

The last of the hitches, hopefully

How long will this drama drag on?

ONLY yesterday we asked the 14-party alliance to withdraw their siege programme and go full speed for the elections and today we are once again faced with another set of inexplicable delays. Why the Zakaria issue has risen again after it was resolved with the consent of all concerned? The President has once again made a u-turn at the last moment and has reneged on his consent to the advisers' solution package. So what looked like 'light at the end of the tunnel' has once again become a mirage and the much-awaited political rapprochement seems to be again eluding us.

The case for removal of Zakaria is both old and well established. He has been known to be partisan from the time he took over as the secretary of the EC and immediately started his infamous non-cooperation with the former CEC Abu Sayed. He started to boycott all meetings called by Sayed without giving any reason. On several occasions the CEC requested the PM, as the head of the EC secretariat, to remove him with no avail. It became very clear that he was BNP's man in the EC and that he was to call the shots and not the CEC. His personal agenda became more apparent when, after Justice M.A. Aziz took over as CEC, he started attending the very EC meetings that he boycotted for over two years. No EC secretary had ever disobeyed his boss the CEC and survived as Zakaria did, and this he could do only because of the full backing of the PMO. Not only that Zakaria did not try to hide his source of power he even flaunted it to increase his influence.

With such a background it is only natural that the 14-party alliance will demand his ouster. To be fair, they have been demanding it from the very beginning. BNP counters this demand by reminding the AL about Shafiqur Rahman, well known for his partisan leanings, who remained in the EC during the 2001 elections, and who refused to resign in spite of the caretaker government's repeated request. May be today BNP is trying to pay AL back in the same coin.

While we can understand BNP's position of playing tit-for-tat, we are constrained to ask must we repeat the mistakes, the partisanship, and the crudities of the past? Is there no lesson to be learnt from the past? Now that we have traversed a long winding route to a near understanding, can we not close the matter by agreeing to this last point of Zakaria's removal? We urge the BNP to do so, particularly when a big cloud of uncertainty has been removed with the 14-party alliance signaling their readiness to go to the polls.

Women arbiters settle disputes

Why not train up more such social workers?

IT is refreshing to learn that trained women arbiters (shalishkars) are contributing their talent and skill in settling disputes at local levels. From dowry related family complications to raising awareness among the abused women about their various rights, these arbiters are contributing to bringing about positive changes in society. With the required training to do their job to everyone's utmost satisfaction, the women arbiters, we are told, are doing a laudable job. These courageous women deserve applaud from us all.

We appreciate the initiative taken by Bangladesh Legal Aid and Services Trust (BLAST) to create a trained group of social workers. The task is undoubtedly challenging as it involves working with people at grassroots level where more often than not women rights violation manifests with all its ugliness and damaging side effects. This requires proper highlighting of gender issues, knowledge, networking and human rights intervention in the communities. It is encouraging to note that people who had resisted such arbitration attempts in the past, like local elders, UP chairmen and religious leaders, are now able to perceive the good side of the programme.

With the legal system losing its past credibility fast, no doubt such local level arbitration efforts would solve problems as well as save money and harassment of the simple village folks, who otherwise would have to go to the sub-districts or districts to seek justice. We understand at present such local level arbitration is being conducted in 12 districts, but with the good response coming from there, we feel the training programme should encompass the entire country.

In the male-dominated society women fall victim to all sorts of abuse and violation that the existing legal system cannot handle properly. In many South and South-East Asian countries the *panchayat* system is still in vogue in remote rural areas to settle minor disputes. We feel the arbitration system could pick up some good features from the traditional *panchayat* system to make it more acceptable to the local level people.

Better late than never



MUHAMMAD ZAMIR

I wonder what the Hon'ble President and the Chief Adviser sees in his mirror when he looks at it for the first time every morning and for the last time every night. Is it hope or is it despair? Does he feel that he is really doing his best as the head of a neutral Caretaker Government charged with the difficult responsibility of holding a free and fair election that will be acceptable to all within the country and also to our friends and development partners abroad?

These are serious questions. We are faced today with an extremely complex scenario that demands not only astute constructive engagement but also political will and sincerity of purpose. The whole electoral process after nearly six weeks of caretaker governance has reached the proverbial crossroads. The clock is ticking away and many are concerned that ineffective leadership might eventually result in our missing the bus.

The first few days of the second month of this administration have witnessed frustration, rowdism, some hope and very little maturity. Some of the Advisers within the Caretaker Government, despite the wily machinations of the President, have also demonstrated a degree of determination, sensitivity and

efforts geared towards finding acceptable solutions to intractable problems.

It is indeed sad that time has been lost unnecessarily through short-sightedness on the part of the Chief of the Caretaker Government. His actions have worsened matters and confirmed suspicions that he was implementing the hidden agenda of the former BNP-led Alliance which had appointed him as President. Unnecessarily, on the

sirable dead-lock. Despite provocation, the aggrieved lawyers could have exercised restraint and proceeded with the process of redress in accordance with available law. They might have filed for review. I do not know why this was not attempted.

This controversial situation has become murkier with the Judges and lawyers venting their grievances through absence from the Court. This in turn has affected the

ule. If the elections are to be considered as free and fair, necessary and serious measures will have to be carried out to re-check that list. The duplicate and incorrectly listed names (euphemistic to say the least) need to be weeded out. This is a prerequisite and definitely the first step.

It was heartening therefore to note that the Election Commission has finally agreed to undertake such a step. After spending nearly Taka 700 million on this exercise, they

Such a measure will introduce the required flexibility and create the requisite atmosphere for the holding of a peaceful election, where all parties can participate freely and voters can express their choice without intimidation.

After this comes the question of reconstitution of the Election Commission and its Secretariat. The observations made by Election Commissioner Mahfuz have not helped. They have only created

state that they are finding it difficult to persuade suitable persons to accept the responsibilities of being Election Commissioners. One can understand their frustration given the fact that they have to tackle this challenge of reforming the Election Commission without any real support from the Chief Adviser. One can only hope that the changes being put in place through their initiative will be able to resolve the problems. Unfortunately, days are running out and the constitutional crisis can only deepen in the near future.

This current imbroglio with regard to the electoral process had led many to suggest that the Caretaker Administration should carefully examine the possibility as to whether the election schedule can be extended beyond the current constitutional provision of ninety days. Such a move on the part of some political leaders created its own degree of uncertainty. They suggested that any doubt in this regard could be resolved by the President referring the matter to the Appellate Division of the High Court under Article 106 of the Constitution. They felt that this would enable the Caretaker Administration to ascertain whether the time frame (with regard to holding the election) as mentioned in Article 123 of the Constitution, was mandatory or just a directive.

However, the latest developments, in all probability, have created a situation which will not require such a reference. All political parties now appear to be agreeing to participate in an election within the ninety days period. This is indeed good news.

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Some of the Advisers are trying their best to find acceptable solutions through flexible initiatives. This has been a complicated task. One of them has been candid enough to state that they are finding it difficult to persuade suitable persons to accept the responsibilities of being Election Commissioners. One can understand their frustration given the fact that they have to tackle this challenge of reforming the Election Commission without any real support from the Chief Adviser.

very evening of the hasty announcement of the election schedule, he appointed two controversial persons as new Election Commissioners. One of them, an ex-bureaucrat, had been openly campaigning for the past few months in his constituency with the hope that he would receive the BNP nomination to contest from that seat in the forthcoming election. This was brazen by any stretch of the imagination.

Similarly, over the past week, judicial aspects related to the electoral process, not helped by the sudden and debatable decision of the Chief Justice led to unfortunate and regrettable acts of vandalism and reason within the premises of the High Court. Such action did not enhance the dignity of the legal profession. It only created an unde-

operation of the High Court. This extreme crisis in judicial governance has recently deteriorated even further with authorities of the Supreme Court deciding to initiate additional action against some senior lawyers under Section 124 A of the Penal Code. I feel that time has come for both sides to take a step back from the brink. Efforts must be made to find a satisfactory compromise. This is absolutely essential. This dispute is distracting attention from the more important factor -- the holding of a free and fair election.

Sheikh Hasina, leader of the 14-Party Alliance has correctly set forth the priorities. She has demanded proper updating of the flawed voters' list before the commencement of the electoral process through the announcement of the election sched-

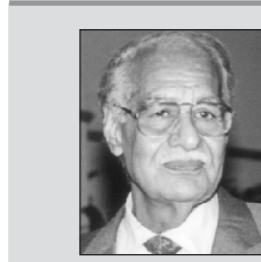
have now decided to spend another Taka 100 million for this purpose. Their task has to be completed very carefully. Otherwise doubts will remain about their intention and the effectiveness of their action. The time that they have decided to allocate for this purpose has to be spent effectively. We have been given to understand that the National Democratic Institute might assist them in this regard. That is good, but it might have been better to associate also an indigenous civil society, an organisation like 'Sujon', which has already undertaken widespread action in this area.

It was also a relief to be assured about a changed election schedule. Efforts geared towards rectification and correction will be that much more meaningful if that is followed by a revised election schedule.

greater complexity. He has already become controversial for the manner in which he had himself appointed as the Acting Chief Election Commissioner. The steps undertaken for this purpose do not appear to conform to the spirit and intent of the existing provisions contained in the Representation of the People Order (PO No 155 of 1972). The power to make an appointment to that office lies with the President, not the Commission itself. This, and many other irrelevant utterances by Commissioner Mahfuz have only made his functioning in the Election Commission that much more contentious.

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The 'best of minds' and the 'teeming millions'



KULDIP NAYYAR
writes from New Delhi

IT was the last sitting of India's constituent assembly. The constitution had been passed. Chairman Rajendra Prasad was saying goodbye to members. With pride, he said that it was the best of the constitution which 'the best of minds' in the country would interpret and the 'best of minds' would adjudge what was what. But it was a pity, he said, that those who would frame the law need not have to possess any educational qualification. (The constitution has enfranchised the illiterate).

In reply, Prime Minister Jawaharlal Nehru said that here reciprocated Rajendra Prasad's sentiments but his predicament was that when they were fighting for independence, "the best of minds," were on the side of the British. They were toadies. The illiterate, "the teeming millions," as Nehru put it, were on our side and had staked everything on freedom. How could they be denied vote in a free India when their sacrifice was the most?

The ever-running debate between parliament and the judiciary to determine who is supreme reminds me of Nehru's words. The judiciary represents "the

best of minds" and parliament the "teeming millions". The first are the appointees. The second are elected. Even to think that parliament is not supreme is to betray the trust of people who return MPs. It will be a sad day when there is confrontation between the two because both have their spheres demarcated and both are independent in their own way. The Supreme Court is supreme, as Chief Justice of India Y K Sabarwal says. But its

times, the executive has been rightly taken to task. The aggrieved party has been given relief. In cases like the Babri Masjid, the Supreme Courts directive was just and categorical but the executive failed to comply with it. The unfortunate demolition took place.

However, in the process of reaching its judgment on certain cases, the judiciary has tended to arrogate itself the authority which belongs to the executive. This violates the

review. The provision drafted by the Jawaharlal Nehru government said that none of the laws specified in the Ninth Schedule "shall be deemed to be void, or ever to have become void," on the ground that it was inconsistent with any of the fundamental rights, "notwithstanding any judgment, decree or order of any court or tribunal to the contrary." However faulty the Ninth Schedule, it should stay. The constitution has a grey area

that the laws framed do not violate the constitution. But the Courts cannot function as a kind of super-legislature or super-executive. At times, the obiter dicta by judges give the impression that they are running down the elected representatives in state assemblies or parliament. This is bad in law and bad in ethics. In one of his lectures, Speaker Somnath Chatterjee rightly said: "In the interest of harmonious functioning, I believe that no one organ of the state should

then, the Additional Solicitor General had to give an assurance that "a copy of the standing committee's report shall be placed in a sealed cover before this court." The judges did not realize that even if they were to make a case of judicial review, the examination was to be after the bill had been passed, not at the stage of consideration.

The independence of the judiciary is essential in a democratic country. It strengthens the pillars on which the structure of democratic India stands. But the judiciary should know its limitations. It cannot give any direction to parliament to amend any law. Nor can it intervene in any matter pending before the Speaker or the House. India's first Speaker G.V. Mavalankar always stressed that parliament was the supreme law-making body. For him, no one was above parliament, although he wanted effective judiciary for a meaningful functioning of democracy.

True, people have vested interest in maintaining and sustaining a strong and an independent judiciary. But they have equal vested interest in keeping the role of parliament and assemblies pre-eminent. People are sovereign and their representatives act with the same confidence to articulate their problems and try to find solutions. It is another matter that politicians have degraded the role assigned to MPs and MLAs. Still, the judiciary will be well advised to leave them alone.

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supremacy ends where the supremacy of parliament begins.

Lately, the judiciary, primarily the Supreme Court, has been violating the *Lakshman rekha* and expanding its boundary and going beyond it. Partly, the executive is to blame because it is lethargic and does not do its job properly. Partly, it is the tendency of the judiciary to spread itself all over. In the name of judicial review, the Supreme Court is adjudging such government measures which are purely administrative.

There is no doubt that the judiciary has, by land large, interpreted the constitution to benefit the vulnerable sections of the society. At

doctrine of separation of powers enunciated in the constitution. Perhaps, unwittingly, the judiciary has taken upon itself certain tasks which are those of the executive. It is time that the judiciary did some introspection. However superior "the best of minds", the judges are not accountable. The executive is answerable to parliament, "the teeming millions". This is what democracy is all about.

I am not sure whether the executive's response to expand the Ninth Schedule of the constitution is justified. The schedule is a lock room available in the constitution to stash any law that Parliament wants to insulate from judicial

which a determined Supreme Court can use to register its primacy. In the absence of the Schedule, the confrontation between the judiciary and Parliament is inevitable.

True, the Ninth Schedule was not in the constitution when it was passed. But when the land reforms were challenged in Courts, Nehru added the Ninth Schedule to the constitution. It was a battle between the 'conservative' judiciary and the 'progressive' executive. Nehru did not want the Courts to get in the way of welfare measures like this land reforms.

The judiciary is there to ensure

usurp the functions which essentially belong to another, nor should it abdicate its essential functions and thereby upset the well-cherished principles of separation of powers and checks and balances provided by our constitution."

Not long ago, the Supreme Court caused a flutter in demanding the report by a parliamentary standing committee on a bill under consideration. The division bench which made the demand wanted parliament not to proceed with the bill till the court had considered the matter. The situation was saved when the government's own lawyer pointed out to the bench that it could not pass such an order. Even

President as CA himself likely to undermine CTG neutrality

A K Md ABEDUR RAHAMAN

THE concept of the CTG, although a departure from the principle of the Parliamentary form of Government, was incorporated into the constitution of Bangladesh in order to provide a bulwark against the abuse of power by the ruling party to rig the election. The cornerstone of the CTG is its non-political entity and neutrality, which can be maintained provided the CA and the President to whom the interim powers are vested to hold a free and fair election can remain free from any political interference.

The retention of the post of the President as the head of the CTG was necessary because the administration of the country cannot be left in the hands of an appointed body even for a short period of time. The vacuum of power likely to be created by the resignation of the PM and the Cabinet might have influenced the founders of the constitution to give wider powers including Defence to the President. The President in a Parliamentary form of Government acts as a titular head, taking advice from the PM in most cases, in accordance with its principles. The retention of his position as a nominal head during the interim period of the CTG, requiring him to take action on the advice of the CA, is likely to jeopardise the democratic values.

The President, who is elected although indirectly by the people, cannot be made subservient to an appointed person.

The effectiveness of any political innovation can be judged after it is put into operation when its merits and defects and other factors associated with its application can be identified. As the concept of the CTG is a new political phenomenon, its operation can be improved by taking necessary steps to rectify its defects. The practical application of the procedures to appoint a CA in 2006 has resulted in creating a political deadlock requiring remedial actions to improve its application.

The allegation by the AL that the BNP government extended the retirement age of the judges of the High Court and Supreme Court in order to ensure that a particular Chief Justice retires in time to become the CA of the CTG has created a political situation fraught with a grave constitutional crisis. The impasse to appoint a CA was resolved by invoking the constitutional provision that the President should take over the power of the CA in the event of a deadlock to appoint him from amongst the retired Chief Justices. Whether the procedures adopted in appointing the president as the CA was constitutional or not is not the subject matter of my topic, although most of the constitutional experts in

Bangladesh considered such action as a flagrant violation of the constitution.

The founders of the constitution included such provision in the constitution as a last resort in order to resolve any constitutional crisis without giving proper thought to the consequences that could follow from taking over the power of the CA by the President. The granting of

The neutrality of the CTG, which is vital for holding a free and fair election, can only be maintained if the President as an integral part of it can remain non-political. The only way to make him relatively independent is to elect him directly by the people. There cannot be any guarantee that the President will remain neutral even if he is elected by the people directly because each party will nominate a candidate of their own choice to contest the Presidency. However, even if the ruling party becomes successful in getting its nominee elected as the President, it would not be in a position to exert influence to the same extent as it could when it would elect him by its majority votes in the Parliament.

immense power to the President during the interim period, although not consistent with the principles of Parliamentary form of Government, can be justified if we take the view that the President as an elected person cannot act as a nominal head taking advice from an appointed person like the CA. But if we consider his position as an integral part of the CTG, while taking into account the fact that he is elected by the ruling party by virtue of their majority in the Parliament, there cannot be any certainty that he

can rise above party politics to create an environment for holding a free and fair election.

The concentration of power of the president and the CA in one person is likely to make him a constitutional dictator as there is no authority to restrain him from abusing his power. Such abuse of power by one person, acting in the capacity of both the President and the CA, is bound

to undermine the neutrality of the CTG if he cannot remain above party politics. The way the President is elected is likely to make him politically vulnerable. As the President is elected by the members of the Parliament, the ruling party is likely to exert its influence on the President because he is elected by their majority votes. It may prove difficult for him not to get involved in party politics. How can the President who is elected by the ruling party be expected to act independently to hold a free and fair

election? In the following paragraph I will try to identify the weakness of such provision with a particular emphasis that the neutrality of the CTG, which is considered as its nucleus is likely to be seriously impaired.

The provision of the CTG is a unique feature in the constitution of Bangladesh. As no other country adopted a CTG, the founders of the

Bangladesh constitution could not follow any guidelines towards its formation and application. They innovated the formation of such Government, defining its tenure, power and jurisdiction to suit the genius of the people of Bangladesh. The task was not easy because they had to combine the elements of both the elected and the appointed bodies towards the formation of such government. The retention of the post of the President as the head of the CTG was included in the constitution in order to maintain the

representation of an elected body in the formation of the CTG. The founders of the constitution, while striking a balance between the elected and the appointed bodies in the formation of the CTG, ignored the fact that such representation could adversely affect its neutrality. Such neutrality could be maintained if the President who retains his post as a head of the CTG could work

independently unhampered by any political intrusion. The only way to make him politically independent is to ensure that he, like the members of the Parliament, is elected by the people directly. Such change in the method of electing the President directly by the people, if adopted, would ensure the neutrality of the CTG and at the same time the representation of an elected body in its composition. However, although the political neutrality of the president as the head of the CTG can be maintained by electing him directly

by the people, it will not be prudent to overburden him with the responsibility of the CA. Such concentration of powers in one person may give rise to a situation whereby the President can exercise his power arbitrarily. The powers of the President and the CA are clearly defined in the constitution in order to see that each of them, while performing his duties, keeps himself within the jurisdiction as outlined in the constitution. The President, while acting in the capacity of the CA, in addition to his own duties, may not be able to make clear demarcation of such powers. Proper identification of such duties is necessary so that while acting in the capacity of the CA and the President he can confine himself within their respective jurisdictions. Such a situation is not likely to arise when they are performed by two different persons because each of them will be conscious to safeguard his own functions so that it cannot be hampered by the interference of the other.

A change in the method of electing the President directly by the people may put him in the same position as the PM, providing scope for a clash of power between them. Such clash of power may adversely affect their relationship, which may create an atmosphere not conducive to the smooth running of the Parliamentary form of Government.

Despite the fact that the President will have the same basis of representation as the PM, his powers are restricted by the constitution requiring him to act on the advice of the PM as a titular head. The neutrality of the CTG, which is vital for holding a free and fair election, can only be maintained if the President as an integral part of it can remain non-political. The only way to make him relatively independent is to elect him directly by the people.

There cannot be any guarantee that the President will remain neutral even if he is elected by the people directly because each party will nominate a candidate of their own choice to contest the Presidency. However, even if the ruling party becomes successful in getting its nominee elected as the President, it would not be in a position to exert influence to the same extent as it could when it would elect him by its majority votes in the Parliament. Besides, the President being elected by the people directly should have the backing of the people's mandate not to succumb to any pressure from any political party in order to maintain his neutrality.

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