

Election Commission of Bangladesh: A Legal Study

Syed Sarfaraj Hamid*

1.1 Introduction

The Constitution of Bangladesh (Article 118) gives the provision for setting up an Election Commission for the superintendence, direction and control of the preparation of electoral rolls for election to the office of the President and to the Parliament, and the conduct of such elections in accordance with the Constitution. According to the Constitution, the EC is independent in the exercise of its functions and subject only to the Constitution and applicable laws. Bangladesh EC is constitutionally responsible for the conduct of elections in a free and fair manner. To ensure such elections, transparency and accountability are required at all stages of the electoral process. Although a large number of civil society organizations are engaged in poll observation, there is a serious dearth of documented information on the EC itself, along with a diagnosis of the EC's limitations.

1.2 Expedition of Election Commission

Election Commission is one of those vital institutions the meaning existence of which indicates the strength of democracy. Therefore a strong, vigilant and independent Election Commission was very much in vision of the framers of Constitution. The foundation of strong democracy, in any type of society, is the process of choosing people's representative who would speak for them in appropriate forum i.e. Parliament and elsewhere. The Constitution is father of the Election Commission which is born with the virtue of Article-118. The fundamental optimum sources of power derived from the Constitution under Article-119(1). The superintendence, direction and control of the Election are from the Constitution. In the interpretation of Article-119(1) the High Division of Supreme Court of Bangladesh while disposing a writ petition no 2561 of 2005, Abdul Momen Chowdhury and others vs. Bangladesh, the Court in a judgment of 24th May 2005 stated that from a close reading of Article 119 of the Constitution, it appears that the Election Commission has been a plenary power of superintendence, direction and control of the preparation of the electoral affairs and therefore whatever power is necessary for the purpose must be presumed to be there unless there in on ouster by express provision.¹

* Associate Professor, Department of Law, EXIM Bank Agricultural University Bangladesh, email: sarfaraj_shovon@yahoo.com

¹ Origin of Election Commission of Bangladesh: Viewed from-<http://en.wikipedia.org/wiki/election.bd>. Accessed on 30.10.2013

Bangladesh Election Commission soon after Bangladesh was liberated, as structured under the Constitution of 1972. Prior to the liberation Dhaka had a regional election office since ECP was established in 1956. Therefore, the staff those constituted BEC had the continued experience of holding elections and referendum at all Pakistan basis and Provincial Assembly elections under civil government. The staff those played pioneering role in establishing BEC almost from the scratch had experienced one of the cleanest elections to the then Pakistan National Assembly in 1971 which won by Awmi leag. These officials and staff had also held election to the East-Pakistan Provincial Assembly in the same year. These experiences paid rich dividend setting up the BEC at the earlier stage of liberation. BEC was strengthen and further structured on the sound footing with the enactment of the most important electoral law the Representative of the People Order 1972. A number of the rules and regulations were enacted in the same period. Under the new order the voting age was lowered from 21 to 18 years. Under the constitution and as per the procedure set in the RPO the first Parliamentary Elections in Bangladesh was held in March 7, 1973. The country was delimited into 300 constituencies' bases on the seats limited by the Constitution. A total 14 parties including independent candidates those participated in the election in which Awmi leag under Bangabundhu Sheikh Mujibur Rahman emerged as single majority party with overall majority securing 282 seats out of 289 contested constituencies. Though the election was successfully held by BEC yet it was not above, however feeble, opposition parties criticism.²

Article 65(2) reads, parliament shall consist of three hundred members to be elected in accordance with law from single territorial constituencies by direct election...”, though the Constitution did not mention any system of voting rather left to the law but the Article specifies the method election of members i.e. direct election which remains open to interpretation. Be it as it may, the first ever Parliamentary election was held under FPTP, single constituency basis in Bangladesh as is practiced in most of the Commonwealth and other countries of the world. The regional countries both India and Pakistan had adopted FPTP since independence in 1947. Keeping in view the system followed in the region and elsewhere, Bangladesh elections at National Assembly including local government are also held adopting FPTP system.³

² Dr. Badiul Alam Majumder, Nirbachon Commission E Choloman Dondho Oanakangkito O Ain Bohirvhuto (the Current Conflict in Election Commission in Unexpected and unlawful), The Daily Prothom Alo, 17 December 2005

³ Ibid.

EC was established since the liberation of the country with virtue of Article-118 of the Constitution of the People's Republic of Bangladesh. The Constitution itself also provides other guarantees as regards to the function, character and authority. The Constitution further ensures the independence of the Election Commission. Before Proceeding again on the subject heading the Constitutional provisions needs to be examined and analyzed in this concerned. From the Constitutional point of view as there is an Election Commission Consisting with a chief Election Commissioner and such number of Election Commissioners for accelerating the obligatory of the Commission. The appointment procedure of Election Commissioner subject to the provisions of the Constitution and the Constitutional guided of the President. The Commission is an independent in exercise of its functions and subject to only this Constitution and any other law. The conditions of service and other affairs subject to the Constitution and other law made by the Parliament. The tenure is fixed under the terms of the Constitution and there is no procedure stipulated in selecting the Commissioners under the Constitution but enacting a separate law for such selection. However, the Constitution is silent about the independence of the secretariat that provides logistical and operational functionalities to the Constitution.⁴

1.3 Establishment of Election Commission

The President appoints the Chief Election Commissioner and other Election Commissioners under Article-118. The Commission consists of a Chief Election Commissioner and such number of other Election Commissioners as the President may from time to time direct. However, from the language applied in Clauses-(1) and (2) of Article-118, it becomes clear that Election Commission may be constituted even with the Chief Election Commissioner alone. The question of fixing the maximum number of Election Commissioners was raised seriously during 2006.⁵

1.4 Election Commission's Own Laws

The purpose of Election laws include proper holding of Elections, explaining the proper conduct expected from candidates and the people working on their behalf, and ensuring punishment to those who violate the legal provisions. The provision for an Election Commission was kept in the Constitution framed in 1972 after the emergence of Bangladesh. To prosecute duties as prescribed which are supposed to perform there needs to exist other laws other than Constitution.

⁴ Present Operational Stage of EC in Bangladesh: Viewed from-www.EC.org.bd/.../policy%20breif/.../task-force_reports/Governancein Election in bd. Accessed on- 29.10.2013

⁵ Supra note 2

Representation of People Order 1972, The Conduct of Election Rules 1972, and The Code of Conduct 1996 has been framed for fixing the procedures to be followed and the measures to be undertaken by the Election Commission. The Election laws comprise of all these orders, rules and regulations.⁶ With the assistance of these laws and Constitution, the EC conducts the Elections.

1.5 Delimitation of Constituencies for Election

Delimitation of Constituencies to the parliament is one of the major functions of Election Commission. On the other hand delimitation of local body's constituencies is usually the job of Local Government Ministry. Administrative unit, location of the settlement, number of voters is major factors for delimitation. Last delimitation of constituencies for the parliament election has completed on 1991. Resettlement of voters and new growth centers taken place demand delimitation, but it was ignored in past due to undue political pressure. It is considered as an unpleased job and was avoided by the Commissions in the past. Delimitation is one of the agenda of this Commission, placed in the Roadmap to be completed before election.

1.6 Duties of Election Commission

Election Commission an independent constitutional body entrusted with the responsibility of holding national and local government elections. It announces schedules of elections, delimits constituencies, prepares election rolls, supervises elections, announces election results and establishes election tribunals to settle election disputes. Part VII of the Constitution of the Peoples Republic of Bangladesh defines the composition, powers and functions of the Election Commission. The Bangladesh constitution provides that 'there shall be an Election Commission consisting of a Chief Election Commissioner and such number of other Election Commission, if any, as the President may from time to time direct.' At present, the Election Commission consists of three members including the Chief Election Commission. The Election Commission is constitutionally oath-bound to ensure free and fair elections to the office of President of the Republic, and to Jatiya Sangsad and local government bodies. The Elections Commission maintains close relations with all political parties. On matters of election schedule, election process and overall arrangement for elections, dialogue is

⁶ The Elections Governing laws in Bangladesh: Viewed from- <http://:Thaizbangladesh.net/election.phn>. Accessed on- 25.09.2013

initiated with all political parties. Discussion on issues relating to voter registration, preparation and updating of electoral rolls and relevant matters is also held with contesting political parties.⁷

1.7 Independence of Election Commission

The functional and institutional independence of the Commission is ensured in the Constitution. Article-118(4) specifically mentions that the Election Commission shall be independent in exercise of its functions. The term of office of an Election Commissioner is fixed for five years from the date on which he enters upon his office. An Election Commissioner cannot remove from his office except like manner and on like grounds as a judge of the Supreme Court.⁸ To make an Election Commissioner free from bias or influence in the exercise of his power, Article-118(3) provides that a persons who has held office as CEC shall not be eligible for appointment in the service of the Republic and any other election Commissioner shall, on ceasing to hold office as such, be eligible for appointment as CEC but shall not be otherwise eligible for appointment in the service of the Republic.⁹ The Representation of People's Order, 1972 also guarantees the independence. However, the independence also certainly depends on the actions of the Election Commission. If the Election Commission proceeds with a democratic mandate then the concept of independence will be complied with.

1.8 Principles of Election Commission

A freedom is inherent human right, but it is also fragile and can be lost through neglect or misuse. Freedom requires responsibility. Freedom can be maintained and nurtured through the democratic process. The success of the democratic process requires fair and open elections which accurately reflect the intent of the electorate through election commission. Therefore, it is the unique role of election officials to serve as gatekeepers of democracy. It is the sacred honor to protect and promote public trust and confidence by the conduct of election commission. As the public's guardians of freedom within a democracy society, election commission is responsible for the integrity of the process. These roles demand that these principles must be placed above personal or partisan gain.

Nurturing and protecting democracy are the team effort in the profession of elections administration. Election Commission task requires wisdom, courage and the desire to remain focused on the vision of free and impartial elections despite changes in our society and its laws. By dedicated adherence to these principles and Standards of the Conduct, it demonstrates the loyalty to freedom, pride in the

⁷ Ibid.

⁸ The Constitution of the People's Republic of Bangladesh, Article-188(3)

⁹ Ibid, Article-118(5)

profession and a commitment to the excellence of the democratic process through a neutral and strong Election Commission.

1.9 Corruption in Election Commission

Corruption of Election Commission under Article-120 of the Constitution of the Peoples Republic of Bangladesh, the President shall, when so requested by the Election Commission make the available to it such staff as may be necessary. So most of the practical scenario of this country is that President of the country is a political leader and appointment system is not clear so on the basis of demand of EC, the President shall appoint such person. So there is a call-in-question to the opposition parties and mass people that whether the appointment system is neutral or not Election Commission can make corruption of this system and so they cannot avoid of this incidence. Political parties are essential institution of a democratic society. Their growth is through the participation of the people directly or indirectly. These institutions are based on ideas which are propagated through agenda and implemented when in power. Election is the only legitimate means to secure power through peoples legitimate votes. Unless fair, free and transparent elections are held it is difficult for parties aspiring to replace the party in power. Therefore, it is essential that the EBM creates an even field for all participating parties. So, it is fair to assume that it is the political parties who should be the main vehicles for change in electoral system more responsive to the changing election atmosphere.

2.0 To What Extend Election Commission Reformation is Necessary?

The apex court decision on the unconstitutionality of the Caretaker Government system and its hast abolition by the government has generated serious concern among those desirous of free and fair elections to propel a robust democratic governance. This incumbent government and the opposition alike publicly support free and fair election but they differ on how to achieve it. Election is one of the inevitable pre-requisite of democracy. So, free and fair election at any level is a must for an ideal and sustainable democratic system. For this reasons, a standard electoral process is very important for smooth running of our government, state mechanism, development, national growth and a peace loving foreign policy. The recent constitutional amendments and legal changes concerning the electoral process are very much significance for achieving goal enshrining the Constitution in the absence of the Caretaker Government. No legal provision or system of accountability of the Election Commissioners and other officials exists, as a result of which millions of public and donor money

was wasted in different projects.¹⁰ Election laws have been interpreted differently by different Commissioners and other EC officials, indicating the complexity of the law and vested interest of manipulating the situation. Gross violation of law and rules with regard to voter list preparation and updating indicates poor understanding of such law by CECs and Commissioners¹¹. Questions may be raised on such confusions even most of the CECs and Commissioners were from the judiciary. Implementation of law has not been strictly maintained by most of the CECs, although the EC has enough power within the existing law. Non-implementation of these laws indicates weak moral standing of the Commissioners including the CECs.¹² On the whole, this is to uphold the democratic government, a free and fair election is a must. For such the present election commission should be reformed. As the Caretaker Government system is abolished so why the standing election procedure is supposed to alter to bring a good election commission for the betterment of the Republic. It may be the way of poll and code and conduct of the parties concerned. And these processes which are outdated for better election.

2.1 Grounds to Reform Election Commission in Bangladesh

From the diagnosis of the EC, it is revealed that the EC in reality has to depend on the government functionaries in respect to appointing CECs and other Commissioners, recruiting staff for the EC Secretariat, discharging its functions at field level during elections, maintaining law and order, and managing different financial issues including budget allocation and disbursement of funds. The EC's neutrality is hampered due to arbitrary appointment of CECs and Election Commissioners with partisan image, recruitment of local level election officials with partisan background, politicization of the NCG, and planned placement of officials of the administration before elections.¹³ All these are reflected in the results of elections in favor of the ruling party. The EC has not been up to the mark in terms of efficiency since there is existence of fake voters in the voter list, irregularities in voter list preparation, imbalance in voter distribution due to not conducting delimitation of constituencies

¹⁰ EC IN BD and OVER View: The unique role of the EC is being confined to the delivery of social services and advocacy for a better poll. They have to develop political ventures in order to elect a democratic government.

¹¹ Ibid.

¹² Bangladesh Election Commission: A Diagnostic Study: Viewed from- <http://www.ti-bangladesh.org>. Accessed on- 11.12.2013

¹³ Bangladesh-Economic Reconstruction after Independence: Viewed from http://www.mongabay.com/history/bangladesh/bangladesh-economic_reconstruction_after_independence.html. Accessed on 04.12.2013

over the last 22 years, lack of actions undertaken on electoral malpractices, and controversial roles played by the CEC and other Commissioners.¹⁴

2.2 Unrest Situation among Political Parties in Respect of Belief

There is a serious lack of professionalism in terms of discharging the functions of the EC in respect of political dialogue. Poor understanding of electoral laws, non-implementation of the laws, nonperforming regular jobs such as delimitation and updating the voter list, lack of precedence, handing over responsibilities, lack of proper orientation to the job nature at the EC, sense of accountability, and absence of stock taking indicate that capacity building is necessary for the Commissioners as well as other officials of this institution.¹⁵ There is no government policy on strengthening the EC in terms of using the experience of field level officials through their proper placement. These lacunas bring the political parties in unrest mode showing their faith each other when the poll is held under the commonplace Election Commission. The 15th amendment brings the political parties in more outdated situation.¹⁶ The present EC is opt to hold such level of election though City Corporation Election is being held under it. But the face of it is not seemed to more confidence, these question to the commentator for criticize and mark to the ultimate poll questionable. This is all about puts an Unrest Situation among Political Parties in Respect of Belief.

2.3 Procedure to Reform of Election Commission

The cost of actions of the EC are quietly depends on financial affairs. However, it is dependent on the Ministry of Finance for its budgetary allocations. Considering the experience to conduct election and election-related expenses such as voter list updating, training of the personnel, costs of the administrative machinery, the Commission estimates the yearly budget. However, the Ministry of Finance does not necessarily provide the amount as required. There is a huge gap between the demand placed by the EC and provided by the ministry. Sometimes the ministry delays fund disbursement which hampers the activities of the Commission.¹⁷ So the reformation should be addressed with considering each and demands arising from different department. The starting

¹⁴ M. Jashim Ali Chowdhury, *An Introduction to The Constitutional Law of Bangladesh*, 1st Edition, Northern University Bangladesh(NUB), 2010, pp. 496

¹⁵ Bangladesh Election Commission: A Diagnostic Study: Viewed from- <http://www.ti-bangladesh.org>. Accessed on-11.12.2013

¹⁶ Ibid.

¹⁷ Corporate Responsibility to the EC in BD: Viewed from <https://www.google.com.bd/search?q=corporate+responsibility+and+election+&ie=utf>. Accessed on-13.11.2013

concerned point is to be the financial offspring which is the ultimate fuel to conduct a good mechanism of election. This is the soul matter of the Ministry of Finance. So first of all the sources of money should be ensured for any actions arising from election commission. Then the requirements of staff are to be appointed from talents searching for authentic business. Since all the features demand finance, so for the transparency and fairness should be a guide for a procedure of reformation of election commission. The EC demands assistance from the State Ministry. So every Department of the State should be availed to link up with the EC. These are the aspects need to be considered reformation of election commission.¹⁸

2.4 Findings

Since independence the EC has so far conducted a number of elections that include eight parliamentary elections, three president elections with direct voting from the common people, three referendums, and several other local body elections. Among these, 13 were held under military (five local, three referendums, two presidential and three parliamentary) government, and the remaining under civilian government. Three parliament elections were held under non-party caretaker governments in 1991, 1996 and 2001. Since 1972, nine CECs have been appointed, among who seven were from the Judiciary. Only three of the CECs completed their tenure of five years as CEC. Elections held under different CECs were criticized for gross violation of electoral rules and termed 'un-free' and 'unfair'.¹⁹ There was no serious attempt was made to a holistic review of the entire electoral System. No in depth study or methodology was for continuous reform. Some observations are appended below which contributed the ineffective reform of the past. Political parties were not taken into confidence by the past Election Commissions and thus due to trust deficiency reforms attempts failed. No methodology was developed for continuous process of Election Commissions reforms.

2.5 Suggestions

The ruling parties have key responsibilities to strengthen the EC by enacting suitable laws such as enabling law and creating healthy political environment. In the relevant enabling law, among other things, qualification and number of Election Commissioners must be determined. Necessary laws may be enacted in this regard. This can be done through the parliament. All complications,

¹⁸ Ibid.

¹⁹ <http://www.ti-bangladesh.org>. Accessed on-11.11.2013

limitations, and inconsistencies of election laws, rules, orders and ordinances must be identified and resolved with a group of law experts, so that no debates are raised in future. A prosecution wing of the EC should be set up for dealing with all kinds of irregularities election. The EC should be given the authority to file cases against any candidate who violate electoral law and code of conduct, and to cancel candidature if the concerned candidate is proven guilty of violating electoral laws or code of conduct. The EC should increase its own capacity in terms of empowering staff and developing infrastructural and logistical strength, so that its dependence on bureaucracy may be reduced. The frequency of elections is increasing, so effort to build capacity of EC is needed. A neutral mechanism should be developed for appointing the CEC and Election Commissioners. This responsibility may be laid upon the Law and Parliamentary Standing Committee. It can also be a selection committee comprising of eminent persons from all segments of the society who will select the CEC or Commissioner for appointment. Necessary amendments may be brought in the Constitution prior to consensus from all political parties. The EC must be financially independent. There should be separate allocations in the national budget for the EC. Projects implemented by the EC have to be designed and developed incorporating monitoring and evaluation activities. There should be evaluation after each project and the assessment report should be made open for public review.

2.6 Conclusion

From the above study it is seen that soon after liberation Election Commission was established and electoral law RPO was enacted in 1972. Since then BEC has involved itself in various elections including eight elections to the Parliament up to 2006. Due to political turmoil that the country had gone through the Election Commission could not be established as an independent institution. Election Commission on the other hand could not deliver either due to lack of confidence or political apathy towards the institution. Defeated party after every election singled out Election Commission for their defeat. The blame game continued and became the focal issue of political tumult in 2006. On the Other hand, favoritism, partisan behavior married the reputation of the Election Commission in most cases. Under such circumstances the very appointment of the Commission remained questionable. Lack of confidence and political apathy towards Election Commission did not provide enough time and space for the Election Commission to take up enough initiative to take up the issue of the election process reform which should have been a continuous process. Politicization of civil administration, lack of will power to implement the law by

the Commission stigmatized the conduct of election. Due to lack of political will and Election Commission resolve past endeavor of electoral reform turned. Existing political culture did not support growth of an independent election commission. On the other hand past reform attempt was neither touched the public nor stakeholders were consulted which became the main causes of failure.