1 Rule of law in Bangladesh

The good, the bad and the ugly?

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Introduction

'The rule of law' has become something of a buzz-phrase, often readily invoked by politicians either to claim credit for their own rule or to disclaim or oppose the governance by their counterpart. In retrospect, in the wake of a third wave or surge of democracies in the 1960s to 1970s,[2] the concept attained a heavy usage in the context of developmental needs of the newly emerged sovereign states. That the new sovereign nations lacked the rule of law was taken almost for granted by the global South, making the 'rule of law' an inevitable part of the law and development discourse and foreign aid agenda.[3] Globalisation, conspicuous rise of global civil society, post-nine-eleven world order and other political factors contributed enormously to what Baxi calls a "new explosion of the rule of law discourse" in the advent of the twenty-first century.[4] Within the discursive framework of rule of law, this ideal remained dominantly "assumed to be a 'good thing' all round"[5] and a "panacea for the problems faced by the developing world".[6] This limited use of the doctrine of rule of law, on the one hand, largely disguises its normative character and refuses, on the other, to recognise the normative and instrumental diversity or internal plurality of the concept.[7]

The rule of law means, and used to mean "different things to different peoples, in ways that render any general theory about it inchoate" or impossible.[8] Moreover, "[i]ts histories differ not just across legal and social cultures but also within same-law regions".[9] In a powerful exploration of the political significance of the moral justification of the rule of law in British society, Joseph Raz considered "the rule of law not as a universal moral imperative, but rather as a doctrine which is valid or good to certain types of society provided they meet the cultural and institutional presuppositions for the rule of law".[10] In speaking about the value of the rule of law in a "pluralistic" society, Raz emphasised two virtues – the protection of the individual objectively, which he called "bureaucratic justice",[11] and democratic continuity. Raz then argued that "these virtues can only be achieved in a country with democratic culture, and a culture of legality with a tradition of independence for the courts, the legal profession, the police, and the civil service".[12] I shall analyse this statement of Joseph Raz further

below, but deem it necessary now to reiterate his insistence on the view that the rule of law has more to do with the tradition or culture of any political society.

The importance of a tradition-oriented approach to the rule of law has been emphatically endorsed by many other scholars. Abdullahi An-Naim, for example, came to a conclusion in agreement with his students that the model of the rule of law for each particular country "will have to be negotiated by the permanent population with reference to cultural norms and political realities prevailing in that country", although any such model has to conform to certain minimum universal standards.[13]

In this opening chapter of the volume on the rule of law in Bangladesh, I analyse the status of rule of law in the politico-social context of the country.[14] While I emphasise the dependence of the realisation of rule of law on the country's political culture, social tradition and democratic practices, I also focus on the institutions and the quality of legal rules that are needed to establish, consolidate and maintain the rule of law.

Below I first provide a brief introduction to the concept of the rule of law first generally and then in the context of Bangladesh. This is followed by a narrative of the nature of Bangladeshi constitutionalism and political developments, with the assumption that an idea of them is indispensable to locate 'the rule of law' within the culture of constitutional and extra-constitutional politics in Bangladesh. The chapter then analyses three aspects of the Bangladeshi rule of law – human rights performance, judicial independence and reform, and executive accountability. The chapter finishes with a few concluding remarks.

The concept of the rule of law and the Bangladeshi context

The many meanings of the rule of law[15]

The philosophical history of the rule of law has its root in ancient European political thought, prominently in Greek history. The great Greek philosophers Plato and Aristotle stressed in a variety of ways the utility of invoking and practising the rule of law in state governance.[16] The prominence of the 'rule of law' concept in modern constitutionalism, however, began with the English legal traditions, notably in the thirteenth century.[17]

The principle of rule of law is often credited as a fundamental aspect of the British Constitution, and, indeed, also of other democratic constitutions. Constitutionalist A. V. Dicey is reportedly the first legal scholar to have significantly elaborated the concept. For Dicey, who spoke against the backdrop of the British tradition of human dignity and individual liberty, the rule of law is meant to embrace three major attributes. First, it means the *absence of arbitrariness* in patterns and structures of governance, meaning that the rights of individuals are determined by legal rules and not by the arbitrary behaviour of authorities. Second, it requires the *prohibition of punishment except in accordance with the law*, which means that punishment is unlawful unless a court decides that there is a breach of law by the condemned. This requirement seems to establish a

prerogative of state control of punishment, taking powers away from societies and communities that are part of the state. Dicey's third attribute of the rule of law is the increasing *equality of all before the law*, requiring that everyone, regardless of their position in society, is subject to the same ordinary, as opposed to special, laws of the land, which is more of a human rights argument, in today's parlance.[18]

The concept of rule of law is an ever-growing concept, and it has indeed gone a long way since the Diceyan notion was expounded.[19] In its classical exposition, the critical feature of the rule of law remains that individual liberties depend on it, and that all should receive equal legal treatment. In the modern sense of the term, which is not too distinct from its classical expression, it means the supremacy or the rule of (good) 'law', not simply 'rule by law'[20] or 'rule of men'. In this sense of the rule of law, law refers to the *qualitative/good* and *inclusive* 'law' that is informed of higher norms, ethics and morality,[21] and not just *any law*.[22] With reference to the quality or goodness of law as a prerequisite of the rule of law, Lon Fuller identified eight basic attributes of 'the law'. As Fuller explained, laws must be *general* (specifying rules prohibiting or permitting behaviours), *widely promulgated*, *prospective*, *clear*, *non-contradictory*, *implementable* (laws must not ask the impossible), *certain* (laws should not change frequently) and *congruent* in aligning laws' intent and the modes of their enforcement.[23] Based on this conception of laws and the internal moral contents of any legal system, Fuller argued that a government breaching the basic requirements of a 'good' system of law would not be "a government according to law". There are, however, reservations against Fuller's argument,[24] and societies may indeed widely differ in perspectives of what is 'good'.

The legal supremacy can be attained through ensuring a formally complete responsibility of those in charge of powers on behalf of those governed. In the modern sense, the rule of law is considered the foundation of democracy,[25] and is interchangeably used with good and humane governance. To quote Baxi, "the rule of law is always and everywhere a terrain of people's struggle to make power accountable, governance just, and *state ethical*".[26] It is in this sense that many scholars emphasise the procedural or institutional approach, which calls for the establishment of fair procedures and efficient institutions to deal with the people according to the law.

In addition to the functional approach to the rule of law that emphasises the creation and maintenance of institutions, we often relate the concept to some substantial principles such as liberal democracy, protection of fundamental rights, judicial independence, openness in the affairs of the governance, removal of past discriminations, guaranty of human equality and dignity, and so on. These elements of the rule of law were emphatically reaffirmed in the International Commission of Jurists' 1959 Delhi Congress that underscored the value of human dignity as an inseparable aspect of rule of law,[27] specially urging for the creation of adequate political, social, economic and cultural conditions for the realisation of human dignity and development.[28] This early awareness of the interplay of the rule of law, good governance and social justice was probably an

indication of the subsequent growing impact of human rights and social justice imperative on the state of rule of law in South Asia and elsewhere.

Delhi Congress's articulation of the rule of law, thus, seemingly spoke of the notional goal of the concept, which is the establishment of a just society or a 'just government' where everyone will get their due, and state-decisions will be justified and taken for and with the consent of the people. The 1959 call of the International Commission of Jurists later found an expression in a statement of the Secretary-General of the United Nations who in 2004 defined the rule of law as

> a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards.[29]

This broader aspect of the rule of law, which even binds the private entities, now appears to be fully formulated in twenty-first-century discourse.

In the above, modern sense of the term, the rule of law refers in effect to the ideal of constitutionalism that signifies an ideal of total accountability of those men and women in charge of governance, including, of course, the idea of effective institutions and a responsible citizenry. In that sense, the rule of law reflects a grand ideal that is cognitive of and akin to the grand ideal of 'justice' in the sense Amartya Sen ascribed to it. For Sen, *justice* is not just about effective institutions and fairness in the abstraction. Instead of trying to achieve an ideally just society, Sen argues, the idea of justice (and, for that matter, the rule of law) should be more concerned with the lives of human beings, and requires the removal of those social injustices that are identifiable or conspicuous and hence eradicable.[30]

Rule of law in the context of Bangladesh[31]

The existence or absence of rule of law in Bangladesh in the above-explained senses is a contested issue. Despite the constitutional entrenchment of the high ideal of rule of law, and despite the fact that Bangladesh's liberation war was a consequence of the denial by the West Pakistani colonisers of the rule of law and human dignity to Bangalees, the present Bangladeshi society, like any other society elsewhere, is faced with the rule of law as a constant challenge to overcome. There is certainly a gap between the constitutional ideal and the reality, and between the hopes of the founding moments and the post-independence actions of the polity. This claim may be further explained by reference to, *inter alia*, certain legal rules, state of human rights and social development, institutional inefficiencies and political practices. During the formative periods of the nation, two particular issues affecting the rule of law remained unresolved. One was the failure to ensure inclusive constitutionalism by accommodating in the constitutional structure demands of the indigenous peoples, and the second issue

was the State's failure to reverse the war-time massive injustice by trying and punishing the war criminals. The latter failure has, however, recently been addressed.[32]

It would be convenient here to begin with a constitutional narrative of the rule of law. Grown out of supreme sacrifices of the people who liberated the country, the Constitution of the People's Republic of Bangladesh (hereafter, 'the Constitution')[33] entrenched the principle of rule of law as a preeminent "basic structure".[34] Predicated upon the values of rule of law, democracy, respect for fundamental human rights, freedom and human dignity, and equality and social justice,[35] the Constitution is what Rizvi calls "a most remarkable essay on liberal democratic constitutionalism, allowing for popular participation"[36] and inclusion of the marginalised,[37] although, as briefly analysed further below, Bangladeshi constitutionalism remains deficient in inclusiveness. The Constitution entrenched four core values of the nation – democracy, socialism, secularism and nationalism[38] – while its supremacy clause, Article 7, proclaimed the supremacy of law and provided for the sovereignty of the people, exercisable only by the representatives, and on behalf of the people. These assertions, no doubt, constitute a major embodiment of the substantive contents of the rule of law.[39]

The next important aspect is the incorporation of Fundamental Principles of State Policy (FPSPs) into the Constitution. The State Policy Principles are indeed a charter of social justice, providing a set of State duties that, although not judicially enforceable, provide the normative framework for the governance of the state and law-making.[40] They mandate an all-out state endeavour to attain an exploitation-free society, i.e. a society where everyone's entitlement to basic amenities[41] would be ensured, and democracy, human dignity, participation and equal economic development would be upheld. Together with the enforceable fundamental rights, therefore, the FPSPs provide "a reservoir of legal resources" which can be drawn upon by the courts and other institutions of governance to achieve social justice.[42]

A more solid articulation of the rule of law obligation of the State is to be found in Part III of the Constitution which guarantees for the citizens almost all universally recognised fundamental human rights with a further guarantee of their judicial enforcement.[43] 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 the Constitution's restraint on parliament's power to make laws in contravention of the fundamental rights. Clause (2) of Article 26 provides that "the State shall not make any law inconsistent with [fundamental rights provisions]", while the Supreme Court is vested with the judicial review power under Article 102 to adjudge any law as void for being inconsistent with fundamental rights. At odds with these fine manifestations of the rule of law concept is clause (3) of Article 26, inserted in 1973,[44] which kept any constitutional amendments outside the purview of clause (2).[45]

Importantly, there are unconditional guarantees of the right to life and the equal legal protection of all citizens irrespective of sex, race, status, religion or anything else.[46] Article 32 proclaims that "[n]o person shall be deprived of life

or personal liberty except in accordance with law", while Article 31 provides that everyone has an inalienable right to "enjoy the protection of the law, and to be treated in accordance with law", and that "no action detrimental to the life, liberty, body, reputation, or property of any person shall be taken except in accordance with law". In these provisions, without using the relevant nomenclatures, the Constitution seeks to portray 'human dignity' as a fundamental right and establish the imperative of 'the due process of law'. These provisions, read with the preamble, can thus be interpreted as having given rise to a right to honest and democratic governance which in turns sets a duty to make 'good' and 'qualitative' laws conforming to moral and ethical standards. These provisions no doubt lead to the principle that every state organ and functionary must justify their actions under the law.[47]

At the institutional level, the Constitution has provided for a representative democracy and responsible government, allocating 'separate' powers to each of the three branches of the State. Article 11 provides that the Republic shall be a democracy in which "effective participation by the people" through their elected representatives in administration at all levels shall be ensured. While the "executive power of the Republic" is exercisable by or on behalf of the Prime Minister, that power must only be exercised in accordance with the Constitution. On the other hand, the Cabinet has been made to be collectively responsible to Parliament.[48] The Constitution also provides for an independent Election Commission,[49] a responsible civil service,[50] and an independent judiciary.

The Constitution uniquely places the Supreme Court as its guardian, and seeks to ensure the court's authority to enforce the Constitution as a normative order by providing for arguably a strong form of judicial review. The High Court Division of the Supreme Court can review the constitutionality of executive actions, administrative legislations, judicial decisions, and laws including even constitutional amendments.[51] Judicial review is available on the grounds of not only the breach of the Constitution or its fundamental rights provisions, but also of the principle of legality.[52]

A brief history of the development of constitutionalism in Bangladesh[53]

Constitutionalism and the rule of law are mutually influential, and they both seek to attain the same goal of constitutional governance. In Bangladesh, the practice or the absence of constitutionalism has had a great impact on the society's capacity to establish and adhere to the rule of law.

The very emergence of Bangladesh in 1971, following the nine-month long historic war of independence, conveys its people's deep commitment towards the values of constitutionalism and the rule of law. The people of Bangladesh during the pre-Independence days (1947 to 1971) had long suffered the evils of military rule and social injustice, and hence they longed for a free society based on the rule of law. The constitutional founding moments[54] were filled with heightened zeal and intense commitment to a system of constitutional governance. Yet, ironically,

except for brief interludes of civilian/elected governments, Bangladesh for the most of its history has experienced authoritarian rule and the absence of rule of law. Sadly, throughout the past years, the situation of governmental unaccountability and impunity has often prevailed over the norms and ethos of constitutionalism, due mainly to constitutional manipulation by those in power.

Not too long after its entrenchment in the independence Constitution, Bangladesh's parliamentary democracy faced a tragic demise in 1974–75 when a one-party presidential form of government was installed through the most controversial Fourth Amendment to the Constitution, which dismantled several founding values of the nation such as the independence of the judiciary and political pluralism.[55] A state of emergency was imposed in 1974, and a law authorising executive detention of people suspected to be involved in the subversion of the State was enacted.[56] Paradoxical as it is, this subversion of the rule of law was carried out by the first post-Independence democratic government. Those sweeping changes were not only an intrusion into the identity of the polity, they also constituted a beginning of "paternalism" and the "absence of constitutionalism" in Bangladesh.[57]

For almost about the half of 45-odd years of its existence, Bangladesh has been 'ruled' by military or autocratic regimes. After the brutal assassination of the founding leader of the nation in August 1975, the military intervened and thwarted the Constitution altogether, pushing the country to a long autocratic era (1975–90) that ended up with a democratic transition in 1991 when a spontaneous public upsurge yielded to a new beginning of parliamentary democracy.[58] During that long autocratic regime, there was no political government at all, despite two sham general elections. The first martial law regime intruded into the secular base of the Constitution, a venture which was completed by the second martial law regime that made Islam state-religion.[59] In the sense that secularism is an expression of democracy[60] and constitutional equality of the citizens, these extra-constitutional interventions, notwithstanding their constitutionalisation, were nothing but subversion of the rule of law ethos.

Following the transition to democracy in 1991, a general election was held in accordance with a consensus-driven mechanism under the stewardship of the then-Chief Justice of Bangladesh, and multiparty democracy was restored. The restoration of democracy in 1991 inspired hopes that it would continue,[61] but the promise soon appeared to be hollow. When the first post-1990 government of the Bangladesh Nationalist Party (BNP) was about to complete its stint, a major political crisis concerning the mode of the next general elections was already looming. The opposition, the Bangladesh Awami League (AL), demanded a neutral, non-party CTG for holding a free and fair election. After a constitutional crisis of several months, the CTG, a special type of election-time government system, was introduced in 1996.[62]

The next two general elections (of 1996 and 2001) were held under the CTG administration. However, a few months before the scheduled 2007 elections, the then-ruling party (the BNP) adulterated the CTG system by increasing the retiring age of Supreme Court justices to 67 with a particular retiring chief justice in

mind as the CTG-head.[63] The opposition (the AL) announced that it would not participate in the election under that particular justice's leadership and reacted violently. Consequently, another irreconcilable political crisis ensued, resulting in a State of Emergency being declared in early 2007; the elections were postponed and a military-backed civilian CTG took the charge. The 2007 CTG remained in power for two years rather than for the constitutional three months, and the next election was held in December 2008 in which the AL won. Although the 2009 AL government did not publicly announce so, it likely had a plan to eliminate the CTG system, which by then became not only controversial, but it also revealed generic defects. In early 2011, the Supreme Court's Appellate Division declared the CTG system unconstitutional for being antidemocratic.[64] Soon after the "short order" of the Court and by relying on it as a legitimacy-giver,[65] the parliament hurriedly enacted a constitutional amendment abolishing the CTG system without the concurrence of the opposition.[66]

The new amendment triggered another crisis. Major opposition parties began violent protests to a degree never seen before to press their demand for the restoration of the CTG system. The ruling party, on the other hand, asserted that every election would be held under the incumbent government, as in other democracies. It is, therefore, not surprising that the third and so far the longest-running constitutional crisis in post-1990 Bangladesh ensued. Amid the boycott by the opposition parties, the elections of the tenth parliament were held on 5 January 2014, and were marked by chaos, terrorism and extremely low voter turn-out.[67] Ironically, the abrupt and unilateral exclusion of the CTG system on the plea that it was 'undemocratic' resulted in a type of distorted democracy. The elections of the tenth parliament were virtually a one-party election, with the AL once again in power and without any true opposition in parliament to challenge the government.[68] The current inclusion of a few less prominent political parties in governance seems to be a show of sham pluralism in the sense that they have in effect become subsumed in the ruling party, without any effective opposition at any rate. From the point of view of rule of law, the government is arguably deficient in democratic legitimacy, that is, the consent of the majority.[69]

The preceding narrative of Bangladesh's constitutional history illustrates how the rule of law has remained elusive in the country. Undeniably, there is a wider gap than is often appreciated between normative formulations of the Constitution and the socio–political realities. Although "the law" and "politics" should have been the ideal intuitions to establish, promote and maintain the rule of law, they have often been the factors twisting the rule of law. The military or autocratic regimes were, by nature, alienated from the rule of law. Intriguingly, by contrast, successive 'elected' governments also appeared failing in maintaining a political environment and ensuring good governance based on the rule of law. They quite frequently used the Constitution and the law for selfish interests, thereby polluting the course of constitutionalism. The lack of a permanent structure for holding free and fair elections has been a major source of instability that has cast serious negative impact on the rule of law. Beyond the issue of fair and participatory elections, substantive factors of constitutionalism also remained

unconsolidated and the existing governance institutions, including the Election Commission, have remained unsuccessful in making the 'elected' governments tread the rule-of-law path.

In the rest of the chapter, I examine the realisation, or the failure to do so, of the rule of law by way of analysing the rule of law principles with reference to three major areas: human rights protection, judicial independence and the accountability of the executive.

Human rights and social emancipation

In this heightened time of rule of law discourses, the link between the existence of rule of law and the level of protection of human rights in any given society hardly needs any explanation. As Peerenboom wrote, "[r]ule of law is seen as directly integral to the implementation of rights. Without rule of law, rights remain lifeless paper promises rather than the reality for many throughout the world".[70] Further, the rule of law presupposes democracy and is associated with economic development and political stability that "are key determinants in rights performance".[71] The 1959 Delhi Declaration defined the rule of law in the following terms:

> The function of the legislature in a free society under the Rule of Law is to create and maintain the conditions which will uphold the dignity of man as an individual. This dignity requires not only the recognition of his civil and political rights but also the establishment of the social, economic, educational and cultural conditions which are essential to the full development of his personality.[72]

In the modern sense of the notion of rule of law, therefore, there is embedded the imperative of emancipation of people from social injustices, which requires the effective and equal protection of both civil-political and social rights of all peoples including those who are often inappropriately called 'minorities'. As Amartya Sen has repeatedly yet ever-relevantly argued, the whole breadth of human rights discourse needs to be reshaped by the terminologies of human development and 'capabilities'.[73] Borrowing from Sen's idea of justice and development, the rule of law can be seen as having required, first and foremost, the removal of human inequalities and social injustice, not necessarily through laws.[74] This, in the special context of Bangladesh and similar societies, would arguably cast a responsibility on the part of the executive, for example, to ensure basic education and the basic health facilities for the multitude of people who are unjustly deprived of these elements of rights (entitlements), without which human dignity is rendered devoid of any substance. In the same vein, in terms of this vision of the rule of law, in addition to political actions as Sen envisioned, there is a duty on the State to enact laws that would ensure social and economic rights of the people beyond simply meeting the criteria of 'good' and 'ethical' attributes of the law.[75]

Below, I will analyse the rule of law from the perspective of human rights performance of the State, emphasising two aspects of it – social and economic rights of the people, and the rights of those people who are politically marginalised – but also taking up the traditional field of civil and political rights.

As noted above, the Constitution aspired to an exploitation-free society, based on social, economic and political justice. With the 'progressive realisation' of this goal in mind, the framers of the original text incorporated certain "fundamental principles of state policy" (FPSPs), which are indeed the most important social human rights. A conundrum with regard to the legal value of unenforceable social rights was, however, left unaddressed as the implementation of these social rights and the modus thereof were placed in the domain of the representative branches of the state. Unlike civil and political rights, the social rights, placed in Part II of the Constitution, are not subject to enforcement by the judiciary.[76] Put in other words, even an aggrieved community which is in desperate need of basic facilities and entitlements such as education, employment, medicine and so on would remain incapacitated to seek judicial help in mandating the State to undertake measures to ameliorate the condition of that community. Needless to say, this situation belies the rule of law. Seen in the light of Sen's "political normativity" theory of human rights as human capabilities, where basic human entitlements draw their value from an appreciation of political normativity, there are no rule-of-law-implications in non-enforceability of social rights. In the context of Bangladesh, however, where law-making is still largely colonial in nature as well as in spirit and the public policy-making is still power-facilitative and command-based rather than welfare-based, seeing social and economic justice purely as a matter of political wisdom of the executive and legislative branches would render the rule of law an empty rhetoric. In fact, apart from a few social welfare or poverty alleviation programmes of the government, undertaken inconsistently over the years, the social, economic and cultural rights of the people are pushed almost to a state of denial.

There are, however, chances for the realisation of the normative value of FPSPs. First, the Constitution mandates that these principles should be treated as "fundamental" in the governance of the State and law-making and as "a guide" to the interpretation of the Constitution and other laws.[77] Second, the Constitution established a concept of substantive equality, protecting any affirmative action that may have been taken to advance any "backward section" of citizens from being unconstitutional on the equality ground.[78] These provisions, when taken with the Constitution's emphasis on 'human dignity' and 'the rule of law', become amply generative of a duty to implement and enforce social rights. The judiciary, for that matter, can assert its authority in realising the Constitution's social justice goal.

It hardly needs any explanation that the realisation of social justice goal of the rule of law requires the existence of an unhindered access to justice. The Supreme Court of Bangladesh, through a progressive interpretation of the Constitution, entrenched the tool of public interest litigation (PIL) that opened a wide avenue for the court to reach to the people who are disadvantaged, disenfranchised and the

victims of social inequalities.[79] Empowered with the PIL-tool, the court initially began with, and showed its activity in the area of socio-economic rights, albeit through the 'negative' or 'indirect' enforcement model or by harmonising them with the enforceable fundamental rights.[80] Unfortunately, however, the question of transcending through 'access to justice' to 'justice' for the socially excluded became lost at some point. This fall of interest and zeal as regards social justice may be imputed, among other factors, to the problems of legal activism in Bangladesh that became – indeed it had to be – preoccupied with concerns for violation of civil and political rights.[81]

I now turn to the issue of protection of human rights of the socially marginalised people. The degree of the protection of rights of 'minority' – ethnic, linguistic, religious, or otherwise[82] – is sort of a mirror that reflects the quality of rule of law in a given society. The rule of law presupposes inclusive constitutionalism that ensures not only the political participation and representation of all peoples, but also protects their rights, both civil-political and socio-cultural, against the usurpation by the majority.[83] Various minorities in Bangladesh, in particular those religiously or culturally marginalised, are reported to have faced political, economic and social discriminations.[84] As a pluralist society with a democratic constitution, a constant challenge for Bangladesh is to protect all non-Bangalee and non-Muslim minorities, including even some Muslim minorities such as the *Shi'as* and *Ahmediyas*. The need to protect the rights of the terminally marginalised communities such as the aboriginals or indigenous peoples or those called 'minorities within minorities' such as *Dalits* is even more pressing.[85]

The Constitution, although it per se does not recognise the protection of minorities, protects "religious freedom"[86] and ensure legal equality of all citizens. Article 28 specifically prohibits any kind of discrimination against citizens, and authorises affirmative state actions for any under-advanced section of the public. The provision of "secularism"[87] as a fundamental state policy should also be creating an environment of equality at a wider level. The reality, however, is something else. Bangladesh's affirmative action regime continues to remain inadequate, and the issue of inclusive constitutionalism vis-à-vis the peoples that are excluded or marginalised remains under-addressed.

Despite its rule-of-law-base, the independence Constitution was fraught with the exclusion of cultural diversity and non-recognition of identity of certain ethnic groups. The question of inclusive governance as an aspect of the rule of law can be explained a little further by reference to the demand of indigenous peoples in the CHT for constitutional recognition of their cultural autonomy and the right of special governance, which was straightforwardly explained away in 1972.[88] Until the Fifteenth Amendment in 2011 that incorporated the policy of preservation of local culture and tradition, there was no mention at all in the Constitution of minorities or of cultural diversity. There have been some political efforts to widen the indigenous peoples' participation in governance. Given the political majority's over-obsession with hegemonic national identity, however, it seems that "formal acceptance of many of their basic demands on

political, economic, and cultural matters, including constitutional recognition as indigenous peoples, is still a long way away".[89] A reflection of this apprehension is to be found in the newly inserted Article 23A of the Constitution (a fundamental state policy) that requires the State to "protect and develop the unique local culture and tradition of the *tribes*, *minor races*, ethnic *sects* and communities".[90] The use of these terminologies to refer to the people who have been long demanding for their recognition as 'indigenous' or 'aboriginals' is incompatible with the concept of human dignity and inclusive governance.[91] The lack of constitutional recognition of aboriginals and indigenous peoples is an antithesis to the rule of law, and is linked with varying forms of human rights implications.[92]

I now take up the case of civil and political human rights, the most prominent of which are entrenched in the Constitution.[93] During the times of extra-constitutional and autocratic regimes, human rights were conditioned or depreciated by the absence of constitutionalism. It is not surprising that during those periods there was no meaningful protection of human rights. But how does one explain the controlled or, sometimes, restrained status of human rights entitlements during the 'democratic' regimes? The undeniable mutual influence of constitutionalism and human rights notwithstanding, it is quite intriguing to explain the relegated status of human rights in Bangladesh during democratic periods, sometimes reaching a level that is no better, but rather worse than that under autocracies.

One would immediately recall the recent phenomenon of lawlessness often manifested in such instances as forced disappearances, unlawful, arbitrary and secret detention of suspects, extra-judicial killings at an unprecedented pace and the associated illegitimate defence by senior law-enforcing officials of transgression by their forces, and so on. Is not the human rights protection a matter of culture, tradition and substantive democracy that is based on morality in politics, not merely a set of positive laws prescribing norms without deeply dealing with the 'facts'?[94] As regards human rights, Bangladesh's legal system seems to tolerate and even generate a gap "between facts and norms".[95] This claim requires a little more expansion. As against the constitutional as well as legal prohibition of torture and other cruel, inhuman or degrading treatment or punishment,[96] one sees the nasty legacy of arbitrary arrests, and torture and inhuman or degrading treatment of citizens by both State agencies and private individuals. Despite the unconditional constitutional right to life and the criminalisation of extra-judicial killing,[97] thus, the State continues to immunise those who would have been otherwise held liable.[98]

Another example of norm–facts gap could be the existence of a number of anti-liberty laws alongside the constitutional guarantee of freedom of expression and personal liberty. Take, for example, the case of section 57 of the Information and Commutation Technology Act 2006, which provides for a minimum seven years' term for "tarnishing the image of any person or the State" or for the act of "defamation" through publishing anything electronically.[99] Not surprisingly, therefore, abuses of this provision have already become more real than apparent,

leading to almost a complete negation of the rights of freedom of expression or conscience.[100] Similarly, despite the constitution's guarantee of legal equality of citizens, a few laws tend to unduly privilege those in positions of powers in the administration. Section 197 of the Criminal Procedure Code 1898, inherited from the British colonial period, provides an example of this. It states that criminal actions cannot be initiated against public officials without government approval if the offence is committed while the concerned officer is acting or purporting to act in his official capacity. This undermines the fundamental principle of equality of all irrespective of rank before the law. Discordance also exists between the establishment of human rights or good governance institutions and their co-existence with the grim 'facts' on the ground.[101]

In the post-9/11 period, a whole new challenge for governments across the world has been to uphold the principles of rule of law in dealing with the ever-escalating problem of terrorism. The idea of rule of law requires that the terrorists should be tried and punished. On the other hand, "rule of law plays a crucial role in ensuring that civil liberties are not encroached upon in the zeal to crack down on suspected terrorists".[102] Likewise, the challenge for Bangladesh is to strike a right balance between the security and terrorism concerns and the need for protecting the liberty and rights of the suspects. This is a difficult challenge indeed, at the least because those in power often tend to assume an exaggerated role of maintaining 'peace and order' at the cost of everything else. As evident in the recent human rights breaches, Bangladesh is showing clear traits of failure to meet the challenge of managing the tension just mentioned. Similar failures are glaring in the field of criminal justice administration where the basic constitutional guarantees of those suspected or arrested are more often than not violently denied. The balancing task has become apparently difficult for Bangladesh as the country has arguably embraced, and is now nurturing, a culture of force-based power as opposed to communicative or transformative power as a means of governance.

Against the above odds, however, there are a few positive developments. First, Bangladesh has shown commitment and willingness, at the international level, to live up to the global human rights standards. Bangladesh has ratified almost all core human rights instruments, which has brought the country within a certain level of international oversight of responsibility. The ratification of human rights treaties has also empowered the civil society actors, social impact organisations, and the judiciary with an additional tool to apply in the realisation of their respective roles vis-à-vis human rights. Second, the government has in recent years resorted to making a number of rights-based laws such as those guaranteeing the right to information, or the laws relating to women's and children's rights including those concerning human trafficking and domestic violence.

Judicial independence, judicial reform and the rule of law[103]

According to Joseph Raz, the benefits and virtues of the rule of law are obtainable "only in countries with certain practices and traditions" the first and foremost

of which is the democratic government and the second is "the existence of a strong and independent judiciary".[104] It is overwhelmingly acknowledged across the world that an independent judiciary is a pre-condition for the rule of law in a free society. In this section, I examine the nexus between the two concepts and their reciprocal impact,[105] without providing a too-detailed account of the theoretical nuances of the concept of judicial independence which lacks a general theory or a common definition.[106] Nevertheless, one cannot but begin with the question of what is meant by 'independence' of the judiciary when we regard it as a presupposition of the rule of law. Often, the concept is thought of in terms of some of its constitutive elements such as the security of tenure of judges, financial security of judges, objective judicial appointments, functional independence of judges and institutional independence of the judiciary as a whole.

Most scholars, domestic constitutions and international instruments[107] tend to focus on two necessary traits of judicial independence[108] – impartiality and "political insularity"[109] of the judges and their institution, the judiciary. Combining these two constituents of judicial independence, the UN Basic Principles on the Independence of the Judiciary[110] defined the notion in these words:

> The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.

Needless to say, even with these two attributes any given judiciary may not be institutionally efficient in promoting the rule of law. The key idea of framing different attributes of judicial independence is to develop a framework where judging is entrusted to a set of people who are reasonably independent, trained in liberal values of society, and capable of ascertaining the legal disputes in their proper perspective and thus can apply the law objectively, disinterestedly and without fear, fervour or favour, even against the government. From this point of view, Larkins' addition of a third element to 'impartiality' and 'insularity', namely the judiciary's institutional authority vis-à-vis other parts of the political system and society, is quite impressive.[111] As Larkins notes, an independent judiciary means and emphasises "a judicial branch which has the power as an institution to regulate the legality of government behaviour, enact neutral justice, and determine significant constitutional and legal values".[112] This definition, which puts certain weight on the enactment of justice, probably includes within its ambit the ability of the judiciary to force the state to perform its constitutional responsibilities in ensuring social justice, beyond merely preventing or remedying arbitrary state actions. In a wider context, therefore, liberalised "access to courts", a broader judicial authority over all "issues of judicial nature"[113] or to engage in fact-finding,[114] and the diversity on the bench[115] are important elements of judicial independence.

There is, however, a lack of universal standards or parameters for measuring judicial independence as broadly conceived of above. Even the most forthright

and personally impartial judges may not be able to assert their authority in a state where the judiciary either enjoys no significant independence or is substantially interfered with by the executive. The judiciary in Bangladesh during military and emergency regimes provided examples of such judges. The judges in Bangladesh almost shunned their responsibility of upholding justice during extra-constitutional and martial law regimes.[116] Except for some notable exceptions, the Court remained exceedingly deferential to the executive and resorted to subjective interpretation of the Constitution.[117]

By contrast, despite apparent political insularity (in terms of, for example, security of judges' service and ostensibly lawful appointments), a judiciary may still incur substantial non-independence arising from certain less visible inhibiting factors that may exist in a given political society, which seems to be the case presently in Bangladesh. Indeed, judicial 'authority' to a large extent depends on the creativity, intellectual foresights and personality of individual judges and the judiciary as a forum, as well as on the public confidence in the judiciary or the judges. Therefore, what appears to be needed is a combination of formal constitutional guarantees and real socio-politico-legal incentives for judicial independence.

Within the (limited) sphere of public reasoning and debates in Bangladesh, the issue of independence of the judiciary figures as the most prominent.[118] Beyond debates and discourses, 'politics' has, not infrequently, attacked the independence of judiciary in Bangladesh in a variety of manners. Having emerged as a sovereign nation in 1971 with unpleasant past experiences of political meddling with judicial independence,[119] Bangladesh constitutionally entrenched the principle of judicial independence. The original text of the Constitution in effect mandated separation of the judiciary "from the executive at all levels",[120] providing a legal framework for functional and institutional independence of the judiciary. It laid down provisions for the appointment of associate justices of the Supreme Court in consultation with the Chief Justice and guaranteed the tenure of their service by making a judge removable only on the ground of proved misconduct and infirmity pursuant to a resolution of Parliament passed by a two-third majority.[121] As regards the lower judiciary, the independence Constitution vested the authority of controlling and disciplining the judges in the Supreme Court.[122]

The framework of judicial independence, however, collapsed not too long after its establishment in 1972. Beginning in 1975, judicial appointments and removal procedures became increasingly politicised. The Fourth Constitutional Amendment demolished almost the whole of judicial independence. Even the judicial power to enforce fundamental rights was taken away from the court.[123] In this context, a few extra-constitutional amendments during the first martial law regime (1975–79) sought to restore some independence to the judiciary, but controversially introduced a peer-driven system of removal of Supreme Court judges.[124] In a similar way, the second martial law regime sought to make the judiciary ever subservient in the name of decentralising the Supreme Court.[125] After some experimentation and manoeuvring with the independence of the judiciary, the recent

Fifteenth and Sixteenth Amendments of the Constitution have largely restored the foundation policy relating to judicial appointments and de-appointments. According to amended Article 95(1), a change brought forth through the Fifteenth Amendment of 2011, the Supreme Court judges' appointments are now subject to the President's "consultation with the Chief Justice". On the other hand, the Sixteenth Amendment has re-introduced the system of judicial removal through parliament. This process apparently seems to be pro-democratic, but there are allegations that the government introduced the removal system to control the judiciary.[126] Despite a few good institutional reforms, certain problems of judicial independence still seem to persist. Bangladesh has not yet put in place any judicial appointments commission,[127] nor has it enacted any law determining judicial selection criteria beyond those mentioned in the Constitution.[128] Neither has been the control of members of the junior judiciary given back to the Supreme Court as was the case under the independence Constitution.[129]

While judicial protection of the rule of law largely depends on the existence of an active and independent judiciary, perceptive judges may well navigate through prevalent social factors and constitutional norms to attain the rule of law and maintain judicial autonomy.[130] The judiciary in Bangladesh has in a long series of cases shown its activism in protecting the independence of the judiciary,[131] which the Supreme Court termed "a basic pillar" of the Constitution in the famous case of *Anwar Hossain Chowdhury v. Bangladesh* (1989).[132] Following that landmark decision, the Supreme Court in another monumental decision in *Secretary, Ministry of Finance v. Md. Masdar Hossain and Others* (1999)[133] issued a few directives concerning the independence of, mainly, the lower judiciary.[134] As a direct result of this judicial intervention, the lower criminal judiciary became separate from the executive on and from 1 November 2007.[135] Further, a Judicial Service Commission for the recruitment of judges of the junior judiciary and a Judicial Pay Commission for them have been established. The *Masdar Hossain case* also directed to ensure the Supreme Court's financial autonomy, which has been largely realised lately. In another important decision handed down in the pre-2011 context of unwritten principle of consultation with the Chief Justice in appointing judges, the Appellate Division held that despite the absence of a posited duty upon the President to consult the Chief Justice while appointing associate justices, the practice of such consultation has turned out to be a binding constitutional convention and that the Chief Justice's opinion upon the executive's proposal of judicial appointments (in areas of legal acumen and suitability of the person concerned) shall have the primacy.[136]

Despite the formal constitutional guarantee of independence and the institutional support-base for judicial independence as briefly discussed above, it cannot be firmly claimed that the Bangladeshi judiciary has been always able to operationalise the rule of law principles. It is true that the judiciary could not function in a democratic environment for quite a long time. The long absence of democracy had left strains not only on constitutionalism but also on the top court judges of the country. Undeniably, the Bangladeshi judges began to robustly enforce the rule of law principles only lately, especially in the post-1990 democratic period. In this

period, except for the times of emergency-years (2007–08), they remained largely pro-active in upholding constitutionalism.[137] Yet, the top court judges can be critiqued for not adequately standing up for the protection of human rights in certain areas even during the times of 'elected' governments. An illustration of this could be the lack of any significant judicial activity against the continuing gross violation of constitutional rights arising from custodial deaths, police-brutalities, shootouts, or forced disappearances by law-enforcing agencies that have turned quite disdainful in recent times.[138] This type of failing is certain to have negative implications for the independence of the judiciary.

It seems that the judiciary still suffers a significant degree of non-independence. With the increase of the political importance of the Supreme Court arising mainly from judicial decisions entailing politico-legal consequences for the government,[139] successive post-1990 governments have indulged in overt or ingenious manipulation of, or interference with, the judiciary.[140] These actions include, but are not limited to, the import of political considerations into the judicial selection process, wide and non-transparent political discretion in appointing High Court Division judges to the Appellate Division and in appointing the Chief Justice, and the post-retirement appointment of judges to ostensibly quasi-judicial bodies such as the Law Commission,[141] a practice that quietly suppresses judges' independence.[142] Another similar factor is the politicisation of the bars and the bar council. A judiciary can be independent in true sense if and "only if it is supported by a strong and independent legal profession".[143] As Raz emphasised, "[a] politically manipulable legal profession can subvert the rule of law just as much as weak and politically manipulable courts".[144] With due regard to the glorious past of the legal profession which spearheaded many movements for the restoration of the rule of law in the country, it cannot be denied that Bangladesh's legal profession in recent years has become overly politicised, leading to the diminishing of its role in safeguarding the independence of the judiciary and the integrity of the rule of law.

The most notorious factor inhibiting judicial independence seems to be the executive's leeway with regard to the 'confirmation' of the service of any particular additional judge after her provisional service in the High Court Division often in disregard of the Chief Justice's advice.[145] Of similar effect is the executive's frequent disregard of the tradition of elevating the most senior High Court Division judges to the Appellate Division.[146] Frequent supersession of judges while making appointments to the both Divisions of the Supreme Court "without having any regard to their competence" remains a serious threat to the independence of the judges.[147] To the extent that activist decisions might displease the government, it is likely that additional judges expecting to be appointed as permanent judges as well as judges aspiring to be elevated to the Appellate Division are more likely to exercise caution and conservatism.[148] As a leading member of the bar wrote in 2010,

> the failure to overhaul inherited institutional structure, and the continued intervention of deeply embedded vested interests, further exacerbated by overt politicization of the court, … have – if not as yet demolished – certainly

diminished and curtailed the scope for the court to operate with full independence.[149]

There is yet another element, internal to the court administration, which is likely to entail a significant obstacle to the HCD-judges' mental independence. This is the Chief Justice's personal administrative power to constitute or deconstitute any particular bench of the HCD that, *inter alia*, has the most politically important constitutional review jurisdiction. The potential consequences of any motivated exercise of this administrative function of judicial governance may be hidden but are not unreal.[150] This point needs a little more elaboration. First, the government retains enormous power to appoint the Chief Justice by superseding the most senior judge(s) of the Appellate Division and thereby to arm itself to manipulate the judiciary through an arguably pliable Chief Justice. Second, the Chief Justice is under no obligation to explain the reasons for reshuffling HCD benches. Third, there are neither formal criteria nor any judicial body to ensure transparency in this important function of the Chief Justice. Fourth, there even is not any judicial appointment commission which would be able to mitigate or possibly prevent politicisation of appointments in the highest court right from the beginning.

Even despite the formal constitutional guarantee of judicial independence in Bangladesh, several political and internal factors like those discussed above do arguably constitute an atmosphere where judges are not fully free from fears of political retaliation and manipulation. The question, however, remains whether the judiciary would be able to overcome such problems of judicial independence. Doubtless, mitigation of the factors of judicial non-independence depends on a political will to abide by both the letters and spirit of the Constitution, which seems not to be an imminent reality. In this backdrop, the judiciary's assertion of its authority and autonomy, particularly when deciding cases involving the principle of judicial independence, would arguably have an impact on the rule of law. At another level, unless the appointment and removal processes are attuned to "altered realities",[151] global and local, the judiciary would remain incapacitated in realising its core values and to function optimally as a rule-of-law instrumentality. A good way to that end might be to install a collegiate forum in the form of a 'council' or 'commission' consisting of mostly judicial members[152] to consider the nominations for the Supreme Court.[153] Other ways would be to set the minimum standards for the qualifications of the appointables in the judiciary, and to install efficient internal mechanisms to check corruption[154] and ensure transparency within the institution.

The concept of rule of law in the context of judicial independence in Bangladesh should necessarily be seen as requiring essential reform at all strata of the judiciary. To reiterate the obvious, rule of law will be meaningless and the independence of the judiciary will fall into disrepute if the people cannot get justice promptly and without having to spend too much. The present costly and dilatory justice-delivery system in Bangladesh is quite obstructive to the realisation of the rule of law.[155] It is well known that each court in the country is extremely

overburdened and judicial processes are prohibitively costly.[156] Often, the litigants, especially those financially constrained, need to wait for years and spend almost the last penny to get justice. For the rule of law to prevail, there is no better way than to make reasonably prompt and affordable justice available to the litigants. In the field of criminal justice administration, in addition to excessive delays, there is the need for a major overhauling, including reform in the police and the prosecution wings of the system.

Accountability of the executive

It hardly needs any stressing that the rule of law calls for an accountable executive and a responsible government that would endeavour to attain "governance", based on principles of justice, instead of ruling a country.[157] Joseph Raz linked the rule of law to the existence of any given country's suitability for democratic government. This, Raz continued, demands above all a culture of restraint and compromise on part of the "current majority" in circumscribing its dominance in a way that respects the interests and beliefs of the "current minorities".[158] Preventing the tyranny of majority is indeed a primordial goal of any true democracy. From the context of Bangladesh, the challenge of the rule of law seems to be the establishment of a democratic government – as opposed to the one that is merely elected – which would be not only empowered (and duty-bound) to promote and protect the people's welfare but would also be duly constrained and limited in dealing with its citizens.

As noted above, the independence Constitution provided for a responsible democratic government and a functional scheme of separation of powers, within which is embedded the idea of a responsible executive. The Constitution, for example, provides for parliamentary oversight of the executive, among other things, through the committee system,[159] while the Supreme Court is endowed with judicial review power over executive actions and inactions. There were nevertheless some criticisms that the Bangladeshi Constitution was fraught with an imbalanced power-equilibrium, with a Prime Minister being overly empowered. These criticisms are largely misplaced, although it is true that intrusions were subsequently made to the founding idea of a responsible and balanced executive. Two such major intrusions are: (i) constitutionalisation of the concept of executive/preventive detention (i.e. detention without trial) in 1973[160] and (ii) the entrenchment of emergency powers, giving almost an unchecked power to the executive to promulgate emergency and to suspend the citizens' "right to move any court" for the enforcement of "such" of the fundamental rights as may be specified by it.[161] Emergency provisions have been a little rationalised recently, but the executive's unbound power to postpone the enjoyment of any of the fundamental rights including those that cannot be deviated from even during a war continues to exist.[162] Needless to say, therefore, these provisions are at complete odds with the rule of law.

Apart from the constitutional deviations as just discussed, there also exists a large gap per se between the ideal and the reality. Despite the framers' original

scheme of accountable governance, the executive branch in Bangladesh is becoming increasingly overweening and over-empowered due to, among other causes, ineffective institutional structure and over-centralised party leaderships. In effect, legislative and executive powers in any parliamentary system are diffused only theoretically. In practice, party monopoly in, and executive dominance over parliament and the presence of a group of same people in both stations of power often generate arbitrariness, oppressive majoritarianism and abuses of power. This problem of parliamentary democracy is hard to overcome unless there is a strong political tradition of respecting the oppositions ("the minorities") and of democracy within the political parties. In Bangladesh, governance of political parties is fraught with sheer 'political' and personalised interests of party leaders. There are studies that argue that an extreme form of "party overinstitutionalization"[163] and the nature of the Bangladeshi political parties are primarily responsible for the lingering crisis of democratic transition in Bangladesh.[164]

As noted above, 'electoral democracy' is in operation in Bangladesh, but the consolidation of substantive democracy has remained rather unattained. Despite all good constitutional provisions including the recently modified anti-defection rule,[165] parliament is increasingly losing its credibility as a check on the executive, which is evident, *inter alia*, in the conspicuous failing of parliamentary committees. Conversely, executive dominance over the parliament has become an unintended reality, leading to a poorly functioning parliament that is increasingly unable to control law-making in a constitutional sense.[166]

To hold any executive within the proper bounds of 'the law', there should be both institutions and 'laws' capable of putting adequate legal checks on the executive. For that matter, the rule of law requires that, in addition to organic institutional mechanisms such as the judiciary and parliamentary committees, and other publicly-funded independent agencies such as the Anti-Corruption Commission,[167] there should also be an objective civil service and a rule-based police department. To borrow from Raz, "the ways in which a corrupt police force or civil service can undermine the rule of law are too numerous and too obvious to require elaboration".[168] In recent years, the police in Bangladesh have increasingly applied the law subjectively in addition to resorting to extra-legal practices, while the government has appeared reluctant in enforcing accountability. The practice of custodial deaths or violence (in whatever name such as 'encounter' or 'crossfire' they might be expressed) 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 abuse their legal power.

One of the greatest checks vis-à-vis potential abuses of power by the executive that democracy has in its folder is an independent and assertive judiciary. The judiciary's accountability role,[169] however, becomes blurred in a situation of politicisation of the judiciary, or when the judiciary becomes deficient in quality and public reasoning. Judiciary is but one accountability mechanism. Bangladesh has established several non-judicial accountability institutions, namely the National Human Rights Commission (NHRC), the Anti-Corruption Commission

(ACC), and the Information Commission.[170] These independent bodies could be a vital means of restraint on the potential abuses of public power by the executive. They, however, are plagued by problems of independence and efficiency. Take, for example, the case of the Human Rights Commission of Bangladesh, a commission that was established more as a political technique to respond to the demands of external sources than as a means to meet the imperative of the rule of law as understood in the local context. The constitutive law of the Human Rights Commission has not provided this forum with any effective means to redress human rights breaches and abuses.[171] This analysis is also largely true of the ACC, the functional responsibility of which has become increasingly handicapped, arguably because of both ingenious political interventions and the politicisation of it. It seems that there is a lack of political will to make the ACC an independent and effective organisation. This tendency is discernible from, for example, the attempts of the government to problematise the prosecution of public officials for corruption.[172]

Any analysis on the interface between executive accountability and the rule of law would remain incomplete without reference to the deleterious impact of corruption in the administration. Corruption is a major threat to the rule of law, democracy and human rights of the people in Bangladesh.[173] Practices of political, bureaucratic, and institutional corruption are endemic in Bangladesh. The continuing existence of corruption, irregularities in public contracts, and keeping of official secrecies,[174] which ultimately deny the people's right to good and open governance, are an antithesis to the rule of law. Yet, legal and institutional checks against executive corruption in particular have largely proved ineffective.[175]

Conclusion

The aim of this chapter has been to present the concept of rule of law in the context of Bangladesh. As seen above, the rule of law in Bangladesh is entrenched in the country's legal and constitutional order as an overarching normative imperative. Yet, there is an increasingly visible continuing gap between norms and reality.[176] The realisation of rule of law is deeply tied with political and social culture, tradition and practices. This chapter suggests that the quality of rule of law in Bangladesh has been often shaped and conditioned by such factors as instability and uncertainties in politics, politicisation of the judiciary, and the absence of enough ameliorative laws. A particularly critical factor that will more likely continue to influence the content and dynamics of the rule of law is the lack of a functional consensus about the basic visions of the nation.[177]

Human rights performance of the State and the governance appear to be not adequately inclusive. Good efforts notwithstanding, human rights practices in Bangladesh continue to remain affected by "negative influence of colonial legacies"[178] and deficient in a transformative vision. On one level, the State seems to be not taking seriously the human rights of the vulnerable or weak groups such

as the indigenous peoples. On another level, there is a rise of breaches of civil and political rights of the people mostly by State-agencies, while restrictive laws and the inefficiency or lack of institutions seem to potentially constrict the rule of law. Effective protection of human rights should be seen not just as an attribute of the rule of law but rather as a means for achieving it.

As this chapter showed, there are also problems of independence of the judiciary and of accountability on the part of the executive. Existing accountability institutions in Bangladesh, including from political parties to the bureaucracy and the law-enforcing agencies, are largely affected by the absence of internal democracy and transparency as well as by the absence of a culture of justification and the faithful, unbiased application of laws. Democracy in Bangladesh, it seems, is increasingly unstable and in an ever-transitioning state, which has had a reductionist impact on the nation's ability to manage diversities and pluralism. As argued above, 'constitutionalism' here is fraught with practices that are overly pro-procedural and exclusionary in nature in that the values of public participation and socio-political pluralism are often not given due regard. This scenario is certainly not helpful for the establishment, maintenance, and consolidation of the rule of law. To reiterate Joseph Raz's proposition, the rule of law presupposes a strong political culture of democracy and inclusiveness. The rule of law can only operate where there is clear political commitment and willingness to operate within the law and parameters of just governance.[179]

Notes

1 I would like to thank Dr Chowdhury Ishrak A. Siddiky for planning and implementing this timely and promising book project. I also gratefully acknowledge Professor Werner Menski's insights and comments on an earlier draft of this chapter that helped me make necessary improvements.
2 See Samuel P. Huntington, "Democracy's Third Wave" *Journal of Democracy* 2(2) (1991): 12–34 and *The Third Wave: Democratization in the Late Twentieth Century*. Oklahoma: University of Oklahoma Press, 1991.
3 See K. Erbeznik, "Money Can't Buy You Law: The Effects of Foreign Aid on the Rule of Law in Developing Countries" *Indiana Journal of Global Legal Studies* 18(2) (2011): 873–900. Erbeznik argues that despite billions of dollars in foreign aid having been spent trying to promote the rule of law in developing countries, in many cases little observable progress has been made.
4 U. Baxi, "Rule of Law in India: Theory and Practice". In Randall Peerenboom (ed.), *Asian Discourses of Rule of Law: Theories and Implementation of Rule of Law in Twelve Asian Countries, France and the US*. New York; London: Routledge, 2004, 324–45.
5 Ibid.
6 Supra note 3, at 873.
7 As Baxi (supra, note 4, at 318) notes, "prescriptive bases [of the rule of law] also remain contested sites. The diversity may seem desirable even for its own sake in a post-modern world".
8 Ibid.
9 Ibid. For ideas of the different statuses of rule of law in certain Asian countries, see Peerenboom, supra note 4.

10 J. Raz, "The Politics of the Rule of Law" *Ratio Juris* 3(3) (1990): 331–39. See further J. Raz, *The Authority of Law*: *Essays on Law and Morality*, 2nd edition. Oxford: Oxford University Press, 2009.
11 By bureaucratic justice, Raz meant the idea of formal justice, where "bureaucratic institutions" deal with "isolated individuals" on the basis of fairness, and known and predictable law. Raz, "The Politics of the Rule of Law", supra note 10, at 332.
12 Ibid., at 339.
13 A. An-Naim, "Law and Development: The Rule of Law in Developing Countries" *Third World Legal Studies* (1986): 33–38, at 38 (reflecting on his experiences of teaching a course on 'The Rule of Law in Developing Countries' in a US Law School in the 1980s). See also Erbeznik, supra note 3, who thinks that one reason why rule of law reform efforts in developing countries have stalled was the focus of those donor-driven efforts solely on formal rule of law institutions, rather than on the informal political or cultural norms that are needed to support such institutions.
14 Yet I do not provide any statistics about, nor do I resort to any yardstick for measuring, the rule of law in Bangladesh. For a review somewhat of that sort, see Md. M. Rahman, "Rule of Law and Reality: Bangladesh Perspective" *Prime University Journal* 8(1) (2014): 32–69.
15 For various rule of law concepts, see Richard H. Fallon, "The Rule of Law as a Concept in Constitutional Discourse" *Columbia Law Review* 1 (1997); W. C. Whitford, "The Rule of Law" *Wisconsin Law Review* (2000): 723; R. Kleinfeld, "Competing Definitions of the Rule of Law". In Thomas Carothers (ed.), *Promoting the Rule of Law Abroad: In Search of Knowledge*. Washington, D.C.: Carnegie Endowment for International Peace, 2006, 31–74; B. Z. Tamanaha, *On the Rule of Law: History, Politics, Theory*. Cambridge: Cambridge University Press, 2004 esp. at 91–113 (providing an in-depth look at formal and substantive theories of the rule of law, and the differences between the two); James J. Heckman, Robert L. Nelson, and Lee Cabatingan (eds), *Global Perspectives on the Rule of Law*. London: Routledge, 2009.
16 See, for example, Plato, *The Laws* (Trevor J. Saunders trans.). London: Penguin, 1970 (dealing, *inter alia*, with the rule-of-law problem of preventing arbitrary and illegal actions by officials); *The Republic* (Desmond Lee trans.). London: Penguin, 2008; Aristotle, *Politics* (H. Rackham trans.). Cambridge, MA: Harvard University Press, 1977; *The Politics and the Constitution of Athens* (Stephen Everson *et al.* eds). Cambridge: Cambridge University Press, 1996. For analyses, see Glenn R. Morrow, "Plato and the Rule of Law" *The Philosophical Review* 50(2) (1941): 105–26; Brian Burge-Hendrix, "Plato and the Rule of Law". In I. B. Flores and K. E. Himma (eds), *Law, Liberty, and the Rule of Law*. Ius Gentium: Comparative Perspectives on Law and Justice 18, Springer, 2013, 27–47; and Jill Frank, "Aristotle on Constitutionalism and the Rule of Law" *Theoretical Inquiries in Law* 8(1) (2007): 37–50.
17 In England, the 1215 Magna Carta, for example, emphasised the need for an independent judiciary and a uniform judicial process for all citizens.
18 A. V. Dicey, *Introduction to the Study of the Law of the Constitution*. London: McMillan and Co, 1885. In 1915, Dicey himself prepared the last (eighth) edition of his book, in which he noted a "decline in reverence for rule of law" in England. As he remarked in the introduction to this edition:

> [t]he ancient veneration for the rule of law has in England suffered during the last thirty years a marked decline. The truth of this assertion is proved by actual legislation, by the existence among some classes of a certain distrust both of the law and of the judges, and by a marked tendency towards the use of lawless methods for the attainment of social or political ends.

19 For the idea of the rule of law in modern Britain, see T. Bingham, *The Rule of Law*. London: Allen Lane, 2010; and J. Jowell, "The Rule of Law". In J. Jowell, D. Oliver

and C. O'Cinneide (eds), *The Changing Constitution*, 8th edition, Oxford: Oxford University Press, 2015, 13–37.

20 On the idea of rule by law with a special reference to the role of the judiciary, a phenomenon of autocratic regimes, see in general Tom Ginsburg and Tamir Moustafa (eds), *Rule by Law: The Politics of Courts in Authoritarian Regimes*. Cambridge: Cambridge University Press, 2008; and J. Li, "The Leviathan's Rule *by* Law" *Journal of Empirical Legal Studies* 12(4) (2015): 815–46 (arguing that courts in an authoritarian regime such as China become a ready servant to serve the interest of the authorities).

21 For the classic exposition of the moral value of the rule of law, see further J. Jowell, "The Rule of Law and its Underlying Values". In J. Jowell and D. Oliver (eds), *The Changing Constitution*, Oxford: Oxford University Press, 7th edition, 2011 at 11–34 (seeing the "rule of law" as not a theory of law but as a principle of institutional morality inherent in any constitutional democracy, conforming to substantive values of legality, certainty, accountability, efficiency, due process and access to justice).

22 A limitation of this aspect is that what is good is a question that is subject to a continuous debate, and not answerable with precision. As Baxi (supra note 4, at 318) argued, this question entails a "complete social philosophy" which deprives the notion of any useful function. Despite cogency in this argument, this view can be contradicted by making a reference to the institutions and principles of the rule of law that can work to ensure the rule of relatively 'good law'.

23 L. Fuller, *Morality of Law*. New Haven, CT: Yale University Press, 1969 at 39. For an appreciation of Fuller's idea of rule of law, see Colleen Murphy, "Lon Fuller and the Moral Value of the Rule of Law" *Law and Philosophy* 24 (2005): 239–62. See also David Luban, "The Rule of Law and Human Dignity: Reexamining Fuller's Canons" *Hague Journal of Rule of Law* 2 (2010): 29.

24 Hart, for example, argued that even a dictatorial regime with no respect for morality or fundamental rights may be able to meet Fuller's requirements of law. Hart did not himself examine whether any dictatorial regime would practicably have a system of legal rules of Fullerian model. See H. L. A. Hart "Positivism and the Separation of Law and Morals" *Harvard Law Review* 71 (1958): 593–629. For Fuller's reply, see L. Fuller, "Positivism and Fidelity to Law – A Reply to Professor Hart" *Harvard Law Review* 71 (1958): 630–72.

25 On this, see, among many works, B. Z. Tamanaha., *On the Rule of Law: History, Politics, Theory*. Cambridge: Cambridge University Press, 2004, 91–113 (seeing democracy as an extension of the 'formal' rule of law concept, and democratic accountability and rule-making as part of a 'thicker' formal rule of concept).

26 Baxi, supra note 4, at 321.

27 Later, in 1964, Fuller poignantly elaborated the nexus between human dignity and the rule of law. See Fuller, *Morality of Law*, supra note 23.

28 See International Commission of Jurists, *The Rule of Law in a Free Society*. *A Report on the International Congress of Jurists*, New Delhi, India, 5–10 January 1959. The *Declaration of Delhi 1959* on the Rule of Law re-emphasised the people's right to responsible government, the legislature's obligation to conform to minimum standards of law, the judicial review of executive actions and delegated legislations, the fair and public criminal trial (meaning criminal justice for the accused and the victims), independence of the judiciary and the legal profession. The Declaration and the report are available at: http://icj.wpengine.netdna-cdn.com/wp-content/uploads/1959/01/Rule-of-law-in-a-free-society-conference-report-1959-eng.pdf.

29 The Secretary General, *Report of the Secretary General: The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, UN Doc. S/2004/616, at 4 (23 August 2004).

30 A. Sen, *The Idea of Justice*. London: Allen Lane, 2009. See further below.

31 Even since the time of the dictatorial regime, it has been quite fashionable in Bangladesh to cite and refer to the rule of law vocabularies. Paradoxically, however, there is a dearth of analytical literature on the rule of law in Bangladesh. But see M. Islam, *Rule of Law in Bangladesh*. (Syed Ishtiaq Ahmed Memorial Foundation Lecture 2005). Dhaka: Asiatic Society of Bangladesh; S. Malik, "Civil Society and the Rule of Law: The Bangladesh Context". In Mizan R. Khan and M. H. Kabir (eds), *Civil Society and Democracy in Bangladesh.* Dhaka: Academic Publisher, 2002, 75–107; and M. H. Rahman, "The Rule of Law and Independence of the Judiciary". In *The Rallying Power of Law*. Dhaka: Pustaka, 1997, 142–52.
32 On this, see Chapter 4 in this volume.
33 The Constitution was adopted on 4 November 1972 and came into effect on 16 December 1972.
34 *Anwar Hossain Chowdhury v. Bangladesh* (1989), below note 51 (holding that Parliament cannot by a law or constitutional amendment derogate from the rule of law principle). See especially the opinion of M. H. Rahman J. at p. 174 of the judgment.
35 The preamble to the Constitution proclaims that, to establish "rule of law" and social, economic and political justice is a "fundamental aim" of the State.
36 G. Rizvi, "Democracy and Constitutionalism in South Asia: The Bangladesh Experience". In E. Venizelos and A. Pantelis (eds), *Civilization and Public Law*. London: Esperia Publications, 2005. Available at: www.innovations.harvard.edu/sites/default/files/8644.pdf, last accessed 30 April 2016.
37 For example, Article 28 that enables affirmative action. The Constitution adheres to an equitable concept of equality, exempting affirmative actions for any "backward section" of citizens from being unconstitutional.
38 See the preamble and Article 8 of the Constitution. Originally adopted in 1972, these core values were discarded or modified during the martial law regimes. They have, however, been restored, albeit in a compromised state through the Fifteenth Amendment of the Constitution in 2011.
39 *Md. Shoib v. Government of Bangladesh* (1975) 27 DLR (HCD) 315, in which case Bhattacharya J. considered popular sovereignty and constitutional supremacy as "basic" ideals of Bangladeshi constitutionalism.
40 See Article 8 of the Constitution. Insertion of these principles as non-enforceable social goals was influenced by similar Indian constitutional provisions on 'directive principles'. For the debate on the normativity of such directive principles see Upendra Baxi, "Directive Principles and Sociology of Indian Law" *Journal of the Indian Law Institute* 11(3) (1969) 2: 45–72.
41 Article 16 of the Constitution.
42 K. Hossain, "Interaction of Fundamental Principles of State Policy and Fundamental Rights". In S. Hossain, S. Malik and B. Musa (eds), *Public Interest Litigation in South Asia: Rights in Search of Remedies.* Dhaka: University Press Limited, 1997, 43–52, at 43.
43 Articles 26 to 47A (Part III) of the Constitution, of which Articles 27 to 44 deal with specific fundamental rights, and Articles 45 to 47A provide certain exceptions and save the authority of certain laws.
44 Section 2 of the Constitution (Second Amendment) Act, 1973 (Act No. XXIV of 1973).
45 Article 26(3) reads as follows: "Nothing in this article shall apply to any amendment of this Constitution". There are strong doubts regarding the extent to which this sweeping provision is compatible with the concept of rule of law.
46 Articles 27–29, and 31–32.
47 M. Islam, *Constitutional Law of Bangladesh*, 2nd edition. Dhaka: Mullick Brothers, 2003, at 61.
48 Article 55, clauses (2)–(3) of the Constitution.
49 Articles 118–26 of the Constitution.

50 For example, Article 21 that says that to strive to serve the people at all times is a fundamental duty of every public official.
51 Judicial reviewability of constitutional amendment was established in *Anwar Hossain Chowdhury v. Bangladesh* (1989) BLD (AD) (Special) 1 (*the Eighth Amendment Case*).
52 Article 102 of the Constitution, to be read with Articles 26(2), 44(1), and 7.
53 These paragraphs draw on my earlier works, See R. Hoque, "Constitutionalism and the Judiciary in Bangladesh". In Sunil Khilnani, Vikram Raghavan and Arun K. Thiruvengadam (eds), *Comparative Constitutionalism in South Asia*. New Delhi: Oxford University Press, 2013, 303–40; and "Judicialization of Politics in Bangladesh: Pragmatism, Legitimacy, and Consequences". In Mark Tushnet and Madhav Khosla (eds), *Unstable Constitutionalism: Law and Politics in South Asia*. New York: Cambridge University Press, 2015, 261–90.
54 This refers to the time when the newly born nation set out to make its own Constitution, which was drafted by a thirty-four-member Constitution Drafting Committee of the Constituent Assembly comprising 403 members who were elected in the 1970 elections for provincial and central legislative assemblies of the then Pakistan. Starting in mid-April 1972, the Committee held more than 70 meetings and several public consultations, after which it finalised the draft in early October 1972. There is a paucity of literature on the history of constitution-making. But see A. F. Huq, "Constitution-Making in Bangladesh" *Pacific Affairs* 46(1) (1973): 59–76; S. Malik, "Laws of Bangladesh". In A. M. Chowdhury and F. Alam (eds), *Bangladesh: On the Threshold of the Twenty-First Century*. Dhaka: Asiatic Society of Bangladesh, 2002, at 434.
55 The Constitution (Fourth Amendment) Act 1975 (effective 25 January 1975) (among other things, making the Supreme Court judges removable without legal process and taking off the Court power to enforce constitutional rights, and abrogating the most basic of civil rights – freedom of expression). On the failure of parliamentary democracy, see J. S. A. Choudhury, *Bangladesh: Failure of a Parliamentary Government 1973–1975*. London: Jamshed Foundation, 2005.
56 The Special Powers Act 1974. Preventive detention and emergency provisions were inserted into the Constitution in 1973. See note 160 below.
57 Paraphrased from Y. Ghai, "The Theory of the State in the Third World and the Problematics of Constitutionalism". In D. Greenberg *et al*. (eds), *Constitutionalism and Democracy: Transitions in the Contemporary World*. New York; Oxford: Oxford University Press, 1993, 186–96, at 187.
58 The autocratic then-ruler, General H. M. Ershad, resigned as President on 6 December 1990, ultimately making way for the chief justice of the country to become the President and to lead the neutral election-time government. For these accounts, I rely on my work: *Judicial Activism in Bangladesh*, below note 80, at 95–96.
59 Now see Article 2A of the Constitution, first introduced by the Constitution (Eighth Amendment) Act 1988, and amended by the Constitution (Fifteenth Amendment) Act 2011.
60 A. Anwar, "The Future of Secularism". In Ali Anwar (ed.), *Secularism* (in Bangla). Dhaka: BPL, 2015, 103–18, at 114–15.
61 M. H. Rahman, "Our Experience with Constitutionalism" *Bangladesh Journal of Law* 2(2) (1998): 115–32.
62 The now repealed non-party Caretaker Government (CTG), introduced through the Thirteenth Amendment to the Constitution, was to take power following the dissolution of parliament and for three months, principally to oversee the general elections.
63 See the Constitution (Fourteenth Amendment) Act 2004, amending Article 96(1). According to the now repealed Article 58C, the most recently retired chief justice was to be the first choice as the Chief of the CTG.
64 *Abdul Mannan Khan v. Bangladesh* (2012) 64 DLR (AD) 1 (an appeal from *M. Saleem Ullah v. Bangladesh* (2005) 57 DLR (HCD) 171; judgment of 4 August

2004). The challenge was made in 1999 (WP No. 4212 of 1999), after another challenge in WP No. 1729 of 1996 was unsuccessful.

65 I elsewhere critiqued this as an extreme example of judicialisation of politics. See Hoque, "Judicialization of Politics", above note 53.

66 See the Constitution (Fifteenth Amendment) Act 2011 (Act No. XIV of 2011). Although the government claimed that a constitution-reform committee had been working for two years preceding the Fifteenth Amendment, the committee was actually formed to consider changes in light of the Supreme Court's decisions striking down the Fifth and Seventh Amendments. The committee, however, held quick consultations before finalising its report on the Fifteenth Amendment Bill, and was advised by experts and politicians not to discard the CTG system. In its 29 May 2011 decision, the committee decided to retain the CTG system, but ultimately recommended its abolition.

67 For a brief account of the political crisis of the time, see Ali Riaz, *Congressional Testimony: Bangladesh in Turmoil: A Nation on the Brink?* (Testimony before the Sub-Committee of the House of Representatives), 20 November 2013.

68 Candidates in 153 seats (of 300 seats to be elected) were declared 'elected' without contestation. Also, candidates of the Jatiya Party – which, after submitting nominations of candidature, declared that it would not participate in the 2014 election – were elected because their withdrawals were held to be not lawful. This party later joined the current Cabinet. As such, although the government officially appointed the Jatiya Party as the opposition party, it seems to have become a sham opposition in parliament.

69 That there is a distinction between representation and legitimacy needs to be appreciated. As Mehta explained, "[*r*]*epresentation* refers to a process of popular authorization. Legitimacy concerns the reasons that people have for accepting the political relationships in which they find themselves". See P. B. Mehta, "The Indian Supreme Court and the Art of Democratic Positioning". In Tushnet and Khosla (eds), supra, note 53, at 241. Needless to say, when "popular authorization" becomes questionable, legitimacy also becomes strained. On legitimacy and democracy see further R. A. Dahl, *On Democracy*. New Haven, CT: Yale University Press, 1998; and J. Vidmar, "Judicial Interpretations of Democracy in Human Rights Treaties" *Cambridge Journal of International & Comparative Law* 3(2) (2014): 532–55 (arguing that international human rights courts have clearly established a requirement for multiparty elections as a condition for democracy).

70 R. Peerenboom, "Human Rights and Rule of Law: What's the Relationship?" *Georgetown Journal of International Law* 36(3) (2005): 809–945.

71 Ibid., 812.

72 Clause 1 of the Conclusions of the First Committee attached to the Declaration of Delhi 1959, supra, note 28.

73 See A. Sen, *Development as Freedom*. New York: Knopf, 1999; *The Idea of Justice*, above note 30. See also A. Sen, "The Elements of Theory of Human Rights" *Philosophy & Public Affairs* 32(4) (2004): 315–56.

74 A. Sen, "Thirteenth Annual Grotius Lecture Series: The Global Status of Human Rights" *American University International. Law Review* 27(1) (2012): 1–15 (focusing on the 'political normativity' of human rights, that is,

> the understanding that certain basic entitlements come not from specific national legislation, but from the recognition that these freedoms (to which people in general could be taken to be entitled) come from general appreciation of normativity, rather than any specific territorial legislation.

For a critical analysis of Sen's idea, see K. L. Scheppele, "Thirteenth Annual Grotius Lecture Response: Amartya Sen's Vision for Human Rights – and Why He Needs the Law" *American University International Law Review* 27(1) (2012): 17–35.

75 On this point, Baxi fascinatingly critiques the usual notion of rule of law that merely speaks of "constraints upon lawmaking (legislative) power" but does not adequately speak about "any ethical obligation to make law, a public 'right' to have a law made for disadvantaged, dispossessed and deprived peoples" (supra, note 4, at 319).

76 Article 8(2) of the Constitution. There was not much debate in the Constituent Assembly about the enforceability of FPSPs. In a singular exception, Mr Suranjit Sengupta, the only opposition member in the Constitution Drafting Committee, objected that judicial non-enforceability of social rights made the whole content of Part II of the Constitution nugatory, and urged for the deletion of this bar. See Huq, supra, note 54, at 62.

77 Article 8(2) of the Constitution. As Hossain (above note 42, at 43) argued, these principles clearly provided the mandate for innovative laws, institutions and remedies with regard to social justice. See also his recent speech on this theme: K. Hossain, *Social and Economic Justice Under the Constitution of Bangladesh*. A. K. Khan Memorial Law Lecture, Faculty of Law, University of Chittagong, 27 February 2016. See further M. E. Haque, *Protection of Economic, Social and Cultural Rights: A Critical Analysis of the Fundamental Principles of State Policy in the Constitution of Bangladesh*. Unpublished PhD Thesis, Faculty of Law, Monash University, Australia, 2012 (arguing that there is "enough scope" under the Bangladeshi constitution to judicially enforce economic, social and cultural rights despite the bar of Article 8(2)).

78 Article 28 (4) of the Constitution.

79 *Dr Mohiuddin Farooque v. Bangladesh* (1997) 17 BLD (AD) 1 (25 July 1996) (establishing the public interest standing to lodge constitutional litigation on behalf of the public). The space constraint does not allow a detailed discussion on public interest litigation jurisprudence. On PIL generally, see N. Ahmed, *Public Interest Litigation in Bangladesh: Constitutional Issues and Remedies*. Dhaka: BLAST, 1999 and R. Hoque, "Taking Justice Seriously: Judicial Public Interest and Constitutional Activism in Bangladesh" *Contemporary South Asia* 15(4) (2006): 399–422.

80 For concerned judicial actions till 2010 and for a theoretical discussion on the legal value of social rights provisions of the Constitution, see Hoque, *Taking Justice Seriously*, note 79. See also R. Hoque, *Judicial Activism in Bangladesh: A Golden Mean Approach.* Newcastle-upon-Tyne: Cambridge Scholars Publishing, 2011, especially at 176–82.

81 See Hoque, "Taking Justice Seriously" supra, note 79, in which I supported the redirected focus of PIL on constitutional rights. Since then, however, PIL's focus on social rights became extremely weak. But see a recent court order in a pending case, *Syed Saifuddin Kamal and BLAST v. Bangladesh*, Writ Petition No. 1509 of 2016 (High Court Division, 10 February 2016, directing the adoption of measures to set up a national emergency medical service for traffic accident victims).

82 For a concept of 'minorities' in Bangladesh, see M. Tajuddin, "Minorities in Bangladesh: A Conspectus". In Sumanta Banerjee (ed.), *Shrinking Space: Minority Rights in South Asia*. Kathmandu: South Asia Forum for Human Rights, 1999, 101.

83 On this idea, see Y. Ghai, "Constitutionalism and the Challenge of Ethnic Diversity". In James J. Heckman, Robert L. Nelson, and Lee Cabatingan (eds): *Global Perspectives on the Rule of Law*. London: Routledge, 2009, 279–302.

84 On the protection of minority rights in Bangladesh, see generally, M. F. Islam, "Ethnicity, Ethnic Conflict and Discrimination against Ethnic Minorities of Bangladesh" *Journal of Ethnic Affairs* 2 (2006): 27–31; and B. Khan and M. M. Rahman, *Protection of Minorities: Regimes, Norms and Issues in South Asia.* Newcastle upon Tyne: Cambridge Scholars Publishing, 2012, esp. Chapter 5.3, at 72–83.

85 On this, see generally I. U. Chowdhury, "Caste-Based Discrimination in South Asia: A Study of Bangladesh" 3(7) Working Paper Series, 2009, Indian Institute of Dalit Studies, New Delhi, 1–58 (focusing on Dalit Hindu and Muslim communities).

86 Articles 12 (secularism) and 41 (freedom of religion) of the Constitution. Clause (1) (b) of Article 41 provides that every religious community or denomination has the right to establish, maintain and manage its religious institutions.
87 Article 12, reinstated by the Constitution (Fifteenth Amendment) Act 2011. Alongside secularism, however, the Constitution recognises Islam as the state religion, which might still potentially give rise to problems of inequality amongst citizens.
88 S. Haq and E. Haque, *Disintegration Process in Action: The Case of South Asia*. Dhaka: Bangladesh Institute of Law and International Affairs, 1990, esp. at 44–46; A. Mohsin, *The Politics of Nationalism: The Case of the Chittagong Hill Tracts, Bangladesh*. Dhaka: Dhaka University Press, 2002.
89 R. D. Roy, "Challenges for Juridical Pluralism and Customary Laws of Indigenous Peoples: The Case of the Chittagong Hill Tracts, Bangladesh" *Arizona Journal of International & Comparative Law* 21(1) (2004): 113–82 at 115–16; supra, note 4.
90 Article 23A of the Constitution, inserted by the Constitution (Fifteenth Amendment) Act 2011, section 14. Yet the Constitution does not clearly recognise cultural and linguistic rights of aboriginal/indigenous peoples.
91 For an argument that marginalised ethnic communities in Bangladesh qualify to be called 'indigenous' according to international standards, see K. Ahmed, "Defining 'Indigenous' in Bangladesh: International Law in Domestic Context" *International Journal on Minority and Group Rights* 17 (2004): 7–73. See further E. Gerharz, "What is in a Name? Indigenous Identity and the Politics of Denial in Bangladesh" *Südasien-Chronik* (South Asia Chronicle) 4 (2014): 114–37.
92 T. Bleie, *Tribal Peoples, Nationalism and the Human Rights Challenge: The Adivasis of Bangladesh.* Dhaka: University Press Limited, 2005. See also K. Ahmed, supra, note 91, at 73 (concluding that recognition of indigenous peoples could prove immensely valuable for their legal protection against discrimination).
93 Part II, Articles 26 to 47A. This and a few following paragraphs are developed on the basis of the following work: R. Hoque, "Human Rights and Unstable Constitutionalism: *Quo vadimus*?" 20 December 2014, Dhaka Law Review Blog, 2014 at: www.dhakalawreview.org/blog/2014/12/human-rights-and-unstable-constitutionalism-quo-vadimus-560.
94 On the link between the human rights performance and the legal tradition/quality of legal system, see Sara M. Mitchell, Jonathan J. Ring and Mary K Spellman, "Domestic Legal Traditions and States' Human Rights Practices" *Journal of Peace Research* 50(2) (2013): 189–202 (showing that states with common law traditions engage in better human rights practices than states with other legal systems).
95 J. Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*. Cambridge, MA: MIT Press, 1996 (in suggesting means to close norms–facts gaps, Habermas undertook an ambitious project of reconciling law, justice, rights and democracy, placing 'legitimate' laws at the centre of the web of other phenomena).
96 Article 35(5) of the Constitution; and the Torture and Custodial Death (Prevention) Act 2013.
97 See, for example, ss. 302 and 304 of the Penal Code 1860, and the Torture and Custodial Death (Prevention) Act 2013.
98 There is almost a complete absence of prosecution of extra-judicial killings by law-enforcing agencies over the past couple of years. See, e.g. section 13 of the Armed Police Battalions Ordinance, 1979. See also the Joint Drive Immunity Act 2003 (Act I of 2003) that was enacted to immunise the excesses of state agencies in the course of anti-terror operations in 2002. It should be noted that the High Court Division in a judgment of 13 September 2015 in *Z. I. Khan Panna v. Bangladesh* (2016) 4 CLR (HCD) 265 (Writ Petition No. 7650 of 2012) invalidated this 2003 Act for being incompatible with the rule of law.

99 Deplorably, a draconian penalty for an almost undefined offence was inserted quite recently, in 2013. The original text of this statute provided for any term in prison not exceeding ten years, and thereby kept a margin of appreciation for the court intending to apply discretion. A similar example is section 54 of the Code of Criminal Procedure 1898 that provides for an almost unregulated discretion of the police to arrest any person 'suspected' of committing any offence. On this, see *BLAST and Others v. Bangladesh* (2003) 23 BLD (HCD) 115 (issuing guidelines to prevent arbitrary arrest and custodial torture/death), largely endorsed by the Appellate Division in *Bangladesh v. BLAST* 8 SCOB [2016] AD 1 (Civil Appeal No. 53 of 2004).

100 Here, reference can profitably be made to an Indian decision invalidating section 66A of the Indian Information and Technology Act that criminalised statements in social media. As Indian Supreme Court held (order of 24 March 2015), this law was unconstitutional for violating the constitutional protection of liberty of thought, expression and belief.

101 See Conclusion below.

102 Supra, note 70, at 815.

103 For this Section, I have relied on and extended my earlier arguments in Hoque, *Judicial Activism*, supra, note 80, at 207–13; Hoque, "Constitutionalism", supra, note 53.

104 Supra, note 10, at 338.

105 There is a huge volume of literature on the interface between judicial independence and the rule of law. See, among other works, A. Lamer, "The Rule of Law and Judicial Independence: Protecting Core Values in Time of Change" *University of New Brunswick Law Journal* 45(3) (1996): 3–20; E. S. Herron and K. A. Raandazzo, "The Relationship between Independence and Judicial Review in Post-Communist Courts" *Journal of Politics* 65(2) 2003: 422–38; D. Berkowitz and K. Clay, "The Effect of Judicial Independence on Courts: Evidence from the American States" *The Journal of Legal Studies* 35(2) (2006): 399–440.; and J. C. Bond, "Judicial Independence in Transition: Revisiting the Determinants of Judicial Activism in the Constitutional Courts of Post-Communist States" *Hungarian Journal of Legal Studies* (*Acta Juridica Hungarica*) 49(1) (2006): 25–87.

106 P. H. Russell, "Toward a General Theory of Judicial Independence". In P. H. Russell and D. M. O'Brien (eds), *Judicial Independence in the Age of Democracy: Critical Perspectives from Around the World.* London: University Press of Virginia, 2001, 1–24.

107 See, among other documents, the UN Basic Principles on the Independence of the Judiciary 1985 (endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985), the Bangalore Principles of Judicial Conduct 2002, and the Commonwealth (Latimer House) Principles on the Three Branches of Government 2003. Different principles that constitute the wider folder of the principle of judicial independence are to be found in major human rights instruments, especially in the Covenant on Civil and Political Rights and the Covenant on Social, Economic, and Cultural Rights of 1966. For an excellent note on the Latimer House Principles, see J. van Zyl Smit, *The Appointment, Tenure and Removal of Judges under Commonwealth Principles: A Compendium and Analysis of Best Practice.* London: The British Institute of International and Comparative Law, 2015.

108 C. M. Larkins, "Judicial Independence and Democratization: A Theoretical and Conceptual Analysis" *American Journal of Comparative Law* 44 (1996): 605–26.

109 'Political insularity' in a wider sense refers to the idea of an all-out protection of judges from any kind of retaliation or harassment for their decisions.

110 Principle 2 of the UN Basic Principles, above note 106. Available at: www.ohchr.org/EN/ProfessionalInterest/Pages/IndependenceJudiciary.aspx.

111 Supra, note 108, at 610.

112 Ibid., at 611.

113 The UN Basic Principles, principle 2, above note 110.
114 S. Shetreet, "The Challenge of Judicial Independence in the Twenty-First Century" *Asia Pacific Law Review* 8(2) (2000): 153–68, at 156.
115 See, for example, Sylvia R. L. Vagras, "Does a Diverse Judiciary Attain a Rule of Law that is Inclusive?: What Grutter v. Bollinger has to Say about Diversity on the Bench" *Michigan Journal of Race and Law* 10 (2005): 101–52 (arguing that inclusion of judges of different racial backgrounds improves the quality and inclusiveness of the rule of law).
116 See R. Hoque, "The Recent Emergency and the Politics of the Judiciary in Bangladesh" *National University of Juridical Science Law Review* 2(2) (2009): 183–204; A. Islam, "Status of a Usurper: A Challenge to the Constitutional Supremacy and Constitutional Continuity in Bangladesh" *Chittagong University Journal of Law* 2 (1997): 1–30; and S. H. R. Karzon and A. A. Faruque, "Martial Law, Judiciary and Judges: Towards an Assessment of Judicial Interpretations" *Bangladesh Journal of Law* 3(2) (1999): 181–210.
117 Among many other cases, *Mofizur Rahman v. Govt. of Bangladesh* (1982) 34 DLR (AD) 321 in which case the Court questionably endorsed the validity of a law extending legality to a statutory provision and a few orders of the government retiring some public officials that were earlier annulled as unconstitutional. Here, the Appellate Division interpreted one's constitutional right to be treated "only in accordance with law" (art. 31) exceedingly narrowly, reading into it any retrospective law. This purely positivist interpretation did not take into consideration the basic tenets of the rule of law that disapprove of the kind of injustice done to the petitioners through the colourable use of the State's legislative power. See also the relevant case of *Dr Nurul Islam v. Bangladesh* (1981) 33 DLR (AD) 201.
118 Yet, there is a dearth of literature on the independence of judiciary in the Bangladeshi context. See, however, S. Malik, *Bangladesh Country Report on Judicial Independence*. A report presented at the Asian Development Bank's International Symposium on Judicial Independence, held in Manila, 6–7 August 2003; Sarker Ali Akkas, *Independence and Accountability of Judiciary: A Critical Review*. Dhaka: Centre for Rights and Governance, 2004; S. Hossain, "Confronting Constitutional Curtailments: Attempts to Rebuild Independence of the Judiciary in Bangladesh". In Paul Brass (ed.), *Handbook of Politics in South Asia.* London: Routledge, 2010, 191–202; and Justice S. R. Ahmed, "Deconstructing Judicial Independence", a lecture delivered in Dhaka on 22 August 2015 as the first of the *Think Legal* lecture series, 2015 (available at: www.thinklegalbangladesh.com).
119 S. Hossain "Confronting Constitutional Curtailments: Attempts to Rebuild Independence of the Judiciary in Bangladesh". In Paul Brass (ed.), *Handbook of Politics in South Asia.* London: Routledge, 2010, 191–202.
120 Ibid.
121 Articles 95 and 96 of the Constitution as were enacted in 1972.
122 Article 116 of the Constitution as it existed before the Fourth Amendment in 1975.
123 The Constitution (Fourth Amendment) Act 1975, ss. 3 and 16, substituting respectively Articles 44 and 102 of the original text with new provisions that made the enforcement of fundamental rights dependent upon a law to be made by parliament, and removed the judicial power to enforce these rights.
124 Article 96. Given the absence of democracy and the fact of politicisation of the judiciary at the time, the independence of the Supreme Judicial Commission was of serious doubt.
125 The Constitution (Eighth Amendment) Act, 1988 (Act No. XXX of 1988) (amending Article 100 to create regional permanent sessions of the High Court Division).
126 The Appellate Division of the Supreme Court has recently held unconstitutional this re-introduced scheme of parliamentary removal of judges. See *Bangladesh v. Advocate Asaduzzaman Siddiqui* (Civil Appeal No. 6 of 2017), judgment of 3 July 2017.

127 It is to be noted that the 2007–08 emergency government enacted a law establishing a judicial appointments commission for the Supreme Court. See the Supreme Judicial Commission Ordinance 2008 (16 March 2008), which later lapsed. The legality of this Ordinance was challenged in *Md. Idrisrur Rahman* v. *Bangladesh*, WP No. 3228 of 2008 (37 *Chancery Law Chronicle* (HCD) 1 (2008)) where the High Court Division by a two to one decision held section 9(4) as unconstitutional for breaching the principle of judicial independence. Section 9(4) empowered the President to reject the recommendations of the Commission. The minority judge, Rashid J., held the whole Act unconstitutional. See further Bari, below, note 152.

128 Article 95(2) of the Constitution, which provides that a person who has, "for not less than ten years", been an advocate of the Supreme Court or held a judicial office in Bangladesh shall be qualified to be appointed as a judge of the Supreme Court. Article 95(2) also provided that Parliament may by law make other criteria for judicial appointments. It seems that the single criterion of ten years' experience keeps a wide margin of leverage for the executive to manipulate the judicial appointments.

129 Article 116 (as amended by the Fifteenth Amendment in 2011) that says that the control and disciplining of judges and magistrates are vested in the President who shall exercise the power "in consultation with the Supreme Court". It should be noted that, in *Masdar Hossain*, below note 132, the Appellate Division (at p. 109) held that the views of the Supreme Court in this regard "shall have primacy over those of the Executive". Recently, the Law Minister has acknowledged that the President acts by the Supreme Court's advice in ninety per cent of cases. Needless to say, this trend of the government is of doubtful legitimacy and legality.

130 Perhaps the best example of this is activism by the Appellate Division in the *Eighth Amendment Case*, above note 51, which was decided during the time of an autocratic regime in 1989. In this case, the Court robustly defended its independence by striking down the Eighth Amendment that dispersed the High Court Division into six regional branches.

131 Judicial decisions on the question of autonomy of the judges and the judiciary are by now plentiful. See, among many other decisions, *Ruhul Quddus v. Justice M. A. Aziz* (2008) 60 DLR (HCD) 511 (holding that appointing a sitting judge as the chief election commissioner breaches the principle of judicial independence), *AKM Shafiuddin v. Bangladesh* (2012) 64 DLR (HCD) 508, and *Bangladesh v. Idrisur Rahman* (2010), below note 136. For other decisions bearing upon judicial independence see Hoque, "Constitutionalism and the Judiciary", supra, note 53, esp. at 329–32. Indeed, judicial activism over the issues of judicial autonomy has been more frequent and robust in Bangladesh than in any other area of constitutionalism. One might think that Bangladeshi judges have sometimes made subjective use of their authority to improve their own service conditions. See Hoque, ibid., at 332, fn 127.

132 (1989) BLD (AD) (Special Issue) 1.

133 (2000) 52 DLR (AD) 82 (judgment of 2 December 1999).

134 Speaking for the Court, Kamal J. reiterated that judicial independence is a basic pillar of the constitution that cannot be "demolished, whittled down, curtailed or diminished in any manner": (2000) 52 DLR (AD) 82, at 104.

135 For a background to the problems of judicial independence see Naimuddin Ahmed, "The Problems of Independence of the Judiciary in Bangladesh" *Bangladesh Journal of Law* 2(2) (1998): 133–51.

136 *Bangladesh v. Idrisur Rahman* (2010) 7 LG (AD) 137, 143 (affirming *Idrisur Rahman v. Secretary, Ministry of Law, Justice and Parliamentary Affairs* (2009) 61 DLR (HCD) 523). See Article 95 of the Constitution. Although the consultation obligation was dispensed with through the Fourth Amendment of the Constitution in 1975, consultation with the Chief Justice was being followed as a matter of convention until February 1994 when, in a single instance, nine additional judges were

appointed without consulting the Chief Justice. These appointments were, however, soon modified and freshly made.

137 I examined this aspect elsewhere. See Hoque, "Constitutionalism and the Judiciary", supra, note 53. See further R. Hoque, "Judicial Agency to Achieve Good Governance in Bangladesh: An Analysis" *Dhaka University Law Journal* 18(1) (2007): 91–108; S. A. Akkas, "The Role of Judiciary in Good Governance: The Case of Bangladesh". In Mizanur Rahman (ed.), *Human Rights and Good Governance*. Dhaka: ELCOP (Empowerment through Law of the Common People), 2004, 67–78.

138 For a brief criticism of the court's approach to the protection of rights particularly of the people belonging to opposition politics during the 2009–14 regime, see Z. I. Biswas, "Do we Have an Independent Judiciary?" *Forum (The Daily Star)* 6(9) Dhaka, September 2012, available at: http://archive.thedailystar.net/forum/2012/September/do.htm.

139 Many believe that the scope for the involvement of former chief justices with the now abolished care-taker government (CTG) system, the independence of the judiciary was seriously undermined. See, e.g. M. J. A. Chowdhury, "Elections in Democratic Bangladesh". In Tushnet and Khosla (eds), 2015, supra, note 53, 192–232. See, however, Islam (below note 147, at 86–87), who believes that "the provisions relating to caretaker government cannot be blamed as destroying the independence of the judges of the Supreme Court". The fact that the CTG system has now withered away does not mean that the Supreme Court's political importance has diminished at any rate.

140 An early analysis of political interference with the Bangladeshi judiciary is in M. I. Farooqui, "Judiciary in Bangladesh: Past and Present" *Dhaka Law Reports* 48 (Journal section) (1996): 65–68.

141 Although judges' appointments to the Election Commission (EC) are no more constitutional after the judgment in *Ruhul Quddus v. Justice M. A. Aziz*, supra, note 131, post-retirement appointments of judges to some other offices are still being made.

142 As insightfully observed in *Abdul Bari Sarker v. Bangladesh* (1994) 46 DLR (AD) 37, 41, this practice is very likely to tempt a judge aspiring for lucrative postretirement appointment to be influenced in favour of the authorities concerned. See further Malik, *Bangladesh Country Report*, supra, note 118, at 34–36.

143 Supra, note 10, at 138.

144 Ibid.

145 See Article 98 of the Constitution, according to which judges are provisionally appointed to the High Court Division for two years after which they are appointed as permanent judges (the process is popularly known as 'confirmation'). This is, however, not the mandatory appointment channel, and direct permanent appointments to either Division of the Supreme Court is possible under Article 95.

146 In *S. N. Goswami v. Bangladesh* (2003) 55 DLR (HCD) 332, the Court, apparently from a highly technical stance, overstated the non-legal character of this convention. Some observations made in this case are overruled in the case of *Idrisur Rahman* (2010), above note 136.

147 M. Islam, *Constitutional Law of Bangladesh*, 3rd edition. Dhaka: Mullick Brothers, 2012 at 87.

148 Accounts of insiders confirm that some judges think that their non-confirmation as permanent judges or non-elevation to the Appellate Division are prices they had to pay for their (activist) decisions. For example, with reference to a decision in *Anwar Hossain Khan v. Speaker* (1995) 47 DLR (HCD) 42 involving parliament-boycotting by the then opposition members, Justice Kazi Shafiuddin in a post-resignation statement in 2000 doubted that he might not have been appointed to the Appellate Division for his opinion in that case. See Hoque, *Judicial Activism*, supra, note 80, at 211.

149 Supra, note 117, at 191.

150 There were some allegations, in 2006–08, that Chief Justice had indeed deconstituted certain activist High Court Division-benches. See Hoque, *Judicial Activism*, supra, note 80, at 212.

151 Justice S. R. Ahmed, "Deconstructing Judicial Independence", supra, note 118, 8 (noting that judiciaries across the world are readily adapting to altered realities). One example of this from South Asia is Pakistan's introduction of a judicial appointments commission for the Supreme Court, brought about through the Eighteenth Amendment to the Pakistani Constitution.

152 This idea is borrowed from Justice Ahmed ("Deconstructing Judicial Independence", 3), who considered "a judiciary council with majority representation from the judiciary" the preferred mode of oversight and regulation vis-à-vis the Bangladeshi judiciary. See further M. E. Bari, "The Natural Death of the Supreme Judicial Commission of Bangladesh and the Consequent Patronage Appointments to the Bench: Advocating the Establishment of an Independent Judicial Commission" *International Review of Law* (2014): 1–18 (arguing that an independent judicial commission in Bangladesh is an imperative for the independence of the judiciary).

153 This, in the first place, would require the practice of publication of nominations for posts in the Supreme Court. This practice would then have given the public a chance to engage in a public discourse about the appointments in their supreme court.

154 On corruption within the judiciary, see S. Islam, *Corruption Nexus in Bangladesh: An Empirical Study of the Judicial Governance*. Hong Kong: Asian Legal Resource Centre, 2010.

155 These aspects of the rule of law were one of the main pull-factors for several judicial reform projects of international donor agencies in Bangladesh. See, for example, S. I. Ahmed, "Law Commission and the Judicial Service". In *The Ishtiaque Papers*. Dhaka: University Press Limited, 2008, 135–39.

156 I am not entering a detailed discussion here on this point. These concerns have been articulated enough in several studies. See, among other sources, Law Commission of Bangladesh, *Recommendations on Expediting Civil Proceedings*, Report No. 106, 2010 and *Proposal for Disposal of Suits and Cases in Subordinate Courts in Bangladesh*, Report No. 103, 1996.

157 It is important, from the rule of law perspective, to distinguish 'government' from 'governance'. Broadly speaking, 'governance' refers to that idea of government that is not only inclusive of all relevant horizontal institutions/factors but is also reoriented in its role and functions. For a theoretical conceptualisation, see M. Bonnafous-Boucher, "From Government to Governance" *Ethical Perspectives: Journal of the European Ethics Network* 12(4) (2005): 521–34. See also R. Bellamy (ed.), *From Government to Governance.* London: Routledge, 2010. See further G. Rizvi, *Democracy and Development: Restoring Social Justice at the Core of Good Governance*. Colombo: International Center for Ethnic Studies, 2008; G. Rizvi, "Reinventing Government: Putting Democracy and Social Justice Back into the Discourse". In Dennis A. Rondinelli (ed.), *Public Administration and Democratic Governance: Governments Serving Citizens.* New York: United Nations, 2007, 78–115 (emphasising 'development' and 'social justice' as the core of governance).

158 Supra, note 10, at 339.

159 Article 76 the Constitution (providing for "standing committees of parliament").

160 Articles 33(3)–(6) of the Constitution that, along with the emergency provisions in Articles 141A–141C, were introduced through the Constitution (Second Amendment) Act 1973 (Act No. XXIV of 1973), sections 3 and 6. Following this, the Special Powers Act 1974 was enacted providing for the preventive detention of any person on the suspicion of subversive or 'prejudicial' activities. For a critique that the judiciary did not do enough in preventing the abuse of this law, see Hoque, *Judicial Activism*, 110–12.

161 Article 141C of the Constitution.

162 E. J. Criddle and E. F. Decent, "Human Rights, Emergencies, and the Rule of Law" *Human Rights Quarterly* 34 (2012): 39–87 (arguing that emergencies can be reconciled within the rule of law provided that limitations on rights during an emergency are justified and the curtailments proportional, and that the prohibition on derogation of peremptory norms (such as the right to life) is complied with).

163 H. Blair, "Party Overinstitutionalization, Contestation and Democratic Degradation in Bangladesh". In Paul Brass (ed.), *Handbook of Politics in South Asia.* London: Routledge, 2010, 98–117. Supra, note 118, 98–117.

164 S. I. Khan, S. A. Islam and M. I. Haque, *Political Culture, Political Parties and the Democratic Transition in Bangladesh.* Dhaka: University Press Limited, 2008 (arguing that the role of political parties cannot be understood without taking into consideration the overarching political culture and societal characteristics of the country).

165 Article 70 of the Constitution, as amended in 2011 through the Fifteenth Amendment, which provides that a member of parliament will vacate her seat if she votes in Parliament against the party that nominated her at the election she won. Although this provision can still be argued as being incompatible with the rule of law principles, this can be seen in a local context as an essential mechanism to attain democratic stability in a country like Bangladesh. The present anti-defection rule is an improvement from the earlier provision which was so wide that it made memberships of parliament liable to be vacated even for members' abstention from voting or absence from a session against a party decision.

166 On parliamentary committees and the functioning of parliament generally, see N. Ahmed, "Parliamentary Committees and Parliamentary Government in Bangladesh" *Contemporary South Asia* 10(1) (2001): 11–36; N. Ahmed, *The Parliament of Bangladesh*. Aldershot: Ashgate, 2002. See further R. Jahan and I. Amundsen, *The Parliament of Bangladesh: Representation and Accountability*, CMI-CPD Working Paper 2. Dhaka: Centre for Policy Dialogue, 2012. Available at: www.cmi.no/publications/file/4422-the-parliament-of-bangladesh.pdf, last accessed 9 March 2016.

167 I refrain from initiating a detailed analysis of the role of the accountability institutions, but see G. Rizvi, *Holding the State Accountable: Building Institutions of Democratic Accountability* (Barrister Ishtiaq Ahmed Memorial Lecture), Dhaka: Asiatic Society of Bangladesh, 12 December 2010.

168 Supra, note 10, at 338. Raz (at 336) spoke of "the police, prosecution service and administrative authorities" capable of applying law "faithfully, openly and in a principled way".

169 For a helpful, critical assessment of the Indian judiciary's accountability role, see Mehta, supra, note 69. See further Nick Robinson, "Expanding Judiciaries: India and the Rise of the Good Governance Court" *Washington University Global Studies Law Review* 8(1) (2009): 1–69.

170 On another level, the absence of the office of ombudsman, envisioned by the framers of the Constitution (article 77), that would have responsibility for investigating, and recommending measures against, abuses of public power can be seen as a sign of political unwillingness to be amenable to a wider range of accountability checks.

171 The NHRC is given a mandate to investigate human rights violations and to recommend to the government for the removal of any factors retarding the protection of human rights, but no power to remedy any breach of human rights. See, the National Human Rights Commission Act 2009.

172 For example, s. 32A of the Anti-Corruption Commission Act 2004 (inserted via an amendment of the Act in 2013), which required the ACC to seek sanction of the government before bringing a corruption charge against any government official. In *Human Rights and Peace for Bangladesh v. the Hon. Speaker, Bangladesh Jatiya Sangsad*, WP No. 12272 of 2013, the HCD by a decision of 30 January 2014 adjudged s. 32A as unconstitutional on the ground of being "discriminatory". The government appealed to the Appellate Division against this decision.

173 Iftekharuzzzaman, *Corruption and Anti-corruption in Bangladesh: Primacy of the Political*. Paper presented at the Seminar on "Bangladesh at 40: Changes and Challenges", Faculty of Business Studies, Jahangirnagar University, Dhaka 9–11 December 2011.

174 This scenario continues to exist even after the enactment of the Right to Information Act 2009.

175 Consider the case of, for example, judicial and legal activism against corruption in Bangladesh. While the judiciary has been by and large proactive on governance issues, one should not be over-content with its anti-corruption role. It has to go an extra length to become what is called a 'good governance court'. See Robinson, supra, note 169. From the perspective of legal activism, there is no major public interest litigation (PIL) exclusively concerning political corruption in the post-1990 period. But see the case cited above in supra, note 172.

176 M. Ashrafuzzaman, "Rule of Law in Bangladesh: Normative Standards and Reality's Mirror" *Article 2* 13(2 and 3) (2014): 9–26. Hong Kong: Asian Legal Resource Centre.

177 It is beyond the scope of this chapter to provide a detailed analysis of the four principles of identity of the nation, which remain heavily contested. For a view that this often "brutal" contestation has held back the nation as a whole from prospering as much as it might do otherwise, see W. Menski, "Bangladesh in 2015: Challenges of the *iccher ghuri* for Learning to Live Together" *University of Asia Pacific Journal of Law and Policy* 1(1) (2015): 9–32. [The term *iccher ghuri* means 'wish kite'].

178 The phrase is from Mitchell, *et al*., "Domestic Legal Traditions", supra, note 94, at 200, who think that negative colonial influences can be overcome with time through an active strengthening of legal institutions.

179 M. Ndulu, *Rule of Law Programs; Judicial Reform, Development and Post Conflict Societies*. ANLEP Working Paper No. 2. Oslo: University of Oslo and Centre for Development and the Environment, 2009, at 27.

References

Ahmed, Justice S. R., "Deconstructing Judicial Independence", first lecture in the *Think Legal* lecture series, Dhaka, 22 August 2015, available at: www.thinklegalbangladesh.com.

Ahmed, K., "Defining 'Indigenous' in Bangladesh: International law in Domestic Context" *International Journal on Minority and Group Rights* 17 (2010): 47–73.

Ahmed, N., "The Problems of Independence of the Judiciary in Bangladesh" *Bangladesh Journal of Law* 2(2) (1998): 133–51.

Ahmed, N., *Public Interest Litigation in Bangladesh: Constitutional Issues and Remedies.* Dhaka: BLAST, 1999.

Ahmed, N., "Parliamentary Committees and Parliamentary Government in Bangladesh" *Contemporary South Asia* 10(1) (2001): 11–36.

Ahmed, N., *The Parliament of Bangladesh*. Aldershot: Ashgate, 2002.

Ahmed, S. I., "Law Commission and the Judicial Service". In *The Ishtiaque Papers.* Dhaka: UPL, 2008, 135–39.

Akkas, S. A., The role of Judiciary in Good Governance: The Case of Bangladesh". In Mizanur Rahman (ed.), *Human Rights and Good Governance*. Dhaka: ELCOP, 2004, 67–78.

Akkas, S. A., *Independence and Accountability of Judiciary: A Critical Review*. Dhaka: Centre for Rights and Governance, 2004.

An-Naim, A. A., "Law and Development: The Rule of Law in Developing Countries" *Third World Legal Studies* (1986): 33–38.

Anwar, A., "The Future of Secularism". In Ali Anwar (ed.), *Secularism* (in Bangla). *Dhaka:* BPL, 2015 [1973], 103–18.

Aristotle, *Politics* (H. Rackham trans.). Cambridge, MA: Harvard University Press, 1977.

Aristotle, *The Politics and the Constitution of Athens* (Stephen Everson ed.). Cambridge: Cambridge University Press, 1996.

Ashrafuzzaman, M., "Rule of Law in Bangladesh: Normative Standards and Reality's Mirror" *Article 2* 13(2 and 3) (2014): 9–26. Hong Kong: Asian Legal Resource Centre.

Bari, M. E., "The Natural Death of the Supreme Judicial Commission of Bangladesh and the Consequent Patronage Appointments to the Bench: Advocating the Establishment of an Independent Judicial Commission" *International Review of Law* (2014): 1–18.

Baxi, U., "Directive Principles and Sociology of Indian Law" *Journal of the Indian Law Institute* 11(3) (1969): 245–72.

Baxi, U., "Rule of Law in India: Theory and Practice". In R. Peerenboom (ed.), *Asian Discourses of Rule of Law: Theories and Implementation of Rule of Law in Twelve Asian Countries, France and the US*. London: Routledge, 2004, 324–45.

Bellamy, Richard (ed.), *From Government to Governance.* London: Routledge, 2010.

Berkowitz, D. and Clay, K., "The Effect of Judicial Independence on Courts: Evidence from the American States" *The Journal of Legal Studies* 35(2) (2006): 399–440.

Bingham, T., *The Rule of Law*. London: Allen Lane, 2010.

Biswas, Z. I., "Do we have an Independent Judiciary?" *Forum (The Daily Star)* 6(9), Dhaka, September 2012.

Blair, H., "Party Overinstitutionalization, Contestation and Democratic Degradation in Bangladesh". In Paul Brass (ed.), *Handbook of Politics in South Asia.* London: Routledge, 2010, 98–117.

Bleie, T., *Tribal Peoples, Nationalism and the Human Rights Challenge: The Adivasis of Bangladesh.* Dhaka: UPL, 2005.

Bond, J. C., "Judicial Independence in Transition: Revisiting the Determinants of Judicial Activism in The Constitutional Courts of Post-Communist States" *Hungarian Journal of Legal Studies* (*Acta Juridica Hungarica*) 49(1) (2006): 25–87.

Bonnafous-Boucher, M., "From Government to Governance" *Ethical Perspectives: Journal of the European Ethics Network* 12(4) (2005) 521–34.

Burge-Hendrix, B., "Plato and the Rule of Law". In I. B. Flores and K. E. Himma (eds), *Law, Liberty, and the Rule of Law*. Ius Gentium: Comparative Perspectives on Law and Justice 18. Springer, 2013, 27–47.

Choudhury, J. S. A., *Bangladesh: Failure of a Parliamentary Government 1973–1975* London: Jamshed Foundation, 2005.

Chowdhury, I. U., "Caste-Based Discrimination in South Asia: A Study of Bangladesh" 3(7) Working Paper Series, 2009, Indian Institute of Dalit Studies, New Delhi, 1–58.

Chowdhury, M. J. A., "Elections in 'Democratic' Bangladesh". In M. Tushnet and M. Khosla (eds), *Unstable Constitutionalism: Law and Politics in South Asia*. New York: Cambridge University Press, 2015, 192–232.

Criddle, E. J. and Decent, Evan F., "Human Rights, Emergencies, and the Rule of Law" *Human Rights Quarterly* 34 (2012): 39–87.

Dahl, Robert A., *On Democracy*. New Haven, CT: Yale University Press, 1998.

Dicey, A. V., *Introduction to the Study of the Law of the Constitution*. London: McMillan and Co, 1885.

Erbeznik, K., "Money Can't Buy You Law: The Effects of Foreign Aid on the Rule of Law in Developing Countries" *Indiana Journal of Global Legal Studies* 18(2) (2011): 873–900.

Fallon, Richard H., "The Rule of Law as a Concept in Constitutional Discourse" *Columbia Law Review* 1 (1997): 1–56.

Farooqui, M. I., "Judiciary in Bangladesh: Past and Present" *Dhaka Law Reports* 48 (1996): 65–68.

Frank, J., "Aristotle on Constitutionalism and the Rule of Law" *Theoretical Inquiries in Law* 8(1) (2007): 37–50.

Fuller, Lon L., "Positivism and Fidelity to Law – A Reply to Professor Hart" *Harvard Law Review* 71 (1958): 630–72.

Fuller, Lon L., *Morality of Law.* New Haven, CT: Yale University Press, 1969.

Gerharz, E., "What is in a Name? Indigenous Identity and the Politics of Denial in Bangladesh" *Südasien-Chronik* (South Asia Chronicle) 4 (2014): 114–37.

Ghai, Y., "The Theory of the State in the Third World and the Problematics of Constitutionalism". In D. Greenberg, Stanley N. Katz, Steven C. Wheatley and Melanie Beth Oliviero (eds), *Constitutionalism and Democracy: Transitions in the Contemporary World.* New York; Oxford: Oxford University Press, 1993, 186–96.

Ghai, Y., "Constitutionalism and the Challenge of Ethnic Diversity". In James J. Heckman, Robert L. Nelson and Lee Cabatingan (eds), *Global Perspectives on the Rule of Law*. London: Routledge, 2009, 279–302.

Ginsburg, T. and Tamir, M. (eds), *Rule by Law: The Politics of Courts in Authoritarian Regimes.* Cambridge: Cambridge University Press, 2008.

Habermas, J., *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*. Cambridge, MA: MIT Press, 1996.

Haq, S. and Haque, E., *Disintegration Process in Action: The Case of South Asia*, Dhaka: Bangladesh Institute of Law and International Affairs, 1990.

Haque, M. E., *Protection of Economic, Social and Cultural Rights: A Critical Analysis of the Fundamental Principles of State Policy in the Constitution of Bangladesh*. Unpublished PhD Thesis, Faculty of Law, Monash University, Australia, 2012.

Hart, H. L. A., "Positivism and the Separation of Law and Morals" *Harvard Law Review* 71 (1958): 593–629.

Heckman, James J., Robert, L. N. and Lee, C. (eds), *Global Perspectives on the Rule of Law*. London: Routledge, 2009.

Herron, E. S. and Raandazzo, K. A., "The Relationship between Independence and Judicial Review in Post-Communist Courts" *Journal of Politics* 65(2) (2003): 422–38.

Hoque, R., "Taking Justice Seriously: Judicial Public Interest and Constitutional Activism in Bangladesh" *Contemporary South Asia* 15(4) (2006): 399–422.

Hoque, R., "Judicial Agency to Achieve Good Governance in Bangladesh: An Analysis" *Dhaka University Law Journal* 18(1) (2007): 91–108.

Hoque, R., "The Recent Emergency and the Politics of the Judiciary in Bangladesh" *National University of Juridical Science Law Review* 2(2) (2009): 183–204.

Hoque, R., *Judicial Activism in Bangladesh: A Golden Mean Approach.* Newcastle-upon-Tyne: Cambridge Scholars Publishing, 2011.

Hoque, R., "Constitutionalism and the Judiciary in Bangladesh". In S. Khilnani, V. Raghavan and A. K. Thiruvengadam (eds), *Comparative Constitutionalism in South Asia.* New Delhi: Oxford University Press, 2013, 303–40.

Hoque, R., "Human Rights and Unstable Constitutionalism: *Quo Vadimus*?" Dhaka Law Review Blog, 20 December 2014, available at: www.dhakalawreview.org/blog/2014/12/human-rights-and-unstable-constitutionalism-quo-vadimus-560.

Hoque, R., "Judicialization of Politics in Bangladesh: Pragmatism, Legitimacy, and Consequences". In M. Tushnet and M. Khosla (eds), *Unstable Constitutionalism: Law and Politics in South Asia*. New York: Cambridge University Press, 2015, 261–90.

Hossain, K., "Interaction of Fundamental Principles of State Policy and Fundamental Rights". In S. Hossain, S. Malik and B. Musa (eds), *Public Interest Litigation in South Asia: Rights in Search of Remedies.* Dhaka: UPL, 1997, 43–52.

Hossain, K., *Social and Economic Justice under the Constitution of Bangladesh*. A. K. Khan Memorial Law Lecture, Faculty of Law, University of Chittagong, 27 February 2016.

Hossain, S., "Confronting Constitutional Curtailments: Attempts to Rebuild Independence of the Judiciary in Bangladesh". In Paul Brass (ed.), *Handbook of Politics in South Asia.* London: Routledge, 2010, 191–202.

Huq, A. F., "Constitution-making in Bangladesh" *Pacific Affairs* 46(1) (1973): 59–76.

Huntington, Samuel P., "Democracy's Third Wave" *Journal of Democracy* 2(2) (1991): 12–34.

Huntington, Samuel P., *The Third Wave: Democratization in the Late Twentieth Century.* Oklahoma: University of Oklahoma Press, 1991.

Iftekharuzzzaman, *Corruption and Anti-corruption in Bangladesh: Primacy of the Political*. Paper presented at the Seminar on "Bangladesh at 40: Changes and Challenges", Faculty of Business Studies, Janhangirnagar University, Dhaka, 9–11 December 2011.

International Commission of Jurists, *The Rule of Law in a Free Society*. A report on the International Congress of Jurists, New Delhi, India, 5–10 January 1959.

Islam, Amir-Ul, "Status of a Usurper: A Challenge to the Constitutional Supremacy and Constitutional Continuity in Bangladesh" *Chittagong University Journal of Law* 2 (1997): 1–30.

Islam, M., *Constitutional Law of Bangladesh*, 2nd edition. Dhaka: Mullick Brothers, 2003.

Islam, M., *Rule of Law in Bangladesh*. (Syed Ishtiaq Ahmed Memorial Foundation Lecture 2005). Dhaka: Asiatic Society of Bangladesh, 2005.

Islam, M., *Constitutional Law of Bangladesh*, 3rd edition. Dhaka: Mullick Brothers, 2012.

Islam, M. F., "Ethnicity, Ethnic Conflict and Discrimination against Ethnic Minorities of Bangladesh" *Journal of Ethnic Affairs* 2 (2006): 27–31.

Islam, S., *Corruption Nexus in Bangladesh: An Empirical Study of the Judicial Governance*. Hong Kong: Asian Legal Resource Centre, 2010.

Jahan, R. and Amundsen, I., *The Parliament of Bangladesh: Representation and Accountability*. CMI-CPD Working Paper 2. Dhaka: Centre for Policy Dialogue, 2012, available at: www.cmi.no/publications/file/4422-the-parliament-of-bangladesh.pdf.

Jowell, J., "The Rule of Law and its Underlying Values". In J. Jowell and D. Oliver (eds), *The Changing Constitution*, 7th edition. Oxford: Oxford University Press, 2011, 11–34.

Jowell, J., "The Rule of Law". In J. Jowell, D. Oliver and C. O'Cinneide (eds), *The Changing Constitution*, 8th edition. Oxford: Oxford University Press, 2015, 13–37.

Karzon, S. H. R. and Faruque, A. A., "Martial Law, Judiciary and Judges: Towards an Assessment of Judicial Interpretations" *Bangladesh Journal of Law* 3(2) (1999): 181–210.

Khan, Borhan Uddin and Rahman, M. M., *Protection of Minorities: Regimes, Norms and Issues in South Asia*, Newcastle upon Tyne: Cambridge Scholars Publishing, 2012.

Khan, Shamsul I., Aminul Islam, S. and Imdadul Haque, M., *Political Culture, Political Parties and the Democratic Transition in Bangladesh.* UPL: Dhaka, 2008.

Kleinfeld, R., "Competing Definitions of the Rule of Law". In Thomas Carothers (ed.), *Promoting the Rule of Law Abroad: In Search of Knowledge*. Washington, D.C.: Carnegie Endowment for International Peace, 2006, 31–74.

Lamer, A., "The Rule of Law and Judicial Independence: Protecting Core Values in Time of Change" *University of New Brunswick Law Journal* 45(3) (1996): 3–20.

Larkins, C. M., "Judicial Independence and Democratization: A Theoretical and Conceptual Analysis" *American Journal of Comparative Law* 44 (1996): 605–26.

Law Commission, *Proposal for Disposal of Suits and Cases in Subordinate Courts in Bangladesh*. Report No. 103. Dhaka: Law Commission of Bangladesh, 1996.

Law Commission, *Recommendations on Expediting Civil Proceedings*. Report No. 106. Dhaka: Law Commission of Bangladesh, 2010.

Li, J., "The Leviathan's Rule *by* Law" *Journal of Empirical Legal Studies* 12(4) (2015): 815–46.

Luban, D., "The Rule of Law and Human Dignity: Reexamining Fuller's Canons" *Hague Journal of Rule of Law* 2 (2010): 29–47.

Malik, S., "Laws of Bangladesh". In A. M. Chowdhury and F. Alam (eds), *Bangladesh: On the Threshold of the Twenty-First Century.* Dhaka: Asiatic Society of Bangladesh, 2002, 433–80.

Malik, S., "Civil Society and the Rule of Law: The Bangladesh Context". In Mizan Khan and M. H. Kabir (eds), *Civil Society and Democracy in Bangladesh.* Dhaka: Academic Publisher, 2002, 75–107.

Malik, S., *Bangladesh Country Report on Judicial Independence*. A report presented at the Asian Development Bank's International Symposium on Judicial Independence, Manila, 6–7 August 2003.

Mehta, P. B., "The Indian Supreme Court and the Art of Democratic Positioning". In Mark Tushnet and Madhav Khosla (eds), *Unstable Constitutionalism: Law and Politics in South Asia*. New York: Cambridge University Press, 2015, 233–60.

Menski, W., "Bangladesh in 2015: Challenges of the *iccher ghuri* for Learning to Live Together" *University of Asia Pacific Journal of Law and Policy* 1(1) (2015): 9–32.

Mitchell, Sara M., Ring, Jonathan J. and Spellman, Mary K., "Domestic Legal Traditions and States Human Rights Practices" *Journal of Peace Research* 50(2) (2013): 189–202.

Mohsin, A., *The Politics of Nationalism: The Case of the Chittagong Hill Tracts, Bangladesh*. Dhaka: Dhaka University Press Limited, 2002.

Morrow, G. R., "Plato and the Rule of Law" *The Philosophical Review* 50(2) (1941): 105–26.

Murphy, C., "Lon Fuller and the Moral Value of the Rule of Law" *Law and Philosophy* 24 (2005): 239–62.

Ndulu, M., *Rule of Law Programs; Judicial Reform, Development and Post Conflict Societies*. ANLEP Working Paper No. 2. Oslo: University of Oslo, 2009.

Peerenboom, R., "Human Rights and Rule of Law: What's the Relationship?" *Georgetown Journal of International Law* 36(3) (2005): 809–945.

Plato, *The Laws* (Trevor J. Saunders trans.). London: Penguin, 1970.

Plato, *The Republic* (Desmond Lee trans.). London: Penguin, 2008.

Rahman, M. H., "The Rule of Law and Independence of the Judiciary". In *The Rallying Power of Law*. Dhaka: Pustaka, 1997, 142–52.

Rahman, M. H., "Our Experience with Constitutionalism" *Bangladesh Journal of Law* 2(2) (1998): 115–32.

Rahman, Md. M., "Rule of Law and Reality: Bangladesh Perspective" *Prime University Journal* 8(1) (2014): 32–69.

Raz, J., "The Politics of the Rule of Law" *Ratio Juris* 3(3) (1990): 331–39.

Raz, J., *The Authority of Law*: *Essays on Law and Morality*, 2nd edition. Oxford: Oxford University Press, 2009.

Riaz, A., *Congressional Testimony: Bangladesh in Turmoil: A Nation on the Brink?* Testimony before the Subcommittee on Asia and the Pacific Committee on Foreign Affairs, House of Representatives, United States, 20 November 2013.

Rizvi, G., "Democracy and Constitutionalism in South Asia: The Bangladesh Experience". In E. Venizelos and A. Pantelis (eds), *Civilization and Public Law*. London: Esperia Publications, 2005, available at: www.innovations.harvard.edu/sites/default/files/8644.pdf.

Rizvi, G., "Reinventing Government: Putting Democracy and Social Justice Back into the Discourse". In Dennis A. Rondinelli (ed.) *Public Administration and Democratic Governance: Governments Serving Citizens.* New York: United Nations, 2007, 78–115.

Rizvi, G., *Democracy and Development: Restoring Social Justice at the Core of Good Governance*. Colombo: International Center for Ethnic Studies, 2008.

Rizvi, G., *Holding the State Accountable: Building Institutions of Democratic Accountability.* Barrister Syed Ishtiaq Ahmed Memorial Lecture. Dhaka: Asiatic Society of Bangladesh, 12 December 2010.

Robinson, N., "Expanding Judiciaries: India and the Rise of the Good Governance Court" *Washington University Global Studies Law Review* 8(1) (2009): 1–69.

Roy, R. D., "Challenges for Juridical Pluralism and Customary Laws of Indigenous Peoples: The Case of the Chittagong Hill Tracts, Bangladesh" *Arizona Journal of International & Comparative Law* 21(1) (2004): 113–82.

Russell, P. H., "Toward a General Theory of Judicial Independence". In P. H. Russell and D. M. O'Brien (eds), *Judicial Independence in the Age of Democracy: Critical Perspectives from around the World.* London: University Press of Virginia, 2001, 1–24.

Scheppele, Kim L., "Thirteenth Annual Grotius Lecture Response: Amartya Sen's Vision for Human Rights – and Why He Needs the Law" *American University International Law Review* 27(1) (2012): 17–35.

Sen, A., *Development as Freedom.* New York: Knopf, 1999.

Sen, A., "The Elements of Theory of Human Rights" *Philosophy & Public Affairs* 32(4) 2004, 315–56.

Sen, A., *The Idea of Justice*. London: Allen Lane, 2009.

Sen, A., "Thirteenth Annual Grotius Lecture Series: The Global Status of Human Rights" *American University International Law Review* 27(1) (2012): 1–15.

Shetreet, S., "The Challenge of Judicial Independence in the Twenty-First Century" *Asia Pacific Law Review* 8(2) (2000): 153–68.

Smit, J. van Zyl, *The Appointment, Tenure and Removal of Judges under Commonwealth Principles: A Compendium and Analysis of Best Practice.* London: The British Institute of International and Comparative Law, 2015.

Tajuddin, M., "Minorities in Bangladesh: A Conspectus". In Sumanta Banerjee (ed.), *Shrinking Space: Minority Rights in South Asia*. Kathmandu: South Asia Forum for Human Rights, 1999, 101.

Tamanaha, B. Z., *On the Rule of Law: History, Politics, Theory*. Cambridge: Cambridge University Press, 2004.

Tushnet, Mark and Khosla, M. (eds), *Unstable Constitutionalism: Law and Politics in South Asia*. New York: Cambridge University Press, 2015.

Vagras, Sylvia R. L., "Does a Diverse Judiciary Attain a Rule of Law that is Inclusive?: What Grutter v. Bollinger has to Say about Diversity on the Bench" *Michigan Journal of Race and Law* 10 (2005): 101–52.

Vidmar, J., "Judicial Interpretations of Democracy in Human Rights Treaties" *Cambridge Journal of International & Comparative Law* 3(2) (2014): 532–55.

Whitford, W. C., "The Rule of Law" *Wisconsin Law Review* (2000): 723.