



Election beyond 90 days: Legitimacy and constitutional ways forward

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At present the country is experiencing a real constitutional and political challenge. Both questions of preservation of constitutional order as well as maintaining political stability are hanging in the balance due to the recent political development of the country. Addressing the nation at the aftermath of the issuance of the Proclamation of Emergency, the President said it is not possible to hold an acceptable election within the stipulated 90 days as it is imperative to prepare a flawless voter list as well as ensuring effective participation of all major political parties to hold a free and fair election. In such an event, the most important constitutional question is whether a legitimate election can be held beyond the stipulated time of the Constitution. Amended Art.123(3) incorporated by the Constitution (Thirteenth Amendment) Act, 1996, reads as follows: "A general election of members of Parliament shall be held within ninety days after Parliament is dissolved, whether by reason of the expiration of its term or otherwise than by reason of such expiration." Ninety days period for holding general election starts from the next day when the Parliament is dissolved. According to Art.72(3) dissolution of parliament occurs in two ways: (i) it stands dissolved on the expiration of the period of five years from the date of its first meeting; (b) the President may dissolve the Parliament earlier than its five-year term.

Although according to proviso to Art.123(4) time for holding bye-election can be extended for further 90 days if Chief Election Commissioner thinks due to an act of God such election is not possible within stipulated time, there is no

provision in the Constitution for extension of time for holding general election. Mr. Mahmudul Islam in his 'Constitutional Law of Bangladesh' submits: "The framers of the Constitution, having act of God in their contemplation and consciously not making any provision to meet such contingency in case of the general election, it must be held that the holding of the general election cannot be deferred beyond the period stipulated in Art.123(3)." In the case of *Mahabubuddin Ahmed v. Bangladesh* the High Court Division, in the context of bye-election, held that the provision of Art.123 is mandatory and the bye-election had to be held within the stipulated time. Besides, use of the word 'shall' tends to favour the mandatory interpretation of Art.123(3).

Despite strict stipulation in Art.123(3), there are some possible ways to hold a legitimate general election beyond 90 days maintaining constitutional spirit intact. Although none of the methods are full proof, to avoid the biggest constitutional and political predicament of the present time, they may pave the way for a rightful solution to the crisis. It may be mentioned that it is the Election Commission who has the authority in accordance with the Constitution as well as the Representation of the Peoples Order 1972 to declare the date of general election but under no circumstance the Election Commission can defer such date beyond 90 days.

The most likely solution could have been the amendment of the Constitution for extension of time for holding the general election by the Parliament. But such power can only be exercised by an existing Parliament under Art.142 following

a special procedure. Since the present parliament is already dissolved and the President can recall a dissolved Parliament if the country is at war under Art.72(4), there is no scope for the Parliament to make such amendment to the Constitution at the moment.

The President's power, especially discretionary or residuary, in case of extreme necessity to go beyond what is apparent from the Constitution to tackle constitutional crisis is very important. Indian Supreme Court in *Shamer Singh v. Punjab* case implied certain discretionary powers of the President though no such power is clearly laid out in the Indian Constitution. In our parliamentary system of government role of the President is normally limited. But situation is completely different at the time of caretaker government. Care-taker government shall be collectively responsible to the President under Art.58B(2). President need not act in accordance with the advice of the Chief Adviser in exercising his functions under the Constitution as Art.48(3) remains ineffective during caretaker government by virtue of under Art.58E. Taking oath as President casts a duty upon the President that obliges him to preserve, protect and defend the Constitution. The President must have the necessary authority in discharging the duty of preserving, protecting and defending the Constitution, specially his discretionary power to save the country or the Constitution from destruction.

In the case of *Reference of Governor General, Federal Court of Pakistan* held that the President may promulgate an Ordinance without taking constitutionally required advice from the Prime Minister in a special circumstance along with other civil laws of the country loses its superior position. The doctrine of necessity will

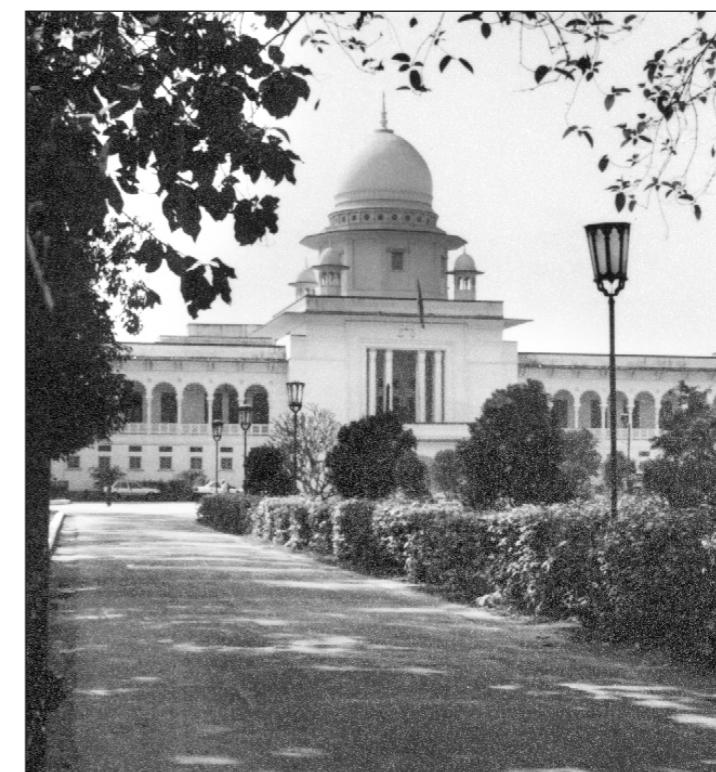
render such Ordinance valid. Lord Mansfield described the principle of necessity as follows: "Subject to the condition of absoluteness, extremeness and imminence, an act which would otherwise be illegal becomes legal if it is done bona fide under the stress of necessity, the necessity being referable to an intention to preserve the constitution, the State or the society and to prevent it from dissolution".

The doctrine of necessity was applied by the Pakistan Supreme Court in *Asma Jilani, Begum Nasrat Bhutto and Zafar Ali Shah cases*. In all these, doctrine of necessity was applied after a constitutional deviation occurred. In the present situation, notionally, holding general election is still possible on time. But in light of the political developments in past few months, holding general election leaving the boycotting political parties, will certainly cause major political crisis and the country will experience prolonged uncertainty which the President has acknowledged in his speech before the nation. Application of doctrine of necessity should not confine to past scenario but it should equally be applied if it facilitates to avert inevitable disaster. In terms of the doctrine of necessity, prevention should be more important necessity than just to clean up the dirty mess created in the past.

Deviation from the Constitution is not unprecedented in Bangladesh. With regard to Martial Law our Appellate Division in many cases, such as *Halima Khatun v. Bangladesh, Joyal Abedin v. Bangladesh, Md. Salimullah v. Bangladesh*, conceded that the moment the country is put under Martial Law, constitutional provision along with other civil laws of the country loses its superior position. In the subsequent case of *Khandker Ehteshamuddin v. Bangladesh*, the Appellate Division held, "It is true that Article 7(2) declares the Constitution as the supreme law of the Republic... but the supremacy of the Constitution cannot by any means compare with the proclamation issued by the Chief Martial Law Administrator." Hence under unusual circumstances certain special provision can get primacy over the Constitution. If law framed by usurpers gets priority, there is no reason why law made by legitimate authority in hostile conditions should not be treated likewise.

To resolve constitutional crisis the President, as an immediate necessary action, may make and promulgate ordinance deferring the general election date beyond stipulated 90 days under Art.93. Although proviso(ii) to Art.93 prohibits such promulgation for altering or repealing any provision of the Constitution, it may be justified as a temporary measure [without altering or repealing Art.123(3)] by virtue of the President's discretionary or residuary power exercisable in case of extreme necessity to save the country and the Constitution which is embodied in the maxim *salus populi est suprema lex* (public welfare is the highest law).

The President has already issued a Proclamation of Emergency under Art.141A as he is satisfied that a grave emergency exists in which the security or economic life of Bangladesh is threatened by internal disturbance. Ordinarily prior counter signature of the Prime Minister is required for the validity of such proclamation, but during caretaker government, under Art.58E President alone can issue such Proclamation of



Emergency.

Constitution has not clearly spelt out the extent of President's power under Art.141A. It does not provide any limitation on his power as well. As the whole purpose of Art.141A is to tackle emergencies and known/unknown contingencies, the Constitution does not bind the hands of the President defining his power within certain limits. But there is a common misconception regarding Fundamental rights. The issuance of the Proclamation does not automatically suspend the operation of the fundamental rights guaranteed under articles 36, 37, 38, 39, 40 and 42 of the Constitution. Art.141B gives the President an option to make laws or to take executive action inconsis-

tent with those articles regarding fundamental rights. Art.141C gives the President discretionary power (not automatic) to suspend the right to move before the court as well as to suspend all pending proceedings for enforcement of fundamental right during emergencies, but such power has to be exercised by issuing specific order if they are at all needed.

In order to clear any confusion that exists as to the mandatory effect of Art.123(3) and/or the application of doctrine of necessity and/or the exercise of President's power for deferral of general election beyond 90 days, the President under Art.106 may refer the matter to the Appellate Division of the Supreme Court for its opinion. In

this process even if the Appellate Division opines that there is no scope for deferral under the Constitution, it may still exercise its inherent power to allow the Election Commission to conduct the election on this occasion within a specified time to uphold the Constitutional order and maintain political stability in the country.

If time for holding general election is extended beyond 90 days, it will be held under the care-taker government. Duration of the caretaker government is not confined to any express stipulated time. Under Art.58C(12) care-taker government shall stand dissolved on the date on which the Prime Minister enters upon his office after the constitution of new Parliament. Until new Parliament is constituted and new Prime Minister is sworn in care-taker government shall continue to function.

In the absence of express power in the Constitution and the fact that neither the care-taker government nor the Election Commission have the power to go beyond the constitutionally stipulated timeline, in order to avoid the inevitable, the President has the sole authority to defer the date for holding a legitimate general election beyond 90 days. The President can either pass an executive order under Art.141B (or an ordinance under Art.93) directing the Election Commission to that effect or to settle the matter once for all put the matter before the Appellate Division under Art.106 for their opinion.

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HUMAN RIGHTS advocacy

CLOSE GUANTANAMO

Worldwide protests call for Guantánamo closure on 5th anniversary

On the fifth anniversary of the Guantánamo Bay detention centre, millions of Amnesty International members and supporters are mobilising around the world in a series of demonstrations and activities calling for the US authorities to close the prison camp once and for all.

As detentions at the US Naval Base move into their sixth year, the organisation also called for all detainees to be given a fair trial without further delay or to be released. Demonstrations and other events are being held in cities across the world in more than 20 countries from Washington DC to Tokyo and from Tel Aviv to London, Tunis, Madrid and Asunción. "No individual can be placed outside the protection of the rule of law, and

no government can hold itself above the rule of law. The US government must end this travesty of justice," said Amnesty International's Secretary General Irene Khan.

"Equally, it is not enough for world leaders to express concern about Guantánamo and carry on business as usual with the USA. The international community must actively press the USA to close Guantánamo and restore respect for international law."

"With every passing day, the cruelty of this indefinite detention regime ratchets up another notch," said Ms. Khan. "Guantánamo has come to symbolize the hollowness of the US government's promise that respect for human dignity and the rule of law would lie at the heart of its response to the attacks of 11

September 2001. Torture, humiliation, discrimination, bypassing of the courts and disregard for treaty obligations, with almost total impunity, are all now among the entries in the Guantánamo logbook."

The first of more than 750 detainees of some 45 nationalities who have been taken to the base arrived on 11 January 2002.

Detainees have included children as young as 13, people who were

simply in the wrong place at the

wrong time, and scores of individuals handed over to the USA from Pakistan or Afghanistan in return for bounties of thousands of dollars.

Five years on, nearly 400 people are held in Guantánamo. None has been tried. None has appeared in court and all are unlawfully held.

None of them know for how long they will be there, itself a form of

psychological abuse in addition to

the physical abuse detainees have

been subjected to. By association,

their families too are subjected to

the cruelty of this virtually incom-

unicado island incarceration.

The US authorities have

branded the detainees as "enemy

combatants" in a global conflict.

That the world is seen as the "bat-

tlefield" is illustrated by the fact that

those held in Guantánamo have

included individuals picked up in

Gambia, Bosnia, Mauritania,

Egypt, Indonesia, and Thailand as

well as Pakistan and Afghanistan.

The CIA is known to have oper-

ated an interrogation facility at

Guantánamo, although the

agency's activities remain

shrouded in secrecy. Amnesty

International has raised allegations

with the US authorities that agents



of other countries, including China and Libya, have been in the base and participated in ill-treatment.

Some of the detainees have

been held in CIA-run secret prisons

in other parts of the world before

being transported to Guantánamo.

"Guantánamo is a central hub in

the web of secret prison sites and

renditions which has been spun

around the world by the USA with

the complicity of other govern-

ments including in Europe, the

Middle East and North Africa," Ms

Khan said. "It is high time the USA

and its partners in crime ended this

web of secrecy and abuse."

"Far from strengthening secu-

rity, these practices have weak-

ened human rights and the rule of

law, which are the best antidote to

insecurity, and have undermined

the moral authority of the USA to

speak on other human rights issues

such as Darfur."

The US government has not

only ignored international human

rights standards, it has also

blocked judicial oversight by its

own courts. Last October,

President Bush signed into law the

Military Commissions Act which

strips the US courts of jurisdiction

to hear habeas corpus appeals

from foreign detainees held as

"enemy combatants", including in

Guantánamo. Habeas corpus is a

fundamental safeguard against

arbitrary detention and torture.

Amnesty International is cam-

paigning for restoration of habeas

corpus and repeal or substantial

amendment of the Military

Commissions Act.

Instead of holding RAB accountable the govern-

ment heaped praise on it. Despite substantial

evidence, no RAB member has been criminally

convicted for extrajudicial killings.

Death in custody is common. In 2006, 51

prisoners, of whom 32 were standing trial, were

reported to have died from various causes,

including violence by guards and fellow prison-

ers, and delays in medical treatment.