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THE SEPARATION OF POWERS BETWEEN THE THREE ARMS OF GOVERNMENT AND THE EFFORTS MADE IN BANGLADESH

What have been the particular challenges for the Bangladesh Parliament?

The expression ‘separation of powers’ is well known to all of us working with the government. In liberal democracies, it provides a useful guide to the Government. It is generally accepted that there are three cardinal categories of governmental functions: (i) The Legislative; (ii) The Executive; and (iii) The Judiciary. At the same time, the government, in a state, has the same main three organs (i) The Legislative; (ii) The Executive; and (iii) The Judiciary. According to the dogma of the separation of powers, these three functions of the government must, in a free democracy, essentially be kept separated and be exercised by separate arms of the government. In this purview, the legislative cannot exercise executive or judicial power and in the same way the judiciary cannot exercise the legislative or executive power of the government.

Now the question arises among the people, are these organs of the state or the organs of the government? We know that there are five ingredients needed to become a state; these are (i) Land; (ii) People; (iii) Government; (iv) Sovereignty; and (v) Constitution. We see in another way that the government needs three organs to govern the state smoothly; these are: (i) the Legislative (ii) the Executive and (iii) the Judiciary. So, we can say, these are the organs of the government.

**Historical sights and jurist comments**

If we see the history of the dogma of separation of powers, we will see that its origin is traceable to Plato and Aristotle. But Montesquieu, who for the first time formulated this dogma systematically, methodically, scientifically and clearly expressed in his book ‘Esprit des Lois’ or Spirit of the Law; published in the year, 1748. In this book, he clearly expresses that the separation of powers is… “when the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty, because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner. Again, there is no liberty if the judicial power is not separated from the legislative and executive. Where it is 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. Where it is joined with the executive power, the judge might behave with violence and oppression. Miserable indeed would be the case, were the same man or the same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions and that of judging the crimes or differences of individuals.”

According to Wade and Phillips, separation of powers may mean three different things—

(i) that the same person should not form part of more than one of the three organs of Government.

(ii) that one organ of the Government should not control or interfere with the exercise of its function by another organ.

(iii) that one organ of the Government should not exercise the functions of another.

According to Basu, in modern practice, the theory of separation of powers means an organic separation and a distinction must be drawn between ‘essential’ and ‘incidental’ powers and that one organ of the Government cannot usurp or encroach upon the essential functions belonging to another organ, but may exercise some incidental functions thereof.

**Internationally Separation of Powers in Practice: USA**

The American Constitution is based on the separation of
powers. It was accepted and strictly adopted by the Founding Fathers of the Constitution of the United States of America. Article 1, 2 and 3 of the US Constitution are very much related to the separation of powers.

In the USA, the separation of powers was implemented by an elaborate system of checks and balances. The Congress (legislative) is given the power to make laws but those laws become effective only when they receive the approval of the President (executive). He can exercise two kinds of vetoes. If the bill is sent to him towards the end of a session, he can kill the same by simply not taking any action upon it. In other cases, the President can veto a bill sent to him by the Congress, but if the Congress passes the same bill again by a two-third majority, the President can declare war but he can do so only with the approval of both Houses of the Congress. The President can enter into treaties but those must be ratified by the Senate. There are certain appointments made by the President which have to be confirmed by the Senate. The Congress are balanced against each other.

**United Kingdom**
The United Kingdom does not however have a written constitution as such and the division of powers has been exercised largely through conventions and usage, supplemented by statute, with the consequence that the principle of parliamentary supremacy exists in its widest sense: no court of law can declare an Act passed by the British Parliament to be null and void or ultra vires. Thus, under Article IX of the Bill of Rights, proceedings of the two Houses of Parliament cannot be ‘impeached or questioned’ outside Parliament.

**India**
Apparently the separation of powers is accepted in India. Under the Indian Constitution, the executive powers are with the President, the legislative powers with Parliament and the judicial powers with the judiciary. The President’s functions and powers are enumerated in the Constitution itself. Parliament is competent to make any law subject to the provisions of the Constitution. It can amend the law prospectively or even retrospectively but it cannot declare a judgment delivered by a competent court void or of no effect. Parliament has also inherited all the powers, privileges and immunities of the British House of Commons. Similarly, the judiciary is independent in its field and there can be no interference with its judicial function either by the executive or by the legislature. The Supreme Court and High Courts are given the power of judicial review and they can declare any law passed by the Parliament or Legislature as ultra vires or unconstitutional.

But if we study the constitutional provisions carefully, it is clear that the dogma of separation of powers has not been accepted in India in its strict sense. There is no provision in the Constitution itself regarding the division of functions of the Government and the exercise thereof. Though, under Articles 53 (1) and 154 (1) the executive power of the Union and of the States is vested in the President and the Governors respectively, there is no corresponding provision vesting the legislative and judicial power in any particular organ.

**Separation of powers and its efforts in Bangladesh**
Bangladesh emerged as an independent country in 1971, following a long struggle for liberation. The Liberation War ended on 16 December 1971. After that the great leader of the people of the Republic of Bangladesh, the Father of the Nation,Bangabandhu Sheikh Mujibur Rahman as President of the People of the Republic of Bangladesh, signed and promulgated the provisional constitution order, 1972.

Thereafter on the basis of the Proclamation of Independence declared and promulgated by the elected representative and unanimous leadership of Bangabandhu Sheikh Mujibur Rahman, a written Constitution was framed and it was adopted on 4 November 1972. By virtue of this, our Constitution is quite different from others but it can be compared only with the USA constitutional model. Like other written constitutions, the Bangladesh Constitution from its beginning
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has stated itself the provision regarding the division of
functions of the government
and the exercise thereof. From
its beginning the supremacy of
the constitution and all actions
of the legislature and executive
have been confirmed in the
constitution. Having regard
to the past constitutional
developments, the framers of the
constitution, like me, thought if
necessary and proper not only
to declare the supremacy of the
constitution in the preamble, but also make a substantive
 provision in the constitution.
Thus Article 7 of the Bangladesh
Constitution declares “that all
powers in the Republic belong
to the people, and their exercise
on behalf of the people shall be
effected only under, and by the
authority of the Constitution and
further that the Constitution, as
the solemn expression of the will
of the people, is the supreme
law of the Republic, and if any
other law is inconsistent with ‘this
Constitution’ that other law shall,
to the extent of the inconsistency,
be void.”

Only this article fully
encompasses that law of
the Constitution as regards
paramountcy. In fact, the idea
of the Father of the Nation
was to protect the functioning
of the governmental arms by
making them supplementary
and complementary with
each other. It indicates the
separation of powers between
the three co-ordinate arms of the
government and the supremacy
of the Constitution.

The other salient feature of
our Constitution is that it vests
the executive power of the
Republic upon the executive
and the legislative power of
the Republic in Parliament.
Though there is no specific
vesting of the judicial power of
the Republic, it is vested upon
the judiciary. The division of
powers is not, however, absolute.
The executive can legislate
under certain circumstances,
and, in fact, Parliament cannot
make any law relating to the
appointment of judicial officers
and magistrates exercising
judicial functions, which has to
be provided for by the President.
On the other hand, Parliament
can cause a fall of the executive
government and impeach
the President. Parliamentary
Standing Committees can
review the enforcement of laws
by the Ministries and propose
measures for such enforcement
and in relation to any matter
referred to it by Parliament as
a matter of public importance
and investigate or inquire into
the activities or administration
of the Ministries. These are
constitutional provisions inserted
from the beginning; whereas,
in the USA, it was introduced in
1994. While the judiciary has the
legislative power to make certain
rules, Parliament can adjudicate
certain disputes; it has the power
to enforce its own privileges
and to punish those who offend
against them. This may in certain
situations bring it into conflict
with the courts.

What the Constitution has
done, can very well be described
as an assignment or distribution
of the powers of the Republic
to the three organs of the
government and it provides for
separation of powers in the
sense that no one organ can
transgress the limit set by the
Constitution or encroach upon
the powers assigned to the
other organs. The result is that
unless the Constitution has
expressly provided otherwise,
no one interpretation of the
Constitution and the laws, the
judiciary cannot create a new law
or amend an existing law, which
will be offensive as a judicial
legislation. Nor can the judiciary
give direction to Parliament to
make laws or to the President
to make rules. The Appellate
Division held that when there is
a constitutional deviation and
constitutional arrangements
have been interfered with and
altered by Parliament by enacting
laws and by the government
by issuing various orders, the
higher judiciary is within its
jurisdiction to bring it back to
Parliament and the executive
from constitutional derailment
and give necessary direction to
follow the constitutional course
by making or amending laws or
rules. It is submitted that when
there is a constitutional deviation
in legislative measures, the court
can declare such legislative
measures to be ultra vires, but
cannot give direction to repeal
or modify it. It may be noted
that Article 112 stipulates that
all authorities, executive and judicial (but not legislative), shall act in aid of the Supreme Court. Parliament may amend a law retrospectively within certain limits so to destroy the foundation on which a judicial decision is based, but it cannot set aside a judgment of a court or declare it to be invalid as it will be void as legislative judgment. Parliament cannot pass a law creating an offence and holding a person guilty of the offence not can pass a law giving a decision in a controversy.

Judgement against an Act passed by Parliament

The principle of the supremacy of the constitution exists in Bangladesh and according to the provision of the Constitution, the Supreme Court has the power to review and can declare any law passed by Parliament, in certain circumstances, as ultra vires or unconstitutional if that law is inconsistent with the Constitution. In 1988, Parliament passed an Act named The Constitution (Eighteenth) (Amendment) Act, 1988 and subsequently, it was signed by the President. Then the amendment was challenged before the High Court in Anwar Hossain Chowdhury v. Bangladesh. In this case, the Appellate Division by a majority of 3 to 1 held that the amendment was void as the High Court Division, as an integral part of the Supreme Court with plenary judicial power of the Republic, had been rendered non-altered. So it could not be done by Parliament. It is out of the jurisdiction of Parliament.

In 2013, the Contempt of Court Act, 2013 was passed in Parliament. The Act was challenged before the High Court and it observed that total freedom without restriction leads to total chaos. The court could not allow such kind of freedom of the journalist who had no legal knowledge on how to report on proceedings pending with the court. So it was deemed to be out of the jurisdiction of Parliament. Now it is pending before the Appellate Division.

Recently, the High Court Division of Bangladesh has declared the Constitution (Sixteenth) (Amendment) Act, 2015, as ultra vires because the amendment was inconsistent with the Constitution. Now it is also pending before the Appellate Division.

Challenges for Parliament

We know that the most important aspect of the dogma of the separation of powers is judicial independence from administrative discretion. There is no liberty if judicial power is not separated from the Executive and also the Legislature. So, the separation of the Judiciary from the Executive is challenge for any government. In 2009, the present government under the leadership of Prime Minister Sheikh Hasina, who has also been famous as an international leader, has passed an Act giving the Judiciary independence from the Executive. This is a challenging job for Parliament and subsequently has included an amendment in the Constitution, which is also to maintain a check and balance on the separation of powers. Through this amendment, the power of the removal of a justice/judge of the Supreme Court has been vested in Parliament which is noted as: “96 (2) A Judge shall not be removed from his office except by an order of the President passed in pursuant to a resolution of Parliament supported by a majority of not less than two-thirds of the total number of members of Parliament, on the ground of proved misbehaviour or incapacity.

(3) Parliament may by law regulate the procedure in relation to resolution incapacity of a Judge.”

Conclusion

The separation of powers between the arms of the government is essential for any kind of government because its success depends on the cooperation and team work of these arms of the government. After over fifty years as a Member of Parliament, I am speaking from my own experience that every state should have stated in their own constitution clearly the provision of the separation of powers. I think this can be done and possible only by Members of Parliament. At present, the government under the leadership of Sheikh Hasina is going ahead and working to fulfill the dream of our Father of the Nation, Bangabandhu Sheikh Mujibur Rahman. Sustainable development is now the Prime Minister’s main challenge together with keeping untouched those of fundamental human rights and freedom of expression. As a result, the judiciary now is separated from the executive.

So, for those who are at present at the 63rd Commonwealth Parliamentary Conference in Dhaka, it should be our own responsibility to incorporate this idea into our own constitution and I would like to propose to the CPA Secretariat that this can be a topic of discussion for the next conference; to formulate the best practice on the separation of powers in different countries and to adopt it.

*Sadly since the submission of this article for this publication the Hon. Member has deceased and so this article is published in tribute.