

## **Is the Non-Party Care-Taker Government unconstitutional?**

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On 3<sup>rd</sup> January, the grand alliance led by Awami League announced that it would boycott the January 22 election. One of the demands is the resignation of the President from the position of the Chief Adviser of the Non-Party Care-taker government.

Liberal Democratic Party (LDP) President, Professor Dr. Baddruddoza Chowdhury, a former President of Bangladesh, reportedly pointed out another vital reason for boycotting the election by saying " The effect to legalise an illegal election by an illegal government will not be accepted. We as the grand alliance will not be a part of legitimising such an election".

The statement of the President of LDP seems to raise a significant point of the legitimacy or constitutionality of the Non-Party Care Taker government.

Let us examine the probable basis of such statement. There could be several arguments that are described below:

*First*, it has been argued that the President has assumed the office of the Chief Adviser under the last sub-clause (6) of the Article 58C, without exhausting the three other options, specified in sub-clauses (3), ( 4), and (5) of Article 58C.

Briefly under the three options, the eligible persons are: (a) a retired Chief Justice, (b) a retired Judge of the Appellate Division of the Supreme Court and (c) a non-partisan citizen of Bangladesh. When all these options are fully exhausted, it is argued that the President can only resort to the last option.

It has been strongly canvassed by many constitutional experts that since these options (a), (b) and (c), available to the President, have not been fully exhausted by the President, his assumption of office concurrently as the Chief Adviser is unconstitutional.

*Second*, prior to assumption of the office of the Chief Adviser, many lawyers argue that it was desirable that the President, on such important legal issue of public importance, should have referred the matter, under Article 106 of the Constitution, to the Appellate Division of the Supreme Court, for its opinion, as to whether the President could take charge of the office of the Chief Adviser. The controversy remains because the President reportedly did not seek the opinion from the Appellate Division.

*Third*, the current President was elected by the majority party in the Parliament and not on the basis of a consensus of other political parties represented in Parliament. This being the case, the President arguably cannot be a "non-party" person.

If the "non-party" person heads the "Non-Party Care-taker government", it takes heart out of the objective of installing the Non-Party government under Chapter IIA of the Constitution. Accordingly, the assumption of the office of the Chief Adviser by the

President is argued to be inconsistent with the provisions of the Constitution and therefore is unconstitutional.

*Fourth*, it has been argued that the office of the President is separate from that of the Chief Adviser. The former is the head of the State (state has three organs, government, parliament and judiciary), the Chief Adviser is only the head of the government under Article 58B(3), the Speaker remains as the head of the parliament, even dissolved and the Chief Justice is the head of the judiciary and that is why, each institution has separate emblems. Accordingly, only the head of the State, the President, is entitled to use the national emblem of the State, Shapla flower and others cannot.

Article 58B(2), therefore acknowledges, the two high separate offices and provides clearly that the "Non-Party Care Taker Government shall be collectively responsible to the President". That means that the Council of Advisers headed by the Chief Adviser would be accountable to the President. This provision is important because Advisers including the Chief Adviser are non-elected persons and in the absence of the Parliament, they would be responsible to the President.

*Fifth*, under this Article 58B (2), it is argued that unfettered powers of the Care-taker government are checked because in the case of issuing ordinance or amending a law by the interim government, the consent of the separate institution, i.e. the President, is necessary.

For instance, under the Latifur Rahman Care-Taker government in 2001, the Chief Adviser with the agreement of all Advisers wanted to amend by ordinance the Criminal Penal Code, but the President did not agree and the ordinance could not be issued. This demonstrates palpably how the powers of the Care Taker Government are curbed under the Constitution so as to retain checks and balances on each other's powers in a democratic country.

It has been argued that since the President has been concurrently holding the office of the Chief Adviser, the two high offices have been merged and as such no checks and balances exist on the activities of the current Non-Party Care Taker government. Under the current situation, it is argued that the spirit of the Constitution is violated and the merging of two high offices in one person is unconstitutional.

#### *Conclusion:*

The unconstitutionality or otherwise of the Non-Party Care-Taker government would have been taken care of, if the writ petition lodged on November 20, with the High Court Division, challenging the constitutionality of holding concurrently the office of the Chief Adviser by the President, would have been disposed by the High Court but on November 30, it was stayed before a rule nisi could be issued.

A word about rule nisi is necessary for the understanding of the readers. It simply means "please explain" to the other party and empirical records suggest that 60% per cent of case where rule nisi was issued by the High Court was finally dismissed after hearing explanations by the other party.

Since the High Court could not dispose of the writ petition, a strong case can be argued that the President is holding unconstitutionally the office of the Chief Adviser and the corollary is that it taints the Non-Party Care-Taker government from illegality. This is what the LDP President Professor Dr. Badruddoza Chowdhury underscored when he supported the boycott of the ensuing election because the outcome of the election could be challenged as illegal.