



Star LAWanalysis



In search of a President with power

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PRESIDENT is the constitutional head of the People's Republic of Bangladesh. The President takes precedence over all other persons and exercises the powers and performs the duties conferred on him by the Constitution and by any other law. [Article 48(2)] Furthermore, all executive actions of the government are expressed to be taken in the name of the President. [Article 55(4)]

instrument so attested or authenticated shall not be questioned in any court on the ground that it was not duly made or executed.

The President makes rules for the allocation and transaction of business of the government [Art. 55(6)]. The President appoints a member of the *Jatiya Sangsad* as Prime Minister who appears to him to command the support of the majority of the members of the *Sangsad* [Article 56(2)]. His discretion comes into play when no political party has a clear majority in parliament. He is then to be satisfied as to which combination of the parties can form a government. Besides the Prime Minister, the President appoints other ministers, state ministers and deputy ministers.

In accordance with the advice of the Prime Minister, the President also appoints the attorney general of Bangladesh [Art. 64(1)], the chief justice, judges of the Supreme Court [Art. 95(1)], the Chief Election Commissioner and other Election Commissioners [Art. 118(1)], the Comptroller and Auditor General [Article 127(1)], and the chairman and other members of the Bangladesh Public Service Commission [Article 138(1)].

The supreme command of the defence services of Bangladesh is vested in the President and the exercise thereof is regulated by law and such law shall, during the period of care-taker government is administered by the President [Article 61]. Article 133 says that it shall be competent for the President to make rules regulating the appointment and the conditions of service personnel in the service of the Republic and until provision in that

behalf is made by or under any law, and rules so made shall have effect subject to the provisions of any such law.

President may regulate the raising and maintaining of the defence services of Bangladesh and of their reserves, the grant of commissions therein, the appointment of Chief of Staff of the defence services, and their salaries and allowances; and the discipline and other matters relating to those services and reserves until these are provided for by the Parliament [Article 62(2)].

demand for a grant can be made except on the recommendation of the President [Article 89(3)]. The President has the power to authorise expenditure from the consolidated fund as supplementary or excess grants. If the *Sangsad* in any financial year fails to make any grant the President, upon the advice of the Prime Minister, would have power to draw from the consolidated fund, the necessary funds for a period not exceeding 60 days, stipulated in the annual financial statement for that year. [Article 92(3)(b)]

Miscellaneous powers: The President has to perform some other functions like administration of oaths. The oath of the Chief Justice, the Prime Minister, other ministers, and state ministers, deputy ministers, Speaker and deputy speaker are to be administered by the President under the Third Schedule of the Constitution [Article 148]. Likewise, as the head of the state, the President sends and receives ambassadors and other diplomatic representatives.

All contracts and deeds made in exercise of the executive authority of the Republic are expressed to be made by the President and executed on behalf of the President and these are submitted to the President who causes them to be laid before *Sangsad*. [Article 145A] The remuneration, privileges and other terms and conditions of service of a person holding or acting in any office to which this article applies are determined by or under act of parliament, but until they are so determined they may be determined by order made by the President [Article 147(1)(b)].

Is the President always subordinate to PM's will?

Though Article 55(2) expressly vests all executive power on the PM, it cannot be said that the framers of the Constitution did not intend to give any further discretion. [Constitutional Law of Bangladesh, Mahmudul Islam] Besides the President is oath bound under Article 148. He is oath bound to protect, preserve and safeguard the Constitution which implies some discretionary power on the President [Shamsur Shing v. Punjab, AIR 1974 SC 2192]. An important area of discretionary power resides in Article 57(2). If the Prime Minister ceases to retain the support of a majority of the members of Parliament and advises the President to dissolve the Parliament, he may dissolve the Parliament accordingly if he is satisfied that no other Member of Parliament commands the support of the majority of the members of Parliament.

He will not be bound to act on the advice of the PM if it is *ex facie* unconstitutional. Thus where a PM has lost support of the majority of Parliament members and thus refuses to advise the President to summon Parliament even after 60 days of its prorogation the President may require the PM to submit a written advice in this regard. If the PM

denies doing so, he may summon Parliament even without the advice of the PM.

Proviso added to article 48(3) says that the question whether any, and if so what, advice has been tendered by the Prime Minister to the President shall not be enquired into in any court. Because of this provision there can be no remedy in court if a President chooses to act without or against the advice of the PM. Even *prima facie* unconstitutional advice of PM is also not covered within judicial scrutiny. However if the government produces the advice showing the advice tendered, it may come under judicial scrutiny. [India v. Jyoti Prakash, AIR 1971 SC 1093]

The President is entitled to be informed by the PM or Ministers of domestic affairs and foreign relationship [Article 48(5)]. He may request the Prime Minister to submit any proposal for consideration in the Cabinet. On paper this may not appear to be a power at all. But having regard to the stature of the post this may have a great influence on the over all state mechanism especially in the context of turmoil between the opposing and rival political parties as we face here in Bangladesh.

Strengthening the role of President

There is wide and deep-rooted belief in the mass people that the prestigious institution of Presidency should not enjoy a mere subsistence. The powers and functions of the President should be increased and the secretariat of the President should be strengthened. Many suggestions and recommendations are already made in this regard. Shujan, a civil society initiative [http://www.shujan.org/] came with some proposals which include the following:

- The President should be elected by an extended electoral college which may comprise the members of the Parliament and all elected members of the local elective bodies (like Municipal corporations, Pourashava, Zilla Parishad, Upazila Parishad, Union Parishad) and for that purpose Art 48 (1) may be revised as: 'There shall be a President of Bangladesh who shall be elected by the Members of the Parliament and by the elected Members of the local elective bodies (like Municipal Corporations, Pourashavas, Zilla Parishad, Upazila Parishad, Union Parishad) in accordance with Article 59 of the Constitution.'
- This proposal seems to stabilise the local government by making its existence as a precondition to the Presidential election. It is unacceptable that there shall not be a President of Bangladesh. Now the non-existence of local government also becomes unacceptable. It will also give the institution a non-partisan fibre.
- President's obligation to abide by the PM's advice may be reduced by amending Art 48 (3) as the following. 'In the exercise of all his func-

tions, save only that of appointing the Prime Minister pursuant to clause 3 of article 56, the Chief Justice pursuant to clause 1 of article 95, and Chairmen and Members of all constitutional bodies (the Election Commission, Anti-Corruption Commission, Public Service Commission, and Comptroller and Auditor General).'

This will ensure neutrality and status of the constitutional posts and these strong democratic institutions are sure to consolidate the democracy.

- The President may be a solution to the politicisation of universities. He should be assigned a guardian's role in this regard. A new sub article as 48(4) should be added: 'The President as Chancellor of the Universities shall meet the Vice-Chancellors every month and advise them on academic and administrative matters. The University Grants Commission shall serve as the President's secretariat for this purpose.'
- Some other proposals in this regard are
- There should be an additional requirement of securing at least 50 per cent vote of the members of the opposition in the Presidential poll.
- The requirement of not belonging to any political party or its affiliate association should be introduced for a presidential candidate.

This may seem unreasonable to some as it will disqualify a member of parliament to be a President. Some may argue that already there is a provision in the Constitution requiring the newly elected President to discontinue all his party allegiance by resigning from parliament membership [Article 50(4)]. But it is undeniable that there is difference between pre-requirement and post-requirement of neutrality. Physical allegiance may be abandoned theoretically but it is almost impossible to abandon psychological allegiance which has been badly demonstrated by our contemporary experience.

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Though theoretically he is above all, but in reality he is a titular head performing ceremonial functions only, and the real executive power of the state is exercised by the cabinet under the leadership of the prime minister. Except for appointing the Prime Minister pursuant to clause (3) of article 56 and the Chief Justice pursuant to clause (1) of article 95, the President always act in accordance with the advice of the Prime Minister. [Art.48 (3)]

Powers and functions

President's power and functions stem from two sources, i.e., the Constitution and any other law. The generally exercised power of the President can be divided into the following:

Executive power: The President is the head of the state and all executive actions of the government are expressed to be taken in the name of the President. The President, by rules, specifies the manner in which orders and other instruments made in his name be attested or authenticated. [Article 55(5)] And the validity or any order of

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The supreme command of the defence services of Bangladesh is vested in the President and the exercise thereof is regulated by law and such law shall, during the period of care-taker government is administered by the President [Article 61]. Article 133 says that it shall be competent for the President to make rules regulating the appointment and the conditions of service personnel in the service of the Republic and until provision in that

Judicial power: the judicial power of the President originates from article 49 of the Constitution. It says that the President shall have power to grant pardons, reprieves and respites and to remit, suspend or commute any sentence passed by any court, tribunal or other authority.

Legislative power: In accordance with the written advice of the Prime Minister, the President summons, prorogues and dissolves *Jatiya Sangsad* [Article 72(1)]. The President has right to address the *Sangsad* and may send message thereto [Article 73(1)]. The President is required to give assent to every bill passed by the *Sangsad* to make it a law [Article 80(2)]. When *Sangsad* stands dissolved or is not in session the President may make law by promulgating ordinances and such ordinances have the same force and validity as an Act of *Sangsad* [Article 93].

Financial power: No money bill or any bill that involves expenditure from public money can be placed before the *Sangsad* except on the recommendation of the President [Article 82]. No

HUMAN RIGHTS advocacy



EARLY MARRIAGE

Why does it happen and how we can stop it

LAILA NOOR

Dhaka, July 19 (News Network) Taslima Begum of Comilla was married off with a 22-year-old man at an age when she could not even utter the word 'Kabul' (accepted) to recognise the marriage. It was her grandmother who acted as proxy for her. When Taslima got adult, she refused to accept the marriage. "I cannot accept a marriage which was arranged when I was only two years old," she told her mother.

Having failed to convince her, Taslima's parents arranged her marriage somewhere else when she turned 20. Now 32, Taslima is blessed with two lovely kids and happy with her present husband. In Bangladesh, child marriage is widespread, particularly in rural areas, although there is a law against it. The underlying reasons are poverty and lack of awareness. "It goes back to traditional idea that kids have to be married at an early age," says Taslima. "Now time has changed. People do understand the damaging aspects of early marriage. Still, early marriage takes place in our society due to the emergence of new problems."

Taslima's husband Helal Uddin, who is three years older than her, agrees with his wife and says, "In most cases, parents arrange the marriage of their children thinking little whether they are capable to take the responsibility of the families." Helal's mother Saleha Begum, however, does not agree with her son and daughter-in-law. "It's better for the girls to get married at an early age when they look pretty and are obedient. When girls get adult they become arrogant and they don't want to carry out orders. Boys are also better off getting married early because they tend to be more attentive to earning only after marriage," says the old lady.

Many people in the country are of the same opinion. Village girls, in particular, are forced to get married at an early age, which cannot be stopped although early marriage is discouraged by many international charters, including the United

Nations CEDAW. The UN General Assembly formulated a charter in 1962 regarding the minimum age of marriage, consent of bride and bridegroom and marriage registration. Bangladesh is a signatory to the charter. And early marriage is prohibited under the existing law of the land too. Male under the age of 21 and female under the age of 18 cannot get married as per the section 2 of the Early Marriage Prevention Act, 1929.

Unfortunately, early marriage is taking place at random showing little respect to the law. Why cannot the existing law play an effective role in stopping early marriage? Human rights activists and social workers say that according to the law early marriage is a punishable offence, but it is not banned. Besides, people do not abide by the law because there is hardly any campaign to make the people aware about it, let alone the solving social problems.

Hasan Imam Khandaker, the project director of Assistance for Slum Dwellers that has been working for a long time with street adolescents, says although a girl's minimum age for marriage is 18, a staggering 75 percent of the girls are married off between 15 and 19 years of age.

Explaining the reasons, he says, "Most people in our country are poor and always suffer from a sense of insecurity about their daughters. Therefore, they want to have a sight of relief after marrying their daughters off at an early age."

About the existing early marriage prevention law, he says, "Parents are the secure refuge of children, so enacting law against parents and guardians is not the solution. But birth and marriage registrations can help reduce the trend of early marriage." According to the information of UNFPA, a UN front organisation, the average age of marriage for Bangladeshi girls is 16.9 years. Statistics provided by Bangladesh Demographic Health Survey (BDHS-2005) show Bangladesh tops the world when it comes to early marriage. During 1993-93, 47.2 percent of the country's females were married at the age of 16 and the tendency is upward.

A recent survey by Steps Towards Development, carried out in Chowgachha upazila of Jessore, shows the rate of early marriage among girls is three times higher than that of boys. According to a Unicef research, 48 percent of the females are married off before being adult. Five percent of the girls, aged 10-14, are married off. Steps Towards Development executive director Ranjan Karmaker says, the tendency of early marriage in the country is relatively higher and socially it is approved although there is a law against it.

"While registering a marriage, the minimum age of bride and groom can be proved by the birth certificate. But, in spite of many initiatives, the birth of 88 percent babies and most marriages in rural areas are not registered. Besides, 70 percent of the registered marriage is actually early marriage. So, it is clear that the law is ignored and the situation is getting worse day by day." Karmaker emphasises the importance of public awareness to stop early marriage and says union parishad members, kazis (marriage registrars) and imams have an important role to play in checking early marriage. "The first thing to stop early marriage is to ensure registration of birth and marriage in cooperation with all concerned. After that it's necessary to build a social cordon with the help of the administration and the locals."

Recently in Comilla, an imam conducted the marriage of 16-year old Ayesha Khanam. Mizanur Rahman, a local kazi, points out, "In most cases, the ages of brides and grooms are determined by their parents for lack of official records. Therefore, it is not possible to detect the early marriage. And if a kazi refuses to conduct the marriage, the responsibility is then given to an imam to do that. The problem of early marriage also persists among the indigenous people and in different anthropological sectors. Malobika Hajong, an indigenous social worker, says, "Despite knowing about the law, many don't abide by it. Although the registration is mandatory for the Christian and Muslim communities,



there is no registration system for the marriage of the Hindus, Buddhists and the indigenous people. Therefore, the age remains unknown."

Gourango Patra, president of an indigenous organisation, says about 99 percent of the females of his community are married off at an early age. Experts blame poverty and lack of awareness for the failure to check child marriage. Mahmuda Islam, a professor of Dhaka University's Sociology Department, says, "The social problems behind early marriage will have to be solved. First of all, the guardians will have to be made aware about the adverse impacts of early marriage. People will be respectful to the law only when they will understand it."

Former Advisor to the caretaker government and executive director of Ain O Shalish Kendra Sultana Kamal in a recent press conference said, "It seems impossible to reduce early marriage if there is no overall change in the attitude of women."

About checking early marriage in different anthropological sections and indigenous communities, she said advocacy at the national level and enactment of identical family law are needed to make a unified marriage registration and divorce process for all religions. "It's essential to address the main causes first to put an end to early marriage. The government will have to play the main role in implementing the steps. Above all, media's active cooperation and people's conscious participation are needed to prevent early marriage," she said.

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LAWweek



August 15 as national day of mourning: SC lawyer files writ

A Supreme Court lawyer and two other persons filed a writ petition with the High Court (HC) challenging a cabinet division order issued during the immediate past BNP-led alliance government's regime canceling August 15 as the National Day of Mourning and a public holiday. The petitioners also sought court directives reinstating the date as the National Day of Mourning and a public holiday. Advocate Mozammel Huq, a Supreme Court lawyer, filed the writ petition with an HC division bench, which is likely to hear the writ. Mentioning the great contribution of Bangabandhu Sheikh Mujibur Rahman in the Liberation War of Bangladesh, the petitioners said Mujib was killed on August 15, 1975. In 1996 the erstwhile government introduced August 15 as the National Day of Mourning and declared the day a public holiday with the national flag flying half-mast to pay respect to the slain father of the nation. But the BNP-led alliance government in August 2002 canceled the earlier decision to observe August 15 as the National Day of Mourning and a public holiday through issuing a notification through the cabinet division. The petitioners filed the petition as a public interest litigation. -The Daily Star, August 7.

Bangabandhu case: SC rejects plea

On the first day of resumption of hearing of the Bangabandhu murder case after six years at the Appellate Division of the Supreme Court (SC), counsels for the convicts pleaded for adjournment of the hearing for one month but the court overruled it. The counsels repeatedly tried to persuade the court to adjourn the hearing. But the three-member SC bench took a firm position that the case had waited long enough, and now there is no justification for not hearing the petitions by four condemned prisoners seeking leave to appeal against the High Court (HC) verdict. The HC had awarded death penalty to 12 former army personnel including the four on April 30, 2001. "We have sat not to deliver adjournment," said Justice Joydul Abedin, who is on the SC bench headed by Justice Tafazzul Islam with Justice Hassan Ameen as the other member. The court sat to hear the leave to appeal petitions filed by four convicts Lt Col (ret) Bazul Huda, Lt Col (ret) Syed Faruk Rahman, Maj (ret) Sultan Shahriar Rashid Khan and Lt Col (ret) Mohiuddin Ahmed. Another condemned prisoner, Maj (ret) AKM Mohiuddin, also filed an appeal through the jail authorities in June following his extradition from the US. -The Daily Star, August 8.

Faizee case: CU to appeal against HC verdict

Chittagong University (CU) Syndicate in an emergency meeting decided to appeal to the Supreme Court (SC) Appellate Division against the High Court (HC) verdict that declared the cancellation of the LLB certificate of Justice Faisal Mahmud Faizee illegal. The HC delivered the verdict on Monday stating that the CU's decision to cancel Faizee's LLB certificate in connection with his alleged tampering with the mark sheet was illegal. CU Vice-chancellor (VC) Prof M Badiul Alam presided over the syndicate meeting. Syndicate member Prof Helal Uddin Nizami said, "We hope to get

justice at the Supreme Court." He said, "We decided to cancel the LLB certificate of Justice Faizee based on three probe committee reports." He said Prof Shamsuddin, Prof Abu Saleh and Prof MA Hakim headed the committees. -The Daily Star, August 8.

ACC files graft cases against 10 high govt officials

The Anti-Corruption Commission (ACC) sued ten bureaucrats, including former Power Division secretary ANH Akhter Hossain, on graft charges. ACC Deputy Director Mahbulul Alam filed the case against the bureaucrats with Shahbagh Police Station under sections 409 and 109 of Bangladesh Penal Code and the Corruption Resistance Act 1974. The nine other accused in the case are joint secretary of the Power Division Mezbauul Islam, deputy secretary of the Employment Bureau Nazma Begum, deputy secretary of the Energy and Mineral Resources Division Abdullah Masud, deputy secretaries of the Power Division Laila Jesmin and Ismat Ara Jahan, assistant secretary of the Ministry of Liberation War Ali Hossain, administrative officer of the Power Division Chanchal Krish Talukder, managing director of Dhaka Electric Supply Company Limited and secretary of the same company HM Nurul Huda. Of the accused, ANH Akhter Hossain is now in jail while the rest have been transferred to different ministries as part of the administrative reshuffle. -Unb, Dhaka, August 9.

Hasina's appeals: HC adjourns hearings in all 3 graft cases till Aug 21

The High Court (HC) adjourned till August 21 hearing of three appeals by detained former prime minister and Awami League chief Sheikh Hasina for quashing three graft cases against her in connection with the purchase of a frigate and eight MiG-29 fighter aircraft, and setting up Meghnaghat power plant. All the three appeals were on the case list for hearing by an HC bench. The court first took up for hearing Hasina's appeal for quashing the case concerning MiG-29 purchase. In a packed courtroom, hearing started in the morning and continued till lunch break. At this stage, Hasina's counsels sought more time to prepare for the cases. And the court adjourned hearing of all the three appeals till August 21. Later, one of Hasina's counsels Barrister Shafique Ahmed told reporters that they (counsels) read out the first information report (FIR) and charge sheet of the case regarding MiG-29s, and submitted those along other relevant papers to the court. Shafique said they pointed out to the court that some essential ingredients of law are absent in the FIR and charge sheet of the case. -The Daily Star, August 9.

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