

# Convention of the Constitution

by M Amir-ul Islam

**I**n order to resolve the present political impasse people are looking for a possible solution with a great deal of urgency. A national consensus is key to the possible solution in this context.

There already exists a national consensus as to the status of the one party election held on 15th February, 1996 and as to the need for an election under a neutral caretaker government. Even the Prime Minister Begum Khaleda Zia conceded for holding a fresh election in May, 1996 under a neutral caretaker government.

The only difference now, as it seems, may still be there as to how a neutral caretaker government can be achieved without making any assault to the Constitution.

In order to give an indication as to how that can be achieved many of us have advocated that it may be possible to do so without amending the Constitution only if Begum Khaleda Zia would help realize what she already promised. According to many of us it could have been possible to achieve such a goal without spilling so much blood on the street if the Prime Minister would have resigned with a clear understanding that neither she herself nor any one else from her party is willing to hold the office of the Prime Minister so that a neutral caretaker government could be formed.

Our contention has been that if such situation occurs due to the inability or unwillingness of the Prime Minister or any of her partymen to hold the office of the Prime Minister, a scope could then be created immediately for promulgation of an Ordinance to meet such contingency. Since there is no provision in the Constitu-

tion providing for such contingency the gap can be bridged by the law which could be sponsored as a consensus package without violating the Constitution.

I am rather surprised that without knowing and appreciating the object for such an Ordinance an idea has been floated to counter this view without any application of mind as to the content, substance or context of the proposed Ordinance. It is no one's suggestion that the Constitution can be amended by an Ordinance. As a matter of fact, there is a clear limitation to that effect under the Ordinance making power itself (Art. 93 (f) (ii)). But one ought not to overlook that Constitution cannot survive nor can be made workable without the time honoured convention which is a supplement for the working of the Constitution itself. It is a faulty proposition to argue the dangerous doctrine of necessity which caused so much of damage to Pakistan's Constitutional history as resorted to by Justice Munir in order to justify the military take over by Ayub Khan.

What is clear however is that the law of the Constitution itself visualizes the role to be played by the rules of convention to step in during the unforeseen contingency. Convention as Wade traces to be "Constitutional obligation, obedience to which is secured despite the absence of the ordinary means of enforcing the obligation in a court of law".

Dacey defines the Convention as is "intended to secure the ultimate supremacy of the electorate as the true political sovereign of the State". This concept of Convention is well entrenched in our Constitution (Article 7 and 11). He further

elaborates that "as the process of representation is nothing else than a mode by which the will of the representative body or House of Commons is made to coincide with the will of the nation, it follows that a rule which gives the appointment and control of the government mainly to the House of Commons is at bottom a rule which gives the election and ultimate control of the executive to the nation".

Professor Wade writing an introduction to the law of Constitution points out in his book how those conventions can be incorporated in the statutes. "There are statutes" as he says, "which assume conventions as the basis of the law which they contain and cases where the Judges have treated conventions as having legal effects"; the Constitutional authority cites as an example "the Statute of Westminster, where a convention recited in the preamble... is explicitly enacted as an operative Section (4) established beyond any doubt the place of conventions in Constitutional Law". The Ordinance as we contemplate and propose is that category of statute identified by Professor Wade as part of the Rules of convention as determined by A V Dacey long time ago. When we talk about the resignation of the Prime Minister we do not ask for it as a grace but as part of her Constitutional obligation which evolved on her.

This is also part of that convention as to under what circumstances the Prime Minister is required to resign. It becomes necessary at times to do so in order to uphold the Constitution itself. Because only by so resigning she can now uphold the Constitution. In the present circumstances only through her resignation

millions of people in this country can hope to register their verdict under a neutral caretaker government and thus form a government of their choice. In order to fulfill the pledge under the Constitution Art. 7 and Art. 11 the Prime Minister must cease to hold the office in order that the effective participation of the people through their elected representatives could be ensured. (Art.11).

Our contention is that it is the Constitutional obligation as defined by Dacey to honour the Convention. And it is the Convention which warrants the resignation of the Prime Minister in the present circumstances in Bangladesh. Because it is only her resignation which militates against speedy resolution of the problem and keeps the country away from Constitutional fall.

In order to bring our thoughts together and for removing any doubt as to the Constitutionality of such an Ordinance it may be useful to provide a working draft for discussion. We believe that it is important for Constitutional lawyers to help bring a consensus and not to make the present situation more difficult and contentious, though it is possible. I know for certain that any lawyer is capable to argue against the contention put forward by his other colleague.

We are here however not in the court room. Our object is primarily to search for a consensus. It is easy to say that there is no Constitutional difficulty in holding the elections which could not be held within the stipulated time of 90 days, which time limit earlier though treated by the Chief Election Commissioner and

the party in power as mandatory. But who is going to answer for the cost that it may entail as an attempt to hold such farcical ritual of an election causing loss to so many human lives.

To go ahead holding the one party election as was done by the Election Commission in the name of the Constitution is at the root of the Constitutional folly which leads a nation towards confrontation. We plead for consultation, conciliation and consensus; not for contentious and confrontational acrimony. In this spirit I submit herewith a mere working draft for such an Ordinance hoping that this may help towards bringing consensus and resolving the procedural rangle as to how we can hopefully bring about a neutral caretaker government during the transition. This Ordinance is based on the hypothesis that Begum Khaleda Zia in order to fulfill her pledge for a fresh, free and fair election to be held in May under a neutral caretaker government is ready, willing and earnest and under a Constitutional obligation to discontinue. This package can be worked out within next 24 hours if only the President will exercise the power which he has under the Convention of the Constitution known as the unwritten law of the Constitution giving him the residuary power to act for the purpose of facilitating immediate formation of a neutral caretaker government. Other options do not bring consensus and merely wastes time and increase suffering and lead the country into chaos, confusion and confrontation and ultimately to the breakdown of a civil society causing thereby irreparable loss to our economy and the people.

# Hour of Statesmans

by A Hasib

**I**t is very encouraging that the President has invited all the political parties for discussion to resolve the national crisis. It is a right step in the right direction. He has got their unanimous views regarding the caretaker government and holding of election in May under such government. For the last two years Begum Zia seemingly did not understand the concept of such government as it was not in the constitution. Now she has understood it and its necessity and she wants that the constitution should be amended to incorporate such clause as is necessary for caretaker government.

But what Begum Zia now wants for this purpose is that all should recognise the 15th February election and the sitting of the 6th Parliament to pass the necessary amendment for such caretaker government and then only she will resign by handing over power to such caretaker government. But this is not acceptable to the opposition. The necessity of this new precondition raised by Begum Zia is the subject matter of this article with possible solution within the constitution.

In my opinion since all parties have agreed to the concept on the caretaker government, the President can promulgate an Ordinance under Article 93 of the constitution to form the caretaker government and Begum Zia can lawfully hand over power to such caretaker government and under an all-party election in May the same Ordinance regarding the caretaker government can be approved in the next session and incorporated in the constitution.

It is the best solution for Khaleda Zia to agree to, and not to insist on any precondition to summon parliament for passing the amendment by her BNP alone. Caretaker government is not her idea. It was

conceived by the opposition. So, let the opposition also take apart in approving the Ordinance of caretaker government and its incorporation in the constitution in a parliament comprising members of all parties.

In my earlier article in The Daily Star on January 26 under the heading "Why the Talks Failed" I stressed the need for application of Article 93 and again in my article on February 6, 1996 under the heading "Way out from the Abyss" I emphasised the importance of Article 93 by stating that solution need not be sought outside but within the constitution and after quoting Article 93 I stated as follows: "Thus Art 93 gives the President the law making power under special circumstances and this wide and sweeping power can be applied when there is necessity for immediate legislation. The satisfaction of the President about such necessity is subjective and cannot be challenged in the court. The law making power in Art 93 is not for nothing. It is to meet emergency and necessity."

I further stated in that article that holding of election on February 15 without participation of major parties would not solve the problem. It would create more problem in future. More blood would be spilled on the street. We must address ourselves to this issue at this critical juncture. But unfortunately all this has happened. We should not allow this blood, this suffering of the people, this loss of economy of the country to go unaccounted for. There is hardly any scope for compromise on such serious public matters.

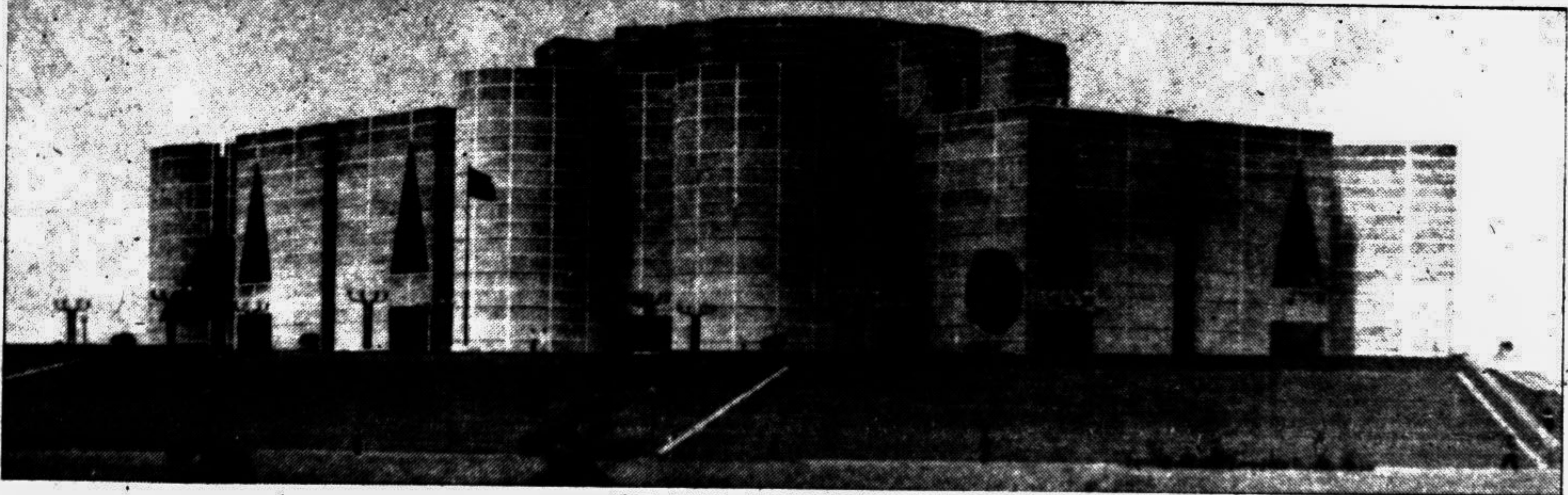
It is clear that Begum Khaleda Zia having agreed to the demand for caretaker government, has now raised new issue like recognition of the 15 February election and sitting of Parliament to pass the caretaker government bill. These

are preconditions which will only create more problems. We don't think she doesn't know that it is the illegality more than illegitimacy of her authority to exercise power democratically due to such and constitutionally due to such and unrepresentative election which has not been recognised either at home or abroad. All parties are, therefore, urged not to create precondition for the President to act according to Article 48(2) and Article 93 which provide as follows:

"48(2). The President shall, as head of State, take precedence over all other persons in the State, and shall exercise the powers and perform the duties conferred and imposed on him by this Constitution and by any law made by Parliament stands dissolved or is not in session, if the President is satisfied that circumstances exist which render immediate action necessary, he may make and promulgate such Ordinance as the circumstances appear to him to require, and any Ordinance so made shall, as from its promulgation, have the like force of law as an Act of Parliament."

It should be specially noted that Article 93 is for the President to resort to. No one can advise him to have resort to it. He is now the arbitrator of the entire issue. He should abide by the Constitution. At the same time he must act according to Article 93 in the interest of the country. He should not feel any body except Allah to uphold the constitution as per his oath. His conscience and constitution should be his best guide to rid the nation of the great crisis. This is the test of statesmanship. This is the moment to rise and act according to the great expectation of the people.

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# The Country, the People and the Election Commission

by Md Asadullah Khan

**D**ESPITE all cautionary signals conveyed from all quarters, the reconciliation move has stalled and the country is haemorrhaging. The trouble is: once a momentum is not prevented from setting in, it would be difficult to stop and even harder to contain it by any hard measure conceivable. But the greatest threat to a country that often pops out in such a desperately hopeless situation, usually too weak to keep control over the whole country riven by clashes.

All of these represent a severe challenge to our political leadership, nay statesmanship. Nineteen donor countries in a meeting held on March 5, have already expressed their dismay at the escalating violence, non-functional railways and ports services and have counselled the country's leaders to bury the hatchet and look for a solution of the lingering crisis. Does the crisis pose such a problem for which a happy outcome seems almost inconceivable only allowing a descent into more bloodshed, chaos and authoritarian rule?

In a situation when the hostility breaks out from within the country, from its own people, it seems government's police action turned on its own people can hardly pay off. Indiscretion and foolhardiness of the administration turned a blitting into a ghost city in the early part of March after the Mayor's arrest. Clearly, the ruling party bosses could no longer be regarded as the democratic heroes of 90's myth. Many are wondering if the leaders have become some old style autocratic rulers turning their back on every 'counselling, thwarting every attempt to resolve the conflicting issue.

Small wonder, most outsiders have instinctive sympathy with the toiling masses as the victims of assault, indiscriminate killings and rowdyism. Most shockingly, a continuing conflict in the country might not only push it toward economic ruin and stagnation but also triggers some other forms of divergence isolating one part from the other and plunging the whole area into nasty clashes. It has been a far-fetched fear lurking in people's mind while it is difficult to see any good resolve to the terrible mess that the differences have turned it to be. The economic and political price would be crippling. A protracted strife and clash would doom any hope of holding the nation's budget deficit as well as halting the escalating inflationary trend that continues to mount up. Potential trade partners and investors would shy away as evidenced by the cancellation of orders in the garments and leather goods sector.

At the moment, 80 per cent of the country's financing of

different development projects comes from external aid. Indications are there that different aid-giving agencies are already muttering about withholding funds and diverting to other countries in such a turbid situation. The country would lose huge amount of foreign currency in shipping and other necessary disruptions in the form of strikes, hartals and deadlocks in transport movement and ports services continue for an indefinite time.

All told, the lingering impasse has already caused the set-back and most shockingly true, reversed the country's economic recovery. People's opposition to administrative policies culminating in suppression and oppression that often take toll of human lives in police firing, is ferocious. It is fed by a widespread belief that the administration is systematically shying away from the truth.

Criticism mounted from well-known public figures, litterateurs, university teachers, artists and social workers have already pointed out that no one can remain indifferent to the victimisation of civilians. At least no one will like the country to be stained with blood. At the same time nobody knows for certain to what extent the ruling elite are in charge of things. To all intents and purposes, it appears that power has gravitated to some other people known as hoodlums, mastans and power mongers who are totally oblivious of the country's future and only mindful of their own interests.

The dialogue initiated by the President with the dissenting political parties now hinges on one point: cancellation of the February 15 polls result. The ruling party has taken a tough and uncompromising stance in legitimising the election and the polls result despite rejection by all and sundry affiliations. Polls-related violence since February 15 has taken a heavy toll of human lives. Without any contradiction, people are pointing their finger at the Election Commission which acted naively without taking into consideration the sentiment of the people. Even the red signal shown by the national dailies were not heeded to. Further, if the government has failed to heed the warning, the will and drive of the CEC coupled with the determination of maintaining strict law and order in the election process could avert much of the disastrous scenario. Indeed all politicians particularly those who were keen to go ahead with the election would not have liked it but to maintain his much-vaunted aura of sagacity and neutrality, CEC could have fought off the evil designs of the mastans and goons, allegedly of the governing party.

Suppose... were not... ing... prove... cal... Election... Seshan... the... enjoyed... ing him...

In such a situation... different... perhaps it is worth recalling what Seshan did in some critical situation that he faced squarely with the ruling Congress party of P V Narasimha Rao in 1994. Ignoring the Rao government's wishes, Seshan staggered balloting in four important northern states... India over a month, so that 40,000 troops could be deployed in each state to prevent vote rigging. Indian administration's bid to weaken Seshan's power by appointing two more Election Commissioners to outvote his decision was flawed by the Supreme Court injunction when the embattled Seshan filed an appeal...

CEC's claim to hold a free and fair election in the country in the days before the polls and in some measure outmanoeuvring others in the contemporary world proved to be hollow. The Daily Star editorial of 9th March is worth recalling here... editorial rightly pointed out that CEC could have chosen some of the options left to him as a retired Supreme Court Judge, he could have seen the bloody clashes that this one-party election would lead to and could have either stopped holding this election or resigned to leave a name in the history of Bangladesh like his erstwhile colleague in the bar Justice Shahabuddin Ahmed...

Personal... and charisma... in enforcing... as it did in the case of Seshan. "Nobody can tempt or terrorise me," Seshan said. "I am unbelievably fearless. I also live a life of extra-ordinary simplicity. I don't want anything from any body." He is a bully but his financial prudence is unquestionable," so says a high-ranking Indian legislator. After a month long visit to the US in 1991 he brought back nothing other than \$1.25 yo-

CEC of Bangladesh has not lost all the cards. He can play his trump card at this critical juncture and save the country, its people and its economy from total... As an autonomous... authority... of a Supreme Court... and with the power... in him to strike at the rot if he has detected malfeasance, he can play his last card before it is too late for him or for the nation that is plunging into quagmire of dirty politics.

## DRAFT ORDINANCE

WHEREAS, the Fifth Parliament was dissolved on 24th November, 1995 and an election schedule was finally announced for holding the election for the sixth Parliament to be held on 15th February, 1996;

WHEREAS all the Opposition Parties who were represented in the Fifth Parliament declined to participate in the said election held on 15th February, 1996 as they have been demanding for the formation of a neutral caretaker government as a precondition for holding of election;

WHEREAS, vast majority of the people and all the opposition parties having boycotted the said election it could not provide the necessary choice before the electorates nor could it reflect the will of the people and the said election is far from being able to ensure "effective participation" by the people through their elected representatives in administration at all levels" as is envisaged under Art 11 of the Constitution; AND WHEREAS, the election in all the constituencies could not be completed also within the stipulated period of 90 days;

WHEREAS, it is the Constitutional obligation under the Rule of Convention for the Prime Minister to resign under the prevailing circumstances; AND WHEREAS, the Prime Minister Begum Khaleda Zia who held majority in the erstwhile Fifth Parliament

though continued to act as the Prime Minister by holding over but as the election for the Sixth Parliament could not be completed within the stipulated time she cannot therefore continue in office and in view of the above the President was advised by the Prime Minister to meet other political parties represented in the Fifth Parliament and former Chief Justices and Senior Constitutional Lawyers in order to find out a way to facilitate formation of a non-partisan neutral caretaker government under which the Prime Minister promised for holding of an election in May, 1996 in order that all the parties may participate in such election without any reservation;

WHEREAS in order to facilitate the formation of a neutral non-partisan care-taker government it is not possible for any Member of the Fifth Parliament to become the Prime Minister nor able therefore to form the Cabinet; WHEREFORE, it is not possible to form a Cabinet with the Prime Minister for the interim period till the next election is held for ushering a new Parliament and a successor Prime Minister;

WHEREAS, there is no provision available under the Constitution to meet such contingency and therefore resort has to be made on the general law of conventions for the working and upholding of the Constitution which is

"intended to secure the ultimate supremacy of the electorate as the true political sovereign of the State". WHEREFORE, the President on the advice of the Prime Minister held wide consultations with all the political parties represented in the Fifth Parliament as well as with two former Chief Justices of the country and other senior citizens and counsels in order to find a workable solution to the present political and Constitutional deadlock.

WHEREAS, the Fifth Parliament being dissolved there is no Parliament in session nor in existence;

WHEREAS the President is satisfied that circumstances exist which render immediate action necessary. Therefore, in exercise of Article 93 of the Constitution it is necessary to make and promulgate the following:

**This Ordinance will be known as THE INTERIM CONTINGENCY ARRANGEMENT (FOR NEUTRAL CARE-TAKER GOVERNMENT) ORDINANCE.**

1996. Notwithstanding any other provisions contained in any other law this Ordinance will come into force at once whereupon the election held on 15th February, 1996 would stand cancelled and annulled and the Prime Minister and other Ministers will be deemed to have resigned on the promulgation of this Ordinance. The provisions of this

Ordinance being purely of temporary nature are promulgated with an object for bringing in a Prime Minister to succeed in office; and it is in no way to alter, amend or repeal any provision of the Constitution and will never be deemed as having formed part of the Constitution and the Ordinance can with such modification be replaced by an Act of Parliament, with such change or modification as may be suggested and agreed by the Parliament to be elected in the manner provided hereunder; During the absence of the Prime Minister and the Cabinet an advisory council is constituted consisting of immediately preceding former Chief Justices not exceeding three in number who in turn may include such other members as may be deemed necessary not exceeding eight in number to act as the members of the Advisory Council. PROVIDED however that the eight members so to be appointed must be such persons who have already made significant contribution in the area of his or her field of work and nationally well reputed for his or her commitment to the people and the Constitution having pronounced belief in the basic norms necessary to uphold the freedom, Constitution, democracy and the interest of Bangladesh and its people. Before such persons as are to be appointed on the recommendation of three former Chief

Justices must be done after prior consultation and concurrence of the leader of the House and the leader of the opposition in the Fifth Parliament. That the Senior most retired Chief Justice so appointed as adviser would be known as the Principal Adviser and will exercise such powers as are to be performed by the Prime Minister and other advisers will perform such functions as are to be performed by the Ministers and all of whom together would exercise the power of a Cabinet till the successor Prime Minister enjoying the confidence of the Parliament to be elected under the neutral caretaker government is sworn in. Primary object and function of the caretaker government comprising the number of advisers so appointed in the manner prescribed hereinabove and headed by the senior most retired Chief Justice will be to establish and ensure a neutral administration and to help create a peaceful and congenial environment for holding of a free and fair general election for electing the Members of Parliament to be conducted by the Election Commission which also need to be reconstituted in consultation with the leader of the House and the leader of the Opposition in the Fifth Parliament and such election is to be held within a period of 90 days so that the President can appoint a Member of Parliament as the Prime Minister who appears to him to command the support of a majority of the Members of Parliament. Provided that the Prime Minister so appointed by the President after the election held will remain a Prime Minister designate until he/she secures a vote of confidence in the House within seven days of his appointment by securing a clear majority of total number of members of Parliament whereupon he/she will enter upon the office of Prime Minister by taking the oath of office. On the failure to secure the vote of confidence his/her appointment as given under Art 56(3) to become the Prime Minister will stand terminated and a fresh appointment be given to another Member of Parliament in similar manner till one could be found to command the confidence of the House within the stipulated time of one week. If on the third attempt the Prime Minister, so appointed fails to secure a vote of confidence the Parliament will be dissolved for organizing a fresh election soon thereafter. The Council of Advisers will be automatically dissolved on the expiry of the interim period which will end on the entering upon the office by the new Prime Minister having taken the oath of office after securing a vote of confidence and the Members of the Advisory Council will cease to hold their respective offices thereby.

