Text of the Speaker's decision

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stitution.

Thus point No 1 is disposed of accordingly.

Point No. 2

Point No. 2: — This point, in my view, is most important. The question is whether en-masse submission of resignation letters by 144 members of Parliament out of which 87 members belong to Awami league, 34 members to Jatiya Party, 19 members to Jamaat-e-Islami and Mr. Md Dabirul Islam, MP and Mr Md Yusuf of CPB and Mr Suranjit Sen Gupta, MP of Ganatantri Party and Mr Salauddin Quader Chowdhury of NDP in the manner and under the circumstances, herein above mentioned, could be legally done within the meaning of Article 67 (2) of the Constitution of the People's Republic of Bangladesh read with Rule 177 of the Rules of Procedure of the Parliament. In other words, whether such an en-block resignation by almost all the Members of the Opposition, in protest of non-acceptance of their demand for Care-taker government has been conceived by or contemplated under Article 67 (2) of the Constitution ?

Prior to submission of the resignation the opposition parties abstained continuously from attending sessions of the Parliament without leave of the Parliament on the demand that the Treasury Bench shall have to introduce a Constitutional Amendment Bill to the effect that the National Elections for Members of Parliament shall have to be held under a Caretaker Government comprising neutral and non-partisan persons to be nominated by the political parties represented in the Parliament. They maintained that election of members of Parliament, if held under the Ruling Party, cannot be free and fair. As the Ruling Party, namely, Bangladesh Nationalist Party (BNP) was not conceding to their demand, the opposition members of Parliament took to streets by boycotting the sessions of the Parliament. Challenging the continuous and unabated abstention of members of Parliament of the Opposition parties one Mr Mohd. Anwar Hossain Khan filed Writ Petition No. 1001 of 1994 in the High Court Division of the Supreme Court, Dhaka against Sheikh Hasina, MP, Hon'ble Leader of the Opposition and President of Bangladesh Awami League, Mr Moudud Ahmed, MP Hon'ble Leader of the Parliamentary Party of Jatiya Party and Moulana Matiur Rahman Nizami, Hon'ble Leader of the Parliamentary Party of Jamaat-e-Islami.

In this case their Lordships, Mr Justice Kazi Shafiuddin and Mr Justice Kazi A T Monwaruddin passed judgement on 11th on December, 1994. It was held by their Lordships that "Article 67 clearly states that a member could remain absent with leave of the Speaker. Nowhere, the members are authorised to remain absent without leave of the Parliament. If members walk-out or boycott the session they are to attend first then they may walkout. But without attendance no such walk-out is contemplated. If a member remains absent anybody on his behalf could ask for leave for such person; but absence without any leave is wholly illegal and unauthorised and therefore the long, unabated and continued absence cannot absolve the members from the liability; but such liability could be imposed only as provided under the Constitution. But absence without leave is illegal and unauthorised. The respondent Nos. 3-5 both are validly elected as members of the Parliament but are not attending the Parliament without any leave, are not discharging their constitutional obligation but are engaged in some other activities prompted by political consideration, namely for realisation of the demand for a Caretaker Government. The concept of Caretaker Government is nowhere to be found within the four corners of the Constitution. In the fundamental principle of State Policy as stated in Part II of the Constitution it does not even contemplate such idea. Shorn of legal cover or sanction as to the demand of 'Caretaker Government' the respondent Nos 3-5 along with others are abstaining from Parliament session without leave and are carrying on activities for their own selfish ends which is clearly against their oath of office; as such the demand so canvassed for by the respondent Nos 3-5 in order to justify their unabated absence from Parliament is wholly illegal and unconstitutional."

Mr Moudud Ahmed who was respondent No. 4 in the aforesaid Writ Petition stated in his affidavit-in-opposition that the decision of his party in the Parliament is to boycott the proceedings of the Parliament and it is further stated that to participate in the proceedings in the Parliament is only one of the functions of the members of the Parliament. He further stated on oath that, "the boycotting of the proceeding of Parliament was continued to pressurise the Government (the underline is mine) with the expectation that it would respond to resolve the issue peacefully and constitutionally inside the Parliament but it failed." It is further stated that, "members of Parliament belonging to the opposition were always eager to join the Parliament but since the ruling party took no initiative to resolve this impasse, it made the Parliament ineffective." So the abstention of the members from Parliament is not a simple abstention but it is a conditional abstention i.e. the demand for Caretaker Government be not conceded by the ruling party they should abstain from Parliament till realisation of such demand.'

In the said judgement of the Writ Petition their Lordships further held that "The normal course of effecting any reform or amendment of the Constitution is to be done by introducing a bill and in case of amendment of any 'Constitutional provision 2/3rd majority of the members of the Parliament is necessary. As the ruling party (BNP) is not conceding to such a demand, it is stated in the affidavit, the respondent Nos 3-5 have opted for abstention and are making agitation in order to pressurise the ruling party concede to such demand. Such an attempt is not only illegal and unconstitutional but is also a coercive measure unknown to the history of the country, The free-will and freedom to exercise one's judgement subject to limitation imposed by law each member should participate in the internal proceedings of the Parliament. But such right of the ruling party has been taken away by the members of the opposition including the 3 respondents and they are not only coercing the ruling party members to concede to their demands but also about to bring a downfall of the democratically elected Government for their selfish ends. This cannot be called a struggle for emancipation of downtrodden people or restoration of democracy, nationalism or socialism but be called sabotising all efforts of the democratically elected government to bring down showing complete disregard and defiance to the provision of the Constitution. The action of the respondent Nos 3-5 cannot be called legal or constitutional but are violative of the provision of the Constitutional and democratic norms."

The Appellate Division of the Supreme Court by an order dated 12th of December, 1994 stayed the operation of the judgement passed by the High Court Division in the said Writ Petition till January 15th, 1995 subsequently extended till disposal of the appeal. While the said Writ Petition No 1001 of 1994 was pending and argument on both the sides were continuing the opposition members made a declaration on 6-12-94 that they would resign en-masse from Parliament on December 28 if the ruling party failed to accept their demand for a Caretaker Government for holding general election to the Parliament which has been already held to be illegal by a competent court. And on 28th of December, 1994 as stated in foregoing paragraphs, resignation letters were submitted to the Speaker of Parliament for being received under Article 67 (2) of the Constitution read with Rule 177 of the Rules of Procedure.

Bearing these facts in our minds, let us try to address the question as to whether en-masse resignation for government's refusal to accept the demand for a Caretaker Government is legal and hence receivable by the Speaker or not. Article 67 (2) of our Constitution reads as under:-

"67 (2) — A member of Parliament may resign his seat by writing under his hand addressed to the Speaker and the seat shall become vacant when the writing is received by the Speaker or, if the office of Speaker is vacant or the Speaker is for any reason unable to perform his functions, by the Deputy Speaker."

To submit the resignation is of course a member's right. This is an enabling Article. Now the question is, what is the extent of this right and whether such a right as given under Article 67 (2) could be exercised by a member of Parliament and for what purpose such a right could be so exercised?

If a person has a right he must have a correlative duty. John Austin, in his lectures on Jurisprudence says, "For though every law does not create a right, every right is the creature of law. And though every obligation and sanction does not imply a right every right implies an obligation and sanction."

Let us now examine the nature of this right. Is this right absolute or is it limited to the extent of his Constitutional obligation to the people? As soon as he volunteers to represent the people in Parliament he is undertaking certain responsibility and obliged to serve them. Thus a representative is shrouded with the characteristic of a "representative" only after the electors have "created" him. A "representative" is thus a creation of the electors as per law. The process of birth of a representative of the people has been laid down in "The Representation of the People Order, 1972 (PO 155 of 1972)." Electors are principals and representatives are their agents under the scheme of PO 104/72 and 155/72. He is supposed to have held out his or his party's programme to the people, given assurance to serve them. Sovereignty lies with the people, not with the executives, Legislature or the Judiciary — all three are creations of the Constitution. The sovereign will of the people to legislate is achieved through elected representatives elected to the elective body, that is, Parliament (Legislature). So the legislative power, as envisaged by Article 65 read with Article 7 of the Constitution of the Republic belong to the people. He has therefore a corresponding duty and obligation. He has also taken oath to the following effect: -

"I ..... having been elected a member of Parliament do solemnly swear (or affirm) that I will faithfully discharge the duties upon which I am about to enter according to law:

That I will bear true faith and allegiance to Bangladesh;

And that I will not allow my personal interest to influence the discharge of my duties as a member of Parliament."

Thus his right to resign is certainly not an unfettered and absolute right. He, as a member of Parliament, has undertaken the task of "faithfully discharging his duties" and will not allow his "personal interest to influence" the discharge of the said duties. The Constitution of the People's Republic of Bangladesh and the Rules of Procedure of the Parliament have set forth the duties of a member of parliament. It is known to all of us that the concept of a Caretaker Government with neutral non-partisan nominated persons is alien to our Constitution and is unknown to any democratic system or in any Constitution based on the principles of Parliamentary democracy. It is also known to us that no candidate, no elected member of Parliament, no political party had in his or its election manifesto in February, 1991 the concept of formation of a caretaker government. Nobody got any such mandate from his voters. If so, then not only the demand for a neutral non-partisan caretaker government is illegal — as found by the High Court Division of the Supreme Court — but on the ground of non-acceptance of such a demand by the government no member of Parliament has a right to resign in the manner and on the ground as they have done. If he does so, he certainly violates his solemn oath and committing a breach to his duty towards his people.

Then, the question is, is a member of Parliament not permitted at all to resign from parliament? Yes, of course he can in normal and usual circumstances. And that is what exactly has been envisaged in Article 67 (2) of the Constitution. If an elected member becomes sick or otherwise incapable of performing his duties for any other similar such reason he may of course resign. But could it be the intention of the framers of Constitution that such an unfettered and absolute right may be given to the members of Parliament and by using that right the members should create such a condition that the democratic system itself collapse or stands on the verge of being collapsed? The answer shall and must be — No. Thus I find that this right as has been given to a member of Parliament under Article 67 (2) of our Constitution has been wrongly and illegally used. It cannot be used as a weapon to create Constitutional crisis. If it is so, then en masse resignation to paralise the parliament and frustrate the democratic system and the scheme and fundamental principles of the Constitution is illegal. It is a negatory step designed to create a Constitutional crisis which might force the democratically elected government to fall instead of taking resort to the constitutional step of bringing a no-confidence motion. If an interpretation is given to the effect that en masse resignation is contemplated by Article 67 (2) of the Constitution, then its consequence may be that all future Parliaments in the country would meet similar fate and this virus may affect other Parliaments as well. As such it is inconceivable that the framers of the Constitution would sow a seed of destruction of the system they wanted to set up, strengthen, establish and institutionalise.

The next question which may come for consideration is could the incidence of resignation be called a parliamentary privilege? In interpreting such words "right" or "privilege" the judges have had to take resort to jurisprudential meanings of these words because these had not been specifically defined in the laws. In our Constitution Article 78 deals with the privileges of the members.

"78 (5). Subject to this Article, the privileges of Parliament and of its committees and members may be determined by Act of Parliament."

But there has been no Act so far passed by our Parliament stating the privileges of the members. The only law that has so far been enacted is "The Members of Parliament (Remuneration and Allowances) Order, 1973" which does not contain any privilege of the nature we are discussing.

Parliamentary privilege has not also been defined in the interpretation clause of the Constitution of India (Article 366). Hatsell, the great 18th century authority, said, "the privileges of Parliament are rights which are absolutely necessary for the due execution of its powers." (Hatsell's precedents 1818, Vol-I, page-1). It should be emphasised that these privileges are essentially those of the Parliament as a whole; "individual members can only claim privileges in so far as any denial of their rights or threat made to them would impede the functioning of the House. Members of many continental parliaments cannot claim privileges that are unrelated to their functions in the House."

Erskine May in his Parliamentary Practice (21st Edition, page 69) says: "Parliamentary privilege is the sum of the peculiar rights enjoyed by each House collectively as a constituent part of the High Court of Parliament, and by Members of each House individually, without which they could not discharge their functions and which exceed those possessed by other bodies or individuals. "Thus parliamentary privileges are certain exemptions from general law which have been given to a member of Parliament for performing their functions in the House."

In a similar tone, MN Kaul and S K Shakdar in Practice and Procedure of Parliament (fourth Edition, 1991 page 193) says, "In parliamentary language the term privilege applies to certain rights and immunities enjoyed by each house of parliament and Committees of each House collectively and by members of each House individually. The object of parliamentary privileges is to safeguard the freedom, the authority and the dignity of the Parliament. Privileges are necessary for the purpose of exercise of the functions entrusted to Parliament by Constitution. They are enjoyed by the individual members, because the House cannot perform its functions without unimpeded use of the services of its members."

Thus a reading of all these suggest that a parliamentary privilege is available to a member of Parliament to enable him to effectively discharge his duty in the House of the parliament and not to resign from the parliament or to join hands with others and then to create an issue like a caretaker government (not found in the Constitution) and destroy the very existence of Parliament and create a constitutional crisis.

Article 67 (2) has to be read and interpreted not in an isolated way but along with other Articles of the said Constitution, its spirit, and basis and fundamental principles. Happily our judiciary was never oblivious to this cardinal principle of constitutional interpretation. Our Courts have always "taken light from the burning candle." It has taken into consideration the socio-economic condition of our people, the grim realities of our lives, our national aspirations and has always followed the principles of natural justice in interpreting our Constitution. In fact in part-II of our Constitution particularly Article 8 (2) clearly states as to how our Constitution would be interpreted and which are the principles that shall guide such interpretation. There has been quite a good number of judicial decisions passed by our illustrious Judges of both the High Court Division of the Supreme Court and the Appellate Division reported in various Law Journals. A recent publication captioned "Bangladesh Constitution: Trends and Issues" by Mr Justice Mustafa Kamal is a superb work on such decisions.

About the difference made in interpretation of subordinate law and constitutional provisions, Lord Diplock,. expressing the majority view in Hinds and others VS the Queen (1976) I All ER page 353 says:

"To seek to apply to constitutional instruments the cannons of construction applicable to ordinary legislation in the fields of substantive criminal and civil law would, in their Lordships view, be misleading..."

In the case of Kudrat-E-Elahi Panir and others VS Bangladesh reported in 44 DLR (AD) page 314, Mustafa Kamal, J says that a constitutional provision is to be interpreted in the following way:

"It is law of the Constitution itself that the fundamental principles of State Policy are not Laws themselves but "principles." To equate "principles" with "laws" is to go against the Law or the Constitution itself." Thus interpretation of Constitutional law does not stand on the same footing as interpretation of subordinate law.

Like 1972, immediately after liberation war, the people of Bangladesh got another opportunity in 1991 to establish their democratic rights and march ahead with economic reforms. On both the occasions they got ideal opportunity for building up democratic institutions, culture and norms with a distinct national vision.

The new 5th Parliament had its first sitting on 5th of April, 1991. However, after a few turbulent sessions the question of switching over to parliamentary system was accepted to all the political parties in the Parliament. Consequently the 11th and 12th amendments Acts were passed in August, 1991. After a prolonged struggle and blood bath it was a real victory of the people; constitutional provisions were amended unanimously. Presidential system was abandoned and parliamentary system of democracy was unanimously accepted. All the relevant Articles of the Constitutions stood amended. The object and reasons for which the 12th amendment was passed unanimously have been set out as follows:

"The present Parliament is the outcome of a persistent, and severe people's movement for the last eight years which culminated into an unprecedented mass upsurge at its last stage. This unique Parliament has, therefore, a distinct national appeal. The members of this Parliament, who have been elected by direct adult franchise in a free, fair and impartial election held under a neutral non-partisan caretaker government in an ever peaceful atmosphere have, therefore, an undisputed and fervent appeal and prestige. To them the people's aspiration is immense. Such hopes and aspirations of the people could only be fulfilled by establishing a government accountable to Parliament through a democratic process based on the backdrop of realities and multiparty system. Thus, to adore democracy with an institutional shape this amendment Bill of the Constitution is deemed expedient and essential."

The above brief and bare statement of historical facts have been given with a definite purpose to show what is the historical background of the present Constitution, to show what is the ultimate goal of the people of this country and where do we really intend to go now. Does this nation want to institutionalise and strengthen democracy? Should we really have a national vision? Keeping all these aspects in view we have also to interpret our constitutional provisions in the light of the objectives and reasons for the 12th amendment, as stated above, and the preamble to Constitution which runs as under:

"We, the people of Bangladesh, having proclaimed our Independence on the 26th day of March, 1971 and through a historic war for national Independence, established the independent, sovereign people's Republic of Bangladesh.

Pledging that the high ideals of absolute trust and faith in the Almighty Allah, nationalism, democracy and socialism meaning economic and social justice, which inspired our heroic people to dedicate themselves to, and our brave martyrs to sacrifice their lives in the war for national independence, shall be the fundamental principles of the Constitution;

Further pledging that it shall be a fundamental aim of the state to realise through the democratic process a socialist society, free from exploitation, a society in which the rule of law, fundamental human rights and freedom, equality and justice, political, economic and social, will be secured for all citizens;

Affirming that it is our sacred duty to safeguard, protect and defend this Constitution and to maintain its supremacy as the embodiment of the will of the people of Bangladesh so that we may prosper in freedom and may make our full contribution towards international peace and cooperation in keeping with the progressive aspirations of mankind."

Rule 177 (1) provides that no reason shall be assigned by a member in the resignation letter. Proviso to this rule, however, says that the Speaker has a discretion not to read in the House, if any extraneous or irrelevant reason is assigned.

Now the question is, can it be said that the identical reason assigned by all the 144 members is extraneous or irrelevant? For getting the correct answer it is necessary to examine the reason assigned together with the backdrop of events leading to such resignation and the manner in which these were submitted. I have already mentioned that these were submitted by leaders of the three opposition parties in three folders. The reason assigned is the failure of the majority party to bring a bill in Parliament for making provision to hold future elections to Parliament under a caretaker government. On this issue the opposition members continued boycotting the Sessions from 1st March, 1994.

Thus it is imperative to examine in its true perspective whether or not Article 67 (2) of the Constitution contemplate such resignation. For finding a correct answer to this question of fundamental importance, it is necessary to refer to some constitutional provisions relating to governance of the country, composition and tenure of Parliament, election of members and the oath taken by the members after being elected.

It is one of the fundamental principles of state policy to attain the objects set forth in the Constitution through democrat process. In furtherance of this, the Constitution provides for governance of the country by elected representatives of the people and further provides for transfer of power by elected govt to another elected govt.

As per provision of the Constitution the Parliament comprises of 330 members of whom 300 members are to be elected by the people and the members so elected elect 30 women members thus bringing the total to 330. The tenure of the Parliament is a period of five years.

Now, before election a candidate seeks votes of the electorate on the pledge or solemn promise to represent the interest of the electorate in the Parliament and to actively participate to enact laws for the welfare of the people and to focus attention on the problems of the people for proper redress. After being elected, a member is required to take oath as prescribed by the Constitution which has already been quoted above.

Now, under democratic dispensation as contemplated by the Constitution all decisions are to be taken on the basis of majority opinion. Indeed this is the fundamental concept of democracy and clearly enshrined in our Constitution. But the reason assigned in the resignation letters, as already indicated herein before, is against the very concept of democracy and contrary to the constitutional provisions.

Article 67 (2) of the Constitution is an enabling provision which provides that a member may resign. It is important to bear in mind that Constitution cannot and does not contain any provision which will enable a member or a number of members of a Parliament to do everything which will impede, disrupt or frustrate the objects sought to be achieved through democratic process clearly stipulated in the Constitution.

The reason assigned and the en masse resignation by 144 members of the Parliament assigning reason already indicated is designed to frustrate the democratic process and push the country into a constitutional crisis with unpredictable consequences. I am clearly of the opinion that these resignation letters which contained reasons opposed to the very concept of democracy and contrary to the fundamental principles of state policy are not contemplated by Article 67 (2) of the Constitution.

Having given my anxious thought and from my examination and consideration of the constitutional provisions the irresistible conclusion is that these 144 resignation letters cannot be deemed to have been received by me as contemplated by Article 67 (2) of the Constitution

The floor of the Jatiya Sangsad. — Star file photo