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# Missing separation of powers

The system of checks and balances, founded on the principle of separation of powers, is quite weak in Bangladesh. This is partly because there is no inherent formal separation of powers between the executive and the legislative branches in a parliamentary system. Bangladesh's unitary system of governance, which allows for "winner-take-all" arrangements, makes it even weaker. It is no wonder then that people's rights are routinely trampled here.

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This article is a slightly modified version of an essay submitted for a competition sponsored by the Commission on the Bicentennial of the U.S. Constitution, The American Bar Association and The USA Today for high school students in America. It was the national winner among 13,000 entries from all over United States. The essay was earlier published in the Congressional Record.

**M**OST nation-states were created on the basis of long-standing birthrights of a people over a land. China is for the Chinese as Germany is for the Germans. America, however, was founded upon an ideal "that all men are created equal... with certain unalienable rights, that among these are life, liberty and the pursuit of happiness." The American Constitution was written to protect these rights.

Recognizing that all authority inherently belongs to, and is derived from, the people, the Constitution vests limited powers in government for certain permissible activities. These limited powers are further diluted and diffused, in order to protect inherent human rights, by the constitutional mechanism of separation of powers and its logical extension, federalism. The separation of powers is thus a cardinal principle underlying the American Constitution. This article examines how the separation of powers facilitates the functioning of the constitution and in the process safeguards the fundamental rights of Americans.

## Mechanism of the separation of powers

The doctrine of separation of powers is primarily an American innovation, and its application represents a novel experiment in the art of governing. It defies the inherited wisdom that government required the unification of authority and creates a governmental structure with separate power centers checking and balancing each other.

Formulated implicitly upon Articles I, II and III, the broader concept of separation of powers, mandates the creation of a governmental structure with three "separate and distinct" branches: executive, legislative and judicial each independent of the others and endowed with distinct functions. The legislative branch is primarily to enact laws, the judiciary to interpret them, and the executive to implement them. The objective of this triangular arrangement is to limit powers through diffusion and specialization.

The three branches are also to be co-equal, preventing domination by one another. They are to

resist each others' intrusive designs and thereby prevent concentration of powers. This built-in policing mechanism institutionalises competition and conflict into the American political system. By pitting the three separate branches against one another, in a framework of institutionalized tension, the framers sought to bring a "balance" in the Newtonian sense to the process of governing.

The three branches, although independent as institutions, are to be interdependent in functions. As Justice Brandeis explains in *Myers v United States* (272, U.S. 52, 291 (1926)): "The separation of the powers of government did not make each branch completely autonomous. It left each in some measure, dependent upon the others, as it left to each power to exercise, in some respects, functions in their nature executive, legislative, and judicial."

This dependence is manifested in many ways. For example, the President often initiates and sometimes vetoes legislative actions, while the legislature is empowered to override that veto. The judiciary is authorized to reject both executive and legislative actions. The President is also empowered to grant pardons. Finally, the legislature is given the power to impeach both the President and members of the judiciary. The three branches are also to cooperate with each other. Presidential nominations for executive and judicial appointments require the "consent and advice" of the Senate. However, while engaging in interactive, overlapping activities through "congressional investigation, "judicial review," "executive pardon," and so on, no branch is to exercise the full powers of another "at the same time."

The separation of powers safeguards constitutional rights. The Constitution was framed in 1787 as a blueprint to make America a unified, sovereign and democratic nation. In order to establish such a nation, the Constitution and its subsequent amendments recognized and guaranteed Americans the most fundamental human rights: life, liberty, equality, representation, due process and so on. The separation of powers makes the constitutional work by safeguarding these rights.

History has taught us that constitutions are not self-executing documents; mere recognition or guarantee of rights does not make them secure. Most written constitutions, including the Russian Constitution, contain provisions similar to our Bill of Rights. But those provisions, as the contemporary experience shows, do not create free societies unless a constitutional mechanism is provided to safeguard

them. The framers of the American Constitution realized this simple truth. They foresaw two distinct threats to the constitutional rights concentrated powers in the hands of a ruler, and the "tyranny of the popular majority."

The framers were profoundly influenced by Montesquieu's warning against joining the executive, legislative and judicial powers in the same person, for every person is capable of abusing powers and, if he attains it, is likely to do so. They had no illusion of man's lust for power. In fact, they were too well aware of the tyrannical excesses of the British monarch, which they sought to resist by signing the Declaration of Independence (or Resistance). Such tyranny, they reasoned, could be prevented only by pitting power against power.

Popular majorities, even in democratic societies, may also use power to advance their interests at the expense of minorities. The persecution of the poor, disadvantaged and nonconformists (those holding unpopular views or belonging to undesirable groups) has been a fact of life throughout history. This danger of intolerance is more serious in America, unique in its ethnic heritage and racial diversity.

The framers devised the doctrine of separation of powers as a precaution against these twin threats. By fragmenting and diffusing powers among three separate branches, within a scheme of mutual dependence, the Constitution not only avoids the emergence of dictators, but also assures "full, vigorous and open debate on the great issues affecting the people. This makes governing a political process an art of compromise and coalition-building, not a means to exercise the whims of a select few over the many. Widespread agreements and consensus-building must generally precede governmental actions. For example, for a bill to become law, it must be first passed by Congress, signed by the President, and if called upon, reviewed by the judiciary. This process thereby institutes multiple check points for every public policy decision.

The overlapping, staggered process of governing, within the triangular scheme of multiple scrutiny, provides the citizens multiple access points to their government. They have three separate recourses for their grievances. They can lobby Congress to pass or reject legislation; they can approach the President to initiate or veto legislation. Failing all of these, they can seek recourse from the multiple layers of the judiciary. The system of multiple access historically has served the nation well. The fundamental rights of Americans have repeatedly been affirmed and upheld.

The multiple access points not only protected constitutional rights, but also served as conduits for advancing them. Such advancement sometimes required amending the Constitution in the light of changing



circumstances, and other times interpreting and enforcing its provisions in specific cases. The leadership for these has historically come mostly from the executive and judicial branches. For example, Presidential leadership was instrumental in the abolition of slavery. The judiciary, through its landmark decision in *Brown v Board of Education*, took the initiative in guaranteeing civil rights to the racial minorities.

The doctrine of separation of powers also effectively protects the individual's constitutional

rights against the tyranny of the majority. In the American system, the majority controls a part, and sometimes only a small part of the government. As a result, even an overwhelming majority, armed with a popular cause, cannot steamroll an action. Similarly, the so-called "imperial presidency," despite the concerns of some observers in recent years, has also not been able to subvert the system of checks and balances. Such inability to undermine the system has been instrumental in making America a stable democracy

through two world wars, a civil war, assassinations and the near impeachment of two presidents. The constitutional mechanism embodying the doctrine of separation of powers is, however, not without flaws. Changes and deviations from the status-quo are slow and often painfully difficult; but when they do take place, they are deliberate, orderly and lasting. More importantly, these changes have been made to advance liberty rather than take it away. Furthermore, there is no perfect system of government, yet the American constitutional system can be viewed as a giant step towards that lofty goal.

The separation of powers in Bangladesh

The system of checks and balances, founded on the principle of separation of powers, is quite weak in Bangladesh. This is partly because there is no inherent formal separation of powers between the executive and the legislative branches in a parliamentary system. Bangladesh's unitary system of governance, which allows for "winner-take-all" arrangements, makes it even weaker. It is no wonder then that people's rights are routinely trampled here.

In a parliamentary system, the executive branch is accountable to the legislature. Parliamentary standing committees provide such accountability by overseeing the activities of the executive. They attempt to ensure that legislation is faithfully implemented and that resources are honestly and efficiently utilised. In fact, the effectiveness of a legislature is directly related to the aggressiveness of its oversight activities. In Bangladesh, the oversight role of the legislature is almost nonexistent. Consequently, executive abuses of powers often go unchecked. Judicial independence is also yet to be ensured.

Article 70 of the Bangladesh Constitution, which enforces party discipline by preventing the floor crossing of legislators, compromises the oversight role of the legislature. Article 70 effectively makes members of parliament "accountable" to the party higher ups who hold executive positions, rather than the other way around. This, along with the lack of democracy within party hierarchies, has for all practical purposes contributed to the emergence of a system of "imperial premiership" in Bangladesh. Such concentration of unchecked powers and the potential for excesses and abuses that go along with it, perhaps pose the biggest threat to the future of democracy in Bangladesh.

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# Making Bangladesh safe for democracy

FROM PAGE 2

We often hear that democracy has never been given a chance. This is a self-serving assertion of our politicians. Our political leaders fought unitedly against foreign rulers taking the people along with them, but they could not stand unitedly against the native generals. In the past our politicians vied with each in an indecent haste to court the generals. The military played a very crucial role at difficult times by withdrawing its support or lending it to a particular person or for a particular option for action. In December 1990 its withdrawal of support to Ershad made the popular fronde a success. In 1991, it was with the help of the Chief of Army Staff that it was possible to switch back to parliamentary form of government.

Liberation movement often generates monolithic parties. It does not brook opposition. The political party under whose aegis independence is achieved is often found reluctant even to share power with the fellow comrades. In the first Parliament only six Members were in the opposition. In the seventh parliament the main opposition party got 116 Members. The leader of the Bangladesh National Party polled highest popular votes. Out of the top first ten vote-winners five are from BNP. In the eighth parlia-

ment the strength of opposition has dwindled. Democratic constitutionalism in our country has been badly jolted by the self-serving exercises of both politicians and members of the defense services. Amidst leader-dominated political parties and their fractious innumerable competitors, coup-prone armed forces and outlandish radical and fundamentalist ideas as to nation-building. We have survived with the same resilience and withstood numerous natural calamities in the past.

Our people's participation in elections has increased steadily from 34% in 1954 to nearly 75% in 2001. This unmistakably shows our commitment to the electoral process. A noticeable feature in the last two general elections was the ever increasing participation of women.

The future of the democracy lies on our commitment and we are obliged under art.21 of our Constitution "to observe the Constitution and the laws, to maintain discipline, to perform public duties and to protect public property." We are putting more emphasis on the economic development than on institution-building. Plans of development will come to nothing if we fail to lay the foundation strong enough to bear the burden of development

and changes that may follow it.

During Pakistan time we were against detention without trial. Many of our leaders were detained under various preventive laws. At the commencement of our Constitution there was no provision for preventive detention. The Constitution was soon amended. The Special Powers Act was passed in 1974. The electoral promise to abolish that law was forgotten and it was asserted that the question of abolishing that law "does not arise at all". Now the alleged miscreants are liquidated without any trial, getting killed in Operation Clean Heart 45 persons died of heart failure in custody in such questionable circumstances that we had to pass an indemnity law. We are assured that no such legislative exercise will be needed this time. We often forget that the reputation of a country does not depend on how severely the miscreants are dealt with, rather it depends what treatment is meted out to the accused, the malcontents and the deviate in custody, and after trial in prison.

When Bangladesh was born, there was an expectation that free and fair elections would take place regularly and peacefully. The constitution stipulated for regular democratic elections and

in 1973 both a national and a local elections were held. But between 1975 and 1990 the country was ruled by successive military dictators for fifteen years. Elections, held under military rule, were not regarded as "free and fair". The people reclaimed their democratic rights to choose their governments when they overthrew the military regime in 1990. In the last two decades change of regimes and peaceful transfer of power from one party to another as a result of elections may be regarded as evidence of the progress of democracy in Bangladesh.

Institutionalising democratic competition in free and fair elections has, however, been proved to be difficult. We have demonstrated extreme distrust of each other's good faith in democratic practices. When in opposition both the two principal political parties preferred street demonstration to participation in Parliament. It is, however, difficult to blame them. In the past in 1969, 1971, 1990 and 1996 it was the street power that brought about the desired changes. The increasing use of arms to voice protest and settle political differences is a menacing deterioration in our present-day confrontational politics.

Political parties have little or no

instructive role for the people, and, instead, they are used to mobilising crowds or organising demonstrations during protest meetings and mobilising votes during elections. On economic or social policy matters there is no worthwhile difference between the two parties. In the party meetings of both the parties there is hardly any debate on economic and social options and decisions taken by the party leaders are generally endorsed by acclamation.

After independence, we have failed to provide for effective participation of the people through their elected representatives in all levels of administration. The jury system was abolished in 1959, and its replacement, the assessor's system, in 1979. At present there is no people's participation in the judicial administration. The constitutional provisions for local government in arts. 59 and 60 are unique features of our Constitution. It is held by the Supreme Court in *Kudrat-e-Elahi's* case that local government must exist in some form at any given point of time and if Parliament has to pass a local government legislation it must conform to arts. 59, and 60. Although the case was decided on 30 July, 1992, the Government has

not yet fully complied with the directions of the Supreme Court.

In respect of separation of the judicial functions of magistrates from their executive functions, a law was passed as early as 1957 by the then East Pakistan Legislative Assembly. Only a notification was required to bring that law into effect. No notification was made in the last forty years. We have so far failed to separate the subordinate judiciary from the executive organs and to provide for independent supervision of all subordinate courts by the Supreme Court that exercises supreme judicial power over the country. If Bangladesh is to be made safe for democracy, its peace must be planted upon foundations of constitutional safeguards and protection for citizens' rights. The government is to protect life, liberty and property of the citizens. That is the primary function of any state. And then the government is to improve the quality of life. The government is to carry on the mandates of the Constitution. Art. 112 provides: "All authorities, executive and judicial, in the Republic shall act in aid of the Supreme Court" With regard to the Election Commission art. 126 provides: "It shall be the duty of all executive authorities to assist the Election Commission in the dis-

charge of its functions." Had this provision been faithfully complied with then there would have been no occasion to pass the Thirteenth Amendment providing non-party caretaker government. No other democratic country, either in the region or elsewhere, had to make that exercise.

Article 128 (1) provides that the public accounts of the Republic and of all courts of law and all authorities and officers of the Government shall be audited and reported on by the Auditor General. For the independence of the office of the Auditor-General it has been provided in clause (4) of art. 128 that in the exercise of his functions under clause (1) shall not be subject to the direction of any other person or authority. As required by art. 132 the Reports of the Auditor-General relating to the public accounts of the Republic shall be submitted to the President, who shall cause them to be laid before Parliament. During the military rule the reports of the Auditor General could not be placed before parliament.

The effectiveness of Comptroller and Auditor General is largely dependent upon that of the Public Accounts Committee (PAC). The number of reports lying with the said committee is enormously large. Even if the

committee works day and night for a couple of years it will not be possible to clear the backlog. Again, there is no institutional arrangement to follow up on the recommendations of the PAC or to monitor the actions being taken by the respective agencies.

It is not clear whether the recommendations of the PAC are binding on the ministries concerned. The reports prepared by the PAC containing its deliberations and proceedings are placed in the House. The Parliamentary Rules of Procedure have not clearly stipulated any provision to discuss the same on the floor of the House.

If we want to make our country safe for democracy we must preserve, protect and defend the Constitution. For preserving the independence of the judiciary, the Election Commission and the Office of the Comptroller General and Auditor General there are sufficient directions in the Constitution. Unfortunately the executive branch of the government instead of acting in aid of the three organs of the State by making necessary laws and supplying adequate logistic support is often treating them, in blatant violation of the principle of separation of power, as its adjuncts.

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