

The Rule of Law in the Globalized Society

Mohan Peiris PC

Former Chief Justice

Your Lordship the Chief Justice, His Lordship Yasantha Kodagoda, the Vice Chancellor, Major General Milinda Pieris, Dr. Charika Marasinghe, Shavindra Fernando President's Counsel, Members of the Faculty, members of the academia and finally, perhaps, the most important of the stakeholders, the officer cadets and the students.

My dear students, I'm pleased that his Lordship Justice Kodagoda did mention the parameters within which the whole concept of national development and national security must be structured upon. And I think, I was equally pleased, when his Lordship the chief justice was pleased to observe that there must be the contours to national development and national security. In other words, we have to have parameters. And it is within that context, that I propose to place before you for your discussion certain matters which I thought you might find interesting to listen to. My dear students, you will appreciate that sustainable growth, I am really coining this term 'sustainable growth' from the expression sustainable development, sustainable growth and security must take cognizance as his Lordship was pleased to observe, must take cognizance of and strike an appropriate balance with the Rule of Law and be equipped to protect against potential dangers in these very difficult contemporary times. There is, therefore, my dear students, an urgent need to take a holistic view of national security and national development. By adopting such an approach, a full spectrum of security issues is assessed, ranging from people's security, which is the

ultimate concern, political security, which is of overarching importance, and economic security, which underpins all other considerations, to military, cultural and social perspectives, which reinforce efforts in other areas, and the promotion of international security, which provides support for measures taken in a national context.

My dear students, a holistic approach of this nature requires a focus on both internal and external security. Internally, it is essential to promote development, continue reform, maintain stability, and create a safe environment. Externally, we should promote international peace, seek cooperation and mutual benefit, and strive to bring harmony to the world. The nation's security in the context of terrorism; homeland security and the security of our citizens are both of paramount importance. All initiatives taken in this respect must be people-centered, and implemented for the people, on the basis of the people's needs, and with the support of the people. Security issues, both traditional and non-traditional, must be taken into account. The national security system we envisage will integrate not only political security and homeland security, but also security-related military, economic, cultural, and social concerns, science and technology, information, and ecological resources.

National Security doesn't mean posting security personnel all over the country. That's not what it is. Issues pertaining to development must be considered as an indispensable adjunct to security issues. Development provides a basis for security, whereas security constitutes a necessary

condition for development. Our national security must also be viewed in the context of international security. For the sake of our global community with a shared future, we should all work toward our goal of satisfying the world's security needs in a way that is beneficial to all. We will continue to improve our national security system, strengthen our national security capacity, and defend our sovereignty, security and national interest as it concerns our development needs. That is something we must understand.

Two decades into the new millennium, the components of national security itself needs to be redefined. The traditional view that national security is related only to security of territory from external aggression needs to be changed. Internal stability and order and comprehensive national strength of the country are equally important factors in protecting and maintaining the security of the nation state.

We have been through a long-drawn conflict in our country which led to bloodshed and disorder and posed a serious threat to national security. You will agree that the path towards minimizing social conflict depends on what measures are taken nationally in improving individual security. The essential components of such security are in the realms of food, health, education etc. Security threats can also arise out of environmental degradation. It has been our experience that where there is a multitude of problems relating to personal, economic, political or environmental security, there is a risk of breakdown of national security. Policymakers will tell us that selected indicators of human security provide us with early warning on whether a country is heading towards social disintegration

and possible national breakdown. That's a warning we should take seriously.

A growing phenomenon that we see is rapid urbanization. It is undoubtedly one of the key megatrends driving change in society across the world. The frequency, direction and speed of urbanisation means that it must be at the forefront of the strategic agenda for any country, but particularly in emerging economies such as ours. But this isn't the only megatrend that impacts on the agenda of today's town planner. Another is demographic change, where certain areas of our country are ageing while birth rates in other parts of the country are making the average population younger. The socioeconomic characteristics of the influx of people into expanding cities raises important policy issues. Who is coming, and what do they bring with them in terms of both tangible and intangible assets, particularly the skills to make them employable? This leads to another of our identified megatrends – technological breakthroughs – which (if managed well) holds the promise to provide parts of the solution for the future sustainable management of the country. As HE the president observes, smart solutions to urban problems need technology as an enabler and he keeps reminding of that need consistently.

A question that I would wish to pose is as to what opportunities a sustainable approach to development offer to communities in developed and emerging economies alike? Urbanization is not so much of a threat to sustainability as many people think. The quality of growth that countries can achieve is strongly linked to their power to address social, environmental and economic issues in a cohesive and proactive manner, while making the most of future opportunities. This is what we call the “new capitalism” – managing and developing all capitals

holistically for the development of a sustainable local economy. It is in this context that I will focus on the imperatives of the Rule of Law in our pursuit to a rapid movement of development and the growing need for national security. In the case of this modern approach to governance, you might ask yourself the question whether there is room for the Rule of Law? Is the rule of law simply rhetoric, or a universal principle? No doubt the Rule of law has gone through turbulent times in contrast to the other concepts, and has been subject to the severest of critique. Today Dicey's theory of rule of law cannot be accepted in its totality. The modern concept of the rule of law is fairly wide and therefore sets up an ideal for any government to achieve. This concept was developed by the International Commission of Jurists. It is known as Delhi Declaration of 1959 which was later on confirmed at Logos in 1961.

According to this formulation.

"The rule of law implies that the functions of the government in a free society should be so exercised as to create conditions in which the dignity of man as an individual is upheld. This dignity requires not only the recognition of certain civil or political rights but also creation of certain political, social, economical, educational and cultural conditions which are essential to the full development of his personality".

According to Davis, there are seven principal meanings of the term "Rule of law: (1) law and order; (2) fixed rules; (3) elimination of discretion; (4) due process of law or fairness; (5) natural law or observance of the principles of natural justice; (6) preference for judges and ordinary courts of law to executive authorities and administrative tribunals; and (7) Judicial review of administrative actions. So finally, it may correctly be said that rule of law does not mean and cannot

mean any government under any law. It means the rule by a democratic law-a law which is passed in a democratically elected parliament after adequate debate and discussion. Likewise, Sir Ivor Jennings says-

"In proper sense rule of law implies a democratic system, a constitutional government where criticism of the government is not only permissible but also a positive merit and where parties based on competing politics or interests are not only allowed but encouraged. Where this exist the other consequences of rule of law must follow".

I ask the question - Is the Rule of Law simply rhetoric or a universal principle? You will recall that at one time of our jurisprudential history, it was thought that any form of discretionary power was incompatible with the Rule of Law, as it was thought to be the sure way to arbitrariness. You will appreciate that today that would perhaps be an overstatement of the principle, and a product of academic overreach. Today exercise of discretion is an indispensable element in any modern administrative structure. Discretionary power therefore must be exercised in good faith and in consonance with the Rule of law. In other words, we can never have unbridled discretionary power. This must be borne in mind in deciding the parameters of national growth and national security. We have to remember the decision-making process must be within the confines of legality; procedural propriety; rationality or reasonableness and as the Europeans would say - within the confines of the doctrine of proportionality. It might be well to remember that this supplies to our Courts themselves, who are trustees of the Rule of Law.

The topic is presented by relating to a real-life story which brings out a well-known

generalization by the executive to this much misunderstood principle. A Greek Professor of International Law was asked by the United Nations to assist a country in North Africa to fall in line with the international standards followed in the treatment of political prisoners. The Greek Professor, having spent quite some time in that country, had one day, to present his report to the Ruler of that country. Having done so, the Ruler observed that the important part of that report required the Government to conduct itself in consonance with the established standards of democracy. The Ruler had point blank rejected such a proposition. The Ruler had said “you Greeks, you think you invented democracy, that has no meaning”. A few days later they re-presented the report with amendments. The amended report required the Government to act in accordance with human rights. The Ruler was extremely displeased and went on to express his reservations by saying “I fear, the bodies such as Amnesty International or Human Rights Watch have influenced you unduly”. The meeting ended there. The Good Greek Professor returned with his team and after much deliberation, re-presented the report to the Ruler with a new formula. They presented the report the third time, and this time, they required the Government “to act in accordance with the standards of the Rule of Law”. To their utter surprise, the Ruler was pleased, and he said “fine, that’s perfect, nobody will know what that term means”. How true this is, for we see today, globally, the words ‘Rule of Law’ are generously spoken of notwithstanding the naked violation of the basic rules of equity and fairness. I would not be wrong to say that this is a term to which lip service is paid in generous doses without stopping to think of what these simple, but cogent, words really mean.

My dear students, as academics say, few political concepts have globally accepted meanings. As you heard in what the North African Ruler said of the concept of democracy, this approach also applies to the concept of rights, liberty, justice and freedom and to law itself.

Amidst all the discussion of the national security and development, and the enthusiastic discussion of the rule of law, we observe naked violations of the rules of equity and fairness. I would probably venture the observation that the term Rule of Law is one to which lip service is paid without pausing to think as to what these simple but cogent words really means in designing a holistic approach to national security and development.

We are reminded of Sir Ivor Jennings who describe the Rule of Law as something which threatens the fair distribution of wealth and power. We have Prof. Titmuss who says the Rule of Law is one which would introduce a pathology of legalism into relations between the subject and State. Prof. Morton Horowitz of the Harvard Law School says the Rule of Law enables the shrewd, calculating and wealthy to manipulate its form to their advantage.

Look around us, from East to West, from North to South, we see strife, turmoil, aggression, death, devastation of life and property, amidst our drive for growth and national security. With all the mayhem around us, academics seem to suggest that the Rule of Law is a force entirely for the good, and which advances democracy. It is commonly said and heard that for rapid development and the need for achieving effective national security requires the exercise of discretionary power. But this is not exactly true. We have seen the Rule of Law gaining tremendous popularity, notwithstanding its turbulent history. Its survival, it is said, has been attributed to

the fact that it is entrenched in the legal and political cultures in the civilized world. How then could discretion be exercised, having regard to the overarching need to preserve the Rule of Law? How can we embark on rapid development and preserve national security by the exercise of discretionary power for the public good?

It might be interesting to note that Parliament and the Executive are also subject to the Rule of Law. We see this in civilized jurisdictions all over the world. I ask the question – is the system of justice in a globalizing world under strain in finding accommodation for the Rule of Law? It must be borne in mind that the development process and concerns for national security must be within the confines of the law. Public officials are not expected to exceed their power and are expected to apply the law equally. National growth, national development or national security cannot be at any cost.

To be able to sustain this balance, it is necessary that we ensure access to justice. Prof. Jeffrey Jowell, an eminent jurist, says that the Rule of Law does not rule only by law. It is a much richer concept that must be appreciated. The development process and the national security framework must be conducted within the structure of recognized rules and principles which restricts discretionary power.

Another question I have for you is whether national growth and national security be achieved side by side? How do we manage these competing factors? The key to the answer is the principle of ‘sustainable development’. The problem appears to be the equitable application of the principle in the different circumstances we apply it to. As Justice Weeramantry puts it, the difficulty is steering a course between the need for development and the need for environmental protection which is part of

national security. In the context of globalization and continuous economic integration that we have seen in recent times, the relationship between the economy and national security has become increasingly interlinked. It is these connections that represent both opportunities and potential threats to the country’s national security. The open and interconnected nature of our economy leads to vulnerabilities from both internal and external threats. Having recognized this, economic security has emerged as an important strategic priority for governments.

Given these growing international interdependencies within our national security as well as recent concerns of the environment there is a recognized need for assessments of the potential risk that may emerge as a result of such economic activity.

Some of the questions that emerge are; firstly, how can national security be defined? Secondly, as to what can be learned from academia about the relation between the economy of a county and the various aspects of national security? Understanding national security has evolved over time. It has been shaped and influenced by historical events. In broad terms, stability, safety, protection and freedom from fear, threat or conflict are considered some of the core themes of national security. It can also be defined in terms of the values that people hold, such as physical safety, economic welfare, autonomy and psychological wellbeing.

National security today has become associated with preventing disruptive effects on society, economic performance or critical processes such as democratic decision making. The interconnection between national security and economic growth has grown, as globalization and

economic integration have increased over the last few years.

With the experience of successive wars and conflicts, and the proliferation of the Nation State throughout the 19th and 20th centuries, realist explanation of behavior among States dominated the discussion, highlighting the importance of national preservation. In terms of the realist thinking, certain common themes appear in relation to national security, inter-state aggression, the fear and threat of violence from hostile States, and a focus on the military and the ability to respond in order to preserve itself and its security – in other words its territory.

With the establishment of the League of Nations, there was a liberal school of thought inspired by writings by Emmanuel Kant. National growth within a critical political economy is the mutual constitution of the economic and political sphere and the security threats posed by the unequal divisions of power and welfare. Academics supporting this theory are reluctant to treat the economy and national security as separate fields. If one was to look at it through the lens of the theory of critical political economy, the security of the State may be threatened by the unequal divisions of power and welfare, and by transnational corporations that are able to influence these conditions.

There is an overall consensus that poor governance and corruption plaguing many developing nations are the principal obstacles to progress. These obstacles invariably lead to the feelings of desperation, apathy and determinism. It is therefore necessary that we seek the protection of the Rule of Law as a guiding concept in our quest for national growth and security. Members of the public are expected to comply with the law. Public officials are not expected to exceed their power and are expected to apply the law

equally. The application of the law must be fair and impartial. It is therefore imperative that in arriving at decisions with regard to national growth and national security, that the law must be accessible. What I mean by that is that the law that has been applied, must be easily understood. It must be clear. It must be predictable. Secondly, the legal principles that apply to national growth and the maintenance of security must be applied having regard to law, and not discretion. Any decision making process must be exercised lawfully, fairly and reasonably. There must be equality before the law. National growth and national security must take cognizance of human rights; any disputes with arising out of or concerning national growth and national security must be resolved without delay or undue expense. Any inquiry or legal procedure pertaining to, arising out of or concerning national growth or security – must be fair, and must be compliant with the obligations in international as well as national laws.

I might wind up by reminding you of what Plato famously said; “if the law is the master of government, and government is its slave, then the situation is full of promise; and may enjoy all the blessings and all what the Gods shower on the State.” The Rule of Law, ladies and gentlemen, does not rule only by law – as I said before it is a much richer concept. It is again said by Prof. Jowell, that the Rule of Law in democratic governance is not a theory of State but a simple practical guide to the bare essentials of how power has to be exercised, even in the cause of national growth and national security. That it is not a monopoly of the developed world, but a fundamental need to recognize the dignity of humankind. That it must be recognized against other values such as the right to life, to right to secure existence. And for

that reason, could not be compromised arbitrarily.

You will finally appreciate that to callously and recklessly disregard the Rule of Law in achieving national growth and national security, can lead to national chaos. I want you to appreciate that it is a worthy objective to be upheld and an inexplicably

indispensable principle of good governance and to establishing a world order where all humankind can live in peace and in dignity.

Thank You.