

A shield against constitutional deviation

MIZANUR RAHMAN KHAN

ANY experts have suggested that the 747-page verdict has become either infructuous or lost its teeth; primarily because of the annulment of the original amendment. It is the moot point, some argue. Contrary to this line of argument, I am inclined to suggest that despite serious limitations and several grey areas, this verdict could act as a shield, perhaps be instrumental, against any constitutional deviation in the wake of any situation which may evoke the Latin maxim -- "people's safety is the supreme law."

There is a clear consensus among the seven judges in the verdict, to be precise unanimity among the judges, that two forthcoming elections can be held under caretaker governments. Yet, there is an unfortunate and disturbing consensus between the ruling party and the opposition not to embrace this unanimous position of the apex court. A drowning man clutches at a straw, as the saying goes. We may catch the dictum of this verdict if such an extraordinary situation arises. Yet I am trying to explore the legal options in good faith and thereby defend the spirit of the editorial of *The Daily Star* on this topic.

There is no disagreement that the transfer of power through a free and fair election participated by all parties is the real challenge for the future of democracy in Bangladesh. I can understand the likelihood of the repetition of February 1996 election scenario and am not unwilling to embrace it, but a repetition of the 1/11 scenario will be more dreadful. The former has the potential to create a breathing space while the latter might bring long-term despair. If an election akin to 1996 is held, we can argue that, despite the nature of the majority opinion, it will remain effective only until 2019.

It will be sensible, and expected, of the Election Commission that it will appreciate the essence of the verdict in its entirety. It should not act mechanically and wait

for the auspicious moment of announcing the election schedule and hold an election "within 90 days." The EC should explore whether it now has a moral standing to remind the "executive authorities" to consider the majority view for holding two parliamentary elections under the "elected caretaker government." We wholeheartedly concur with the opinion of dissenting judge Md. Iman Ali that the selection of a nonpartisan PM would always be paramount in resolving the current impasse. It is well to bear in mind that he coined the expression "neutral interim government" instead of the "caretaker government."

If a person is selected to be the head of interim government then he or she can be elected through a by-election. This will not require any amendment to the present constitution. The fundamental basis of the majority judgment stands on the "elected MP theory" -- that the government must be headed by an elected member of the parliament. But it is also worthy to note that they have suggested restoring Article 56(4) of the 1972 constitution, which will allow above mentioned nonpartisan elected PM to appoint unelected ministers up to six months.

The politicians should seize the opportunity as crystallised in the full verdict of the 13th Amendment case. One may find fault in the majority judgment. One may even raise serious ethical concerns because the majority judges have broken the established judicial maxims not to alter anything that had been pronounced in the open court. They have shifted their position, articulated in the short order of the verdict,

from non-party caretaker government sans judges to "only elected caretaker."

Evidently, the author of the majority opinion did bring the changes with the unqualified support of three colleagues. However, three minority judges have registered their dissent underscoring the fact that these are not consistent with the original short order.

Yet I am inclined to argue that this shift can be considered technical rather than substantive. The suggestion for holding election before 42 days by dissolving parliament is also a "pious wish."

Whether the opposition party would continue to hold on to its initial reaction of rejecting the verdict in its totality is a million dollar question. The treasury bench, as we all can forecast, will remain silent. The leader of the opposition should look into the "two elections under caretaker government" option as delineated by the majority judges.

The ratios 4:2:1 of dissenting views of the judges indeed show the depth of division in our society over the nature of caretaker government during the forthcoming election. My reading of the verdict is that the all seven judges unanimously agreed that elections to the tenth and eleventh parliaments could be held under caretaker government.

The most bizarre argument made by a good number of experts since the verdict was published was to give too much weight on the "shall" and "may" relating to the two next elections formula. They are ignoring the spirit of said Latin maxim. The four senior-most judges, including the chief justice and two

judges of the Appellate Division, expressed their "pious wish" that the two coming elections would be held under elected caretaker government, yet not with a partisan PM. That should be the focus of attention of the contending parties.

Someone may be curious to know what encouraged the majority judges to invent the "elected caretaker government" when they found the nonparty caretaker government constitutionally illegal. One may point to an interesting similarity between the invention of elected caretaker government, which was not discussed in the open court at the time of hearing, and the so-called "interim government" outlined by the PM.

It is important to note that the majority judges made a joint declaration somewhat concurring with the apprehensions of the amicus curie. The judges observed: "The senior lawyers of the country expressed apprehension that there would be anarchy if the ensuing election is held under party government. And we cannot ignore their view."

Therefore, the treasury and the opposition have an opportunity and are now in a position to find a solution on the basis of the judgment. The parliament and executive should accept the verdict -- in its entirety and both in letter and in spirit.

If the opposition continues to spout venom, it will further erode the dignity of the highest court. They should also be cautious not to bring this institution in disrepute. The opposition should differentiate between attacking the ruling party and attacking the court. The parliament could be dissolved and reconstituted but the court is permanent.

The opposition may think it has many reasons to go down the path of confrontation. But this is a test for the politicians -- from both ruling party and the opposition -- to choose the right course to resolve the impasse.

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A man next time?

K.A.S. MURSHID

I am willing to wager the princely sum of BDT1 that neither of our two Great Leaders (GL) will make it in the next general election, if that is, elections are held at all. In other words, people of Bangladesh would love to see these two GL take a well-deserved rest for five years and allow a man, any man, to take charge for a little while. It may well be that he too will mess things up -- but hopefully, the nature of the mess will at least be different!

Why the wager? I sense a distinct change in the mood of the masses, grown weary of the same old story being repeated *ad infinitum*. Thus, the people are in a mood for experimentation given all the hazards that go with such experiments. The question is, is there a man to be found?

Apart from our very own "Poet Laureate" -- much discussed, much debated, much the underdog these days -- there are a few others that in fact come to mind. There is our Nobel Laureate -- perhaps even more maligned and harassed -- a man who however is likely to have "learned his lesson" and will in all likelihood, stay miles away from politics.

Then there are the two boys; the princelings who presumably would not mind being crowned, especially in a situation when the nation "demands" it of them -- ay there's the rub. Unfortunately, there is likely to be a rather large demand-side deficit for a principdom this time around. I am sure their turn will come one day, though. It's just that it hasn't come yet, and timing, after all is everything in such matters.

So are we then left all alone with the poet? Much as many would find this option difficult to swallow, I fear this is where we may well be headed -- unless of course, other things happen first. In this context, a number of possibilities come to mind -- none of which are particularly appetising, and hence best avoided.

Of far greater relevance perhaps is the question of why, once again, we are running headlong towards the precipice. If I remember correctly, no one really came off very well from that sort of experience the last time we tried it. Why would it be any different this time? Have we forgotten all those "minus" theories, the abandoned BMWs by the wayside, the exodus of the well heeled to Singapore, the Truth Commission, and so on? Am I mistaken or was it the case that ordinary people breathed a sigh of relief in the face of efforts by the government of the time to reign-in corruption? I can certainly vouch for the fact that I did not have to pay Rajuk a single taka to get my building plan approved!

Unfortunately, the CTG Alliance bit off much more than it could chew and quickly lost control of the game. Isn't there a very clear, loud message nevertheless that continues to reverberate down the years or have we all become deaf and blind (dumb we are not of course although sometimes I feel that that may not have been such a bad thing).

It should be clear to all that neither of the two parties is able to command sufficient public support to be able to politically (or otherwise) crush the other decisively, once and for all. If we take this assumption as fact, the only way open for the political parties is to arrive at a consensus. There

simply is no other alternative! Or is there?

Actually, Prime Minister Hun Sen of Cambodia managed things very well. Could he be a possible role model for us? Hun Sen was ultimately able to scuttle and finally eliminate the rival Funcinpec (Royalist) Party led by Prince Ranaridh. Incidentally, Ranaridh actually won the elections in the early 1990s but had to agree to a coalition government with Hun Sen's Cambodia Peoples' Party given the latter's superior fire-power! Those were the days when Cambodia had two prime ministers, two armies, two police forces, etc. Hun Sen, over the years managed to dismantle Funcinpec brick by brick until such a stage that Ranaridh had to run away (back to Paris) while CPP reigns supreme, unchallenged, save by a few obscure, newly emerged political parties with little support and zero clout.

Hun Sen has forced democracy to take a back seat (as in fact is the case throughout SE Asia). In exchange, Cambodia has achieved political stability and high economic growth, despite rampant, unabated corruption. Phnom Penh is no longer a run-down, decrepit town but a vibrant, clean, gleaming city. Per capita GDP after a decade of double-digit growth has now reached \$1,000 -- significantly higher than that of Bangladesh.

Can Hun Sen's strategy be repeated here? In theory yes but in practice, it would be suicidal! Bangladesh is not Cambodia -- we have a long history of popular political participation, a history of political struggle against dictators and autocrats where this sort of strategy would inevitably fall flat on its face. Any move towards another dictatorship (in whatever form) would fail miserably, ushering in even greater uncertainty and instability.

There is no shortage of adventurers on either side of the political divide advocating for a stern, uncompromising stance against their opponents. There is a real danger that the hawks could sway the mood of our GLs who are already reeling under complex, multiple pressures from all sides. There may thus be a temptation to go for drastic action in the hope of gaining a few additional years in office -- of course all hell will break loose in the process but this is something "we can worry about later!" We may even be able to convince ourselves that that indeed is the right, moral way forward.

Let me, however, end with a positive note (and one that may actually help me win my bet): I truly think that the only way AL can get another term in office is to announce a new (unrelated male) leader who will be PM if it commands enough seats in parliament. Such a move would galvanise public opinion in AL's favour.

In the same vein, BNP too can guarantee a win in the next elections by simply announcing an unrelated, male leader as its future PM (with the GL taking a back seat a la Sonia Gandhi).

In the unlikely event that both parties adopt my suggested policy advice, the outcome would be difficult to predict. But at least I would have won my bet.

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Dreams versus memories: Which side are we on?

LUTFEY SIDDIQI

ON September 12, upon his election as the new president of Somalia, Hassan Sheikh Mohamud said that his country "will now turn a new page, and that page will be written with good history rather than bad history."

Almost exactly at the same time, at the World Economic Forum in Tianjin, I had the opportunity to tell Thomas Friedman -- acclaimed author of *The World is Flat* -- how thought-provoking I found this line of his: "Are you a nation with more dreams than memories or more memories than dreams?"

I suggested to him that we should rank every country in the world on a scale of 1 to 10, 10 for those that are dream-driven and 1 for those that are history's hostages.

We should not only compare across countries but also observe an individual country's shift on that spectrum over time. This could perhaps be a leading indicator of where that country is headed.

Watching the recent party conventions for example, it seems to me that the US no longer commands a perfect score of ten, while watching the Chinese in their confident role of "new champions" suggests that their bandwidth is increasingly dominated by the future, not the past.

I think of my native Bangladesh and wonder whether we overindulge not only by the number of backward-looking commemorations every year, but the extent to which our nostalgia can take a negative form.

I wonder whether the images of victimhood, betrayal and bloodshed and the occasional frenzy around them is a touch overdone. I wonder whether it is necessary to warn ourselves that unnamed destructive forces still hatch conspiracies in our midst or whether our perspective on personalities needs to be so divisive that one man's hero is another man's villain.

I appreciate the importance of honouring the sacrifices of those that have cre-

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ated a nation and laid the foundations of liberty for posterity. All nations do that.

The difference is in the degree to which the national psyche is held to ransom by what has been, instead of what could be.

I believe it was the former prime minister of another East Asian country who, in response to a question in 2009, characterised Bangladesh as being uniquely "captive of its history."

There are, perhaps, alternative ways of showing respect to the heroes of our history.

Wouldn't it be wonderful if either of March 26 or December 16 was a date on which we reaffirm our goals for the future and a date on which we take stock of what has been achieved in the preceding year?

I don't mean a scorecard of what the government has achieved -- I mean a positive celebration of our achievements as a nation in multiple arenas.

There is much to be proud of.

At this same event in Tianjin, I listened to Abul Maal Muhith remind his audience that, in the 27 years between his first and second innings as finance minister, our aid-dependence has shrunk from 30% to 3% of the budget. Earlier in the day, I watched Runa Khan win the prestigious award of Social Entrepreneur of the Year. Also at the forum, I met Seattle-based Nadia Mahmud who was recently honoured as a "global shaper," who shared with me incredible stories of social innovation by college students in Dhaka. And throughout the day, I witnessed multiple references to Grameen Bank, Brac and their founders as true global leaders in more ways than one.

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