

LAW opinion

Article 58C: Gymnastics of options

The additional "self" appointment of our President as the Chief Adviser to the Care-taker Government using the "sixth" or the "last option" under article 58C of our Constitution amid violence, uncertainty and controversy paralysing the country has raised more constitutional questions than it has solved. The number of loopholes in the dreaded article should in one sense put its framers to the dock for being aimless, erroneous and shoddy. It has rendered the provision almost devoid of any clarity showing the thumb to all our learned retired Chief Justices and Justices of the Appellate Division, i.e. the prospective Chief Advisers!

KHALED HAMID CHOWDHURY

THE additional "self" appointment of our President as the Chief Adviser to the Care-taker Government using the "sixth" or the "last option" under article 58C of our Constitution amid violence, uncertainty and controversy paralysing the country has raised more constitutional questions than it has solved. The number of loopholes in the dreaded article should in one sense put its framers to the dock for being aimless, erroneous and shoddy. It has rendered the provision almost devoid of any clarity showing the thumb to all our learned retired Chief Justices and Justices of the Appellate Division, i.e. the prospective Chief Advisers! The upshot can even be said to be a boomerang for all the "efforts" of the opposition to embarrass the last retiring Chief Justice to avoid his assumption as the Chief Adviser. It was successful indeed but could they foresee or desire the end result? It will be known on time as someone must be having the last laugh but it is not an easy guess as to who that could be.

Now dealing with the loopholes. Firstly, the 1st and the 2nd options: Arts. 58C(3) and (4) and its provisions require the President to appoint

as Chief Adviser the last retired Chief Justice (CJ) of Bangladesh who is also qualified to be appointed as an Adviser under Art. 58(7). If that fails due to his unavailability or unwillingness to hold the office then he should appoint the next retired Chief Justice to that position. Since the first option fell through due to "unwillingness" of Mr. Justice KM Hasan the question came as to who would be deemed to be the next retired former CJ? As Mr. Justice Mainur Reza Chowdhury died having retired as such CJ, should that mean the options for searching a former CJ was over so that the President should go for 3rd and 4th options or should he have gone on to invite Mr. Mahmudul Amin Chowdhury, the next retired CJ on line having ignored the death of Mr. M R Chowdhury? The constitutional experts are divided and our President mainly citing the opinion of our learned Attorney General went for the 3rd and 4th option straight. Now could that be the true intent of the legislature at the time Art. 58 was drafted? The result is, with all due respect, ludicrous. Here we have a retired CJ, available and not even asked and not yet 72 or otherwise not incompetent, yet our President decides to climb down the ladder too fast! If he has taken

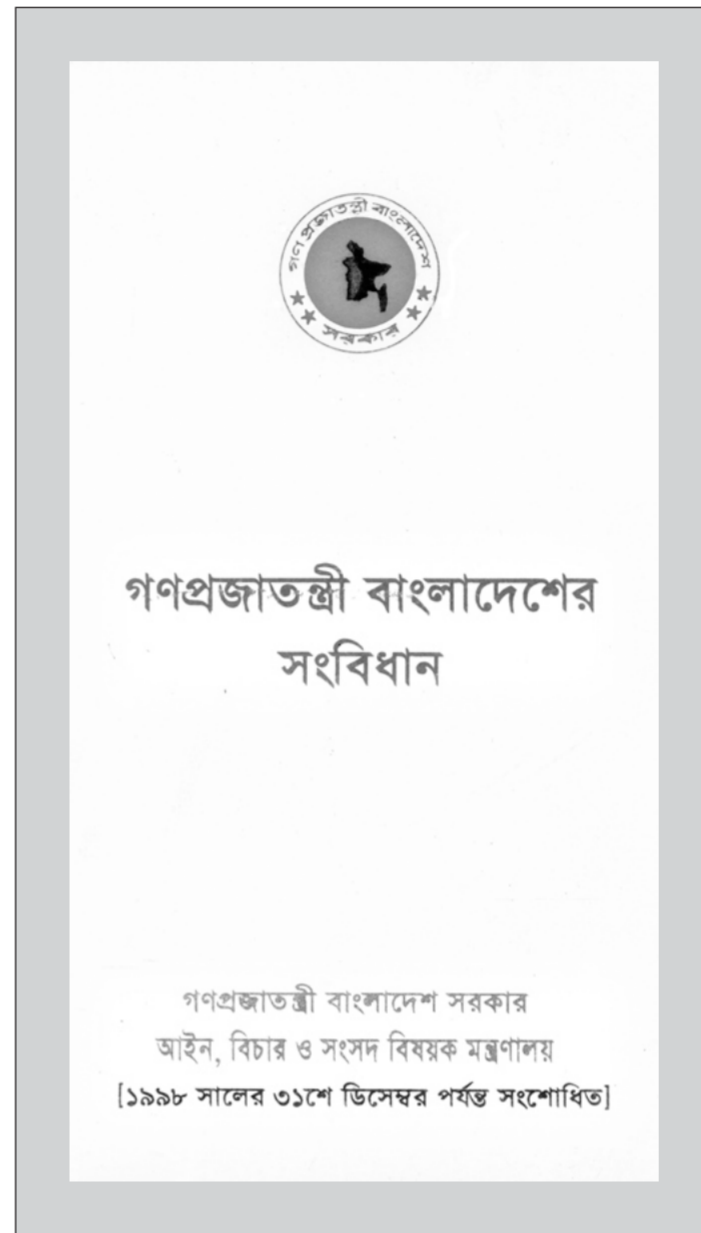
into account the objection of BNP (for the reasons best known to its party leaders), then it is submitted that he has acted unconstitutionally as there is no such option in this regard as otherwise one should get rid of all these statutory gymnastics anyway! Mr. M Amin Chowdhury should have been approached and should have shown his "unwillingness" first. Then how about Mr. Justice Mustafa Kamal, the next ex-CJ on line? Art. 58(4) reads: "If no retired Chief Justice is available or unwilling" then the President should seek the last retiring Judge of the Appellate Division. It does not say "if no such retired Chief Justice...". Does it not mean that the President must have exhausted the line of former CJs first? What else could be the intent of the drafters and legislature? Alternatively one can argue anyway that "unavailability" must relate to someone who is alive and not someone deceased. Again here Mr. M Amin Chowdhury was available. The same arguments could be raised in case of the 3rd and 4th option while searching for a retired Judge of the Appellate Division. The issue of Mr. Justice M A Aziz, the CEC is understandable one but it was sad indeed to see the deceptive way adopted to avoid Mr. Justice Hamidul Haque. One should not try to put words into the

mouth of a retired Hon'ble Judge. Look at the era we are living in! What then of the next retired Judge of the Appellate Division after Mr. Haque? Again one must note that the Constitution requires the President to go to the 5th option only "If no retired Judge of the Appellate Division is available or unwilling..."

We were also not clearly told as to what happened to the 5th option under Art. 58(5)? Could the leaders of the political parties who met the President not find a "qualified" citizen in one of the most populous countries? Such is the division among our politicians that perhaps they readily gave a disclaimer to this!

Hence our President had no "other options" and decided to take up perhaps the most important assignment of his life. This time his own election "thesis" will be scrutinized by perhaps the "deadliest" of the "examination board" imaginable. At 75, he should not otherwise be eligible as an Adviser hence ineligible as the Chief Adviser (Art. 58C(3) and 58C(7)(d) read together) and there is no express exemption from this age bar for the President as the Chief Adviser in the Constitution. Another drafting error perhaps? It was indeed a very brave oath for our Hon'ble Chief Justice to administer.

As an end note, ironically, one must say that the upshot will ultimately make our Judiciary stronger. The lesson should be learnt. The retired judges now have seen the reality of the political dirtiness where public life and inconvenience is the least that our politicians have in mind. This whole concept of bringing a retired CJ into this role of "Kingmaker" is an affront to the concept of separation of powers unnecessarily creating confusion among the senior judges. Once Mr. Justice Hasan was compulsively made to refuse, the other Judges should have stoutly left the queue. One last question for our President, did



it not come to his mind to seek guidance of the Supreme Court under Article 106 on the interpretation of Arts. 58C(3)-(7) when so much is at stake? It was definitely a question of law of immense public importance. He did have 15 days in hand under Article 58C(2). What was the haste Mr. President? Should the issue of law and

order be an excuse for possible violation of the Constitution? It exposes the weakness of the executive even more, nothing less!

The writer, a bar-at-law, is an Advocate of the Supreme Court and the Head of Laws, London College of Legal Studies, Panthapath Campus.

FACT file



Chinese Supreme Court will review death penalty verdicts

Under the new legislation which comes into effect on 1 January 2007, all death penalties handed down by provincial courts must be reviewed and ratified by the Supreme People's Court.

"This new legislation will possibly help improve the quality of trials for those facing the death penalty in China - and may also reduce the number of executions," said Purna Sen, Asia-Pacific Programme Director of Amnesty International and they also welcomed the decision. "But there is a danger that it could also further entrench the death penalty system in China, unless it is accompanied by other measures, including full transparency on the use of the death penalty nationwide and a reduction in the number of crimes punishable by death."

Even with this reform, those facing the death penalty are unlikely to receive a fair trial in line with international human rights standards, Amnesty International fears. Trials in China are generally marked by a lack of prompt access to lawyers, lack of presumption of innocence, political interference in the judiciary and the failure to exclude evidence extracted under torture.

The authorities should also release full public statistics on death sentences and executions in China, which remain classified as a state secret. These statistics would help to assess whether or not this reform leads to a reduction in executions.

Amnesty International has been urging China to accelerate reforms aimed at abolishing the death penalty. "We hope this is a step towards full abolition of the death penalty," said Purna Sen. "It is only by abolishing the death penalty that China can guarantee that the innocent will not be put to death."

The death penalty remains applicable to around 68 crimes in China. They include non-violent offences, such as committing tax fraud, embezzling state property and accepting a bribe. Chinese legal academics opposed to the death penalty have recommended reducing the scope by, for example, eliminating the punishment for economic offences but these calls have so far gone unheeded.

China remains the world leader in its use of the death penalty. According to Amnesty International estimates, over 1770 people were executed and 3900 sentenced to death in 2005. The true figures are believed to be much higher. In March 2004, a senior member of the National People's Congress announced that China executes around 10,000 people per year.

Source: Amnesty International.

LAW alter views

President's use of Article 106: Necessity, limitations and no-limitations

SINHA MA SAYEED

IN the face of any necessity/compulsion of President's seeking any reference to the Supreme Court of Bangladesh, the head of the state under the existing parliamentary system of government is not constitutionally free to move on his own; rather his powers are subject to Article 48(3). In fact Article 106 ----- if at any time it appears to the President that question of law has arisen, or is likely to arise, which is of such a nature and of such public importance that it is expedient to obtain the opinion of the Supreme Court upon it, he may refer the question to the Appellate Division for consideration and the division may, after such hearing as it thinks fit, report its opinion thereon to the President ----- must be read with Article 48(3) ----- in the exercise of all his functions, save only that of appointing the prime minister pursuant to clause (3) of Article 56 and the Chief Justice pursuant to clause (1) of Article 96, the President shall act in accordance with the advice of the prime minister.

Under parliamentary system of government, reintroduced in 1991 through 12th Amendment to the constitution the President constitutionally cannot under any circumstance apply Article 106 even if it is unanimous call of the people in a given period of time. It was found in the past, in 1995-1996, that constitutional experts and politicians including intelligentsia of various shades talked without any check and balance in favour of President's use of Article 106 at his own; and it is apparent again today in 2006. Above all it is more interesting to note that the 12th Amendment to

Article: 106
Advisory jurisdiction of Supreme Court
If at any time it appears to the President that a question of law has arisen, or is likely to arise, which is of such a nature and of such public importance that it is expedient to obtain the opinion of the Supreme Court upon it, he may refer the question to the Appellate Division for consideration and the division may, after such hearing as it thinks fit, report its opinion thereon to the President.

the constitution was passed unanimously by all the members of parliament belonging to different political parties in the fifth parliament and not a single voice was heard against it.

To our utter surprise, while the political leaders were over flooded with a sense of victory by passing the 12th Amendment, it was Justice Shahabuddin Ahmed, then Chief Justice of Bangladesh who, after coming back to the same office through 11th Amendment, apprised the nation of his sincere effort that he, then as the Acting President of the country under the presidential form of government introduced by fifth Amendment and strengthened again by the seventh Amendment, told both Khaleda Zia and Sheikh Hasina to give due weight to the President's overall importance as the head of the state under the re-emerging parliamentary system of government.

While delivering a speech at the reception accorded by the Supreme Court Bar Association on October 10, 1991, he, with a painful bend of mind, also expressed that the political parties in the fifth parliament vied each other on question of making the office of the President so nominal and symbolic that in the

end it culminated in to lowering the powers and functions of the President to the bottom; looking at the 12th Amendment he commented: The President has now virtually nothing to do but to offer prayer at the graveyard and/or attend *milad mahfil*.

Dr. Kamal Hossain, Chief architect of the Constitution of Bangladesh, during the 24N months long imbroglio from 1994-96, knowing very well of the powers of the President under Article 106 read with Article 48C, in an article titled "President Should Resume the Dialogue?" published in The Daily Star on March 30, 1999, wrote: Today a consensus has been achieved on the basic issues (even if belatedly) that is on the need to hold as soon as possible the election to Parliament under a neutral Caretaker Government. There is continuing controversy between the government and the three-party opposition on the modalities of procedures for installing a caretaker government, which drags on as both sides continue rigidly to maintain their respective position.

"The President in response to the urging of the political parties including the ruling party, profes-

sional and conscious citizens from all walks of life had on 10th March initiated a national dialogue. This raised hopes among the people. The President consulted three former Chief Justices, had meetings with all the parties represented in the last parliament, and with a number of lawyers towards finding a way to resolve the present crisis.

"We, on behalf of Gonoforum, had met with the President and subsequently sent him our written proposal urging that a caretaker government be expeditiously established and power transferred to it. A consensus was discernible on the appointment of a retired Chief Justice, either Chief Justice Shahabuddin Ahmed, who had successfully headed the last caretaker government and carried everyone's respect by the impartial manner in which he had discharged his responsibilities, or if he, for any reason, was not able to accept this responsibility, then the immediate past Chief Justice. If the procedural disagreement continued, the former Chief Justices would be consulted and thereafter this matter would be referred under Article 106 of the constitution to the Supreme Court for an advisory opinion. Since the Supreme Court is the ultimate

authority to interpret the constitution it is reasonable to expect that, if this course is adapted all political parties would accept the opinions delivered by the Supreme Court and proceed to implement it."

If the valued opinion of the Bangladesh constitution maker is examined in the true perspective of the constitution having due attention to Article 48 (3), the unfolding truth shall be that even Dr. Kamal Hossain neither spoke to come out of the limitation of such constitutional provision of article 48(3) nor emphasised the need for any constitutional reforms therein. Rather the chief architect of the constitution of Bangladesh even in the face of longstanding crisis did prefer the existence and continuance of such article hanging over the head of the President under parliamentary system of government; but ironically his indirect/implied urge to the President for taking initiative on his own has also been manifested which is a kind of contradiction about the role of the President in times of necessity as opposed to president's constitutional limitations in doing so.

This is very much reasonable and relevant to cite here that in an article titled, "For a President who can take an initiative" published in The Daily Star on March 30, 1996, I made attempts to point out how President's helplessness arising out of constitutional limitations became a reality; to strengthen the hands of the President constitutionally I put forward a few recommendations of which the following deserve to be recalled here:

1) Let there be a constitutional provision through a further

Amendment to the power and functions of the President to the effect that as the head of the state, as the custodian of the constitution and as the commander-in-chief of the armed forces, President of the Republic shall enjoy a set of powers to deal with a national crisis, political or otherwise, provided the party-in-power fail to cope with it positively within the time frame, say, 60/90 days.

2) Let the president be enlightened with necessary powers so that he may, under the above circumstances, seek a reference to the Appellate Division of the Supreme Court at his own without a prior advice from the Prime Minister. To suit this purpose, both the ruling and the opposition party have to be accommodative, up to date with the emerging concept of the role of the President under a Parliamentary system of Government.

Therefore it is crystal clear that under parliamentary system of government of Bangladesh's nature the hands of the head of the state are tied to constitutional provisions under Article 48 (3). This period of party-run parliamentary system of government may be termed as Phase one from the point of view of President's use of article 106.

On the other hand 13th Amendment to the constitution introducing non-party, neutral caretaker government in place of interim political government after the dissolution of parliament has turned constitutional weak president into constitutional strong president. With such rise and fall of the powers and functions, his power to use Article 106 has been reversed by the insertion of clause

58B (2) ----- the Non-Party Caretaker Government shall be collectively responsible to the President, and 58D (1) ---- the Non-Party Caretaker Government shall discharge its functions as an interim government and as such carry on the routine functions of such government and, except in the case of necessity for the discharge of such functions it shall not make any policy decisions. Thus Article 48 (3) automatically becomes inoperative meaning that the president now may use article 106 whenever he feels so in the context of national necessity and importance. This period may be called phase three as well.

This is, pursuant to the Article 58C(2), also truly applicable even during the tenure of the party-run caretaker government for fifty days after the dissolution of parliament; further because of the instant operation of the article 58B (2) after the dissolution of parliament, President shall not be so bound by the advice of the Prime Minister to apply article 106, if need arises. The period may be marked as Phase two: because this period exists in between phase one and phase three fundamentally.

After the dissolution of the 8th parliament on October 27, 2006, President professor Dr Iajuddin, by virtue of the constitutional provisions, could have used article 106 to seek advisory opinion of the Supreme Court to settle the opposing approaches to the interpretations of article 58C (3) and (4) and 58C (7) (b) in particular. Instead, after assuming the office of the Chief Adviser, he in a live broadcast said to the nation that he had taken advice from the Attorney General

on the constitutional interpretations of those articles. Why President Professor Iajuddin avoided article 106 when it was of most necessity not only for him but also for the nation, is not clear at all. By setting aside article 106 he has, in fact, kept the interpretations finally unresolved: in future this may be a big problem for the next President while deciding the constitutional choice for the office of the CTG: because the opinion of the Attorney General is not the final one as he is representing the government only; such interpretation leaves enough scope to raise the issue before the Supreme Court either by the President at the time of the appointment of Chief Adviser to the next CTG under article 106 or by any citizen of Bangladesh.

Therefore President's use of article 106 in three phases/ perspectives is very much fortified constitutionally and the President shall feel more relaxed and free to apply such article in phase two and three; any sort of debates on or ambiguities of such use of power may simply be waste of time and energy. Let our political leaders, lawmakers, constitutional experts including intelligentsia of various shades of opinions pragmatically and constitutionally, not mere politically, realise this truth.

The author is former international, publicity & publications secretary of Jatiya Party and faculty member of Newcastle law academy.



