FOCUS

CONSTITUTIONAL CRISIS

In Search of a Way Out

The question that is on everyone's mind is, what lies ahead. How are we going to resolve the Constitutional crisis. More than a year has passed since the Opposition parties began their boycott. It is almost six months that 147 MPs, of combined opposition, have submitted their resignation from the Parliament. Having rejected their resignation, the Speaker now faces the issue of 90 days continuous absence of the Opposition MPs. Few days back the President sought an opinion from the Supreme Court on the issue. Whichever way the Supreme Court may give its opinion, the political crisis will continue, threatening the very prospect of a peaceful general election.

So what needs to be done, what can be done? From today we begin a new series (to be published every alternate day) on ways to come out of this Constitutional crisis. At the first phase we will publish opinion of lawyers, or those with legal training. Then we will seek opinion of eminent citizens on how we could resolve the political crisis.

While we agree with all concerned that there has to be an understanding among the major political parties to resolve this crisis, yet the question remains, how to bring about that "understanding" which is eluding us for the last year and a half.

In order to solicit readers' opinion, we start our "Search". It is our hope that the readers of The Daily Star will actively participate in this 'search' and help the political parties find a solution which will be acceptable to all.

We start our series by publishing a detailed backgrounder (produced by Centre for Analysis and Choice) on the President's reference to the Supreme Court, and an interview of advocate Shamsul Huq Chowdhury, Vice-Chairman of Bangladesh Bar Council.

The President's Reference to the Supreme Court
A Background

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

— The Constitution of Bangladesh

Article 143: (1) If at any time it appears to the President that a question of law or fact 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 Court for consideration and Court may, after such hearing as it thinks fit, report to the President its opinion thereon.

(2) The President may, notwithstanding anything in the proviso in article 131 refer a dispute of a kind mentioned in the said proviso to the Supreme Court for opinion and the Supreme Court shall, after such hearing as it thinks fit, report to the President its opinion thereon.

— The Constitution of India

Article 186: (1) If, at any time the President considers that it is desirable to obtain the opinion of the Supreme Court on any question of law which he considers of public importance, he may refer the question to the Supreme Court for consideration.

(2) The Supreme Court shall consider a question so referred and report its opinion on the question to the President.

— The Constitution of Pakistan

Background

The Constitutions of India, Pakistan and Bangladesh have the above provisions in their Constitutions, a legacy of the Government of India Act, 1935, to allow the President to seek the opinion of the Supreme Court on a question of law or fact. The philosophy behind the provision is that since the Supreme Court is the final interpreter of the Constitution, prior consultation would help the Executive in reaching a more educated decision. However, while the above articles seem similar, they differ in scope and application.

Bangladesh

The Bangladesh Constitution only allows the President to refer a question of law, and not fact as in the Indian Constitution. The Bangladesh Supreme Court may decline to give its opinion and even if it does so, it is not binding upon the President or any other party to accept it. An opinion under Art. 106 is not a judicial pronouncement. Furthermore, unlike the Presidents of Pakistan and India, the Bangladesh President has no powers on his own, and with the exception of appointing the Prime Minister (under clause (3) Art. 56) and the Chief Justice (under clause (1) Art. 95), he must act in accordance with the advice of the Prime Minister. The first reference made by the President of Bangladesh to the Supreme Court is his reference of 4th July, 1995.

Pakistan

The President of Pakistan may also refer only a question of law, but in his case, the Supreme Court is obliged to render an opinion. There have been few references by president of Pakistan to the Supreme Court. Perhaps the most well known was the Governor-General's Special Reference No 1 of 1955 (under the government of India Act. 1935, s. 213). The point of law arose from the famous Maulvi Tamizuddin Khan case where the Federal Court held that the assent of the Governor-General was necessary to all laws passed by the Constituent Assembly. The Governor-General sought to validate such Acts by indicating his assent, with retrospective operation, by an Ordinance (Emergency Power Ordinance, IX of 1955) issued under section 42 of the G.I. Act, 1935. The Federal Court had earlier declared (in Usif Patel's case) that the Acts mentioned in the Schedule to that Ordinance could not be validated under section 42 of the GI Act, 1935, nor could retrospective effect be given to them.

The Governor-General made a Reference to the Federal Court asking the Court's opinion on the question whether there was any provision in the Constitution or any rule of law applicable to the situation by which the Governor-General could by order or otherwise declare that all orders made, decisions taken, and other acts done under those laws should be valid and enforceable until the question of their validation was determined by a new Constituent Convention?

A five member Court headed by Chief Justice Muhammad Munir considered the question and an answer was given by a majority of three to two. Justice Cornelius and Justice Muhammad Sharif gave a dissenting opinion. The majority answer was that in the situation presented by the Reference the Governor-General has during the interim period the power under two common law of civil or state necessity of retrospectively validating the laws listed in the Schedule to the Emergency Powers Ordinance, 1955, and all those laws, until the question of their validation is decided upon by the Constituent Assembly are during the aforesaid period valid and enforceable in the same way as if they had been valid from the date on which they purported to come into force.

A more recent reference made by the President of Pakistan was Reference No 1 of 1988. The President sought to know from the Supreme Court as to what measures may be adopted to enable the Federal and the Provincial Governments to authorise incurring of expenditure out of the Federal and Provincial Consolidated Funds in the absence of National and Provincial Assemblies till the respective Budgets are passed by the Assemblies to be elected in the ensuing General Elections.

A eleven member Court headed by Chief Justice Muhammad Halem considered the question and an answer was given by a nine to two majority. Justices Muhammad Afzal Zullah and Shafiur Rahman gave a separate opinion. The majority opinion was that the Federal and Provincial Governments can authorise incurring of expenditure out of the Federal and Provincial Consolidated Funds upto one month after the declaration of the result of the General Elections.

India

Since the Presidential reference has been more established in India, we may look at it in more depth. The provision in the Indian Constitution differs from that of Bangladesh and Pakistan. The President of India may refer both a question of law and of fact. Under clause (1) Art. 143, the Supreme Court can refuse to render an opinion, but under clause (2) they must do so. Art. 131 refers to disputes between the (a) Government of India and the States, (b) between the Government and some States against other States, Or (c) between two or more States. There have been a number of references by the President of India to the Supreme Court. These have included questions of the following nature:

a) The constitutionality of an existing law,
b) The constitutionality of a Bill presented for the president's assent.
c) The implementation of an international agreement.
d) The constitutionality and vires of a draft Bill to be moved in parliament,
e) The respective jurisdictions of the Legislature and the Superior Courts in relation to the power of the former to punish for contempt.
f) Interpretation of Constitutional provisions relating to election of the President.

In the established practice, it is for the President to determine what questions are to be referred. The court cannot go beyond the questions referred and discuss other questions. Neither can the Court go into disputed questions of fact or inquire into the truth or otherwise of the recitals in the Order of Reference or the bonafides of the Order of Reference.

A reference on the question of constitutionality of a pending Bill does not encroach upon the functions and privileges of the Legislature. Under Art. 143 clause (1), it is not obligatory for the Supreme Court to give an opinion, (as their refusal in the Ayodhya/Babri Masjid case) nor for the President to act upon it. The advisory opinion given is not a judgement and, as such, does not furnish a root title as that which may spring from a judgement. Nevertheless, all Courts of India (Other than the Supreme Court) would be bound by the opinion of the Supreme Court even though it has been given under advisory jurisdiction. However, the Supreme Court itself would remain free to re-examine and, if necessary, overrule the view taken in an opinion.

Questions of privilege of the Parliament, and how it conducts itself, have never been referred to the Supreme Court, and when a reference was made regarding the jurisdiction of a State Legislature in relation to its power to punish for contempt, the Legislature proclaimed its independence and declared itself outside the purview of the Supreme Court and its opinion. The following case study describes the issue.

A Case Study

The President's Reference No 1 of 1964

In 1964, there occurred in India a controversy between the Uttar Pradesh (UP) Legislature and the Allahabad Judiciary in reference to which the then Chief Justice Gajendragadkar of the Supreme Court was to observe," each one of the constituents of the State, the Executive, the Judiciary and the Legislature was inclined to claim sovereignty. These claims ... were true within a very limited sense; basically it was the Constitution, which was the fundamental law of the country, that was sovereign."

The case in short was that one Keshav Singh was reprimanded, by the UP Assembly through a resolution, for contempt of the Assembly by publishing a pamphlet libelling one of its members. Though asked by the Assembly to appear before it at Lucknow to receive the reprimand, he refused, citing inability to procure the trainfare for travel from his home town. He was finally brought to the Bar of the House by the Marshall of the Assembly on a warrant issued by the Speaker. Keshav Singh stood with his back to the Speaker and refused to answer any questions including his name. The Speaker read out the reprimand and then brought to the notice of the House a letter, written earlier by Keshav Singh to the Speaker, wherein he stuck by what he had said in his pamphlet and wherein he also rejected the sentence of reprimand. Thereupon the Assembly passed a resolution sentencing Keshav Singh to imprisonment for seven days and a warrant was issued to the Marshal of the House and the Superintendent of the District Jail, Lucknow, to carry out the sentence. Keshav Singh was taken to jail on the same day and imprisoned there.

Five days later on 19th March 1964, Mr B Soloman, an advocate, presented a petition of a writ of habeas corpus for the release of Keshav Singh before a two member Bench of the High Court of Uttar Pradesh. On the same day, the Bench comprising Justice GD Sahgal and Justice NU Beg admitted the petition, ordered the release of Keshav Singh and issued notice on the respondents named. The State Assembly considered this to be an interference of an order passed by the House. On 21st March 1964, the Assembly passed a resolution stating that Justice Beg, Justice Sahgal, B Solomon and Keshav Singh had committed contempt of the House and that Keshav Singh be immediately taken into custody and kept confined in the District jail for the remaining term of his imprisonment, and that Justice Beg, Justice Sahgal and B Solomon be brought in custody before the House. Warrants were issued on 23rd March to the marshal of the House and the Commissioner of Lucknow for carrying out the terms of the resolution. On the same day, the Justices moved a petition under Art. 226 of the Indian Constitution in the High Court of Uttar Pradesh at Allahabad for a writ of certiorari quashing the resolution of the Assembly and restraining the Speaker, the Marshal of the Assembly and the State Government from implementing the resolution. The petition was heard by the Full Bench of the High Court and an order was passed directing that the implementation of the resolution be stayed.

By this time the issue had caused a favour throughout India, raising questions of the sovereignty and independence of both the Legislature and the Judiciary. The President, in order to defuse this sensitive issue of law, referred the matter to the Supreme Court headed by Chief Justice Gajendragadkar.

The questions referred were whether:

a) it was competent for the UP High Court to entertain petition challenging the legality of the sentence imposed by the Legislative Assembly.
b) whether the two Judges, Keshav Singh and B Solomon had committed contempt of the Legislative Assembly.
c) whether the Legislative Assembly could direct that two Judges be produced before it in custody or call for their explanation for contempt.
d) whether it was competent for the Full Bench of the High Court to deal with the petition of the two Judges and pass interim order of restraint on Speaker of the Assembly, and,
e) whether a Judge who entertains or deals with a petition challenging the order of or decision of a legislature regarding contempt or an infringement of its privileges commits contempt of the Legislature.

A seven member Bench of the Supreme Court heard the parties involved, i.e. the UP Assembly and the High Court. The Uttar Pradesh Assembly was represented by senior lawyer and Advocate-General of Maharastra, Mr. HM Seervai-later to write his magnificent book on the Constitutional Law of India. The High Court was represented by another senior and much respected counsel Mr MC Setalvad. Other State Assemblies of India joined the issue by having their counsels appear before the Court.

The events now took a curious turn and are best described in Mr HV Seervai's own language. "Before the hearing began, I spoke to the senior counsel for the High Court, Mr MC Setalvad and proposed a settlement to him. He said, 'let the matter be decided by the Judges." I believe, he took this stand because he felt that it was most unlikely that the judges constituting the Supreme Court Bench, or a majority of them, would decide against the two Judges."

The position of the Assembly was unambiguous. The written statement that was submitted said, "Thus under Art 143 (1), this Honourable Court is not exercising any judicial function and therefore ... the question of submitting to the jurisdiction of a court does not arise. In any event, by filing this case, and by appearing in the hearing to this reference, this House does not thereby submit its power, privileges and immunities and those of its members or of its committees for the opinion or decision of this Honourable Court."

Opening the case, Mr HV Seervai said to the Bench, "surely it is not beyond the writ of man to put an end to this dispute, if necessary, by the assistance of the Court." To this, a member of the bench Justice Subha Rao replied, "what is there in the matter? We will decide it." This ruled out a possible settlement and the Assembly's counsel replied to Justice Rao: "Very well, let me tell you that we will not be bound by anything you say. I make it clear to you, as I made it clear to the Chief Justice in his Chamber, that the Assembly will not be bound by anything you say." Justice Rao then asked, "You mean you will not obey our order?" Seervai replied, "yes, the Assembly will not obey your orders."

Mr Seervai then argued that the Court should not give an opinion, and decline to answer the questions put before it "because every one of them was personally interested in the result if this claim made by the Assembly was correct and had to be upheld." There then followed lengthy arguments on the independence of the Parliament and its privileges, and many cases in many countries were cited. Eventually in a 6-1 majority decision, the Supreme Court gave its opinion in favour of the High Court. However, the Committee of Privileges of the UP Assembly went into the question and held that the majority opinion was wrong in law and concluded; "Having held that Sri Keshav Singh, Sri B Solomon, and JJ Sehgal, Beg and other aforesaid Judges of the Allahabad High Court were guilty of contempt of the house by the above-mentioned acts, the Committee feels confident that Sri Keshav Singh and Sri B Solomon and the Judges would not have done what they have done, had they realised the importance and implications of the matter at the time but in view of the importance of the harmonious functioning of the two important organs of the State, i.e., the Legislature and the Judiciary and the recent judicial pronouncements, the Committee feels that the end of justice would be met and the dignity of the House vindicated if the House expresses its displeasure. The Committee accordingly recommends that the displeasure of the House be expressed."

Thus ended the controversy. The Supreme Court upheld the High Court and the State maintained its independence, each emphasising their right to be the arbitrator of their own proceedings.

How does the Court consider a President's Reference?

In a situation where there is a dispute between two or more parties, the Court may ask them to appear before it through counsel. On questions purely of law, the Court may ask prominent legal minds to advise them as 'animus curiae' or friends of the Law-court. As far a feasible, the Court observes the procedures that it would observe in a judicial proceeding.

The President's Reference of 4th July, 1995

In essence the President of Bangladesh has asked the Appellate Division of the Supreme Court for their opinion on;

i) whether the walkout and non-return to Parliament by all the opposition parties be construed as 'absent' from Parliament?
ii) whether the boycott of the Parliament means 'absent' from Parliament without leave of Parliament resulting in the vacation of the seats?
iii) whether ninety consecutive sitting days be computed excluding or including the period between two sessions intervened by prorogation of the Parliament? and,
iv) whether the Speaker or Parliament will compute and determine the period of absence?

Vacation of Parliamentary Seats

Since the main issue of the President's reference is whether the seats of the absent MPs are to be vacated, we may like to take a look at the relevant provisions of our Constitution and compare them with the Indian Constitution. Article 66 of our Constitution describes how a Member of Parliament would be disqualified and Art. 67 describes how a seat is vacated.

Art. 67 (1) A member of parliament shall vacate his seat—
(a) if he fails, within the period of ninety days from the date of the first meeting of Parliament after his election, to make and subscribe the oath or affirmation prescribed for a member of Parliament in the Third Schedule:
Provided that the Speaker may, before the expiration of that period, for good cause extend it;
(b) if he absents from Parliament, without the leave of Parliament, for ninety consecutive sitting days;
(c) upon a dissolution of parliament;
(d) if he has incurred a disqualification under clause (2) of article 66; or
(e) in the circumstances specified in article 70.

(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.

The Indian Constitution is similar to ours in respect to the above provisions, but allows more flexibility in determining the rulings. The relevant Article in the Indian constitution is Art. 101 where clauses (1) and (2) prevents a person from having more than one seat in either the Union or State Legislatures. Since we only have one Parliament, our Constitution does not have this clause. However it is clauses (3) and (4) of Art .101 which are relevant to Bangladesh.

Art. 101 (3) If a member of either House of parliament —
a) becomes subject to any of the disqualifications mentioned in clause (1) or clause (2) of article 102, or
b) resigns his seat by writing under his hand addressed to the Chairman or the Speaker, as the case may be, and his resignation is accepted by the Chairman or the Speaker, as the case may be,
his seat shall thereupon become vacant:
Provided that in the case of any resignation referred to in sub-clause (b), if from information received or otherwise and after making such enquiry as he thinks fit, the Chairman or the Speaker, as the case maybe, is satisfied that such resignation is not voluntary or genuine, he shall not accept such resignation.

(4) If for a period of sixty days a member of either House of parliament is without permission of the House absent from all meetings thereof, the House may declare his seat vacant:
Provided that in computing the said period of sixty days no account shall be taken of any period during which the House is prorogued or is adjourned for more than four consecutive days.

Absence from Parliament

The main difference between the Bangladesh Constitution and the Indian one in regard to absence from Parliament is that in the case of Bangladesh the seat shall become vacant whereas in the Indian case, the House may declare it vacant.

Resignation

According to HV Seervai "in the absence of any restrictions imposed by law, a resignation takes effect from the time it is communicated to the appropriate party, and acceptance of the resignation is not necessary." Thus;

a) "the President can resign his office by writing under his hand addressed to the Speaker" (art. 50 (3) Bangladesh Constitution),
b) the Prime Minister 'if he resigns from office at any time by placing his resignation in the hands of the President" (Art. 57 (a) ibid).
c) the Speaker "if he resigns his office by writing under his hand delivered to the President" (Art. 74 (2) (d) ibid).
d) "a Judge may resign his office by writing under his hand addressed to the President" (Art. 96 (8) ibid).
e) A Minister "if he resigns from office by placing his resignation in hands of the Prime Minister for submission to the President" (Art. 58 (1) (a) ibid).

There are only two conditions to be fulfilled before the resignation of Members of Parliament or the above executives, take effect, namely that there must be a writing under the hand (signature) of the person resigning, and the writing must be communicated to the specified person. The Bangladesh Constitution does not provide for any other condition.

In India, however, experience showed that by extra-constitutional agitation, members of Legislatures were coerced into resigning their seats, and so the Constitution (33rd Amendment) Act, 1974 was enacted introducing the proviso to Art. 101 clause (3) (b) as we have shown above in italics. The effect of the 33rd Amendment was to add one further condition which had to be complied with before the resignation took effect, namely, that the resignation must be accepted by the Speaker. This acceptance is not a mere formality as the Speaker has an obligation not to accept the resignation if he is satisfied that the resignation was not voluntary or genuine. However, if the member demonstrates that his resignation is voluntary and genuine, the Speaker has little option but to accept it no matter what the cause or reason for the resignation may be.

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'If Both Sides are Sincere it is Possible to Overcome Tangles"

An Interview with the Vice Chairman of Bangladesh Bar Council by Chapal Bashar

Shamsul Huq Choudhury, Vice Chairman of Bangladesh Bar Council has said that there should be an immediate understanding between the two leaders — Begum Khaleda Zia and Sheikh Hasina — to solve the political crisis for averting a disaster.

Choudhury, an elderly lawyer of the country, believes that the constitutional provisions cannot be considered as obstacles to settle the political disputes. "Constitution is for the people, people are not for the constitution", he said adding, "legal tangles should not be made complicated further in the name of so-called laws."

In an interview with The Daily Star, Advocate Choudhury expressed his views about the ongoing political and constitutional crisis created over Opposition's demand for conducting elections under a non-partisan caretaker government.

Besides holding the highest elected position in the Bar Council, Choudhury is also the chairman of the Coordination Council of the Bar Associations of Bangladesh. He played a significant role in the lawyers' movement for establishing the independence of Judiciary during the late eighties.

Well-known as an outspoken man, Choudhury bitterly criticised both the government and the opposition for their uncompromising attitude towards a political issue which could be easily settled through rapprochement. "They have pushed the nation into a chaotic condition for which the country's hard-earned democracy is now at stake and this situation will only benefit undemocratic forces," he maintained.

Choudhury said that the two sides will have to find a solution of the problem since 'they themselves have created it.'

"Politicians should solve the political problems in a political way. And the problems should not come into the arena of the court of law, because it makes the judiciary controversial", he said emphatically.

When asked to suggest possible solution to the ongoing political as well as constitutional crisis, Choudhury said, "an understanding and consensus on the disputed issue is the prerequisite for a peaceful solution. If they can do it, legal tangles will not be a problem to overcome. We will find out the way."

Giving his opinion about amendment to the Constitution — if required to pave the way for holding elections under a caretaker government — Choudhury said, "it will also be possible if they (ruling party and Opposition) want to do it."

Elaborating the point, he said that both sides should come to an agreement first and then it could be approved by the parliament. If it is not possible in the present parliament due to absence of opposition MPs, then the holding of elections under an agreed formula can be ratified by the next parliament.

"Post-facto ratification is, of course, possible by the parliament", he said firmly, adding, "If both sides are sincere it is possible to overcome any tangle."