

Politics behind the Passage of Eleventh Amendment to the Constitution of Bangladesh

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Abstract

Chief justice shahabuddin Ahmed was made Head of provisional caretaker government after the fall of military dictator Ershad in 1990 while he was in active service. Justice Shahabuddin Ahmed was the common choice of the political parties though this selection contravened the constitution. After arranging nationally and internationally acclaimed free and fair election in February, 1991 Shahabuddin Ahmed, Acting President, expressed his desire for going back to active judicial service. Constitution stood against his wish again this time. Political government for materializing the illegal and unconstitutional choice of the political parties as well as Acting President Shahabuddin Ahmed added eleventh amendment to Bangladesh Constitution. This paper is intended to unearth the reason for giving illegal deed and will of political parties as well as individual Shahabuddin Ahmed respectively constitutional sanction.

Keywords: Caretaker government, Common choice, Opposition, Justice Shahabuddin Ahmed, Incumbent, Acting President, Illegal, Unconstitutional.

1. Introduction

Practice of ethical and moral values is the precondition of secularized democratic political culture. In Bangladesh neither political parties nor government imbibe this value in their businesses. As a result secularized political system has not been flourished here. For the same reason political parties fail to produce honest, sincere and efficient politicians. In spite of having unknown number of political parties when the nation faces a crisis that requires a clean imaged personality acceptable to the people to take the charge of the nation, none of the politicians, according to the perception exhibited before the people, is available in the list. Under such atmosphere political parties are to search for person not affiliated with politics but adorable to them such as government official, media personality, academician, judge, army officer. In 1990 Bangladesh experienced such type of event. At that time political parties finding no acceptable politician who could act going beyond party interest requested incumbent Chief Justice of Supreme Court to play the role of acting president for the object of arranging free and fair election. This offer was unconstitutional no doubt. In spite of that incumbent Chief Justice agreed to this unconstitutional offer on the condition of materializing his illegal demand. Since political parties do not create sincere and patriotic political leaders who can think of the sense of the people as a whole keeping aside his/her party interest, the political parties had to surrender them to the illegal wish of such person which led to the adoption of eleventh constitutional amendment in Bangladesh.

2. Eleventh Amendment

After Constitution sixth amendment Vice-President Abdus Sattar was elected President on November 15, 1981. Lt. General Ershad ousted President Sattar and took over power by Martial Law Proclamation on March 24, 1982. During his rule from March 24, 1982 to December 6, 1990 four constitutional change/amendments were made. After his departure civilian rule began its journey from February 27, 1991 in third phase. But elements of eleventh amendment became matured in the last days of Ershad's military rule.

3. United Movement

The leaders of different political parties realized that unity among the opposition forces was required to strengthen anti-Ershad movement. Keeping this goal in view seven-party alliance, Muslim League, GAGPA (National Democratic Party), Jatiya Ganatantrik Party (National Democratik Party), Krishak Sramik Party (Peasant-Labour Party), Ganatantrik Karmi Shibir (Democratic Workers Camp) and Jatiya Ganatantrik Front (National Democratic Front) met on September 13, 1990 and declared one point programme for oust of Ershad regime.¹ On September 14, 1990 eight-party alliance, seven-party alliance, five-party alliance and other political parties resolved to start united movement against Ershad regime and announced united political programmes. Mr. Rashed Khan Menon, Mr. Khalequzzaman, and others attended the meeting.²

4. Caretaker Government Formula

Though opposition political parties were announcing and observing different anti-Ershad programme yet they

¹ *Ibid*, September 14, 1990

² *Ibid* September 15, 1990

were not clear about what type of government should take over the presidency immediately after the expulsion of Ershad for transitional period. On November 19, 1990 leaders of three alliances and Jamaat-e-Islami removed this uncertainty and declared that a neutral government would take charge for transitional period. They spelt out that a neutral and non-partisan person should be appointed as Vice-President under articles 51(3), 55(1) and 55(3) of the Constitution of the People's Republic of Bangladesh and President Ershad should quit his office handing over his power to Vice-President. He should hold free and fair election within three months of its installation.¹

5. Common Choice of the Opposition

Three alliances in a joint meeting presided over by BNP leader Major (Retd) Majedul Huq unanimously nominated incumbent Chief Justice of the Supreme Court Mr. Shahabuddin Ahmed for the post of Vice-President according to November 19 joint declaration on December 5, 1990. Rashed Khan Menon, Mr. Mujahidul Islam Salim, Mr. Pankaj Bhattacharya and Mr. Nirmal Sen leaders of three alliances conveyed the name of their nominee to the government and they also handed over a copy of their choice to the Chief Justice Shahabuddin at 9.20 p.m. on the same day.²

6. Conditional Acceptance by Justice Shahabuddin

Chief Justice Shahabuddin Ahmed violating the constitutional provisions accepted his nomination and assured that he would try to fulfill the task entrusted with him as head of the caretaker government. He said he had agreed to assume the post of Vice-President in the greater interest of the nation on condition of necessary constitutional amendment allowing him to return to his present position after election.³ Accordingly President Ershad appointed Chief Justice as Vice-President and quit his office on December 6, 1990.⁴

7. Demand for Realisation of the Condition of Shahabuddin

Acting President Shahabuddin Ahmed urged on March 1, 1991 the new Parliament to amend the constitution allowing him to go back to his previous post as Chief Justice of the Supreme Court.⁵

He on June 5, 1991 in a nation wide speech urged the *Jatiya Sangsad* to take constitutional measures at the outset of the coming budget session to pave the way for his exit from the presidency. He called for an immediate settlement of the issue of the form of government which had created a lot of speculations. He said that consensus of all political parties was the basis of his being the Acting President. Such basis no longer existed and therefore he would prefer to quit his present position before any controversy generates.⁶

Accordingly for greater public interest on July 2, 1991 Law and Justice Minister Mirza Golam Hafiz introduced the Constitution (Eleventh Amendment) Bill, 1991 in the House to amend the fourth schedule of the Constitution for ratification and confirmation of the appointment of the Chief Justice Shahabuddin Ahmed as Vice-President and facilitating his return to the office of the Chief Justice of Bangladesh.⁷

8. Outline of Caretaker Government

Second phase of civilian rule ended with the declaration of Martial Law on March 24, 1984. Third phase of civilian rule started its journey with the fall of autocratic Ershad on December 6, 1990. In order to expedite the movement for oust of Ershad government and to bring about coordination in the demands and programmes of the opposition on November 19, 1990, 8-party alliance, 7-party alliance, 5-party alliance and Jamaat-e-Islami Bangladesh from their respective stages spelt out the formula of neutral government. Before that declaration the three alliances agreed on the following terms.⁸

- 1) They will not participate in any election under Ershad government,
- 2) They will not only boycott the elections under Ershad government but also resist all elections under him,
- 3) They will participate in the polls for electing a sovereign parliament.

The formula of neutral caretaker government was following-⁹

The president shall dissolve cabinet and parliament. He shall have to appoint a neutral and non-partisan person as Vice-President acceptable to the three alliances and parties under article 51 clause (3), article 55 clause (1) and article 55 clause (3) of the Constitution.

After the appointment of new Vice-President President Ershad shall have to handover power to the

¹ *Ibid*, November 20, 1990

² *Ibid*, December 6, 1990

³ *Ibid*.

⁴ *Ibid*. December 7, 1990

⁵ *Ibid*, March 2, 1991

⁶ *Ibid*, June 6, 1991

⁷ See the Parliamentary proceeding of July 2, 1991. See *the Daily Ittefaq*, July 3, 1991

⁸ *The Bangladesh Observer*, November 20, 1990

⁹ *Ibid*

Vice-President who will be the head of caretaker government as acting President. The interim government shall hold a free and fair election to the parliament within three months of its installation.

The head of the interim caretaker government must be a non-partisan and neutral person who will not be associated with any political party directly or indirectly, and he will not contest the election of President, Vice-President or parliament. No minister of his caretaker government will take part in any election.

The caretaker government will perform only day to day administrative activities and it will reconstitute the election commission and redefine its activities and responsibilities.

The interim government will restore the credibility of electoral system and ensure the franchise right of all voters. It will also guarantee the freedom of radio and television and state controlled media to ensure the right of publicity and election campaign through these media to all.

9. Appointment of Incumbent Chief Justice to the Presidency

President Ershad in the face of mass upsurge on December 4, 1990 conceded to his defeat and agreed to step down.¹ Immediately after getting such positive signal from the government three alliances in a joint meeting presided over by BNP leader Major (Retd) Majedul Huq unanimously nominated incumbent Chief Justice of the Supreme Court Mr. Shahabuddin Ahmed for the post of Vice-President according to November 19 joint declaration on December 5, 1990. Rashed Khan Menon, Mr. Mujahidul Islam Salim, Mr. Pankaj Bhattacharya and Mr. Nirmal Sen leaders of three alliances conveyed the name of their nominee to the government and they also handed over a copy of their choice to Chief Justice Shahabuddin at 9.20 p.m. on the same day.²

Chief Justice Shahabuddin Ahmed violating the constitutional provisions accepted his nomination and assured that he would try to fulfill the task entrusted with him as the head of the caretaker government. He said he had agreed to assume the post of Vice-President in the greater interest of the nation on condition of necessary constitutional amendment allowing him to resume his present position (Chief Justice) after election.³ It is required to mention that Chief Justice's condition was also unconstitutional.

On December 6, 1990 at 2.44 p.m. Vice-President Moudud Ahmed resigned. President Ershad appointed incumbent Chief Justice Shahabuddin Ahmed as Vice-President and on the same day President Ershad resigned from his office.⁴ In the absence of President Vice-President Shahabuddin Ahmed became acting President under article 55 clause (1) of the Constitution as stated earlier. Before appointment Chief Justice Shahabuddin Ahmed said he would retain his post as Chief Justice under article 147 and 66 of the Constitution. Acting President Shahabuddin Ahmed appointed Justice Habibur Rahman, senior most judge of the Supreme Court, as acting Chief Justice on December 6, 1990.⁵

10. Lack of Consensus between BNP and AL, and Bold Stand of Acting President for His Conditional Acceptance

Under the chairmanship of Justice Shahabuddin Ahmed fifth Parliamentary election was held on February 27, 1991. AL and BNP president expressed their deep satisfaction that free and fair election was held in peaceful atmosphere on February 27, 1991.

In the election BNP got 140, AL 84, JP 35, Jamaat- e- Islam 18, BWP 1, Islami Oikkya Jote 1, National Democratic League 1 and the rest independent candidates.⁶

After the election AL Chairperson Hasina on February 28, 1991 reiterated her commitment for struggle for establishing parliamentary democracy.⁷ But BNP Chairperson Khaleda Zia favoured presidential system. Accordingly under presidential system Begum Khaleda Zia was appointment as Prime Minister on March 20, 1991.

On the other hand acting President Shahabuddin Ahmed urged on March 1, 1991 the new parliament to amend the Constitution allowing him to return to his previous post as Chief Justice of the Supreme Court.⁸ Chief Justice Shahabuddin was the common choice of all the political parties. In spite of that after the election mutual consensus and understanding among the political parties particularly between main two parties- victorious BNP and losing AL faded so rapidly that they forgot their commitment that led the incumbent Chief Justice Shahabuddin to hold the office of Acting President for arranging free and fair election. Losing AL, perhaps, was unwilling to see someone from BNP in the office of President in place of Shahabuddin Ahmed. On the other hand Acting President did not want to stay in the presidency and strict to join the judiciary immediately. Being

¹ *Ibid*, December 6, 1990

² *Ibid*

³ *Ibid*

⁴ *Ibid*, December 7, 1990

⁵ *Ibid*

⁶ See EC report of Fifth Parliamentary election result supplied by the EC without date.

⁷ *The Bangladesh Observer*, March 1, 1991

⁸ *Ibid*, March 2, 1991

frustrated of the delay in making arrangement for his return to judiciary through amendment Acting President himself reminded political parties of their commitment. It is required to mention that Bangladesh Constitution did neither allow any incumbent justice to hold the office of highest executive, nor permit the same to join judiciary after serving else where.

Acting President Shahabuddin Ahmed on June 5, 1991 in a nationwide speech urged the *Jatiya Sangsad* to take constitutional measures at the outset of the coming budget session to pave the way for his exit from the presidency. He called for an immediate settlement on the issue of the form of government which had created a lot of speculations. He said that consensus of all political parties was the basis of his being the acting President. Such basis no longer existed and therefore he would prefer to quit his present position before any controversy generates.¹

On July 2, 1991 Law and Justice Minister Mirza Golam Hafiz introduced the constitution (Eleventh Amendment) Bill, 1991 in the House to amend the fourth schedule of the Constitution for ratification and confirmation of the appointment of the Chief Justice Shahabuddin Ahmed as Vice-President and facilitating his return to the office of the Chief Justice of Bangladesh.²

The return of the Vice-President to his former post has been proposed in the bill in accordance with the pledge given to him by the people and the principal political alliances. The Constitution (Eleventh Amendment) Bill was passed by 278 votes to none. 28 members abstained from voting on August 6, 1991. Acting President gave assent to the Constitution (Eleventh Amendment) Bill on August 10, 1991 which was his ultimate desire.³ By eleventh amendment the nation as a whole recognized the wrong wishes of the Chief Justice Shahabuddin in the name of urgency. But his contribution in that crucial moment can't be undermined.

10.1 Inclusion of a New Paragraph 21 in Fourth Schedule

The eleventh amendment inserted a new paragraph 21 after paragraph 20 in the fourth schedule of the constitution. The new paragraph had two sub-paragraphs. Sub-paragraph (1) legalized all actions of acting President Shahabuddin Ahmed starting from law making to administrative functions during the period between December 6, 1990 and October 10, 1991.⁴ Sub-paragraph (2) allowed acting President Shahabuddin Ahmed to join his previous office i.e., the Chief Justice of Bangladesh. It also counted his service of acting President with his judicial service.⁵

11. Comment

Violation of constitution in respect of appointment of justice to the office of president is not uncommon in independent Bangladesh. Prime Minister Sheikh Mujibur Rahman, father of the nation, made first violation of article 99 of Bangladesh Constitution in this respect by making Justice Abu Sayed Choudhury president of Bangladesh on January 12, 1972. Same case happened in 1975 and in 1982 with the appointment of Justice Abu Sadat Mohammad Sayem and Justice AFM Ahsanuddin Choudhury respectively. In these cases appointee did not raise any question of legality regarding their appointment. But Justice Shahabuddin Ahmed perhaps did not want to face any question surrounding his service as president and return to judiciary after spending few months in the office of president. Though hot political temperature prevailing after February 27, 1991 election subsided the demand of Justice Shahabuddin Ahmed yet his reason, probably, did not allow him to sacrifice his earned reputation in the name of political uneasiness. In previous occasions constitution was nakedly violated by appointing justices to the post of President but none of those cases they (justices) expressed their willingness for joining judiciary again. But in Justice Shahabuddin case he had made it clear that after completing the duties as Acting President he would get back his previous service. Since the question of returning to judiciary was involved, the political parties had no other alternative but to fulfill the pledge made to incumbent justice Shahabuddin Ahmed on the night of 6th December, 1990 by eleventh amendment. However, failure of political leadership in producing efficient, honorable and acceptable politicians is not a good sign for political system.

12. Conclusion

Justice Shahabuddin Ahmed was the common choice of the political parties and he was acceptable and adorable to the general people as well, no doubt. Justice Shahabuddin was not a politician. Although political parties frequently claim they are popular and their leaders possess the best quality of a statesman but in reality their assertion is found hollow when they are seen to look for non-political figure for running the government in time of crisis. In order to cover up the short comings of efficient leadership the political parties are to persuade non-

¹ *Ibid*, June 6, 1991

² See draft of constitution eleventh amendment bill and Parliamentary proceeding of July 2, 1991 published in *the Bangladesh Observer* of July 3, 1991

³ *The Bangladesh Observer*, August 11, 1991

⁴ See Act No-XXIV of 1991 published in official gazette on August 10, 1991

⁵ *Ibid*, and see also chapters 2.4.32, 2.7.22, 2.9.6, 3.1.13.3, 3.2.3 and 3.4.15

political figure and they are to meet, some times, up illegal demand of these persons. Shahabuddin Ahmed was not the only justice appointed to the office of president in Bangladesh. But he was very much aware of his position that his appointment was unconstitutional and his return to judiciary would also be illegal. Therefore to avoid controversy he forced the political parties to realize her illegal wish through constitutional amendment. Thereby political parties proved their failure in creating rational and sound political leadership in their business. Thus this amendment obviously negated the possibility of emergence of secular political system in Bangladesh.