Civil Society and the Rule of Law: The Bangladesh Context

Shahdeen Malik

1. Preliminaries

The paper contains a rich mixture of analyses on various dimensions of the civil society vis-à-vis the NGOs. The GO-NGO relationship is also subjected to detailed scrutiny. Hence, to avoid the pitfalls of repetition as far as possible, this paper concentrates primarily on the rule of law and derivatively on the relationship between the rule of law and civil society as well as the connection between the rule of law and process of democratisation.

The following words of Justice Muhammad Habibur Rahman are worth mentioning:

Have we failed to ensure the independence of the judiciary and its separation from the executive for some peculiar traits in our character? Who will judge us? The lawyers are least suited for the task. We shall have to turn to the sociologists for an answer to the question why so many times we have missed an opportunity to establish the rule of law in the country.¹
One may venture to look for the answer in the realm of perceptions which are often shaped by notions of law, justice, politics and power not only of the ruled but of the rules as well. George Bernard Shaw has asserted in the Preface to his play *Arms and the Man* that "I am no believer in the worth of any mere taste for art that cannot be produced what it professes to appreciate." In paraphrasing this to our present context, it seems that we are taking a stance contrary to what G.B. Shaw has posited. We are clearly taking admittedly appreciatively, about something, i.e., the rule of law, which we can hardly produce. We do have a taste for the rule of law but this taste does not seem to be sustained by worthwhile efforts for it's realisation. Hence, our taste is worthless. Or so it would seem to G.B. Shaw, were he is familiar with our pretensions.

G.B. Shaw, as we know, was very scathing in his remarks and recollections about his parents. "My father was impecunious and unsuccessful." And "My mother was, from the technical point of view, a modern welfare worker, neither a mother nor a wife, and could be classed only as a Bohemian anarchist with ladylike habits." The consequences of parenting by such persons for the children, Shaw and his two sisters, were that, "As we grew up and had to take care of ourselves unguided. We met life's difficulties by breaking our shines over them, gaining such wisdom as was inevitable by making fools of ourselves."

G.B. Shaw is brought here into this presentation about the civil society and the rule of law with a view to drawing some analogies. Again to paraphrase another guru. Dean Roscoe Pound of the Realist School of Law, life of law has not been experience. Rather, law is embedded more in analogies than in experiences.
One more digression into Shaw. He was baptised in the faith of England (he was an Irish) and he grew up believing that "God was a Protestant and the Roman Catholics went to hell."

Now to attempt some analogies—similar to Shaw's Protestant God, ours is a society that has, from time to time, held very strong views about various aspects of public life. During the periods of ascendancy or dominance of a particular view, the contrary ones were easily relegated to Roman Catholic hell. In the late sixties, those of us who went to school, must have taken regular pledges, in the name of God, to defend and save Pakistan every morning during our school assemblies. A couple of years later, most were fighting for liberation, against Pakistan, whatever the vows of a few months ago. The parliamentary democracy of the first couple of years after liberation was soon changed into one party dispensation, followed by non-party 'military-democracy; contrived democracy and so forth. The revolving doors of scores of Ministers of the 1980s now, since the early 90s seem to be replaced by almost fixed-term ministers. The list of our about-turns, some very noticeable and some less noticeable, looks endless. Even the euphoria of the cricket victory of just a few months ago has now turned into relentless criticism against virtually the same cricket team. Without even mentioning the dynamics of relationship between our main two political leaders and parties, it seems that we prefer at times to be Protestants with total condemnation of anything Catholic or the opposite, without any reasonable predictability. And closer to home, i.e., the rule of law, there were periods when hundreds of magistrates were appointed at one go, literally hundreds of courts established in those numerous upazillas created hurriedly and high courts were scattered far and wide. And then, as suddenly these were
rolled back, their doors shut. Now the spectrum of hundreds of 'grameen' courts is looking large, in thanas and unions all over the country.

Result of these, it appears, is somewhat similar to our growing up as Shaw siblings. It is worse because, unlike Shaw's parents, we also have acquired the Protestant-Catholic frame of reference not only in matters relating to hell and heaven, but in increasingly grown aspects and issues of public life and affairs. In such a situation, how do we even begin to contemplate the rule of law. Ours is a situation very unlike Shaw's plays. Our perceptions of public life and public affairs and often replete with unmistakable good or equally unshakable evil, producing only crudely valiant heroes or absolutely despicable villains. Such a milieu hardly provides the fertile soil of the seed of the rule of law to grow and prosper.

2. The Rule of Law
The rule of law, at one level, is a rather pedantic notion. We readily understand what it means and we can easily enrich it by including whatever component we want to and probably can get away with. It is something good and noble. However, scratching the surface of the concept of the rule of law can not but leave us in a dilemma.

In terms of the democratisation process, the rule of law contains two distinct elements: (a) to rule, and (b) the law. The plain meaning is to rule according to law. However, one element of this concept-to-rule is a practical one, while the other-law-is almost totally a theoretical one.

2.1 Law as a rational construction: Law is not a thing we can touch, smell, see, taste or feel. Law does not exist in
physical forms, as do the readily available subject matters of a medical doctor (human body), engineer (various materials), physicist or chemist (determinable or verifiable characteristic or components or speculation about different matters). There is no such thing as law among the material objects, which surround us. Nor can law be made a subject matter of physical enquiry and determination, as would be the case with relics or archaeological sites or fossils for a historian, archaeologist or paleontologist. Law, somewhat similar to the trade of a novelist, poet or the concepts of zero or infinity of a mathematician, almost totally resides in that part of our thinking process, which we generally term as 'rationalisation'. Law in other worlds is a construction of intellect. It is a product of the process of rationalisation. The process may be tempered with notions of justice, right and wrong are also abstract. We can hardly relate the notions of justice to any thing physical. Only in the application of law such as putting someone behind the bar or taking away money or property from someone under the order of court, can law take tangible forms. Nevertheless, the notion of what is law or what is justice is totally a-physical. This important aspect of law in our discourse is often lost sight of.

Under law in such a manner has certain implications. First and foremost is that since law is primarily a product of rationalisation, it can hardly be an empirical science or discipline. There is an increasing number of empirical investigations about law and it’s application or effect by our NGOs in recent times. Curiously, one hardly finds an empirical study in any of the scholarly journals of law published in the West. The point is that the absence of such articles should at least make us ponder more seriously about the efficacy of empirical enquiries about the application of law
and be cautious about drawing hasty conclusions about operation of law.

Economists, about a quarter of a century or so ago, had a lot of faith in the validity of responses on the monetary incomes of respondents or their surveys. Gradually, they realised that the stated incomes are not the actual incomes. Hence they proceeded by way of devising other indicators such as consumption of food and other essentials, expenditures in social events, purchases of luxury commodities and so forth. Unlike economics, the concerns of law or behaviours encompassed by legal regulations are swayed more by 'externalities' than almost by any other behaviours of ours. To put it simply the debate of actual worth of say Taka 5000/- to someone in a given situation is much less complicated than the notion of right, wrong or what is just, moral or unjust for a given person in a given situation. Theft, for example, is much less a heinous crime than rape. The law on rape provides for much harsher penalties and punishment than theft. However, victims of theft are usually more forthcoming than victims or rape. Recourse to law for victims of rape is shaped by such a huge number of externalities that it would be futile to judge the efficacy of law of rape by any number of empirical studies.

Thus, one component of the rule of law, i.e., the notions about law, is layered with multiple levels of ambiguities and debates. This is true not only among people in general, but among lawyers and legal scholars as well, as evidenced by two thousand years or writings about the nature, role and functions of law. Today, we are almost as far from any widely accepted conclusion about law as was the case in any given century in the past. One reflection of our uncertainty about law is the fact that unlike any other discipline, law students
in almost all universities of the world have to suffer two courses during their university education on 'what is law', variously titled as jurisprudence, legal theory, comparative jurisprudence and so forth. It would, on the other hand, be unthinkable for a student of chemistry to spend more than a few lectures listening to what is chemistry or for a political science student to prepare answer to more than one or two questions on what is political science or for that matter what is government.

The implication of all these for the rule of law is that the appreciation of the rule of law in its various ramifications involves understanding about law which may not be facilitated only by everyday life or political experiences or insights gained from military manoeuvres or exercises.

2.2 The Rule: Hence to avoid the pitfalls and controversies of linking law with 'to rule', let us therefore confine to the 'to rule' aspect of rule of law. There are a large number of definitions of the 'rule of law', most of which are difficult to agree with. Nevertheless, the rule of law is usually seen to consist of two distinct elements:

a) no one is above law, including the rules. The powers exercised by the State functionaries must have a legal basis, that is, they must be based on the authority conferred by law; and;

b) the law should conform to certain minimum standards of justice, both substantive and procedural.

Obviously, there are a number of plots and sub-plots to these two main elements. Leaving those aside, if we are to focus on
the (b) above, it can easily open up the Pandora's box as we would have to deal with issues, such as what are the minimum standards of justice in any given situation. Directly or indirectly, in answering such queries, we would be drawn into, at least derivatively, the question "what is law"?

One difficulty of leaving the question 'what is law', or 'what is justice' aside and, consequently, accepting any rule backed by the coercive power of the State as law (the Austinian command theory of law)\textsuperscript{13}, is to make us somewhat friendly towards military rules, without intending to be so.\textsuperscript{14} Military rule differs from the ordinary 'rule of law' in that the content of their law is generally assumed not to be tampered with the minimum standards of substantive and procedural justice.\textsuperscript{15} Nevertheless, for our present purpose, better to proceed with 'to rule' component of the rule of law and attempt to link it to democracy, to the process of democratisation. The simplest description of democracy (which is);

a form of governance "in which effective participation by the people through their elected representatives in administration at all levels...."\textsuperscript{16}

A measurement of this criterion will surely and easily lead to the conclusion that we are far from practicing democracy, rhetoric of free and fair election under the caretaker government notwithstanding. Administration, hardly at any level, ensures participation of the people through their representatives, but such participation hardly extends to 'administration which is generally accepted as the domain of the bureaucracy.
It may not be terribly pertinent that trial judges in America as well as public prosecutors are elected by voters. So representation of the people through their representatives not only extends to administration but also to matters of justice, further supplemented by jurors from amongst the citizens. Furthermore, the representatives of the people, i.e., the Senate, elect the judges of the appellate courts (including the Supreme Court of America, on the nomination of the President).

2.3 Nuances of Democracy: This digression aside the issue of democracy can be taken up at another level. The ideas of nationalism and democracy, two of the core concepts of the liberation movement, contained in themselves the notions of not subsuming ourselves to the dictates of a nation state. We revolted against the nation-state called Pakistan because such nation-state did not cater to our ideas of nation and democracy. Implicit in the rejection was the over-riding credo that struggle for democracy can relegate the state, to which we had owed allegiance, to nothing. Allegiance to nation-state is conditional upon recognition of the individual's right to democracy. This condition vis-à-vis state power is the core of democracy.

Any reflection on the background to our history of liberation movement will make clear that there were many contested visions of nationhood and alternative frameworks for development. After liberation, these conflicting visions and goals became hostage to the increasing powers of the centralised state, imposing its own notions of democracy or development in bewildering variants of socialism, one party rule, military rule, civilian-military governance, and governance through corrupt practices. In the process, the democratic space shrunk and the shrinking was rationalised by
resort to the twin towers of preserving the integrity of the state-nation and achieving development. Our political rhetoric, even evident in the recent debate concerning the 'CHT Peace Accord', is still replete with the primary rationale of preserving the state and national integrity at the expense of rights and democracy.19

Another consequence of the ever-increasing power of the state at the cost of democratic safeguards was the marginalisation of the minorities. The primacy of the state easily justified the minimisation of the rights of the minorities which are perceived as detrimental to the national integrity. Their rightlessness was engineered beautifully through laws—the enemy and vested property related laws and regulations. The consequence, it is estimated, has been the out-migration of almost 5 million minorities since the late sixties.20 The plight of non-Bengali speaking people of the Chittagong Hill Tracts and parts of northern Bangladesh is too well known to require any further comments. Similarly, the other non-Bengali speaking people, the Biharis, are still non-persons in the eyes of law and the justification for such a state of affairs easily finds resonance in our distorted frame of reference about nation, state and democracy.

Does the state of democracy have any connection with the rule of law? Or can democracy be described as an embodiment of the rule of law? Or does the rule of law come on the heels of democratic governance? Is the issue similar to the perennial dilemma of which comes first: the egg or the chicken?

Since the focus of this presentation has been shifted away from the content of law to the procedure, i.e., understanding 'to rule' only in its procedural dimension, a
minimal understanding of the procedural requirements of the rule of law not to have been internalised by the rules.

2.4 "To Rule" within the Constitution: Clearly, the most fundamental aspect of our Constitution is Article 7\(^2\), which boldly proclaims that "All powers in the Republic belongs to the people, and their exercise on behalf of the people shall be effected only under, and by the authority of, this Constitution." The surprising aspect of this very fundamental declaration of our Constitution, which is unparalleled for the Constitution of the 60s and early 70s, is that this most important premise of the statecraft has almost totally escaped the attention of our politicians. They still declare, in their public pronouncements, that people are the source of power (jonogon khomotar uttso), ostensibly still thinking that power belongs to the politicians. The power to the politicians comes from the people, but it in reality belongs to politicians.

Article 7 not only declared that the power belongs to people, it also lays down within the parameters set by the Constitution. The Constitution enshrines the limits of power by strictly laying down the procedures and limits of the exercise of power (only under and by the authority of this Constitution). For example, one can be elected as a Member of Parliament, but not for more than five years. We have limited the tenure of office of Members of Parliaments, Ministers, and Prime Minister for a maximum of five years. After that we may renew, as it were, the contract of their service through the next general election.

Another ready example of glossing over the core premises of the constitution would be the Prime Minister's 'recent suggestion that terrorist's be 'shot at sight' That no such thing can ever be done is very clear as the Constitution provides in
Article 33(3) that "Every person accused of a criminal offence shall have the right to a speed and public trial by an independent and impartial court or tribunal established by law." When you authorise police to shoot at sight, you turn the police into both the prosecutor and the judge. It is difficult to think of an example as derogative of the rule of law as shooting at sight.

The purpose in citing these examples from the highest levels of administration is not to belittle any person or group or political party, but only to emphasise the distance to travel before we can meaningfully approach the destination of the rule of law. The first and obvious condition is to understand that one cannot administer (to rule) in any manner which is not sanctioned by the Constitution. The Constitution is the basic or the most elementary minimum. Only after internalising the Constitution that other aspects of being governed or governing according to other 'lesser' laws would arise.

We all know and most of us accept, at least according to various finding on this score, that police do torture suspects. However, it has been suggested that most people readily accept that the police can and should torture at least the ones they seriously suspect of committing serious crimes. Consequently, hardly anyone seems to be aware of the constitutional prohibition on torture of Article 35(5) which strictly lays down that "No person shall be subjected to torture or cruel, inhuman or degrading punishment or treatment." This Article 35(5) is core of the rule of law for the police power. The punishments which a court of law can impose, according to section 53 of the Penal Code, are only of four kinds and do not include torture or beatings.
It is not only derogation of the constitutional provisions that our lack of attention to the rule of law is manifested. No less important is the matter of perceptions. In recent weeks, almost all the relief and rehabilitation related activities, as propagated by the official media, are attributed to the person of the Prime Minister. The official propaganda attributes all decisions and measures to the Prime Minister personally and hardly ever to the institution or Office of the Prime Minister or the Government. It is rather difficult to recollect a phrase to the effect that "the government has decided or directed". (One can easily substitute another name for the rule in another regime). The perception of the ruler is still an individual one and not an institution created by the citizens and controlled by the citizens. We are still submerged, it seems, in the zamindari mode of authority rather than the democratic one. Another interesting twist is that the TV photo opportunities for those who are making donations to the Prime Minister's Relief Fund are most often identified as institutions (Banks, Associations and so forth), while the distributions of relief are portrayed as being done of individual Ministers, i.e., persons and not institutions. The trivial are the institutions, gather the persons.

The ramifications of these and other trends mentioned in "preliminaries" above can now be taken up for scrutiny from a somewhat theoretical perspective.

3. The Tradition of Rule of Law

Why is that does not seem to have much faith in the rule of law, as evidenced by the functioning of our institutions, not only the organs of state but others as well, be it relatively old and large 'autonomous' bodies, such as public universities or small business enterprises. One answer, following Satish Saberwall, may be located in our relatively short history of
By the 1300s, it is clear that a wide variety of institutional forms was available to European experience: the Church, the monasteries, and the proliferating monastic orders; the kingships, their consultative assemblies, their courts of justice, and their growing bureaucracies; the Italian cities' governmental arrangements, resting on explicit, written Constitutions; universities; merchants' co-operations were learning to design, to generate, and to modify institutional forms that is to say, to work up generalised forms of social responses to recurrent contingencies-such as could serve a variety of emergent purpose closely.

Whereas for our society, for various socio-political as well as historical reasons, we have not had the privilege of developing long standing 'ordering devices' and practice those over a substantial period of time.

At one level, to colonise is to impose a different socio-political order, to implant a totalising power structure, and, ultimately, to inhabit the colonised space with 'new' ideas. Colonial law has been the most insidious, as well as the most identifiable, willingly understandable and often readily acceptable of such new ideas. The colonial implant (laws made by the British) not only shaped the re-ordering of the colonised space, but also dictated the parameters to be deployed to understand this new phenomenon itself. Our understanding of laws have, therefore, continued to be shaped by the skills imparted to us by the colonial rules. These understandings have led to imposition of continuously
changing ordering schemes without much attention to the fact that for any legal order to be effective, it must be rooted in the mores and habits as well as notions of justice in the society. Multiparty democracy, one party democracy, military democracy, military-civil democracy, presidential forms, parliamentary forms, populist dispensations, fundamentalist allure and so forth are but attempts at imposing continuously changing ordering devices, the end result of which has surely been the withering away of the perception about the centrally of the rule of law. Let me cite an unpleasant example. Fatwa is perceived as an unmitigated evil. It has drawn such hostility that the role of fatwa (i.e., collective justice in informal settings) in holding together certain accepted ordering devices to maintain social cohesion has gone totally unnoticed. The assault on fatwa has proceeded from the premise that it’s demise will automatically lead to or generate alternative forms of dispute settlement in the rural areas. How much of this assumption is wishful thinking is even blasphemous to ask. The government has now pitched in with it’s novel concept of Grameen Court to resolve petty rural disputes.

The argument here must not be construed as support for the oppressive fatwas and the patriarchy these fatwa perpetuate. The point is that displacement of one ordering system must be followed by another. However, such ordering and re-ordering must not be attempted with the entertaining frequency of scoring goals in a world cup football match or Shahid Afridi’s sixers.

Now to move onto another aspect of dispute resolution: the relevant figure suggesting that hardly 5% of all the crimes recorded with the police, around 80 to 90,000 per year during the last five years, have actually ended in conviction. Despite
100,000 or so police force, around 2,000 politically appointed public prosecutors, special prosecutors, assistant prosecutors, a few dozen advocates in the office of the Attorney General, more than 1000 judges of various denominations conducting criminal trials with a huge contingent of support staff and so forth (those figures are rough estimates as the government does not release such figures). The criminal justice system can not 'achieve' more than 5,000 convictions in criminal cases in a given year. Again this shows the state of our criminal justice system.

The point is that this continuous re-structuring of 'ordering devices' is bound to erode the confidence of the people in the rule of law and that what is exactly happening. The new and newly imposed normative systems, be it in the forms of governance, representative-administrative structures (district governors, upazilla chairman, union parishad chairman, gram sarker or the new gram parishad, fitful paurashavas or municipalities) court system, (at last count there were more than 40 different kinds- actually does anybody keeps count of the different kinds of courts we have?), even continuously changing leadership of sports bodies with changing political fortunes are but various manifestations of this trend. At any given time during the last tow decades almost half of the Ministers must have had different political allegiances in their 'political lives' than the political party under which they held ministerships. That there is 'no last word' in politics is another stark indication of our readiness to accept frequent changes in 'ordering devices'.

The core of the rule of law is impersonal functioning in terms of general principles. The impersonal functioning of a system in terms of generalised principles has not been allowed to command respect or adherence, as suggested, due to
continuous re-ordering of the ordering devices. State or political power is perceived as the authority to change 'ordering devices' and hence political regimes take upon itself to stamp it's authority by fashioning new ordering devices.

However, in the process of these inventions, we tend to lose sight of the fact that the lesser the prevailing rules or orderly devices for securing proper functioning, the greater is the room for coercion in a society. This increasing use of coercion is manifested in the mushrooming of laws empowering various governmental bodies, authorities and institutions with penal power, what can be described as criminalisation of acts elsewhere. Second, these changes in the ordering devices stem from a modernist emphasis on the functional role of law and legal or otherwise, and hence the clamour for new laws. There is, needless to say, no denying the fact that laws do need reform. However, the pace of law reform must not be confused with the pace of change in modern technology. Third, the chasm between the received legal order and the societal codes have been widening, not because of the inherent faults of that legal order but due to ever increasing deployment of that legal order in increasingly large arenas of our social and economic lives. The scope of operation of the received colonial legal order was confined to only parts of our collective lives and hence the disjunction between the logic and institution of that with the societal order was limited and less disruptive. After the end of colonialism, we seem to have persisted with the frame of this received law with renewed vigor and faith, but without internalising the logic and assumptions of these laws or the ordering systems based on legal formalism.

The end result is that we have an ever increasing number of laws, but not the rule of law.
4. Towards a Silver Lining

This last section posits the question whether we are doomed to be ruled beyond law in the foreseeable future. Again, to use an analogy, one silver lining is surely the arrangement of the caretaker government for conducting general elections. The primary rationale for the caretaker government is to ensure that general elections are conducted according to the relevant laws and not influenced by persons, particularly those in power at the time of general elections. In other words, the relevant constitutional amendment has ensured that the rule of law is observed and followed during the parliamentary elections. This certainly is a major step. The fluidity of ordering devices mentioned in the previous sections perverted our election procedures for decades and now, at least after the experience of last two general elections of 1991 and 1996, we may be well onto the right path of the rule of law in election matters. The violations of code of conduct, deployment of crude and physical violence and influence of money are the three factors which subvert the process of election. The caretaker government has succeeded in greatly reducing the abuse of the first two of the above three factors. But the third, i.e., huge and illegal expenditure of money during the election is yet to be taken up. The relevant law\(^{29}\) permits expenditure of only Taka 300,000/- by a candidate for parliamentary elections. Hopefully, in the next election under the caretaker government, the abuse of this aspect of the election law will be reduced.

Looking at the civil society, it seems that only a few major components are even attempting to be ruled by law. The 'chambers' (of commerce, industry and particular trades or productive sectors such as the BGMEA) and the Bar Association of advocates of all the districts are two examples
who have, over the years, established their own 'ordering devices', at least in the formal sense of the terms.

Certain government initiatives of recent months, such as the establishment of the **Human Rights Commission** and the **Office of Ombudsman** are steps in the right direction. The draft law on the Human Rights Commission is, in principle, a good one. The Ombudsman Act contains a number of mechanisms to restrain the independence and effectiveness of the Ombudsman. Hopefully, some amendments would be effected in the 1980 Act (particularly sections 8, 10, 15 and 17) before an Ombudsman is actually appointed and once the government will refrain from controlling the functioning of the Office of Ombudsman through the well tested device of appointing bureaucracy on 'deputation' or 'lien'.

One of the continuing farces of recent years has been the Inquiry Commissions, the latest and very widely reported one was commissioned after Rubel's killing. Over the years, according to newspaper reports, there had been as many as 40 such Commissions. And over the last couple of months we have, from our office, dispatched more than 20 letters seeking reports of these Commissions there hadn't been any response. The Commission of Inquiry Act. 1956 needs to be amended to make these Commissions meaningful, instead of a device for governments and bureaucrats to camouflage their wrong doings. To be meaningful, reports of these Commissions must be available to the public, or Parliament, instead of the Home Ministry. This may go a long way in ensuring some transparency and accountability.

The above three institutions may be cited as the programme minimum. The struggle for the rule of law in its procedural and institutional dimensions is a long drawn out
one for us. The caretaker government is an important such step and these other institutions in the making will also be helpful.

However, we seem to have shelved the most important device—the independence of the judiciary. Justice Muhammad Habibur Rahman has categorically stated—"The rule of law can not be established without the independence of the judiciary."

There had been plenty of promises during election campaigns and there would be more such promises before the coming elections. However, for now most of us seem to have forgotten about it. The absence of independence of the judiciary is one of the most effective devices in the hands of the executive to subvert the rule of law. And all of us, by our silence on this the most important aspect of the rule of law, are conniving to subvert the rule of law.

The rule of law can no longer be perceived as one-dimensional. Therefore, not only the separation and independence of the judiciary, but other organs such as the Human Rights Commission, the Office of Ombudsman and effective Inquiry Commissions need to be put in place.

4.1 In lieu of a Conclusion: 'To Rule' and the NOGs: The rule of law, obviously, does not mean that it is only the government who has to be restricted by the laws in the exercise of its power. The rule of law is also applicable to organisations and associations of the 'civil society'. Except a few, the majority of the 1,400 or so registered NGOs are yet to evolve formal codes by which they should be managed or administrated. For example, excluding the large and well known ones like BRAC, Proshika etc., can we really recall 'employment advertisements' by NGOs in the national dailies with clear statement of remuneration. A careful scanning of
the national dailies for a few months will hardly show any 'employment advertisements' by the NGOs with stated salaries for the posts advertised. NGOs, we all know, do employ thousands of people, but where is the procedure? Transparency of finances and budgets? Almost non-existent. The NOG Directory published by the Bureau of NGO Affairs does indicate the total amount of approved budget, but the last such Directory was published in 1994. Most important, the NGOs are still perceived as 'person-centred' which, needless to say, is anathema to the concept of the rule of law.

To put it differently,

"The civil societies are defined by the practices of their inhabitants. These practices may lead to the sphere becoming a captive of the state, equally the sphere may realise its potential for mounting a powerful challenge to the state oriented practices."  

The NGOs are a site at which the society enters into a relationship, whether of collaboration or critical engagement, with the state and this site is the civil society. The increasing role of the NGOs is obvious. However, whether this increased role will be beneficial for the rule of law needs to be seriously considered.

"There are probably more NGOs in Bangladesh than in any other country of the same size in the world." It is well known that the primary rational for NGOs in Bangladesh was their purported 'service delivery efficiency.' The NGOs in Bangladesh unlike many other 'third world' countries focused, first, on relief and disaster management, followed by people oriented activities in health and family planning, agriculture and gradually and increasingly 'micro-credit' with world wide accolade. Primary education, social mobilisation, mass
literary and empowerment, particularly of the poor became the ‘social dimensions’ of the NGO activities. However, unlike many other countries, the focus of our NGOs on the transparency and accountability of the government, campaign against violations of human rights and other excesses of the state power and machinery has been less than vociferous or effective.

The primary frame of the NGOs is still service delivery and/or micro-credit and the emerging legal awareness and legal literacy campaign are mostly confined to personal laws. In fact, a few months ago, an attempt to collect leaflets, posters and campaigns shows nothing on ‘public law’ - clear indication of the unwillingness to engage the state. True, in recent years, the legal aid and human rights NGOs have mounted quite a few campaigns against the most crude and brutal violations of rights (Yasmin, Sheema, jatwabazi), but the impact of these, unlike the service delivery activities, is yet to be substantial.

A number of factors are responsible for such a state of affairs.

First, the legal aid and human rights NGOs are of comparatively recent origin (mostly since the early 90s).

Second, and consequently, there is an inevitable dearth of experience, expertise and skill.

Third, for donor agencies, income generating and ‘credit-worthy’ activities are deemed more appropriate of support than law-related activities.
Last, for some peculiar twists of our legal education (for example, there is no course on ethics and morals in any of the law faculties) legal aid, human rights and related activities are not perceived as worthy of lawyers' attention. This is not to imply that lawyers do not engage themselves in such causes, but the engagement is mostly personal and not institutional.

Now, if we accept the summation that for a number of reasons, the 'state is in retreat'\(^{37}\), with increasingly lesser spheres of activities for the state (in the wake of privatization, globalisation, marketisation and so forth resulting in, as it were, subcontracting of various governmental function to private players), it follows that the space for state-activities will gradually be confined to law and order, justice and arbitration between various contending forces and, in our context, disaster management. Such a course of event may lead to further concentration of the state power, of violence in the form of intrusion into various dispute resolution mechanisms and strengthening of the punishing power of the state. The consequence for such an evolving state of affairs will be the diminishing of the role of the "legal aid and human rights" NGOs and more so since, as pointed out, these are the weakest of the NOGs. Even the large NGOs such as BRAC or GSS, who have a wide network of 'legal aid and human rights' components, have been the least strident in their-campaign against state violence.

There is no denying that privatisation, de-nationalisation, deregulation and destatisation are clearly neo-liberal dispensations with increased role for the market and decreased welfare role for the state. In this milieu, the recent privileging of the civil society- almost a non-entity in political discourse until a decade or so ago\(^{38}\) - is also a means of
burdening it with the social welfare task abandoned by the earlier 'welfare state'.

Now, going back to the characterisation that civil society is the site at which society and the state is in contest—it is obvious that the increasing participation of the NGOs in social welfare functions will marginalise the NGOs as 'social welfare activities', and this is not a site of conflict or challenge vis-à-vis state’s authority and control. The 'law and order', understanding it in a broader sense to include ordering devices, democracy, human rights and separation of the judiciary are the state of contest. The issue, therefore, for us is whether the NOGs can take up this role as a challenge or continue, as has been the case for the NGO sector so far (at least in the broad contours of their activities), to shun the path of confrontation, remains to be seen. However, the prognostic of a decreased role of state necessitates enhanced role of the legal aid and human rights NGOs in a more strident and assertive fashion. The first and foremost goal should now be the realization of the second step, after the caretaker arrangement as the first step (admittedly without much NGO participation), the separation and independence of the judiciary for establishment of the rule of law.
Notes


2. G.B. Shaw, Arms and the Man, sixth (India) edition, Delhi, 1986, at iv.

3. Ibid., at p 92.

4. Ibid., at pp. 92-3.

5. The 'conventional' critique of 'realism' from a positive stance, the most influential is obviously H.L.A. Hart. The Concept of Law, Oxford 1986 edition, at pp. 123-25.

6. Ibid

7. Needless to say, the relationship between law and moral is one of the million dollar issues of jurisprudence and hence better to be left out.

8. Needless to say, my characterisation of law as a product of our own rationalisation has been pointed out centuries ago. The most celebrated and one of the earliest on this score would probably be the writings of Chief Justice Coke, who is also credited as being one of the first to articulate the notion or rule of law in his confrontations with the King of England. Chief Justice Coke wrote in 1612:

   ...but His Majesty was not learned in the laws of his realm of England, and causes which concern the life, or inheritance, or goods, or fortunes of his subjects, are not to be decided by natural reason but by the artificial reason and judgment of law, which law is an art which requires long study and experience, before that a man can attain to the cognisance of it..."


10. The opposite approach, i.e., focusing on the 'law' (substantive) aspects of the rule of law would be more common in a western setting where the
primary concern is not so much with 'to rule' (procedural), which is seen to be done almost routinely. See for example, Margarate Jane Radin, "Reconsidering the Rule of Law" in Dennis M. Patterson (ed.) Wittgenstein and Legal Theory, Boulder et al, 1992, pp 125-156, particularly at p. 130 as she suggest, "...my focus will be on... the very concept of rules itself."


The formulation 'the rule of law' is often credited to the nineteenth century British jurist Albert Venn Dicey who elaborated upon three characteristics of the rule or supremacy of law:

i. absence of arbitrary power on the part of the government;

ii. ordinary law administered by ordinary tribunals; and

iii. general rules of constitutional law resulting from the ordinary law of the land.

There are other formulations of these three principles. See A.V. Dicey, Introduction to the Study of Law of the Constitution, London, 1908, pp 179-92.

Justice Muhammad Habibur Rahman has pointed out the William E. Hearn and not A.C. Dicey was the first proponent of the rule of law and Dicey has acknowledge his debt to Hearn who used these three words in 1867. See Muhammad Habibur Rahman, "The Rule of Law and Independence of the Judiciary" in his The Rallying Power of Law, Dhaka, 1998, at p 142. The earlier Bangla version of this article was published in a book titled The Rule of Law and the Independence of the Judiciary (in Bangla) Dhaka, 1997, where at p. 61 the year of Hearn's use of the words is dated as 1867, while the English version apparently misprints it as "1987" at p. 142 in The Rallying Power of Law.

12. A leading practitioner has offered the following formulation: "The rule of law which is the basis of democratic societies is closely linked with the issues of access to law and justice, the principle of equality before law and equal protection of law. Is law to be enacted, interpreted and enforced in a context abstracted from or located firmly within changing socio-economic reality?"

Amur-Ul-Islam. "A Review of Public Interest Litigation Experiences in South Asia" in S. Hossain, S. Malik and B. Musa (eds), Public Interest
13. I have sometimes wondered whether it was auspicious or ominous for the history of jurisprudence and philosophy of law that for a number of years in the 1820s John Austin, James and John (Stuart) Mill and Jeremy Bentham were neighbours.


My reference to Austin must not, however, indicate acceptance of Austin's assessment that western law is "a positive product of the will" which is very difficult from the rules of the 'other', which "rest on 'brute custom' rather than 'manly reason' and were thus monstrous or crude productions of childish and imbecile intellect." For this disparaging aspect of Austin's work about the non-western laws, see P. Fitzpatrick, "The Desperate Vacuum: Imperialism and Law in the Experience of Enlightenment" in A. Carty (ed.), *Post-Modern Law: Enlightenment, Revolution and the Death of Man*, Edinburgh, 1990, p 91, p.103.

14. The dominance of the Austinian command theory was first challenged, in English Jurisprudence, by Salmond (The First Principle of Jurisprudence, London 1891). Salmond complained that the analysis in terms of commands left the notion of a right unprovided with significance which is one of its most essential" p. 9.

15. Another reason for confining ourselves to the procedural aspects of law is that our legal scholarship is still strictly confined to what Rajeev Dhavan has termed as 'black letter law tradition'. Analyses of law, in this 'tradition' is limited to understanding law only in terms of legal categories, legal reasoning and legal criteria, excluding factors and forces external to law. In Dhavan's words:

"It is understood and interpreted by esoteric rules known only to the initiated and critiqued on the basis of self constituted legal principles and concept".

In Rajeev Dhavan, "Introduction" to Marc Galanter, Law and Society in Modern India, Delhi, second paperback impression 1994, p. xvii. See also, R.Dhavan, "Means, Motives and Opportunities: Reflecting on Legal Research in India", *50 Modern Law Review*, p. 725 and S. Malik, "

Legal literature in Bangladesh continues the 'black letter law tradition' whole heartedly. There does not seem to be even a half a dozen books not in tradition, i.e., not as guides for lawyers with compilations of relevant decisions and laws, without any comments and analysis on the social role and societal ramifications of law and legal system. One of the recent exception is Muhammad Habibur Rahman, The Rallying Power of Law, Dhaka, 1998. Even the two law journals published by Dhaka and Chittagong Universities seems to reflect the stranglehold of the black letter law tradition.

In India, at least since the mid 80s and particularly with the ever increasing public interest litigation, the focus of legal analyses is gradually shifting away from the black letter law tradition. On these shifts, see Michael Anderson, "classifications and Coercions: Themes in South Asian Legal Studies in the 1980s", 10 (1990) in South Asian Research. p. 158.

It is interesting to note that while our highest court is gradually moving towards accepting a greater role of law in social engineering, our scholarship remains far behind, though it ought to have been the scholars who could have set the pace. Two good examples of innovative judgements would be Anwar Hossain chowdhury v Bangladesh 1989 BLD (Spl) 1 and Dr Mohiuddin Farooque v Bangladesh 50 ( 1998) DLR AD I.

I have often wondered whether our legal literature in the 'black letter law tradition's is oblivious of the strong positive under-current in such an understanding of law, i.e.,

"the contention that a legal system is a 'closed logical system' in which correct legal decisions can be deduced by logical means from the predetermined legal rules without reference to social aims, policies, moral standards" [see H.L.A. Hart, "Philosophy of Law. Oxford, reprint 1986, p. 18. in note 1] which could not but be engendered by colonial influence.

16. Article 11 of the Constitution. The Preamble of the constitution also asserts:

...Further pledging that it shall be a fundamental aim of the State to realise through the democratic process a socialist society, free
from exploitation- a society in which the rule of law, fundamental human rights and freedom, equality and justice, political economic and social, will be secured for all citizens...

A penetrating observation of David Washbrook on 'democracy' and self governance for the colonised Indians seems particularly pertinent to our context, even after almost a century of the mechanism of the colonial government and hence a rather long quote below:

"To help it out of these problems, the colonial state turned to 'democracy', or rather to representation, at the local level- thereby initiating a series of strategies which continue to affect the Indian polity.

The task here was to extend and off-load many of the petty functions- for roads, sanitation, primary schools-onto locally elected and co-opted 'native' boards and municipalities. Once these were in place, taxation could be increased by means which made it appear that Indian society was taxing itself; and much time-consuming local administration could be passed to unpaid 'politicians'. That the extension of these responsibilities should not involve any meaningful shift in power, however, was guaranteed by a complex system of controls, which kept budgets and administration under central surveillance and dependant upon handouts of officials patronage; and by a construction of local political structures, which kept them parochial, divided and distant from the real centers of power."

See David Washbrook, " The Rhetoric of Democracy and Development in Late Colonial India" in Sugata Bose and Ayesha Jalal (eds), Nationalism, Democracy and Development: State and Politics in India, Delhi, 1997, p. 41.

17. These differences were glossed over during 1971, or checked in control under the overriding goal of achieving the defeat of the Pakistan army. However, soon after liberation, the conflicting goals manifested themselves in various 'radical' political stances, leading to violence as means of resolving the conflicts of visions, from early 70s to the late 80s, either in the form actual physical annihilation or crude recourse to mechanisms of state violence, i.e., military takeovers.

18. Similar processes, it has recently been argued, are also being manifested in India through the politics of intolerance. See, for example,


20. For details, see Barket, Zaman, Rahman and Poddar, Political Economy of the Vested Property Act in Rural Bangladesh, Dhaka 1997.

21. The pronouncements of the four judges who delivered the judgement in the most celebrated of all our Appellate Division’s judgements, i.e., Anwar Hossain Chowdhury v Bangladesh 1989 BLD (SpI) 1, popularly known as the 8th Amendment judgement, displays a stark lack of agreement on the 'basic features' of the constitution, through the judgement was based on the premise that the 'basic features' can not be altered even by a procedurally correct constitutional amendment.

   Article 7 was mentioned with differing degrees of emphasis by as one of the basic features of the constitution.

22. An interesting manifestation of our fixation with persons, even in matters directly pertaining to the rule of law, would be the following words of no less a personage than the doyen of our economics, Professor Rehman Sobban, writing in 1993

   The rule of law must once again be made to prevail. This again has stronger possibilities than was once deemed possible. The dismemberment of the judiciary under Ershad had already begun to correct itself following the brave judgment of the outgoing Chief Justice Badrul Haider Chowdhury on the character of the constitution. The fact that the present Chief Justice was the same
person who as Acting President created the preconditions for a return of democracy invests him with a respect in the affections of the people which no other Chief Justice enjoyed in our history. If this is sustained by the passage of a constitutional amendment formally separating the judiciary from the executive, we may create a strong basis for the rule of law”


24. S. Saberwal, " Ethnicity and Social Order" above, p 27


26. I am borrowing Saberwal’s notion and phrase, through his use is for a different context. Ibid., p. 26.

27. If one looks at he basic building blocks of law, for example- the concept of offer, acceptance, formation and breach of contract- these have hardly changed from even the times of the Romans; or ingredients of crime in terms of mens rea, actus rea and their classifications in terms of heinousness and corresponding punishment from the time of the first monograph on the modern principles of criminal law, Beccaria’s One Crime and Punishment of almost two and a half century ago (1764); or the fundamental rights as articulated in the American and French constitutional documents of the late 18th century; and even for the matter our personal laws on marriage, divorce, inheritance, custody, gift, wakf, i.e., the fundamental legal frameworks have operated almost unchanged for many many centuries.


30. The Ombudsman Act, 1980 (Act XV of 1980). The Constitution, in Article 77(1) had provided that "Parliament may, by law, provide for the establishment of the office of Ombudsman". However, it took the parliament eight years to enact the law, but with the caveat that [section 1 (2) of the Ombudsman Act]. "It shall come into force on such date as the Government may, by notification, in the official Gazette, appoint." The notification has been in the making for 18 years now!

31. Muhammad Habibur Rahman, supra note 1, p 144. Apparently this cycle of broken promises concerning separation of power can be traced as far back as to 1836. However, the blameworthiness; of the colonial rules on this score must certainly be less than our present ones. See Muhammad Habibur Rahman, supra note 1, for details of various commissions and reports on the independence of the judiciary.

32. One of the first Reports of the Law Commission concerned the Independence of the Judiciary. According to the Law commission, amendments to three Articles and not seventeen as suggested by the Law Ministry were necessary for ensuring independence of the Judiciary. The Report, obviously, has been gathering dust for almost two years now.

    The following comments by Justice Naimuddin Ahmed (a member of the Law Commission), from an unpublished paper titled "The Problem of Independence of the Judiciary" captures the control of the executive over the Judiciary:

    "The impact of Article 116, as it stands today, on the independence of the subordinate courts will be illustrated by a
single instance. During the latest military regime, a district judge was transferred from the capital within twenty-four hours after he had passed an order which was not liked by the Government. Cases of serious misdemeanor by Judge and the supporting staff of the subordinate courts detected by the Judge of the Supreme Court while inspecting their courts and reported to the Government with recommendations for taking drastic action were sometimes overlooked and sometimes treated with paternal indulgence."


35. For example, "The high incidence of rural poverty in these countries (Bangladesh and Nepal), together with weak government capability to implement development initiatives, undoubtedly provides fertile ground for NGO activity". See John Farrington and Anthony Bebbington (eds.), *Reluctant Partners? Non-Government Organisatoin, that State and Sustainable Agricultural Development*, London, 1993, p. 5.


38. See, for example, C.G.A. Bryant, " Social Self-organisation, Civility and Sociology: A Comment on Kumar's Civil Society", 44 (1993) British Journal of Sociology, pp 397-401 as quoted by Chandoke, supra note 33 above

"Before the 1980s, references to contemporary civil society, whether in academic sociology and political sciences or in the public sphere, were few. Through the 1980s, and into the 1990,
they are many... The formation, or reformation, of civil society is now widely considered an integral part of the great transformation attempted since 1989."