

# The Rule of Law

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## 1. Conceptualising Rule of Law

The 'rule of law' is often credited as a fundamental aspect of the British Constitution. Constitutionalist AV Dicey is reportedly the first scholar to have significantly elaborated the conception. The Diceyan concept of the rule of law involves the following three elements:

- i. The rights of individuals are determined by legal rules and not by the arbitrary behaviour of authorities: this is what is described as the absence of arbitrariness.
- ii. No punishment is legal unless a court decides that there is a breach of law by the condemned/offender.
- iii. Everyone, regardless of one's position in society, is subject to the same ordinary (as opposed to special) laws of the country concerned

The concept of rule of law has indeed gone a long way since it was first categorically expounded by Dicey. In its classical exposition, the critical feature of the rule of law remains that individual liberties depend on it, i.e., equal legal treatment of all. In the modern sense not too distinct from its classical expression, the rule of law means supremacy/rule of 'the law' and not 'rule by law', law being the '*qualitative law*' informed of higher norms, ethics and morality, and not *any law*. This legal supremacy can be attained through ensuring a complete responsibility of those in charge of powers on behalf of those governed. It is in this sense that many emphasize the procedural aspect of the rule of law in that what is called in US constitutional law the 'due process of law' prevails in very state actions.

We, however, often relate the concept of rule of law to some substantial principles such as liberal democracy, guarantee of fundamental human rights, existence of an independent and impartial judiciary to effectively protect the liberties of the public, openness as opposed to secrecy in the affairs of the governance, removal of past discriminations, insurance of human equality and dignity, and so on. To put it briefly, practical aspect of rule of law is to ensure a 'just society' or a 'just government' where everyone will get her/his due.

These elements of the rule of law got their expression in the *Declaration of Delhi 1959* adopted by leading jurists from around the globe, where the following were re-emphasized:

- a. the people's right to responsible government, and the legislature's obligation to conform to minimum standards of law;
- b. Judicial control executive actions and delegated legislations;

- c. a fair and public trial, meaning criminal justice for the accused and the victims;
- d. independence of the judiciary and the legal profession.

The Declaration defined the rule of law in the following terms:

“[T]he 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”. (quoted from IP Massey).

## **2. Context: Bangladesh**

The existence or absence of rule of law in Bangladesh in the above-explained sense is a contested issue. Despite the fact that the framers of Constitution of Bangladesh premised this basic document on the high ideal of the rule of law and that independent Bangladesh had been a result of the denial by the West Pakistani colonizers of the rule of law and human dignity to Bangladesh, the present Bangladeshi society cannot claim to be enjoying the benefits of rule of law. This statement may be further explained by reference to many legal provisions and instructions as well as political practices. Before that, it would be wise to briefly reflect on the constitutional provisions that seek to establish the rule of law in Bangladesh.

**2.1** The preamble to the constitution makes it clear that it shall be a fundamental aim of the state to establish ‘rule of law’ and social, economic and political justice. The preamble to the Constitution also pledges for the protection of fundamental rights and human dignity and the attainment of democracy, which are indeed inseparable limbs of the rule of law. And, the Constitution’s article 7, the supremacy clause, proclaims that all powers of the state belong to the people and that can be exercised by the representatives only on behalf of the people. Article 7 further says that the Constitution is the supreme law of the land and any other law inconsistent therewith would stand void. These assertions, no doubt, are the embodiment of the substantive contents of the rule of law.

Importantly, in the famous case of *Anwar Hossain Chowdhury v Bangladesh* (1989), known as the eighth amendment case, the rule of law was recognized as a basic pillar/feature of the Bangladeshi constitution, eventually putting a limitation particularly on Parliament’s power to make laws or constitutional amendments in derogation of the principle of rule of law.

**2.2** Next important aspect is the embodiment of fundamental principles of state policy, which are fundamental to the lawmaking and governance of the state. These principles mandate the state to set out its all endeavours towards attaining an exploitation-free

society, i.e., a society where everyone's entitlement to basic amenities would be ensured by the state and which will be based on social justice, democracy, human dignity, participation by all, and equal economic development throughout the country.

More concretization of the rule of law obligation of the state is in Part III of the Constitution which guarantees for the citizens almost all universally recognized fundamental human rights with a further guarantee of their judicial enforcement in case of breaches. These fundamental rights correspondingly put a duty on the state not to interfere with the rights of the people. Of central importance from the perspective of the rule of law is that the Constitution de-empowers parliament to make laws inconsistent with the fundamental rights, providing that any such law so made inconsistently with fundamental rights would be void [Art. 26(1)].<sup>1</sup> And, the High Court Division of the Supreme Court has the power to declare any such law unlawful (art. 102), which is a unique, manifestation of the rule of law principle.

Importantly, there are unconditional guarantees of the right to life and the equal legal protection (articles 27-28) irrespective of sex, colour, status, religion or anything else. The Constitution's guarantee of due 'process of law' [which figures as 'except in accordance with law' in articles 31 and 32] can be taken to mean not only the people's right to honest and democratic governance but also 'qualitative laws' conforming to moral and ethical standards. The preamble to the Constitution and the just cited provisions, when read together, yields in the principle that every state organ and any state functionary must justify their actions with reference to the 'law'.

**2.3** Needless to say, the rule of law is synonymous with justice, and rule of law cannot be attained unless the people can access justice without hindrance. For access to justice, there should be in place a well functioning system of legal aid. Although the Constitution has not established directly the right to legal aid, this can be deduced from the rights to life and liberty and the right to be treated equal before the law. Encouragingly, the Supreme Court of Bangladesh, by way of progressively interpreting the Constitution, has forged the tool of public interest litigation that allows any public-spirited citizen to come before the Court with grievances of the disadvantaged and the poor. The public interest litigation has widened the public's access to justice, and thus can be seen as a realization of one of the ends of 'rule of law'. There is no denying that in entrenching the concept of public interest litigation in the late 1990s that later became to be an important weapon at the hands of legal activists to enforce principles of constitutionalism and protect rights of the disadvantaged/poor, the judiciary was motivated by the concepts of rule of law, social justice and constitutionalism.

**2.4** At the institutional level, the Constitution has, among other things, provided for a representative democracy and responsible government with adequately separated powers to each of the state-organs, independent Election Commission, a responsible civil

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<sup>1</sup> Note, however, that Art 26(2), as amended through the Constitution (third Amendment) Act 1973, exempts any change into fundamental rights through constitutional amendments from unconstitutionality. There are doubts as to what extent this sweeping provision is compatible with the concept of rule of law.

service,<sup>2</sup> and an independent judiciary with the power of judicial review over executive actions, administrative legislation, judicial decisions, and laws including even constitutional amendments.<sup>3</sup> Notably, Bangladesh's judicial review is available not only on the ground of the breach of the Constitution or its fundamental rights provisions but also on the ground of breaching the higher principle of 'legality' (see esp. Art102(2)]. These legal and constitutional institutions are constitutive elements of the rule of law.

### **3. Provisions and Practices Anti-thesis to the Rule of Law**

Unfortunately, the Constitution itself contains a number of provisions that defy the basic tenets of the rule of law. For example, the preventive detention exceptions in the Constitution (art. 33) and the Special Powers Act, 1974 that allow for executive detention of any person without any formal charge being brought and without any judicial order is a clear negation of the rule of law. In the same vein, the Emergency Provisions in the Constitution, which give ample and almost unchecked power to the President to promulgate emergency and to suspend enforcement of fundamental rights during such an emergency does not go hand in hand with the ideal of rule of law. Even in our neighboring countries, emergency provisions are not so draconian. It is however promising that the Supreme Court (HCD) has recently held that there are limits as to the President's satisfaction as to when or at all he needs to promulgate an Ordinance. This is a clear step forward towards the objectives of the rule of law.

At the level state practices, the criminal justice system can be blamed for sustaining many ill-thought practices that are indeed an onslaught on the higher norm of rule of law. In addition to excessive delays in bringing justice to the victims of crimes, the practice of custodial deaths or violence (in whatever name such as 'encounter' or 'crossfire' they are expresses) is a glaring example of twisting the law or violating the rule of law. More alarming is the continuing culture of impunity being accorded to those who flout the law and abuses their legal powers. Thus, there is the need for a major overhauling of the criminal justice system including the police department and the prosecution wing of the government.

The continuing existence of corruption, irregularities in public contracts, and keeping of official secrets,<sup>4</sup> that ultimately deny people's right to know and to have open/honest governance, are anti-thesis to a rule of law-based society. Undoubtedly, if we want to transcend to the rule of law, these issues are to be taken care of.

On a different note, absence of the office of ombudsman that would have the charge of investigating and reporting abuses/misuses of public powers and the absence of an

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<sup>2</sup> See, e.g., Article 21 that says that to strive to serve the people at all times is a fundamental duty of every public official.

<sup>3</sup> Please note that the judicial reviewability of constitutional amendment was established by the Appellate Division of the Supreme Court in the case of *Anwar Hossain Chowdhury* in 1989.

<sup>4</sup> This scenario continues to exist even after the enactment of a right to information law.

effective human rights commission<sup>5</sup> are definitely barriers towards establishing the rule of law in this society.

As said above, rule of law is meaningless unless there be an unhindered access to justice. The present costly and prolonged/dilatory justice-delivery system does not match with the goals of 'rule of law'. I am not giving the statistics, but it is well known that each court in the country is extremely overburdened and the people need to wait for years and spend almost the last penny to get justice. In order for the 'rule of law' to prevail, there is no better way than to make reasonably prompt and affordable justice possible for the litigants. Closely linked with this is the recruitment of quality lower court judges and a selection scheme, based on merit, knowledge and integrity, for the top court judges.

#### **4. Concluding Observations**

To conclude, we can reflect briefly on what we need to do in order to achieve and entrench the rule of in our society. We emphasise on:

- A.** qualitative lawmaking,
- B.** repealing of arbitrary laws,
- C.** institutions building,
- D.** enhancing legal aid,
- E.** educating the public,
- F.** improving legal education,
- G.** further consolidation of judicial independence and the integrity of the Bar,
- H.** expedition of the justice delivery process,
- I.** free access to information,
- J.** more effective political participation,
- K.** political stability, and
- L.** improvisation of means of executive and administrative accountability.

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<sup>5</sup> Everyone would probably agree that the current Human Rights Commission is a simply paper-tiger.