

REFORM OF THE CARETAKER GOVERNMENT

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A country cannot be regarded as democratic if the government of that country is not elected by the people. However, a country is not democratic simply because the government was elected. Election is certainly a pre-condition for ensuring a democratic form of government but it is not the only condition. A country in which human right is routinely violated, where there is no freedom of expression or freedom to assemble and hold meetings and processions is not a democratic country. For example, given the daily deaths in “cross-fire” one may argue that the present government of Bangladesh has lost its democratic character. Apart from these deaths in the so-called cross-fire, the BNP-Jamaat government does not permit the holding of public meetings, processions and rallies. Thus an elected government may also become autocratic.

Though election is not the only pre-condition for democracy, it has to be accepted that it is undoubtedly the most important condition. The people can exercise their power only through free and fair election. Article 7 (1) of our Constitution says, “All powers in the Republic belong to the people, and their exercise on behalf of the people shall be effected only under, and by the authority of, this Constitution.” Article 11 of the Constitution says, “The republic shall be a democracy in which fundamental human rights and freedoms and respect for the dignity and worth of the human person shall be guaranteed and in which effective participation by the people through their elected representatives in administration at all levels shall be ensured.” The Constitution reflects the ideals and values nurtured by the nation over a long period of time. Admittedly, these ideals of democracy came to us from the Western societies. It is from the British that we got the idea of representative government. Today, people in Bangladesh know that free and fair election is a sine qua non for ensuring a democratic form of government. This was evident during the movement against the military autocracies of the past.

The elections in 1954 and 1970 occupy a crucial place in our history. Actually both these elections assumed the character of referendum. While the 1954 election reflected the people’s rejection of the Muslim League and its communal politics, the 1970 election was a vote of confidence on Sheikh Mujib and the Awami League. In fact, the demand for full independence was but a logical step from the 1970 elections. The struggle to restore democracy was resumed in 1975 after the assassination of the Father of the Nation Bangabandhu Sheikh Mujib. The practice of rigging elections with the active support of the government started during the military regime of Gen. Zia. In fact the use of the administration to manipulate the elections and their results was an open secret during the martial law regimes of Gen. Zia and Gen. Ershad. The Parliaments, elected through these rigged elections, was used to legitimize their usurpation of power. On the eve of the 1986 elections all the opposition parties had agreed on the formation of a caretaker government for conducting free and fair election but the concept was not very clear at the time. However, popular agitation for election under a caretaker government gathered momentum after the Magura by-election that was blatantly rigged by the ruling party. Finally, after the voterless one party election of February 1996 Begum Zia’s government was forced to accept the proposal for a caretaker government and enact the necessary change in the Constitution.

The concept of a caretaker government during the interim period, when the term of an elected government ends and elections are held for installing a new government, is not new. Those who follow the Westminster style parliamentary system are familiar with it. When a new general election is scheduled and a date is fixed, the outgoing government remains in office but in effect it becomes a caretaker government. According to long established practice and tradition, the outgoing government is not expected to make any new law or take major policy decisions. They are expected to simply carry on the day- to -day routine work of the government. Not only the British, all the countries with parliamentary system follow this practice. I have seen this in Australia. I believe this practice is strictly followed in India. Bangladesh is unique in the sense that the outgoing elected government,

under the law passed in 1996, actually steps down and an interim government is installed as a caretaker government. I believe nowhere in the world such a system exists.

The Bangladesh practice of a caretaker government is the result of deep distrust of the outgoing elected government. It is an admission of failure, on the part of the elected governments, to conduct the elections fairly and honestly. Unlike other countries that have practiced the parliamentary system successfully, in Bangladesh the outgoing government manipulates the levers of power to rig the election in order to ensure its own victory. The history of Bangladesh is unfortunately replete with these examples. The military rulers who assumed power after the coup of August 15, 1975 routinely rigged the election to legitimize their power. The formalities of election procedures were observed without the substance. People did not get the opportunity to freely exercise their choice. Ballot boxes were stuffed with ballot papers in favour of the dictator's chosen candidate. The district level officials of the administration (DCs, UNOs and Police Superintendents) were blatantly used for this purpose. With the fall of Ershad in 1990 and the installation of an elected government, it was expected that the practice of rigged election would come to an end. It was a matter of profound disappointment that the ruling party headed by Begum Khaleda Zia was unable to live up to the expectations of the nation. She was not willing to accept defeat. Instead, her government resorted to the same practice of rigging that was followed by the military rulers. In fact, the Magura by-election in 1994 convinced the Opposition parties that they did not stand the ghost of a chance to win if the ruling party remained in office. The one-party election held on 15 February 1996 further convinced the common people that unless the government resigns a free and fair election could not be held. Public agitation assumed a serious turn. Begum Khaleda Zia had to bow to public opinion and resign. However, before resigning she quickly enacted a law on caretaker government. Though the law followed the basic formula advocated by the Awami League, none of the Opposition parties was consulted on the actual text of the draft law. In order to stem the rising tide of public anger she hurriedly passed the law. We are still living with this law under which two elections have been held.

The flaws in the law were detected right from the beginning. It may be recalled that a crisis was brewing in early 1996 when President Abdur Rahman Biswas ordered tanks in the streets and sacked the chief of army staff Gen. Nasim. Though the chief adviser and his council enjoyed all the powers of the government, the president retained control over the armed forces. Thus the seed of conflict within the government was sown when the relevant law virtually split the powers of the government. The chief adviser exercised great restraint and averted a crisis. His skill and acumen were crucial in maintaining peace and tranquility in the country. Given the history of Bangladesh where most elections in the past were rigged, the introduction of the caretaker system is indeed a positive development. If the system is implemented honestly the people's expectation of free and fair election can be fulfilled.

The experiment with this system in 1996 proved to be a success. Neither side complained of rigging. Admittedly there were minor complaints but on the whole the elections were accepted as free and fair. Both the national and international observers expressed satisfaction about the arrangements. It should be pointed out that the primary responsibility for holding rigging-free elections rests with the Election Commission. However, the government has the power to influence the results if it so wishes. The Deputy commissioners and their subordinates function directly under the government and they are the ones who make all the administrative arrangements. Since the DCs act as Returning Officer, the government can manipulate the results through the DCs who are under its direct control. The Upazila level officers also function as presiding officers and polling officers. Through them the government can rig the election. In 1996 the government was truly neutral and, as a result, the Election Commission was able to discharge its duties without direct or indirect interference.

The general election on October 1 in 2001 was different from the earlier one. There were widespread complaints of rigging and corruption. The problem started right from the moment when Justice Latifur Rahman took the oath of office as chief adviser. Within minutes he issued orders of transfer of 13 secretaries of the key ministries. It was obvious that Justice Latifur Rahman had an agenda that was

not exactly neutral. The selection of the advisers and the subsequent actions made it clear to all discerning persons that he favoured the BNP-Jamaat jote. In a recent article he characterized the Awami League as most corrupt. These pre-conceived ideas motivated him. His hostility to the Awami League was evident when he accepted all the proposals of the BNP with alacrity. He violated the spirit of the underlying principle of the caretaker government. For example, he requested the president to pass ordinances that were not acceptable to the Opposition. Article 58 D (1) of the Constitution clearly says that the caretaker government will perform only the routine duties of the government and that it will not take any policy decision. However, Justice Latifur Rahman and his colleagues changed the ground rules of the election system in Bangladesh. Such far-reaching changes in the law should have been done either by the elected Parliament or on the basis of a national consensus. On the question of changes in the electoral laws, the Election Commission also acted arbitrarily. In the absence of a national consensus, such hastily passed laws compromised the fairness and neutrality of the electoral process.

The Constitution does not give the caretaker government the right to review and annul the orders and decisions of the outgoing government. After all, the outgoing government was an elected government that enjoyed the confidence of the nation. The caretaker council of advisers had no legal or moral right to sit on judgment over an elected government. Their sole duty is to deal with routine work and oversee the elections. Justice Latifur Rahman acted as if his was a successor government with the mandate to undo the actions and decisions of the outgoing elected government. The caretaker council of advisers suspended the implementation of many on-going projects. These presumptuous decisions caused delay and confusion in project implementation. In fact, Justice Latifur Rahman created an impression that the outgoing government was guilty of corruption and that it had taken many wrong decisions. This was certainly a violation of the basic principles of neutrality of the caretaker concept. Clearly it went against the letter and spirit of the provisions of the Constitution. The continuity of the government was disturbed.

Justice Latifur Rahman surrounded himself with officers whose anti-Awami League bias was well known. In league with members and advisers of the BNP, these officers sent instructions to the district officers on the so-called “risky” centres. All the centres that were known to be strongholds of the Awami League were identified and military officers were given lists of Awami League volunteers in these centres as threats to law and order. This was clearly done to prejudice the military officers on duty. The deployment of the army personnel was done as desired by Begum Zia. Justice Latifur Rahman was visibly eager to please Begum Zia. During the 1991 and 1996 general elections, the army personnel were required to patrol the main roads. They did not have the right or duty to enter polling booths. The idea was to use the army to maintain law and order in the area. They should remain within reach of the civil officers in charge of the polling centres. Should there be violence in any centre they would be requested to intervene. This arrangement was not acceptable to Begum Zia who demanded that the military should not only enter the election centres, they should also get police and magisterial powers. Justice Latifur Rahman immediately acceded to Begum Zia’s request. Later it was seen that this regrettable decision was responsible for putting the army in the centre of a controversy.

The first election under the caretaker law went smoothly largely due to the integrity, firmness of character and efficiency of the chief adviser. The major flaws in the law became clear during the term of the last advisory council headed by Justice Latifur Rahman. The defects in the existing law or its negative sides are as under.

In the first place, the law as it exists opens up the possibility of manipulation by the ruling side to place a chief adviser in the post favourable to it. Since the chief adviser and the council chosen by him can influence the elections by using the administration, the ruling party can start a calculated manoeuvre to ensure that the person known to be a member or sympathizer of the ruling party is appointed to this post. Exactly this has happened. The BNP-Jamaat jote has extended the age limit of the judges of the appellate division with a view to ensuring that Justice Hasan is appointed the chief adviser. Justice Hasan, it may be mentioned, was a leading member of the BNP. In fact he was the

secretary of the international committee of the BNP. Obviously he cannot be considered neutral. Thus by clever manipulation the BNP-Jamaat government has arranged that a person of their choice would head the next caretaker government. This is a major fault that must be rectified to prevent such manipulation. The chief adviser has to enjoy the confidence of both the treasury bench and the principal opposition party in the Parliament. It is going to be a difficult process but not beyond human ingenuity to devise such a system. For example, if Justice Hasan declines to accept the post, the president will have the option to invite the next person listed in the Constitution. In the interest of national unity and compromise, will Justice Hasan do it? If he is a patriotic person, he will surely consider the option. Instead of limiting the selection only to the most recently retired chief justice, the field may be broadened to include all the retired chief justices and judges of the appellate division. One person may be chosen out of this pool who would be acceptable to both the ruling party and the principal opposition party in the Parliament. A procedure may be devised to break a deadlock.

Secondly, the present law leaves the selection of the advisers entirely to the chief adviser. The principle of neutrality should be a governing factor in the selection. Besides, both the ruling party and the main opposition party should have the scope to suggest such neutral persons. During the interim government after the fall of Ershad, Justice Shahabuddin used these lists provided by the different political parties. If the advisers are chosen from amongst persons listed by the major parties, the council will enjoy their confidence and there would not be complaints of partiality.

Thirdly, members of the advisory council including the chief adviser have to give written undertaking to the effect that they would neither seek election in the forthcoming election nor accept any office of profit under the government that will be elected. While one may consider this redundant as this is a basic requirement of the caretaker concept, the law as it is drafted does not clearly state the point. Quite clearly, the advisers must not expect to be appointed to any high office in the next five years during the term of the Parliament.

Fourthly, article 58 E of the present law confers extraordinary powers to the president. In a parliamentary system this is contrary to the underlying principle. Our jurists and political parties must consider the issue in order to prevent division of the executive powers of the government. The president must remain above all controversies.

Fifthly, if the government manipulates the administration to influence the election to its advantage, the caretaker government has to take such steps as are necessary to neutralize these measures.

The advisory council of Justice Latifur Rahman had the electoral laws revised without due consultation. The issue should be reopened and fresh consultation should take place to determine whether those laws promulgated as ordinances serve the best interests of the country. As pointed out earlier, the primary task of conducting election rests with the election commission. It would be the duty of the caretaker government to ensure that the election commission is able to function without fear or favour and without interference from any quarter.

The Election Commission must have full control over its budget and staff resources. We have seen how the present government has used its control of the budget and the secretariat of the Election Commission to control its activities. Budgetary independence is an indispensable condition for its freedom of action. As regards staff, once the services of an official is placed at the disposal of the Election Commission, he or she should be completely under the Commission. The Commission should also regulate the transfer and promotion of the officials. Above all, the members of Election Commission must be appointed with the concurrence of the Opposition.

The seminar organized by Bangladesh Foundation for Development Research (BFDR), 31 January 2005 CIRDAP auditorium, Dhaka. Keynote Paper : **REFORM OF THE CARETAKER GOVERNMENT** was to be presented by Mr. Shah AMS Kibria MP, Former Finance Minister & Chairman, BFDR.