# Doctrine of state necessity

**Today or tomorrow, when the government will be compelled to come to some sort of compromise with the political parties, then time may lapse beyond 90 days. So I am giving this suggestion in advance before we go deep into further deadlock. Neither the army would like to come out from the barracks to help us in such situation, nor do the people want them to. Let us work within the "limit" of the constitution. The non-party caretaker government may decide to extend the time for election of 2007 and invoke Article 106, and in the meantime all agitations should be postponed.**

RAFIQUE-UL HAQUE

I have read Barrister Harun ur Rashid's "Advice for the Chief Adviser" published in your esteemed newspaper on December 3. He is a good friend of mine. He has pointed out very clearly how the non-party caretaker government should function.

The hon'ble president was a respectable teacher in the Science faculty (and not in the Arts faculty). He is not supposed to know the intricacies of constitutional law, though by this time he should have some idea about the constitution, more so when he could jump Sub-Articles (4) & (5) of Article 58C of the constitution and assume the "functions of the Chief Adviser of the Non-Party Care-taker Government."

Since he has, rightly or wrongly, assumed that responsibility, so long he is continuing in the said post, for God's sake let him work within the framework of the constitution. Barrister Rashid has clearly pointed out that he shall act in accordance with the advice of the non-party caretaker government and not in the manner as presidential form of government on the advise of his "teacher," as observed by Sheikh Hasina. By this time we have all become "constitutional experts."

In such situation let him also act as a "constitutional expert" and exercise the executive authorities of the republic in consultation with his advisors. His advisors are not his domestic employees but they are his hon'ble and respected "advisors" and have also constitutional responsibilities. They are all very respectable, learned, honest, and persons of integrity. If necessary, the present CA also may consult the previous CAs to know as to how they used to exercise the executive power of the republic. So far as we know, they used to take all decisions on the advice of their advisors.

However, leaving aside all this constitutional advice, please let us face the realities. We are now facing two political extreme rival groups headed by two most respectable ladies. We, the ordinary citizens, cannot afford such confrontation at the cost of our country's existence and sufferings of the people. Let us ignore for the time being the advice given by our Nobel Laureate Prof Yunus. His advice may be a Platonic theory. A person of his stature cannot go below that level. He has rightly said that there should be "Peace Treaty" to save the country. Nobody will disagree with him that the country must have election.

Purely for our own fault and adamant attitude and backed by the present CA's act of omission and commission we have lost more than 30 (thirty) days out of 90 (ninety) days within which the election has to be held. This lapse of time has to be compensated if both parties agree to hold the election, and we think that all parties, including LDP, want the election to be held.

But how this problem can be solved? If the non-party caretaker government decides to have a free, fair, and impartial election, then let them appeal to all parties to give up their program in the street and concentrate on free and fair election, on the undertaking, inter alia, that:

(i) The president shall obtain an order for extension of time for holding the next election from the Appellate Division of the Supreme Court of Bangladesh under Article 106 of our constitution. Article 106 is quoted below:

"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."

In the past there are instances that in such situation the government sought advice of the Supreme Court to find out a solution of the constitutional deadlock. The court in such situation invoked the doctrine of state necessity embodied in the maxim salus populi est suprema lex (public welfare is the highest law). This theory has been discussed in many cases in this sub-continent.

Chief Justice Hamoodur Rahman preferred to call it a "principle of condonation" rather than principle of necessity. In another case, Supreme Court of Pakistan applied the principle of necessity to validate a "constitutional deviation." Whatever term is used, the court can condone the extension of time to hold the Election of 2007. After all, the constitution is for the people, and for their rightful cause, the court can exercise that power even if there is slight deviation from the strict constitutional provision.

Mr SA de Smith in his Constitutional and Administrative Law (6th Edition) while commenting on the theory of state necessity has observed that:

"But the necessity must be proportionate to the evil to be averted, and acceptance of the principle does not normally imply total abdication from judicial review or acquiescence in the supersession of the legal order; it is essentially a transient phenomenon. State necessity has been judicially accepted in recent years as a legal justification for ostensibly unconstitutional action to fill a vacuum arising within the constitutional order in Pakistan, Cyprus, Rhodesia and Nigeria."

So far as I know, our Appellate Division had no opportunity to decide any case on the basis of state necessity except in the case of detention of President Ershad by the then government of Justice Shahabuddin, the Appellate Division observed that:

"The action of the Government taken in an extra-ordinary situation at that time might have been justified on the doctrine of necessity but it would never qualify as a legal order under the Act." (i.e. Special Powers Act).

In the case of Indemnity (Repeal) Act, 1996 some observation was made by the High Court Division on the doctrine of state necessity.

If we all want the election of 2007 to be properly held and in peaceful manner, then government may extend the time for holding election and then obtain approval from the Appellate Division of the Supreme Court of Bangladesh by invoking the doctrine of state necessity. If such action is proposed to be taken then none should object.

In view of recent controversial action of the chief justice, some may doubt whether such an order can be obtained from the Appellate Division. I am optimistic, however. After all, the chief justice himself is not the Appellate Division. There are six other hon'ble judges. The chief is merely the first of the seven.

(ii) In the meantime, the demands of all major parties including LDP may reasonably be solved by the caretaker government as expeditiously as possible. We cannot afford to lose further time.

(iii) The electoral roll may also be rectified. By amending the relevant law by way of an ordinance such objection may quickly be disposed of. Long drawn procedure may be avoided. If the intention is honest and sincere, then nothing is impossible.

(iv) The present election schedule should be cancelled and it may be announced after a month.

This suggestion is given considering the interest of the country and to avoid the suffering of the people. Let us go back to our normal life and the non-party caretaker government proceeds fast to hold a free, fair, and impartial election.

Today or tomorrow, when the government will be compelled to come to some sort of compromise with the political parties, then time may lapse beyond 90 days. So I am giving this suggestion in advance before we go deep into further deadlock.

Neither the army would like to come out from the barracks to help us in such situation, nor do the people want them to. Let us work within the "limit" of the constitution. The non-party caretaker government may decide to extend the time for election of 2007 and invoke Article 106, and in the meantime all agitations should be postponed.

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# Crisis at the EC

**The president has claimed absolute authority for reconstitution of the Election Commission, including the number of commissioners and their appointment. He has ignored the report of the four advisers who had consulted the political parties. The information adviser admitted to the journalists that appointment of an election commissioner is absolutely within the competence of the president. They are wrong -- and most probably violate the Constitution in yielding to the claim made by the president.**

MASIHUR RAHMAN

IT was expected that the departure of CEC Aziz, on leave, would set the stage for reforms and reconstitution of the Election Commission. The self-proclaimed appointment of Mahfuzur Rahman as acting chief election commissioner not only stalls that process, but puts into reverse.

The decision of the election commissioners, and the assumption of the office by Commissioner Mahfuz, are not only wrong but also unconstitutional. A careful look at the constitutional provisions relating to the Election Commission shows how flawed the process followed by the election commissioners has been.

- The Election Commission consists of the chief election commissioner and "such number of other election commissioners, if any, as the president may from time to time direct." [Article 118(1)]
- "When the Election Commission consists of more than one person, the chief election commissioner acts as the chairman of the Commission." [Article 18(2)]
- Election to a vacant seat of Parliament must be filled within ninety days after the vacancy occurs. However, if the election cannot be held within ninety days, for an act of God, the chief election commissioner may postpone it for not more than ninety days following the initial ninety days period. [123 (3)]
- The general election to Parliament must be held within ninety days after dissolution of the previous Parliament. [123 (4)]

The Constitution is unambiguous on two points. First, there is no provision for an acting chief election commissioner. Second, the power of the CEC, as distinguished from that of the Election Commission, is limited to chairing meetings of the commission and postponing by-elections for a limited period. The general election cannot be postponed.

Since there is no provision for acting chief election commissioner, the president cannot appoint anyone to that office and connive with, or support, anyone declaring himself acting chief election commissioner. Commissioner Mahfuz's self-appointment, with the support of the other election commissioners, is contrary to the Constitution. Their conduct is unconscionable. The president cannot indulge their misdemeanor, ex-ante or ex-poste, without implicating himself in the unconstitutional act.

The Representation of the People Order, 1972, gives the Election Commission limited jurisdiction to regulate its procedures and distribute its power and functions among the commissioners and the officers.

- The Commission can regulate its own procedures, subject to the above Order. [Section 3A].
- The Commission can authorize its chairman, its members, or its officers to exercise and perform all or any of its powers and functions under the above Order. [Section 4].

The Order does not define chairman and members. It is presumed that chairman refers to the election commissioner who presides over the meetings of the Commission -- and the Constitution specifies this to be the chief election commissioner. Further, "members" refers to election commissioners. These are the only sensible interpretations of the two terms, which are consistent with the Constitution.

The procedural regulation of the commission is not publicly available, most probably the commission has not prepared and notified the regulation. Leaving aside hair-splitting legal arguments, the power to choose a commissioner to chair a meeting occasionally needs to be conceded to the commission; without this administrative flexibility, the commission cannot function. However, the commission cannot make anyone acting chief election commissioner in the absence of a constitutional provision in this regard. The election commissioners have acted beyond their jurisdiction, for which they deserve punishment, including removal from office.

Further, a commissioner may chair a meeting on an ad-hoc basis; it is doubtful if a regular arrangement for proxy can be legitimately made for an absentee chief election commissioner when the period of his absence is relatively long and indefinite. It makes a mockery of the Constitution if the Election Commission can hold a general election while the chief election commissioner remains on "forced leave."

CEC Aziz went on leave because he was found unworthy of public trust, and incapable of delivering a credible fair election. The circumstances which led to his forced leave also apply to Commissioners Mahfuz and Zakaria. When Aziz started preparation of a fresh voter's list from scratch, the two experienced commissioners (since retired) objected. Commissioners Mahfuz and Zakaria were brought in to bolster support for CEC Aziz. The decision of the High Court, and that of the Appellate Division which upheld the High Court ruling, prove that Aziz was wrong. Commissioners Mahfuz and Zakaria share the liability for the flawed voter's list, and should go the way of CEC Aziz.

Commissioner Mahfuz has declared that he would not accept, or serve under, anyone from the executive service. He argues that the Supreme Court judges have a higher position in the warrant of precedence than the highest executive officers -- like the cabinet secretary and defence services chiefs. It is unpersuasive: the warrant of precedence does not apply once you retire. Besides, as election commissioner, he has a position in the warrant; he can, at best, insist that his position should not be lowered -- or decide to quit if his sense of honour or self-importance is hurt by appointment of new commissioners or chief election commissioner. In any case, he cannot dictate and limit the options of the government and the president. The government and the president can give indulgence to his vanity only by demonstrating their impotence. The president will most probably bend, for Dr Iajuddin and Commissioner Mahfuz worship the same benefactor guardian angel.

The continuation of Mahfuz, with more power, and Zakaria aborts reconstitution of the Election Commission and will impede reforms which can improve the fairness and credibility of the election. Commissioner Mahfuz has already given enough indications to that effect. No attempt will be made for systematic rectification of the voter's list; specific complaints will be addressed, however.

The extent of error is some 16% of the voters enrolled (11% excess registration plus 5% left out), only a fraction of which can be de-registered or registered in this way. There is no initiative to remove from election related duties the thana election officers who were members of BNP-Jamat cadres. However, disciplinary action will be taken if specific complaints of misconduct are brought against anyone. The commission fails to see the distinction between a flawed electoral roll and recruitment (in Durkheim's sense), and individual/particular criminal conduct.

Most disconcerting is that the election schedule has been announced while Commissioner Mahfuz rules over the Election Commission. Once the schedule is declared, all administrative changes come under the control of the Election Commission. The efforts of the caretaker government, and the advisers, to neutralize the administration will become irrelevant and ineffective. The country will go to election with a rigged voter's list, suborned administration, and an Election Commission whose decisions lack legitimacy, and do not comply with the Constitution. That will worsen the crisis.

The president has claimed absolute authority for reconstitution of the Election Commission, including the number of commissioners and their appointment. He has ignored the report of the four advisers who had consulted the political parties. The information adviser admitted to the journalists that appointment of an election commissioner is absolutely within the competence of the president. They are wrong -- and most probably violate the Constitution in yielding to the claim made by the president.

The caretaker government comprises of the council of advisers headed by the chief adviser. The council is accountable to the president and acts as a collegial body. All executive powers are exercised on the authority of, or on behalf of, the chief adviser, and in the name of the president. The chief adviser derives whatever authority he has from the council of advisers -- i.e. caretaker government [Article 58B (2-3)].

The president is not part of the caretaker government and, therefore, cannot legitimately exercise any power over the council of advisers. The president has to act on the advice of the chief adviser, like he acts on the advice of the prime minister. Any action of the president as regards the Election Commission not based on, or contrary to, the advice of the council of advisers is liable to be illegitimate.

Only in two respects has the president been given (or appears to have been given) powers independent of the caretaker government: (i) promulgation of emergency without prior counter-signature of the prime minister remains ineffective; (ii) administration by himself of the laws related to the defence services qua Supreme Commander. On all other matters, the president is as titular as he is during the time an elected government is in office.

Dr Iajuddin is both chief adviser and president. It is difficult -- if not impossible -- for one person to exercise powers, and to enforce accountability for exercise of those powers. Dr Iajuddin is doing both at most critical time. His head remains too much muddied to maintain the distinction and remain correct. That, unfortunately, pushes our democracy into greater crisis.

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# Beyond contempt

**As the news continued to roll, it focused more and more on the scenes of violence, contrasted with these exhortations. But of course there were no images of the AG (supported by senior BNP MPs) obtaining an unprecedented order from the CJ. Nor were there pictures of their "submissions" which resulted in the order they got. Nor of their cold-bloodedly tearing up some of the agreed conventions which enable the functioning of the process of justice in their continuing desperation to un-level the judicial (and ultimately electoral) playing field.**

SARA HOSSAIN

FROM 2:30 to 4 pm the mobile barely stopped ringing. "Have you heard the latest news from court, you're not going to believe it!" I answered immediately: "You mean they didn't even issue a Rule?" "No even worse, the attorney general, Moudud, etc went to the CJ and the CJ gave a stay order even before issuance of Rule."

More calls. "Where are you? Are you okay?" "There's trouble in court, there's a car burning outside." "A procession is moving towards the CJ's room." "Moudud made a threatening gesture" "Moudud has run away."

During the week of November 26, the High Court was due to hear three writ petitions relevant to the current political crisis: the first challenging the assumption of the office of chief advisor by the president, the second challenging the chief advisor's powers to take decisions unilaterally without consultation with the council of advisors, and the third challenging the declaration of the election schedule prior to the correction of the electoral rolls.

On the first date of filing the writ petitions, the attorney general prayed for one day's time to read the writ petitions and in the meantime met the president later at night . The next day in the morning, people watched in amazement the breaking news that the Election Commission, with the advice of the president, had declared the election schedule.

The situation in court had changed remarkably during the week. By Thursday only the hearing of the first writ had concluded. At the outset, even among those supporting the petitioners many felt that this case had been a real gamble, and the 14-party alliance would have to pay a heavy price for the manner in which it had been brought, as well as its outcome.

The logic being that the 14-party alliance had, first, left it too late, having, however resignedly, appeared to concede the president's assumption of office on October 29, and second, seemingly acquiesced in his various actions as chief advisor by meeting him and allowing him to take decisions in the four weeks since then.

The attorney general said as much, adding for good measure a third limb to his submissions, that the president's actions were, in any event, immune from any judicial review. The presentation of these propositions was surrounded by hours of time-wasting, with the AG reading out in full the relevant constitutional provisions, despite most lawyers, and dare I say it many laymen now virtually knowing them by heart, after a month of non-stop 24-hour rolling discussions and analysis on the electoral framework.

And despite the extreme urgency of the matter, the AG seemed more than happy to delay the conclusion of the hearing for as long as possible (perhaps in another bid to create further facts on the ground which would favour one party, as had so successfully already been done with the Election Commission's declaring the election schedule before the court could hear the writ on this matter.

But somehow during the week the case turned around -- much of this to do with the eloquent and, to my mind, unanswerable arguments on behalf of the petitioners, that an unconstitutional act does not become constitutional by lapse of time, that the president is not above the law or the constitution, that the interpretation of Article 58C(1)(f) by which the president assumed the office of the chief adviser was self-serving and wrong.

Before the lunch recess on November 30, the AG submitted that he wished to file an application for a larger bench to hear the matter, given its constitutional importance, and the court should therefore not continue to hear the matter. The two judges in Court No. 12 however commented that there appeared to be no precedent for this, and they were minded to issue a Rule and would reconvene at 2 pm.

Interestingly, the AG then submitted -- contrary to his argument that a larger bench was needed for a fuller hearing! -- that the judges should reject the petition outright. It's important to remember that whatever order the court would have passed would not have been a final judgment with any binding consequences.

A Rule [Nisi] is just the first stage of the case, which in this instance would have involved the court asking the chief advisor to show cause why his assumption of office should not be held to be without lawful authority. So the AG would have had ample opportunity -- even if a Rule were issued -- to make a full reply, and if this was found cogent by the court, even perhaps to obtain a judgment in its favour.

Bizarrely, the AG was insisting that even this preliminary order not be issued and the matter be rejected summarily. From the AG's conduct (and that of his cohorts), it seemed as though they felt that the threat of a mere show cause on this matter would bring the walls of this government tumbling down, and with it the BNP's carefully constructed electoral edifice.

They were shouting and making intimidating gestures, pressurizing the court in order to resist even issuance of the Rule and thus to prevent a full hearing of the petitions. I suppose when someone has gone to so much trouble in designing and semi-executing a blueprint, it is galling to have anything happen which isn't pre-programmed, however minute the change might be and even more infinitesimal its impact.

While the AG was ostensibly representing the caretaker regime, it was understandably difficult for most observers to understand this as he was flanked through the proceedings by lawyers who just happened to be BNP MPs and former ministers (yes Mr Moudud Ahmed again) and indeed represented by them at a later press conference (the AG, like the other great constitutional office holders, the election commissioners, suddenly having become rather bashful about media appearances).

This difficulty was further exacerbated when the AG, accompanied by Mr Moudud Ahmed and others rushed to the CJ's home, hot-footing back to the court with a signed piece of paper by which the CJ had apparently directed that the two judges in Court No. 12 stop hearing the matter with immediate effect. Within minutes the court rose. Eyewitnesses stated that Mr Moudud Ahmed then made gestures which some interpreted as threats to the lawyers for the petitioners, and others saw as an acknowledgment of "victory" -- presumably in having pulled off an unprecedented and gross manipulation of judicial process.

It was at this point that the tensions in the courtroom erupted beyond control. Reportedly Mr Moudud Ahmed led the charge in fleeing the court, and the AG, as well as senior BNP lawyers hurriedly left the compound. Within moments, chaos commenced. Lawyers and litigants were seen crowding the over-bridge and the roof while pandemonium raged beneath.

As the calls came, I held back rising fears and tensions. I hadn't seen the violence myself, but the descriptions were enough for a sense of devastation that this could happen to the Supreme Court, not just our workplace, but the one institution which still remains a bulwark (however battered) for the protection of our basic rights.

At the same time, I felt that the method and manner of procuring the CJ's stay order constituted the most brazen attack on the workings of the higher judiciary, and on the fundamental right to seek protection of the law in cases of alleged violations of rights.

As such, it would surely be the ultimate demonstration for those still intent on seeing no evil and hearing no evil regarding the immediately departed coalition government's actions in seeking domination over the Supreme Court itself and indeed of its domination of key constitutional posts including those of the AG and CJ.

And it seemed that finally the CJ's role in running the court at the behest of what we politely like to call "certain vested interests" would be exposed to the country at large, and not remain an open and shameful secret for lawyers alone to suffer. As Rokonuddin Mahmud put it: "We want to say to the hon'ble chief justice, you are no longer honourable, you are no longer our chief, you have not done justice."

But I'd forgotten the two Ms and their marvellous magical ability to turn black to white, day to night, and wrong into right. And of course truth into lies.

And I'd forgotten the potency of images, and the weakness of mere words. So throughout the evening and the night, the day's events (re-edited) flashed relentlessly over the screen on multiple television news programs and their accompanying commentaries, showing in full technicolour the mayhem in the court compound, the brickbats on the car window, the shattered glass on the floor, the burning ball of newspaper lying on the front seat of former Minister Mr Shahjahan Omar's four-wheel drive, and finally lathi-wielding unknown young men (clearly neither judges nor lawyers themselves) laying into everything in sight, as well as the SCBA (Supreme Court Bar Association) members giving their responses announcing their protest program.

But where were the BNP leaders? All gone to tea! No, really. With the former prime minister in the glitzy China-Bangladesh Friendship Centre, of course, with its cream coloured carpets, involved in a national exchange of opinions for lawyers, including not only the golden oldies, but also, the new generation of clean-cut young men and women (several already significantly reported to have benefited through clients and contracts gained through ministerial parents and in-laws).

Several of those among the cast of characters in Courtroom 12 only hours earlier were now sitting in silence on the podium, gazing gravely into the middle distance. For a deluded moment, I thought that they were about to express regret for the part they had played in the pandemonium that occurred, and in contributing further to destroying the image of the court as a place above prejudice, bias, and impartiality.

But no, they, or rather Madam, were actually, in all seriousness, calling for action against "the party which had caused such violence and treated the court with such disrespect." The latest twist in the tail or the mega-mendacity proffered being to claim that the lawyers for the petitioners were responsible and that action should be taken against them! With, of course, no mention in all this shrill name calling of how it is not only broken windows and burnt cars -- which are utterly condemnable -- that amount to disrespect, but also acts such as the obtaining of the very stay order that precipitated the violence, and left the authority of the High Court judges in tatters, and denied the people the opportunity of a hearing.

As the news continued to roll, it focused more and more on the scenes of violence, contrasted with these exhortations. But of course there were no images of the AG (supported by senior BNP MPs) obtaining an unprecedented order from the CJ.

Nor were there pictures of their "submissions" which resulted in the order they got. Nor of their cold-bloodedly tearing up some of the agreed conventions which enable the functioning of the process of justice, however flawed -- of non violent, peaceful thoughtful and rational deliberation over certain questions raised and their authoritative determination -- in their continuing desperation to un-level the judicial (and ultimately electoral) playing field.

Barrister Sara Hossain is an Advocate, Bangladesh Supreme Court.