

CONSTITUTIONAL COMPONENTS TO SOLICIT AND HOLD THE FREE AND FAIR ELECTION: BANGLADESH PERSPECTIVE

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Abstract: Free and fair elections are a requirement for establishing a democratic rule of law in a country. In democracies, people commonly exercise their executive and legislative powers by electing representatives who speak for them and act as their voice in government. However, almost all modern states, including Bangladesh, have incorporated some crucial provisions in their own constitutional mechanisms to secure free and fair elections. According to this idea, the only source of authority for the government in every state is the will of its citizens, as represented through regular, authentic, and fair elections based on an equal, secret, and universal franchise. Although those constitutional mechanisms were partially successful in providing free and fair elections in certain situations, their failure was also noticeable. This article tries to figure out the constitutional and other legal apparatus of the Election Commission, as well as how well the election commission is capable of staging a free and fair election under the existing legal environment.

Keywords: Constitution, Component, Free and Fair, Election, Bangladesh

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1. INTRODUCTION

Bangladesh is a developing country that faces new issues on a regular basis. The government must find a solution to such problems, and this is where free and fair elections come into play since the general public picks the best-qualified individual to handle such obstacles. The Bangladesh Constitution is the supreme law of the country, which sets several organs and specifies their powers and responsibilities to ensure good governance. The Election Commission, like any other constitutional body, is endowed with all the powers and orders necessary to conduct a free and fair election. However, the Commission does not achieve the full extent that the authors of the Constitution envisioned. Free and fair elections are the cornerstone on which the country's democracy is built. The preamble, which has been regarded as a part of the constitution, as well as its different clauses, make these concepts clear.¹ Democracy entails the respect and observance of human rights, which are inextricably linked, as stated in paragraph 3 of the Preamble and article 11 of the People's Republic of Bangladesh Constitution. AV Dicey says that the rights of the citizen as human rights are necessary for the rule of law, along with the lack of arbitrary power and equal treatment before the law.² So, the rule of law is the condition of human rights since the law is the condition of human rights and freedoms.³ Harold J. Lasky rightly stressed that 'so long as there is inequality, there cannot be liberty.'⁴ Such liberty connotes, among other things, the freedom of the people to participate in the functions of the state through their elected representatives. In Bangladesh, free and fair elections are becoming increasingly improbable when the victory of a specific candidate is obtained through manipulative, coercive, intimidating, or undue influence on the government apparatus. That is the defeat or destruction of democracy.⁵ Therefore, the paper is designed to explore the existing

constitutional and legal frameworks, highlighting potential areas of tension in the roles and responsibilities of the Election Commission. This study also identifies the significance of free and fair elections in a healthy and democratic society by offering some suggestions for further improvement. Primary and secondary data are combined in this paper using the qualitative approach.

2. THE NATURE AND IMPORTANCE OF FREE AND FAIR ELECTIONS

The election is one of the most important ways that people may affect how the government makes decisions. An official declaration of support for a political candidate or a suggested solution to a problem is referred to as an election.⁶ The Latin word "Legere," which means "to choose," is the root of the English word "election." According to Chamber's Law Dictionary, an election is a method through which the general public chooses a potential candidate to represent them in a representative government. An election is "the act of selecting a candidate for public office by means of a vote", as Webster's Dictionary explains. "Election" is defined by Black's Law Dictionary as the procedure of choosing a candidate to hold a post or position, usually in a governmental office.⁷

2.1 The Nature of a Free and Fair Election

Free and fair elections are regarded as a key tenet of a democratic society by both the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. These documents assert that the power to govern must be founded on the desire of the people as expressed in regular and legitimate elections. One of the fundamental and essential requirements and components of democratic government and governance is ensuring free, fair, and credible elections.⁸ When the laws, regulations, and procedures governing the election process are complied with, and a suitable candidate is freely and fairly chosen to represent the electorate, the election will be trustworthy.⁹ The four main elements of free and fair elections as prescribed by Lorry Diamond are: (a) Free and fair competition between independent political parties during the electoral process; (b) People must be free to participate in politics and the electoral process to their preferences; (c) Election procedures would be impartial and accessible so that every adult franchise could exercise their right to vote equally and fairly; and (d) The election results or the vote-counting process would be fair and genuine.¹⁰ Rajasingham highlights three components of a free, fair, and credible election: (i) A favorable legal environment; (ii) An administration that is independent and unbiased, including the election commission; (iii) All political parties support a competitive electoral system.¹¹

Elections are the bedrock of democratic governance. They give citizens the ability to choose their representatives and make them responsible.¹² However, elections must be fair and accessible to serve their essential purpose. It cannot be deemed "free and fair" if some people are barred from participating in the voting process or if the results are not correctly tallied. The term "free election" refers to a voting process in which all eligible voters have the opportunity to cast their ballot for their preferred candidate, and a fair election is one in which every vote is given the same weight and is accurately counted.¹³ Governments must conform to specific requirements before, during, and after elections to guarantee a free and fair process.¹⁴ The eight criteria that come next describe an ideal. Most nations only partially comply with them, but the more they do, the more precisely an election reflects the

people's will.¹⁵ The following eight criteria must be met in order for elections to be deemed fair and free:¹⁶

2.1.1 Voter registration is available to the people

The ability of citizens to register to vote is the first requirement for free and fair elections. It does not preclude governments from imposing some restrictions on the right to vote. Governments cannot, however, block qualified voters from registering or make it complicated for some groups of individuals to register than others.¹⁷

2.1.2 Voters have access to trustworthy data

Citizens require accurate information about the candidates and the platforms they choose between to cast qualified ballots. This implies that political parties don't deliberately propagate false information and that governments cannot stop the media from covering opposing candidates or parties. So, access to credible information is essential for free and fair elections.

2.1.3 People can run for public office

Citizens should be able to run for office if they are entitled to vote. Governments cannot obstruct or stop anyone who desires to run for office, provided they satisfy the same requirements as other candidates and lawmakers. A person's right to select the leaders they want is violated if they are prevented from voting.

2.1.4 Every voter has access to a polling station or other voting option

An election is not free and fair unless voters can cast their votes after being granted the right to vote and having the opportunity to register to vote. Governments must provide citizens with a reasonable opportunity to vote. Voters with a handicap or other health conditions are still able to cast their votes, and they must not be unduly burdened in their efforts to get to voting centers.

2.1.5 Voters don't feel threatened

No one should ever feel threatened or frightened while voting. Voting centers ought to be secure. This applies outside and within the polling place and in the days leading up to the election. Violence or the fear of violence can make individuals hesitant to support their preferred candidate or even dissuade them from casting a ballot. Since they make it more difficult for anyone to target voters based on how they voted, secret ballots can also help avoid pressure and intimidation. Secret votes are very important to make sure that people feel safe and secure when they vote.¹⁸

2.1.6 Voting is fraud-free

Every eligible voter should be permitted to cast one ballot, and that one should count equally with all the others. The outcome does not represent the will of the voters when illegitimate votes are counted alongside legitimate ballots.

2.1.7 Votes are correctly counted and the results are announced

A free and fair election must include counting every ballot and accurate reporting of that count. Votes that have already been cast cannot be changed or discarded. Additionally, the

government is not allowed to withhold the results of a fair count or to announce a different outcome. The most genuine democracies have commissions and other organizations that watch over the observance of these criteria as part of a free and fair election.

2.1.8 The outcome of the election is honored

Once the results of the election have been announced, all candidates are legally obligated to accept them. Democracy depends on peaceful transfers of power; thus, losers of elections should refrain from using force or intimidation to take over.¹⁹

USAID supports ten things that are important for free and fair elections and political processes: (a) Impartial electoral systems; (b) A trustworthy electoral process; (c) A thorough check on election procedures; (d) An aware and engaged citizenry; (e) Competitive and representative multi-party systems; (f) Effective administration by bodies and elected officials; (g) Including women and marginalized groups; (h) A successful transfer of political power; (i) Fostering consensus for political reform; and, (j) Sustainable local involvement.²⁰ Therefore, a free, fair, and credible election means the majority of political parties can participate in all national and municipal elections without fear or hindrance and have equal access to the electoral process and anonymous, unrestricted ballots. This necessitates the absence of fraud and threats, and fair, open, and law-abiding voting procedures throughout elections.²¹

2.2 The Importance of a Free and Fair Election

Voting mechanisms like elections are crucial in a democratic government. Voters must feel safe in casting their ballots, have confidence in the electoral process's ability to accurately reflect their choices, and be free to exercise their right to vote for elections to be fair. A fair poll cannot be held if the candidates are denied the chance to openly conduct their campaigns for public support. The impartiality of government operations and law enforcement organizations must be ensured. Notably, the news media must have the freedom to convey correct information so that voters may make an informed choice, and the judiciary must be free to function impartially and effectively. Citizens' organizations can serve as watchdogs over the political process and the media, checking to see if access to all candidates is equal and if important local and national events are being covered objectively.²² Most of the world's population is deprived of civil freedoms and cannot freely engage in political life because they live under autocratic or only partially free governments. If voters do not have the chance to select their representatives in free and fair elections, a nation cannot be considered fully democratic. Elections present a significant opportunity to promote political liberalization and democratization. Certain civic liberties, such as the freedoms of speech, association, and assembly, are necessary for a free and fair election. The election is a key strategy for fostering political opportunities²³ and increasing political involvement.²⁴ Political parties and community organizations have the chance to organize their supporters through electoral processes and provide other programs to the general public. Elections also promote public discourse and political debate.²⁵

Free and fair elections play a crucial role in political transitions by strengthening democratization and supporting political liberalization, which helps to facilitate the peaceful, democratic political transformation that increases stability and prosperity.²⁶ People who live

in representative democracies can choose their government's political makeup and future course through free and fair elections. It makes a peaceful handover of power more likely. They ensure that losing candidates will acknowledge the legitimacy of the results and hand over authority to the new administration. Elections alone do not guarantee democracy because autocrats can rig elections using state resources.²⁷ Elections must be free and fair because voting gives one a voice. Whole groups of people lose their right to vote and have their rights and interests ignored when citizens are restricted in their ability to voice opinions or are prohibited from voting. When unions cannot form and opposition is repressed, citizens are unable to choose leaders who will work to address their complaints.²⁸ USAID states, "Critical development efforts cannot succeed without a legitimate and democratically elected government that is responsive and accountable to its population." Free and fair elections are also a crucial first step toward economic empowerment.²⁹ Elections that are not free and fair in both text and spirit automatically transform democracy into authoritarianism. Because without allowing the average citizen to vote, democracy will be useless. So, a fundamental prerequisite for achieving democracy is a free and fair election.³⁰

3. ELECTION SYSTEMS IN BANGLADESH

The Election Commission (EC) is in charge of organizing and conducting free and fair elections for various government bodies. There are different types of elections which are carried out by the EC under the authority of the Constitution and other laws are: Presidential Election; Parliamentary Election; City Corporation Election; Zilla Parishad Election; Municipality Election; Upazila Parishad Elections, and Union Parishad Election.

The presidential election system has altered numerous times since Bangladesh gained independence due to the presidential and parliamentary structures. The President of the Parliament used to be chosen by secret ballot under the second schedule of the original Constitution of 1972. Later, the direct voting system for the presidential election was adopted under the fourth amendment to the Constitution. But soon after the 12th amendment to the Constitution, the parliamentary system was put in place, and the option for presidential elections through an indirect election was initiated. The members of parliament currently elect the President in an indirect way, as per article 48 of the Constitution. The election commission is vested with the constitutional authority to conduct the presidential election and create electoral lists for that purpose.³¹ In the event of a vacancy, the members of parliament vote to select a new successor to fill the position.³² If more than two-thirds of parliament agree on impeachment accusations, the President might be removed from office.

At the national level, Bangladesh's voters choose a unicameral legislature, which means there is only one house or parliament. There are three hundred members that make up the unicameral legislature, popularly known as the "Jatiya Sangsad." These members are mandated to be elected directly for five years term from single-member constituencies in accordance with the law.³³ In addition to these seats, there are a further 50 seats that are reserved specifically for female members of parliament, all of whom are elected by the existing members of parliament.³⁴ The Election Commission is tasked with organizing parliamentary elections as well as compiling voter registration lists as per the constitution.³⁵ If the parliament is dissolved because the term has run its course, a general election of

members of parliament must take place within ninety days prior to the dissolution; for any other reason, a general election must take place within ninety days after the dissolution.³⁶

In addition to the above election systems, there are different tiers of local representative election systems in Bangladesh. The Constitution of Bangladesh preserved the provision of elected representative bodies at all administrative levels with the power to prepare budgets, maintain funds, impose taxes, and implement public services and economic development plans.³⁷ Local representatives in every administrative unit of the Republic shall be delegated to bodies composed of persons elected by law.³⁸ In rural areas, there are currently three tiers of local administration, namely: Union Parishad at the village level, Upazila Parishad at the upazila level, and Zila Parishad at the district level, all of which are hierarchical in structure. The Union Parishad is the lowest tier and administrative entity of the government in Bangladesh. It is the only local government entity that has held regular elections for decades.³⁹ It is comprised of 13 members: one chairman and 12 members, with three female members from reserved seats.⁴⁰ The Upazila Parishad is regarded as a local mini-parliament which was established in 1982 in order to create a democratic system at the tertiary level. Currently, an election is being held in Upazila to elect a chairman and two vice-chairmen, including one female from a reserved seat. On the other hand, City corporations for large cities and municipalities for small cities were established for the benefit of urban residents to meet the growing need for municipal services in cities.⁴¹ These urban authorities are run by elected representatives. Municipal elections were held to choose a mayor and some council members, with a third of the seats designated for women. The government determines the number of councilors, which largely depends on the size of the territory and population. On the other hand, a city corporation comprises a mayor and a few councilors, including a third of female councilors from reserved seats. The city's population and size determine how many councilors are needed in each community.⁴²

In Bangladesh, local government representatives are chosen by the direct election of the people every five years based on a universal adult franchise. One must be a Bangladeshi citizen and have their name on the electoral roll to contest elections at the local level in Bangladesh. Notable disqualifications from standing for local election are to be bankrupt, mentally unstable, convicted of a crime involving moral turpitude, or serving in a profitable public office. The Election Commission (EC) is a constitutionally protected, independent and neutral agency in Bangladesh responsible for administering local government elections. Further, the Commission is responsible for all election preparation tasks, such as registering and maintaining voter rolls, setting election dates, and defining electoral districts.⁴³

4. CONSTITUTIONAL AND OTHER LEGAL MECHANISMS FOR FREE AND FAIR ELECTIONS

The following are the fundamental legal mechanisms for the administration of elections in Bangladesh:

- (a) The Constitution of the People's Republic of Bangladesh, 1972 up to its 15th amendment of 2011;
- (b) The Representation of the People Order, 1972 (amended up to 2019);
- (c) Code of conduct for political parties and candidates;
- (d) The Election Commission Secretariat Act, 2009;

- (e) The Electoral Roll Act, 2009;
- (f) Election Observation Policy, 2010 (Amended up to 2013);
- (g) Guidelines for Foreign Election Observer, 2013;
- (h) The Delimitation of Constituencies of the National Parliament Act, 2021;
- (i) The Appointment of Chief Election Commissioner and other Election Commissioners Act, 2022.

4.1 Constitutional Framework on Free and Fair Elections in Bangladesh

The Constitution is the primary source of authority to regulate elections in the democratic system of any state. The Elections Clause of the Constitution gives the states the authority to choose the "times, places, and manner" of elections. Each level of government is given the power to adopt comprehensive election laws, including regulations on public notices, voter registration, voter protection, preventing fraud, counting votes, and determining election results. Whenever a state passes a statute pertaining to holding a free and fair election, it performs its authority under the election clause.⁴⁴ A state is not allowed to refuse to print the names of candidates on the ballot.⁴⁵ The EC is the constitutional authority tasked with upholding the people's right to vote and choose their members in parliament. Parliament may by law adopt provisions concerning all matters pertaining to or connected with elections to parliament, including constituency demarcation, electoral roll compilation, election holding, and any other matters required to ensure the proper formation of parliament.⁴⁶ It is the primary institution responsible for holding and soliciting all elections pertaining to governmental functions in Bangladesh. The formation of the commission and its rights and responsibilities in relation to conducting a credible election are covered in Part VII of the Constitution (Articles 118–126). An EC may be established under Article 118(1) of the Constitution. The President appoints the Chief Election Commissioner (CEC) and the other election commissioners on the basis of recommendations from the search committee.⁴⁷ According to the Constitution, the EC's tenure of office is five years, beginning on the day he takes office.

The Commission has the authority to delegate any or all of its legal duties and responsibilities to its chairman, any of its members, or any of its officers.⁴⁸ The creation of electoral rolls, the conduct of presidential and parliamentary elections, as well as any other similar polls, and the demarcation of electoral districts for parliamentary elections are the primary duties of the EC. The Election Commission must, in accordance with this Constitution and any other law, have supervision, guidance, and control over the creation of the electoral rolls for elections to the offices of the President and Parliament, as well as the conduct of such elections.⁴⁹ As free and fair elections are at the heart of the legislative system, the election commission must follow the law when it passes a valid election law. This is the same as how statutory authorities handle discipline.⁵⁰

4.2 Other Legal Devices on Free and Fair Election in Bangladesh

4.2.1 The Representation of People Order, 1972

This Act is one of the fundamental legal mechanisms to hold and solicit free and election which outlines the details powers and functions of election commission in Bangladesh. The following powers were granted to the EC under this Act, amongst them which are as follows⁵¹; i) Employ returning officers to monitor all aspects of the elections in the

districts. ii) Direct, coordinate, and maintain control over the returning officers. iii) Assign other responsibilities and functions to the returning officers. iv) Remove any election-related officer who interferes with a fair and impartial election.⁵² v) Setting the deadlines for nomination papers to be submitted, nominations to be reviewed, nominations to be withdrawn, and fixing election day.⁵³ vi) Design and approve the ballot boxes.⁵⁴ vii) Controlling and regulating political party registration.⁵⁵ viii) Outline the values and standards for national media coverage of the parliamentary general election.⁵⁶ ix) Establish and supervise the electoral enquiry committee with powers of a civil court.⁵⁷ x) Develop election conduct codes.⁵⁸ xi) Allow independent election observers.⁵⁹ xii) Summon and compel the production of evidence, demand access to public records, and establish a commission to interview witnesses and examine records.⁶⁰ xiii) Regulates the transfer of judicial officers during election days etc.⁶¹ Article 53 of The Representation of the People Order, 1972 gives the election commission the authority to create the election commission tribunal, which consists of a district or session judge, to resolve all election-related problems. The tribunal has civil court authority.⁶² The duties and functions of the EC are primarily administrative, although they also perform some adjudicative and legislative tasks.⁶³ The EC is required to establish specific regulations, make decisions on important administrative concerns as opposed to routine administrative affairs, and resolve some disputes, such as those involving the assignment of symbols.⁶⁴ Elections, however, are a lengthy, elaborate, and complicated procedure that begins with the announcement that they will be held and ends with the publication of the voting results in the way required by law.⁶⁵ The Commission will decide how to carry out its duties and has quasi-judicial authority. Therefore, it has the power to punish anyone who disobeys a law governing the election. The executive authority of the government is obligated to support the commission in carrying out its duties whenever necessary. The commission is responsible for defining the constituencies. Therefore, the EC of Bangladesh has been given all the authority required to conduct a free and fair election.

4.2.2 The Electoral Roll Act, 2009

There shall be a single electoral roll for each constituency for the purposes of electing the members of parliament, and no separate electoral roll shall be created to categorize voters based on religion, race, caste, or sex.⁶⁶ A prerequisite for a free and fair election is an error-free electoral roll. The CEC came under intense criticism from the opposition in 2005, and a writ petition was launched to contest the CEC's decision to create a new electoral roll.⁶⁷ In this context, the High Court division issued the following instructions:⁶⁸ (a) In accordance with Section 7(6) of The Electoral Roll Ordinance, 1982, the commission should create the electoral roll with the current roll as its primary reference. A computerized electoral roll and database should constantly be kept up to date to avoid future controversy, expense, and effort. (b) The names of people who are already on the electoral roll cannot be removed unless they have died, been declared incompetent to stand for office, or moved out of the constituency in question.

In compliance with the above instructions, the government passed the Electoral Roll Act of 2009, which included procedures for preparing an electoral roll and publishing it.⁶⁹ All eligible adults must vote in parliamentary elections. In order to be included on the electoral roll for a parliamentary constituency, a candidate must meet the following criteria: he must be

a citizen of Bangladesh, must be at least eighteen years old, must not have been declared by a competent court to be of unsound mind, must be a resident of the parliamentary constituency in question, and he must not have been convicted of an offense punishable under the Bangladesh Collaborators (Special Tribunals) Order, 1972.⁷⁰

4.2.3 Appointment of Chief Election Commissioner and other Election Commissioners Act, 2022

This Act is enacted with the aim of making provisions for the appointment of the CEC and other election commissioners pursuant to Article 118(1) of the Constitution of the People's Republic of Bangladesh. This Act provides for the formation of a search committee, which shall be constituted by the President, consisting of six (6) members, to recommend the names of persons who meet the requirements under this Act. The search committee will include (a) one judge of the Appellate Division nominated by the Chief Justice, who shall also be its President; (b) a Judge of the High Court Division nominated by the Chief Justice; (c) the Comptroller and Auditor General of Bangladesh; (d) the Chairman, Bangladesh Public Service Commission; and (e) two eminent citizens nominated by the President, one of whom shall be a woman.⁷¹ The search committee must present its proposal to the President within 15 (fifteen) working days of its inception.⁷² The Act outlines the duties and obligations of the search committee which will be carried out in accordance with the values of openness and impartiality. The committee will recommend the names of the individuals to the President for the positions of CEC and other election commissioners after considering their qualifications, disqualifications, experience, reputation, and other factors enumerated in this Act.⁷³ The committee will solicit names from political parties and professional associations in order to find individuals who meet the qualifications stipulated in this Act for the positions of CEC and other election commissioners.⁷⁴ To appoint the CEC and other election commissioners, it must recommend the names of two (2) individuals to the President for each open position.⁷⁵ A person must be a citizen of Bangladesh, be at least 50 years old, and have at least 20 years of experience in any significant government, judicial, semi-government, private, or autonomous post or profession in order to be recommended for appointment to the position of CEC and other Election Commissioners.⁷⁶ No person shall be recommended for appointment who has been adjudicated by a competent court to be of unsound mind, who is an undischarged insolvent, who acquires the citizenship of or affirms or acknowledges allegiance to a foreign state, who has been found guilty of any crime involving moral turpitude and sentenced to imprisonment, who has been adjudicated guilty of any crime under the International Crimes (Tribunals) Act, 1973 (Act No. XIX of 1973) or the Bangladesh Collaborators (Special Tribunals) Order, 1972 (President's Order No. 8 of 1972).⁷⁷ The search committee will receive the required secretarial assistance from the cabinet division to carry out its duties.⁷⁸ The appointment of the CEC and other election commissioners based on the work done by the search committee that was previously formed by the President for the purpose of appointing the CEC and other election commissioners, as well as the recommendations of the said search committee, shall be deemed to be valid and no challenge in this regard shall be brought before any court.⁷⁹

4.3 Independence of the Election Commission

The EC shall be autonomous in its duties and bound only by this Constitution and other applicable laws.⁸⁰ The term of office of an EC is fixed for five years, beginning on the day he assumes his office. An election commissioner cannot be removed from his post other than in a similar manner and on the same grounds as a Supreme Court judge. A person who has held office as CEC shall not be eligible for appointment in the service of the Republic and any other election commissioner shall, upon ceasing to hold office as such, be eligible for appointment as CEC but shall not otherwise be eligible for appointment in the service of the Republic. This provision is made to ensure that an election commissioner is free from bias or influence in exercising his authority. All executive authorities have a responsibility to help the Election Commission carry out its duties. The Commission has the right to compel any individual or organization to carry out certain duties or offer support for any specific election purpose.⁸¹

The independence of Bangladesh's Election Commission is also guaranteed under the Representation of People's Order, 1972. In order to carry out the election, it is stated that the commission may need any person or authority to carry out such a task or offer such support. Additionally, it stipulates that throughout the election period, the Commission must receive assistance from every executive branch of the Republic in carrying out its tasks. In order to safeguard the election commission's independence, two more requirements must be met. (i) Financial Independence, and (ii) Separate election commission secretariat.

To ensure the Commission's financial independence, it is stipulated that the remuneration paid to election commissioners and the Commission's administrative costs, including remuneration paid to their officers and employees, will be charged to the Consolidated Fund.⁸² According to Section 7(1) of the Election Commission Secretariat Act of 2009, the government must allocate funds based on the Election Commission's report. The government may take the report into account before approving the required funds. The Election Commission does not need to obtain approval from the government to use the money after it has been granted.⁸³ Article 125 of the Bangladesh constitution provides for the validity of election laws and elections by providing that the laws relating to the delimitation of constituencies or the allotment of seats to such constituencies are lawful and cannot be challenged in court. No election to the office of President or Parliament may be challenged unless an election petition is filed with the appropriate legal authorities. A court shall not issue any order or direction concerning an election for which the schedule has been announced without first giving the Election Commission sufficient notice and an opportunity to be heard. The Constitution of Bangladesh incorporated better provisions to secure the independence of the election commission, but in practice, it is, in some cases, impossible to ensure such independence.⁸⁴

Election Commission Secretariat Act of 2009 stipulates that, the election commission is represented throughout Bangladesh and maintains a permanent secretariat run by a secretary to oversee the electoral process.⁸⁵ The secretariat is located in Dhaka and contains field offices at the regional, district, and Thana levels, as well as an electoral training institute.⁸⁶ The election offices, under the direction of a returning officer (RO), are responsible for nominations, election administration, and results.⁸⁷ It has been entrusted with the

responsibility of rendering all assistance to implement the decisions and orders of the Commission. The key functions of the election commission secretariat are as follows:⁸⁸ i) Formulating electoral rolls for national and local elections; ii) Delimitation of constituencies for parliamentary elections; iii) Holding a referendum and soliciting all elections; iv) Reserving and allocating symbols to political parties; v) Monitoring polling arrangements throughout the country on the eve of each election and recruitment of polling officials; vi) Printing and distribution of ballot papers to all polling stations; vii) Allocation of Election Procurements amongst the polling stations; vii) Compilation of all election results and publication in the official gazette; ix) The formation of a Tribunal to hear election petitions and perform any other functions mandated by law.

5. DEFECTS IN THE EXISTING CONSTITUTIONAL AND LEGAL MECHANISMS FOR FREE AND FAIR ELECTIONS IN BANGLADESH

Eleven parliamentary elections have been held since Bangladesh gained its independence, and most of them were not entirely free, fair, or competitive. So, Bangladesh has not fully implemented the most crucial part of democracy since it became independent. Another aspect of our political culture is the blame and claim game, which leads to contentious politics and creates a chaotic and unstable environment in Bangladesh that endangers life, liberty, security, the economy, and human rights. The Bangladesh Election Commission (EC) almost never made sure that elections were free and fair because of political pressure. Here are a few examples:

5.1 Appointment of Election Commissions and Their Reliance on the Government

The Constitution of Bangladesh mandates that an election commission is composed of a CEC and "such number of other election commissioners, if any, as the president may from time to time direct."⁸⁹ Therefore, even under the best of conditions, the appointment procedure in Bangladesh has the potential to cast doubt on the impartiality of the election commissioners. It is obvious that the EC must rely on government officials to appoint the chief election commissioner and other commissioners, manage various financial issues, such as budget allocation and fund disbursement, hire staff for the EC Secretariat, carry out its duties at field level during elections, maintain law and order, and manage other issues. The EC's impartiality is compromised due to the arbitrary appointment of the chief election commissioner and other election commissioners with partisan backgrounds, the hiring of local-level election officials with partisan backgrounds, and the deliberate placement of administration officials before elections. Election results that favor the ruling party reflect all of these. When the commission's decision is coram non iudice or tainted by legal malice, the High Court Division may intervene.⁹⁰

5.2 Election Violence and Irregularities

Violence during elections is not a new concept in Bangladesh. Election disputes and the violence that results from disputes are worldwide phenomena. All elections experience pre- and post-election controversies. Each party strives to demonstrate its influence throughout the election campaign, which occasionally results in collision amongst the parties and disturbs the election's environment. The EC is primarily in charge of preventing election violence, but the commission frequently falls short in this regard. Election irregularity is a relatively

prevalent occurrence in Bangladesh. The most recent general election, which took place in December 2018, was at its peak. A report by Transparency International Bangladesh (TIB) titled "Review of the 11th Jatiya Sangsad Election Process" revealed a pattern of violations in 47 out of 300 constituencies.⁹¹

5.2.1 Use of Illicit Resources and Threat of Force

It is widely believed that illegally obtained financial support for political campaigns undermines voter confidence and the legitimacy of elections. Employment of "muscle" or "muscle power" are referred to any act of intimidation or use of force or violence during the election process, especially by candidates, political parties, or their supporters. According to one analysis, 60 to 70 percent of election spending is "invisible payments." Another observer points out that many candidates spent more than their permitted spending caps even before the election schedule was announced. The Appellate Division held in a recent decision that it is not the duty of election commission and its officials to encourage shows of force.⁹² According to several studies, the electoral process increasingly relies on brute force. Additionally, it is widely believed that parties have connections to criminals who would be utilized as enforcers, fundraisers, and election organizers. Since muscle is typically supported by black money, they are frequently interwoven in the context of Bangladesh elections, which are on the verge of a human rights crisis.

5.2.2 Election Expenditure in Bangladesh

It is common in Bangladesh, especially in rural areas, for candidates to attempt to win support by offering financial incentives. As a result, candidates occasionally spend a lot of money in an attempt to win an election, frequently exceeding the legal limit set by the election commission. It is abundantly evident from a study of several general elections that was exposing the overspending by the candidates during the allotted time for election campaigning.⁹³

5.3 Lack of Accountability and Transparency in the Commission

A mere legal framework is not sufficient to make the members of the commission more accountable. It needs monitoring of their activities and setting an example of the punishment for misuse of their posts. In addition, the public should have easier access to the commission's information. The primary responsibility of the Election Commission is to ensure that all parties have an equal opportunity to spread election-related propaganda. People, especially those who reside in distant areas, engage them to participate in the election campaign in exchange for a small sum of money, and dishonest candidates use them as a weapon against their rival party. Without favoring one party over another, the commission must organize election-awareness campaigns and prosecute candidates who violate the code of conduct for elections. It is often discovered that the election commission member's accountability cannot be guaranteed. Convolutioned administrative procedures and a pervasive culture of corruption brought this on.

6. RECOMMENDATIONS:

In principle, the legal structure that underpins the electoral process in Bangladesh is quite robust, and the election commission functions as an autonomous organization. In contrast, it has been demonstrated via actual voting that elections run by political governments are not

reliable or credible to the necessary degree. The majority of elections that are held under a political regime that is currently in power are rigged, making them less competitive and more contentious. On the other hand, four elections that were held under a nonpolitical and interim caretaker government were more competitive, fair, and credible. These elections were also approved by national and international election observers and the media. In addition, the Constitution of Bangladesh made the Election Commission as powerful a commission as is required to keep elections free and fair by providing the necessary legal ingredients. However, in practice, free and fair elections will not be possible until some changes are made to the legal framework for the election and other strategies related to the election. The current unhealthy and anti-democratic status quo in the country begs for major changes to be made as soon as possible. It is now a prerequisite for free and fair elections that they take place under a government that is nonpartisan. In some instances, it is impossible to hold free and fair elections if the election is arranged by the ruling administration of the country. To hold free and fair elections, the executive members of the country are required to provide support in a neutral capacity. A free and fair election would need to take place before the appointment of people to the Commission who have sufficient knowledge and are technically adept in the relevant areas. To make members of the Commission more accountable would require more than just a legal framework to be effective. It is necessary to monitor their actions and set an example for the penalty that should be given when their posts are inappropriately used. The operations of the Election Commissioners, including both the Chief Election Commissioner and Election Commissioners, need to be held accountable to the general populace. It is important to specify exactly how the Election Commission and the Election Commission Secretariat interact with one another. To lessen the Commission's reliance on the bureaucracy that supports it, the Commission should strengthen its own capabilities by training and educating its workforce, as well as by improving its infrastructure and logistics. The protection of human rights during election monitoring is mandated by the Universal Declaration of Human Rights, which applies to any nation that is a member of the United Nations. The electoral process needs to be monitored in light of recent events, debates, and political shifts in order to be effective. It is absolutely necessary that it contributes to increasing public confidence in the voting process. Elections will not have the same level of significance they currently do if citizens are deprived of the freedom and information necessary to select the best candidate. It is imperative that all of the candidates running for office be provided with an equal playing field in order for them to have faith that they can connect with voters and win their support. The confidence of the general public relies heavily on the involvement of citizen organizations in the electoral process. Elections around the world are trending toward a more general recognition of impartial and non-partisan election observers. It is found that there is a lack of confidence among the people of Bangladesh in the present election system that was newly introduced in 2015 by the constitution's 15th amendment in spite of having a direction from the court in thirteen amendment case (64 DLR (2012) (AD)169) for the next two terms of the national election under NCTG. It is, therefore, the duty of the ruling party to win back the confidence of the people in the post-15th amendment election system.

Reforms are urgently needed to address the unhealthy and undemocratic state of affairs now dominating the country. Civil society always supports new, honest, and good reforms for

most people. As the reform program is made and implemented, the state's interests must be kept in mind. It can be suggested particularly following changes, amongst others, the Bangladesh Election Commission may do for holding a free, fair, and credible Election.⁹⁴

Firstly, it is the responsibility of the ruling parties to improve the effectiveness of the Elections Commission by passing appropriate legislation, such as an enabling statute, and fostering a stable political climate. Secondly, the public must be able to hold the CEC and other election commissioners accountable for what they do. Thirdly, to rely less on bureaucracy, the EC should improve its skills by giving its employees more resources and making its infrastructure and logistics better. Fourthly, the number of High Court benches should be expanded to address election petitions. Fifthly, the EC and EC Secretariat should have well-defined roles and responsibilities in relation to one another. In addition to the above, the CEC and Election Commissioners should be chosen in a way that has nothing to do with politics.

7. CONCLUSION

For democracy to continue, the topic of free and fair elections is of paramount importance. The importance of the Election Commission to that end in a democratic society cannot be overstated. The major duty of ensuring a legitimate election is carried out by the Election Commission. In this way, the Constitution of Bangladesh offers sufficient backing for its autonomy. But in today's world, developing states like Bangladesh regularly topple constitutions by disregarding their fundamental principles. If the Election Commission wants a fair election, it needs to be more aware of its own powers. In addition, the government authority that normally controls state affairs has crucial duties to aid the Election Commission in doing its duties. The Elections Commission needs to be watchful in order to address its shortcomings. The Election Commission of Bangladesh should facilitate political discourse between the country's major political parties in an effort to forge a consensus on the need for parliamentary elections, and in doing so, it should help protect justice by guaranteeing a fair election. The actual occurrence of a free and fair election requires more than just strict constitutional requirements for it. When the ruling party controls the electoral process, the outcome is determined by its whim. Nothing can happen in Bangladesh without a free and fair election. Hence, it's time to demand that the neutral election government be reestablished during election season.

Notes:

¹ Kuldip Nayar vs. Union of India AIR 2006 SC 3127

² Latifur Rahman, *The Constitution of the People's Republic of Bangladesh with Comments and Case Laws* (first published 2004, 2nd edn, Mullick Brothers 2005)28.

³ Hamiduddin Khan, 'The Role of Judiciary in the Promotion and Protection of Human Rights' (1987) IV (1) *The Dhaka University Studies Part-F* 102.

⁴ See Descending judgment of Mr. Justice Abdul Wahhab Miah in *Abdul Mannan Khan vs. Government of Bangladesh*, 64 DLR (2012) (AD), para 1360.

⁵ Descending judgment of Mr. Justice Abdul Wahhab Miah in *Abdul Mannan Khan vs. Government of Bangladesh*, 64 DLR (2012) (AD), para 1361.

⁶ 'The Right to Vote' <<http://hrlibrary.umn.edu/edumat/studyguides/votingrights.html>> accessed 3 September 2022.

⁷ 'Electoral Reform : An Approach to Effective Democracy' <<http://www.legalservicesindia.com/article/1198/Electoral-reform--An-approach-to-effective-democracy.html>> accessed 3 September 2022.

- ⁸ Berouk Mesfin, 'Democracy , Elections & Political Parties A Conceptual Overview with Special Emphasis on Africa' (2008) Paper 166 Institute for Security Studies 1 <<http://www.issafrica.org/uploads/PAPER166.PDF>>.
- ⁹ Larry E Udu, Joseph Okwesili Nkwede and A Ezekwe Emmanuel, 'The Imperative of Credible Elections for Sustainable National Development in Nigeria-Lessons from the Ekiti State Gubernatorial Election, 2014' (2015) 8 *Journal of Sustainable Development* 209.
- ¹⁰ Awal Hossain Mollah, 'Free, Fair and Credible Election and Democratic Governance in Bangladesh: How Far the Dream of Success?' (2016) 04 *Review of Public Administration and Management*.
- ¹¹ *ibid.*
- ¹² Steven L. Taylor, Matthew S. Shugart, Arend Lijphart, and Bernard Grofman, *A Different Democracy* (Yale University Press, 2014).
- ¹³ Kara E. Stooksbury, John M. Scheb II, Otis H. Stephens Jr. (editors), *Encyclopedia of American Civil Rights and Liberties: Revised and Expanded Edition, 2nd Edition, Volume 2 (ABC-CLIO, 2017)*, 386.
- ¹⁴ The standards included in this explainer are adapted from Declaration on Criteria for Free and Fair Elections, *Encyclopedia of American Civil Rights and Liberties, Losers' Consent: Elections and Democratic Legitimacy, and OSCE US Mission Free and Fair Elections*.
- ¹⁵ Fair Elections, 'EXPLAINER' <www.facinghistory.org> accessed 31 August 2022.
- ¹⁶ 'Free and Fair Elections: Definition, 8 Standards to Meet | Liberties.Eu' (2021) <<https://www.liberties.eu/en/stories/free-and-fair-elections/43642>> accessed 31 August 2022.
- ¹⁷ Elections (n 24).
- ¹⁸ *ibid.*
- ¹⁹ *ibid.*
- ²⁰ 'Supporting Free and Fair Elections | Democracy, Human Rights and Governance | Archive - U.S. Agency for International Development' <<https://2012-2017.usaid.gov/what-we-do/democracy-human-rights-and-governance/supporting-free-and-fair-elections>> accessed 31 August 2022.
- ²¹ Mollah (n 19).
- ²² 'What Makes an Election Free and Fair? | The Daily Star' <<https://www.thedailystar.net/opinion/politics/news/what-makes-election-free-and-fair-1665028>> accessed 31 August 2022.
- ²³ Udu, Nkwede and Ezekwe Emmanuel (n 18).
- ²⁴ 'Supporting Free and Fair Elections | Democracy, Human Rights and Governance | Archive - U.S. Agency for International Development' (n 29).
- ²⁵ *ibid.*
- ²⁶ *ibid.*
- ²⁷ 'Free and Fair Elections — Principles of Democracy' <<https://www.principlesofdemocracy.org/election-dem>> accessed 31 August 2022.
- ²⁸ 'The Importance of Free and Fair Elections Around the World' <<https://www.borgenmagazine.com/importance-free-fair-elections-around-world/>> accessed 31 August 2022.
- ²⁹ *ibid.*
- ³⁰ *People's Union of Civil Liberties vs India* (2009) 3 SCC 200, 203.
- ³¹ The Constitution of the People's Republic of Bangladesh 1972, art. 119.
- ³² *ibid.*, art. 48 & 123.
- ³³ *ibid.*, art. 65.
- ³⁴ M. Jashim Ali Chowdhury, *An Introduction to the Constitutional Law of Bangladesh* (3rd edn, Book Zone Publication 2017) 347.
- ³⁵ The Constitution of the People's Republic of Bangladesh 1972, art. 119.
- ³⁶ *ibid.*, art. 123(3).
- ³⁷ Nasir Uddin, 'Recent Trends of Local Government Elections in Bangladesh: An Analysis on Profile and Politics' (2016) 4 *Public Affairs And Governance* 166.
- ³⁸ The Constitution of the People's Republic of Bangladesh 1972, Art. 59(1)
- ³⁹ Abu Elias Sarkar, 'The illusion of decentralization: Evidence from Bangladesh.' (2003) 16 *The International Journal of Public Sector Management* 523–548.
- ⁴⁰ Local Government Division (LGD), 2009. *Local Government (Union Parishad) Act, 2009* Government of Bangladesh, 2009. Ministry of Local Government, Rural Development and Cooperatives, (Act No. of LXI of 2009).
- ⁴¹ Uddin (n 8).
- ⁴² *ibid.*
- ⁴³ *ibid.*
- ⁴⁴ 'Interpretation: Elections Clause | The National Constitution Center' <<https://constitutioncenter.org/the-constitution/articles/article-i/clauses/750>> accessed 3 September 2022.
- ⁴⁵ *U.S. Term Limits, Inc. v. Thornton* (1995).

- ⁴⁶ The Constitution of The People’s Republic of Bangladesh 1972, art. 124.
- ⁴⁷ The Appointment of Chief Election Commissioner and other Election Commissioners Act 2022, s 4.
- ⁴⁸ *ibid*, art. 118(4); The Representation of the People Order 1972, art. 4
- ⁴⁹ *ibid*, art.119(1).
- ⁵⁰ Abdul Momen Chowdhury vs Bangladesh (2005) W.P. No.2561.
- ⁵¹ Chowdhury (n 5).
- ⁵² The Representation of the People Order, 1972, s 7(1), (5) and (6)
- ⁵³ *ibid*, s 11.
- ⁵⁴ *ibid*, s 28(2).
- ⁵⁵ *ibid*, s 90A.
- ⁵⁶ *ibid*, s 90 B (c).
- ⁵⁷ *ibid*, s 91 A (1).
- ⁵⁸ *ibid*, s 91B (1).
- ⁵⁹ *ibid*, s 91 (c).
- ⁶⁰ *ibid*, s 91D (1).
- ⁶¹ *ibid*, s 44E.
- ⁶² *ibid*, s 59(1).
- ⁶³ Mohindar Singh Gill v. Chief Election Commissioner (1978) AIR SC 851.
- ⁶⁴ TN Seshan v. India, (1995) 4 SCC 611.
- ⁶⁵ Shah Alam v. Mujibul Haq, (1989) 41 DLR (AD) 68.
- ⁶⁶ The Constitution of The People’s Republic of Bangladesh 1972, art. 121.
- ⁶⁷ Rahmat Ali, MP v. Election Commission, (2006) 11 BLC 380.
- ⁶⁸ Mahmudul Islam, Constitutional Law of Bangladesh (3rd Edn, Mullick Brothers 2012) 961.
- ⁶⁹ The Electoral Roll Act 2009, ss 5,7.
- ⁷⁰ The Constitution of The People’s Republic of Bangladesh 1972, art.122.
- ⁷¹ The Appointment of Chief Election Commissioner and other Election Commissioners Act 2022, s 3(1).
- ⁷² *ibid*, s 3(5).
- ⁷³ *ibid*, s 4(1).
- ⁷⁴ *ibid*, s 4(2).
- ⁷⁵ *ibid*, s 4(3).
- ⁷⁶ *ibid*, s 5.
- ⁷⁷ *ibid*, s 6.
- ⁷⁸ *ibid*, s 7.
- ⁷⁹ *ibid*, s 9.
- ⁸⁰ *ibid*, art. 118(4).
- ⁸¹ *ibid*, art. 126; The Representation of the People Order 1972, art.5.
- ⁸² The People’s Republic of Bangladesh 1972, art. 88(b)(c).
- ⁸³ The Election Commission Secretariat Act 2009, s 7(2).
- ⁸⁴ The Constitution of The People’s Republic of Bangladesh 1972, art.125.
- ⁸⁵ SM Saiful Haque, ‘Election Laws in Bangladesh | Dhaka Tribune’ <<https://archive.dhakatribune.com/uncategorized/2014/01/01/election-laws-in-bangladesh>> accessed 6 September 2022.
- ⁸⁶ Akbar Ali Khan, ‘The Choice between the Unpalatable and Disastrous | The Daily Star’ <<https://www.thedailystar.net/news/the-choice-between-the-unpalatable-and-disastrous>> accessed 6 September 2022.
- ⁸⁷ Mollah (n 19).
- ⁸⁸ The Election Commission Secretariat Act 2009, s 4.
- ⁸⁹ The Constitution of The People’s Republic of Bangladesh 1972, art. 118(1).
- ⁹⁰ Shah Alam vs. Mujibul Haq (1989) 41 DLR (AD) 68.
- ⁹¹ <https://www.thedailystar.net/bangladesh-national-election-2018/bangladesh-election-2018-irregularities-47-out-50-seats-tib-1687840>, accessed 31 December 2022.
- ⁹² Noor Hossain vs. Nazrul Islam (1998) 3 BLC (AD) 229.
- ⁹³ Shahzada Akram and Shadhan Das, (2009), Tracking the National Election Process, Transparency International Bangladesh, https://www.ti-bangladesh.org/beta3/index.php/en/?option=com_content&view=article&id=542&catid=87, accessed 30 December 2022.
- ⁹⁴ Shahzada M Akram and Shadhan Kumar Das, ‘TRANSPARENCY INTERNATIONAL BANGLADESH Social Movement Against Corruption Bangladesh Election Commission: A Diagnostic Study’ <<http://www.ti-bangladesh.org>> accessed 6 January 2023.

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