

Caring for Caretaker and the Constitution

by Dr Mohiuddin Farooque

If "all power in the Republic belongs to the people" as per Article, 7 then the Constitution has to be read in the beneficial language of the highest power holder under it. A unique equilibrium of purposes should exist between the best constitutional experts and the common man if it is to have ramified social meaning as opposed to "constitutional bureaucracy".

Making Bold

Seldom has such a talked-about prized project eluded our grip so much as the Syedabad water treatment plant. When in place, this will make 22.5 crore litres of surface water from the river Sitalakha drinkable on a daily basis. The supply of WASA water in Dhaka city per day is 67.8 crore litres as against the requirement of 140 crore litres leaving a daily shortfall of around 60 per cent. Syedabad plant's estimated contribution to meeting the day-to-day deficit thus looks quite substantial.

Crucially important is also the positive effect the plant is likely to have on Dhaka's soil by securing it against subsidence being threatened by an increasing extraction of ground water through the tubewell installations.

Funding uncertainties have kept the project hanging so far. The World Bank has been saying that it is ready to come forward on condition that revenue collection at the Mirpur and Gulshan zones of Dhaka WASA be contracted out to private parties in a bid to reduce pilferage estimated at around 50 per cent.

Last year, the government tried in vain to persuade the World Bank to drop its privatisation precondition to approving the IDA credit for the Syedabad plant in the face of worker resistance at the WASA. With the World Bank sticking to its conditionality, this year the authorities here have decided to float tenders for private participation in revenue collection but obviously at the eleventh hour: the World Bank board meeting for the approval of the credit being scheduled for April 24, only a month away.

This smacks of desperation. At the same time, there is a bold expression of a positive intent to carry forward the reform agenda in the teeth of opposition. The WB can hardly turn a blind eye to this. The French government which in its turn, has made the availability of a grant for the supply of equipment to the Syedabad plant, conditional upon the approval of the IDA credit, should not also miss the point.

The responsibility of limited revenue collection is being transferred to private companies in this phase, something the workers must take note of. The government may keep a watch over rates in public interest without so much as determining them. The workers' concern over joblessness and lack of economic security must be addressed through an adequate package of rehabilitation, reemployment, welfare and safety net programmes.

Matter of Propriety

We are shocked at the ugly incident — in which two Jatiyatabadi Chhatra Dal (JCD) activists beat up a lifeman — that took place inside the Secretariat on Wednesday. By their own admission, the two are JCD followers and came to congratulate the newly appointed state minister for education. The state minister has denied any link with the two saying that he did not know them. This flat denial, however, is not enough to remove the confusion surrounding the episode. The two offenders were given shelter in a room and the employees of the Secretariat staged an angry demonstration to protest the incident. As a public representative, a minister needs to come out clean on any such unhappy occurrence.

In this connection we want to raise a question of more serious nature which concerns the appointment of student leaders as state or deputy minister of education. During Ershad's infamous rule, the induction of Ziauddin Bablu in this ministry created a lot of consternation. An appointment such as this may be technically and legally correct but it admittedly tends to hurt the sensibilities of university vice-chancellors, professors and teachers over whose meetings their student-turned-minister might have to preside.

Honour and respect are what the teachers value most. Why take it away from them by an injudicious appointment. Let it not happen again in future. As for the present, there is a precedent for interchanging portfolios within hours of cabinet formation. Why not once again?

To the Editor...

"Between democracy and devil"

Sir, I would like to highlight my comments on the letter that was published on March 2, 1996 by Ms Tasmina and an argument that was given by Mr Abu Imran on March 13, 1996 under the caption "Between Democracy and Devil". Mr Abu Imran criticized her for giving her views and then he himself talked about his famous democracy which to me seems quite biased.

After reading the letter I felt that my learned friend is a votary of the opposition if Ms Tasmina is considered as votary of the ruling party. In my opinion what she has written is correct and I stand by her. Following are my viewpoints:

First, I do agree and that there can be no question that we need an election under a non-party caretaker Government, but why did the opposition leave the parliament to come to the street for doing that? To me the moment they resigned they became common political parties and the government within its constitutional framework will have every right to accept or reject a proposal if it does not fall within the purview of the Constitution. Our learned op-

position thought that coming to the street will solve the problem, but has it been effective till now? You might argue on this point and say that this is the reason why the political parties have resigned from the parliament, but that is where they are wrong. This issue should have been solved inside the parliament.

Secondly, I might be optimistic but I feel that most important thing about a non-party caretaker election is not the election, but what measures will be taken for a free and fair election, specially I am concerned about law enforcing agencies and what would be their role. Why? Because, let us face the reality, in 1991 election none of the political parties actually knew where they stood, but this time the total scene is very much different. The ruling party knows that they might not have that popularity as of 1991 but they need to come into power, while on the other hand, the opposition, mainly Sheikh Hasina will try not to take any chances like 1991 and she will also try to come to power by any means. Can you imagine what arms both the parties hold? Doesn't the present situation tells you anything? Can you give guarantee to the people that they will come back safely from the polling stations and

WE are probably in the phase of witnessing the final scene of the collapse of a nation! Too many lives have been lost and affected, irreparable loss to livelihood of citizens have been inflicted.

In the name of Constitution, the Constitution is being hoaxed and humoured for too many pseudo-constitutional activism, among others. Too many aspects of the Constitution are yet remaining judicially and politically unanswered or vague for reasons of the lack of activism except certain ad-hoc attempts. Where a well conceived and articulated constitutional litigation could help the nation to sustain its constitutional process, the capable ones have either opted for political activism or whimsical constitutionalism.

Who would bell the cat? Of course the senior of the most learned, accepting the ugly reality that there is no parameter to determine it, in the politics of constitution! The vast majority of the people are ignorant, including the literate community, about the role and importance of the Constitution. For over use of "Constitution" in partisan jargon people even started saying, "hell with the Constitution if our interest can't be protected since we do not exist for it". Such expression is frightening for the nation because those who are functionally and professionally dealing with the constitution have somehow failed either to make people realize what the Constitution is all about or to deliver any tangible constitutional service for the benefit of the people.

Politico-legal Nature of the Constitution

Constitution is not a document of unitary legal nature for a specific profession although the highest judiciary, i.e. the Supreme Court is the guardian of it as the highest institution of mandatory wisdom of interpretation. If the oath of office for various constitutional positions as described in the Constitution itself is compared, they are identical with hardly any difference. Hence, the words of oath under the Constitution for judges and the Chief Justice of the Supreme Court, the President, the Prime Minister, the Cabinet, the Members of Parliament, the Speaker, Deputy Speaker, Chief Election Commissioner,

Members of Public Service Commission are identical requiring absolute commitment to the Constitution above personal interest to influence any official conduct or decision. Hence the objectivity of the role of each institution is crucial in interpreting the same words of oath in different capacities.

The constitutional provisions and procedures along with the Bangladeshi realities may not always be suitable for comparison on identical issues of countries having different socio-political background or where there is no Constitution. Therefore, during a crisis affecting the whole nation, it is the synergy of understanding of the constitution by actors and the people that matter to avoid the demise of collapse of a constitution and hence the nation. Strict legal interpretation is not always effective to sustain the inherent purpose of the constitution but a politico-social interpretation may be more effective.

If "all power in the Republic belongs to the people" as per Article, 7 then the Constitution has to be read in the beneficial language of the highest power holder under it. A unique equilibrium of purposes should exist between the best constitutional experts and the common man if it is to have ramified social meaning as opposed to "constitutional bureaucracy". The Constitution may appear to look as a legal scripture but it is the basic text of governance enshrining political, executive, legislative, judicial, administrative, electoral, socio-economic activities etc. Although the Supreme Court remains the guardian, it is an instrument having functional bearing wider than the jargons of the lawyers. The nation is seemingly tired of singularity in constitutionalism and personified political nationhood. We are, perhaps, an unfortunate nation with a misfortune Constitution since it has been confused and choked by too many factors. It has suffered and has been under the leadership of political crusaders, justices, generals, lawyers and apparently

house-keepers of political heritage who headed the State or Government. Still looking for an exception?

The CEC and His Election

The Chief Election Commissioner, an honorable person under the Constitution and by profession, has failed to overcome the dirty dances with political tines. One may recall the world appreciation that Acting President Mr Justice Shahabuddin Ahmed received but the present CEC, on the other hand, is hanging on the post in the face of severe condemnation. Unfortunately, we are a nation where resignation by self-condemnation is unknown (perhaps an exception was General Ershad) although on many occasions, a resignation may serve better than clinging to position. For example, the CEC shifted the date of the election more than once to give the political parties space to come to a consensus and take part in it for making it meaningful. It was an excellent reasoning although finally he went on to conduct election with situation even worse. A resignation at that point of time by CEC to refuse to conduct the election would have given the nation a much better contribution than his expensive civil violence.

An election for constituting the 6th Parliament was attempted unsuccessfully essentially because the laws were violated and flouted by the EC, political parties, Government and many candidates. Hence, no lawful election was held and so existence of 6th Parliament is quite arguable and disputed. The cancellation of the 15th February polls is a formal act which may not be necessary unless one goes before court for asserting its validity since it is void ab initio. The CEC has grossly failed to perform his duties under oath. As such a complaint may even be lodged to the Supreme Judicial Council against CEC under Article 96(4)(b) of the Constitution.

The President and His Presidency

The President as an institution, is largely dependent on

the dynamism of the person holding the office. An example is the statement of one of the Indian Presidents who told Mr Nehru that "he hasn't been elected as President to walk in the corridors of Rastapati Bhavan". There are many inherent and implied role which are not barred and hence, the President may evolve and ramify constitutional politics as a practice and convention. Regrettably, besides felicitating foreign heads of state on their national days or receiving their envoys, the President has not developed the progressive role of the office. Perhaps, he is the last person to open his mouth on the present crisis in this country though he is the first citizen. However, there are limits everywhere under the sky.

All executive actions of the Republic are taken in the name of the President as executive head. This power is exercised by the PM under Article 55 and also the way he allocates. If there is a vacancy in the post of PM, who is not bound to continue till successor takes up because nothing "shall disqualify" the PM if she wants to, if the language of Art 57(3) is compared with Art 50 relating President where he "shall continue to hold office until his successor enters upon office," the exercise of executive authority reverses back to the President. There is no alternative or contingency clause like the post of President where the Speaker would take charge under Art 54 in case of vacancy. In such a case of PM's resignation and vacancy to the office, there is no compulsion of having a cabinet, and an advisory council in any form not expressly prohibited by the Constitution can be formed by the President to conduct all the executive functions required to hold an election. Moreover, the election is conducted by the EC and the executive authorities are required to be at the disposal of EC for ensuring holding of the same in accordance with law and constitutional mandates under Arts 120 and 126. Election is not an executive function that cannot be done

by the advisory committee and the President. Hence, an ordinance, at least for the purpose of constituting a transitory non-partisan body at the top executive level, or reversely, to ensure that no political party is holding the executive authority during the election, may not be required.

Caretaker During Parliament Election

It appears that caretaker or neutral non-party government during parliamentary elections is more psychological in nature than in real terms of governance. The implied element is to ensure that no single party monopolizes the vote rigging or succeed the State machinery for its benefit. If, as was manifest during 1991 election, each party can succeed in its bid to show down in pockets of its command area, then reciprocity satisfied the electoral psychology of neutrality.

The framework for caretaker could be in two modalities, namely, one transitory from the present set of mandates and the other could be a long term one as part of the Constitutional process. In both the cases a national consensus is a pre-condition. Even if it is thought that neither of the form of caretaker could be brought to function without an amendment of the Constitution (which is quite true in the case of a permanent provision), yet a positive referendum in the light of Art 7 could be held which would, at least provide a quasi-constitutional basis for holding the election under the present conditions. However, the question of by-elections during the term of a Parliament remains unresolved as to how the caretaker would be applicable in those subsequent elections time to time after holding the full-fledged parliamentary election under a neutral government.

It may further be said that a caretaker body to stay in some executive offices, as secondary pretext since resignation and removal of political party officials from office during election is the primary objective, could be organised. It is pos-

sible as one may argue, by giving effect to the preamble, Parts I and II and other provisions of the Constitution which are not judicially enforceable and the same not being required in the present context, but could be the constitutional working guidelines for non-partisan overseeing of elections by progressive political enforcement of the Constitution since the institutional function of it is overwhelmingly political.

Conclusion

The prevailing crisis requires a politico-legal reading of the Constitution considering people, public interest and the nation as the grand spirit. This reading is the combination of too many factors beyond being legal although the forum may be the Supreme Court (SC) as the custodian with mandatory wisdom. Nonetheless, the provisions of the Constitutions should be translated into the proper language of all and not a prerogative, though a disciplinary advantage but not privilege, of lawyers and judiciary alone.

A reference to the SC could be made under Art 106 for advisory opinion by the President, but two points to be borne in mind, namely, such opinion being not binding what would happen if the President or the interest groups of the other side of the issue disregard the same, and it would have been better to send a worked out package to the SC for opinion instead of requesting for its which would tantamount as if the SC would draft one.

One may further cautiously and consciously state that properly formulated constitutional litigation could have resolved many issues instead of resorting and forcing people to the street in the name of Constitution while nobody went to the SC. It is not acceptable that such matters should not be taken to courts while the nation goes astray due to the irresponsible behaviour of other organs.

There is hardly any judicial constitutional action which has no political ramification, rather politics is essentially based on legal phraseology and concepts.

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The Forest Behind the Trees

by Zafrin J Chowdhury

However bitter it may sound, it is also time we admit some home truths. Our loud and pretentious claims notwithstanding, none of us are pure as the driven snow. Without exception, we have been compelled to live with umpteen irregularities in our life, to shut our eyes and close our ears to things we cannot accept in our hearts.

THE deep sigh of relief that the nation was about to have only days before, is now suspended in the face of yet another uncertainty. The light at the end of the tunnel may yet turn out to be a delusion. Though we will hold on to our hope till the last vestige of possibility for a peaceful and participatory settlement, the uncomfortable churning in the stomach is becoming undeniable by the day, a feeling that here comes another Catch-22 and all efforts may once again, in a round about way, lead to the hopeless obscurantism we have come to know so well.

The case in point this time is the legitimacy of the Sixth Parliamentary Elections held on February 15 last. It is of course for the legal experts and politicians to address this complex issue of national importance. What we, as observers, have to say on the issue will be to echo the numerous comments, oped pieces, and commentaries published in the newspapers. The gist of these pieces, as I gather, is that it is high time to stop the damage, and that good sense must prevail.

Looking back at history, long past and recent, we find that our people sway with the winds of change and are daring enough to shed blood on the streets, make the snakes protest. But we often fail to get to the root of the problem. At the rise of a crisis, our boys go so far as catching bullets in their chests. But our leaders and politicians seldom work at uprooting the evil once and for

all. When will life in this land become more malleable than a leaf of grass. Why cannot we settle things permanently instead of trouble-shooting every time? As a result of our limited vision, we find ourselves in the same pit, time and again. Every few years, crises of very similar nature and magnitude keep popping up and jeopardise our life and our future. Gratification of the ego and selfish motives, more than anything else, keep us from finding long-term solutions through consensus. The unholy game is being played once again.

It is evident that there is absolutely no doubt in the people's mind that the February 15 elections fall short by every measure. In three weeks of arguments, not a single voice has called it a proper election. Even the BNP has gone no further than to defend it as an absolute necessity. That the ruling party is scrambling out of a situation created by the polls is proof enough that this election is difficult to stomach.

What the Opposition could not achieve in two years of campaign, the BNP has now palmed out to them. The contentious election has given the political advantage to the Opposition. Their gamble to boycott the polls has paid quick dividends. Most importantly, the BNP has, on principle, conceded its mistake and re-elected step by step in a visible attempt to rectify. If this fall-out from a democratic victory is not a political victory, then what is? Why then the opposition parties should cling to the childish temptation to strip the ruling party of its last cover, even at the cost of a peaceful settlement? If the ruling BNP is pushed to the wall and forced to throw away its guilt and if it abandons the compromising attitude — the agony that awaits the nation is anybody's guess.

Let alone political understanding or concession, there is a question of greater significance involved here. For all practical purposes, the Sixth Parliament will neither have a life nor the necessary legal strength. Nevertheless, given a political consensus, a session in this parliament can give constitutional legitimacy to a neutral caretaker government, not only for the next election but for all future elections. An ordinance by the President, even if deemed constitutionally valid, will be yet another ad-hoc arrangement. In which case, even if we are bailed out this time, is there any guarantee that the issue of a caretaker government will not plague us again three to four years down the road? It took years to bring BNP to its current stand. How can we be sure that the next government, whichever single party or coalition may form it, will be ready to hold elections under

an interim administration? What if it does not, shall we witness a re-staging of the long and destructive drama? Will the people and the economy again be made to bear the expense?

However bitter it may sound, it is also time we admit some home truths. Our loud and pretentious claims notwithstanding, none of us are pure as the driven snow. Without exception, we have been compelled to live with umpteen irregularities in our life, to shut our eyes and close our ears to things we cannot accept in our hearts. This writer wishes to God that He grants us the courage and strength to overcome these in the future. But to claim that we can accept nothing short of what is absolutely flawless and without a spot, I think, is self-righteousness taken too far. Talking of elections, none except the 1991 polls, will pass the test. But we could not scrap any one of them, could we? Everybody is aware that the recent one is questionable.

But if some good can be obtained from this bad situation for the peace and progress of the country, no one is going to blame or be displeased with the oppositions. Rather, majority of the people will hail them for taking a pragmatic step and bailing us out of this impasse. With the support of the people, the opposition parties at the negotiating table can regulate the formation of a caretaker government and make sure that the Sixth Parliament ceases to be functional after making the avowed amendment, and ensure that the next election is held by May. The Combined Opposition can also do much to make the atmosphere suitable for healthy contest. With great relief and enthusiasm the people, then, will prepare for the coming elections.

A Presidential Ordinance based on the "Doctrine of Necessity" would enable the oppositions to bring down the BNP government here and now, but they will also set a precedence which any future regime may exploit to its advantage. The "Doctrine of Necessity" once invoked, will become an available option to all interest groups to push the state into a similar situation. Without fixed legal and political limits, we will face the prospect of managing a crisis at every discord. Regardless of the high-sounding rhetoric on democratic norms and values, politics in this country will develop no tradition, culture or custom. Streets instead of the Parliament and muscles instead of wits will control the mechanism. Whosoever will be good at making threats and creating anarchy will win in the name of the "people".

Whether the BNP eventually

will or will not agree to scrap the polls, we cannot foretell. The fate of the polls may be decided by the Appellate Division of the Supreme Court. If the polls are scrapped and the government steps down, two major issues must be addressed in clear and concrete terms: 1) How the resultant vacuum is to be filled, and how the slide into terrorism and anarchy will be prevented; 2) There must be a legal basis to the formation and modalities

for a neutral caretaker interim government to administer elections in the future.

To overlook weaknesses and loopholes, which any future government may try to twist, will be unpardonable, specially after the high price the country had to pay on this issue. The real intention of those who are working only with one election in mind will be unmasked before the nation. They will be held responsible for diverting us from a

permanent solution when we have come so close to finding one. Their urgency to find the means only to the next election, without setting the issue of all future elections, will come under scrutiny.

Let us not fail to see the forest because of the trees. We urge our politicians not to lose sight of the future for vengeance and immediate rewards, to save the nation from misery, and to spare us the pain of inferiority and shame in the eyes of the world. That is the best gift they can offer to this poor and tolling people.

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Dhaka Day by Day

The Unique Role of Orbis

by ASM Nurun Nabi

Orbis, a unique flying hospital, is now in Dhaka. The hospital last visited our city in February, 1992. It brings its healing skills to blind people throughout the world. The term Orbis is Latin for 'of the eye'. It is a private non-profit organisation based in New York city. The project undertaken by it began as the idea of Dr David Paton, a Texas ophthalmologist whose father started America's first eye bank. It took ten years for his dream to become a reality, with much of that time spent in seeking donations. The plane was originally a gift from United Airlines.

Sony gave TV cameras and other audio-visual equipment. Hundreds of American corporations, foundations and private citizens donated millions of dollars for additional medical equipment. A substantial amount also came from the US government's Agency For International Development.

At first the medical community was skeptical, though Dr Paton kept pushing. "You can be of some service by treating patients, but your best is only a drop of water falling in the desert," he explained. "If you put your effort into teaching others, then that drop at least falls in a glass."

It is, however, a tall glass that needs filling. Some 45 million people in the world are blind. Another 500 million suffer from various eye disorders that could lead to blindness. Yet experts believe that two-thirds of the world's blindness can be prevented or cured.

Among travelling hospitals, Orbis is unique because it serves as a teaching hospital in Orbis' first year alone, more than 1000 host-country doctors participated as "students". They were experienced medical men and women, but Orbis was demonstrating new technology and operations not even dreamed

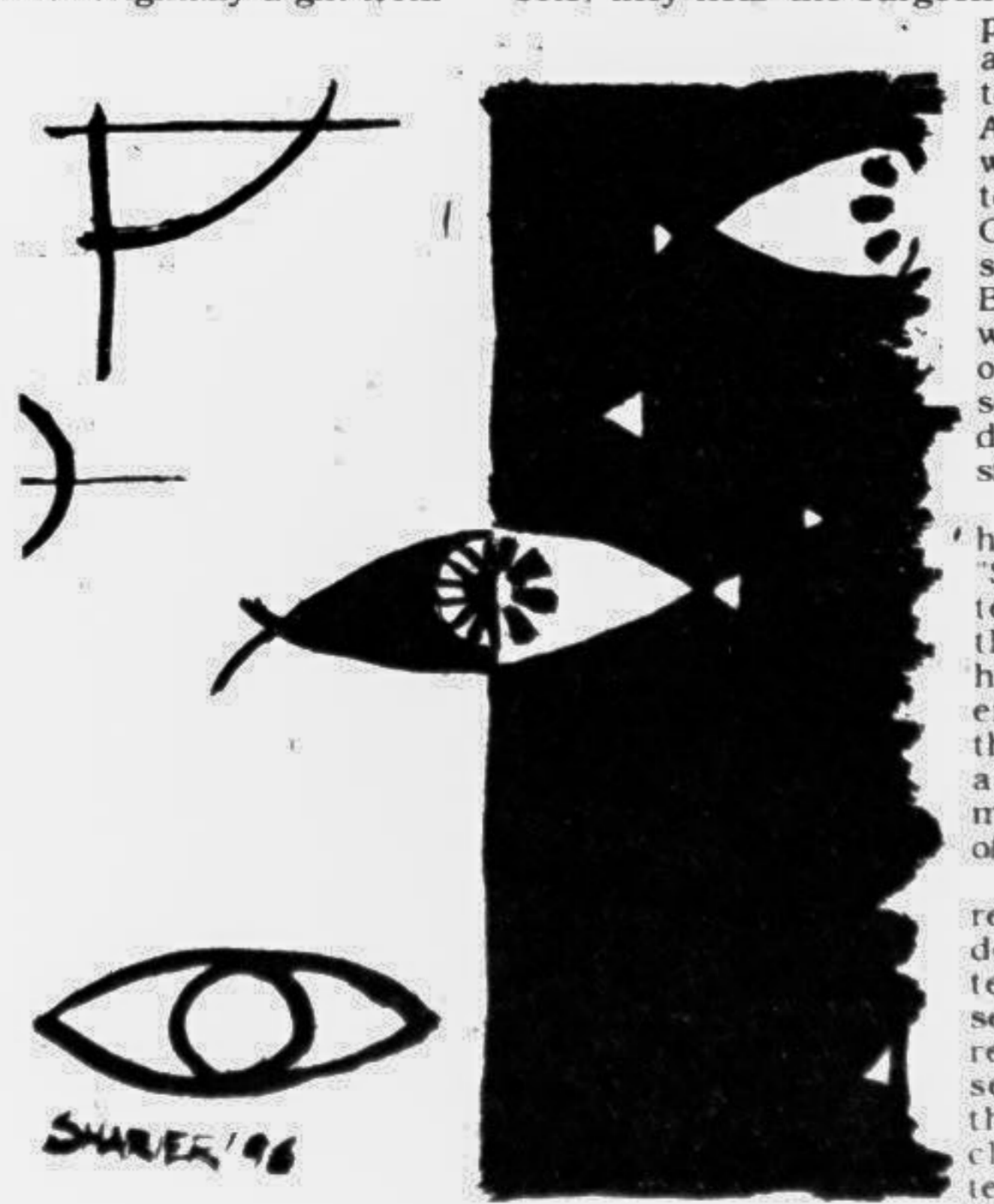
of a few years ago. If each of these doctors uses his new skills on just one patient a day during a working year of 250 days, then 250,000 patients will benefit.

In the plane's special "class room", doctors of a host country watch Orbis ophthalmologists perform their operations. Over closed circuit monitors, the "student" doctors see what the surgeons are viewing through their microscopes and observe delicate procedures that can't be learnt from a text book. Through headsets, they hear the surgeon's comment on the problems they find and how they intend to deal with them. At the end of a week, these spectators will assist the Orbis surgeons in similar operations. By the following week, they will be operating themselves with the Orbis doctors as their assistants.

A slogan is often heard aboard Orbis: "See one, do one, teach one." Once the local doctors have seen the operations, next it is their turn to do one; after a while they may even teach one of their colleagues.

During the current visit to Bangladesh, its medical team will operate serious eye patients referred by a local selection team, at the aircraft-based clinic. The Orbis team will also train up local bio-medical engineers about the use and repair of laser machines to keep them operative throughout the year. Orbis I also said to have both on and off the plane eye treatment programmes.

The Orbis team has already visited almost all the countries in Asia, Africa, Latin America and Europe during the last twelve years. The visit of Orbis to this country once again comes as a relief to various eye patients needing corneal grafting and laser operation. The team reportedly will stay in Bangladesh for three weeks.



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