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What should an election-time government look like?


THE BANGLADESH OBSERVER

Justice Shahabuddin nominated as Vice-President: Emergency goes

ERSHAD TO STEP DOWN

Remain alert against conspiracy: Khaleda

Hasina asks Ershad to dissolve Cabinet, JS

Unprecedented jubilation

60 killed, 1000 hurt in 8 days

The Bangladesh Times

Chief Justice Shahabuddin to head care-taker govt

PEOPLE WIN VICTORY

Guard against plot: Khaleda

Hasina's call to dissolve JS

Leaders' call for peace, harmony

A nation awake, united and happy

Front pages of Bangladeshi newspapers on December 6, 1990.

ASIF NAZRUL

An election-time government performs the special task of holding or supervising a national election to ensure smooth transition of state power. Noting its importance as early as 1972, Surangit Sengupta, an opposition member in the Constituent Assembly of Bangladesh, proposed the formation of a special type of government during the 1973 general election. He spoke of dissolving the ruling Awami League government of that time and forming a "caretaker cabinet" comprising representatives nominated by the president from parties that participated in the country's liberation movement.

In reply, Dr Kamal Hossain, who headed the process of drafting Bangladesh's constitution, argued that this proposal went against the fundamentals of parliamentary democracy and therefore could not be accepted. He, however, assured that during the election period, the incumbent will act as a "caretaker government." Explaining the body's nature, he said the election-time government could not make any policy decision 90 days prior to the polls. Being educated in the United Kingdom, among other places, on constitutional law and practice, Dr Kamal correctly represented the essence of the Westminster system.

However, the above debate has persisted, although in different shapes, throughout the political life of independent Bangladesh, mostly due to successive governments' failure to maintain fairness in the election process.

The controversy over the role of General Ershad's ruling party, or to say it more correctly, its inability and unwillingness to hold a free and fair polls gave rise to the formation of a consensual non-party election-time government in 1991, and later to a constitutional arrangement for establishing election-time governments in 1996.

Unlike the political caretaker cabinet Dr Kamal argued for, and much like the spirit of Sengupta's proposal, the constitutional design of 1996 stipulated dissolving the political government and forming a "non-political" caretaker one during the polls. Such bodies successfully oversaw three (four if we count 1991) general elections until 2009. Based on a controversial Supreme Court judgment, the arrangement was annulled by the 15th amendment of the constitution in 2011.

Following this amendment, the bitter division among political parties has reignited. The beneficiary of this amendment, that is the incumbent Awami League and its allies, insisted on holding polls under the party, and others rallied in favour of reviving the system. In between these two, a compromise for forming an all-party election-time government was sometimes offered but had never been discussed seriously by the confronting groups.

Bangladesh is about to witness another general election in 2024. The future of its democracy yet again hinges on the nature of the overseeing government.

Theoretically, an election-time government may take various forms in democratic culture. In the Westminster system, the incumbent generally continues as a caretaker government (for example, the UK government in 2019) to hold polls in the interim period between the parliament's dissolution and formation of a new government. Its activities are limited by customs and conventions of introducing new legislation and taking major policy decisions or initiatives.

In such democracies, the caretaker government may also be put in place in cases of resignation of the head of state (Belgium in 2020) or getting a vote of no confidence. In other cases, it may be formed as a result of a political settlement or peace agreement with members different from the immediate past regime (Tunisia in 2011 and Nepal in 2012). In countries where coalition governments are frequent, it may turn into a caretaker government with or without new members until negotiations to form a new coalition succeed (coalition governments in the 1990s in Japan).

Irrespective of the formation, two features are more or less common in the above governments. First, they are defined or understood as bodies operating between the election schedule's announcement and formation of a new government. Second, they carry out only day-to-day functions and abstain from making any new law, policy or administrative measure that may affect the election's outcome.

Unlike the above examples, Bangladesh's caretaker government was a unique institution. It was established by the constitution as a permanent foundation, and the members were essentially non-partisan, having no stake in the election's outcome. It was evaluated as a positive innovation both domestically and internationally.

Pakistan later followed Bangladesh's example. The former's 18th and 20th constitutional amendment allows for non-party election-time caretaker governments. The only major difference is that the body is formed primarily through consultation with both the ruling and opposition parties.

The election-time governments in Bangladesh largely succeeded in holding free and fair polls and regaining public confidence in the election process. One major testament to the success is the unanimity of all the major parties, including Awami League and BNP, for the retention of this system, which was expressed during consultation with the constitutional reform committee formed in 2011 by the AL government. This consensus, however, was not honoured when AL annulled the system unilaterally by capitalising on its absolute majority in the parliament.

The next two elections in 2014 and 2018 were widely criticised. Civil societies and the opposition have thus raised serious questions about the capability of the present system to ensure fairness in the next general election.

Our constitution says little about the "caretaking nature" of the election-time government. It declares independence of the Election Commission (EC) in exercising its functions. This independence, however, is subject to this constitution and any other law which may be promulgated by the parliament (Article 118).

The constitution obliges all executive authorities to assist the EC to discharge its functions (126) and guarantees that the president shall, when so requested by the EC, make available to it such staff as may be necessary (128). It also forbids the court to pass any order in relation to an election for which a schedule has been announced, unless the commission has been given reasonable notice and an opportunity to be heard (125).

These provisions may be interpreted as conducive to holding a free and fair election. But we have never seen the EC taking any proactive role to prevent or punish serious and obvious irregularities during elections held under a political government. Unlike commissions of caretaker governments, it never took measures like reorganising public and police administrations during polls, ensuring independence of the state-run media, creating a level playing field for the opposition, or enforcing the code of conduct and election rules. The EC members have been mostly drawn from public officers known for their loyalty to the ruling government and are found to be unwilling to exert their independence during the election process.

Under the prevailing circumstances, it becomes imperative to initiate a political dialogue for exploring all options to establish an election-time government, under which the EC, public and police administrations, and the judiciary may act independently. These options include reinstituting the caretaker government by constitutional amendment or invoking the process under Article 106, forming an all-party government with a different head, and reconstituting the EC with members nominated equally by political parties that ruled post 1990.

We must keep in mind that there really is no alternative to restoring faith in the election-time government. If mistrust and frustration over polls continue to prevail, national unity, solidarity, and strength will crumble further; the government will face the crisis of legitimacy deepening; and institutions will keep failing to deliver, leading to the economy suffering even more. We cannot afford to accept these.

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The constitutionality of 15th amendment

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In 1996, the BNP-led government passed the 13th Amendment to the constitution, allowing the formation of the neutral caretaker government (NCG). The amendment represented a "political settlement" as the then Awami League-led coalition of parties demanded such a system, and BNP, after much resistance, accepted it. It not only allowed a peaceful transfer of power, but also provided equal opportunity to major political parties.

However, the unilateral passage of the 15th Amendment in 2011, in a "majoritarian" manner, by the Awami League-led alliance weaponised the constitution, destroying that political settlement. It started with the BNP-led government passing the 14th Amendment in 2004, which raised the retirement age limit for justices, ensuring that a particular former chief justice would become the chief adviser of the caretaker government before the ninth parliament elections. A further blow to the political settlement came in the form of a divided "short order" of the Appellate Division on May 10, 2011, authored by Chief Justice ABM Khairul Haque, which declared the 13th Amendment "prospectively" void after the 10th and 11th parliamentary elections, although two High Court benches had previously found the amendment constitutional.

It may be noted that Justice Khairul Haque, who was appointed chief justice superseding a senior, revived the appeal against the High Court judgment six years after it had been filed, and authored the short order only eight days before his retirement, with only 10 days of hearing and ignoring the pleas of the amicus curiae. The other three assenting justices were subsequently made chief justices, at least in one case superseding a senior, raising the concern of "some communication" between the chief justice and the government (*The Law and Politics of Unconstitutional Constitutional Amendments in Asia, Chapter 11:* "The Politics of Unconstitutional Amendments in Bangladesh" by Ridwanul Haque). Self-interest might have also played a role in Justice Haque's authoring the short order, as he would be the chief adviser if the 10th parliamentary election was held under the caretaker government system.

It may be recalled that on July 21, 2010, a 15-member special parliamentary committee was formed, 12 of whom were senior Awami League members, to amend the constitution. The committee unanimously recommended on March 29, 2011, after consulting 104 distinguished citizens – including a former president, the incumbent prime minister, three former chief justices, political leaders, editors and civil society members – to amend the constitution by retaining the neutral caretaker government system with a three-month tenure. Next day, the committee met with the prime minister, which led to a change in the committee's recommendation, and the suggestion to amend the constitution to abolish the system.

PHOTO: STAR

On May 31, 2011, the prime minister held a press conference where she said the court had abolished the caretaker government system with an observation that, for holding the next two elections under the system, the parliament's approval would be required (*Prothom Alo*, June 1, 2011), which was not true. Thus, the 15th Amendment was passed not only defying the unanimous recommendation of the 15-member parliamentary committee, but also through a serious misrepresentation of the Appellate Division's short order and before the full judgment was published 14 months later. It was a decision serving self-interests, which led to the next elections being held under a political government headed by the same prime minister. As researcher Adiba Aziz Khan observed, "Despite dissent from the opposition, civil society and voters, the AL-led supermajority Parliament disregarded the direction given by the Court that the NCG should remain in place for two more national elections" ("The Politics of Constitutional Amendment," *International Review of Law*, 2015).

Experts have been raising questions on the constitutionality of the 15th Amendment. The constitution represents the will of Bangladesh people, and it should not be amended without their consent. Although our 1972 constitution did not have it, the Fifth Amendment incorporated the referendum provision in the constitution. The 12th Amendment, which was passed in 1991, based on a compromise between the Awami League and BNP and affirmed by a referendum, amended the referendum provision by limiting it to the amendment of the preamble and a few other articles. Although an Appellate Division judgment found the Fifth Amendment unconstitutional, the referendum provision remained as it was included in the 12th Amendment. Thus, it is clear that the 15th Amendment was neither legitimate nor constitutional, as no referendum was held before its passage.

No serious deliberations took place on the 15th Amendment before its passage either. Even though the BNP was asked to propose a name for the special parliamentary committee, it refused to do so, and it was also absent during the amendment's passage. Thus, the 15th Amendment did not have the support of the major opposition.

In addition, the 15th Amendment made about a third of the constitution unamendable by designating them as "basic provisions," equating them with the "basic structure," which cannot be amended. This clearly violated the constitutional doctrine of basic structure. The constitutional expert, Mahmudul Islam, said, "No parliament can bind the successor parliament" (*Constitutional Law of Bangladesh*, 3rd Edition, Pg 31), which also makes the 15th Amendment unconstitutional.

The Appellate Division's judgment is also unconstitutional. As Mahmudul Islam argued, "Providing the rider clause giving life to the discredited (NCG) system for the next two parliamentary elections, the Appellate Division made judicial legislation interfering with the functions of Parliament assigned by the Constitution and thereby dented the well-established jurisprudence and acted contrary to the rule of law and separation of powers." The Appellate Division also intruded into political matters, which is a clear violation of "political question" – a doctrine respected by our court in the past. In addition, Justice Khairul Haque materially changed his final judgment by adding the condition of parliamentary approval for holding the 10th and 11th parliamentary elections under the caretaker government system, which amounts to "fraud on the court" and the violation of the professional code of conduct.

To conclude, abolition of the caretaker government system led to two failed elections in 2014 and 2018. Another failed election will have serious long-term consequences for us as a nation. Without a new political settlement, a credible 12th parliamentary election is likely to be a far cry, which can get us into an uncharted territory.

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