

# Election and representative democracy

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MASIHUR RAHMAN

THE election scheduled for January 22, aborted by the president's action, raises issues about the legitimacy of the election if deferred beyond ninety days after dissolution of Parliament, the tenure of the interim caretaker government, and about how to legitimize the extra-ordinary measures.

The president took the measure to ward off the deteriorating law and order situation, and to ensure a proper election in due course to restore democracy as well as the political and civil rights of the citizens.

The claim to legitimacy will depend on performance on these scores in terms of both time and quality.

Bangladesh is a constitutional representative democracy. All powers of the Republic – i.e. sovereignty – are vested in the people, and are exercised on their behalf and by the authority of the constitution.

The state follows democratic processes to realize its goals. Fundamental human rights and freedoms, equality and justice, and a socialist society free from exploitation are the goals of the state, and the substance of democracy.

Freedom from exploitation is integral to equality and justice, though not socialism in the form of authoritarian communism. Constitutionalism defines the limits of the powers of the state and its organs [Preamble, Art. 7(1) & (2)].

The electoral system is based on

universal suffrage, simple majority and single member territorial constituency – also called first-past-the-pole (FPTP) system. All citizens not less than 18 years of age are "entitled to be enrolled in the electoral roll of a constituency" (except those judicially declared to be of unsound mind).

The expression "entitlement" imposes on the Election Commission the responsibility to ensure that all eligible voters are registered. The Commission failed miserably in this task – and does not recognize the injustice done to the citizens. [Art.121-2].

Election in a representative democracy performs three functions: mandate to represent the people in government and opposition; accountability of the government; and a citizen's obligation or obedience to the state and government.

The population of a country is not an undifferentiated mass; it is divided by objective cleavages (e.g. religion, ethnicity, culture), as well as divergent interests and opinions. There is no uniquely determined right public policy.

The policies emerge from contestation and change over time, and are validated by election. If there were no plurality of choice, or if the ruler's preference could be imposed on the people, election would not be necessary.

If an election generates only the government, it fails the democratic imperative. Robert Dahl observes that participation loses its significance in large part if there is no contestation.

Yet, until the 18th century or even

later, "political opposition lacked legitimacy and legality, political parties were widely condemned as dangerous and undesirable, and elections were notoriously manipulated by the agents of the Crown." Read contemporary Bangladesh for Dahl's description [Polyarchy, p. 5; On Democracy, p. 24].

There are no permanent majority or minority parties in democracy; they alternate between government and opposition. Any attempt to suppress the temporary minority party requires use of coercion, including unlawful methods. Bernard Mannin warns insightfully:

"In order to avoid the risk of violent confrontation, the majority camp has only one solution: to strike a compromise with the minority, that is, to refrain from subjecting it unnecessarily to its will. Party democracy is a viable form of government only if the opposing interests deliberately accept the principle of political compromise" [The Principles of Representative Government, p. 12-3].

Election makes the government accountable to the people. The parties offer alternative policies and programs, which win them votes.

If the winners fail to fulfill the promises, the voters can throw them out in the next election. However, an election is contested also on leadership appeal and social differences.

In single-seat, simple majority systems, a candidate's appeal to the constituency's people also matters. Redeeming promises should not be taken mechanically: the government is expected to modify those promises, which are harmful, and to successfully cope with contingencies.

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The effectiveness of election as an instrument of accountability depends largely on the quality and symmetry of information flow.

The idea that consent is the basis of obligation of the subjects to the state and government was developed by Grotius, Pufendorf, Rousseau, and Locke most prominently.

Locke also derived the radical conclusion that a government which lacks consent can be overthrown. Authority, obligation and accountability are joined organically. The declaration of American independence, which reflected these principles, asserted that "governments derive their just powers from the consent of the governed."

Likewise, the French Revolution declared that "the citizens submit only to those laws to whose formation they have freely consented individually or through their representatives." It is an article of democratic faith [Principles, p. 83-85].

Election, which is not free, fair and frequent, is sham; it lacks democratic substance. Dahl observes that: "To be free means that citizens can go to the polls without fear of reprisal; to be fair, all votes must be counted as equal; to retain control over the agenda and the elected officials, elections must be frequent." Annual elections for the legislature are too frequent, and intervals longer than five years too long [On Democracy, p. 37-8, 95-96].

Hannah Pitkin puts emphasis on motivation and institution of representation. The parties try hard to win sufficient seats so that they can influence policies as government or as opposition.

The representatives work in an institutional framework, and interact with other groups and persons, who temper their personal ambitions, moderate opinions and interests, and stabilize governance across time and individuals. "Representation without institutionalization is an

empty dream" [The Concept of Representation, p.220-5].

Absence of a major party from election (boycott) denies a large proportion of the people the opportunity to vote for their preferred party, policies and leaders – i.e. effective participation. If Nazim Kamran Choudhury's survey is an indication, voter turnout could be about 16 percent – the level to which hard-core support of BNP-Jamat had fallen (compared with AL's 23 percent). The actual turnout could swing either way but modestly depending on some indecisive persons turning out or some core BNP-alliance staying home, sure of success in an uncontested election.

Low turnout and absence of alternative choices cannot generate a valid mandate. The mess at the Election Commission, and the failure of the president-chief adviser provided the justification for boycott.

Interim, or caretaker, government is common to democratic states. The elected government continues in office after dissolution of parliament, with all the legal powers as before; it does not use any power, take policy decisions, or make new financial commitments or levies.

The prohibitions are "binding conventions." The rationale is that dissolution of parliament signifies exhaustion of the mandate, requiring the parties to seek fresh mandate. The powers are retained for routine administration, and for meeting contingencies [Michael Gallagher et al, Representative Government in Europe, p. 65].

The caretaker government derives legitimacy from the Constitution, which created it for extremely limited functions and time in office. The caretaker government supports the Election Commission in holding a free, fair and peaceful general election, and discharges the routine functions of an interim government.

There is deliberate emphasis on the interim nature of the caretaker

government. The constitutional prescription as regards the interim functions should be read in the light of the binding conventions [Art. 58D].

How long can the caretaker government created by the constitution legitimately remain in office? First, the general election has to be held within 90 days from dissolution of Parliament; second, the caretaker government remains in office from the day Parliament is dissolved, until the day an elected prime minister takes over.

The two provisions have to be read together to derive a logical and consistent meaning. They are connected by the concept of mandate – political mandate of the prime minister through election, and the narrow mandate of the caretaker government from the Constitution.

The caretaker government may remain in office for a few days after election to meet contingencies – e.g. election of the prime minister in a hung parliament. The time for contingency may be 10-20 days, which allows the caretaker government a legitimate tenure of some 100 days, or slightly longer.

The caretaker government cannot postpone election for an undefined period and remain in office, which is destructive of constitutional democracy and contrary to the intention of the Constitution.

The strict interpretation overlooks the reality of the present situation – i.e. free and fair election was not held within ninety days, and cannot be held without substantial reforms of the electoral and government institutions.

It is obvious that the present caretaker, or interim government, will exceed the constitutional limits on functions as well as time, which makes it unconstitutional – not necessarily unconstitutional.

How much it will try to do and for how long are moot questions. The primary task of the interim government is to hold a proper election

within the time, which can be derived from the Constitution.

The prescription that election be held within 90 days after dissolution of parliament evidences the intention of the framers of the Constitution that it is the longest period (90 days) for which there may not be an elected parliament, and their judgment that election can be held within that period.

Therefore, the election should be held by April 12 or 25 – give or take a few days – counting from oath-taking of the chief adviser, or expiry of the constitutionally permitted 90 days.

The interim government may be tempted or urged by many to address broad reforms agenda which are not germane to election, or justifiable on grounds of necessity.

The zeal for reforms takes on perpetual Newtonian motion when not impeded by constitutional limitations and inviolability of the fundamental human rights and freedoms. It is worth noting that elite opinion, though useful, is not sufficient ground for durable reforms without public participation.

Successful professionals often have tried in vain to fix the problems of their countries, but turned out to be masks or harbingers of regimes destructive of constitution and democracy.

The fragile basis of the interim government will affect the effectiveness of whatever course it chooses. A government rules on the basis of constitutional sanction and people's vote, or by the coercive power of an overt military regime.

The interim government has none. In terms of Dieter Conrad's dichotomy, the interim government is a commissarial dictatorship, which pledges to restore the existing constitutional structure, and will be judged by its standards, though not bound by it temporarily.

In contrast, a sovereign dictator-

ship overthrows the existing constitution and is judged by whatever constitutional standard it sets up at a time of its choice. A commissarial dictatorship is constitutionally constrained [Mahmudul Islam, Constitutional Law of Bangladesh, p. 78].

The president may seek the advice of the Supreme Court for legitimizing the aconstitutional government. However, the Appellate Division may decline to give an opinion; besides, it is not binding on either party, and the Court may contradict it in other cases.

An approval for departures from the clear constitutional provisions, without binding/enforceable specification of time-bound commitments, amounts to a blank cheque to an extra-constitutional executive.

The Court also circumspectly restricts itself to constitutional/legal issues and leaves out the political issues, unless they are related to juristic considerations. But now politics is the heart of darkness.

The alternative is to seek retroactive parliamentary legislation, which reflects public endorsement and can conveniently cover the actions the interim government is required to take. The scope of the retroactive legislation will be proposed by the parties in Parliament, since the advisers will not participate in election directly or by proxy.

To facilitate the retroactive legitimization, the interim government may establish consultations with the major parties – a process which has already commenced while choosing the chief adviser [Art. F8C (5)].

The interim government enjoys enormous public good will that should be used to address the pressing problems on hand, and to return the state to the rights-bearing citizens. We wish them well.

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# Blankets and poverty

The government, which has more resources, a nationwide network, and an obligation to serve the people, is in an accountable state to curb preventable cold-related deaths and diseases and provide the necessary services. And this is to include fighting poverty and corruption for which the country is famous. In this manner, a family who are economically able can easily buy a basic need such as a blanket.

GINA DIZON

POVERTY talks about cold facts and the cold wave is one to reckon with.

Nearly a hundred thousand blankets (1 lakh) were estimated handed out to cold-hit victims all over the country by well-meaning organizations and commercial firms. Private companies can only serve limitedly and millions more living below the poverty line are in need of blankets and winter clothes to fight the cold.

This cry for blankets just speaks of one thing – Poverty. It speaks of people who are unable to buy the basic needs in order to survive during such recurring climatic change.

This leaves the government to consider what responsive pro-

grams it can do to curb cold-related deaths and sicknesses, directly and in its long-term poverty alleviation programs since its 140 million people where an estimated 50% live below the poverty line.

Similarly, the cold wave sends a message to organizations as well to come up with disaster management plans and relief missions to be done earlier to avert preventable deaths and diseases such as those aggravated by the cold.

The cold wave which registered its lowest at 6.5 Celsius has hit hundreds of people in the country especially in the north. It is a recurring phenomenon year after year. And annually, people, especially young children and the elderly are most struck with this climatic change. Reports say that already nearly 200 persons died of cold-

related causes while hundreds are being admitted in hospitals due to cold-linked illness.

Health complexes are filled with victims of the cold wave especially children with respiratory related diseases such as pneumonia while the elderly are mostly hit by hypertension and heart diseases.

Here in Rajshahi Medical Hospital, The Daily Star reports say that more than 300 patients are undergoing treatment and the number of admission exceeded last 3 year's records. The situation is getting worse as more patients from the northern districts are arriving for their admission.

Organizations, it has been noted, have conducted their own relief missions for their own beneficiaries while other commercial firms have responded in wider

scale to this call for blankets and winter clothes.

Dutch Bangla Bank Limited distributed 20,000 blankets to those struggling with the cold in the northern districts of Panchagachar, Thakurgaon, Dinajpur, Lalmonirhat, Kurigram, Nilphamari, Gaibanda, Joypurhat, Bogra and Sirajganj. Grameen Phone also recently distributed winter clothes and blankets to indigent people of Kamrangir Char in Dhaka.

The NGOs could only respond with whatever resources they have for their respective beneficiaries. And NGOs, which could only rely on support from donors, could only provide based on programmed systems leaving a lot more people needing help.

In their limited capacities, some non-government organizations like Kakonhat upazila based Adibahi Sangkrutik Unnayan Sangstha (ASUS) and Rajshahi-based Adivasi Unnayan Songstha (AUS) also very recently distributed blankets and clothes for their beneficiaries who are mostly Adivasis living in Kakonhat, Godagari and Tanore

upazillas.

While relief is not a programmed activity of said Adivasi-based NGOs, AUS for one went to seek the support of neighbors, relatives and friends. Staff of Dhaka-based Volunteer Service Overseas (VSO) donated cash to AUS and this utilized on blankets distributed last January 17 to AUS' Adivasi-beneficiaries in Tanore upazilla.

Some other charity organizations too, such as the Catholic Church distributed warm clothes and blankets to their own congregation. Fr Francis Soren and Fr Paolo Ciceri of Bagmapara Cathedral here at Rajshahi City said that the church services its congregation mostly to Adivasis from 11 nearby villages. While the Christian Church does pre-primary and primary education for its beneficiaries, it also gives out warm clothes and blankets to its 4000 beneficiaries.

Also, Fr Arturo Speziale of Mohammadpur-based St Christina Church gave blankets to Bagdi street dwellers in Guaria village of Daulatpur Upazila, with donations from some members of the congregation.

formation of the Rapid Action Battalion (RAB).

In the definition of an Act passed by the US Congress in 1991, the term "extra judicial killing" means "a deliberate killing not authorized by a previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples."

During the tenure of the past government when the HR activists, at home and abroad, raised voices against the deliberate denial of life by the law enforcing agencies, the government leaders termed them as "conspirators," and accused them of "lambishing the image of the country."

On May 9, 2006, Bangladesh was elected a member of the newly formed Human Rights Council (HRC) of the United Nations. Prior to election to HRC, Bangladesh had drafted a document highlighting a few points in support of her candidacy.

Those points reflected the universal aspirations of the people of Bangladesh, irrespective of the government of the day. Two of them were as follows:

1. Bangladesh's deep commitment to the promotion and protection of

human rights of all of its citizens emanates from its constitutional obligation.

2. At the national level Bangladesh, a democratic and pluralistic polity, is fully committed to the principles of good governance, democracy, rule of law and promotion and protection of human rights and fundamental freedom of all her citizens, with particular attention to the rights of women, children and minorities.

Deplorably, the government of that day continued with its unabated disregard for the commitments, and the extrajudicial killings went on. The CG, formed with Dr. Iajuddin Ahmed as CA on October 29, 2006, did not apply any brakes to this blatant violation of rule of law.

The current interim government, headed by Dr. Fakhruddin Ahmed, formed after the declaration of state of emergency commands the support and respect of everyone who wants to see Bangladesh prosper as a democratic modern state, with full adherence to rule of law and human rights.

Dr. Fakhruddin has indeed assembled a team of very competent individuals, each of whom has

shone in full bloom in his arena.

Incidentally, it includes four Ph. Ds (one of them was my class mate, and we were neck and neck for the first position in the class), a remarkable feat in the history of the CG.

The CA, in his maiden speech to the nation, boldly and unequivocally made his intention clear as regards holding a truly free and fair election, reflecting the full aspirations of the people.

In briefly touching upon every aspect of society and governance, he did not forget to underscore the need for "upholding human rights," "establishment of rule of law and justice on firm ground," and his government's resolute commitment to be guided by the "rules of the United Nations" in dealing with national and international terrorism.

In the last few days, during the commendable drives of the law enforcing agencies to nab the criminals, regrettably, a number of people have been killed, either due to custodial torture or in the name of "crossfire," a combination of a blatant lie on the part of the state, and cold-blooded murder by the members of the law enforcing authority.

The victims' political identities – most of them, ironically, were the workers of the party whose apex leader had initiated, and boastfully supported, the extrajudicial killings – do not, in any way, lighten the responsibility of the state to stop this extreme act of violation of human rights.

On May 9, 2006, after Bangladesh got a berth in HRC, Dr. Iftekhar Ahmed Chowdhury, the then ambassador and permanent representative of Bangladesh to the United Nations, described the results as "a great victory for Bangladesh and Bangladeshis."

He went on to say that "today every Bangladeshi should have a reason to feel proud." At that time, Dr. Chowdhury parroted as a mouth-piece of a government responsible for having the worst record of human rights in our history.

Incidentally, today Dr. Chowdhury is a member of the policy making team that has empowered him to give his endeavour, however little, to the system that could reflect the true intent of his words of boastings that he had phrased only eight months ago.

(SASU) today, January 17, 2007.

AUS Director Bhagbot Tudu and SASU officer Luis Murmu distributed the blankets to beneficiary Adivasi-Santals most of whom are elderly, disabled, women and children in response to the cold wave affecting most especially the northern part of the country.

Blankets and clothes are donations from friends, neighbors and staff of AUS and SASU including Rajshahi-based Star Craft Handicrafts and Caritas staff. Staff of Dhaka-based Volunteer Service Overseas (VSO) also donated cash, which was spent for blankets.

The AUS director thanks all those who supported the move to provide relief to cold-hit victims, as he forwarded that support should further on for Adivasi welfare.

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# Extra-judicial denial of right to life to continue?

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MOZAMMEL H KHAN

A central principle of a just society is that every person has an equal right to life, liberty and the pursuit of happiness. However, the privilege of living and pursuing the good life in society is not absolute.

The utter and deliberate denial of life and opportunity to others forfeits one's own claim to continued membership in the community. The preciousness of life in a community must be so highly honoured that those who do not honour the life of others make null and void their own right to membership in the community.

This is an ever-forwarding argument used by the advocates of capital punishment, which even the Greeks and Romans invoked for a wide variety of offences.

Socrates and Jesus were perhaps the most famous people ever condemned for a capital crime in the ancient period. However, even the strongest proponents of capital punishment in the modern day states never ever argue in favour of utter and deliberate denial of life without recourse to judicial proceedings.

The United Nations Human Rights Charter in Article 11 has made it explicitly clear that, "every-one charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence."

The constitutions of all the present-day states, including that of the People's Republic of Bangladesh in Article 35(3), have incorporated the very essence of the aforesaid declaration.

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Even in societies where the judiciary can rightfully boast of being the finest organ of the state, and the members of the community possess unflinching trust in its deliberations, the opponents of capital punishment argue that the denial of right of life is irrevocable, and the errors of justice cannot be rectified.

If an innocent person has been hanged, the judge and the whole legal machinery involved have, thereby, been made a party to the very crime they seek to punish. Their opposition to capital punishment in no way reflects their leniency towards the perpetrators of crimes.

Extrajudicial denial of right to life, in the context of so-called "crossfire," and custodial death have been omnipresent phenomena in the erstwhile BNP-led governance in Bangladesh, especially after the

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