

# Legal regime of people's right to vote

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THE preamble of the Constitution of Bangladesh recognises the fundamental aim of the state as to realise the 'democratic process' for establishing a socialist society, free from exploitation. Article 7 vests all power of the Republic with the people of Bangladesh. Article 11 explains the term democratic process further, "The Republic shall be democracy in which fundamental human rights and respect for the dignity and worth of the human person shall be guaranteed, and in which effective participation by the people through their elected representatives in administration at all levels shall be ensured." So the Republic is a people's one, and the process of governance is democratic. Needless to say that free and fair election is a basic requirement for the success of democracy.

The basis of governance through representative local government is a crucial process for the country. It guarantees the right of the people to elect their representatives who take charge of the statecraft. The whole legislative power of the republic is vested with the legislators elected through direct voting. Part VII of the Constitution attempts to provide for free and fair elections to ensure the right to vote or the process of direct voting. According to Article 122 elections to parliament shall be on the basis of adult franchise. Any citizen of Bangladesh of not less than 18 years of age shall be entitled to be enrolled on the electoral roll for a constituency if s/he is or is deemed by law to be a resident of that constituency and does not stand declared by a competent court to be of unsound mind. According to section 171B of the Bangladesh Penal Code, 'electoral right' means the right of a person to stand or not to stand as, or to withdraw from being, a candidate or to vote or to refrain from voting an election.

This article briefly presents the Constitutional and statutory provisions relevant to holding parliamentary elections of Bangladesh. It also examines the existing scopes of election monitoring and suggests a few changes that would help the monitoring better.

## The Non-Party Caretaker Government

Thirteenth amendment was made in March 28, 1996 (The Constitution (Thirteenth Amendment) Act, 1996). It introduced the provision of a Non-Party Caretaker to the Constitution of Bangladesh (Chapter IIA, Articles 58B - 58E). It will work during the period from the date of which the Chief Adviser of this government enters upon office after parliament is dissolved or stands dissolved by reason of expiration of its term till the date on which a new Prime Minister enters upon his office after the

constitution of parliament. This government shall consist of the Chief Adviser at its head and not more than ten other advisers, all of whom shall be appointed by the President. The Chief Adviser and other advisers shall be appointed within fifteen days after parliament is dissolved or stands dissolved.

The Non-Party Caretaker Government will perform the role of an interim government and will continue the routine functions of such government. Except for emergency, it will not take any policy decision (Article 58D.1). The Non-Party Caretaker Government will be duty bound to provide the Election Commission all possible aid and assistance required for holding the general election of members of parliament peacefully fairly and impartially (Article 58D.2).

The term of the Caretaker Government is three months within which it will have to hold the general election of Parliament. Clause (3) of Article 123 clearly states: "A general election of members of Parliament shall be held within ninety days after Parliament is dissolved, whether by reason of the expiration of its term or otherwise than by reason of such expiration."

The Caretaker Government can not extend its term of governance. If, in the opinion of the Chief Election Commissioner, it is not possible, for reasons of an act of god, to hold such election within the period of ninety days, such election shall be held within ninety days following next after the last day of previous period. Only in this exceptional circumstances, the term of the Caretaker government, will be, as understood from the proviso of the Article 123, extended up to a period of another three months (ninety days).

The thirteenth amendment also affects Article 61 which states the supreme command of the defence services of Bangladesh shall vest in the President and the exercise thereof shall be regulated by law and such law shall, during the period of Caretaker Government be administered by the President.

This amendment has recently been challenged in the High Court Division of the Supreme Court of Bangladesh.

## The Election Commission

The Election Commission is the supreme constitutional body for the superintendence, direction, and control of the preparation of all elections (Presidential, Parliamentary, and other elections as determined by the Constitution and any other law). It conducts elections of members of parliament, delineates the constituencies for elections to Parliament, and prepares electoral rolls for the purpose of elections to the office of President and to Parliament.

The Constitution pronounces that the Election Commission shall be independent in the exercise of its functions and be subject only to the Constitution and any other law. So the Commission is not legally accountable to the Government or any other entity. Article 126 requires

Commission comprises more than one person, the Chief Election Commissioner shall act as the Chairman of the Commission. The Chief Election Commissioner and other Election Commissioners shall be appointed by the President for a term of five years from the date of entering the office. Accordingly

most judges of the Appellate Division investigates the matter. The Council then reports their findings to the president to consider what should be done.

## Necessary laws on election

### Chapter IIA - Non-Party Caretaker Government

58B. There shall be a Non-Party Caretaker Government during the period from the date on which the Chief Adviser of such government enters upon office after Parliament is dissolved or stands dissolved by reason of expiration of its term till the date on which a new Prime Minister enters upon his office after the constitution of Parliament.

(2) The Non-Party Caretaker Government shall be collectively responsible to the President.

(3) The executive power of the Republic shall, during the period mentioned in clause (1), be exercised, subject to the provisions of article 58D (1), in accordance with this Constitution, by or on the authority of the Chief Adviser and shall be exercised by him in accordance with the advice of the Non-Party Caretaker Government.

(4) The provisions of article 55(4), (5) and (6) shall (with the necessary adaptations) apply to similar matters during the period mentioned in clause (1).

58C. (1) The Non-Party Caretaker Government shall consist of the Chief Adviser at its head and not more than ten other Advisers, all of whom shall be appointed by the President.

(2) The Chief Adviser and other Advisers shall be appointed within fifteen days after Parliament is dissolved or stands dissolved, and during the period between the date on which Parliament is dissolved or stands dissolved and the date on which the Chief Adviser is appointed, the Prime Minister and his cabinet who were in office immediately before Parliament was dissolved or stood dissolved shall continue to hold office as such.

(3) The President shall appoint as Chief Adviser the person who among the retired Chief Justices of Bangladesh retired last and who is qualified to be appointed as an Adviser under this Article.

Provided that if such retired Chief Justice is not available or is not willing to hold the office of Chief Adviser, the President shall appoint as Chief Adviser the person who among the retired Chief Justices of Bangladesh retired next before the last retired Chief Justice.

(4) If no retired Chief Justice is available or willing to hold the office of Chief Adviser, the President shall appoint as Chief Adviser the person who among the retired Judges of the Appellate Division retired last and who is qualified to be appointed as an Adviser under this Article.

Provided that if such retired Judge is not available or is not willing to hold the office of Chief Adviser, the President shall appoint as Chief Adviser the person who among the retired Judges of the Appellate Division retired next before the last such retired Judge.

(5) If no retired Judge of the Appellate Division is available or willing to hold the office of Chief Adviser, the President shall, after consultation, as far as practicable, with the major political parties, appoint the Chief Adviser from among citizens of Bangladesh who are qualified to be appointed as Advisers under this article.

(6) Notwithstanding anything contained in this Chapter, if the provisions of clauses (3), (4) and (5) cannot be given effect to, the President shall assume the functions of the Chief Adviser of the Non-Party Caretaker Government in addition to his own functions under this Constitution.

(7) The President shall appoint Advisers from among the persons who are

(a) qualified for election as members of Parliament;

(b) not members of any political party or of any organisation associated with or affiliated to any political party;

(c) not, and have agreed in writing not to be, candidates for the ensuing election of members of Parliament;

(d) not over seventy-two years of age.

(8) The Advisers shall be appointed by the President on the advice of the Chief Adviser.

(9) The Chief Adviser or an Adviser may resign his office by writing under his hand addressed to the President.

(10) The Chief Adviser or an Adviser shall cease to be Chief Adviser or Adviser if he is disqualified to be appointed as such under this article.

(11) The Chief Adviser shall have the status, and shall be entitled to the remuneration and privileges, of a Prime Minister, and an Adviser shall have the status, and shall be entitled to the remuneration and privileges, of a Minister.

(12) The Non-Party Caretaker Government shall stand dissolved on the date on which the Prime Minister enters upon his office after the constitution of new Parliament.

58D. (1) The Non-party Care-taker Government shall discharge its functions as an interim government and shall carry on the routine functions of such government with the aid and assistance of persons in the services of the Republic; and, except in the case of necessity for the discharge of such functions it shall not make any policy decision.

(2) The Non-Party Caretaker Government shall give to 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.

58E. Notwithstanding anything contained in articles 48 (3), 141A (1) and 141C (1) of the Constitution, during the period the Non-Party Caretaker Government is functioning, provisions in the Constitution requiring the President to act on the advice of the Prime Minister or upon his prior counter-signature shall be ineffective.

all executive authorities to assist the Election Commission in the discharge of its function.

Article 118 provides for an Election Commission comprising a Chief Election Commissioner and such number of Election Commissioners as the President may direct. When the Election

Commission was constituted through President Order No. 25 of 1972.

Election commissioners can be removed from their posts. If a complaint is made against a Commissioner, the Supreme Judicial Council comprises the Chief Justice and other two senior

Besides the relevant provisions of the Constitution of Bangladesh, Representation of People Order, 1972 (Presidential Order (P.O. 155 of 72), Electoral Rolls Order, 1972 (P.O. 104 of 72), Representation of the People (Seats for Women) Order, 1973 (P.O. 17 of 1973), Election

Commission Order, 1972 (P.O. 25 of 72), Election Officer (Special Law) Act, 1991, and their subsequent amendments made at different times, primarily deal with different aspects of election.

The Electoral Rolls Ordinance, 1982 defines the electoral area. Section 3 of the same also defines an elector as: "... a person registered as voter and enrolled in the final electoral rolls prepared and published under this ordinance." Section 15 of the Electoral Rolls (Amend) Act, 1994 also empowers the election Commission to include or delete any name in the electoral roll, and to correct it any time.

The functions of the Election Commission concerning the conduct of elections to different institutions have been elaborated in different legislations. The Representation of the People Order (R.P.O.), 1972 is a comprehensive peace of legislation with regard to conducting the parliamentary elections.

## Stages of election

The third chapter of the R.P.O., 1972 deals with the stages of parliamentary elections. The whole process can be summarised as follows:

The election commission shall appoint a Returning Officer for each constituency.

The returning officer shall make polling stations and appoint the Presiding Officers for the polling stations.

After preparing the election rules, the commission shall notify about the election and then ask for nomination papers. One candidate can not contest in more than five constituencies. After scrutiny of nomination papers, the authority shall publish the list of candidates. Then a time of withdrawal will be fixed for the candidates. The authority can postpone the election if it goes beyond their control.

After the final list, election symbols will be allocated to the candidates. For the purpose of election, the candidates appoint their agents. They also appoint polling agents for the election day to be posted at polling stations with a view to checking possible irregularities and malpractice. The polling agents are allowed to remain present at the time of counting.

The election will be conducted by secret ballot and will be held at the stipulated time and hours prescribed by Election Commission.

The voters will be allowed to vote after examining their numbers (voter numbers).

The Presiding Officer shall count the votes after the voting hours in the presence of the candidates or their agents who will sign over the result. The presiding officer will deposit the result with the Returning officer. The Returning Officer will count it again and send the result to the Election Commission from where the result will be published through gazette notification.

It may be mentioned here that

Section 29(a) of the R.P.O., 1972 provides the Returning Officer and the Presiding Officer the right to exclude anyone, other than voters, party agents, candidate and others "who are on duty in connection with the election".

## Election disputes

Challenges to an election can only be made by a candidate submitting an election petition within the 45-day time limit and on deposit of one hundred taka. As per provision of Section 53 of the R.P.O., 1972, the Election Commission constitutes Election Tribunals with persons who are or have been District and Sessions Judge or Additional Session Judge for the trial of the election petitions. As there is no time limit for the disposal of the election petition, the parliament is generally dissolved before their disposal. Another fundamental reason for such prolonged delay is the enormous backlog of cases for the courts to deal with. According to a source of the Election Commission, 18 out of 66 election cases of the 7th Parliamentary Election 1996 are still pending before different Election Tribunals. There should be a specified time frame for the disposal of an election petition.

## Monitoring election

Monitoring election by independent, non-partisan observers, both local and international, has now become an essential component of election affairs all over the world. It increases the transparency of the election process and helps deter fraud, irregularities and contributes to the overall credibility of the process. Effective monitoring also encourages acceptance by all parties of the election result. Monitoring election has taken its firm root in Bangladesh also. A number of citizens groups, NGOs, and coalitions are active in election monitoring. There are, unfortunately, a number of official obstacles that lessen the effectivity of proper monitoring.

Currently only one observer is allowed to enter a polling station. As there are normally three to four polling teams with separate booths and ballot boxes in every polling station, one observer can not monitor everything. Observers are only allowed in a station for a limited period. At present, non-partisan election observers have limited opportunity to observe the counting process. In many countries, the counting of votes is done publicly to enable observers and ordinary citizens to verify that the marks on the ballots are accurately recorded. Domestic observers are barred from observing in their own Thana. As well as increasing the cost of observation, this regulation means that observers who wish to remain at a station the entire day would not have the opportunity to cast their own ballot. It is also more difficult for an outsider to be effective as a local

observer, who will know most of the people on the list and at the station. Another rule requires observers to be at least 25 years old, although the minimum qualification to vote is 18. This restriction prevents college students, and others, from being observers. In other countries, many observers are college students, since they often have the interest and time to volunteer.

1. It is recommended that regulation be amended to allow a reasonable number of officially accredited non-partisan observers (either international or domestic) to watch the polling process with each team, as is currently practice in most other advanced democracy.

2. As continuity of observation is important in validating a process, it is recommended that the regulation be amended to allow individual observers to watch the entire process from the opening of the poll until the completion of the count.

3. The current regulation be modified to allow observers to watch the entire counting process, and record the final results for the purpose of parallel vote tabulation and overall check of the process.

4. The qualification for observers should be no more than those that qualify a person to vote. The minimum age to monitor election should match the age of voting (18 years).

5. The existing provision, which bars a person to monitor the election of his own locality, should be eliminated to conform with internationally accepted norms and standards. Permitting monitors to observe in their own communities will provide a greater check on the process.

## Need for a pro-active Election Commission

Free and fair election is a must for ensuring people's right to participation. The whole process of institutionalisation of democracy, in fact, starts with the process of having elected representative at various levels of governance. There is no alternative of holding periodical election for consolidating democracy, our chosen way of governance.

The existing election laws and regulations are not beyond imperfections and lapses; still the growing dissatisfaction over the electoral process is primarily due to lack of implementation of them. The Election Commission should be more pro-active towards implementing the relevant laws and regulations. At the same time with the system of Non-Party Caretaker Government, the Election Commission have even wider scope of de facto power and authority to supervise the process of election better.

In the next week A. H. Monjurul Kabir will focus on some other important aspects of election laws and recommended changes.

# Declaration on criteria for free and fair elections

THE Inter Parliamentary Union (IPU) Declaration on Criteria for Free and Fair Elections (IPU Criteria), unanimously adopted by the Inter-Parliamentary Council at its 154th session in Paris on 26 March 1994 includes provisions on the rights and responsibilities of voters, candidates, political parties, and states in the conduct of elections. Bangladesh is a member of the IPU, and has formally endorsed the criteria. All the stakeholders of the forthcoming 8th National Parliamentary Election 2001 of Bangladesh should make every effort to meet these internationally accepted standards:

## The Inter-Parliamentary Council,

Reaffirming the significance of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights which establish that the authority to govern shall be based on the will of the people as expressed in periodic and genuine elections,

Acknowledging and endorsing the fundamental principles relating to periodic free and fair elections that have been recognized by States in universal and regional human rights instruments, including the right of everyone to take part in the government of his or her country directly or indirectly through freely chosen representatives, to vote in such elections by secret ballot, to have an equal opportunity to become a candidate for election, and to put forward his or her political views, individually or in association with others,

Conscious of the fact that each State has the sovereign right, in accordance with the will of its people, freely to choose and develop its own political, social, economic and cultural systems without interference by other States in strict conformity with the United Nations Charter,

Wishing to promote the establishment of democratic, pluralist systems of representative government throughout the world,

Recognizing that the establish-

ment and strengthening of democratic processes and institutions is the common responsibility of governments, the electorate and organized political forces, that periodic and genuine elections are a necessary and indispensable element of sustained efforts to protect the rights and interests of the governed and that, as a matter of practical experience, the right of everyone to take part in the government of his or her country is a crucial factor in the effective enjoyment by all of human rights and fundamental freedoms,

Welcoming the expanding role of the United Nations, the Inter-Parliamentary Union, regional organizations and parliamentary assemblies, and international and national non-governmental organizations in providing electoral assistance at the request of governments,

Therefore adopts the following Declaration on Free and fair Elections, and urges Governments and Parliaments throughout the world to be guided by the principles and standards set out therein:

1. Free and Fair Elections

In any State the authority of the government can only derive from the will of the people as expressed in genuine, free and fair elections held at regular intervals on the basis of universal, equal and secret suffrage.

2. Voting and Elections Rights

(1) Every adult citizen has the right to vote in elections, on a non-discriminatory basis.

(2) Every adult citizen has the right to access to an effective, impartial and non-discriminatory procedure for the registration of voters.

(3) No eligible citizen shall be denied the right to vote or disqualified from registration as a voter, otherwise than in accordance with objectively verifiable criteria prescribed by law, and provided that such measures are consistent with the State's obligations under international law.

(4) Every individual who is denied the right to vote or to be registered as a voter shall be entitled to appeal to a jurisdiction com-

petent to review such decisions and to correct errors promptly and effectively.

(5) Every voter has the right to equal and effective access to a polling station in order to exercise his or her right to vote.

(6) Every voter is entitled to exercise his or her right equally with others and to have his or her vote accorded equivalent weight to that of others.

(7) The right to vote in secret is absolute and shall not be restricted in any manner whatsoever.

3. Candidature, Party and Campaign Rights and Responsibilities

(1) Everyone has the right to take part in the government of their country and shall have an equal opportunity to become a candidate for election. The criteria for participation in government shall be determined in accordance with national constitutions and laws and shall not be inconsistent with the State's international obligations.

(2) Everyone has the right to join, or together with others to establish, a political party or organization for the purpose of competing in an election.

(3) Everyone individually and together with others has the right: To express political opinions without interference;

To seek, receive and impart information and to make an informed choice;

To move freely within the country in order to campaign for election;

To campaign on an equal basis with other political parties, including the party forming the existing government.

(4) Every candidate for election and every political party shall have an equal opportunity of access to the media, particularly the mass communications media, in order to put forward their political views.

(5) The right of candidates to security with respect to their lives and property shall be recognized and protected.

(6) Every individual and every political party has the right to the protection of the law and to a rem-

edy for violation of political and electoral rights.

(7) The above rights may only be subject to such restrictions of an exceptional nature which are in accordance with law and reasonably necessary in a democratic society in the interests of national security or public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others and provided they are consistent with States' obligations under international law. Permissible restrictions on candidature, the creation and activity of political parties and campaign rights shall not be applied so as to violate the principle of non-discrimination on grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

(8) Every individual or political party whose candidature, party or campaign rights are denied or restricted shall be entitled to appeal to a jurisdiction competent to review such decisions and to correct errors promptly and effectively.

(9) Candidature, party and campaign rights carry responsibilities to the community. In particular, no candidate or political party shall engage in violence.

(10) Every candidate and political party competing in an election shall respect the rights and freedoms of others.

(11) Every candidate and political party competing in an election shall accept the outcome of a free and fair election.

4. The Rights and Responsibilities of States

(1) States should take the necessary legislative steps and other measures, in accordance with their constitutional processes, to guarantee the rights and institutional framework for periodic and genuine, free and fair elections, in accordance with their obligations under international law. In particular, States should:

Establish an effective, impartial and non-discriminatory procedure for the registration of voters;

Establish clear criteria for the

registration of voters, such as age, citizenship and residence, and ensure that such provisions are applied without distinction of any kind;

Provide for the formation and free functioning of political parties, possibly regulate the funding of political parties and electoral campaigns, ensure the separation of party and State, and establish the conditions for competition in legislative elections on an equitable basis;

Initiate or facilitate national programmes of civic education, to ensure that the population are familiar with election procedures and issues;

(2) In addition, States should take the necessary policy and institutional steps to ensure the progressive achievement and consolidation of democratic goals, including through the establishment of a neutral, impartial or balanced mechanism for the management of elections. In so doing, they should, among other matters:

Ensure that those responsible for the various aspects of the election are trained and act impartially, and that coherent voting procedures are established and made known to the voting public;

Ensure the registration of voters, updating of electoral rolls and balloting procedures, with the assistance of national and international observers as appropriate;

Encourage parties, candidates and the media to accept and adopt a Code of Conduct to govern the election campaign and the polling period;

Ensure the integrity of the ballot through appropriate measures to prevent multiple voting or voting by those not entitled thereto;

Ensure the integrity of the process for counting votes.

(3) States shall respect and ensure the human rights of all individuals within their territory and subject to their jurisdiction. In time of elections, the State and its organs should therefore ensure:

That freedom of movement, assembly, association, and expression are respected, particularly in

the context of political rallies and meetings;

That parties and candidates are free to communicate their views to the electorate, and that they enjoy equality of access to State and public-service media;

That the necessary steps are taken to guarantee non-partisan coverage in State and public-service media.

(4) In order that elections shall be fair, States should take the necessary measures to ensure that parties and candidates enjoy reasonable opportunities to present their electoral platform.

(5) States should take all necessary and appropriate measures to ensure that the principle of the secret ballot is respected, and that voters are able to cast their ballots freely, without fear or intimidation.

(6) Furthermore, State authorities should ensure that the ballot is conducted so as to avoid fraud or other illegality, that the security and the integrity of the process is maintained, and that ballot counting is undertaken by trained personnel, subject to monitoring and/or impartial verification.

(7) States should take all necessary and appropriate measures to ensure the transparency of the entire electoral process including, for example, through the presence of party agents and duly accredited observers.

(8) States should take the necessary measures to ensure that parties, candidates and supporters enjoy equal security, and that State authorities take the necessary steps to prevent electoral violence.

(9) States should ensure that violations of human rights and complaints relating to the electoral process are determined promptly within the timeframe of the electoral process and effectively by an independent and impartial authority, such as an electoral commission or the courts.

## The Indonesian Experience Voter Information Card

The general election will be held on June 7, 1999. The election will be for 3 levels of government; the DPR, DPRD I, and the DPRD II. Lists of candidates for various parties competing in a constituency will be posted at the polling station. Polling stations will open at 8:00 am and close at 2:00 pm, but anyone still in line at 2:00 pm will be allowed to vote. The Polling Station Committee (KPPS) is responsible for administering the ballot and the count, and for reporting results.

**Requirements:** To vote, a person must have a Registration Receipt for that station, or an A2 form or if their name is on the Voter Registry, they may present a valid ID card.

**Observers and Party Agents:** Observers and party agents may observe the counting and polling process inside the polling station and address comments to the KPPS chairman. Observers/party agents may not talk to voters or watch a voter mark a ballot.

**The Polling Process:** At the polling station, your finger will be checked for ink, then your name will be checked on the Official/Additional Register of Voters.

You will be given three ballots, one for each election. Make sure that each ballot has been signed three times (by the Chairman, Vice Chairman and one other member of the KPPS) and has an official holographic seal attached. Without these, the ballot will be invalid at the count!

In the voting booth, mark each ballot by punching a hole through the appropriate party symbol. After depositing ballots in the appropriate ballot box, dip your finger in the indelible ink to verify that you have voted.

Physically disabled and blind voters may be assisted in voting by a relative, friend, or KPPS member.

**The Counting Process:** Counting for each election will be conducted at the polling station after the polling is over. Voters, observers and party agents can observe the counting process. As ballots are counted they will be shown to the audience, and marked on a large tally sheet visible to the audience.

After each election has been counted, the final results will be announced to the audience. Results from all the polling stations in a kecamatan will be added together at the PPS (in the presence of observers and party agents), then transmitted electronically to Jakarta.

This card was circulated among voters by the Indonesian Authority before the last general election of Indonesia. The Election Commission of Bangladesh can replicate the idea.