

Advisers' role in the Non-Party Care-Taker Government

by Barrister Harun ur Rashid

Former Bangladesh Ambassador to the UN, Geneva.

In terms of the Constitution, Advisers have a direct involvement and input in running the interim Non-party Care-taker government. However, many of the Advisers publicly admitted in the media that either they did not know the decisions made by the Chief Adviser or knew them only from newspapers.

Such communication gap between the Chief Adviser and Advisers of the Non-Party Care-Taker government is arguably beyond the scheme contemplated by the provisions of the Constitution.

Structure of the Non-Party Care-Taker Government:

Let us examine carefully the construct of the Non-Party Care-Taker Government. The President is the head of the State and the Non-Party Care-Taker government consists of the following:

- (a) The Chief Adviser
- (b) Advisers

The Non-Party Care taker government literally means the Council of Advisers, led by the Chief Adviser, according to a writer Dr, Nizam Ahmed (Non-Party Caretaker Government in Bangladesh: 2004)

The Non-Party Care -taker government is an interim one and all decisions of the government must be attributed to the Council of Advisers, led by the Chief Adviser.

It is noted that the Chief Adviser and Advisers are un-elected persons and therefore the Chief Adviser has not the same freedom to take decisions as that of the Prime Minister under an elected government.

The interim Care-taker government, under Article 58B (2) of the Constitution, is collectively responsible to the President and this is because there is no elected Parliament.

The word "collectively" has been used in the above Article. The reasonable interpretation is that collegial and collective spirit must remain between the Chief Adviser and Advisers and they make decisions collectively running the government.

Article 58B(C): Executive Power of the Interim Government:

An important Article relating to the role of the Advisers is 58B (C) and let us consider at the language employed in this Article. The operative part of this Article is quoted below for ready reference:

"The executive power of the Republic....shall be exercised in accordance with the Constitution by or on authority of the Chief Adviser *and shall be exercised by him*

in accordance with the advice of the Non-Party Care-taker Government." (italics mine)

First, in the above Article 58B(C), the word "shall", and not "may", has been used in seeking the advice of the Council of Advisers by the Chief Adviser. This means seeking advice from Advisers by the Chief Adviser is mandatory.

Second, the Chief Adviser is the first among the 10 Advisers (for example, in the Westminster parliament system the Prime Minister is the first among the equals).

Third, the President is not to exercise the executive powers except in matters of defence portfolio.

Under this Article, most constitutional experts strongly argue that there is no scope for the Chief Adviser to take decision without the advice from the Advisers, which is similar to the provision that the President shall act (except only in the appointment of the Prime Minister and the Chief Justice) in accordance with the advice of the Prime Minister (Article 48.3) during the tenure of an elected government.

Responsibility of the interim government in election matters:

Article 58D (2) provides that "The Non-Party Care-Taker Government shall give the Election Commission all possible aid and assistance that may be required for holding the general election of members of Parliament peacefully, fairly and impartially".

Here the word " the Non-party Care taker government" has been employed. This means it is the interim government that takes decisions in election related matters and not the Chief Adviser alone.

The phrase " peacefully, fairly and impartially" used in this Article of the Constitution in relation to holding the election is to be given full meaning.

The word "impartiality" has been defined in a dictionary as "not prejudiced towards or against any particular side or party; fair; unbiased", Again the word "prejudice" means "an opinion formed before hand; the act or condition of holding such opinions". Impartiality is not to be interpreted as passivity but is to be achieved through pro-active actions to create an environment of peaceful, fair and credible election.

The important point is that impartiality is to be perceived by stakeholders and not by the decision makers, similar to the doctrine that justice must not only be done but also seen to be done. It is the perception by all stakeholders who have an interest in election that is important.

Conclusion:

In general, in the past the successive Non-Party Care-taker governments worked within the limits of the Constitution.

It is strongly argued that in terms of the Article 58B (3) of the Constitution, the Chief Adviser shall act in accordance with the advice of the Council of Advisers. This

means that the Chief Adviser cannot decide alone. He has no option but to seek advice from the Advisers in making the decision on behalf of the interim government in terms of the Constitution.

Since the Advisers are integral part of the interim Non-party Care-taker government, they cannot reasonably argue that they are not responsible for decisions of the interim government. Such position is arguably against the explicit provision of the Constitution.