

Code of Conduct

Frankly, we expected a stricter, more detailed and far more comprehensive code of conduct for the coming elections. What the Election Commission (EC) has finally produced is, content-wise, almost run of the mill. What, however, is new and positive is the way it was arrived at — through a process of detailed discussion with all political parties. What ultimately emerged was a consensus-document. The EC feels that it must do as much as possible on a consensus basis. We agree with this approach. But we also believe that everything that EC needs to do cannot be done on the basis of consensus. At some point EC will have to stand on its own and take hard and unpleasant decisions which will please nobody except the voters.

In preparing the code of conduct the EC took the decision to delete a clause which had banned the use of religious places for election propaganda. It was in the draft which the EC had sent to the law ministry. At some stage, before finalisation, the EC decided to delete that clause to accommodate objections raised by one major political party. Justifying its decision to buckle under pressure the EC said that it wanted the code to be a consensus document since earnest support of all was needed to make it work. The EC is reported to hold the view that deleting that particular provision does not make any difference as use of religious places for election purpose is banned under section 73/4 of the People's Representation Order of 1972.

We question both the decision and more so the justification. How can places of worship be part of election campaign. Does it not amount to showing disrespect to places which are sacred? We are all aware that some parties exploit religious sentiments of the people to gain political support. This itself is highly condemnable as all of us respect, honour and have deep faith in our religion, and yet have different political views. We recall with horror and disdain how religion was used against our liberation war by the same forces who exploit religious sentiments for their own political end. To delete the banning clause from the code under pressure gives all sorts of wrong signals about EC's strength to safeguard principles which are still part of the law of the land.

The EC, we feel, is a bit too concerned with consensus. We know that when it comes to the interest of each political party it will insist on what suits itself, and not what is good for the country. So it is time that EC becomes its own self and start building an image of independent and no-nonsense body. Without an extremely strong and uncompromising attitude the EC will be constantly under pressure of making concessions to big parties.

Election Expenditure

One of the prerequisites for holding a free and fair election is the removal of any undue influence of money on the electioneering process. Money spent lavishly can not only buy votes but has also the potential to have an undesirable effect on the democratic process as such. It is precisely for this reason that a ceiling is imposed on the electoral expenditure by an individual candidate. This time the Election Commission has gone a step further to ensure that the money spent is consistent with the stated sources of income in a verifiable manner. The EC's concern for transparency of expenditure by the candidates has been served well by its latest demand for them to give in details the sources of the money they will spend on election campaign.

This happily has been made legally binding for the candidates. A very serious attempt has been made to ingrain accountability in the expenditure by requiring that the candidates submit documents and relevant papers to support the amount of money pooled for election expenses. The important thing will be to put in place an effective monitoring system to see that the candidates do indeed comply with the regulations. We believe the EC is alive to this enforcement aspect.

Candidates in the past were required to keep account of their expenditure for submission of necessary particulars to the EC. Questionable expenses were hardly looked into even when brought to light. This time this good move by the EC, let us hope, will not be subverted by anyone involved in the process. Because at stake is both accountability and transparency of a process through which best candidates are expected to get elected to the Jatiya Sangsad.

Word-player's Stress

The poet's work seems less demanding than a playwright's in terms of the stress taken by both. This has to do with how their respective imaginations and senses of involvement work. A 'careful' psychiatric analysis on 100 famous British and American writers and poets by Dr Felix Post of Britain has revealed this. A novelist, concerned as he is with human fate, identifies and empathises with his characters as he weaves his plot along. Having gone through this mill he is mentally battered while a poet has a much less agonising experience as he gives a descriptive and creative expression to his feelings.

This explained why 31 per cent of the poets were alcoholics as compared with 54 per cent in the case of playwrights.

The same British psychiatric in a previous study found that writers as a group were more susceptible to emotional problems than politicians or scientists. It is also said that those who play with words, like the journalists and the lawyers, tend to have a shorter life-span than others. The poets do a lot of words-sifting to get at the desired imaging of his feelings but then his wordage is far from epical. And, to that extent, it can be less exacting than the voluminous writing of a novelist.

The journalists as writers in a hurry and with commitment to fairness do spontaneously sympathise with the poets and playwrights who have their wonderful missions to fulfil.

Where does Defence Belong?

by Mohiuddin Ahmed

The author argues that the thirteenth amendment of the Constitution vests all executive authority of the Republic in the Chief Adviser and the Non-Party Caretaker Government. The armed services, being part of the executive functions of the government, are within the jurisdiction of the Caretaker Government. The amendment of Article 61 of the Constitution seems ambiguous with respect to exercise of the functions of the supreme commander; the interpretation that the armed services are within the executive jurisdiction of the Caretaker Government is more consistent with the Constitution and the thirteenth amendment. Transferring Ministry of Defence and the Supreme Command Headquarters Division to the President apparently diminishes both President and the Caretaker Government.

The thirteenth amendment does not make explicit reference to the other provisions of Article 55 of the Constitution. One of these provisions simply asserts that there shall be a Cabinet for Bangladesh headed by the Prime Minister and another states that the Cabinet shall be collectively responsible to Parliament. [Article 55(1) & 55(3)] Establishment of the Non-Party Caretaker Government makes the thirteenth amendment irrelevant to cabinet irrevocability. The thirteenth amendment makes the caretaker government collectively responsible to the President — i.e. collective responsibility to Parliament is substituted by collective responsibility to President. [Section 58B(2)].

President and the Armed Services

According to the Constitution, the supreme command of the defence forces of Bangladesh vests in the President and exercise of that power is regulated by law [Article 61]. The following are specified as the subject matter of the law related to the defence services: raising and maintaining the defence services and their reserves; grant of commission; appointment of the chiefs of the services and determination of their remuneration, discipline and other related matters [Article 62]. There are laws and orders for the defence forces which regulate the discharge of their functions by the President. Grant of commission is governed by strict rules relating to recruitment and training; there is little scope for discretionary judgment. Raising and maintaining the defence forces is a matter of policy which cannot be decided except on the advice of the executive branch of the government. The decisions have serious foreign policy as well as budgetary and economic implications. Appointment of the chiefs of services is governed by rules as well as tradition. There may be questions of preference for the political government; by and large, the government has followed the principle of seniority in all these appointments. It is not clear why the President shall act on his own and shall not have the benefit of the advice of the Non-Party Caretaker government as much as he would from the elected government.

Exclusion of the armed services from the executive competence of the Non-Party Caretaker Government is not clearly stated in the Thirteenth amendment.

The thirteenth amendment formally establishes the convention applicable to a caretaker government. It seems that the limited power of policy decision granted to the caretaker government is an extension of its power. However, such powers are to be exercised if required for discharging its responsibilities for holding the general election or carrying out administrative functions. For instance, in the normal circumstances a caretaker government is not expected to promulgate an ordinance debaring bank loan defaulters from seeking election or making election conduct rules legally binding; promulgation of such laws is consistent with the responsibility of holding a general election.

President and Caretaker Government

The relationship between the President and the Caretaker Government is modeled on that between the President and the Cabinet or the Prime Minister. During the time the Nonparty Caretaker Government is in office, all executive power of the Republic is exercised in accordance with the Constitution by or on the authority of the Chief Adviser who will act on the advice of the Non-Party Caretaker Government [Section 58B(3)]. The executive power does not extend to those provisions of the Constitution which are explicitly made ineffective (i.e. Articles 48(3), 141A(1) & 141C(1)). This is similar to the manner in which executive power is exercised by the Prime Minister: The executive power of the Republic shall, in accordance with this Constitution, be exercised by or on the authority of the Prime Minister. [Article 55(2)]. All executive actions are taken in the name of the President, who determines by rule or order the instruments made in the name of the President are attested or authenticated. The President also makes rules for allocation and transference of business [Article 55 (4), (5) & (6)]. All these provisions will continue during the administration of the Caretaker Government with necessary adaptations — i.e. the President shall continue to act on the advice of the Caretaker government in these respects as he did from the elected government [Section 58B(4)]. The rules for attestation or authentication of the instruments are already in existence. Rules of business and allocation of business are also continuing in force. Allocation of business simply means organizing the functions of government into different ministries and divisions. It should be noted that changes in the manner of attestation or authentication of instruments and rules of business and allocation of business are done by the President on the advice of the Cabinet. If the President were to make changes in these rules and allocation of business, he would be guided by the advice of the Caretaker Government. Further, the present Government is not expected to effect any fundamental change in these matters as such changes are not required for discharge of its mandate.

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gency for the whole country or any particular area when security or economic life of the country is threatened by war or external aggression or internal disturbance; no such proclamation is valid without the prior counter signature of the Prime Minister [Article 141A(1)]. While the emergency is in force, the President can also suspend court's jurisdiction to enforce certain fundamental rights on the written advice of the Prime Minister. [Article 141C(1)]. While all these powers are to be exercised by the President, it is clear that he acts only on the advice of the Prime Minister. These fall in the third category of powers which the Non-Party Caretaker Government cannot exercise. These provisions imply that during the time that the Caretaker Government is in office the President cannot promulgate emergency. These constitute the third category of the mandate of the Non-Party Caretaker Government i.e. things which are explicitly excluded from its competence.

Exclusion of the armed services from the executive competence of the Non-Party Caretaker Government is not clearly stated in the Thirteenth amendment. The exclusion seems to be based on the amendment of Article 61 of the Constitution.

The supreme command of the defence services of Bangladesh shall vest in the President and the exercise thereof shall be regulated by law, and such law shall, during the period in which there is a Non-Party Caretaker government under article 58B, be administered by the Pres-

ident. (Italics show amendment). The decision that the armed services are not within the competence of the Non-party Caretaker Government is perhaps based on one particular interpretation of the amendment — namely, administration by the President without the advice of the caretaker government. The exclusion is not explicit and the language of the amendment here is ambiguous. Further, this circumscribes the powers of the Non-Party Caretaker Government relative to the elected government in regard to the armed services.

Article 58B(3) read with Articles 58D and 58E makes a persuasive case in favour of the view that those provisions of the Constitution not made ineffective explicitly remain in force. As a corollary to this, the rules and administrative practices associated with those provisions of the Constitution also remain in force. With respect to the armed services, it would imply the following: first, organization of the functions of the government relat-

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ing to defence or the armed services would remain unchanged, second, administration of the law relating to the armed services, the supreme commander shall be guided by the caretaker government, and finally, the functions related to defence cannot be transferred to the President as it involves a change in the rules allocating business. The functions of the supreme commander can be transferred to the President and taken out of the executive responsibility of the Caretaker Government only if the thirteenth amendment unambiguously says so. In our view, the thirteenth amendment does not clearly do so — and given the ambiguity, the position as before the Caretaker Government took office should remain unchanged. This view is consistent with the meaning and spirit of the thirteenth amendment which vests all executive authority in the Chief Adviser and defence cannot be excluded from the domain of executive responsibility of the Caretaker Government only on the basis of interpretation of some ambiguous provision of the thirteenth amendment.

There are a number of powers which are exercised exclusively by the President. In all these cases the President acts on the advice of the executive branch of the government. We do not make a complete catalogue of these powers but cite a few instances to clarify our point. The Judges of the Supreme Court are appointed by the President who also determines the number of judges for the Appellate Division and the High Court Division. The Chief Justice and the other judges are independent in exercise of their judicial functions. [Articles 94 & 95(1)]. The President acts on the advice of the government which consults the Chief Justice in all these matters. The Comptroller and Auditor General is appointed by the President who also determines the terms and conditions of service by order. The Comptroller and Auditor General is independent in carrying out audit of all government agencies, courts, etc. The President also receives and has the reports of the Comptroller and Auditor General laid before Parliament. [Articles 127, 128 & 132].

The President appoints chairman and other members of the Public Service Commission and determines their

terms of service subject to the provisions of the Constitution and law in this behalf. The Commission is responsible for recruitment of officers for the Republic and determines the principles and standards for the government personnel system. The annual report of the Commission is submitted to the President who has it placed before Parliament. [Articles 138 & 141].

The above instances bring out some of the characteristics of the methods in which the President exercises power vested in him. These institutions (e.g. C & AG, PSC, SC) are designed to exercise control over the executive branch of the government; yet the President does not act directly in making appointments to these institutions. There are elaborate procedures of consultation — such as consulting the Chief Justice in cases of appointment to the Supreme Court; the executive branch of the government carries out the consultation and the President acts on its advice. All these institutions report to the President and the President communicates with Parliament through a minister. These are aspects of a modern govern-

ment which tries to establish checks and balances within the framework of parliamentary system. The important point to note is that the President acts on the advice of the executive branch of the government even in respect of those institutions which exercise control and enforce accountability; more importantly, the President acts on the advice of the government in all matters even though the relevant laws or constitutional provisions do not explicitly require him to do so.

Genealogy of Confusion:

The confusion seems to have followed from splitting the defence related functions of the government between the Supreme Command Headquarters Division and the Ministry of Defence. As in all other countries, in Bangladesh also all the functions related to defence were allocated to the Ministry of Defence. During President Ershad's rule, a separate Supreme Command Headquarters Division was created and placed under the President. The distribution of functions between the Ministry of Defence and the Supreme Command Headquarters Division reveals the anomaly and organizational problem. The new division made responsible virtually for all policy matters and deployment of the armed services, while the traditional Ministry of Defence remained responsible for some of the civilian or quasi-civilian functions allocated to that Ministry. The functions of the Supreme Headquarters Division included: preparation of defence policy and plan; mobilization and coordination of the defence forces in times of war and emergency; coordination and control of defence services when deployed in aid of civil power; industrial concerns with war-like stores and ordnance factories; appointment to posts of colonels in the army and equivalent ranks in the navy and air force etc. The following are some of the responsibilities retained for the traditional Ministry of Defence: defence of Bangladesh and defence services excluding during emergency, war, or in aid of civil administration; meteorological services and space research and remote sensing organization (SPARSO); national cadet corps and cadet colleges; hydrographic survey; Muktiyodhya and Muktiyodhya Kalyan Trust; gallantry awards; liaison with international organization, etc. The Ministry of Defence, it would be clear, had little substantive function in regard to the core area of de-

fence. In addition, the distribution and splitting of functions were 'funny' in many cases. For instance, it is difficult to understand how the Ministry would discharge responsibility for defence of Bangladesh if the policy and deployment of the forces were under control of the Supreme Command Headquarters Division. This organizational anomaly was overcome by placing both the Supreme Command Headquarters Division and the Ministry of Defence under the President. The Ministry became basically an adjunct of the Supreme Command Headquarters Division, — maintaining liaison with other ministries — such as Finance Division, Ministry of Foreign Affairs, Ministry of Land Administration and Land Reforms, etc. in respect of budget, participation of the armed services in UN sponsored peace-keeping operations, allotment of khas land or acquisition of land for expansion of cantonment or defence officers housing facilities, etc. The substantive decisions are taken by the Supreme Command Headquarters Division; the Ministry of Defence gets involved in their implementation.

The President, who is the head of the state, is the supreme commander of the armed forces in countries which have a parliamentary system. But, as far as we know, none of these countries has a separate administrative structure to assist the supreme commander in discharging his responsibilities as such. There was no separate Supreme Command Headquarters Division in Bangladesh either until President Ershad's rule. President Ershad, who came to power through military coup-d'etat, had to retain control over the defence services, especially the army, until his popular support was strong enough to discourage any military adventure. The Supreme Command Headquarters Division provided an organizational device for this.

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Begum Zia inherited this anomaly when she assumed the office of the Prime Minister. An elected Prime Minister, she had no need for access to or control over the defence establishment except what the government had in discharge of its executive power which vested in the Prime Minister. Begum Zia did not remove the anomaly by abolishing the Supreme Command Headquarters Division and integrating it with the Ministry of Defence. The Supreme Command Headquarters Division was placed under the Prime Minister who also held the defence portfolio. This points to two important aspects of the interpretation to which we are inclined. First, designating the President as the supreme commander of the armed services does not mean that he exercise this power directly and without the advice of the executive branch of the government. Secondly, defence is very much a part of the executive authority of the government; a minister could hold the portfolio of the Ministry of Defence and that of the Supreme Command Headquarters Division — in this event the Prime Minister — while the supreme command is vested in the President as provided in the Constitution.

The existence of the Supreme Command Headquarters Division may mislead some people to think — though rather naively — that this is a distinct function of the President and that he would act directly in discharge of this function. The functions of the Supreme Command Headquarters Division are very much part of the executive authority of the government. Under the thirteenth amendment the executive authority of the Republic in the Chief Adviser. If the defence portfolio were taken away from the Chief Adviser and vested in the President, then the executive authority in its entirety no longer vests in the caretaker government; it is split and the Caretaker Government shares the executive power with the President. In other words, the President assumes part of the executive power and thus becomes part of the Caretaker Government. There was virtually no debate in the House on the thirteenth amendment which can throw some light on the 'actual' intention of the law-makers.

We have tried to demonstrate that the view that the armed services are part of the executive authority of the Caretaker Government is more consistent with the spirit of the Constitution as well as the thirteenth amendment. If the President were to hold the defence portfolio, this will diminish both the President and the Caretaker Government's executive authority. The extent it does not have authority over an important part of the executive functions of the government; the President becomes diminished to the extent he shares executive authority with the Caretaker Government and ceases to be only the Head of the State to whom the Caretaker Government is collectively responsible. Unless the law-makers make it clear that their intention was to deny the Caretaker Government its executive authority in respect of the armed forces and the language in the thirteenth amendment on this was ambiguous — either deliberately or inadvertently because of the expeditiousness with which the amendment was passed — it will make sense to adopt the more consistent interpretation. Such an interpretation preserves the integrity of the Caretaker Government as the repository of the executive authority and that of the President as the Head of the State to whom it is collectively responsible.

The author is a publisher (UPL) and a columnist.

To the Editor...

Civil servants

Sir, With reference to Mr. M Rahman's letter printed in your daily on 16.4.96 regarding my comments on the recent undignified conduct of some of our senior Secretaries, I would like to answer some of the questions raised by the learned gentleman. To take his last query first, I would like to remind him that whether the BNP government was 'neutral, dignified and dedicated' is not the point at issue here. The relevant point at issue is whether the civil servants' partisan conduct was not a gross violation of the Service Rules by which they are legally and morally bound. Mr Rahman justifies the conduct of the Secretaries by saying that even their counterparts in England and India would have done likewise if they had "a BNP-style government sitting over their head" — a government that politicises the administration, builds and supports armed cadres, treats the bureaucracy as its own servants, holds farce in the name

of election and enters the secretariat with armed cadres." Is Mr Rahman oblivious of our past history? Or has he deliberately chosen to ignore it? When he talks of politicising the administration, has he forgotten its most blatant demonstration when bureaucrats made a bonfire with others to join BAKSAL? Agnani, wasn't the appointment of a Circle Officer to the prestigious post of Additional Secretary of the Establishment Division, by virtue of being related to a powerful political personality, an example of politicisation of the administration?

Let's examine Mr Rahman's next allegation — building and supporting armed cadres. Surely, Mr Rahman must know that this activity is not the exclusive prerogative of the BNP. Can any political party worth its name honestly deny maintaining its own armed cadres? Didn't we have ample proof of this during the recent 'people's movement'? If, as Mr Rahman seems to imply, the holding of the far-

cal elections on February 15, 1996, is one of the reasons for the bureaucrats' partisan reaction, how is it possible then that the same bureaucrats are merrily working under a caretaker government, the creation of which was made possible by amending the Constitution to the 'illegally' and 'farcically' constituted 6th Parliament?

Shouldn't we call a spade a spade? Hasina Zaman Dhaka

"A Black Law..."

Sir, Advocate Sultana Nahar's article 'A Black Law and its Blatant Use' published in your esteemed daily on 7-4-96 is a good presentation of a very bad law which has almost broken the back of the civil service, namely Act XII of 1974. However, the worst damage was caused by its predecessor, the Presidential Order No 9 which did not allow any show cause notice, the right of defence or right of appeal to a court of law. Its successor, the

executive authority vests in the Chief Adviser. So the defence functions are part of the jurisdiction of the caretaker government unless there is explicit exclusion — and there is no clear provision to this effect in the amendment. The functions related to the armed services, therefore, form part of the executive authority of the Non-Party Caretaker Government. The organizational anomaly originating during President Ershad and continuing through Begum Zia might have given rise to the mistaken view that the role of the supreme commander of the outside the ambit of the executive power of the government. As argued above, there is no clear warrant for such an interpretation in the Constitution as well as the thirteenth amendment.

Not the Time for Controversy:

We believe that it is not the time for controversy and that we should devote ourselves to the task of holding a general election of members of parliament peacefully, fairly and impartially. Our attempt was not to generate controversy where there is none; it was directed towards seeking an interpretation of the thirteenth amendment where it seems vague and has already generated controversy. In our view a sensible interpretation of the amendment with respect to the armed services is important at least for two reasons. First, the thirteenth amendment will govern all general elections to the parliament in the future; we do not foresee the possibility of changing the constitutional arrangements too soon. A clear interpretation of the amendment is necessary for correct application of the Constitution as amended. Secondly, the interpretation ought to be consistent with the spirit of the Constitution and the thirteenth amendment. As we showed above, the thirteenth amendment substitutes the Caretaker Government in the place of the Cabinet and explicitly vests the executive au-

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thority of the Republic in the Chief Adviser. If the defence portfolio were taken away from the Chief Adviser and vested in the President, then the executive authority in its entirety no longer vests in the caretaker government; it is split and the Caretaker Government shares the executive power with the President. In other words, the President assumes part of the executive power and thus becomes part of the Caretaker Government. There was virtually no debate in the House on the thirteenth amendment which can throw some light on the 'actual' intention of the law-makers.

We have tried to demonstrate that the view that the armed services are part of the executive authority of the Caretaker Government is more consistent with the spirit of the Constitution as well as the thirteenth amendment. If the President were to hold the defence portfolio, this will diminish both the President and the Caretaker Government's executive authority. The extent it does not have authority over an important part of the executive functions of the government; the President becomes diminished to the extent he shares executive authority with the Caretaker Government and ceases to be only the Head of the State to whom the Caretaker Government is collectively responsible. Unless the law-makers make it clear that their intention was to deny the Caretaker Government its executive authority in respect of the armed forces and the language in the thirteenth amendment on this was ambiguous — either deliberately or inadvertently because of the expeditiousness with which the amendment was passed — it will make sense to adopt the more consistent interpretation. Such an interpretation preserves the integrity of the Caretaker Government as the repository of the executive authority and that of the President as the Head of the State to whom it is collectively responsible.

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Martial Law Order No 9, which was a carbon copy of P O No 9, finished whatever was left of the sense of security and dignity of public servants. Thus successive governments since independence have contributed their mite to destroy the morale, integrity and discipline of the government servants.

We had parliaments packed with indifferent and uncaring representatives of the people. No one has ever bothered to create good government through an efficient and responsible civil service. Many commissions were set up and foreign tours were undertaken to study the administrative system in other countries. These have produced little result. In fact, the changes carried out in the name of reform of a service that was denounced as a model of colonial rule did more harm and created more dissension. The bureaucracy has expanded manifold. And with its inefficiency and corruption.

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