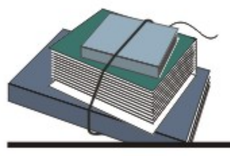

REVIEWING THE VIEWS

Viable alternatives to caretaker government

PROFESSOR M RAFIQUL ISLAM

THE apex court decision on the unconstitutionality of the caretaker system and its haste abolition by the government have generated serious concern among those desirous of free and fair elections to propel a robust democratic governance. The incumbent government and the opposition alike publicly support free and fair election but they differ on how to achieve it. The former's opposition to and the latter's support for, the caretaker system are seemingly non-negotiable. Some civil society members and the media also tend to support the caretaker system. The caretaker system was not an end in itself but a means towards an end of holding free and fair elections. It is now high time for us to emphasise the end more than a means that no longer exists and move forward in working out viable alternatives to attain the desired goal. This brief note is intended to be a way forward, suggesting some widely known and practiced alternatives to the caretaker system for ensuring free and fair elections.

The idea of the caretaker system must be abandoned from consideration merely because it is unconstitutional in textual and deceptive in operational contexts. It transformed a ceremonial president into all-powerful president, heading an unrepresentative and unaccountable government, which eroded the fundamental structure of the constitution and parliamentary form of government. It is now held as unconstitutional by the Supreme Court. To talk about bringing it back essentially amounts to undermine the apex court and its decisions. The caretaker system may well be politically palatable but political consideration cannot and should not be a factor in judicial decision-making. It is the job of the government, opposition, and civil society to deal with the political consequences of a legal decision and tailor their political responses within the limits of law. Chronic abuses of power in vote rigging in past elections held under political party or military governments have legitimately generated widespread electoral mistrust. Whilst the government was duty bound to abolish the caretaker system following the apex court decision, it was also under an obligation to work out a reliable alternative to overcome the deep rooted distrust. Indeed, the apex court had given the government reasonable time to work out such a viable alternative. Instead of availing this opportunity, the government hastily abolished the caretaker system, a process that indirectly facilitated by the opposition's boycott of parliamentary debate on the issue. So far the opposition is yet to come up with any alternative suggestion other than to stick to the caretaker system in total disregard for the apex court decision.

The caretaker government was conceived as 'non-political and neutral', which is deceptive. The political party in power can appoint its own member or follower as the president who would head the caretaker government and choose its advisers. Were president Abdur Rahman Biawas and Iajuddin politically neutral of BNP influence? On 9 December 2006, Iajuddin deployed the army nationwide and pre-empted the oppositions's planned sit-in the next day of the presidency (DS, 12 September 2011). He took this decision unilaterally against the unanimous views of his ten advisers. Hypothetically, assume a future caretaker government headed by the incumbent president Zillur Rahman. Would it be politically neutral of any Awami League interests? Where is the guarantee that it would act neutrally? Obviously the caretaker system had served some purpose but at a cost. The Iajuddin caretaker government functioned from the beginning to the end under the emergency rule backed by the army, denying many constitutional guarantees. Emergency rules and unconstitutional measures are barriers to democratic institutions and governance, which have triggered the Arab springs.

The demand for the restoration of the caretaker system is likely to be counterproductive on the face of the apex court decision against it, which legally insulates the government position. It is not worth fighting a losing battle. The argument that the caretaker system was a 'political necessity' is untenable because of its inability to fulfil the test of 'necessity'. First, it is not the only means of achieving free and fair elections; and secondly it is not the least distortive to the prevailing constitutional rule. Since there are other viable and constitutionally subsumable options available for holding free and fair elections, the caretaker system can-

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not be justified on the ground of 'necessity'. In the best interest of free and fair election, we must put behind the caretaker system and move on to suggest viable alternatives and bring pressure to bear on the government to provide a reliable mechanism for free and fair elections. To this end, let me submit two alternate proposals for the perusal of all concerned.

The first one is to render the Election Commission (EC) strong, effective, and absolutely independent of the government. This is the easiest and politically palatable option that already exists in part VII of the constitution and as such requires no legislative reform. It is a statutory body with constitutionally entrenched independent authority to perform its functions (ss 118:4 and 119:1). The two subsequent sections of the constitution confer on the EC substantive independence of the executive. The President shall, not may, upon request from the EC, 'make available to it such staff as may be necessary for the discharge of its functions' (s120). It is the constitutionally imposed duty on the executive to assist the EC in the discharge of its functions (s126). Following the abolition of the caretaker system, the present government has publicly committed to make the EC strong and independent.

However, the recent non-compliance with the EC's request to deploy troops during the Narayangonj City Corporation election casts doubts in many minds about the government commitment. The belatedly published post-facto explanation that the request gave only few days to act and the Prime Minister (PM) in charge of the Defence Ministry was out of the country. If few days are not enough to mobilise army personnel from the Dhaka cantonment to Narayangonj, how can they face national emergencies? Did the PM's absence mean the Defence Ministry was inoperational or closed at that time? Someone should have been in charge of running the state and defence affairs in lieu of and in the absence of the PM. If this was not the case, it was distinctly possible to communicate with the PM for an order to deploy troops through available high-tech communication technology. In her 'Jail Killing Day' speech published in DS on 4 November 2011, the PM quoting s126 of the constitution stated that the army deployment was not necessary in Narayangonj, that the 'constitution [was] not violated', and that 'the government would provide executive assistance to the EC as and when required'. As the Narayangonj election turned out to be, she was right. It was an exemplary free and fair election without troop deployment.

Part VII of the constitution is exclusively devoted to the EC, being the sole authority of administering free and fair elections. Other arms of the government, such as the president and executive authorities are brought in this part with the expressly imposed duty to assist the EC in the exercise of its functions. This is a manifestation of the principle of the separation of power. Section 126 imposes this duty on the executive to render assistance if so requested by the EC. It does not contain the clause 'as and when required'. I am not sure where the PM has got it from. For the sake of argument and in fairness to the PM, even if it is conceded that such a clause exists, it would be the absolute prerogative of the EC to determine 'as and when required'. If the executive determines 'as and when required', the EC is then anything but independent. Her argument that BNP did not deploy troops in 2003 and 2004 elections despite the EC requests cannot be a justification but a defiance of a constitutionally imposed duty. The defiance of the EC request in the Narayangonj election did not cure the violation of the constitution in 2003 and 2004 but multiplied it and two defiances do not turn them into compliance. Criticisms for unconstitutional acts of the BNP-Jammat government went unheeded, for which it paid a price in the 2008 election. Facing and addressing critical messages is far more rewarding for any elected government than attacking their messengers.

On the face of the Narayangonj precedent, it is easier to deny than affirm that the government is committed to an independent EC in good faith. This is where all concerned for free and fair elections must invest their energy to render the EC strong, effective, and independent. The government is better off by allowing the EC to function independently and discharging its constitutional duty particularly under section 126. This legitimate strategy can act as a safety valve in defusing political demands for the resuscitation of the caretaker system and contribute to the progressive development of a constitutional institution as a permanent body of holding free and fair elections. The ability of the EC in holding fair and free election in Narayangonj without the army and the caretaker government cannot be gainsaid. In this venture, it is not only the government but all concerned with fair and free elections must play a positive role. The opposition can play a crucial role in Parliament by holding the government accountable for non-compliance with its duty. It is a sheer neglect of duty for any parliamentary opposition to abstain from parliamentary debates and allow the government a free hand on matters of national significance. The civil society including the media can wage a campaign of mass awareness for free and fair elections under an independent EC.

Should an independent EC fail to eventuate and the government fail to appease widespread suspicions about holding elections under any political party government, an interim option may be to invite the UN Secretariat to conduct the next national election. The UN has successfully performed this task in many instances (notably East Timor and Haiti). The UN Secretary-General in his recent visit to Dhaka has made such an offer and the government may need to give serious consideration to the offer as a last resort to avert political unrest and constitutional crisis as a result of deep seated scepticism about the credibility of elections held under any political party in power and the abolition of the caretaker system.

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LAW WATCH

Cross examining sexual harassment under our laws

FERDOUS RAHMAN

ISLAM metaphors women as princess and in Hinduism females are the face of deity. But how are our females now? Presently women right is one of the burning issues. There have been several attempts to protect the interest and ensure the safety of females. Many laws have been enacted for this purpose. Most of such laws cover only when a female has been subjected to physical assault such as rape or for murder. So that physical contact is essential for prosecution (except provocation for suicide). But mental torture has never been recognised as an offence in any of these laws. In such torture, there remains neither any physical mark nor any physical contact with the perpetrator but leaves the same disaster on the woman subjected to. How mental torture could be termed?

Sexual harassment

The term sexual harassment has not been defined in Bangladesh yet as we have no statutory laws in this regard. But a guideline has been derived from High Court Division in pursuance of a writ petition by the Bangladesh National Women Lawyers Association (BNWLA) in 2009 (Writ Petition No. 5916 of 2008). As per this guideline Sexual Harassment includes-

a. Unwelcome sexually determined behaviour (whether directly or by implication) as physical contact and advances;

b. Attempts or efforts to establish physical relation having sexual implication by abuse of administrative, authoritative or professional powers;

c. Sexually coloured verbal representation;

d. Demand or request for sexual favours;

e. Showing pornography;

f. Sexually coloured remark or gesture;

g. Indecent gesture, teasing through abusive language, stalking, joking having sexual implication.

h. Insult through letters, telephone calls, cell phone calls, SMS, pottering, notice, cartoon, writing on bench, chair, table, notice boards, walls of office, factory, classroom, washroom having sexual implication.

i. Taking still or video photographs for the purpose of blackmailing and character assassination;

j. Preventing participation in sports, cultural, organizational and academic activities on the ground of sex and/or for the purpose of sexual harassment;

k. Making love proposal and exerting pressure or posing threats in case of refusal to love proposal;

l. Attempt to establish sexual relation by intimidation, deception or false assurance.

Sexual harassment in Bangladesh

People in Bangladesh are much more concern about violence upon women at home for dowry, polygamy or other domestic issues. But sexual harassment is an issue, which is not confined within the home only. A female child or women is not safe in society now. An adult female is facing sexual harassment at her office and a girl child at her school. In spite of these no public places like road (crowded or free), market, public transport etc are safe for female.

Everyday we read several cases on suicide of young girls for such harassment. These are not any scattered incidents rather an outcome of lack of justice. Many cases on such harassment and afterwards suicides are left unpunished therefore people are losing their hope of justice from our present administration of justice. Except this still our conservative society blames females for such incidents. Those female who has not committed suicide leads her life with the blame of the society.

Legal mechanism in Bangladesh on sexual harassment

Different laws with specific sections deal with the offence of such harassment distinct from rape or murder. Some of such laws are: section 354 of Penal Code 1860 for two years imprisonment for assault or criminal force to a woman with intent to outrage her modesty, section 509 of Penal Code for simple imprisonment of one year or fine or both for uttering any words, making any sound or gesture to insult the modesty of any women and Section 10 of Nari O

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Shishu Nirjatan Daman Ain (Act) for rigorous imprisonment for a period between three and ten years for touching the body of a woman for the purpose of gratification of sexual desire. But these laws are vague enough to cover the present act of sexual harassment defined by the HCD in its guidelines and also not oriented to the present social status. The least conviction rate under these sections shows how much difficult it is to prove the acts with required 'Mens Rea' under these sections for conviction.

But it is a positive development for our legal regime that our High Court Division has given a judgment on 2009 as a result of a writ petition by BNWLA with some directives in the form of guidelines. This 'guidelines' will fill the legislative vacuum in laws on sexual harassment within the meaning of Article 111 of our constitution. Its aims are to create awareness among people about sexual harassment, the consequences about sexual harassment.

These 'guidelines' is applicable to all work places and educational institutions in both public and private sectors within the territory of Bangladesh. These guidelines include the provisions on taking preventive measures and disciplinary action, mechanism for complaints at every workplaces and educational institutions, formation of a complaint committee, procedure of complaint committee, punishment for sexual harassment.

Visionary approach

After the directives from the High Court Division we found the legal regime for preventing and punishing the sexual harassment. HCD also directed a proposed amendment to Nari o Shishu Nirjatan Daman Ain 2000 to add section 10(ka) namely punishment for sexual harassment. It proposed the punishment of rigorous imprisonment for not less than one year but not exceeding seven years and also for fine but whether this will be enough to bring the cases before the court and provide justice to the females suffered? In our court, tribunal or any complaint committee, female victims bringing any allegation of rape or sexual harassment used to face many weird questions, which are no less defamatory then the sexual harassment complained against and also harmful to their psychological state. Again some females are afraid of stigma in society. They feel lack of protection during the proceeding when the accused is backed by any influential part of the society.

These entire attempts would be in vain unless we can encourage the women survivors to go before the court and get justice. And this will be possible only when a statutory law addressing the protection of victims from threat of accused and also from defamatory question at the stage of proceedings. Therefore it is the demand of time to enact the 'Victim and Witness Protection Act' for effective enforcement of the guidelines of High Court Division on sexual harassment.

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