Rule of law: Balance of Power

Justice Md. Rezaul Hasan
Supreme Court of Bangladesh
High Court Division

A Question was posed as to whether the phrase "Rule and Law" is a mere rhetoric in legal parlance or is a condition to maintain a civilized society. Instead of myself answering this question, I would prefer quoting some authoritative views, to explain the concept and its significance, as follows, "The first of all law is to respect the law……..Where laws are routinely disobeyed a culture of lawlessness is engendered which is inimical to the Rule of Law……" Another essential component of the Rule of Law is that exercise of governmental powers shall be conditioned and controlled by law. In 1931, Lord Atkin, in the celebrated judgment of the Privy Council, in the case of Administrating Eshugbayi Eleko V. Officer Administrating, Govt. of Nigerial (1939) AC 662, had in mind this principle when it declared that "no member of the executive can interfere with the liberty or property of a British subject except on the condition that he can support the legality of his action before a Court of Justice……". This has been uttered in the Court of a country (UK) where even no constitution, guaranteeing fundamental rights, do exist. Besides, when John Adams used the historic phrase, "a government of laws and not of men", he was not indulging in a rhetorical flourish but was flatly repudiating the idea of rule by fiat or by whim and caprice." Hope, what is quoted now, has plainly, explained the concept 'Rule of law' and its place as a backbone of a civilized and democratic society to sustain. (emphasis added).

Apex Court and the Rule of Law

The judges of the apex court are oath bound to uphold the Rule of law. Supreme Court of Bangladesh, in a good number of cases, has ingrained the principle in our legal system. Similar is the role of Pakistan Supreme Court, the latest instance being the order dated 19th June, 2012, passed in Constitutional Petition No. 40 of 2012 and other connected matters, in consequence whereof Mr. Syed Yosuf Raja Gillani was disqualified from being a member of Parliament for committing contempt of court and the Election Commission of Pakistan issued Notification of his disqualification as Member of National Assembly of Pakistan, with effect from 26.04.2013, the date of pronouncement of judgment by the Supreme Court of Pakistan and in consequence thereof the notification No. F2(4)/2008-Cord, dated 1st March 2008, to extent of declaring him as returned candidate from National Assembly Constituency No. NA-151, Multun-IV stands rescinded with effect from 26.04.2012. Hon'ble Chief Justice of Pakistan Mr. Iftikhar Muhammad Chaudhry, (as his lordship then was) following the judgment and with reference to a Ruling of the speaker tending to undo the judgment, observed that, "what will happen to the independence of the Judiciary if Speaker of Parliament tries to scrutinize judicial ruling? No one can undo a court verdict except a Court of appeal.'' Mr.

Nawaz Sharif, welcoming the judgment, had commented that "This is real accountability". The then ruling party including all major political parties and groups accepted this judgment. This is how the judgment of the Supreme Court was respected and abided by the people and political parties in Pakistan. Then on 1st May 2011, Anti-Terrorism Tribunal, at Pakistan, issued warrant of arrest against General (Rtd) Parvez Musharraf. He was refused nomination by the Election Commission in April 2013. He was arrested by Pakistan Police as per order of Court. Besides, the Supreme Court of Pakistan forced Interior Minister Rehman Malik to resign and surrender his British passport over rules that forbids officials to hold dual citizenship. These are a few example of Rule of law prevailing in that country. These fact shows that the people of Pakistan have accepted 'Rule of Law' as the guiding factor subject to which the country will be run and governed.

While, the supreme court of India, another largest democratic neighbor, has been consistently playing its role in a glorious manner in upholding the Rule of Law, the history other two Supreme Courts, Pakistan and Bangladesh, in this region, have occasionally shown departure, perhaps for the reason that, the people in these countries are yet not fully aware of the significance of the Rule of Law and have seen to be remaining indifferent even though the occasion demanded them to rise. The people of the erstwhile East Pakistan (now Bangladesh), understood the significance of the language movement of 1952 as well as the war of independence and actively participated and supported them and have own both the battles, that claimed millions of lives, limbs and properties of millions and the chastity of lacs of rape victims. But, it is not certain as to whether the people of Bangladesh understand the concept "independence of judiciary'' or the concept "Rule of Law" as do the people in the USA and of other countries of the first world, where the rule of law prevails. Unless the people want "Rule of law" and "independence of judiciary'', mere provisions contained in the Constitution may achieve these only theoretically, not practically. Similarly, if respect for the courts of law (the other name of the Rule of Law) is not born and grown up in the mind of the people, the judges can neither help much keeping the dignity of the court, nor can uphold the rule of law in the 3rd world or underdeveloped countries. To understand the nature and scope of 'Rule of Law' and the "independence of judiciary" in their applied condition, a few instance may be cited from the jurisdiction of US Supreme Court.

Supremacy of the Constitution of Bangladesh

Supremacy of the Constitution of Bangladesh has been ingrained in the PREAMBLE to the constitution that "it is our sacred duty to safeguard, protect and defend this Constitution and to maintain its supremacy as the embodiment of the will of the people of Bangladesh". The question is whether the conduct, of various quarters, amounts to refusal of the supremacy of the Constitution. It should be enough to mention here that refusal to accept the supremacy of the Constitution, whether by words or deeds, is a fore-shadow of the ruination of a sovereign state.

The three separate organs & the concept of limited government

Besides, being committed to uphold the Rule of Law, each of the organs of the government must bear in mind that they are the creation of the Constitution, ordained and

adopted by the people of the country and that the cause of their very existence and the legitimacy of their acts and deeds lies in the provision of the Constitution. Moreover, the existence of a written Constitution necessarily refers to a limited government. Each organ should clearly understand the limit of their respective periphery and should remain confined within that limit. The differences amongst scope of functions of the three organs of the government are well recognized, though the demarcating line (which is always there) might have been obscured (maybe in some cases) because of the change in the landscape. None of the organs is either superior or inferior to the another, but is of co-ordinate jurisdiction. The process of appointment or nomination or election to a particular office does not make any difference in this regard, except denoting that the Constitution lays down different procedure, for assumption of different offices, either by way of selection or nomination or election, according to the nature and function of the offices.

It may not be out of place to note here that the political sovereignty lies with the people, but the legal sovereignty is exercised by the government (on behalf of the people) through it's three independent organs, having co-ordinate jurisdiction, subject, of course, to the provision of law and scrutiny by the apex court, in those cases where the vires of any executive or legislative deeds or acts are challenged before the court. This is well recognized and understood worldwide, since the time immemorial. But in respect of the dispute or question leading to initiation of any proceeding before the court of law, it is the Supreme Court with whom lies the burden and authority to say the last words and giving finality to the same.

Separation of Executive & legislature: another aspect of Rule of Law.

No doubt, in each democratic system of governance based on written Constitution, three organs of the government are always created by and the scope of their authority is defined in the Constitution. If any Constitution provides that the executive power of the Republic shall be exercised by or under the authority of the Prime Minister, then this separation of power between the three organs of the government, is in this particular instance ('Parliamentary executive' or 'cabinet system' as we find in the UK), between the executive and legislative branches of government, may disappear. This is not the situation under the Constitution of the USA and other countries that have adopted constitution following the US system of governance, entrusting the judicial, legislative and executive powers in three separate organs. Separation of powers amongst the three branches of the government have been getting more attention, gradually, in those countries where the democracy has been evolved, survived, nourished and firmly rooted before the 2nd world war, as distinct from those countries (colonies) where democracy has been 'implanted' after the 2nd world war. Amongst this latter group, India is an state indentified as a country having liberal and continuous democracy, as opposed to guided or controlled democracies, where military rulers or one party has ruled. About the separation of powers between the executive and legislative branches, I consider it will be an apt instance to cite the case that has reflected upon the rigid attitude of the balance of power between two political branches of the government i.e. the executive and the legislative. In the case of **CLINTON, PRESIDENT OF THE UNITED STATES, ET AL., APPELLANTS v. CITY OF NEW YORK ETAL, ON APPEAL FROM THE**

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA [June 25, 1998], 524 US417 (1988), it has been highlighted that-

a) Liberty is always at stake when one or more of the branches seek to transgress the separation of powers.

(b) Separation of powers was designed to implement a fundamental insight: concentration of power in the hands of a single branch is a threat to liberty. The Federalist states the axiom in these explicit terms: "The accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny." The Federalist No. 47, p. 301 (C. Rossiter ed., 1961).

(c) In recent years, perhaps, we have come to think of liberty as defined by that word in the Fifth and Fourteenth Amendments and as illuminated by the other provisions of the Bill of Rights. The conception of liberty embraced by the Framers was not so confined. They used the principles of separation of powers and federalism to secure liberty in the fundamental political sense of the term, quite in addition to the idea of freedom from intrusive governmental acts. The idea and the promise were that when the people delegate some degree of control to a remote central authority, one branch of government ought not to possess the power to shape their destiny without a sufficient check from the other two. In this vision, liberty demands limits on the ability of any one branch to influence basic political decisions.

(d) Separation of powers helps to ensure the ability of each branch to be vigorous in asserting its proper authority. In this respect the device operates on a horizontal axis to secure a proper balance of legislative, executive, and judicial authority. Separation of powers operates on a vertical axis as well, between each branch and the citizens in whose interest powers must be exercised. The citizen has a vital interest in the regularity of the exercise of governmental power.

By that Judgment the US Supreme Court has held illegal and struck down the Line Item Veto Act, 1997, by 6-3 ruling, upholding the reason that the Act "impermissibly disrupts the balance of powers among the branches government" , since it has violated Article1, Section 7, clause 2 of the US Constitution.(emphasis added)

Separation of and controversy about the judiciary and the Rule of law

In this respect, I should quote the Hon'ble Chief Justice of Bangladesh Mr. Justice Md. Muzammel Hossain, observing that " *Judges are independent in exercise of their judicial functions and act only on the dictation of good conscience and pronounce judgments in accordance with law. The decisions rendered by the judges may bring disappointment to some, but justice is blind. In the domain of justice, feeling, emotion and sentiment have no part to play."* vide Supreme Court of Bangladesh, Annual Report 2012, Page- 6. With this observation, seems relevant to read Mac Gregor Dawson, writing that, "*There would seem to be little purpose in taking elaborate care to separate the judge from politics and to render him quite independent of the executive, and then placing him in a position as a Royal Commissioner where his impartiality may be attacked and his findings –no matter*

how ever correct and judicial they may be – are liable to be interpreted as favouring one political party at the expense of the other. For many of the inquiries or boards place the judge in a position where he cannot escape controversy," vide Mac Gregor Dawson, The Government of Canada, 3rd ed, at 482.

Hence, in my humble opinion, a Judge taking oath to impart justice should bother least about any step designedly taken to make him controversial, by any quarter, either acting as lobbist or owing to partisan mentality or to serve his own or other's peculiar interest or emotion or ego or due to suffering from any complex, but always keeping in mind the trend of self restraint well-advised in the words that, "let the dogs bark, caravan will pass". He (an Hon'ble Judge) should not, unlike others (few or not), look for temporary applause or publicity, nor should he entrain even a modicum of fear, as his oath requires him of. His judgment will speak for it self.
An interested reader may also go through the article "Attack on and survival of the judiciary", Journal section, of AIR (1983) and AIR (1984).

Rule of law and the US Supreme Court

The most revered of the Supreme Courts, is the Supreme Court of the USA (established under Article III of the US Constitution). The Supreme Court is really supreme there. Because, the people in that country prefers to be governed by Rule of Law, not by men. Because, the Constitution of the USA has made provisions maintaining balance of power in the three organs. The Supreme Court (of USA) itself is the very foundation of the Rule of Law. A few instances to be cited are the cases of (i) Marbury v. Madison: 5 US (1Cranch) 137 (1803), whereby judicial review of legislation has been established. The most famous of all constitutional decisions, asserted the authority over an action of the Federal congress, a co-ordinate and equal branch of the federal government with the judicial. The reasoning and power of the decision, of that case, has given permanent legitimacy to the exercise of such review of the actions of the States; (ii) Fletcher v. Peck:6 Cranch 87 (1810), holding a Georgia statute. unconstitutional; (iii) New York Times v. Sullivan : 376 US 254 (1964), in which the Supreme Court, abandoning English precedent which predated the US constitution, has placed strict constitutional limits on the circumstances (invoking law of torts) under which public officials could recover damages for the publication of defamatory statements about them; (iv) The New York Times Company v. United States (The Pentagon Papers Case): 403 US 713 (1971), a land mark decision by The US Supreme Court on the First Amendment. The ruling made it possible for the New York Times and Washington Post newspapers to publish the then *classified pentagon papers* without risk of government censorship or punishment. [It is to be noted here that Article 1, incorporated in the US Constitution is not similar to Article 39 (2) (a) of the constitution of Bangladesh] (iv) Bush v. Gore, 531 US 98(2000), in which the recount order of the Florida Supreme Court was reversed (in an election dispute), (v) Clinton v. Jones, 520 US 681 (1997), wherein the Supreme Court has held that, when the President (of the USA) takes official action, the Court has jurisdiction to determine whether he has acted within ambit of the legal authority vested in him and that the President is subject to judicial process in appropriate circumstances. The court has endorsed the view that a subpoena *duces tecum* could be directed to the President, as was done in the case of United State v Nixon, 418 US 683 (1974), and President Nixon (in the

water gate scandal case) had to comply with a subpoena requiring him to produce certain tape recordings of his conversation. The US Supreme Court has also opined that the doctrine of "separation of powers" or the need for confidentiality of high level communications cannot help sustaining an absolute, or unqualified Presidential privilege or immunity from judicial process in all circumstances. Besides, the sitting Presidents have been seen responding to court orders to provide testimony and furnishing other information's, pursuant to the court orders. As regards the President's power to grant pardon, the Supreme Court took the view that the president's power to grant pardons and reprieves is not absolute, however, per Justice Breyer, in the concurring judgment passed in Clinton v. Jones. These are a few (amongst hundreds of) instance showing how each organs of the government are functioning within their constitutional confine, showing mutual respect and self restraint and all these three organs as well as the people in the USA are found committed to see that the 'Rule of Law' is upheld in any case.

Why not to be looking much to UK practices in exercising the power of. Judicial Review : Supremacy of the Constitution.

For enlightenment upon this topic, I again find it profitable to quote from *chapter one* the book "Making Our Democracy Work" by Hon'ble Associate Justice Mr. Stephen Breyer of the Supreme Court of USA Referring to the views of some Federalists and Republican, the Hon'ble judge writes that, at least on occasion, to strike down statutes it believed were in conflict with the Constitution. James Madison, for example, pointed out that the Bill of Rights would protect individuals from abuse by a majority. And he (James Madison) immediately added: "*Independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the constitution by the declaration of rights*". Alexander Hamilton wrote the same in *The Federalist Papers* –a series of newspaper articles in which he, James Madison, and John Jay advocated adoption of the Constitution. Hamilton said that *the Constitution's limitation "can be preserved in practice in no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the constitution void....[Otherwise] all the reservations of particular rights or privileges would amount to nothing."* How did the framers [of the US Constitution] explain this expectation of judicial review? Hamilton, in The Federalist numbers 78 and 81, argued that the Constitution must trump any ordinary federal law. *The Constitution is fundamental, it represents the will of the people, and it is the source of lawmaking authority. A statute, by contrast, represents the exercise of constitutionally delegated authority* ..... Thus, says Hamilton, "*where the will of the legislature declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges...ought to regulate their decisions by the fundamental laws, rather than by those which are not fundamental*". *Hamilton, then, assumed that conflicts between statutes and the Constitution could not be resolved by leaving the matter to the public. Hamilton argued against placing final authority to interpret the Constitution in the hands of the president, because the president could then become too powerful. After all the "executive not only dispenses the honors but holds the sword of the community." He also argued against placing final authority to interpret the Constitution in the hands*

of the legislature, because the legislature would too rarely enforce the Constitution if this invalidated a law it had recently passed. How, he asked, can it "be expected that men who had infringed the Constitution in the character of legislators, would be disposed to repair the breach in the character of judges?" That left the judiciary. The "interpretation of the laws," said Hamilton, "is the proper and peculiar province of the courts." Judges enjoy comparative expertise in the matter. They frequently reconcile apparently conflicting statutes; they study precedents: they are "skilled in the laws," whereas legislators are "rarely..chosen with a view to those qualifications which fit men for the stations of judges." Indeed, "there is no liberty" unless the "power of judging" be "separated from the legislative and executive powers".

Hamilton saw a greater risk, in the opposite tendency, namely, that judges would fail to faithfully guard the Constitution when "legislative invasions of it had been instigated by the major voice of the community."It would require that judges be appointed for lengthy terms and receive constitutional guarantees as to their compensation. For all these reasons, the judiciary was the safest as well as the most natural place to lodge the power of judicial review.

[Emphasis added]

On the country, in my considered view, the UK has no constitution, though it has some statutes (eg. Bill of Rights, 1688 and the Act of Settlement, 1700) containing some fundamental principles and provisions found in a written constitution. As such, the peculiar recognition (in my view) of unwritten constitution, is like counting an unborn child for demographic statistics. Hence, this classification of the constitution as 'written' and 'unwritten' is nothing (in my humble view) but an artifice invented by some writers of civics. Besides, a constitution can only be framed by a particular body [Constituent Assembly or Constitutional Convention] elected or appointed for framing a constitution on behalf of the people and which the people adopt, enact and give unto themselves [as we find in the case of in Bangladesh and in India.] Similarly, the Americans in 1787, declared : We the people of the United States of .....do ordain and establish this Constitution for the United States of America. Such formalities are clearly absent in the making of so called unwritten constitution of UK Indeed, to give an authoritative basis to my view, I should quote, the Modern Constitutions, by KC Where. It is desirable to look at the questions made and the explanations given at page 9 and 10 of this book, that reads : "*Why has Britain no Constitution? The question is easier to ask than to answer, and easier to answer at great length –by outlining the constitutional history of Britain-than shortly. But we may suggest a short answer along these lines. Consider the first of the reasons why countries have constitutions –the desire to make a fresh start. Did England ever have this experience? People sometimes speak as if she did not. They talk of an unbroken line of development from earliest times, by which a few rudimentary institutions were adapted and supplemented and finally broadened out and democratized, until absolute monarchy came to be translated into parliamentary democracy. But there was a break in English history and when that break came an attempt was made to make a fresh start, and to enshrine the new principles of government in a Constitution. The break came with the Civil War in 1642 and the execution of Charles I in 1649. In the years of the Common-wealth and the protectorate, 1649-1660, several attempts were made to establish a Constitution for the British Isles-not for England alone, for Cromwell had united England, Scotland, and Ireland in one government. The best known of these*

attempts at a Constitution is the Instrument of Government of 1653. It exhibits all the marks of a Constitution as we understand it today. Had the Commonwealth continued, there is no doubt that there would have been a British Constitution, embodying the fundamental principles of governments they had emerged from the conflicts of the Civil War". ..... "But, it may be asked, what of the Revolution of 1688 and the Bill of Rights? Was not that a break and a fresh start? Was not the Bill of Rights a Constitution? Here again, England might have had a Constitution but did not."

For these reasons, UK is a country where the Parliament is Supreme, not the Constitution, since it does not have any Constitution under which, unlike Article 65 of the Constitution of the PRB, the UK Parliament has been created. The apex Court in UK has, therefore, no power to judicially review a legislative Act. Rather, in UK, it is the Parliament, not the Court, which is invested with the power to investigate whether an Act has been obtained in breach of Parliamentary procedure. Besides, the European Community Act of 1971 (came in to force in January, 1972), has made a difference, pole apart, in the legal system between the UK and other countries having constitution (necessarily meaning a written constitution). Notwithstanding the fact of having no constitution, the UK democratic system is the superb model of true democracy and, no doubt, that is one of the oldest civilized and highly educated nations in the universe and based on the Rule Law.

To make the Supreme Court really supreme: a pre-condition to ensure rule of law:

Before conclusion, I consider it pertinent to refer to the case of Marbury –Vs –Madison, 5 US (1cranch) 137 v (1803) to remind me of the reason how the US Supreme Court has been able to make its position supreme since Marbury and the 'infamous' case of Dread Scott –Vs- Sandford, 60 US (19 How) 393 (1857), as an instance that has taken away all its glory that it had earned by that time and has also made the civil war inevitable, though the latter one was a majority judgment (7:2), the then CJ himself having authored the opinion.

When the US Constitution came into force there was even no land earmarked for the construction of the US Supreme Court Building. The world's largest democracy and the most powerful nation, have earned unqualified respect of the nations all over the world because the people in that country (USA) believe in the Rule of Law (as distinct from rule by any person or party or quarter or pressure groups etc). They respect the judgments passed by the US Supreme Court even though one may not agree with the same. Otherwise, no institution could have devolved or sustained in that country.

In my personal opinion, this country should follow the legal, administrative and political system prevailing in the USA, based on the world's first written Constitution and that has proved it's strength and efficacy as is evident even after the centuries have passed since the US constitution was signed in September 17, 1787. Even the role of Pakistan Supreme Court (at least since the era of the Hon'ble CJ Iftikhar Muhammad Chawdhry) and that of the Indian Supreme Court may be looked at, to be in harmony, so far as the role of our Supreme Court is concerned, because of homogeneity or near homogeneity in the politico-legal situation of these two latter countries.

To speak the least, supremacy of the Constitution lies in the supremacy of the Court (as distinct from supremacy of a judge), on which rests the burden to uphold the Constitution, in any situation, chaotic or normal.