

The Relationship between the Rule of law and the Separation of Powers: A Bangladeshi Perspective

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On November 10, 1987 Nur Hussain, a young man painted on his chest the words ‘let democracy be free’ and on his back ‘let autocracy fall’ during a pro-democracy march. It was a time when Bangladesh was under dictatorial rule and the phrases emblazoned on his torso led to him being gunned down by the police.¹ This death like countless more in history issues from the concentration of power in the hands of the few rather than the many, from the blatant misuse of authority to repress the letter of the law and forward the agenda of the executive. It is repressions such as these that eke out the necessity of having an effective separation of powers, so to ensure a democratic norm and an effective rule of law. The idea of the rule of law and most democracies is premised on striking a balance where pro-people laws are created and these laws are implemented by the executive under the supervision of the judiciary. While despotic societies understandably prefer to act more or less in the same manner when despotic—we see curiously enough, that in democratic societies too there is equivocalness when it comes to the question of whether absolute separation of powers may even be wholly possible. It begs to ask whether a society where an unequivocal ‘separation of powers’ does not exist, can be said to have ‘the rule of law’?

It is not possible to enter a discussion on the existence of a relationship between the rule of law and the separation of powers without first clarifying definitions I will use. There has been a significant amount of confusion about the usage of this term since the time of Aristotle. In his *Rhetoric* he suggests that as many matters as possible be settled in advance by general rules while in his *Nichomachean Ethics* he contradicts himself by stating that the law should be less rigid if there are many hard cases². Little has improved since then. There is an ongoing debate yielding three-part definitions like the one

¹ HOSSAIN, K. 2007. *Making democracy work: What we need to do* [online]. [Accessed 26th March 2009.] Available from World Wide Web:

<http://www.thedailystar.net/suppliments/2008/17th_anniversary/1st_part/making_democracy.htm>

² WALDRON, J. 2002. Is the Rule of Law An Essentially Contested Concept (In Florida). *Law and Philosophy* [online]. Vol.21 (No.2), p.141

forwarded by Dicey³ or the eight desiderata promulgated by Lon Fuller in his *Internal Morality of Law*⁴ but also opinions like those of Waldron⁵ whereby there is no clear definition and the concept is only deepened through ‘contestation’

The same confusion surrounds the phrase ‘separation of powers’. Political commentators have generally favored the definition set down by Montesquieu (even in the US Supreme Court⁶) of the sovereign power being divided into three autonomous parts, the legislative, executive and judiciary which check each other⁷. Just as in the case of the rule of law, Aristotle is considered the first to have forwarded the idea of a separate judicature, legislature and executive. Till the 1700s, power was concentrated in the hands of various people at various times⁸ and it was after this that Parliament and the judiciary started to move out of the shadow of the monarch and the real debate around the separation of powers began. Through the writings of Montesquieu and Blackstone it might seem that each of the three organs must be completely independent for the prevention of arbitrary power by a sovereign. Madison’s *Federalist Paper* seemed to interpret the phrase to mean that the power of one organ should not be wholly vested within another rather than total separation⁹. There were also those who held completely opposing views on this matter with philosophers like Hobbes saying that it would “generate conflict within the divided sovereign, handicapping its ability to preserve social order”¹⁰ and French legal theorists such as Marcel de la Riviere stating that “the right to prescribe laws cannot exist without the physical power of making them observed”¹¹. Rousseau felt that such a

³ ZYWICKI, T.J. 2003. The Rule of Law, Freedom and Prosperity [online]. Supreme Court Economic Review, Vol. 10. p.19 [Accessed 27th March 2009] Available from World Wide Web: <<http://www.jstor.org/stable/1147136>> p.3

⁴ FULLER, L. 1969. *The Morality of Law*. New Haven: Yale University.

⁵ Ibid, p. 140

⁶ *Kilbourn v. Thompson* 103 US 168 (1880)

⁷ FAIRLIE, J.A. 1923. Separation of Powers. *Michigan Law Review*. Vol.21 (No.4) p.407 [Accessed 27th March 2009] Available on World Wide Web: <<http://www.jstor.org/stable/1277683>> p.396

⁸ Ibid, p.395

⁹ Ibid. pp. 398-399

¹⁰ TAMANAHA, B.Z. 2004. *On The Rule of Law: History, Politics, Theory*. 1st Edition. Cambridge: Cambridge University Press p.98

¹¹ FAIRLIE, J.A. 1923. Separation of Powers. *Michigan Law Review*. Vol.21 (No.4) p.407 [Accessed 27th March 2009] Available on World Wide Web: <<http://www.jstor.org/stable/1277683>>

separation was nothing more than a ‘sleight of hand worthy of the fairground’ as the political theorists who dismember the social body put the pieces back together anyway¹².

With such a variety of meanings, I think it would be appropriate to contest their definitions when examining their relationship and this would be best served by using examples from Bangladesh

If we look at the concept of the rule of law from the perspective of Dicey, where regular law is supreme and not arbitrary power, where all people are favored equally by the law and where constitutional law is incorporated into ordinary law-- it might seem that Bangladesh might not have been always ruled by law. While the Constitution of Bangladesh was originally written with the intention of securing a fair and democratic society¹³ within two years many emergency amendments were made that concentrated power strongly in the Founder of the Nation Sheikh Mujibur Rahman’s hands. This could be seen whether it was through the *Second Amendment Bill* passed in September 1973 that provided “for emergency powers to be exercised by him as the President of the Republic”, the creation of a pseudo-military force above the law¹⁴, detaining journalists without cause¹⁵ or even latching the judiciary to the single-party dominated legislature by establishing “a constitutional court, tribunal or commission for the enforcement of fundamental rights”¹⁶

Before his assassination the incumbent President formed the *Bangladesh Krishak Sramik Awami League* which was made the only legitimate party in 1975¹⁷. Such an accumulation of power would have been Montesquieu’s nightmare as they exercised “the three powers; that of making the laws, of executing the public resolutions, and of judging

¹² CRANSTON, M. (ed.) 2004. *The Social Contract*. London : Penguin, p.28

¹³ See Articles 27, 28, 29, 32, 42(1) of the Constitution of the People’s Republic of Bangladesh. [Accessed on 30th March 2009] Available on the World Wide Web: <<http://www.pmo.gov.bd/constitution/index.htm>>

¹⁴ *Jatiya Raksi Bahini (Amendment) Bill 1974*

¹⁵ *Special Powers Act 1974*

¹⁶ CHOUDHURY, D. NA. BANGLAPEDIA: *Rule of Law* [online]. [Accessed 30th March 2009] Available on World Wide Web: <http://banglapedia.search.com.bd/HT/R_0258.htm>

¹⁷ ISLAM, S. NA. BANGLAPEDIA: *Krishak Sramik Awami League* [online]. [Accessed 30th March 2009] Available on World Wide Web: <http://banglapedia.search.com.bd/HT/B_0207.htm>

the cases of individuals”¹⁸ and thereby, a breach of the traditional concept of the rule of law.

However, from a legal positivist view law is, in the end, administered by men, laws are by nature, subjective and indeterminate¹⁹ and they must be a ‘pragmatic normative practice’ per Professor Radin²⁰. Only in such terms maybe a ‘lack of democratic principles’ seems less appalling. If we remember that Sheikh Mujib was leading a newly formed nation that was rife with economic distress, natural disasters and the scars of war it might become more understandable why he would want to create a more united entity rather than allow the forces of partisanship to prevail. That is why Hegel’s definition of the separation of powers involving a monarchic, unifying power is of the utmost importance:

“It is the unifying force through which the other two powers are restrained from disrupting the state...The differentiation of legislative and executive expresses the principle of diversity that is essential to the idea [of a] constitution; the monarchic power contributes the principle of unity that makes the idea complete.”²¹

Here Mujibur Rahman can be said to be the monarchic figure under which the organs were united and while mistakes did occur, the intention was to prepare the country for passage towards a ‘rule of law’. It would thus seem here that a Montesquieu brand of separation of powers may not be the *sole fundamental pre-requisite* for materializing the rule of law.

It is contested that the ‘rule of law’ was *non-existent* during the General-turned-President Husain Mohammad Ershad’s almost decade-long rule. During the first phase of Ershad’s

¹⁸ MONTESQUIEU. 1989. *The Spirit of Laws*. 1st Edition. Cambridge: Cambridge University Press

¹⁹ ZYWICKI, T.J. 2003. The Rule of Law, Freedom and Prosperity [online]. Supreme Court Economic Review, Vol. 10. p.17 [Accessed 27th March 2009] Available from World Wide Web: < <http://www.jstor.org/stable/1147136>>

²⁰ ZYWICKI, T.J. 2003. The Rule of Law, Freedom and Prosperity [online]. Supreme Court Economic Review, Vol. 10. p.19 [Accessed 27th March 2009] Available from World Wide Web: < <http://www.jstor.org/stable/1147136>>

²¹ FAIRLIE, J.A. 1923. Separation of Powers. *Michigan Law Review*. Vol.21 (No.4) pp.411-412 [Accessed 27th March 2009] Available on World Wide Web: < <http://www.jstor.org/stable/1277683>>

rule, the Constitution was suspended altogether and all the other organs of power were subordinated to the executive. In such a government it is impossible for a system of checks and balances to exist and tyranny results. As Montesquieu said “there is no liberty if the judicial power be not separate from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would then be the legislator. Were it joined to the executive power, the judge might behave with the violence of an oppressor.”²² All of his and Blackstone’s fears were realized, as massive corruption ensued and the judiciary was completely gagged. This is evidenced most starkly with the passage of the *Seventh Amendment Bill* in 1986, after Ershad had transitioned to a civilian President, where all the decisions he made under martial law were legitimized²³!

This is not to say that there was no ‘disbursement of power’ under his rule. Ershad set up High Court divisions of the Supreme Court all over the country – not with the stated purpose of ensuring justice for a greater number of people, but also to offset the political influence of lawyers²⁴. And though the Constitution was reinstated, many dubious articles like Article 70 – which did not allow party members to vote against their own party - still applied²⁵. Far from the voice of the people being heard, even the voice of individual MPs was diminished leaving only the head of the majority *Jatiyo Party* (Ershad) with any real authority. Thus it can be seen how by cleverly using the façade of ‘deregulation’ and ‘dispersal of power’ the President was actually tightening his stranglehold on power.

So far, I have identified issues with the state of the rule of law during the exceptional period in which Mujib governed and during the dictatorial tenure of Ershad, and how the

²² FAIRLIE, J.A. 1923. Separation of Powers. *Michigan Law Review*. Vol.21 (No.4) p.396 [Accessed 27th March 2009] Available on World Wide Web: <<http://www.jstor.org/stable/1277683>>

²³ ISLAM, S.S. 1986. Bangladesh in 1986 – Entering a New Phase. *Asian Survey*. Vol. 27 (No.2) p.169 [Accessed 5th April 2009] Available on World Wide Web: <<http://www.jstor.org/stable/2644611>>

²⁴ MANIRUZZAMAN, T. 1992. The Fall of the Military Dictator – 1991 Elections and the Prospect of Civilian Rule in Bangladesh. *Pacific Affairs*, Vol. 65, No. 2 p.205 [Accessed 7th April 2009] Available on World Wide Web: <<http://www.jstor.org/stable/2760169>>

²⁵ AHMED, E. Imperial Prime Minister: How to make the office accountable?.2008. *The Daily Star*. 16th February 2008

absence of the Montesquieu separation of powers played a role in shaping these circumstances.

While Bangladesh reverted to a Parliamentary form of government after Ershad's collapse in 1990, in actuality many of the powers that were held by the erstwhile President was merely transferred to the Prime Minister²⁶. Considerations of protecting the civilian population fueled the creation of the Rapid Action Battalion (RAB), a para-military unit kitted with broad indemnities in order to enable them to tackle smuggling and terrorism. While both the *Special Powers Act* and RAB might be said to violate some basic human rights as the executive maintained a certain amount of power outside of the judiciary's control, they were often effectively used to curb the crimes they were created to handle. These tie in to the argument that a foundation needs to be set before the 'rule of law' in the traditional sense can be aspired to. So is the rule of law in Bangladesh a myth? I would think not. While a foundation was being put in place, the separation of powers in Bangladesh was evident through its elusiveness rather than a total absence of it all together.

In the UK and India, it is true there is a system of checks and balances to ensure that the executive never subordinates the legislature and the Prime Minister is the 'first among equals'²⁷ rather than the Minister vested with all the powers of the executive. There is also the existence of a strong and independent judiciary that can review the actions of all public bodies²⁸. Not so in Bangladesh. While the democratic phase in Bangladesh did bring in a movement towards an independent judiciary, this was introduced in 2008 and that too under an interim government that had overstayed by twenty one months its constitutional legality!²⁹ It must be noted that the economy of Bangladesh has also improved in recent years and the corruption that has plagued the system has dropped as

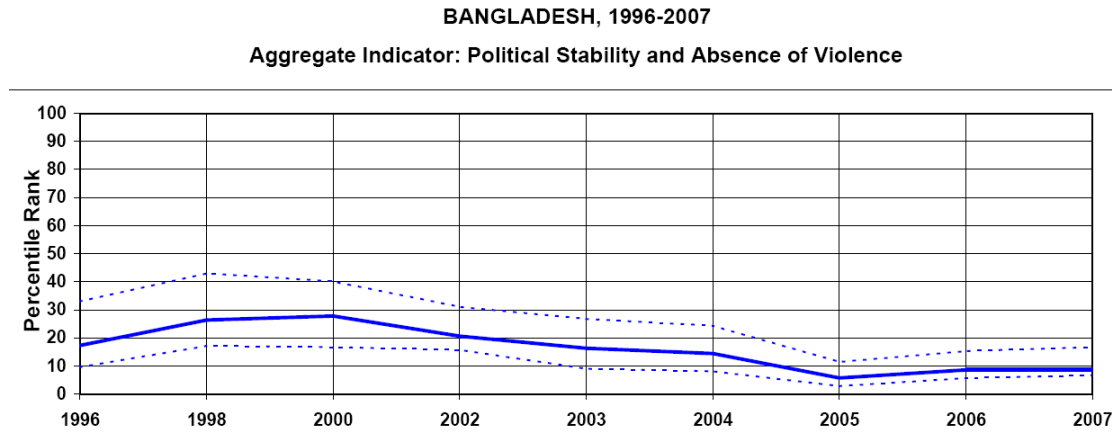
²⁶ SAMI. C.M.S. Dispersal of power for check and balance. 2008. *The Daily Star*. 16th February 2008

²⁷ Ibid

²⁸ Environmental Law Center. 2009 [online] [Accessed 4th April 2009] Available on World Wide Web: <<http://www.elc.org.uk/pages/lawukjudicial%20review.htm>>

²⁹ BBC. Bangladesh poll campaign begins [online]. 2008. *BBC*. 12th December 2008. [Accessed 4th April 2009] Available on World Wide Web: <http://news.bbc.co.uk/2/hi/south_asia/7778898.stm>

evidenced by recent Transparency International statistics³⁰. It is not surprising then that with greater security and wealth that the call for greater government accountability has increased as well³¹:



Concepts of the ‘rule of law’ and the ‘separation of powers’ have always been respected in Bangladesh, even if not followed exactly. Steps are now being taken towards divesting power from the government. More ideas are being promulgated now to ensure this, like the creation of bicameral legislature like in the USA or India to scrutinize legislation³² or dividing the power between the President and Prime Minister more equally³³.

These changes have been quantified by an organization called *Governance Matters 2008*³⁴ in the form of a line chart:

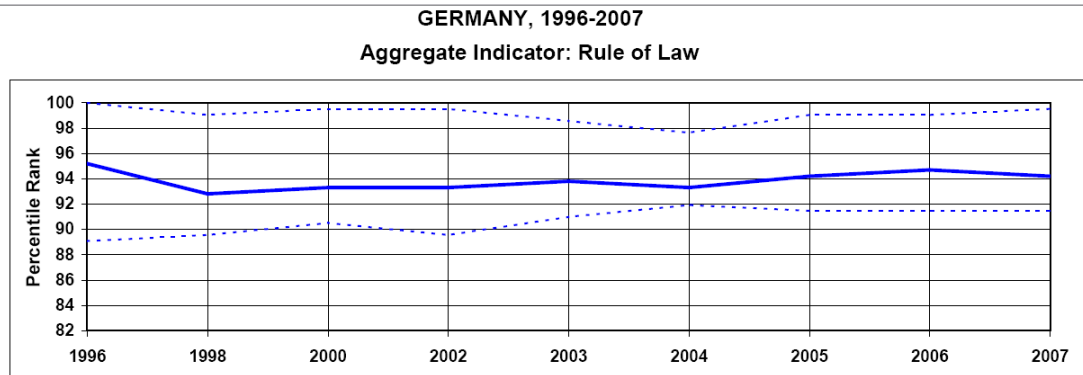
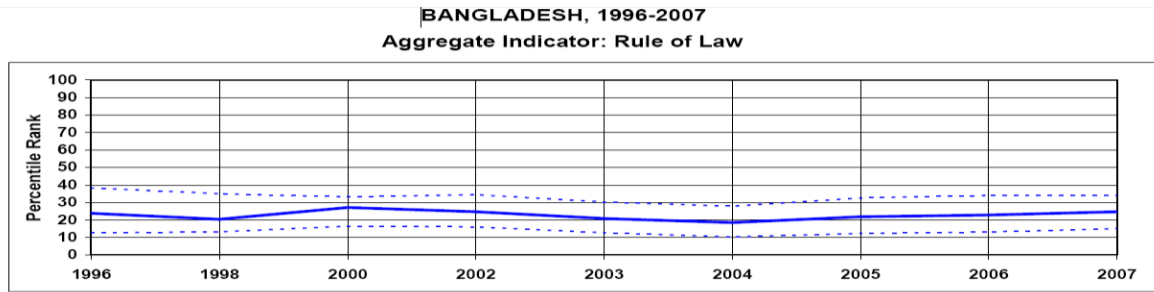
³⁰ Transparency International. 2009. [online] [Accessed 4th April 2009] Available on World Wide Web: <http://www.transparency.org/policy_research/surveys_indices/cpi/2007>

³¹ Governance Matters. 2008. [online] [Accessed 4th April 2009] Available on World Wide Web: <www.govindicators.org>

³² SAMI. C.M.S. Dispersal of power for check and balance. 2008. *The Daily Star*. 16th February 2008

³³ AHMED, E. Imperial Prime Minister: How to make the office accountable?.2008. *The Daily Star*. 16th February 2008

³⁴ Governance Matters. 2008. [online] [Accessed 4th April 2009] Available on World Wide Web: <www.govindicators.org>



While the Bangladesh Line (25%) is no where near as high as the German one (94% in 2007) it is still, some think, showing a positive trend. It would seem that for the sake of a stable environment the public would be ready to tolerate a certain amount of repressive powers and it might be found that their perception of the existence of the rule of law is more than 20-30%. ‘Rule of law’ in Bangladesh is not merely an imported ideal expected to flourish only when a controlled climate of ‘separation of powers’ is ensured but one that is growing its own roots.

It is said that “the rule of law is not a *means* towards Freedom and Prosperity but an inherent *part* of such a society”³⁵. This distinction could imply in an obtuse manner that the road taken towards achieving a society where the rule of law prevails might not necessarily be all that democratic! Basic rights such as those to food, shelter and security need to be ascertained before ideals such as a right to suffrage become relevant. As

³⁵ ZYWICKI, T.J. 2003. The Rule of Law, Freedom and Prosperity [online]. Supreme Court Economic Review, Vol. 10, p.17 [Accessed 27th March 2009] Available from World Wide Web: <
<http://www.jstor.org/stable/1147136>>

Rousseau said: “the wise lawgiver begins not by laying down laws good in themselves, but finding out whether the people for whom the law are intended is able to support them”³⁶; therefore the rule of law can only be instituted after a certain level of ‘maturity’³⁷ is gained.

The Bangladesh example illustrates various attempts made to centralize power through ‘legal’ means, by amending the Constitution but without due process. This would go against the concept of the ‘rule of law’ according to Fuller’s eight desiderata as law shouldn’t be changed arbitrarily or too frequently³⁸. It also raises a point about the content of the laws, while theorists like Dicey and Hayek may have been satisfied with whatever is codified, writers such as Trevor Allan have expressed the view that “legislation which seeks to override fundamental human rights, such as the rights to due process, equality and freedom of speech, is incompatible with the rule of law”³⁹. However, this example shows that the rule of law rests not always on the ‘separation of powers’ but also on the unifying of benevolent intent of the different branches. The umbilical cord between the legislative, judiciary and the executive powers should be severed without disfiguring the *principle aim* among the three branches to be unified in their purpose of aiding and not hindering the common good.

For the voice of the people to be heard, an independent judiciary, an independent board of experts to review Constitutional amendments, and a strong legislature are prerequisites. Without these it is impossible for judicial legalism, publicly promulgated legislation and equal application of law to occur. Even at this stage it is difficult to determine which conception of the separation of powers should exist, a Montesquieun separation of powers or a more Madisonian view⁴⁰. Countries could be said to find

³⁶ CRANSTON, M. (ed.) 2004. *The Social Contract*. London : Penguin, p.49

³⁷ CRANSTON, M. (ed.) 2004. *The Social Contract*. London : Penguin, p.50

³⁸ WALDRON, J. 2002. Is the Rule of Law An Essentially Contested Concept (In Florida). *Law and Philosophy* [online]. Vol.21 (No.2), p.154

³⁹ MEYERSON, D. The Rule of Law and The Separation of Powers [online] p.4 [Accessed 4th April 2009] Available on the World Wide Web: < <http://www.austlii.edu.au/au/journals/MqLJ/2004/1.html> >

⁴⁰ FAIRLIE, J.A. 1923. Separation of Powers. *Michigan Law Review*. Vol.21 (No.4) p.399 [Accessed 27th March 2009] Available on World Wide Web: < <http://www.jstor.org/stable/1277683> >

themselves on a rule of law scale where they are positioned depending on their ground realities and the perception of the international body. The Hegelian conception of the separation of powers figures on one end, the Madisonian towards the middle and the Montesquieu/Blackstonian at the other. Dictators can be said to go off the scale.

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