

The constitutional process

The nation was left guessing, and that the president would assume the position of the chief advisor was revealed to the nation only when he was invited to take oath as the chief advisor at the swearing in ceremony. This was an extremely non-transparent way to assume the position of a supposedly non-partisan, neutral caretaker administrator, supposed to ensure holding of a transparent general election. This is bound to raise serious doubts about the president's honesty of purpose, and one doesn't have to be rocket scientist to guess how transparent and fair the upcoming election would be. I only hope that the honourable president and now chief adviser proves me wrong in the coming months through his actions. Let us see.

DR AHMED ZIAUDDIN

A leading weekly, *The Economist*, in its October 26 edition wrote an article on Bangladesh titled: "Isn't democracy wonderful?" The ironic title turned out eerily right in less than seventy-two hours, when, the president assumed "the functions of the Chief Advisor of the Non-Party Care-taker Government in addition to his own functions under the Constitution."

There is now serious question whether the president's assumption of the position of the chief advisor was constitutional or not, whether it followed the constitutional procedures or not. It is almost beyond doubt that the assumption did not follow the constitution's ordained sequences.

As the tenure of the BNP-Jamaat alliance came to an end at midnight of October 27, on October 28, the president met two leading leaders of BNP and Awami League, informed them of Justice KM Hasan's inability to assume the position of the chief advisor, contemplated by the constitution as the last retired chief justice, and according to news reports, expressed his preparedness to lead the caretaker government.

Amongst others, in a front-page appeal, the editor of *The Daily Star* urged the president to stay away from controversy: "[The president's] offer of himself to head the caretaker chief came a bit too early to be above all legal questions and propriety. There are five distinct steps that need to be taken before the president becomes a legal alternative."

The Awami League rightly rejected the president's offer to take over the caretaker government, as did the Supreme Court Bar Association.

The president, however, disre-

garded all appeals, but most importantly, also disregarded the provisions of the constitution. Article 58 C provides six options, five of which have to be exhausted first before the president could become chief advisor.

Option 1: Under Article 58C (3): "The President shall appoint as the Chief Advisor the person who among the retired Chief Justices of Bangladesh retired last" and who is otherwise qualified under Article 58C (7). Here the word "shall" means "must" in law with no choice (as opposed to phrase "may" which connotes discretion).

In case, "such retired Chief Justice is not available or not willing to hold office of Chief Advisor," then:

Option 2: "The President shall appoint as Chief Justice the person who among the retired Chief Justices of Bangladesh retired next before the last retired Chief Justice."

Use of phrase "retired Chief Justices of Bangladesh," contemplates the possibility of presence of more than one retired chief justice.

Option 3: Article 58C (4): "If no retired Chief Justice is available or willing to hold office of chief advisor, the President shall appoint as Chief Advisor the person who among retired Judges of the Appellate Division retired last."

In case, "such retired Justice is not available or not willing to hold office of Chief Advisor," then:

Option 4: Article 58 C (4): "The President shall appoint as Chief Justice the person who among the retired Judges of the Appellate Division retired next before the last such retired Judge."

Option 5: Article 58 C (5): "If no retired Judge of the Appellate Division is available or willing to hold office of Chief Advisor, the President shall, after consultation, as far as practicable, with the major political

parties, appoint the Chief Advisor from among citizens of Bangladesh who are qualified to be appointed as Advisors under this Article."

Option 6: Under Article 58 C (6), only "if the provisions of clauses (3), (4) and (5) cannot be given effect to, the President shall assume the functions of the Chief Advisor."

Here, the constitution leaves no choice for the president but to act exactly in this prescribed order. The use of the word "shall" limits the president's power and obliges him to act without fail.

Moreover, the use of plural to denote "retired Chief Justices" and "retired Judges" means that the drafters of the constitution assumed that there could be more than one retired chief justices and judges. This is reinforced by the use of the expression, "If no retired Chief Justice is available" and "If no retired Judge of the Appellate Division is available" in Article 58C (4) and Article 58C (5) respectively, which suggests that option 1 and 2 are only completed when there is not a single chief justice available or willing to act as chief advisor, so also for the retired judges of the Appellate Division.

This also is common sense interpretation. The drafters of the constitution could not have chosen a retired judge of the Appellate Division while still a retired chief justice was around and willing. Equally, where a retired Appellate Division judge was available, the constitution could not have opted for to search a chief advisor from amongst citizens of Bangladesh. The idea was rather simple; first exhaust searching retired chief justices, then the retired Appellate Division judges, then from among the citizens of Bangladesh, and only then, if all efforts failed, the president would assume the responsibility.

Article 107: Advisory jurisdiction of Supreme Court

If at any time it appears to the President that a question of law has arisen, or is likely to arise, which is of such a nature and of such public importance that it is expedient to obtain the opinion of the Supreme Court upon it, he may refer the question to the Appellate Division for consideration and the division may, after such hearing as it thinks fit, report its opinion thereon to the President.

This provision has been there when there are different interpreta-

If sequences of these constitutional mandates are checked with time lines of facts and happenings on the ground, it will be found how the president jumped the queue.

On Friday evening, October 27, the president's office announced postponement of Saturday's (October 28) oath taking of Justice KM Hasan as chief advisor, as he was "indisposed," while immediately, reports appeared in the media quoting persons meeting Judge Hasan around the time, him being in good health, which was confirmed in Judge Hasan's own statement a day later, explaining his inability to accept the position of the chief advisor, where there was no reference of his reported indisposition. That was the first knock to the president's credibility.

In any event, when Judge Hasan declined, the president had no choice but to appoint the remaining retired chief justice Mr Mahmudul Amin Chowdhury. According to news reports, BNP then offered to the president different interpretation to Article 58 C (3) and (4) the constitution against appointing Judge Chowdhury suggesting, that search for retired chief justice stops at two retired chief justices.

Although this is a non-starter argument, because logically a retired Appellate Division judge could not get preference over a retired chief justice, but nonetheless, this was a serious question of interpretation of the constitution which never arose before.

In such a situation, the president had two options; he could have invited eminent legal minds of the country to share their views with him, or, most constitutionally, he should have followed Article 107 of the constitution.

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tions of law with enormous public significance, and there could not be anything more important than appointing a chief advisor of a non-party caretaker government to hold parliament election to ensure continuity of country's democratic system.

He did neither, instead, accepted argument advanced by BNP, as he himself said in his broadcast to the nation after assuming the position of chief advisor.

He did not appoint the third retired chief justice (as the second judge had expired), which, under the constitution, he was obliged to. Meanwhile, Judge Chowdhury said to the press that he was not offered the responsibility.

The president then rightly ignored option 3, as the retired judge is currently holding another constitutional position as the chief election commissioner, and is prohibited by the constitution's provision to hold to two such positions concurrently.

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judge in question, Justice Hamidul Haque, he agreed to accept the position of the chief advisor on condition that if both parties agree about him, since "different explanations of the constitution's Article 58 (C) have surfaced." In his letter to the president, he said, he did not express his inability to assume responsibility.

Justice Hamidul Haque's letter should have been enough for the president to rigorously consider question of different interpretation of Article 58 C by resorting to the Supreme Court's advisory jurisdiction.

But, instead of following these procedures scrupulously one after another, he threw the baby out with the bath-water and offered himself as the chief advisor to the two leaders of BNP and Awami League yesterday, skipping all other provisions, option 4 and 5, only to be reminded by the Awami League later that he should follow the constitutional provisions.

Then he invited only four political parties on October 29 and suppos-

edly followed option 5 as he later claimed in his speech. None of the participants of the meeting reported the president talking about finding a person, from among the citizens of Bangladesh, qualified to be appointed as chief advisor. He did not seek any name nor did he himself suggest any.

The nation was left guessing, and the president assumed the position of the chief advisor, revealed to the nation only when he was invited to take oath as the chief advisor at the swearing in ceremony. This was an extremely non-transparent way to assume the position of a supposedly non-partisan, neutral caretaker administrator, supposed to ensure holding of a transparent general election.

On the contrary, for the last few days, the former prime minister and other alliance leaders have been telling opposition political parties and the nation that the president's decision will be final and all must abide by that, which suggests that this was a

pre-scripted event, where BNP-Jamaat were aware of the president's decision to assume the chief advisor position, as testified by the fact that no name of any eminent citizen was even raised or discussed under option 5. In other words, all was fixed well before the process began.

This is bound to raise serious doubts about the president's honesty of purpose, and one doesn't have to be rocket scientist to guess how transparent and fair the upcoming election would be. I only hope that the honourable president and now chief adviser proves me wrong in the coming months through his actions.

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Winning formula: A real solution?

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"A winning formula," authored by Mr Manzoor Hasan (DS, October 29, 2006), which provides a sharp analysis of our current socio-economic situation as a result of continuing corrupt political system, failure in governance and lack of farsighted leadership, is quite thought provoking and deserves consideration by those who are looking for a window of opportunity to serve the country, by putting the nation's interest at the top.

Political changes in some countries in Asia, Europe, and Africa over the last several decades have shown that when the population is plunged into the depth of uncertainty, a conscientious group of people from among its citizens rise to the occasion to fill the vacuum and lead the nation to meet its aspirations. The situation in our country has long been fertile for that purpose, but our bright and honest intelligentsia did not bother to get down and dirty to cultivate the land and reap the fruits for its citizens.

There are many obstacles for the so-called intelligentsia to form a nationwide political movement for election of "clean candidates." But the first and foremost

of population and intelligentsia are to equally blame for this.

We need to ask ourselves what we did for the people, keeping in mind that our responsibility as the privileged ones do not end after just talking or writing about the miserable situation the nation is thrown into by our corrupt politicians. We have a bigger obligation than just the lip-service – to do something about it.

One reason for this clear disunity among the intellectuals is that most of them in their heart are BNP-sympathisers, AL-sympathisers, JI-sympathisers, or something like that – they are not absolutely neutral and above the party bias. So, what is the meaning of the slogan, "nation first"?

Take this example to illustrate the above point. The current impasse regarding the appointment of chief advisor to the caretaker government (CTG) is a crisis of enormous magnitude which poses a potential danger to our democracy. Should not our constitution provide the guidance to resolve this crisis? If so, why do the media and a group of intelligentsia continue to suggest that the "government of the people" should surrender to the pressure or demands of one political party or the other? Does it

mean that our government did something unconstitutional, or our intellectuals cannot agree with or respect the existing constitution?

If the constitutional provision regarding the appointment of chief advisor to the CTG were good for the last elections, why should it not be good until it has been duly changed by another appropriate amendment? Why should street violence be created by some political groups and used as an excuse by a group of our intellectuals to advocate that government yield to the pressure and compromise the existing constitutional means to appoint the chief advisor? Many of our intellectuals will say that the above questions are too simplistic to point to a solution to the crisis at hand. Well, if this is true, then again it is the intellectuals who are to blame for their inaction or inability to this effect.

Democracy in practical application means that disagreement, when it happens, is to be settled through objective debates, and then decisions made by majority opinions, without any prejudice to the differing

opinions. But, if our intellectuals fail to follow this fundamental principle of democracy in real life, should we be surprised that our cunning and corrupt politicians will use the disagreement or difference of opinions to create confusion and a situation of violence among the common mass in order to achieve their ulterior motives. Using difference of opinions to create division, disunity and violence, or having a decision forced out of undue selfish pressure or coercion is not only undemocratic, but also an uncivilised and inhuman act.

So, where is the ray of hope or sense of direction for that "large chunk (over 50%) of voters sitting on the fence," going to come from? And that is not just for the ensuing elections, but also for the future course of actions for the nation in general? Again, in spite of the above analysis, there is no one but the conscientious, honest, educated and privileged middle class that the nation can think of at this time to serve as a beacon of hope and rescue the people from the clutches of the current band of politicians.

The two major political parties have kept our nation and people hostage for too long already. No doubt, one of those two parties, maybe in alliance with other smaller parties, will once again come to power after the next elections and rule the country for another five years. Since the elections are knocking at the door, it is too late now for the proposed "honest group" to have a significant number of "clean candidates" elected to the Parliament this time.

However, it is the right time for the "honest people" to launch the movement now and work vigorously over the next five years of almost certain misrule by the incoming government. Let us all work together, truly together, to position the "clean candidates" to win the next Parliament in five years from now and prove that Mr Hasan's "winning formula" $GG = (FFE + CC)/time$ is right.

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ment, to exhibit his neutrality in deeds, not in words.

In his first address to the nation, after taking oath as chief adviser, he called upon all to cooperate with him in discharging his duties towards holding peaceful, free, and fair election of the 9th Parliament of the country which has to be completed within 90 days of dissolution of the 8th Parliament.

He also, in his speech, called upon all concerned to assist him in selecting other advisers of the caretaker government. President Iajuddin shall appoint 10 other advisers on the advice of the chief adviser (himself). Look how difficult it is on the one hand, and how easy it is on the other hand!

President Iajuddin is now really in a very difficult situation. But he will have to go with this. He will have to give people's mind the priority, he will have to read and understand their minds, wishes, and aspirations. He will have to understand and determine what the common people want. He will have to read correctly the minds of the people. He will have to give utmost attention so that people's hopes and aspirations are reflected in his acts.

The main task of President Iajuddin as chief adviser will be to hold free, fair, and peaceful election -- to present to the nation and the world at large a credible election within the specified time. To accomplish this task, the chief adviser will have to take the following steps to expel distrust from the mind of the people:

- Appoint honest and capable advisers.
- Reshuffle the administration and reform the election commission, which are already politicized to the unthinkably extent.
- Improve law and order situation.
- Remove irregularities from government machineries.

It is a tough job, but you will have to do it, Mr President-cum-Chief Adviser.

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A regrettable decision

MAS MOLLA

THE much awaited sixth round of talks between BNP Secretary General Abdul Mannan Bhuiyan and AL General Secretary Abdul Jalil ended in failure on October 23. So it was understood that the nation would face hazards. But, perhaps, none could guess that the Hon' able President himself could be dragged into politics by the four-party alliance.

But that sad thing happened just after Justice KM Hasan regretted to serve as the chief adviser (CA) on October 28 afternoon. In the very first meeting with the two general secretaries the Hon' able President sought opinion of the partisan leaders if he himself (according to Article 58C (6)) could act as the CA (additional to presidency) before exploiting all the constitutional provisions available in Article 58C(3), 58C(4) and 58C(5).

Earlier, in the last (sixth) session of the dialogue, Mr Bhuiyan pro-

posed that the incumbent CEC, Justice M A Aziz, should take over the responsibility of the CA, since the 14-party combine objected to Justice Hasan's takeover. Mr Jalil failed to say yes or no directly to Mannan Bhuiyan's proposal, but later rejected this ugly choice.

I realize that the constitution has the provision for the last retired Appellate Division judge to take over as the CTG chief according to Article 58C (4) first paragraph. This constitutional provision allows Justice MAAziz to take over just by resigning the post of CEC, provided that both the provisions under Article 58C (3) have been met.

But how big are the letters of our constitution? Are they bigger than the very spirit based on which it was framed and amended to contain the provision of the CTG? The CTG was needed because our political parties could not rely on each other for conducting a general election. The political leaders themselves realized their incapaci-

ty, so they made the provision for a neutral CTG that would be acceptable to all the parties. How acceptable a man is Justice Aziz? The character that he himself exposed to the nation so far is unlike the average Bangladeshi. Average Bangladeshi do not play hide and seek with their own health. They do not pretend that they do not know anything about a mob outside the office. No average Bangladeshi flees from the press-men, and no average Bangladeshi employee is so disinterested that he would not meet his retiring colleagues. But these all are part and parcel of Justice Aziz's funny character. He has been rejected as the CEC by all. If the general people are set free from the police cordon they will form a mob and go to the EC office just to pull Justice Aziz down from his present seat, let alone a higher one.

Now let us come to the point of the president's taking over as CA as an additional responsibility. This

political parties, including the 14-party combine (henceforth discontinue using the word "opposition"), need to stop violent movements provided that the president appoints CTG advisers after consulting all major parties, reshuffles the EC (asking the incumbent CEC to do the needful is a bad sign) and the top administration for making the government machinery work neutrally towards an acceptable general election.

It can be added here that Mr Tareq Rahman is now in active politics (though rather prematurely), and he has traversed the country campaigning for the party. Certainly Tareq would not like to be defeated in his first attempt, and Begum Zia is helping him even by compromising on the terms for senior leaders (not to speak of the national interest).

So BNP, and the entire alliance, left no stone unturned for a victory in the next election. Their turning of stones became ugly practices one after another, and the president is helping the process somehow. Thus, the president has belittled the highest position of the state by complying with the urgencies of the alliance in taking over as the CA.

Anyway, rightly or wrongly, the president has taken over on October 29 evening, and all the

people, wrong or right