

# 'There can be no excuse for not formulating the EC law'

Dr Badiul Alam Majumdar is global vice-president and country director, The Hunger Project, and secretary of Sushashoner Jonno Nagorik (Shujan). In this interview with Eresh Omar Jamal of The Daily Star, he talks about the constitutional obligation of formulating a law to establish the Election Commission and why politicians so far have ignored it.

Despite the constitution providing for the formulation of a law to establish the Election Commission (EC), why is it that we still don't have it?

Because, in simple terms, our politicians did not want to have the law. A law would lay down some procedures, restrictions and guidelines, so you cannot do whatever you want—although laws may have loopholes, and if your intentions are not honest, you can manipulate them. But a law ties your hands to some extent, and our politicians did not want that. They wanted to do whatever they wanted and appoint whomever they wanted.

Constitutional obligations aside, why is such a law necessary? How would it improve holding elections?

As I've already said, a law would set some boundaries, erect some guardrails and set out certain procedures. It could, for example, ensure that appropriate and non-partisan people are appointed to the EC, who may be able to withstand pressure from vested quarters. It may not guarantee that we will have free and fair elections, but it will definitely increase the likelihood. It is in the public's interest that we have free, fair and credible elections, so that a democratically formed government runs the affairs of the state. That way, those in charge are more accountable to the people.

What kind of boundaries or procedures am I talking about? See, a law could spell out the qualifications or disqualifications of candidates for the EC posts. If the appointing authorities—the president and, indirectly, the prime minister—are honest in their intentions and want to abide by the law, then we are likely to have qualified people appointed to the EC. With regards to qualifications, the first important provision in the law could be that the candidates would be required to submit their antecedents in the form of affidavits, which should be made public.

The law could lay down the procedure to appoint EC members through a search committee that represents different stakeholders. One committee member could be appointed by the PM, one by the leader of the opposition, one by the third largest party in parliament—even though most members of our current parliament were not elected by the people. The search committee could also be headed by an honourable person such as a former chief justice or a former justice of the Appellate Division. There could also be a representative of the civil society and another from the media. The comptroller and auditor-general could also be included. The workings of this committee should be made transparent. The minutes of their meetings and their deliberations should be written down and made public.

In the past, the PM would decide the appointees. Since 2011, the president has been holding dialogues with political parties to constitute a search committee. And how was it constituted? If you look at Article 48(3) of our constitution, it essentially says that except in the case of appointing the PM and chief justice, the president will have to act on the advice of the PM in all matters. In forming the search committee, I am pretty sure the president had to get the advice of the PM. So, basically the head of the executive branch—the PM—decided who became members of the search committee. And we have no knowledge of how those search committees functioned and how they came to their decisions.

Another alternative could be to have a parliamentary special committee—representing the different parties in parliament—in lieu of the search committee. But the problem with that is the parliament in our country is not representative, and most of the incumbent MPs did not get "elected" with the consent of the people. Another reality is that the parliament has become subservient to the executive, so I don't think such a committee would work here.

The framers of our constitution perhaps never thought that there would be a day when the people in power would select EC members who would serve their own interests, rather than the interests of the people. I have talked to a few of them, who said they thought honourable

people would be selected for the EC, not those who would hold tainted elections. They never thought we would ever have what is now practically a one-party government.

How would you rate the performance of the present EC, particularly in light of the fact that voter turnout in recent polls has dropped to an abysmally low level?

Not only did the present Election Commission harm our electoral system, but there are also serious allegations of fiduciary nature against them. This is the first time that such allegations have been made against such a body and its chief. Earlier, when the BNP was in power, the incumbent CEC was forced out of his job—being victimised by the BNP. Later, the Awami League government reinstated him with the rank of a secretary, even though he was a joint secretary when BNP had forced him out. So, there is reasonable ground for him to take a negative view against one party.

One may recall that the CEC had made a public commitment about electronic voting machines (EVMs), that they would not be used unless there was political consensus. Yet, when all the opposition parties were opposed to EVMs, he did not keep his words, and went ahead with using the EVMs. The EVMs that we bought do not have any paper trail, making them vulnerable to manipulation. Also, they were bought at a price that was 11 times higher than the ones bought in India ("EC procures EVMs at 11 times higher than India's price", October 16, 2018, *Prothom Alo*). When our EVMs were bought, a technical committee was formed, headed by the late Professor Jamilur Reza Choudhury, who refused to endorse the purchase of these EVMs because they did not have paper trails.

At first, India too had EVMs that did not



Badiul Alam Majumdar PHOTO: TWITTER

have paper trails. But then, the Indian Supreme Court directed the election commission to add paper trails—VVPAT, or Voter Verifiable Paper Audit Trail. So the Indian election commission had to modify their EVMs. Bangladesh could do that too. In addition, our EVMs are directly under the EC's control, and there is no way to verify any of the election results they give. One example of manipulation could be seen in the Chattogram City Corporation elections, where the result was declared at least twice, according to media reports. I also wrote about it myself. EVMs should not have the scope to publish results twice.

What had happened was that the results that were published on the night of the election were embarrassing—showing the BNP candidate receiving zero votes in 22 centres and so on. So they had to issue a second version. Even the results of the 11th parliamentary elections raised a lot of questions. I, for example, wanted to have the centre-wise election results. In the past, the EC would publish centre-wise election results on its own, but the present EC did not publish them. We tried to talk to them and convince them, but they paid no attention. So I submitted an RTI application. Eventually, after much

dillydallying, they published them on their website. When we analysed the centre-wise data, we found that in 213 centres—out of 40,000—there was 100 percent of votes cast, which is impossible because the voter list was created many months prior to the elections, and there were people who had died, people who were out of the country, people who were in jail. Not only that, they even showed a candidate in Chattogram getting zero votes, which they later changed. Centre-wise results showed that the BNP-led alliance got zero votes in 1,177 centres. And even AL got zero votes in two centres.

It is unfortunate that the present CEC and three other election commissioners acted in a manner that many may consider less than honourable and that, in my view, was not in the public interest. In fact, I would say, this is the worst election commission we have had in our history.

*The EC alone cannot hold free and fair elections. If other stakeholders such as the law enforcement agencies and the bureaucracy—that is, the government in power—do not function in a neutral manner, even the strongest EC will not be able to deliver free, fair and credible elections. But it can prevent tainted elections. The Appellate Division of our Supreme Court, in Altaf Hossain vs Abul Kashem case, said that the EC can even "add to the statutory rules" for the sake of free and fair elections. So the EC has almost unlimited power to hold fair elections.*

Just to illustrate this point: the present commissioners created 15 special designations for themselves—such as special speaker, course adviser, course director, course coordinator, assistant course coordinator—and they got paid for performing these tasks, although they are employed to do these things anyway. Past election commissioners performed the same tasks but never charged extra money for it. Boishakhi Television aired a seven-part series unearthing these irregularities. And a group of 44 citizens, including myself, had written two letters to the president asking for an investigation into this. We gave specific information supporting our allegations, although the burden of proof does not fall on us. But the president did not even acknowledge our letters.

However, I must add, the EC alone cannot hold free and fair elections. If other stakeholders such as the law enforcement agencies and the bureaucracy—that is, the government in power—do not function in a neutral manner, even the strongest EC will not be able to deliver free, fair and credible elections. But it can prevent tainted elections. The Appellate Division of our Supreme Court, in Altaf Hossain vs Abul Kashem case, said that the EC can even "add to the statutory rules" for the sake of free and fair elections. So the EC has almost unlimited power to hold fair elections. If the EC realises that it is impossible to hold a fair election, it can always stop the election or cancel the results of tainted elections after an investigation. But this EC did nothing. Even when there were attacks on Dr Kamal Hossain and other opposition leaders, it did not bother to take any action.

As we celebrate 50 years of independence, couldn't the Awami League leave a lasting legacy by finally giving the country a law to formulate the EC? What reasons could it have for not doing so?

We have moved far away from the spirit of our Liberation War and the guiding principles of our constitution, democracy being one of them. Article 11 of our constitution says that, "The Republic shall be a democracy..." Article 59 says that people's rule will be ensured in all administrative units at the local level. We have moved away from these commitments, even though our freedom fighters gave their lives for

these ideals, including the right to self-determination of the people.

The declaration of our independence pledged that "it shall be a fundamental aim of the state to realise, through the democratic process, a socialist society free from exploitation and a society in which the rule of law, fundamental human rights and freedom, equality and justice, political, economic and social, will be secured for all citizens." This is why we fought our Liberation War. But we have deviated from those ideals. The state is no longer run in the public interest—but in coterie interest. It is no longer run with those principles in mind, but to ensure that whoever is in power, stays in power. So that is why they are not doing it.

As a nation are at a dangerous juncture. There are a lot of disaffection

this is a simple law—three to four pages in length—and it would not take much time.

The Dr Shamsul Huda Commission prepared a draft in 2011 before they left office. Based on that draft and using the experiences of other countries, we prepared a draft in a week. So a law could be drafted quickly and opened up to the public for their feedback. There are still several months left to do that. So these excuses that they give do not make any sense. We have already shown that it can be done, and we are willing to help.

Another thing the ruling party says is that it wants to abide by the constitution. Well, the election-time government—the caretaker government—is not in the constitution and they do not want to discuss it, and we can understand that, although I have a different view. But a search committee is not in the constitution either. So they are basically cherry-picking. They want to use the constitution when it is in their interest, but avoid it when it is not.

In 2011, a parliamentary committee was set up under senior lawmaker Sajeda Chowdhury. This committee, comprising senior leaders, held extensive consultations with different stakeholders. This is what Tofail Ahmed had said at the committee meeting: "My personal opinion is that it won't be appropriate to change any major aspect of the caretaker government. Even if we do away with the caretaker government, keep it for another two terms. After two terms, if we are in the opposition, then we may have to clamour for it to be brought back" ("Which constitution, whose constitution", October 28, 2013, *Prothom Alo*).

Amir Hossain Amu said: "If we really want to make a change, then a lot of complications will arise. We will get into a lot of hassles. Instead, it is better to just keep it as it is." Abdul Matin Khanru, the late law minister, said: "When we sat down for discussions, we prepared some guidelines which said we won't get into anything that could lead to conflict. I sincerely want to say, the caretaker government system that we have, let's just leave it as it is." Shirin Sharmin Chaudhury said: "We don't need any changes to the caretaker government system right now." The late Suranjit Sengupta said: "In spite of all the limitations, we should proceed with it [caretaker government system]."

The committee "unanimously" recommended amending the constitution keeping the caretaker government provision, and went to meet the PM. The change came later. So the chief of the ruling party and head of the executive branch decided to do away with the caretaker government. Not only that, the Appellate Division under Justice Khairul Haque gave a divided short order, where they kept the option to keep the caretaker government, if the parliament wanted to, for two terms. The manner in which the amendment was brought about created a lot of questions that still linger in the public mind.

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British-American author

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