



## LAWvision



# The premature departure of a President The Constitution takes a back seat

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"Affirming that it is our sacred duty to safeguard, protect and defend this Constitution and to maintain its supremacy as the embodiment of the will of the people of Bangladesh so that we may prosper in freedom..." - From the Preamble of the Constitution of the People's Republic of Bangladesh

THE dramatic resignation of Professor A.Q.M. Badruddoza Chowdhury from the post of the President of the Republic on 21 June 2002 following the dictates of the Parliamentary Party of the ruling BNP raises couple of critical constitutional questions. It brings forth the old debate of 'neutrality' of the President in a parliamentary democracy. It also seriously questions the sincerity of the ruling class to maintain the supremacy of the Constitution, as the embodiment of the will of the people vis-à-vis will of the party. Whether we may prosper in freedom as desired by the framers of the Constitution in the Preamble still remains to be seen.

### Can a Parliamentary Party pass a resolution asking President to resign?

The two-day meeting of the Parliamentary Party of the ruling Bangladesh Nationalist Party (BNP) concluded on 20 June 2002 'apparently asking' President Prof. Badruddoza Chowdhury to resign from the office of the President immediately. The meeting with Leader of the House and Prime Minister Begum Khaleda Zia in the chair adopted the resolution unanimously urging the President to resign as the BNP lawmakers had lost confidence in him. Insiders revealed that the BNP Parliamentary Party took such hard line following demand of a considerable number of BNP MPs to impeach the President as he refrained from visiting the mazar of late President Ziaur Rahman on the occasion of his last death anniversary (30 May 2002).

Briefing the newsmen Chief Whip Khandaker Delwar Hossain said on 20 June that the decision was unanimous and it had been conveyed to the President. BNP Secretary General Abdul Mannan Bhuiyan told the journalists that they did not want that the President would play partisan role but the reluctant mood of the President to show due respect was unfortunate, he regretted. Majority of the speakers were critical of the President as he held back from citing the name of Ziaur Rahman as proclaimer of independence in his message to the nation on the eve of death anniversary of the late Shaheed Zia.

From the constitutional point of view, this development is both unprecedented and very unfortunate. In fact, there is no provision in the Constitution that says a president has to resign as per the resolution of a parliamentary party. It is also very disturbing to note that the MPs viewed the President as a mere party representative, not as the holder of the highest constitutional office. The President might be nominated by a particular party but he could not be removed, or asked to be resigned by a political resolution. The Constitution does not authorise any parliamentary wing of the ruling party to take up such measure. A Parliamentary group or party can formally moot 'vote of no confidence' against the Government in the prescribed manner of the Constitution and the Rules of Procedure of the Parliament. Similar motion can also be mooted against the Leader of the House or the Prime Minister. They simply cannot pass a resolution asking the President to step down. The Constitution does not permit such course of action. It is against the spirit and letter of the Constitution.

Once elected, the President does not have any relation with the Parliamentary Party. The Parliamentary Party cannot dictate him. There is no arrangement of such direct collective control over the President even in a parliamentary democracy. As per Article 48 (3), in the exercise of all his functions, save only that of appointing the Prime Minister pursuant to clause (3) of article 56 and the Chief Justice pursuant to clause (1) of article 95, the President shall act in accordance with the advice of the Prime Minister. The only manner a President can be removed is by way of impeachment. The resolution asking resignation in disguise of the threat of impeachment of a sitting President is nothing but abuse of the present government's two-thirds majority.

### The Office of the President and the vexed question of neutrality

In some democratic systems, the head of the state is also the head of the government and, therefore, he will also be the head of the political executive. The US presidency represents this form. In Britain, the monarch is the symbolic head, representing the British nation. The powers of the government are vested in the political office of the prime minister. In our parliamentary democracy we have adopted the latter form. The President of Bangladesh is the first citizen and represents the Bangladeshi identity and does not, therefore, belong to any particular political party. He is elected by the representatives of the people through an electoral college, e.g. Members of Parliament.

Article 48 (2) of the Constitution of Bangladesh unequivocally states the unique position of the President in the Republic. 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 other law. There is a positive obligation imposed on the Prime Minister to keep the President informed on matters of domestic and foreign policy, and submit for the consideration of the Cabinet any matter, which the President may request him to refer to it (Article 48 (5)).

During the two-day meeting, some 35 ruling BNP lawmakers condemned the "neutral role" played by the BNP-appointed President. (The Daily Star, 21 June 2002). The President can, in no circumstances, be considered as a member or actor of any political party, group, or class. He might be a politician in past, there is no constitutional bar on nominating a politician as a President candidate. However, he ceases to have any formal or official link with any political party once he is elected to the highest position of the Republic. One of the most fundamental prerequisites of the President is her/his neutrality. Unlike the Prime Minister, the President does not need to enjoy the confidence of the MPs.

Professor Badruddoza Chowdhury had assured the nation, with his very first words as President, that he would try to maintain utmost neutrality as the head of state. The assurance has its validity in our political context. Though the President cannot exercise any powers, beyond appointing the Prime Minister and the Chief Justice under constitutional stipulation, he is seen as the one who should provide the moral leadership to the country. Such leadership is, no doubt, crucial for a nation, which has not had the right kind of experience with parliamentary democracy over the last one decade or so, particularly when it comes to political tolerance. Professor Chowdhury's decision to resign from the BNP added substance to the neutrality that he was committed to. By sloughing off his party identity, he was in a position to remain above partisan controversies. Dr. Chowdhury's visit to the residence of his former counterpart in Awami League Mr. Abdus Samad Azad defying protocol was considered a commendable move earning the support and admiration of many.

The point is that though the President has no powers, people would still be expecting him to steer the country out of any crisis constitutional or political. Neutrality is a trait that people would invariably look for in the man holding the highest constitutional position.

### Is the President accountable to the Parliamentary Party of any Political Party?

Members of Parliament elect the President of Bangladesh in accordance with law (Article 48(1)). However the President is not accountable to any parliamentary group of any political party including the ruling one. The President during his term of office shall not be qualified for election as a Member of Parliament, and if a Member of Parliament is elected as President he shall vacate his seat in Parliament on the day on which he enters upon his office as President (Article 50 (4)). Unlike the Prime Minister, who is directly accountable to the Parliament, parliamentary party to his/her political party in particular, the President is accountable to the people through the Parliament as a whole. In the recent episode, it is really very surprising to note that without resorting to the formal process of impeachment, the members of the Parliamentary Party of the BNP threatened to impeach him for betraying its political ideology, not the interests of the country or the Constitution.

### What is Impeachment?

Impeachment, a proceeding in which accusations are brought by a legislative branch of a government against



civil officials (chiefs of state, cabinet members, and judges). Legally the term impeachment applies only to the indictment. In popular usage it embraces also the trial of the accused, usually conducted by the higher branch of a legislature. In the United States the power to impeach resides solely with the House of Representatives; the power to try an impeachment case resides solely with the Senate. Article II, Section 4 clearly states, "The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of Treason, Bribery, or other high Crimes and Misdemeanors."

In some countries, including Belgium, France, India, and Italy, and in some states of the United States, a court conducts the trial. In a few countries, including the Republic of China (Taiwan) and Cuba, impeachment proceedings may be brought by an executive body against civil officials. Although in most countries impeachment is a device for removing civil officers, in some countries, notably England, it applies also in theory to private citizens to commoners, for treason or other high crimes and misdemeanors; to peers, for any crime.

Impeachment existed in ancient Greece, in a process called the *eisangelia*. The modern institution did not originate until the latter part of the 14th century, in England, and it spread throughout the world. In the modern world impeachment clauses appear in the constitutions of many political systems. The English system, which began as a means of enforcing responsibility of the king's ministers to Parliament, was used heavily for 200 years beginning with the accession of James I in 1603. With the rise of the doctrine of ministerial responsibility in the 19th century, however, whereby the cabinet holds executive authority and Parliament may enter a vote of censure or no confidence, the need for the procedure receded. It was last used in England in 1806, in an unsuccessful attempt to remove Lord Melville.

Many foreign governments lack an impeachment mechanism or else have one largely in name only, making it unlikely that opposition leaders will

want to use it. Other governments both have and have used the impeachment mechanism. Leaders who have survived impeachment attempts include Sri Lanka's President Ranasinghe Premadasa (1991) and Russian President Boris Yeltsin (1993). Officials who have resigned in the face of impeachment proceedings include Venezuela's president Carlos Andres Pérez (1993) and Indian Supreme Court justice V. Ramaswami (1993). Those who have been removed from office following the successful prosecution of an impeachment include Nigeria's Gov. Balarabe Musa (1981) and Brazil's Pres. Fernando Collor de Mello (1992).

### Impeachment in Bangladesh

Article 52 of the Constitution deals with impeachment of the President. The President may be impeached on a charge of violating the Constitution or of grave misconduct. The notice of motion has to be signed by a majority of the total number of members of the Parliament and delivered to the speaker, setting out the particulars of the charges, and the motion shall not be debated earlier than fourteen nor later than thirty days after the notice is so delivered. The Speaker shall forthwith summon Parliament if it is not in session. The Conduct of the President may be referred by Parliament to any court, tribunal or body appointed or designated by Parliament for the investigation of a charge under this article. The President shall have the right to appear and to be represented during the consideration of the charge. If after the consideration of the charge a resolution is passed by Parliament by votes of not less than two-thirds of the total number of members declaring that the charge has been substantiated, the President shall vacate his office on the date on which the resolution is passed. The President may also be removed from office on the ground of physical or mental incapacity. However that incapacity has to be proved before a formal medical board (Article 53). There is no precedent of holding a impeachment trial for the holder(s) of the constitutional position in Bangladesh.

### The Impeachable Crime

It is clear that violation of the Constitution and grave misconduct are defined in Bangladesh as impeachable crime. Failure to mention the name of the party founder and not visiting his mazar cannot constitute an offence under this specific constitutional category. If the president declined to resign then the ruling BNP would have faced difficulties to impeach him because there is hardly any valid ground on which they could proceed. The question of physical or mental incapacity does not arise in his case at all. Impeachment is a political process guided by legal and/or constitutional directives designed to remove holders of the constitutional position who breach the public trust in matters of state, not any political party.

### The defeated spirit of the Constitution

The word "democracy" refers to a decision-making process that is eminently political. The election of President is, for example, the result of a collective democratic decision. A democratic decision must be either a popular result or made in the interest of the people. For any person holding constitutional position, it is traditionally understood that anonymity and neutrality are essential elements for any decision to be made in the interest of the people. The saga of forcing an elected President to step down by a political resolution is against the norms and values of democracy. It does not augur well for our hard-earned democracy. It also vitiates constitutional spirit of democracy and ethos of freedom. The nascent parliamentary democracy of Bangladesh becomes the ultimate loser. The government should realise its two-thirds majority is to provide good governance and not to establish its brand of party mantra.

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## LAW campaign

26 June: International Day against Torture and for the Victims of Torture

# Take practical steps to eliminate torture

ASIAN HUMAN RIGHTS COMMISSION

EVERYONE knows that torture is bad, that it is a heinous crime and that it violates one of the most basic rights regarded in the Universal Declaration of Human Rights and clearly articulated in the UN Covenants and Conventions. But torture continues to be practiced in a massive scale in many parts of the world, and is endemic in most Asian countries. It is only through effective action aimed at eliminating torture that a change can be made to occur and the failure of which would result in continuous cynicism and the demoralization of the people.

### What we can do to eliminate torture

**1. To make torture and other cruel, inhuman or degrading treatment or punishment a crime in each country:** There are many countries that have done it. This is done by adopting the UN Convention against torture and other cruel inhuman and degrading treatment or punishment into the local law, or prescribing a serious mandatory punishment. In some countries the minimum sentence for a proven case of inflicting torture is seven years of mandatory sentence. It is disappointing to see in many countries, torture is not treated as a crime and even the human rights movements in these countries have failed to get such a law passed. The result is that the condemnation of torture remains at a low level, and actions to eliminate it are rather weak and ineffective. Where there are laws against torture, it is also necessary to develop ways to ensure that the laws are enforced.

**2. To make the society see the link between the defense of economic, social, cultural rights and the elimination of torture:** The promotion and defense of ECOSOC rights require effective freedom of association and expression. Those who exercise the right of association and expression must be able to live without fear of torture and assassinations for having engaged in their activities. Today fear grips most societies, and deep levels of intimidation paralyzes actions for seeking economic, social and cultural rights. Assured of the possibility of getting police support by way of torture and assassinations, various forms of actions are taken by employers, the middlemen, and others to deprive the basic economic, social and cultural rights to the people. To talk of ECOSOC rights and not to fight to eliminate torture is to ignore this reality.

**3. Form community organisations that work towards elimination of torture:** Often, the anti-torture groups tend to be small and get engaged only in limited activities. Such a massive problem like torture cannot easily be dealt with. On the other hand, as torture affects the entire society and every aspect of it, there is very good reason for the community to take a serious interest in the matter. The experience shows that when approached, the community does respond quite vigorously. Often the community inaction is due to absence of serious calls for action, backed by meaningful strategies. Small but relevant community work should be the special responsibility of

community leaders, including religious leaders (such as priests, monks, nuns and lay leaders) the journalists, academics and teachers.

**4. Torture should also become a primary concern for women's movements:** While they are affected by torture, including sexual abuse and rape in custody, they are uniquely disadvantaged in that when women go to seek help from the law enforcement authorities, they are likely to become victims of the law enforcement officers. Besides, even when men are tor-



tured, the women equally suffer. The economic burden of torture victims often fall on women.

Even in cases of domestic violence, it is not possible to fight it effectively, so long as violence by law enforcement officers are taken as legitimate. Without de-legitimizing torture, it is not possible to delegitimize domestic

violence, as heinous forms of male behaviors that deserves serious punishment. Besides, the women are aware that when they complain about their violent husbands, the chances are that the law enforcement officers may torture them. Due to this women will desist complaining, as they will be socially ostracized for getting their husbands tortured by the police. Thus, all community groups have good reasons to be engaged in the elimination of torture and that such community organisations are a dire need if there is to be an effective fight against torture.

**5. Making serious efforts at rehabilitating the torture victims:** Experience shows that one act of torture, can cause serious harm and not just to the victim, but his entire family. The family loses the breadwinners, has to incur medical and legal costs, and often get socially ostracized. The work of rehabilitation should be to help victims and their families, so that such harm will not occur. Such rehabilitation thus requires, financial help to the families so that they will not get into serious debt and that they can carry on with their lives, medical help to the victim without making it a burden on the family and psychological help for the victim and the family.

Such rehabilitation is possible only through strong organisations and community support. The community support can reduce the financial burden for such work. Organisations and families can help with protection, care and expert advice. Sometimes, centers are needed to provide protection to the victims from perpetrators and for rest and recovery. Often, when the perpetrators of torture are faced with legal or disciplinary inquiries, they harass the victims to get the complaints withdrawn. Comprehensive rehabilitation is very much a need. But in most countries, rehabilitation efforts are very small, if they exist at all. A sad result of this is that the victim become dependent on the perpetrators for little mercies. To obtain these little mercies, the victim forgo their rights.

### 6. Develop better documentation, information sharing and solidarity networks:

Such networks should involve

- quick action programs such as Urgent Appeals
- Communication networks giving such information to a vast audience made possible by modern communication and media.
- Skills training programs to collect and use such information,
- Special networks for lobbying at national and international levels
- quick and effective legal aid programs
- quick and effective humanitarian assistance programs.

Law Desk along with the Asian Human Rights Commission urge to make a firm determination to take effective action in eliminating torture.

## LAW opinion

# Information technology in legal profession

MOYEEEN FIROOZE

We are as a nation gaining momentum with the information age. Use of computer is no longer a luxury but a necessity. Computer has revolutionized modern life. Although we are slow to respond to this reality, it is optimistic that our young generation is making significant progress.

Compare to other professions, legal professionals are way behind in utilizing this technology. Many of us do not even feel the importance of using computer let alone using it. This is not because we do not want to, but because we do not have enough information from which we would be enlightened as to the usefulness of computer in the legal profession.

Traditionally, legal professionals use typewriter in drafting various documents. Once a document is typed by using a typewriter, it is hard to amend or modify. Sometimes, typed words are not clear and visible. Drafting in a computer is so easy that any document may be amended million times without giving single scratch on papers. In Computer, document can be formatted and presented in a simplified and attractive manner. It is a common sight in a law chamber or in an office of a legal professional that documents are piled up on floor or shelves. Finding a precedent or research material from work previously done is very difficult since it may involve prolonged battle with countless files. Computer does make life easy in relation to compilation of data. All files can be recorded in computer systematically and coherently. Even important images or hard documents can be kept in computer using a scanner, which will be available for a long time.

Legal professionals cannot imagine their workplace without a library. However, relevant books on appropriate time may hardly be found due to lack of proper library management. Computer is very useful in managing a library. Name, author and subject reference of books may be inserted in the computer and a search engine will help to find out the exact location of the relevant book. This will certainly increase the efficiency of work. The most amazing development in relation to computer is Internet. Internet and the World Wide Web (www) are changing the face of the world in the most dramatic fashion. Internet is the heaven for gathering information. Simply, there is nothing that cannot be found in the internet. Internet browsing has opened up the door for legal research. There are thousands of websites where statutes and case references from various countries, forms and precedents, sample agreements, legal journals, articles on numerous topics can be found. Although some of them are pay sites, there are numerous sites, which are free. By simply typing a relevant word and giving search in the internet, required information might be instantaneously available.

In future IT and IT related laws, shall play a vital role. Data protection, privacy laws, cyber terrorism laws, computer fraud, computer crime, internet law, intellectual property laws are some of the examples where legal professionals will have to take active part. Electronic commerce (e-commerce) is a fast growing commercial concept. Since computerization expanded into the business community, systems of electronic data interchange (EDI) have facilitated the placing and dispatching of orders between commercial undertakings. Multi-trillion dollars worth of transactions are taken place through internet every year. We are not out of these commercial activities. Due to a wide range of legal complications, involvement of legal professionals is inevitable. Unless we are ready to tackle problems involving computer, we will face irreparable consequences.

Effective and fast access to information is a key to improve efficiency. Computer opens up the floodgate for using, storing processing and gathering information. Unless we get use to computer oriented technology, our level of contribution towards our legal system will remain insufficient and standard of contribution will be incompatible with the legal system around the world.

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