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FOUNDER EDITOR
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What a pact with Khelafat-e-Majlish!

How credible is AL's denial

WE are dumbfounded by the once-anointed secular party the Awami League's U-turn into an inexplicable marriage of expediency signed up with Khelafat-e-Majlish, the ultra orthodox Islamist group led by Shaikul Hadith Allama Azizul Haq.

Though AL has denied making such a deal, we find the denial somewhat convenient. We feel some sort of undertaking has been given by the AL which is far removed from its founding principles.

In terms of what has been reported as parts of a written contract between AL's general secretary Abdul Jalil on behalf of his party and Khelafat-e-Majlish secretary general Abdur Rab Yusufi, the AL, on assumption of power, stood committed to grant the right of fatwa (Islamic decree) to 'certified clerics', which a High Court verdict in our country had forbidden earlier on. The AL also has virtually acquiesced in enacting an anti-blasphemy law.

The other three features of the accord are: firstly, no law that in any way contradicts the Quran and Sunnah will be enacted in parliament; secondly, recognition will be accorded to Quam-I-Madrasah; and thirdly, those who do not believe in the assertion that the Prophet of Islam is the last messenger of Allah would forfeit their right to be known as Muslim, an oblique reference to the Ahmadiyya community.

On the question of fatwa, a system of law parallel to the existing legal system is being pandered to. This means that certain Ulemas will be placed above the law of the land.

By one fell stroke, the AL has sacrificed at the altar of opportunism and a numbers game in the power struggle against the right of centre Bangladesh Nationalist Party (BNP), whatever principle the party stood for as a historically secular and liberal organisation.

By this action the AL has disappointed a large part of its traditional voters who may well, in disgust, desist from voting for the party. Therefore, we believe the AL should withdraw from the position it has reportedly taken, both out of a principled stand as well as to preserve its traditional vote bank.

To build a forward looking and modern Bangladesh aligning with fringe obscurantist elements cannot be of any help; this realisation must dawn on the AL before the party can come out clean on the issue.

Happy Christmas

Need for peace and love the greatest today

CHRISTMAS, the biggest religious festival of the Christian community, is being celebrated all over the world today with due religious fervour.

The day rekindles the memories of Jesus Christ, who through his message of love and compassion, changed the world in a very perceptible manner, and established sanctimonious values that still form the basis of civilised existence. Very few great men, before or after him, exerted such great influence on the course of history as did the architect of Christianity. In fact, the teachings of Christ had far reaching impacts which are acknowledged by all -- regardless of religion and community.

The day is celebrated in a joyous mood and it has assumed an almost universal character, being no longer confined to the Christians only. The growth and spread of Christianity across the world has elevated Christmas to a truly world festival. There is merry-making and celebration of almost every conceivable kind. But the devotees have to bear in mind that the day marks the birth of the man whose mission, during his short but eventful life, was to promote peace, goodwill and compassion. Christ's love for mankind is a source of great inspiration to not only his followers but to humanity in general.

His message of peace is particularly relevant in the present day world embroiled in violence and bloodletting in many places. It is indeed time to pray for peace and stability to carry forward the mission initiated by the great man.

The essential features of Christmas celebrations include exchange of gifts and cards, decorated Christmas trees and the arrival of the good old Santa Claus on the X-mas Eve. However, local and regional traditions have enriched the day in various ways as Christianity has emerged as the major world religion.

The day will be observed in Bangladesh with the members of the Christian community enjoying every bit of it in their own colourful ways.

We wish them a very happy Christmas. Let the day bring joy and happiness to people all over the world.

Fair polls: Still a possibility

M ABDUL HAFIZ

PERSPECTIVES

The AL-led 14-party alliance is not far behind, in spite of its plethora of complaints and reservations. It is reported that the Awami League, at the helm of the alliance, had an expensive and expert survey done with regards to its electoral prospects, which, it is said, are encouraging. This tantalizing prospect may push the country's oldest and largest party to bite the bullet at long last. Moreover, the party is under tremendous internal and external pressure to participate.

THE election for the 9th Parliament is around the corner. The country's political class can be seen stretching its legs and exercising its muscles in preparation for the coming electoral bout. Traditionally, the elections elicit so much interest and even passion in Bangladesh that this class, irrespective of party affiliation, itches to join the fray -- no matter how dicey, or even crooked, its process may be.

The four-party alliance is in the forefront of election enthusiasts for obvious reasons, the prominent one being its resolve to pass the litmus test before the election engineering mechanism crafted by it falls apart in the face of the momentum of a mass movement that is underway for elaborate electoral reforms -- notwithstanding the blanket support of Dr Iajuddin, who himself is now the target of agitators.

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This tantalizing prospect may push the country's oldest and largest party to bite the bullet at long last. Moreover, the party is under tremendous internal and external pressure to participate. The beeline made by the diplomats to Sudha Sadan reinforces its validity. Even the splinter groups of Islamist parties are catching up in the race by aligning themselves with either of the alliances, because the elections buy them local relevance and influence.

As part of the electoral preparations, the European Commission's observers group is already in town. Earlier, several US state department emissaries and the special representative of UN Secretary General visited this country with enigmatic missions.

On the surface, they expressed their desire for a violence-free credible election with the participation of all political parties, as well as continuity of a democratic order in this country -- a concern we are quite well familiar with. We are frequently receiving such sermons, and are ourselves delivering such to others.

But all those who are concerned about a credible election are mum about how that credibility can be ensured when the country is in the clutches of a caretaker government headed by a partisan Dr Iajuddin Ahmed and an Election Commission staffed with BNP-Jamaat elements. To top it all, the presidency, the Election Commission, and the judiciary, in collaboration, are performing the pantomime of a convoluted election engineering.

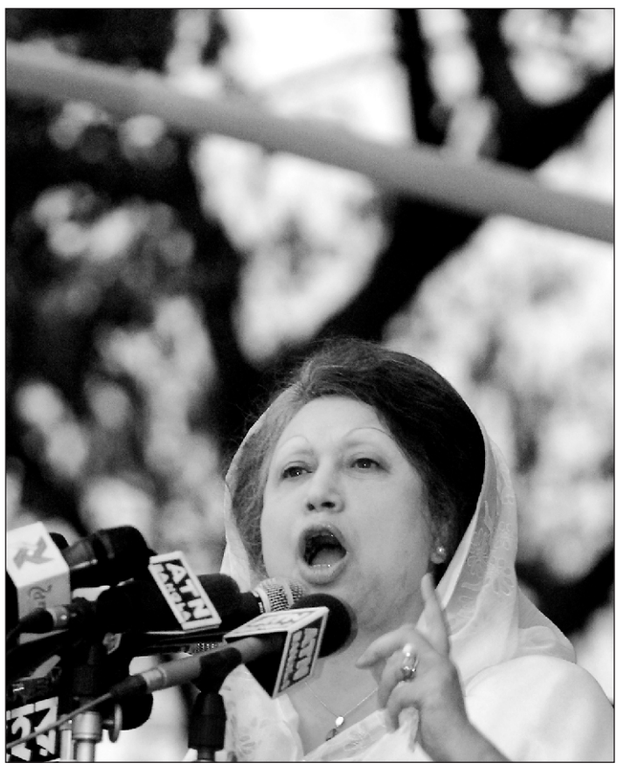
Well, the outsiders are not expected to understand the intricate dynamics of our local politics. This is not just a Kerry versus Bush bout. This is a fight between embittered rivals -- Sheikh Hasina and Khaleda Zia -- representing two diametrically opposed political philosophies and out-looks, the hiatus between which is simply unbridgeable.

Therefore, it is the people who are the arbiters of choice between the two. But the people must be allowed a level playing ground to make that choice freely and without interference. And that's the crux of the whole issue.

It is a pipe-dream to think that an election of sorts on an uneven turf -- even if held with the participation of all political outfits -- will solve the problems of political unrest and usher in an era of peace and prosperity.

People who think that way are living in a make-believe world of their own. Such an election, let there be no mistake, will portend a period of more turbulence, taking its toll on all sectors of national life and making the society, the polity, and the economy more vulnerable to uncertainty.

The election in a democracy is a festival, and is the only occasion where its universality is demonstrated. There is still time to make it that way, only if Dr Iajuddin Ahmed's conscience is stirred a bit. He has already inflicted a mortal blow to the country's body politics with his bias, megalomania, intransigence, and indecision. He has also made fair polls impossible by tilting the balance in favour of his preferred "party."



He can still bring about a balance in his conduct by compensating the other parties for the loss of time. The constitutional experts say that there are ways the polls can be rescheduled without making the sky fall down. It's time that Dr Iajuddin acted positively.

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Election after 90 days is permissible

HARUN UR RASHID

BOTTOM LINE

It is strongly argued that the 90-day limit for holding the election, as specified in Article 123 of the Constitution, can be extended for protecting, preserving and defending the principle of democracy. One of the fundamental principles of state policy, otherwise Article 8 of the Constitution that enshrines the principle of democracy would be grossly violated. It is desirable that the president, in terms of Article 106, seeks opinion from the Appellate Division of the Supreme Court on this subject and resolves the issue soon.

A Constitution is founded on certain basic principles. The historical background plays an important part. The 1789 American Constitution was formulated against the background of its war of independence with Britain.

After the liberation of Bangladesh through an armed struggle against the oppressive regime in 1971, the fundamental principles of the 1972 Bangladesh Constitution have been laid down in its preamble. The paragraphs in the preamble are important in order to appreciate the basic framework of the Constitution.

One of the fundamental principles of the Bangladesh Constitution, as enumerated in the preamble, is democracy. Democracy, in essence, means rule of law (not by law only), free and fair election, respect for opposition political parties, and free and robust media.

In countries where there is no written Constitution, such as in Britain, certain documents, for example the Magna Carta of 1215, guide its democratic principle.

Debate on the time limit for holding election:

At present there is a heated debate in the country as to whether the election can be held after 90 days. One view is that it can be held, and does not materially breach the Constitution, to meet national exigencies. The other view is that the election has to be held "within 90 days" after Parliament is dissolved.

Both the views are based on interpretation of the provisions of the Constitution. The former is based on liberal and contextual interpretation, while the latter is rooted in strict and literal interpretation.

Rules of Interpretation

Ordinarily the rules of interpretation are as follows:

(a) The Constitution must be read as a whole, and the meaning is not determined merely by particular words or phrases.

(b) The words can be given a meaning that is in conformity with the text and spirit of the Constitution.

(c) If the words lead to an unreasonable interpretation, the method of interpretation will be to ascertain what the framers of the Constitution meant when they used those words.

(d) Particular provisions should be interpreted in such a manner so as to give effect to the purpose and objective of the Constitution.

(e) Any previous practice in the application of the provisions of the Constitution should be the guide in interpretation of a particular provision of the Constitution.

(f) A provision must be read as a whole, and sub-clauses must not be detached from its meaning and purpose as a whole.

Doctrine of Necessity

Besides the above methods of interpretation, another principle has been added, namely, the doctrine of necessity.

In 432 BC, the Spartans went to the oracle of Delphi to ascertain whether they should go to war against Athenians or not. After receiving a positive response, the Spartans urged the Corinthians: "Delay not, we have arrived at the moment of necessity."

Before I deal with the legal meaning of the doctrine of necessity, a few words need to be said about the meaning of "necessity."

Throughout the ages, many scholars have echoed the Corinthians' call of necessity to different exigencies of different situations.

Scholars have variously defined necessity, but the consensus is that certain actions need to be taken by taking into account the complete and just view of circumstances in a given situation. In essence, there must be a linkage between justice and necessity. The solid ground of reasoning of necessity is drawn from past experience.

Let me cite an example of how the doctrine of necessity was applied in the legal field. In 1954, there was a legal challenge on the dissolution of the first Constituent Assembly by the deposed speaker. The Chief Justice of Pakistan's Supreme Court, Justice Munir, decided in favor of the dissolution.

The basis of the decision was the "doctrine of necessity," meaning that to preserve the country the Constitution had to be abandoned.

This means that the Constitution is for the people and the country, and if it is necessary to preserve the integrity of the country from chaos and instability or civil war it may be liberally interpreted.

Instances of breaches of the Constitution

The pillars of the Constitution are Part 1, Part II and Part III. Part 1 deals with the constitutional framework and territory of Republic of Bangladesh wherein all powers are vested in the people. Part II lists the "Fundamental Principles of Policy" by which the Republic would be governed, and Part III incorporates the "Fundamental Rights" of people.

Many of the fundamental principles of the Constitution are being violated. Did the successive governments since 1975 care?

For example, Article 22 provides that: "The state shall ensure the separation of judiciary from the executive organs of the state." Although the word "shall" has been employed in the Article, this provision remains unfulfilled to this day. Is it not a gross violation of the Constitution? How did the past successive governments neglect, or ignore, its implementation?

Another requirement of the Constitution is that the local governments shall consist of elected representatives who would administer local areas (Article 59 read with Article 11 of the Constitution). Again the word "shall" has been used in Article 59. This provision is yet to be implemented.

I cite these instances to bring home the point that there have been many violations of the provisions of the Constitution, but no government in the past has bothered about them.

Reasons for extending the 90-day time limit:

The question is: Does the provision relating to the holding of election within 90 days allow an extension of the time limit? There are several reasons why the 90-day time schedule can be extended, and some of them deserve mention:

First, in 1990, after the fall of the Ershad government, the provisions of the Constitution did not act as barriers to implementation of democracy.

For instance, in 1990, the appointment of the then chief justice as the vice-president (so that he could later assume the office of the president in the caretaker government) after the dissolution of the parliament was unconstitutional because the vice-president had to be elected by the parliament.

Since the parliament had been dissolved, there was no scope for appointment of a new vice-president. Furthermore, the president was subsequently allowed to return to his office of the chief justice after the elected government was formed.

How and why were these actions taken? Did not these steps constitute breaching or violation of the provisions of the Constitution? It is noted that these steps were taken to preserve democracy and were later validated through amendment of the Constitution post-facto (after the event) in 1991.

Second, Article 123 (3) that provides that the 90-day limit for holding elections has to be read as a whole, and not piecemeal. The Article has 4 sub-clauses, and one of the sub-clauses claims that to fill the seat of a Member of Parliament the 90-day time limit can be relaxed in the case of an act of God. Act of God may be interpreted to mean unforeseen circumstances or circumstances beyond control.

One may easily argue that if a by-election can be held beyond the 90-day limit, the general election can also similarly held after 90 days.

Third, if the 90-day limit is not extended it is argued that the principle of democracy, enshrined in Article 8 of the Constitution as being one of the "Fundamental Principles of Policy," would be violated.

Article 8 arguably is more substantial than Article 123. Article 123 is merely a procedure or method to implement Article 8, the principle of democracy.

Fourth, the provisions of the Constitution are not dead letters, and can be adapted to ensure the participation of the largest number of people in elections through multiple parties.

Fifth and finally, it is argued that the provisions of the Constitution in respect of fundamental rights cannot be violated because they are enforceable by higher judiciary under Article 102 of the Constitution. Fundamental rights are those rights that cannot be taken away by legislation or amendment of the Constitution.

The expression of the will of the overwhelming majority of people of Bangladesh needs to be acknowledged in conducting a fair, free, peaceful and credible election.

It is strongly argued that the 90-day limit for holding the election, as specified in Article 123 of the Constitution, can be extended for protecting, preserving and defending the principle of democracy. One of the fundamental principles of state policy, otherwise Article 8 of the Constitution that enshrines the principle of democracy would be grossly violated.

It is desirable that the president, in terms of Article 106, seeks opinion from the Appellate Division of the Supreme Court on this subject and resolves the issue soon.

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In search of a free and fair election

M AMIR-UL ISLAM

Without a voter list yet in sight how can there be an election schedule, or a free and fair election? Those who are now at the helm of the affairs do not seem to be interested in a transparent and flawless voter list. All that they are bent upon is holding the election in any way within 90 days, of which more than half have already been wasted.

THERE are three prerequisites for an election under the Constitution.

a) Non-party caretaker government constituted under Article 58C, and a real transfer of power to that government.

b) An independent Election Commission preparing a lawful voter list.

c) Both the caretaker government and the Election Commission together ensuring a level playing field in every respect.

Our constitutional right, and the legitimate expectation from a non-party caretaker government, was nipped in the bud when President Iajuddin Ahmed, instead of appointing the appropriate designate under the Constitution, assumed the power of the chief adviser himself and started functioning not according to the collective decision but unilaterally. It is because of this that the balance of power between the Constitution and the government was destabilised. Secondly, the draft voter list was not prepared nor published according to the directive of the Supreme Court, nor did it conform to the transparency requirement. Furthermore, no opportunity was given to the people to inspect the voter list.

The intending candidates formally applied in all 300 constituencies for copies of either the draft or the final list, but received the reply that they were not available. All the major political parties went to court with writ petitions challenging Professor Iajuddin's assumption of the office of chief adviser. They were asking for direction to publish the voter list before announcing the schedule, and also to direct the chief adviser to act collectively along with the 10 advisers in all matters, including the appointment of new Election Commissioners.

Copies of the petitions were served on the learned attorney general on November 26. They were due to be heard the next day, and it was done with the concurrence of the attorney general. Following the filing of those writ petitions, the attorney general went to the Bangabhaban. The secretary of the Election Commission was also summoned. The very next morning, November 27, the election schedule was announced, followed by the appointment of two new election commissioners. The two remedies sought by way of the two writ petitions were thus frustrated by pre-emptive moves.

On the next day, November 28, when the writ petitions were to be heard, the attorney general insisted for time/adjournment. His prayer was reinforced by the presence of former ministers and lawmakers. Ultimately, the case was fixed on November 29 when the court heard submissions from both sides extensively and the matter was to come up next day for order. However, on November 30, the attorney general came up with an application for the formation of a larger Bench. The court said that it would consider the same after issuance of the 'Rule'. This was because there was no reason or precedence for the formation of a larger Bench at this stage, particularly when the court had decided to issue a Rule. When the court formulated the terms of the Rule about to be dictated, the learned attorney general submitted that he would show a precedent at 2p.m. On this premises, the court decided to pass the order after the recess.

Soon after the court resumed the attorney general appeared with a file containing an order made by the Honorable Chief Justice. A hand-written on the attorney general's "petitions" (of which the other side have had no copy so far), stating the proceedings of the three writ petitions. As a result, the fate of the three writ petitions is hanging in uncertainty. Since it is not a judicial order and is not covered by the administrative power under the Rules, it is not yet known how to redress it.

In this context, getting no constitutional and lawful remedy through the court system, or through all the attempts and persuasion of the advisers, what are the options for restoring the constitutional process for holding an election? Four advisers have already resigned identifying the main obstacle. Everyone by now realizes that the obstacle is none but the president who usurped the office of the chief adviser, acting unilaterally.

Under these circumstances the plea for having an election within the stipulated 90 days, as if the Constitution will fall or collapse if the election is held beyond the 90 days deadline, needs careful scrutiny.

Here is an attempt to explain how Article 123 (3) can be considered in its proper context.

The Constitution is the basic document, which preserves the system of governance, the rights of the people and its supremacy. All powers in the Republic belong to the people. The people's ownership cannot be exercised without right of franchise. The highest court of our land, in its judgment on preparation of voter list while giving direction to the Election Commission, held that: "In order to make democracy successful election of the representatives in a free and fair manner is indispensable."

The first element is an acceptable voter list in which the names of all eligible voters are enrolled. As the Court said: "In order to ensure a fair and free election a flawless electoral roll is necessary." Secondly, there must be a level playing field. Under our Constitution, a non-party caretaker government should ensure a neutral administration and equal opportunity in all respects, particularly in the government owning media and other areas. The Election Commission must make available a transparent voter list, and ensure everyone's access to it in a draft form so that necessary corrections and modifications can be made. These essential prerequisites are not present.

Without a voter list yet in sight how can there be an election schedule, or a free and fair election? Those who are now at the helm of the affairs do not seem to be interested in a transparent and flawless voter list. All that they are bent upon is holding the election in any way within 90 days, of which more than half have already been wasted.

With a view to look for a solution, it is necessary to remedy two major violations of the Constitution.

Firstly, what is needed under the Constitution is a non-party caretaker government. It is yet to be constituted as per Article 58C. Let the office of the president and that of the chief of the caretaker government be bifurcated, and an appropriate Constitutional designate under Article 58C be installed in order to bring the Constitutional process back on the rails. According to the provisions of 58C(3) and (4), if read together, then the last retired chief justice having declined. The immediate past retired chief justice, preceding Justice Hasan, who has not reached the age of 72, could be made the chief adviser.

Secondly, the Election Commission, having failed to discharge its primary responsibility of preparing and publishing the voter list in time, despite the Supreme Court's direction as per law and the Constitution, should be asked to resign. A proper Commission also needs to be reconstituted. This will be in conformity with the observation of the Supreme Court, as it has found the dismal situation in the Commission itself. Mr. Justice Amirul Kabir Chowdhury observed: "We have adopted a democratic Constitution. However, making it a success requires that those responsible for making democracy successful should discharge functions in accordance with the Constitution."

The question is, have the president and the Election Commission discharged their functions in accordance with the Constitution. If not, this must be remedied. An assessment must be made by a properly installed chief adviser and the EC as to how long it would take to get a voter list prepared and published. Then the election schedule should be declared in consultation with the major political parties.

There is no express bar under the Constitution to holding the election beyond 90 days. Such an election, whether held within or beyond 90 days, cannot be challenged. The Constitution protects such elections under Article 125 (b). Only an election petition, which can be made on the grounds of malpractice and corrupt practices materially affecting the election results, can challenge an election and on no other grounds can such elections be challenged.

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