



Star LAW analysis



LAW event



A Constitutional leapfrogging to the last option

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AMID terrible political unrest the President assumed the functions of the Chief Adviser of the 'Non-party Caretaker Government' in addition to his own functions. The phenomenal takeover by him came in the backdrop of refusal of Justice K.M. Hasan to assume the responsibility as the Chief of the caretaker government following a nationwide political movement launched, in demand, among others, of his exclusion on point of his linkage with the (erst-while) party in power Bangladesh Nationalist Party (BNP). With Justice Hasan-issue settled in this way came up the question of reverting back to other Constitutional options for the office.

The need to look for other possible options made us to turn to the respective clauses of the Constitution. The phraseologies of the Constitutional clauses relating to the Caretaker Government are couched with came to the fore in terms of their letters and import as to the range of persons the President must be confined to in his obligation to appoint the Chief of the Caretaker Government. Different opinions from different constitutional experts and senior lawyers began to pour in but they appeared to have branched into two conflicting lines of interpretations.

One line of opinion is that the Constitution provides in all six options: first the Chief Justice who retired last and if he is not available, second, the Chief Justice who retired immediately before him and if he is not available, third, the Judge of the Appellate Division who retired last and if he is not available fourth the Judge of the Appellate Division who retired immediately before him and if he is not available, fifth, any citizen of Bangladesh to be nominated upon discussion with major political parties and if such person is not available, the sixth and last option is the President.

It needs to be mentioned that any person to be appointed as such is subjected to four conditions, namely, (a) he is qualified for election as member of Parliament, (b) not member of any political party or of any organization associated with or affiliated to any political party, (c) not a candidate for ensuing Parliament election and (d) not over seventy two years of age.

Another line of argument is that the plain reading of the Constitutional clauses negates the above view and widens the ambit of choice so far as the Chief Justices and Judges are concerned, to the one who has not exceeded seventy-two years of age. The experts holding this view seem to be so convinced by the letters and spirit of the constitutional clauses that they outright dismiss the other view as wrong. The lawyers advocating this view strongly hold that the



panel of Chief Justice and Judges are not limited to four only. It extends to any justice/judge not exceeding 72 years of age. A plain reading of the relevant clauses lends support to this view, as they emphasize.

In the Constitutional melee the actual letters and phraseologies used therein need to be quoted. In view of the dearth of space the most relevant portion of Article 58C of the Constitution are reproduced below:

"Article 58C(3) The President shall appoint as Chief Adviser the person who among the retired Chief Justices of Bangladesh retired last and who is qualified to be appointed as an adviser under this Article.

Provided that if such retired Chief Justice is not available or is not willing to hold the office of Chief Adviser, the President shall appoint as Chief Adviser the person who among the retired Judges of the Appellate Division retired last and who is qualified to be appointed as an Adviser under this Article.

(4) If no retired Chief Justice is available or willing to hold office of Chief Adviser, the President shall appoint as Chief Adviser the person who among the retired Judges of the Appellate Division retired next before the last such retired Judge.

(5) If no retired Judge of the Appellate Division is available or willing to hold the office of Chief Adviser, the President shall, after consultation, as far as practicable, with the major political parties, appoint the Chief Adviser from

among citizens of Bangladesh who are qualified to be appointed as Advisers under this Article."

The President comes next as the last option.

The controversy seems to have arisen out of the phraseologies chosen to be used by the drafters. This is ultimately a matter to be resolved by the Supreme Court. It may aptly be put in the words of Charles Evans Hughes, Ex-Chief Justice of the United States Supreme Court: "We are under a Constitution, but the Constitution is what the courts say it is."

Constitutionality of the takeover

Without going into the controversy as to the ambit of choice provided by the Constitution it can reasonably be said that the way the Constitutional options were exhausted didn't look like usual procedure of doing so. If it is accepted that Justice Mahmudul Amin Chowdhury suffered Constitutional bar there were two other options, namely, Justice M. A. Aziz and Justice Hamidul Haque the last retiring judges of the Appellate Division. Justice M. A. Aziz no doubt has made himself highly controversial and is now holding a Constitutional post. In view of the reality he is now facing he, by all probability, would have declined to accept the offer of being the Chief of the Caretaker government. The fourteen party alliances already raised objection about him. Still technically speaking, he cannot be wished away on the objection raised or on the ground that he is holding a constitutional post. I do not find any legal bar in offering a justice/judge of the Supreme Court falling within the options but at the relevant time holding a Constitutional post to hold the office of the Chief Adviser. It is not as much for Justice Aziz as a person that the offer was to be made as it was for exhausting the options

provided by the Constitution. The President's explanation that he is holding a constitutional post does not seem to be enough in view of our Constitutional position and prevailing practices in particular. As for Justice Hamidul Haque, he was communicated with by the Military Secretary of the President. As things later transpired Justice Haque expressed his mind saying 'if both the parties agree I do not have objection. But if they do not agree it would not be proper to accept the proposal.' He was requested to put his words in writing and send the same through a messenger to be sent to him from Bangabhaban. His written words to that effect were taken to be his refusal to accept the post of Chief Adviser. Firstly, as I understand the procedure adopted in inviting opinion of the possible Chief of the Caretaker Government was not acceptable in any view. Secondly, Justice Haque later made his position clear saying to the media that he had not declined. He was willing to take over charge of the Caretaker Government provided both the parties could agree. This vague words put in writing collected through an official of Bangabhaban in view of Constitutional importance of the matter cannot be translated into refusal.

The fifth option, as it is so called, i.e., one amongst the citizens could never find the light of the day. The president was seen to have discussed with the leaders of major political parties to examine this option but the names discussed, if any, are still not made public. Mr. Abdul Jalil, the General Secretary of Awami League has denied having shared any discussion on this option.

The above series of events suggest that before going to the last option the other options were not exhausted as is contemplated by

the Constitution.

President to face challenges of neutrality and commitment

We have left behind the constitutional controversy as the interim government is already formed and the opposition political alliance has accepted the arrangement, though with reservation. The Constitutional controversy having had lost currency the main focus has shifted to the question of neutrality of the President and his commitment to ensure a 'peaceful, fair and impartial' election. This is more a question of expectation than of analysis. It cannot be denied that the President was the BNP-Jamaat candidate for the presidency. It is not denying that BNP Secretary General proposed him to hold office of the Chief Adviser in addition to his own functions as President. The President also expressed his willingness to do so at a moment which could safely be called premature. And he finally took over charge of the Caretaker Government in a way that gave birth to many questions. Therefore the usual neutrality of the President as the head of state has already suffered a bit of set-back. This may be illustrated with the eventful moments between 27th to 29th October leading the President to take recourse to the last option.

In the evening of 27th October the then Prime Minister addressed the nation. Soon after the address she called on the President at Bangabhaban. She had stayed there, as it is thought, more than usual time of a courtesy call. On the 28th October the pre-announced Dhaka-Seize programme by the fourteen party alliances started erupting countrywide violence virtually paralyzing the government. Sometimes at noon that day Justice KM Hasan declined to join the Caretaker government. In the afternoon the President called upon the Secretary General of BNP General Secretary of Awami League and sat with them over the crisis created following refusal of justice Hasan. At a stage of discussion as to who were the other possible constitutional options before the President Mr. Mannan Bhuiyan, the Secretary-General of BNP, proposed the President to assume the functions of the Chief Adviser in addition to his own functions as President. The President was found to be agreeable and expressed his willingness to do so. But Mr. Abdul Jalil, the Secretary-General of Awami League dissented and asked the President not to be involved in political controversy. He requested him to appoint any one else except Justice Aziz as chief of the Caretaker Government in accordance with the Constitution.

Begum Khaleda Zia, the outgoing prime minister addressed a party meeting in the afternoon of 28th October in front of her party

office, Dhaka in which she said her party would accept any decision whatsoever to be taken by the President. She called upon the opposition political parties to accept the same. Those who would not accept the decision would be resisted, she proclaimed.

On the 29th October the President was found to switch to the 5th option (as it is so called) i.e., the nomination of a citizen for appointment and in that view sat with the leaders of major political parties. Awami League General Secretary Mr. Abdul Jalil didn't admit having shared discussion about any citizen. Rather he said he requested the President to exhaust the Constitutional options barring Justice M. A. Aziz and appoint any one he finds available in order of the priorities set therein. Before dusk rumour had it that the Caretaker Government Chief was going to take oath in the evening. The name of the would be Chief Adviser was still in dark and not known to the media, and as it later transpired, even not to Sheikh Hasina, the leader of the fourteen party alliance.

Having resolved all speculations ultimately the oath taking session took place at Bangabhaban in the evening in an unceremonious way. It finally transpired that it was the President who took oath as Chief Adviser in addition to his own functions under the Constitution.

It seemed that strict secrecy was maintained. The major opposition political alliance i.e., the fourteen party alliance and many other dignitaries didn't join the ceremony. It was later known that Sheikh Hasina herself received the invitation to join the ceremony five minutes before it started.

All the above events coupled with the insistence of BNP on holding back Justice K. M. Hasan taken together heavily point to BNP's mission to continue under the shadow of power after the expiry of the tenure of its government. And the whole thing now in place looks like as if BNP has succeeded in its mission.

The reality is that the President is sworn in as the Chief Adviser. He has started his journey with neutrality and credibility disturbed by parochialism in politics. Still he cannot afford to fail. He has no option but to rise to the occasion and go ahead with his prime agenda of inspiring confidence of the people and creating a circumstance congenial to holding a peaceful, free and impartial election, the only way to save the democratic process and the nation at large.

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Bangladesh wins the Regional Moot Court Competition

Bangladesh has won the award and certificates as the winner of the Second Regional Moot Court Competition held in New Delhi, India, during 27-29 October organized by the International Committee of the Red Cross (ICRC) in collaboration with the Indian Society of International Law (ISIL). The competition is named in memory of Mr Henry Dunant, the co-founder of the ICRC in 1863 and spiritual father of the Red Cross and Red Crescent Movement. On the basis of the criteria set by the ICRC for the eligibility of the participants in the Regional Moot Court competition, students from Iran and five SAARC countries namely Bangladesh, Sri Lanka, Nepal, Pakistan and India participated in the Competition. Each participating country nominated the team who became the champion at the National Moot Court Competition consisting of three student members and a coach from the faculty of the University that they represent. From Bangladesh, University of Dhaka, being the Champion at the national level competition, participated in the Regional one. Taslima Yasmin, Christabel Randolph and Md. Azharul Islam Habib were the members of the Dhaka University team. Mr. Nazmuzzaman Bhuian, Assistant Professor, Faculty of Law, Dhaka University, guided them as the Coach. The eminent Judges who were selected from the different categories such as academicians, senior legal officers of the ministry of the external affairs, serving and retired judges and the senior advocates of the High Court of Delhi judged the teams. Each team had to prosecute and defend the other five teams before reaching the final round on the basis of a hypothetical case provided by the organisers. After the daylong mooting, only the top two teams namely Bangladesh and India reached the Final round. On the very next day, Bangladesh defeated the Indian team in the final round and became the winner of the Competition. Mr. Justice Madan C. Lokur, Hon'ble Judge of the Delhi High Court was present as the chief guest at the award giving ceremony. Mr. Justice S. Ravindra Bhat, Hon'ble Judge of the Delhi High Court, Mr. Vincent Nicod, Head of the Regional Delegation of ICRC, Mr. Larry Maybee, Legal Advisor of the Regional Delegation of ICRC and Dr. Manoj Kumar Sinha, Director, the Indian Society of International Law, were present on the occasion. As the winner of the regional competition for South Asia, Bangladesh team will now participate in the International Moot Court Competition to be held in March 2007 in Hong Kong. Undoubtedly, Dhaka University team deserves congratulations for winning such a prestigious award for Bangladesh.

Law desk



RIGHTS column

China-Africa Summit

At its upcoming Forum on China-Africa Cooperation summit with more than 30 African countries, China should use its growing diplomatic and economic ties to press for improvements in the status of human rights across the continent, Human Rights Watch said today. The summit opens today in Beijing. "China insists that it will not 'interfere' in other countries' domestic affairs, but it also claims to be great friend of the African people and a responsible major power," said Sophie Richardson, deputy Asia director at Human Rights Watch. "But that doesn't square with staying silent while mass killings go on in Darfur." China's relations with Africa date back to the earliest years of the People's Republic. Despite its own relative poverty, China provided aid and maintained diplomatic ties with a variety of countries, often presenting itself as a poor but principled alternative to Cold War powers, particularly through its harsh criticism of South Africa's apartheid regime.

China's policies have not only propped up some of the continent's worst human rights abusers, but also weakened the leverage of others trying to promote greater respect for human rights. Chinese companies now own 40 percent of Sudan's production facilities, and Beijing blocked several UN resolutions designed to discipline the Sudanese government. Only recently have Chinese diplomats begun to claim that they have pressed Sudanese officials to accept a UN force. While China's leaders use this summit to hammer out new economic aid and trade agreements, they must also underscore their stated interest in African peace. Human Rights Watch called on China to suspend aid to Sudan that could be used in Khartoum's brutal campaign against the people of Darfur, and to press Sudanese President Omar El Bashir to permit the presence of a UN peacekeeping force. China should refuse to sell censoring technology to Mugabe, who uses it to brutally repress his real and imaginary opponents. "Africans do not need another external power enabling abusive regimes they need all powers, including China, to place human rights at the center of their policies," said Richardson. "A truly revolutionary approach for any power in Africa, particularly those that pride themselves on their solidarity with the developing world, is to defend human rights."

Source: Human Rights Watch.

LAW news



LAW week



Nansen Refugee Award to Dr. Akio Kanai

Formerly known as the Nansen Medal, this Award is named after the Norwegian arctic explorer Fridtjof Nansen, who was appointed in 1921 by the UN's predecessor, the League of Nations, to be the very first High Commissioner for Refugees. The Award, consisting of a medal and a \$100,000 monetary prize, is given out yearly to a person or group for outstanding services in supporting refugee causes. This year's (2006) winner is Japanese optometrist Dr. Akio Kanai of Fuji Optical, who over more than two decades has improved the quality of life of over 100,000 uprooted people around the world by testing their eyes and providing them with spectacles. The Nansen Refugee Award Committee selected Dr. Kanai, chairman and chief executive officer of Fuji Optical, for his practical commitment to humanitarian work and dedication to easing the plight of refugees by improving their eyesight.

The committee found Dr. Kanai had "rendered exceptional service to the refugee cause" and had made a huge and genuine contribution to uprooted people in human as well as financial terms. "I am deeply honoured and grateful to have been chosen as the 2006 Nansen Refugee Award recipient. This award is testimony to the significance that the role of optometry plays in the future of refugees by improving their sight and thus empowering them to secure a future in focus," Dr. Kanai said from Japan.

"Tens of thousands of displaced people living in extremely difficult circumstances have been given a new outlook on life thanks to Dr. Kanai," said UN High Commissioner for Refugees Antonio Guterres. "The gift of sight is precious. Restoring it makes a huge difference in individual lives, making learning possible for children and adults and pulling them back from the fringes of marginalisation." Dr. Kanai, himself forcibly displaced from the northern Pacific island of Sakhalin at the end of World War II, started his humanitarian optometry work in 1983 in Thailand with Indochinese refugees, many of whom had lost or broken their glasses while fleeing. Many were undergoing courses ahead of being resettled and needed glasses to study. Dr. Kanai checked the sight of the refugees and, in doing so, started a long engagement with refugee work.

He began cooperating with UNHCR in 1984, and has since conducted more than 24 missions to help uprooted people in Nepal, Thailand, Azerbaijan and Armenia. He has donated more than 108,200 pairs of glasses, provided optometry equipment, made cash grants and trained local medical staff. Dr. Kanai said the missions would not have been possible without the support of UNHCR. "In continuing partnership with the UNHCR, we look forward to a long and productive future empowering refugees by serving their essential vision needs."

Source: unhcr

Retaliate in similar way, if attacked

Khaleda tells rally

Former prime minister and BNP Chairperson Khaleda Zia asked people to remain alert against any move to foil the next general election and create constitutional crisis. She also urged her party men to retaliate in similar way if attacked by their political opponents. Urging all other political parties to help caretaker government hold a free and fair election, she said, "President has taken up the charge of chief advisor constitutionally". She was addressing a huge rally in front of the BNP central office at Naya Paltan to declare a three-day programme against anarchy and vandalism of 'the 14-party combine'. Dhaka mayor Sadeque Hossain Khoka presided over the rally, attended by a host of 4-party alliance leaders and thousands of workers. The BNP chairperson asked them to take serious preparation for a vote revolution in the upcoming polls. "We must go ahead with our roadmap for development," she said amid applause and slogans from the audience. She accused the Awami League for killing 24 people in the last few days. "The caretaker government must have to take action against persons involved with these killings." "We showed enough of our patience and won't tolerate anymore. We know how to tackle someone trying to create anarchy." "From now on, if anyone tries to attack on my workers, we will hit back." Khaleda was also critical of the intention of her rivals about participating in elections. --The Daily Star, October 31.

Legal notice served on president

A legal notice was served on President Iajuddin Ahmed to refrain from performing as chief adviser to the caretaker government, the post he assumed on Sunday night in addition to his presidential responsibilities. Challenging his action, Advocate Manzill Morshed said the president has violated the constitution by assuming himself as chief adviser without exhausting the options laid down in article 58 C (3, 4 and 5). He urged the president to appoint a chief adviser to the non-party caretaker government in accordance with the constitution within three days, failing which he will move the High Court to protect the integrity of the constitution and rule of law. He termed Iajuddin's taking over the office of chief adviser unlawful and in disregard to the constitution. Soon after president's oath as chief adviser on Sunday night, legal experts including Dr Kamal Hossain, Barrister Amir ul Islam and Barrister Rafique ul Huq accused him of violating the constitution. --UNB, Dhaka, October 31.

Election, not resignation, on Aziz's mind

Brushing aside the possibility of resignation to pave the way to reconstitute the Election Commission (EC), Chief Election Commissioner (CEC) MA Aziz

said holding a free and fair parliamentary election is the only thing in his mind. "Don't ask me such questions since I am not a politician. It is better to ask the politicians," Aziz responded to a query whether he was going to resign in the wake of the volatile political situation. "I think I am doing the right thing. I would have left if I thought I was doing something wrong," Aziz said. In an oblique reference to Awami League-led 14-party alliance's demand for his resignation, Aziz said each political party speaks for their own interests. "I am holding a constitutional post to give the country a free and fair election," he stated, adding that he was hopeful that he would be able to conduct the next parliamentary election in January. Aziz said very little time is left ahead of the next parliamentary election. A lot of time has been wasted and everybody knows the reasons for that, he added. "I hope the next parliamentary election will be held way before January 25, the deadline for holding the election. I have talked to the chief adviser. He asked me to make all efforts to hold the election in time," the CEC said referring to his conversation with the chief adviser on Sunday night. --The Daily Star, November 1.

First Council Meeting

Advisers talk ways to make EC effective

The council of advisers to the interim government in its first meeting started searching for ways to make the Election Commission (EC) factually effective by any means necessary to hold the next parliamentary election in a free and fair manner. On the first working day of the council, the advisers to the caretaker government headed by President Iajuddin Ahmed, reached a consensus that the EC must be made effective as holding a fair election largely depends on its capabilities, sources said. In response to the opinions of his advisers, the president also chief adviser to the interim government asked them to keep on thinking about all matters regarding holding a free and fair election, the sources added. "In fact, we are now heartily trying to find the means to make the Election Commission effective," an adviser told The Daily Star on condition of anonymity. The adviser however declined to make any instant comment on whether they plan to reconstitute the EC that has been mired in controversy raising questions about its ability to hold a fair election. Contacted by The Daily Star last night, Adviser Dr Akbar Ali Khan however said the issue of reform in the EC and the electoral laws is being discussed among the public, but no official measure has been taken yet in this regard. "We will chalk out probable measures for reforms and then if necessary will seek legal opinions," the adviser said. --The Daily Star, November 2.

Taher Thakur among 18 charged

with Aug 15 killings

A Dhaka court framed charges against 18 accused, including Taher Uddin Thakur, in connection with the 14 Murder Case of August 15, 1975 in Mohammdpur. Judge Mohammad Monzurul Bachhid of the Fourth Additional Metropolitan Sessions Judge's Court rejected the discharge petitions filed by the defence lawyers of the five accused and framed charges against them. Accused Taher Uddin Thakur, Lt Col Syed Farook Rahman, Lt Col Sultan Shahriar Rashid Khan, Lt Col Muhiuddin Ahmed and Major Bazul Huda pleaded not guilty and demanded justice before the court after the judge read out the charges against them. The judge fixed January 25, 2007 for trial of the case and issued summons upon the complainant to appear before the court on that date. Fourteen people were killed by artillery fire on August 15, 1975 night at Mohammdpur when Bangabandhu Sheikh Mujibur Rahman was assassinated along with most of his family members in a bloody military putsch. The military personnel, who were taking part in the putsch, artillery fire hit two housed in Mohammdpur and left 14 people dead. On the fateful night over 30 years ago, the army personnel who took part in the Bangabandhu killing operation also killed Habibur Rahman, Anwara Begum-1, Anwara Begum-2, Moyful Bibi, Sabera Begum, Abdullah, Rafiqul, Safia Khatun, Shahabuddin, Kasheda, Aminuddin, Honufa Bibi, Rezia Begum and her daughter Nasima in Mohammdpur. On November 29, 1996, Mohammad Ali, a resident of Sher Shah Suri Road, Mohammdpur, who was injured in the attack, filed the case with Mohammdpur Police Station against Lt Col Syed Farook Rahman, Lt Col Sultan Shahriar Rashid Khan, Major Bazul Huda, Lt Col Khondaker Abdur Rashid, Lt Col Shariful Haq Dalim, Lt Col SHMD Noor Chowdhury, Maj AKM Mohiuddin Ahmed, Lt Col Abdul Aziz Pasha, Capt Abdul Majed, Capt Mohammad Kismat Hashem and Lt Col MA Rashed Chowdhury. -- The Daily Star, November 2.

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