



LAW vision



Political process under caretaker government



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FEW national issues have caused widespread concern at home and abroad as intensely as has the issue of holding a free and fair election under the incumbent caretaker government. This caretaker government has so far succeeded in performing some functions and services that are indicators of a good government. Governance is more a duty than a right. A government formed through a political process receives a mandate to govern. It must conduct its affairs according to the Constitution and the rule of law. The purpose of a political process is to elect or select a government, the functioning of which must be pursuant to the law. It is the law, not the political process that accords legitimacy to governmental powers and functions. A tendency is

discernible in Bangladesh that governments think that the legitimacy of their operation flows from political process and power. In so doing, they not only show disregard for the rule of law but make many of their functions suffer from legitimacy crisis.

The primary function of the caretaker government is to assist the Election Commission in holding free and fair elections within certain constitutional limitations. Article 58D of the Constitution mandates the caretaker government only to "discharge its functions as an interim government and shall carry on the routine functions..." Its primary function is to assist the Election Commission in holding free and fair elections, a task that must be accomplished within 90 days. The Constitution does not expressly authorise the caretaker government to make policy decisions.

Its very status as an interim government may prevent it from taking any long-term policy decisions. Whether the tenure of the caretaker government can be extended beyond 90 days is debatable. The Constitution is totally silent on this matter. Within this limited scope of its tenure and executive powers, the current caretaker government has now been operational beyond 90 days and performing wide-ranging functions.

Benvolent functions are criteria of a good government. The current caretaker government enjoys popular appreciation and support for its wide-ranging activities that serve national interests, which were expected of elected governments but they could not deliver. Its conducts appear inevitable in national interest and are justified under the doctrine of "public necessity". There are

instances where various measures of a government have been judicially declared valid on the basis of "necessity". A government may deviate from constitutional limits, provided its departure is justified as a matter of necessity. Obviously every such departure itself constitutes a wrong, but its justification lies in the fact that it is "necessary" in the national interest to correct a previously perpetrated greater wrong. It is for the court to decide whether a particular departure is warranted by "necessity".

The current caretaker government must be mindful of the requirements of legal necessity as a justification of its conducts. Any future regular government and its parliament need to endorse its actions in order to avoid any legal gap in the continuity of governmental authority. The 90-day tenure of the caretaker government has expired and it remains functional under an emergency proclaimed under Article 141A of the Constitution. The President alone can prolong this emergency for a maximum period of 120 days. Any continuation beyond this period is subject to parliamentary approval within 30 days from the date on which the new parliament meets after the election.

The forthcoming elected government will have a role to play in validating the continuation of the caretaker government and its activities. Awami League, if comes to power, has made a public commitment to validate all activities of the caretaker government. This is an appropriate step, for which there are ample precedents. Exiled governments in London during the World War II, viz the provisional governments of de Gaulle and Czechoslovakia, and their activities were regularised retrospectively to avoid any legal vacuum. Activities of the Bangladesh government between the proclamation of independence on 26 March 1971 and 16 December 1972 were confirmed retrospectively when the Constitution came into force in the Fourth Schedule and Article 150 of the Constitution. Profound unconstitutional acts of the martial law regimes of Zia and Ershad were ratified albeit by their ductile parliaments in 1979 and 1986, respectively.

The caretaker government must now take its primary responsibility of holding a free and fair election seriously and accomplish it within the shortest possible time. It must bear in mind that it is an interim government for a specific purpose. Its wide-ranging involvement in long-term policy matters and reforms may bring about a corresponding depreciation in its engagement in holding free and fair

election. The prolongation of emergency should not be an option, as it does not provide a normal and healthy climate for major reforms because of the absence of popular participation in the reform process and the curtailment of some human rights embodied in the Chapter 3 of the Constitution.

Reforming the political process and institutions are best left to the province of elected governments, the people, and the civil society. Given its limited mandate, it would be exceedingly difficult for the caretaker government to continue for a period longer than "necessary" to hold a free and fair election and to justify as a matter of "necessity" its functions. A failure to justify is likely to overshadow its achievements and dilute its status of good government.

The army certainly has a role to play in aiding the caretaker government to perform its constitutional duty. The armed forces have been displaying their profound professionalism, nation-building commitments, aloofness from national politics since 1990. They are apparently the driving force behind the success of this caretaker government. They must consolidate this role further and should not venture into politics.

The progressive development of political process has been hamstrung by selfish power politics and unlawful acts of both political and military governments. It is naive to suggest that there could be no situation where the army access to political power may be appealing to redress mass sufferings in the hands of corrupt and dishonest politicians in government. But successive experience of army access to politics suggests that they are not necessarily the best custodian of the national interest and better serve in government. Politicians must also not think that they enjoy a monopoly over government and extract maximum possible benefits while in government, which seems to be the prevailing pattern. A minimum standard of responsible political behaviour and culture of compliance with the rule of law are expected of politicians. They must show their habitual obedience and unqualified accountability to the people and national interests. They must exercise their power according to the Constitution. These are the prerequisites of a stable political order for good governance with democratic institutions as its propeller.

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LAW week



Special graft courts start rolling

In a major development in the interim government's campaign against graft, four of the five special courts designed to try the corrupt suspects got down to work. Of the tribunals set up at the MP Hostel in Sher-e-Bangla Nagar, one took depositions in a case against Harris Chowdhury, political secretary to former prime minister Khaleda Zia, in his absence while the others fixed May 9 as the date for hearing on charge framing against three detained former state minister and two of their family members. Earlier the same day the Metropolitan Sessions Judge's Court, Dhaka took into cognisance graft charges against the ex-state ministers and their relations. After scrutinising dockets, it ordered the cases filed with different police stations to be shifted to the special courts for quick disposal. The Anti-Corruption Commission (ACC) pressed charges against former state minister for planning Mohiuddin Khan Alamgir, ex-state minister for civil aviation and tourism Mir Mohammad Nasiruddin and his son Mir Helaluddin, former state minister for labour and employment Amanullah Aman and his wife Sabera Aman on April 29. Meanwhile at the MP Hostel, the authorities concerned did not allow the newsmen to cover proceedings of the special courts. They let the journalists in but by that time the day's business was over. -- *The Daily Star, May 7*.

Writ petition filed in HC challenging legality of CG

A writ petition was filed in the High Court (HC) challenging the legality of the present caretaker government. Josneara Chowdhury made a prayer to the court to ask Chief Adviser (CA) Fakruddin Ahmed and the 10 advisers to explain on what authority they are holding their public offices as members of a non-party caretaker government. According to the petition, Josneara hails from village Karmutia in Tangail, her husband's name is Md Haris Chowdhury and present address is 62, Bijoynagar, Dhaka. A group of lawyers including BNP's Law Affairs Secretary Zainul Abedin assumed that Josneara might be the wife of former prime minister Khaleda Zia's political secretary Harris Chowdhury, but it could not be confirmed. In the same petition, she also prayed to issue rule upon the Election Commission (EC) as to why it has been delaying in holding the general elections. After filing of the petition in the morning a division bench of the HC partly heard the matter and fixed May 16 for the next hearing. This is the first ever petition filed against the caretaker government challenging its legal base of its holding office. While Abdus Salam Mandal is the filing advocate of the petition, Syed Golam Mostafa moved in the court as counsel of the petitioner. -- *The Daily Star, May 7*.

EC to push political parties into reforms

Political parties will have to amend their constitutions to de-link professional bodies and student organisations to get registered with the Election Commission (EC) as part of electoral reforms the EC is now working on. They will also have to complete elections to their central and grassroots level committees in accordance with their constitutions before applying for registration, and sources of their funds will have to be disclosed. Intra-party democracy and financial transparency in the parties will be ensured greatly when the electoral reforms are implemented, the EC said explaining the objectives of the reforms. Election Commissioner Brig Gen (retd) M Sakhawat Hossain said as per the EC's plan the proposed electoral reforms will be made laws through an ordinance promulgated by the president by July. "Through laws, we will ask political parties intending to get registered to cut links with professional bodies and student fronts," Sakhawat said. "We are formulating proposals requiring the political parties to complete elections at all tiers and submit (to EC) lists of elected representatives to their central committees for getting registration." -- *The Daily Star, May 8*.

Guidelines given to free judiciary

The Supreme Court (SC) directed the government to complete the process for implementation of separation of judiciary from the executive and to inform the court about its execution by July 19. A full bench of the Appellate Division of the SC headed by Chief Justice Mohammad Ruhul Amin in its three-point direction asked the government for creation and sanction for a certain number of courts for magistrates across the country along with its manpower and logistic support, allotment of courtrooms and chambers for judges, and necessary budgetary allocations. The SC accepted four rules that were submitted to the court earlier after corrections regarding judiciary separation and the amended CrPC ordinance separating the magistracy from the executive. The court adjourned the hearing of contempt rule until July 23 and following a prayer from the counsel of nine bureaucrats facing a contempt charge, the court exempted them from appearing before the court in person. Thirteen bureaucrats, including four secretaries working under the administration of former BNP-led government, are facing the contempt charge. Nine of them faced the charge for distortion of SC's 12-point directive regarding judiciary separation and the four secretaries for not implementing the directives within the time frame given by the court. -- *The Daily Star, May 8*.

EU reiterates support to CG

European Union (EU) envoys reiterated support for the current military-backed government citing the administration's progress towards holding free and fair elections and what one envoy said was a slightly improving human rights situation. "We would like to see Bangladesh return to democracy and elected government provided the conditions are there to hold free, fair and credible elections," said Stephan Frowein, EU ambassador in Dhaka, at a press conference to mark Europe Day at a city hotel. German Envoy Frank Meyke, representing the current EU presidency, said the EU is encouraged by the Election Commission's (EC) proposed electoral reforms, particularly the move to register political parties and ensure intra-party democracy. EU is currently the largest development cooperation partners of Bangladesh, disbursing well over Tk 3,900 crore in 2006 alone. British High Commissioner Anwar Choudhury said they support the caretaker government as long as they are "working towards holding free and fair elections and leaving behind an infrastructure and a set of reforms to ensure a sustainable democracy and high standard of elections in the future". -- *The Daily Star, May 9*.

Sylhet mayor freed on bail in graft case

Mayor of Sylhet City Corporation (SCC) Badar Uddin Ahmed Kamran, who was arrested in connection with a graft case, was released on bail from Comilla Central Jail. A Sylhet court is to frame charges tomorrow against him and 18 others in connection with the case filed for graft in leasing out Shibganj kitchen market in Sylhet. On April 30, a High Court (HC) division bench granted the SCC mayor ad interim bail but his release was delayed due to official formalities and public holidays. The mayor went to Sylhet from Comilla following his release. While talking to newsmen he claimed that the case was filed out of political grudge. "The BNP-led alliance government filed the case to harass me as they failed to defeat me in the election. I am hopeful of getting justice from the court," Kamran said. The now defunct Bureau of Anti-Corruption filed the case in 2003. Sylhet police arrested Kamran early April 6 after Sylhet District and Sessions Judge Abdul Gafur issued an arrest warrant against him a day before in this connection. Following the arrest, the mayor was sent to Comilla Central Jail. He was transferred to Comilla Central Jail three days later. On April 22, a divisional special judge rejected the interim bail prayers of the mayor and two other accused. -- *The Daily Star, May 9*.

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LAW update



New effort to tackle divisive issue of Security Council reform

THE U.N. General Assembly launched a new effort to tackle the divisive issue of Security Council reform, issuing a report proposing that the 192 member states consider a temporary expansion of the U.N.'s most powerful body. The report was prepared by five "facilitators" who spent three months surveying members' views on ways to reshape the council currently which has 10 members elected for two-year terms and five permanent members with veto power: the United States, Russia, China, Britain and France.

There is strong support for enlarging the Security Council to reflect the world today rather than the global power structure after World War II when the United Nations was created. But all previous attempts, starting in 1979, have failed because national and regional rivalries blocked agreement on the size and composition of an expanded council. The ambassadors of Tunisia, Cyprus, Croatia, Chile and the Netherlands who served as the facilitators reported that these rivalries still exist, but they said "a transitional approach" to Security Council reform, with a mandatory review on a predetermined date, offered the possibility of breaking the deadlock.

General Assembly President Sheikh Haya Rashed Al Khalifa, in a letter submitting the report to members, said she shares the facilitators' view that there is a path forward that member states can build on taking advantage of the current momentum." She scheduled an informal meeting to discuss the report on May 3. The deep divisions forced the General Assembly to shelve three rival resolutions to expand the council in 2005 and there has been no serious effort to tackle the issue since then. The so-called Group of Four Germany, Japan, Brazil and India aspire to permanent seats without veto rights on an expanded council with 25 members. A group of middle-ranking countries, including Italy and Pakistan, who call themselves Uniting for Consensus, want a 25-member council with 10 new non-permanent seats.

The African Union, whose 53 members argue that their continent is the only one without a permanent seat on the council, wants to add 11 new seats: six permanent seats including two for Africa with veto power, and five non-permanent seats. The facilitators' report emphasizes that Security Council reform is crucial to overall reform of the United Nations, that an overwhelming majority of members believe "the status quo" is unacceptable, and that flexibility is key to tangible results. "Any achievable solution must address the concerns of the wide majority of United Nations member states aimed at enhancing their access, both in terms of increasing their chances to serve as members of the council and by being more intensively involved with its work while not a member," the report said.

A significant number of member states tend to agree that their ideal solution may not be possible at this stage, and believe that it may be more reasonable to consider the best possible solution for now," the report noted.

An expansion of the council must be based on a country's contribution to international peace and security, equitable geographical distribution, and a address the under-representation of developing countries as well as small states," it said. The facilitators said the veto issue is so contentious that it should be put aside until the mandatory review. During a transitional period, they said, members could explore creating new non-permanent seats, possibly for the entire intermediate period, possibly for extended but limited periods, with the length of terms and the method of reelection to be decided in negotiations. The facilitators also suggested that member states consider whether to support a limited, medium-size, or large expansion; whether to limit the use of the veto; ways to enhance access to the council for countries not on it; and the "notion of accountability" for regional representatives.

On the last day, there was a panel discussion on "Rohingya refugees and challenges for Bangladesh," which was participated by Ms. Pia Prytz Phiri, UNHCR Representative in Bangladesh, Professor Shah Alam and Associate Professor Zakir Hossain, Professor Mizanur Rahman moderated the session.

Recommending for accession to the Refugee Convention, Professor Dr. M. Shah Alam, a former Member of Bangladesh Law Commission said that Bangladesh has been hosting refugees and extending assistance to them for a long time, however did not sign the relevant instruments. The State is also a member to the UNHCR's executive committee (EXCOM) since 1995. "Likely, the government does not want to go under any legal obligation, which is not a right standing," opined the Professor Alam, an

LAW event

TRAINING ON REFUGEE LAW
Experts urge accession to Refugee Convention

UDATTI BIKASH



expert on International Law. He observed that Bangladesh has already become a party to major international human rights instruments, which obliged it to the protection of refugees' rights anyway. So, no logic sustains here not to be a party to the Refugee convention.

Underscoring the need for a legal regime and institutional mechanism for refugee status determination (RSD) by the government of Bangladesh, Advocate Dr. Naim Ahmed mentioned that this would facilitate an effective protection for the refugees and identification of illegal immigrants in the country. Referring to the Rohingyas from Myanmar, he said that due to absence of a registration mechanism, there is no authentic data on the Rohingyas and other foreigners staying in Bangladesh illegally. A significant number of the Rohingyas, got de facto citizenship here. In some villages in Bandarban district bordering Myanmar, the Rohingya immigrants out numbered the local Bangali population.

In the panel discussion, UNHCR Representative, Ms. Pia Prytz Phiri appreciated the role of the people and government of Bangladesh for hosting a large number of refugees from Myanmar for more than a decade. However, she expressed her dissatisfaction and concerns for lack of fundamental rights refugees and their exploitation in camps. She mentioned that UNHCR would propose to the government of Bangladesh to open up the camps by 2009 for ensuring freedom of movement of refugees.

The writer is a researcher and practitioner specializing on legal and human rights issues.