

Law and Our Rights

"The proper functioning of democracy is impaired when political parties become captive to powerful groups..."

Dr. Kamal Hossain, Senior Advocate of the Supreme Court, speaks to Zaved Hasan Mahmood about the present political impasse, its political and constitutional implications and a probable way out.

The Daily Star (DH) The purpose of election in democracy is not only to elect a government but also to give an opportunity to the people to choose from the competing policies of different political parties.

Dr. Kamal Hossain (KH): Democracy is a form of government in which people choose, through elections, representatives, who are entrusted with legislative and executive powers. The representatives are expected to be responsive to the needs and priorities of the people.

The proper functioning of democracy is impaired when political parties become captive to powerful groups, who use money (ill-gotten black money) and musclemen (often armed gangs) to control political parties and to interfere with the electoral process.

longer consider it important to present meaningful alternative programmes or to aim to win the hearts and minds of people. To have meaningful election, people must be offered a choice between political parties committed to promote the interests of those who vote for them.

DS: It is felt by many that 90 per cent people abstained from voting. What would be the legal validity of the government formed in pursuance to the election?

KH: Widespread abstention from voting detracts from, and if it is on large enough scale negates, the very purpose of holding an election, which is to enable people to choose their representatives who are to exercise power on their behalf.

time a one-sided election has been held which has not been meaningful and has denied the people the right to choose their representatives. This is why there is serious concern that this election could not produce a representative or effective parliament, whatever view may be taken about its formal legality.

DS: What can be done to solve the present crisis? Do you think that the President has power to take over executive authority of the state and conduct an election, as claimed by some of the oppositions?

KH: Under the Constitution, there is no scope for the President directly to take over executive authority. He can, however, help to initiate a process of national dialogue by expressing his view about its desirability and suggesting that some respected personalities who enjoy public esteem and confidence, take a constructive initiative to hold consultations with all concerned sections of the nation and to propose a peaceful solution to the national crisis.



caretaker government which can take measures and steps to reconstitute the Election Commission, which failed miserably to discharge its constitutional responsibility and to take other, effective measures to hold a free and fair election.

DS: Under the Constitution all powers in the Republic belong to the people and that is exercised by the elected representatives of the people. Do you think that the new government, which doesn't represent a vast majority of people, has the right to exercise the power on behalf of the people?

KH: The basic constitutional provision (Article 7) that all power of the Republic belongs to the people and that this should be exercised by representatives of the people can only be made effective through a genuine free and fair election, in which all people entitled to vote can exercise right to vote freely and fairly, and thus establish a truly representative parliament.

DS: What would be the position of the people when they feel that the government is not entrusted to exercise sovereign power on behalf of the people?

KH: It is essential now for people, regardless of the political affiliation, unitedly to call for a truly free and fair election to be held as early as possible and to establish an interim

"Power of the people needs to be exercised through their collective will and through the political pursuits"

Barrister Amirul Islam, Senior Advocate of the Supreme Court, speaks to Isaac Robinson about the present political impasse, its political and constitutional implications and a probable way out.

The Daily Star (DS): The purpose of election in democracy is not only to elect a government but also to give an opportunity to the people to choose from the competing policies of different political parties.

Barrister Amirul Islam (AI): It is very true that the purpose of election in a democracy is not merely to elect a group of people to power but is primarily to provide an opportunity for the people to exercise their choice and to ensure their effective participation thereby in the affairs of the Republic through their elected representatives.

Under Article 7 of the Constitution "All powers in the Republic belong to the people, and their exercise on behalf of the people shall be effected only under, and by the authority of, this Constitution."

The Article 11 further reinforces by proclaiming that "The Republic shall be a democracy in which effective participation by the people through their elected representatives in administration at all levels shall be ensured."

In order that the people can effectively participate in the running of the affair of the government and in the decision making process, the election has to play the key role. Since people as a whole can't act in the day to day running of the affairs of the republic, they need to act through their agents namely the elected representative. It is therefore fundamental that process through which their representatives are chosen must ensure that the election could be an effective vehicle to reflect the true and correct will of the people.

a) To facilitate popular participation in public affairs in order to strengthen empowerment of people.

b) To effect change in the policy through the electoral verdict.

c) To ensure accountability of the government to the people through the parliament.

d) To effect a periodical audit on the political power and its exercise.

e) Ultimate exercise of sovereign power and authority of the people through its chosen representative.

f) To be able to make choice in a multi-party system implying thereby that there must exist a condition and environment in which all the parties can feel free to participate — that electorates are not deprived of choice.

g) Provide for orderly succession in government by the peaceful transfer of power.

Exercise of the 15 February by rubber stamping an election return on an inflated number of votes having been secured as claimed, the election has not only failed to perform its functions but it has further eroded and destroyed the credibility of the electoral system in our

country, not to talk about the Election Commission or of the party government in power. There are instances when no election has at all taken place in most of the centres causing failure of election, yet the return has been filed and result gazetted. If the proper account is taken, it will reveal that no poll has taken place in majority of the centers in the country. Yet results have been declared on the basis of some inflated stuffed votes in

DS: It is felt by many that 90 per cent people abstained from voting. What would be the legal validity of the government formed in pursuance to the election?

AI: The government which would claim to continue and succeed on the basis of such a farcical election in which 90 per cent people abstained from voting would not have the legal, political or moral legitimacy to run the country. This will not be a government by consent. The government thereby loses its efficacy in the absence of the consent. It will be a rule merely by force.

DS: Under the Constitution all powers in the Republic belong to the people and that is exercised by the elected representatives of the people. Do you think that the new government, which does not represent a vast majority of people, has the right to exercise the power on behalf of the people?

AI: The present government having failed to represent the vast majority of people has also lost its right to exercise the power on behalf of the people. Such government and functioning thereof would be violative of the main theme of the Constitution. It is like acting under a false pretext on the basis of a false power of attorney which is not executed by the actual author in whose name the power of attorney is claimed as to be exercised.

DS: What would be the power of the people when they feel that the government is not entrusted to exercise sovereign power on behalf of the people?

AI: The power and the object of the people is to form a government of its own choice. When this right is denied, it is bound to bring anarchy and violence in the society. Bangladesh itself was born because the people were denied to form its own government and make and work its own Constitution. In 1971 while the people rose against the occupation army, the military rulers also held a so-called election in 1971 to elect representatives in the seats, shown as vacant, of all those members who participated in the liberation war. Like the present February election the people in 1971 also didn't have to come to the polling station for vote. The people chosen by the regime known as collaborators were declared elected. Those who were then elected failed to represent people, nor could become legal representatives or authority. Soon they perished in history as collaborators.

Power of the people need to be exercised through their collective will and through the political pursuits. The history has proven again and again that power of the people can't be

ignored or denied nor the truth be suppressed by falsehood.

DS: What can be done to solve the present crisis? Do you think that the President has power to take over executive authority of the state and conduct election, as claimed by some of the oppositions?

AI: In order to solve the present crisis, resort must be taken to constitutional mechanism need to be resorted to.

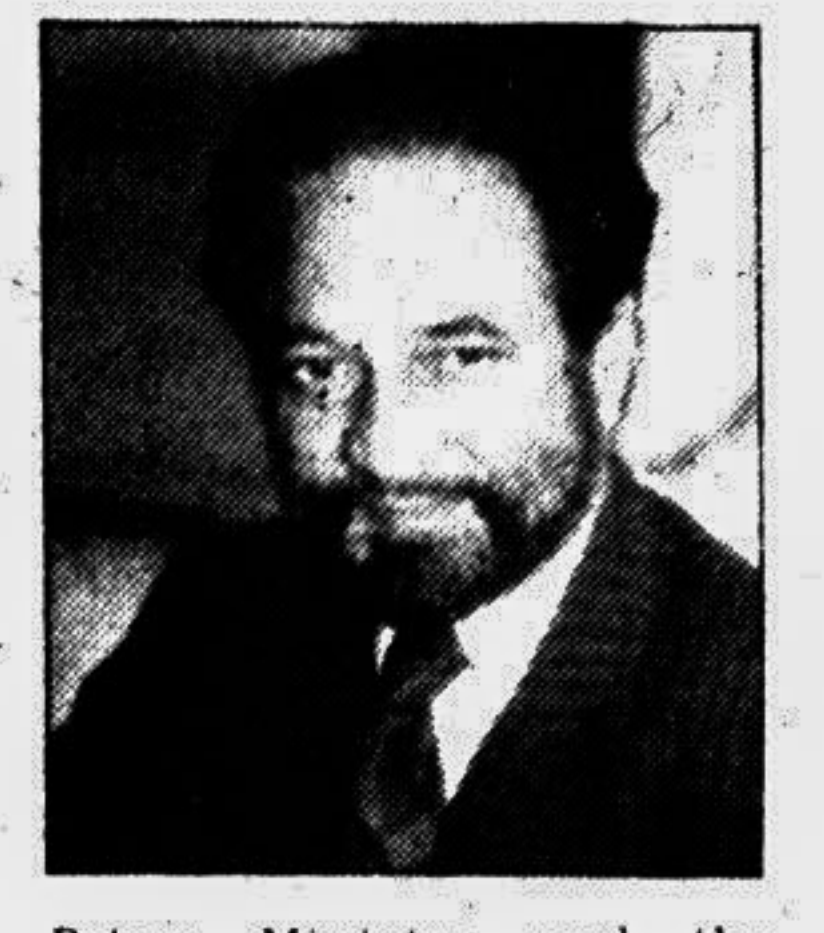
It is unfortunate that the holder of appellate offices have become violators of the Constitution. The Chief Election Commissioner for instance is expected under the Constitution to hold an election and not to hold a farce or a fraud. But like that election in 1971 during the liberation struggle held by Justice Sattar and like the other similar election held to legitimise the regimes of the usurpers, this Election Commission now headed by Justice Sadeque is about to rubber stamp yet another farcical exercise thereby committing fraud on the election and on the Constitution. Had this commission had minimum respect for the Constitution and minimal understanding of the role of the election it should have by now cancelled the entire election and should have requested the President to refer the matter to the Appellate Division of the Supreme Court which is possible to do under Article 106 of the Constitution. I think that all the questions as have been raised are questions of law and of the Constitution and of great public importance. They could easily seek institutional and constitutional intervention in form of advise and direction under Article 106 as to what the President or the Election Commission could do in order to hold a free and fair election. But before that can be done it is necessary to have a minimum honesty of all concerned to admit the following three premises.

Firstly — The exercise which was made on the 15th February 1996 is not an election either in fact or in law.

Secondly — It is not possible to hold a free and fair election under the present circumstance having the party government in power.

Thirdly — All the major opposition political parties having boycotted the election under a party government in power, the election so held participated by only one significant political party alone, the election lacks basic ingredient of multi party choice.

This basic realisation shared by all have become part of a national consensus; but yet this consensus is not acknowledged by the defender of the Constitution. Neither by the Election Commissioner, nor by the Prime Minister. So it is not the question whether the President has the power to take over executive authority of the State and conduct the election or otherwise, it is primarily the question of basic honesty which has become a rare commodity as it appears in recognising the reality in present political situation. Exercise of 15th February election was in order to bypass these realities both by the



Prime Minister and the Election Commissioner. This basic political truth and political reality can't be buried under the hips of false voting or under the inflated result sheets, nor the voice of people can be drowned under the volume of lies relayed by the BTV.

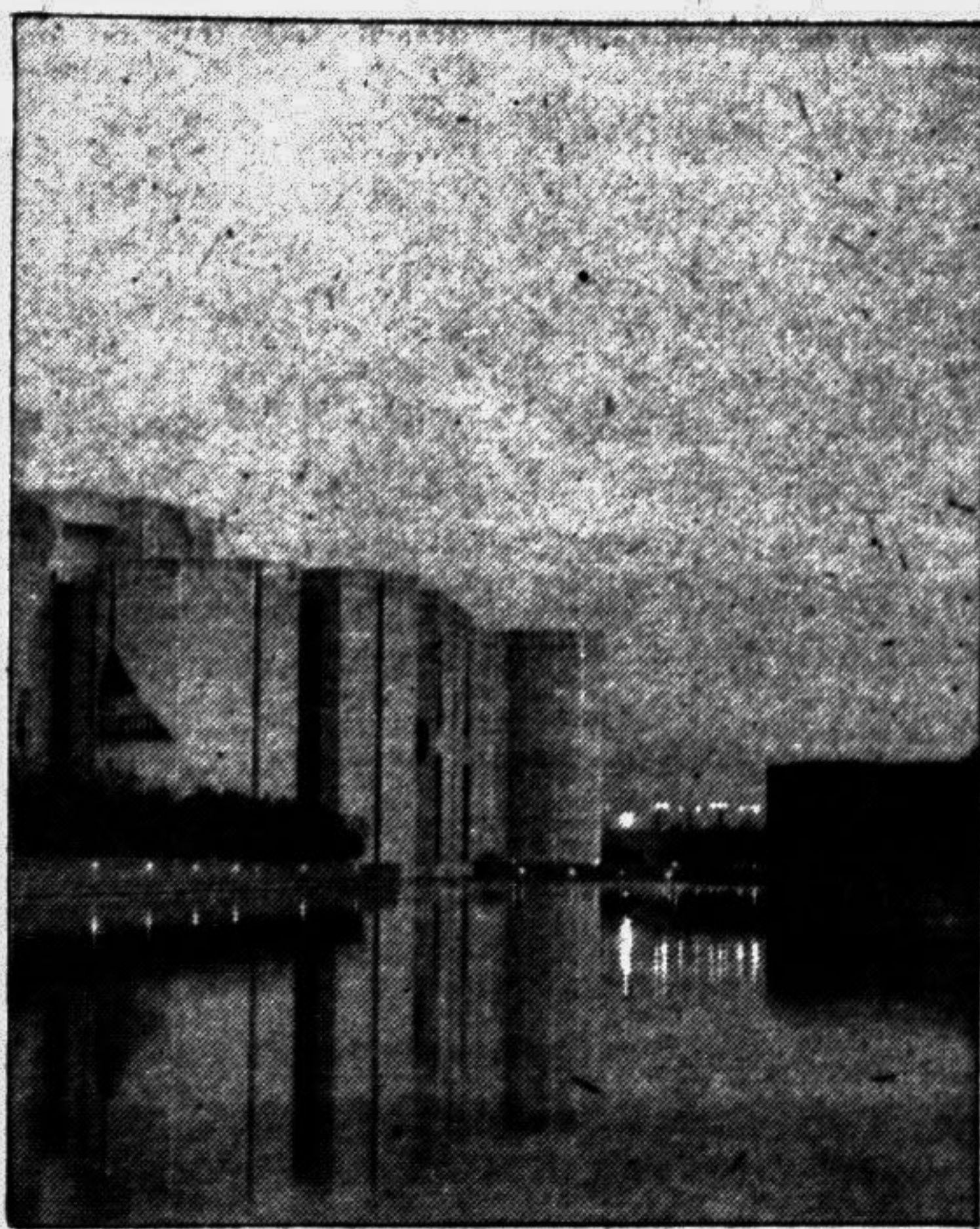
The solution is therefore, I would suggest that, if at least the Election Commission would be honest enough to recognize that there were no election on 15th February as an election contemplated under the constitution, it is within its powers to reject and cancel the election as a whole and request the President to refer the matter to the Appellate Division as to what can be done in respect of holding a fresh election in which all the major political parties could participate and whether any interim government can be formed within the constitutional framework in order to usher a representation government in power. The Prime Minister should in her own turn, must acknowledge the reality. She must act as an interim Prime Minister as she is today and not as the chairperson of BNP. She ought not to forget that she holds a constitutional post. Often she has said that she is under oath to uphold the Constitution. Let her realise that there has been failure on the part of the Election Commission to hold the election. The exercise of 15th February is anything but an election as contemplated under the Constitution. Furthermore, there have been at least 10 constituencies where election could not be held and election in most of the centres are incomplete in many.

In the premises the EC failed to hold the election in the eye of law and within the time as prescribed under the constitution. If there is consensus in the above three premises made in the reference itself to the Appellate Division of the Supreme Court could advise, after hearing all the concerned parties, as to how the present impasse could be resolved through constitutional device and by meeting the need of the hour within a legal frame.

Such a reference can also be made by the President suo motu as the making of the reference would not amount to exercising the executive authority but a mere seeking of opinion under a given situation. It will be, however, graceful, if such reference is made with the concurrence of the Prime Minister. Let there be grace in admitting the truth and the reality. Truth and the realisation of the truth alone with an honest mind and a sincere will to resolve the problem for the benefit of the entire nation can only help us in this situation. Above all it is most important that people irrespective of their party leanings must be able to voice the truth and reality of today. We can not allow another Nero in Bangladesh to play the flute of power while Chittagang, Narayanganj and Nilphamaries are burning.

Mandate or No Mandate: An Analysis

A weak mandate can only be rectified by way of seeking a new mandate. The sooner a weak mandate can be strengthened the better it is for the sake of democracy, suggests Manzoor Hasan



Seeking for a true mandate

In normal circumstances one of the issues that a general election should settle is that of electorate's preference for a set of policy espoused by one political party as opposed to others. In other words, after a general election the successful political party can confidently form a Government knowing that it has the support of the electorate to implement certain policies over a period of time prior to the next general election. Lawyers would describe this as the doctrine of mandate. But such a doctrine is dependent on a number of factors and subject to certain exceptions.

Firstly, the electorate must be presented with a real choice. By definition choice indicates plurality of political parties. The electorate cannot indicate its preference if, for all practical purposes, the election is dominated by a single political party. In spite of the existence of certain peripheral organizations such as one-party election may achieve other constitutional and political objectives but cannot claim to have the public support or mandate. In other words, the victory is hollow.

Secondly, the participation of the electorate has to be significant. Even if it is considered that the electorate has been presented with a real

choice in terms of political parties it is only the voters' involvement in the actual process which can provide the required legitimacy. In most countries the civic duty of the electorate is not compulsory but nevertheless the level of turnout is a crucial indicator. The forces determining the electorate's behavior on the election day and percentage of vote cast have become a subject matter on its own right. In many countries the famous "swingometer" as seen on television screens on the election evening has a serious side to it. A low turnout on the election day could be either due to political apathy on the part of the electorate or just due to atrocious weather condition.

Thirdly, the environment in which the electorate has to exercise their political and civic right is crucial. The prevailing environment may also have a bearing on the level of turnout as discussed above. But one can envisage a scenario which satisfies the two factors discussed above; there may be a real choice and the level of turnout of the electorate may also be relatively significant but nevertheless it is possible to have an environment which creates forces, either blatant or subtle, in favour of or against certain political parties. In other words, the perception of the general elec-

torate is as important as the actual machinery of election.

Fourthly, the machinery of election. In order to encourage voters to participate such mundane matters as the election registers, the delivery of the polling cards to the electorate, the dissemination of information regarding polling stations and the assurance that the voters will actually be able to cast their votes are important psychological considerations. Finally, it could be said that a country like Bangladesh with limited experience of democracy could gain from the presence of observers from other countries. A clean bill of health from such observers could give the final seal of approval for the political party which comes out victorious.

It is obvious that the elections of 15 February 1996 would struggle to satisfy the criteria discussed above. As stated at the outset the doctrine of mandate is applicable in normal circumstances. Therefore, it could be argued that as the country is going through an abnormal situation the doctrine of mandate will have little relevance. Even if it is relevant the mandate of the electorate obtained during an abnormal and exceptional situation can only be a weak one. Such a weak mandate can only be rectified by way of seeking a new mandate. The sooner a weak mandate can be strengthened the better it is for the sake of democracy.

A mandate obtained during normal circumstances can be set aside by a government in the event of changed circumstances, for example, a state of emergency or conflict, natural disaster, dramatic economic upheaval. It cannot be expected that a government will remain totally faithful to the policies put to the electorate during the whole period in be-

tween elections. This would amount to serious handicap and may even be detrimental to the welfare of the people. It is one of the duties of the Government to respond to changing circumstances. Neither is it practical for a Government put to the electorate for a fresh mandate every few policy formulated during its lifetime.

Finally, the doctrine of mandate is usually a "stick" that the Opposition uses to humiliate, harass and embarrass the Government. But the Opposition cannot totally absolve itself from its responsibility. Similar to the Government's mandate from the electorate the Opposition has to discharge its own mandate. It is in this context that the famous saying of "politics being the art of the possible" would come into play. The relationship between the Government and the Opposition is to do with the level of accommodation and trust between the two sides within the context of an open society. The accusations of "illegitimacy", "illegality", "electoral dictatorship", "vote rigging", "opposition irresponsibility" should remain confined to the political tactics of the Government and the Opposition within a defined parameter. Unfortunately the politicians in Bangladesh, belonging both to the Government and the Opposition, are yet to formulate the ground rules to determine the relationship discussed in this article. It is never too late. The people of Bangladesh must be hoping that the politicians will rise above the present bickering and involve themselves in a constructive dialogue bearing in mind the wellbeing of the nation and its citizens.

Manzoor Hasan Barrister-in-Law

Lawscape

Over 1 lakh Hutus killed since '94: Tens of thousands of Rwandan Hutu civilians have been massacred since the Tutsi dominated Rwandan Patriotic Front (RPF) seized power in Kigali in July 1994, said the French Daily Liberation.

The RPF "is to blame for very large scale massacres. Which according to a conservative estimate, have cost the lives of more than 100,000 Hutus," said the paper. It said it based its figures on reports from witness cross checked against lists of victims. However, a UN official said the organisation did not have any proof of such large scale killings and could not say if the figures were correct.

Human rights issue a major divide between Asia and Europe

BANGKOK, Feb 29: When Asian and European leaders meet for their first economic summit, there are two words many of the Asian ministers don't want on the agenda human rights, reports AP.

Views on civil rights and child labour differ markedly from Asian to Western Europe. Indonesia's annexation of the Portuguese colony of East Timor — still unrecognized by the United Nations 20 years.

A New York-based group, Human Rights Watch Asia, called on leaders participating in the summit to curb trafficking in women, protect labour rights, guarantee freedom of association and ban forced labour.

To ignore these problems for fear of offending Asian leaders is an abrogation of responsibility at best and a capitulation to the call of the dynamic Asian market at worst, Sidney Jones, executive director of the group, said in a statement released in Hong Kong.

The group called for controlling weapons sales to countries with serious human rights violations. Leaders of some Asian countries — particularly Singapore, Malaysia, Indonesia and China — have emphasized the importance of economic prosperity for society as a whole. A free press, aggressive parliamentary opposition and Western style civil liberties are seen as potential hindrances to development.

Not all Asian countries embrace such philosophies, however. Thailand and the Philippines continue to nourish multi-party democracies: Japan actively promotes human rights.



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by Jim Davis

