

Election after 90 days is permissible: Why?

by Barrister Harun ur Rashid

Former Bangladesh Ambassador to the UN, Geneva.

A Constitution is founded on certain basic principles. Historical background plays an important part. The 1789 American Constitution was formulated against the background of its war of independence with Britain.

After the liberation of Bangladesh through an armed struggle from the oppressive regime in 1971, the fundamental principles of the 1972 Bangladesh Constitution have been laid down in its preamble. The paragraphs in the preamble are important to appreciate the basic framework of the Constitution.

One of the fundamental principles of the Bangladesh Constitution as enumerated in the preamble is democracy. Democracy in essence means rule of law (not by law only), free and fair election, respect for opposition political parties and free robust media.

In countries where there is no written Constitution, such as in Britain, certain documents for example the Magna Carta of 1215 guide its democratic principle.

Debate on the time limit of holding election:

At present, there is a heated debate in the country as to whether election can be held after 90 days. One view is that it can be held and does not breach materially the Constitution to meet national exigencies, while the other view is that the election has to be held "within 90 days" after Parliament is dissolved.

Both the views are based on interpretation of the provisions of the Constitution. The former is based on liberal and contextual interpretation, while the latter is rooted in strict and literal interpretation.

Rules of Interpretation:

Ordinarily the rules of interpretation are as follows:

- (a) The Constitution must be read as a whole and the meaning is not determined merely upon particular words or phrases.
- (b) The words can be given a meaning that is in conformity with the text and spirit of the Constitution.
- (c) If the words lead to unreasonable interpretation, the method of interpretation will be ascertain what the framers of the Constitution meant when they used those words.
- (d) Particular provisions should be interpreted in such a manner as to give effect to the purpose and objective of the Constitution.
- (e) Any subsequent practice in the application of the provisions of the Constitution should be the guide in interpretation of a particular provision of the Constitution.

(f) A provision must be read as a whole and sub-clauses must not be detached from its meaning and purpose as a whole.

Doctrine of Necessity:

Besides the above methods of interpretation, another principle has been added, namely, the doctrine of necessity.

In 432 BC, Spartans went to the oracle of Delphi to ask whether they should go to war against Athenians. After receiving a positive response, Spartans urged Corinthians:

" Delay not, we have arrived at the moment of necessity."

Before I deal with the legal meaning of doctrine of necessity, a few words need to be said about the meaning of "necessity".

Throughout the ages, many scholars have echoed the Corinthians' call of necessity to different exigencies of situation.

Necessity has been variously defined by scholars but the consensus is that certain actions need to be taken by taking into account of complete and just view of circumstances in a given situation. In essence there must be a linkage between justice and necessity. The solid ground of reasoning of necessity is drawn from past experience.

Let me cite an example how the doctrine of necessity was applied in the legal field. In 1954, there was a legal challenge on the dissolution of the first Constituent Assembly by the deposed Speaker. The Chief Justice of Pakistan's Supreme Court Justice Munir decided in favour of the dissolution.

The basis of the decision was the "doctrine of necessity", meaning that to preserve the country, the Constitution had to be abandoned.

This means that the Constitution is for the people and if it is necessary to preserve the integrity of the country from chaos and instability or civil war, it may be liberally interpreted.

Instances of breaches of the Constitution:

The pillars of the Constitution are Part I, Part II and Part III. Part I deals with the constitutional framework and territory of Republic of Bangladesh wherein all powers are vested in the people. Part II lists the "Fundamental Principles of Policy" by which the Republic would be governed and Part III incorporates the "Fundamental Rights" of people.

Many of the Fundamental Principles of the Constitution are being violated. Did the successive governments care since 1975?

For example, Article 22 provides that "The State shall ensure the separation of Judiciary from the executive organs of the State." This provision remains unfulfilled to this day, although the word "shall" has been employed in the Article. Is it not a gross violation of the Constitution? How did the past successive governments neglect or ignore the implementation of it?

Another requirement of the Constitution is that the local governments shall consist of elected representatives who would administer local areas (Article 59 read with Article 11 of the Constitution). Again the word "shall" has been used in Article 59. This provision is yet to be implemented.

I cite these instances to bring home to the point that there are many violations of the provisions of the Constitution and no governments in the past have bothered about them.

Reasons for extending 90-day time limit:

The question is : Can the provision relating to the holding of election within 90 days be extended ?

There are several reasons why the 90-day time schedule is permissible to be extended and some of them deserve mention as follows:

First, in 1990, after the fall of the Ershad government, the provisions of the Constitution did not act as barriers to implement democracy.

For instance, in 1990, the appointment of the then Chief Justice as the Vice- President (so that he could later assume of the office of the President in the care-taker government) after the dissolution of the Parliament was unconstitutional because the post of Vice-President was to be elected by the Parliament.

Since the Parliament was dissolved, there was no scope for appointment of a new Vice-President of the Republic. Furthermore, the President was subsequently allowed to return to his office of the Chief Justice after the elected government was formed.

How and why were these actions done? Did not these steps constitute breaches or violations of the provision of the Constitution? It is noted that these steps were taken to preserve democracy and later were validated through amendment of the Constitution post-facto (after the event) in 1991

Second, Article 123 (3) that provides 90-day limit for holding elections has to be read as a whole and not in piecemeal. The Article has 4 sub-clauses and one of the sub-clauses provides that to fill the seat of a Member of Parliament, the 90-day time limit can be relaxed in the case of an act of God. Act of God may be interpreted to mean unforeseen circumstances or circumstances beyond control.

One may easily argue that if by-election can be held beyond 90-day limit, the general election may also similarly held beyond 90 days.

Third, it is argued that the extension of 90-day limit will find strong support from Article 8 of the Constitution that provides for the preservation of the principle of democracy as being one of the "Fundamental Principles of Policy".

Article 8 arguably is more substantial than Article 123. Article 123 is merely a procedure or method to implement substantive Article 8, principle of democracy.

Fourth, the provisions of the Constitution are not dead letters and are to be adapted to protect the participation of widest number of people in elections through multiple parties.

Fifth and finally, it is argued that the only provisions of the Constitution in respect of fundamental rights cannot be violated because they are enforceable by higher judiciary under Article 102 of the Constitution. Fundamental rights are those rights that cannot be taken away by legislation or amendment of the Constitution.

Conclusion:

The expression of the will of overwhelming majority of people of Bangladesh need to be acknowledged in conducting a fair, free, peaceful and credible election.

It is strongly argued that the 90-day limit of holding election specified in Article 123 of the Constitution is to be extended for protecting, preserving and defending the principle of democracy, one of the Fundamental Principles of State Policy, otherwise, Article 8 of the Constitution that enshrines the principle of democracy would be grossly violated.

It is desirable that the President in terms of Article 106 may seek opinion from the Appellate Division of the Supreme Court on this subject and resolve soon the issue.