

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 backdrop 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 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.

(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.

Muhammad Nurul Huda is a former Secretary and IGP.

STRAIGHT LINE

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.

that branch of the state which formulates policy and is responsible for its execution. In formal terms, the sovereign is the head of the executive. The judiciary is that branch of the state which adjudicates upon conflicts between state institutions and individuals. The judiciary is independent of both parliament and the executive. It is this feature of judicial independence which is of prime importance both in relation to government according to law and in the protection of liberty of the citizen against the executive.

Bangladesh scenario: "The Constitution of Bangladesh exhibited a very impressive, pragmatic and sound system of governance of

within the meaning of Article 152(1) of the Constitution, but it is functionally and structurally distinct and separate service from the civil executive and administrative services of the Republic with which the judicial service cannot be placed on par on any account and that it cannot be amalgamated, abolished, replaced, mixed up and tied together with the civil executive and administrative services.

(2) It is declared that the word "appointments" in Article 115 means that it is the President who under Article 115 can create and establish a judicial service and also a magistracy exercising judicial functions, make recruitment rules and all pre-appointment rules in that behalf,

make Rules under Article 115 to implement its provisions which is a constitutional mandate and not a mere enabling power.

It is directed that the nomenclature of the judicial service shall follow language of the Constitution and shall be designated as the Judicial Service of Bangladesh or Bangladesh Judicial Service. They are further directed that either by legislation or by framing Rules under Article 115 or by executive order having the force of Rules a Judicial Services Commission be established forthwith with majority of members from the Senior Judiciary of the Supreme Court and the subordinate courts for recruitment to the judicial service on merit with the objective of

national status of the said service.

(6) The impugned orders in the writ petition dated 28.02.94 and 21.95 are declared to be ultra vires of the Constitution for the reasons stated in the judgment. The appellant and the other respondents to the writ petition are directed to establish a separate judicial Pay Commission forthwith as a part of the rules to be framed under Article 115 to review the pay, allowances and other privileges of the judicial service which shall convene at stated intervals to keep the process of review a continued one. The pay etc. of the judicial service shall follow the recommendations of the Commission.

(7) It is declared that in exercis-

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 11 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.

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 constitu-

tion, 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-

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