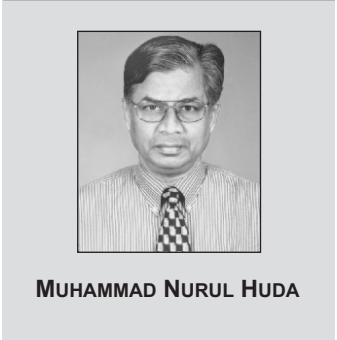


Separation of powers: Concept and reality



MUHAMMAD NURUL HUDA

THE concept of separation of powers has played a major role in the formation of constitutions. The extent to which powers can be and should be separate and distinct was a central feature in formulating, for example, both the American and French revolutionary constitutions. In any state, three essential bodies exist: the executive, the legislature and the judiciary. It is the relationship between these bodies which must be evaluated against the backcloth of the principle. The essence of the doctrine is that there should be, ideally, a clear demarcation in function between the legislature, executive and judiciary in order that none should have excessive power and that there should be in place a system of checks and balances between the institutions.

In *The Politics*, Aristotle proclaimed that: "There are three elements in each constitution in respect of which every serious lawgiver must look for what is advantageous to it; if these are well arranged, the constitution is bound to be well arranged, and the differences in constitutions are bound to correspond to the differences between each of these elements. The three are, first, the deliberative, which discusses everything of

common importance; second, the officials; and third, the judicial element."

The constitutional seeds of the doctrine were thus sown early, reflecting the need for government according to and under the law, a requirement encouraged by some degree of a separation of functions between the institutions of the state.

Baron Montesquieu (1689-1755, living in England from 1729-31) stressed the importance of the independence of the judiciary in the following manner: "When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty ... Again, there is no liberty if the power of judging is not separated from the legislative and executive. If it were joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would then be the legislator. If it were joined to the executive power, the judge might behave with violence and oppression. There would be an end to everything, if the same man or the same body whether of the nobles or the people, were to exercise those three powers that of enacting laws, that of executing public affairs, and that of trying crimes or individual causes."

Throughout history, there has been exhibited a tension between the doctrine of separation of powers and the need for balanced government – an arrangement depending more on checks and balances within the system than on a formalistic separation of powers. Political thinkers did not mean that the legislature and the executive should have no influence over the other but rather that neither should exercise the power of the other. It was considered that the executive and the legislature should be sufficiently separate to

avoid 'tyranny', and that their total separation may potentially lead to the domination of the executive by the legislature. It was opined that partial separation of powers was required to achieve a mixed and balanced constitutional structure. It was thought that constitutional arrangements characterised by powers and personnel being largely – but not totally – separated with checks and balances in the system to prevent abuse, that is, mixed government and weak separation of powers would be desirable.

The executive may be defined as

which the Supreme Court was a valiant guardian. A testimony to this is the case of *Secretary of Finance vs. Masdar Hossain* (20BLD[2000] [AD] 141) where the Supreme Court painstakingly laid down twelve directions to give meaning, shape and thrust to the requirements of the Constitution in the matter of separating the judiciary from the executive."

The historic twelve directions

(1) It is declared that the judicial service is a service of the Republic

make rules regulating their suspension and dismissal but Article 115 does not contain any rule-making authority with regard to other terms and conditions of service and that Article 133 and Article 136 of the Constitution and the Services (Reorganisation and Conditions) Act, 1975 have no application to the above matters in respect of the judicial service and magistrates exercising judicial functions.

(4) The appellant and the other respondents to the writ petition are directed that necessary steps be taken forthwith for the President to

achieving equality between men and women in the recruitment.

(5) It is directed that under Article 133 law or rules or executive orders having the force of Rules relating to posting, promotion, grant of leave, discipline (except suspension and removal), pay, allowances, pension (as a matter of right, not favour) and other terms and conditions of service, consistent with Articles 116 and 116A as interpreted by us, be enacted or framed or made separately for the judicial service and magistrates exercising judicial functions keeping in view constitu-

ing control and discipline of persons employed in the judicial service and magistrates exercising judicial functions under Article 116 the views and opinion of the Supreme Court shall have primacy over those of the Executive.

(8) The essential conditions of judicial independence in Article 116A, elaborated in the judgment, namely, (1) security of tenure, (2) security of salary and other benefits and pension and (3) institutional independence from the Parliament and the Executive shall be secured in the law or rules made under Article 133 or in the executive orders having the force of Rules.

(9) It is declared that the executive government shall not require the Supreme Court of Bangladesh to seek their approval to incur any expenditure on any item from the funds allocated to the Supreme Court in the annual budgets, provided the expenditure incurred falls within the limit of the sanctioned budgets, as more fully explained in the body of the judgment. Necessary administrative instructions and financial delegations to ensure compliance with this direction shall be issued by the government to all concerned including the appellant and other respondents to the writ petition by 31.05.2000.

(10) It is declared that the members of the judicial service are within the jurisdiction of the administrative tribunal. The declaration of the High Court division to the opposite effect is set aside.

(11) The declaration by the High Court Division that for separation of the Subordinate Judiciary from the executive no further constitutional amendment is necessary is set aside. If the Parliament so wishes it can amend the Constitution to make the separation more meaningful, pronounced, effective and

complete.

(12) It is declared that until the Judicial Pay Commission gives its first recommendation the salary of Judges in the judicial service will continue to be governed by status quo ante as on 8.1.94 vide paragraph 3 of the order the same date and also by the further directions of the High Court Division in respect of Assistant Judges and Senior Assistant Judges. If pay increases are affected in respect of other services of the Republic before the Judicial Pay Commission gives its first recommendation, the members of the judicial service will get increases in pay etc. commensurate with their special status in the Constitution and in conformity with the pay etc. that they are presently receiving.

The ground reality, in Bangladesh, is that the judiciary possesses neither the financial resource nor the power to extract the allegiance of the other organs of the State to the constitution and the implementation of its decision in so far as it relates to the separation of the judiciary from the executive. As such, in spite of public declarations and commitments to judicial separation from the executive branch, political groups and the administration have maintained the status quo. Thus the intentions of our constitution have not been carried through. Therefore, although the judiciary is in the process of separation of late, the civil society and the political class of Bangladesh should relentlessly pursue the issue until the constitutional dignity and effectiveness of the supreme judiciary is fully and credibly established.

Muhammad Nurul Huda is a former Secretary and IGP.

Have the people lost confidence in politics and constitution?

G M QUADER

PRESIDENT Iajuddin Ahmed resigned from the post of the Chief of (non-party) caretaker government on the night of January 11 last in consideration of mounting demand from the political parties under grand alliance of 14 parties, LDP (Liberal Democratic Party) and Jatiya Party. He also declared state of emergency amid growing political crisis over election at the same time.

In his speech over radio and television on 11th January night, President Iajuddin Ahmed accepted that there had been flaws in the process of updating voters' list. He also admitted that it was not possible to hold a free and fair election without a flawless voters' list. Under the circumstance he mentioned it was not possible to hold an acceptable election within the 90 days.

On the same night it was made to know that nine out of ten advisers of the advisory committee already submitted their resignation while the senior most (among the advisers) took charge as acting chief adviser till a fresh council of advisers could be reconstituted.

Our system of governance is parliamentary where Prime Minister (PM) is appointed from amongst the elected members of parliament (MP) by the President after being satisfied that he/she commands the support of majority

of MPs, article 56(3). PM acts as the chief executive, article: 55(2) who select the council of ministers, article: 55(1) to be appointed by the President, article 56(2). The Cabinet, that is PM and other ministers, as per constitution remains collectively responsible to Parliament, article: 55(3).

After expiry of 5-year term of an elected government a non-party caretaker government is formed as per provisions of constitution, article: 58C, with the aim of aiding to conduct a free and fair election, article 58D, so that an elected government and a parliament could be formed to take charge for the next five years.

President appoints one Chief Adviser (CA) to head that government as per conditions of article 58C (3) to (6). The CA subsequently selects a maximum of 10 advisers to be appointed by the President to form an advisory council. The non-party caretaker government that is CA and other Advisers are to be collectively responsible to the President, article 58B (2).

For all practical purposes the functions of PM of the elected government and CA of the non party caretaker government are similar as regards running of the country as its chief executive. So are the positions of ministers and the advisers of elected government and interim caretaker government, respectively. The status, remuneration and privileges of CA and other

advisers are also allowed accordingly, article 58C (11).

As already mentioned earlier Cabinet is to perform collectively and constitution stipulates collective responsibility. Constitution also says that in case PM resigns or ceases to hold office other ministers shall be deemed to have resigned, article 58 (4). It is also pointed out that Council of Advisers is also to act and be responsible collectively. It is natural

that in case the CA resigns other advisers shall be deemed to have resigned.

The common perception of the people seems to be that the elected government does not represent the people. People find their role reducing every day not only while electing the representatives but also find no representation of their mind in the activities of the so called representative government. Naturally they do not find it difficult to welcome the interim government consisting of a selected group of technocrats which to some extent represent them in its activities by cracking on corrupt and irregular activities and working to provide them the right to make their choice of representative in a free and fair way.

that in case the CA resigns other advisers shall be deemed to have resigned.

Was not it superfluous that advisers are to resign as was done on the 11th January when President decided to relinquish his position as CA and rendered resignation accordingly? Was not it incorrect that the senior most of them remained to act as CA till the new council of advisers was reconstituted and more so when as per newspaper report, he (the senior most adviser) claimed to be continuing as he did not resign?

As per provisions of our constitution, article 123 (3), general election of Members of Parliament is to be held within ninety days after Parliament is dissolved. Under the existing circumstances it is obvious that the same cannot be adhered to. In this respect Mr. Mahmudul Islam, a former Attorney General of Bangladesh, wrote in his article published in The Daily Star dated, January 11, 2007, "There are other reasons why the provision in ques-

tion cannot be held mandatory. When no consequence is provided for non-compliance of a provision, that provision is generally taken to be directory. When a provision is directory, it does not mean that it need not be complied with. A directory provision need not be complied with strictly in terms provided – and substantial compliance is sufficient to satisfy the requirement of law."

What the constitution says now as regards the definite time frame for conducting the general election and also up to what time the emergency may be continued are the questions stirring the minds of

people. There is also doubt whether the newly formed interim government under CA Dr. Fakhruddin Ahmed after resignation of the immediate past caretaker government of President Iajuddin may be considered a non-party caretaker government as stipulated in the constitution.

It may be derived from the above that constitution does not mention definitely within what time the election should be

expiration of the said period of thirty days a resolution approving the Proclamation has been passed by Parliament."

The constitution does not have any provision of a second non-party caretaker government after the resignation of the first. Moreover, it is not clear whether the President has obtained assent of all major political parties prior to selecting CA. As such, the present government of Dr.

Fakhruddin may be considered more as an interim government created as per the need of the hour than a non-party caretaker government as per constitution.

Prospect of a government elected by the people soon does not look so certain at the moment. The country would run for quite some time now by people chosen on the basis of their non-partisan role and past records of performance under the cover of emergency when the enforcement of fundamental rights recognised by constitution are kept suspended. Are the people unhappy about it?

Animal biotechnology: Improving livestock productivity

MD.RASHEDUL ISLAM

BANGLADESH is a very densely populated country with very limited resources for about 140 million people. More than 80 percent of the population live in the rural areas of which more than 70 percent people are directly or indirectly engaged in agriculture. Livestock plays an important role in the agricultural sector, and in the national economy of Bangladesh. But, unfortunately, the genetic potentiality of the indigenous animals in Bangladesh is very poor and they are unable to reproduce at an optimum level. On the other hand, it is not possible to meet the increasing demand for animal protein by applying traditional technology. This is now being considered as a problem for livestock development in our country, and this problem can only be overcome through genetic improvement of indigenous stock by biotechnological methods.

Biotechnology, globally recognised as a rapidly emerging and far-reaching technology, is aptly described as the "technology of hope" for its promise of food, health and environmental sustainability. The recent, and continuing, advances in life sciences clearly show a future energised and driven by the new tools of biotechnology. In general 'animal biotechnology', as a compendium of new tools and techniques using biological processes and living organisms, has opened up wide opportunities.

Development of livestock by embryo transplant and transfer of alien genes to the genetic background of domestic

animals cover many well established procedures of conventional livestock breeding such as performance-testing and artificial insemination, as well as major developments in reproductive physiology over recent decades such as in vitro fertilization (test-tube babies) and embryo transfer (surrogacy).

Many third world countries, including our neighbours, have already made great advances in biotechnology through embryo transfer technology (ETT) (as many as ten calves of good breed are being produced in a year from a single cow in Pakistan), gene manipulation of microbes and animal cells, downstream processing and isolation methods, extraction and isolation of animal products, recombinant DNA technology of animals, stem cell biology, bioinformatics, proteomics and genomics, traditional and molecular marker assisted breeding of animals, fabricating bio-reactors and processing equipment (human and animal health products, industrial and other biotechnology products are not being taken up on commercial scales). While other nations, including our neighbours, have made, and/or are making, impressive advances with biotechnology, Bangladesh is pathetically lagging behind and thereby increasing the risk of becoming technologically far too dependent on others.

This is happening in spite of our potential to take advantage of the new technology. It is, therefore, imperative for us to include biotechnology as a priority item in our economic development programmes for improved productivity, profitability, stability and

sustainability of our major farming/production systems. Considering the demand of the present time, and to coordinate research and development efforts in different areas of biotechnology in the country, and to explore new and innovative gene technologies for improved productivity and quality of life the National Institute of Biotechnology (NIB), situated at Ganakbari, Savar, in Dhaka has been established, with six divisions named DNA division, animal division, fisheries division, plant divi-

sion, fermentation and bioprocess division, biofertilizer and bioenergy division, with the aim to promote livestock, fisheries, agriculture and industrial biotechnology researches through biotechnological approaches.

The animal division has been specially established to promote research on multiple ovulation and embryo transfer (MOET), in vitro production (IVP) of embryos, embryo sexing, cryopreservation of biological materials, production of transgenic animals, animal cloning, production of knock-out (KO) laboratory animals, production of recombinant proteins in milk, sexing of semen, development of monoclonal antibody, diagnostic kit and vaccine

development for animals. A bit of progress has been made in the field of animal biotechnology in different national universities and research institutes.

The Department of Animal Breeding and Genetics, Bangladesh Agricultural University in Mymensingh, has developed a Reproductive Biotechnology Laboratory for research on embryo culture and embryo transfer. On the other hand, Bangladesh Livestock Research Institute (BLRI) is trying to produce different types of vaccines

responses are needed to meet the challenges as they unfold, and there is a requirement for specialised personnel and centres of excellence for research and development. The policy goal for the next decade is to facilitate the availability of scientific and technical human resources in all disciplines relevant to the livestock science and animal biotechnology sector.

In order to build a successful animal biotechnology sector, large talent pools are required in multiple scientific disciplines such as molec-

ular and cell biology, chemistry, physics, engineering, bioinformatics, medicine, agriculture, microbiology, technology transfer and commercialisation, bioenterprise and biofinancing, and intellectual property rights management. Production and process development are inter-disciplinary in nature and deficiencies in specific areas may weaken the whole sector.

The key issue is the manner in which to create an effective interface across disciplines. Strengthening the basic knowledge in livestock sciences and animal biotechnology at the university level will be accorded high priority. This is considered to be important for

improving the quality of education and providing exposure to new technologies for students at various levels. Specific mechanisms to achieve the goal will include creation of inter-disciplinary centers of excellence with world-class infrastructure in key areas, programmes aimed at encouraging inter-departmental networking, exchange of visiting professors between our country and our neighbouring countries, and creation of partnership with the biotechnology department.

The need for an integrated biotech policy, with concurrent attention to education, social mobilisation and regulation, is considered to be an essential pre-requisite for the orderly progress of the biotech sector. Synergy between technology and public policy is essential for us to achieve an effective mobilisation of the tools of new biology for adding both, years to life and life to years.

The development strategy is based on a strong innovation promotion framework in which industry, academia, civil society organisations and regulatory authorities will communicate in a seamless continuum. In this regard, the government can play a central role in promoting

biotechnology through supporting the research institutes, as well as the scientists, on priority basis and by providing favourable research environments with special attention to facilities which will provide security to the scientists both in research and personal interest.

As we all know, many scientists of our country are working abroad but, as far as I know, they would rather work in our country if they were provided favourable working atmosphere, suitable remuneration, recognition and a reasonable amount of job security. In this regard, I would like to propose that a different salary structure, and other admissible benefits, be offered for biotechnologists. Furthermore, it is important to recruit advisors/experts in the fields of livestock, fisheries and agriculture to conduct research work in those aforementioned areas. Research will help to establish a basis for active research in improved biotechnology when it is introduced, and acknowledged, as a discipline.

It is time to give special attention to the following key points for the development of biotechnology in this region of Asia, including our country, prioritising biotechnology for national development by the respective governments. A strong task force, consisting of members from all Asian countries, well trained in biotechnology, has to be formed for chalking out the future plan of action. A 20-year plan has to be drawn immediately so that no time is lost unnecessarily for lack of proper planning.

Most of the Asian countries are poor, therefore a 'common fund' for biotechnological development

through voluntary or compulsory contributions, commensurate with national capacity, may be raised in order to take action-oriented programmes common to all countries of the region. This will also avoid duplication of efforts by individual countries and save fund. Biotechnology is a subject of precision and excellence. Therefore, it needs centres of excellence. But, since for individual nations of Asia it is difficult to build up such centres, a joint collaborative programme of the region may solve the problem.

The key technologies in animal biotechnology to be absorbed at this preliminary stage of development are embryo transfer, produced through multiple ovulation (MO) and in vitro produced (IVP), cryopreservation of genetically important biological materials such as semen and embryos, recombinant DNA, production of transgenic and cloned animals, cell culture, hybridomas, vaccine development, and the industrial application of microorganisms etc.

Using the above technologies, along with other modern technologies, it is believed that the production profile of livestock would be enhanced, and specific focus on this kind of improvement of livestock productivity would play a vital role in emancipating rural economy and alleviating poverty.

MD. Rashedul Islam is a scientist (Animal Division) at the National Institute of Biotechnology (NIB).