decline depended largely on excessive progress in parliamentary legislation.

Finally, I must point out that the liberal rule of law is likely to be a legalized form of the political domination of bourgeois society. It establishes a social order which more or less depends on *modus vivendi* of property owners or dealers of marketplace, but in a formalized manner it objectifies the legal order, divorced from politics as a semi-autonomous social sub-system. Evgeny Pashukanis (1980: 275-300), Soviet jurist, should not be criticised for his famous thesis, as he alleged in the 1930'ies, that bourgeois law, especially under the rule of law form, masked bourgeoisie domination, just as commodity fetishisation was nothing more than a veil on surplus value exploitation, under the cloak of free labour, exchanged in the market relationships.

3. Substantive Rule of Law or *Rechtsstaat*

Corollary of the ideas abovementioned, the rule of law principle emerged initially as a product of natural law that its ever-constitutive unit was natural liberty. A natural law system is congenial to judicial legislation, developed at a level incapable of modifying individual rights or liberties, especially property rights. But, political consequences of modernisation stirred the machinery of legal system and caused to harness legislative policy to remould substantive law, as having happened in modernisation headed by governments or by the pressure of working class demands. In this context, *tour de force* legitimisation legal order shifts from natural law to the will theory and consequently to the rule of law, in novel form as a result of modification. Immanuel Kant already elaborated

the changing nexus of legal system that was primarily remoulded by legislation. Despite natural lawyer stance on rights and the fact that duties are depended on the innate and immutable endowment by God or Nature, Kant (1887: 14,20), and the will theory in general, relied on general will for legitimate basis of law convergent with individual will, at any extent redundant from the Lockean point of view. Kantian pure reason and practical reason twins subsumed all actions under the reason that its objectivity covered all individual and general deliberations. Kant made a principal distinction between internal and external duties in that external duties were legal duties, imposed by legislator, whereas internal duties were ethical, set by internal legislation of individual (Kant, 1887: 23). According to Kant, law and ethics are closely connected with freedom that conceals a bifurcation as internal freedom and external freedom. While, law is concerned with external freedom that can only be regarded as positive law, it does not impose ethical duties, but prepares their necessary conditions or potentialities[2] However, Kant (1887: 78) did not reject natural rights, rather he considered them provisory, the rights that must be secured by law and emanated from the general will, i.e. legislation.

General will is an equivocal denomination, uttering in democratic or any kind of autocratic political discourses which may enliven a series of legislative policies. Dicey (1905: 9, 48-61), as a liberal, confessed that all laws of the country, which were predominantly enacted in the parliament, were result of convulsion of the public opinion that manifested itself in expanding democratisation, willy-nilly internalised by traditional political elites. The German experience displayed more bitter divorce with liberalism in favour of a seamless legal order that was completely radical and open to abuse. Hegel (1979: 127) rejected an intractable conception of "individual", and redefined it according to momentums of his dialectics that it gains "personality" in abstract right; it becomes "subject" in

2 Cf., the quotation from Immanuel Kant: "The universal Law of Right may then be expressed, thus: 'Act externally in such a manner that the free exercise of thy Will may be able to co-exist with the Freedom of all others, according to a universal Law.' This is undoubtedly a Law which imposes obligation upon me; but it does not at all imply and still less command that I *ought,* merely on account of this obligation, to limit my freedom to these very conditions. Reason in this connection says only that it *is* restricted thus far by its Idea, and may be likewise thus limited in fact by others; and it lays this down as a Postulate which is not capable of further proof. As the object in view is not to teach Virtue, but to explain what Right *is,* thus far the Law of Right, as thus laid down, may not and should not be represented as a motive-principle of action." (Kant, 1887: 46).

the morality, "family-member" in family and "bourgeois" in civil society. When his philosophical speculation reached the state, there is common identity of politics, law and morality that comprises all momentums of persons, of civil society and of laws; it is therefore actuality of ethical idea (objective morality) or absolute rationality (Hegel, 1979: 155-160). Though, Hegel, in his "abstract right" momentum, quietly approves the unequal distribution of property (Hegel, 1979: 44) and consequently capitalist mode of production, but, at the same time, proclaims apocalypses of the liberal rule of law and opens up the way regulatory state and unlimited legislative policy. The German *rechtsstaat* evolved under rationalism penumbra that depended on the will theory rather than natural law (cf. Schuerman, 1994).

From the last quarter of nineteenth century onwards, emerging social demands pushed western states to legislate new measures in order to avail the betterment of social conditions of working classes. The policy was not completely benevolence of ruling elites; rather, genuine political pressure spurred such measures to be fulfilled that made welfare inevitable concern to the states (Kirchheimer, 1967: 193). As a consequence, the states assumed a new responsibility to soften class antagonisms via entrenchment of new legislation that yielded with essential modifications at substantive law. It must be noted that it did not directly arise from the Hegelian philosophy. Rather, Hegel and German intellectuals, contemporary with him, were sensitive to a national question, namely German unification that more or less needed to working class contribution to that irredentism contrary to indifference of the liberal bourgeoisie[3]. Hence, the Hegelian era and welfare state period are very akin to convenience for regulatory state in order to undertake assumed necessary measures by the use of legislation that as witnessed in the Weimar Republic, which its very nature nurtured nationalism, congenial with German intellectual legacy. As has been said, the liberal rule of law, which yielded with procedural provisions, legal formalism and objectivity of law, was corresponding to relatively small property owner's political longing, but the substantive rule of law opened a way to the unwarranted government fiat. Legal

3 Von Savigny (1986) and Puchta (1887), the two pre-eminent Historical School lawyers, not only melted public and private domains of law within objective law, more rather made it manifestation of national culture, ethics became submerged unto. Hans Kelsen (1978: 280-286), less notorious legal theorist than historical school lawyers, availed same conclusion that public and private law dichotomy is of ideological character; that is, in practice private law is becoming absorbed by public law, likely to will theory.

historians witnessed the Weimar republic, as an erratic example of substantive rule of law that on the one hand law itself was transformed with unrestrained legislation, on the other hand subscribed to "benevolent" interpretations of lawyers, as "free law" or "jurisprudence of general principles" that destroyed all formal guarantees of individual and undermined legal system on behalf of the interests of monopoly capitalism (Neumann, 1996). Although, the Weimar constitution granted more democracy in favour of working class people, and developed *sozialrechtsstaat* that noticeably restricted greedy liberal bourgeoisie, but in practice it abolished all collective bargaining rights for the sake of permanent emergency regime, i.e. fascism (Kirchheimer, 1996). In sum, the substantive rule of law demolished the essential political component of the modern society, while liberal individuality disappeared in the milieu of mass society, and working classes consequentially incurred to *panem et circenses* policy to the extent to which democracy demolished.

4. Conclusions

An important dilemma remains unresolved, as to whether or not the rule of law is (and was) a reality or an imaginary relationship[4], which to any extent legitimises the political order. The rule of law is both of them; on the one hand, it is unprecedented reality of political legitimacy in the modern society that laws are stake in the society, substitute for the deconstructed traditional legitimacy doctrines; on the other hand, it could not assure a viable well-ordered society. To a great extent, the rule of law is a language of imaginary relationship upon how to better the so-called civic life which may centre on individuals. Instead, we must rethink a civilized life in the dialectic of citizen and public instead of the market model of property owners' society, in the so-called reciprocity. The dialectic between citizen and public was known at the Ancient Greece that its main political units were construed as households versus public realm, corresponded with wants and needs versus political deliberation (cf. Arendt, 1959: 27-34). But, this time we think of mass production, mass society and inexorable power of monopoly capitalism, incomparable with artisan production, aristocratic society and relatively undifferentiated powers of household owners of ancient society. Contrary to Arendt (1959), we cannot retrieve the modern society to the time of Athenian democracy, because there is no room for credulous daydreams in order to reinstate Athenian po-

4 I borrowed "imaginary relationship" term from Louis Althusser (cf., Larrain, 1980: 154-164).

lis. As regards the current state of affairs, the present global system is not a candidate to set up betterment and equality among all human beings; rather it raises more deterioration, exploitation, armed conflicts and abuses of human rights. For, whether or not we use the "rule of law" conception, we think of a new mode of citizenship, aiming at sustainable social life and of democracy of responsible civic citizens without discrimination, instead of untouchable rights and privileges of property owners or gloomy incrementalism of difference politics. This is not only predominantly a legal concern, but also a political challenge that should aim taken for the improvement of human race.

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