

An Option to Reconstitute the Election Commission

by Barrister Harun ur Rashid

Former Bangladesh Ambassador to the UN, Geneva.

Deleted: How to replace the Chief Election Commissioner?

Regrettably the Chief Election Commissioner has become the subject of controversy. Ordinarily the Chief Election Commissioner and the Election Commissioners are above controversy.

Under Article 118 of the Constitution, the Chief Election Commissioner and the Election Commissioners constitute Election Commission. The Election Commission shall be independent in the exercise of its functions, subject only to the Constitution (Article 18.4).

The Election Commission "shall hold elections of members of parliament" in terms of Article 19.1 (b). Under Article 121 of the Constitution, there shall be one electoral roll for each constituency for the purposes of elections to Parliament, and no special electoral roll shall be prepared so as to classify electors according to religion, race, caste or sex.

The Election Commission must enjoy confidence from voters so that the Commission can hold free, fair and credible election. I emphasize the words, "free", "fair" or credible. It is the responsibility for the Non-Party Care-Taker government and the Election Commission to create conducive environment to hold free, fair and credible election.

Tenure of Election Commissioners:

In every country, the Chief Election Commissioner and other Commissioners are independent from interference of the government. Election Commissioners shall perform in accordance with the provisions of the Constitution without fear or favour.

Election Commissioners know that they have a fixed term of tenure during which they cannot be removed. The certainty of tenure gives them their independence to perform their functions without fear or favour.

That is why Article 118(5) of the Constitution provides that an Election Commissioner shall not be removed from his office except in like manner and on the like grounds as a judge of the Supreme Court.

The removal or replacement of Election Commissioners is not an easy process. Such procedure was deliberately incorporated in the Constitution to make it difficult so that they can perform functions independently of the government or of any other outside pressure.

In the past, Election Commissioners could not be removed by the government or Non-Party Care-taker government. They could not be persuaded by the government to resign or take leave (*for details, see Dr. Nizam Ahmed, "Non-Party Caretaker Government in Bangladesh" :chapter 4*)

It is noted that a few Chief Election Commissioners resigned on their own taking into account the reality on the ground.

Reconstitution of the Election Commission:

The President can remove or replace Election Commissioners through engaging a process of the Supreme Judicial Council that comprises the Chief Justice and the two next senior Judges, if the President has the reason to apprehend that an Election Commissioner may have been guilty of gross misconduct.

Under the above circumstances, the President may direct the Supreme Judicial Council to inquire into the matter and report Council's finding to the President. If the findings are against the Election Commissioner, the President "shall by order, remove" the Election Commissioner from office.

The above process is time-consuming and may not be expedient to resolve the current political crisis.

However many Constitutional experts suggest that there is another easier process to reconstitute the Election Commission.

The terms and conditions of Election Commissioners are governed, among others, by the Supreme Court Judges, Remuneration and Privileges Act of 1982 as amended. That means their remuneration, amenities and leave are regulated by the Act. The Act provides, among others, for extraordinary leave, if asked by the functionary. However there is no provision for forced leave.

Experts suggest that the President may make and promulgate an Ordinance under Article 93 of the Constitution incorporating the provision of "forced leave" in the aforesaid Act.

Under the amended Act, the President may ask any Election Commissioner to go on leave for three or six months. In this way the President may ask the Chief Election Commissioner or any Commissioner to go on forced leave, thereby re-constituting the Election Commission with qualified persons for the election-period.

Conclusion:

The way to move forward, rather than get mired in further debates, is to consult an eminent non-partisan constitutional expert within or outside Bangladesh who can throw light on this option. The civil society may help expedite the process if they obtain a legal opinion in the matter and submit it to the Non-Party Care-Taker government.