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He completed his B.A Honours in Jurisprudence from University of Oxford in 1957, Bar-at-Law from the Lincoln's Inn in 1959 and PhD in International Law in 1964. Dr. Kamal has served as Vice Chairman, Bangladesh Bar Council from 1989 to 1995, President, Supreme Court Bar Association from 1990 to 1991, Chairperson, Commonwealth Human Rights Advisory Commission from 1993 to 1998, Visiting Professor at the Free University of Amsterdam in 1997, Vice-Chairman, International Law Association, Chairman, Advisory Council, Transparency International and Co-Chairman, UN Commission on Inquiry of Human Rights Violations in the Occupied Territory. Dr. Kamal as served on various international election observations missions

**THE QUEST FOR FREE AND FAIR ELECTONS IN BANGLADESH
ELECTORAL REFORM AND CARETAKER GOVERNMENT**

BY

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I. INTRODUCTION

A. HISTORY OF PAST ELECTIONS

(1) The goal of political development in Bangladesh has been pursued through successive national movements to secure free and fair elections. Historical memories of popular electoral success in 1954 and 1970 underline the conviction that such elections are key to people's empowerment. Such empowerment in turn is seen as a necessary precondition for achieving the political, economic and social change which people aspire for and which our Constitution promises.

(2) Bangladesh has had eight parliamentary elections: 1973, 1979, 1986, 1988, 1991, 1996, 2001.

Parliamentary Elections in Bangladesh

| Date of Election | No. of voters (million) | Turnout | AL | BNP | JP | Jamaat |
|------------------|-------------------------|---------|-----|-----|-----|--------|
| 7.3.1973 | 35.21 | 54.9 | 293 | n/a | n/a | n/a |
| 18.2.1979 | 38.36 | 51.3 | 39 | 207 | n/a | 6 |
| 7.5.1986 | 47.31 | 61.1 | 76 | Dnp | 153 | 10 |
| 3.3.1988 | 49.86 | 52.5 | Dnp | Dnp | 250 | Dnp |
| 27.2.1991 | 62.18 | 55.4 | 88 | 140 | 35 | 18 |
| 15.2.1996 | 56.12 | 21.0 | Dnp | 250 | Dnp | Dnp |
| 12.6.1996 | 56.72 | 75.6 | 146 | 116 | 32 | 3 |
| 1.10.2001 | 75 | 74.9 | 62 | 193 | 14 | 17 |

(Note: "D np": Did not participate)

(3) Parliamentary elections in 1979, 1986 and 1988 were held under a presidential form of government. In each presidential election (1978, 1982 and 1986) the opposition had campaigned for restoration of a parliamentary form of government. The reason for this was the perception that the presidential form promoted concentration and centralization of executive power, reducing the legislature in effect to a rubber-stamp Parliament. It could hardly play any effective role to ensure accountability or to check abuses of power.

(4) The reluctant participation by some parties and abstention by others in the 1986 Parliamentary elections was the result of a deep suspicion that elections would not be free and fair given the incumbent president's aim to have a compliant Parliament. These suspicions proved to be well-founded. The 1986 Parliamentary elections were characterized as "voterless elections". The announcement of electoral results was described as a "media coup". This led to a movement for restoration of democracy which set as its goal the establishment of a parliamentary democracy through a free and fair election. It urged that no election would be acceptable under the incumbent president and a free and fair parliamentary election had to be held under a "caretaker government".

(5) A Parliamentary election held under the President in 1988 was boycotted. A massive movement for restoration of democracy and for the resignation of the President led to his resignation in December 1990 and to the formation of the first caretaker

government headed by the sitting Chief Justice was established. This was truly a constitutional innovation. The parties which had led the movement for the resignation of the President had insisted that the transfer power to an interim “caretaker government” headed by an independent, non-partisan person, who enjoyed the confidence of all of the parties engaged in the movement. The “caretaker government” would then take steps to hold a parliamentary election.

(6) The challenge of finding an individual who would be acceptable to all the pro-democracy parties was formidable. Agreement was ultimately reached on designating the sitting Chief Justice as the head of the caretaker government. This was to be effected by first securing the resignation of the Vice-President, inducting the Chief Justice as Vice-President and then securing the resignation of the incumbent President, whereupon the Chief Justice would take over as the Acting President.

(7) The constitutional difficulty of a sitting Chief Justice taking over the office of the Chief Executive was dealt with by an agreement among all the parties that a constitutional amendment would be effected to ratify these transitional acts.

(8) The Eleventh Amendment (1991) ratified the acts but did not incorporate the “caretaker government” into the Constitution as a permanent feature. A parliamentary election was held in 1991. All parties participated. The parliamentary election, however, held under the incumbent government in February 1996 was boycotted by the opposition and subsequently became a subject matter of intense controversy as the electoral results were challenged, and a fresh election demanded. A constitutional crisis could only be averted by an agreement with the opposition parties to hold a fresh election, which would be conducted by a “caretaker government”. An amendment had to be made to the Constitution incorporating into the Constitution a “caretaker government” as a permanent interim mechanism .

B. CARETAKER GOVERNMENT: COMPOSITION AND POWER

(1) A constitutional amendment (the Thirteenth Amendment, 1996) was adopted providing for a non-party caretaker government (CG), headed by a former chief justice, to be designated Chief Adviser, and composed of not more than ten advisers, which would assume the responsibility for administering the country during the interim period between the dissolution of parliament and the date when a new Prime Minister would enter upon the office. Neither the Chief Adviser, nor any of his advisers, could be a member of any political party. Nor could they contest the elections. The CG would stand dissolved on the date on which the new prime minister (PM) entered office after the constitution of a new parliament. The underlying rationale for CG was to ensure that the state machinery (the administration, police and the defence services) did not play a partisan role in the elections. The past experience of ruling parties and incumbent governments influencing the outcome of elections by misusing the state machinery (the administration, police and defence services) had prompted the demand for establishing a non-party “caretaker government”, which thus became a permanent feature of the Constitution.

(2) The Constitution now empowers the President to appoint a ten-member CG, with a Chief Adviser as its head, within fifteen days of the dissolution of the Parliament.

Unlike in normal circumstances when the President enjoys some discretion in the appointment of the Prime Minister, his choice in the selection of the Chief Adviser, who enjoys the status, privileges and remuneration of a Prime Minister, is strictly regulated by Article 58C which provides as follows:

(1) 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:

Provided that if such retired Chief Justice is not available or is not willing to hold the office of the 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.

(2) 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 a 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.

(3) 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 the citizens of Bangladesh who are qualified to be appointed as advisers under this article.

(4) Notwithstanding anything contained in Chapter IV of the Constitution, 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.

(3) The CG has authority over all ministries/departments of government except defence, which remains the responsibility of the President. The mandate of the CG is quite limited; it essentially acts as an interim administration. Article 58(D) of the Constitution provides that the CG shall carry on the routine functions of the government with the aid and assistance of persons in the services of the Republic. The Constitution also provides that except in the case of necessity for the discharge of routine functions, the CG shall not make any policy decision. The CG has been empowered to make policy decisions, if necessary, to undertake its routine functions. It is expressly provided that the CG shall give to the Election Commission all possible aid and assistance that may be required for holding the general elections of members of Parliament peacefully, fairly and impartially.

(4) Reform proposals have been presented by the opposition in relation to the CG. An issue has arisen because of the particular provision in the Constitution relating to the appointment of the head of the caretaker government, which specifies that the immediate past Chief Justice would be the person first called upon by the President and

if he is unable or unwilling then his predecessor, and so on. Any action by the incumbent government, which conveys the impression that it is seeking to ensure that a particular person is chosen by adopting such means as altering the retirement date of the existing Chief Justice raises doubts about the impartiality of that person. The Fourteenth Amendment (2004) raised the retiring age of the Chief Justice. This had the effect of ensuring that the person who was then the immediate past Chief Justice would continue to be in that position when the time came for the formation of the caretaker government. The opposition is strongly objecting to his being designated as head of the CG on account of his past association with the ruling party. The other issue relating to CG is that the Thirteenth Amendment provides that during the period when there is a non-party caretaker government, the law regulating the supreme command of the defence services (which vests in the President), shall be administered by the President. The opposition urges that the defence services should be administered during the caretaker government period in exactly the same way as all other subjects, that is, on the advice of the Chief Advisor.

II. ELECTORAL REFORMS: SOME CONCRETE PROPOSALS

Free and fair elections are currently at the top of the national agenda. It stems from a widely shared concern that without such reforms being effected, the forthcoming parliamentary election would not be free and fair and would be materially affected by 3 M's – muscle, money and misuse of executive authority. Over the years the “cost” of elections has continued to mount – so that in major urban centres the costs are measured in “crores” when the legal limit of election expenses is five lakhs. This is the corrosive affect on elections of “back money”. The deployment of armed cadres, funded by such black money, has introduced another element which undermines free and fair elections through injection of political violence and intimidation. A truly impartial non-party caretaker government and a truly independent and effective Election Commission are seen to be imperative if the election process is to be protected from the destructive impact of the 3-Ms.

C. INDEPENDENT ELECTION COMMISSION

For an Election Commission to be independent, the following reforms have been proposed:

- (1) Appointment of Chief Election Commissioner and Election Commissioners should be made after consultation with the opposition parties and other sections of society which enjoy respect and confidence;
- (2) The Election Commission must have financial independence by providing it a direct budgetary grant so that the resources needed by it are granted without intervention of the Finance Ministry.
- (3) The EC must have powers to recruit and control its own secretariat and staff under the existing dispensation, the Secretariat of the EC is a division in the

Prime Minister's office – which *ex facie* negates its independence. This issue is awaiting adjudication in a pending writ petition.

- (4) The EC must have powers to appoint returning officers, presiding officers and polling officers, whose independence must be secured; and where staff is provided on deputation, such staff must be exclusively subject to the direction and control of the Election Commission, free from any interference from the executive.
- (5) The EC must determine the deployment of police and defence services personnel (with concurrence where necessary of the caretaker government).
- (6) Rule-making authority should be vested in the Election Commission.

D. MEASURES TO PROTECT ELECTIONS FROM “BLACK MONEY”.

The following measures are intended to protect the elections from the impact of “black money”:

- (1) Candidates must be required to file affidavits with their nomination papers disclosing their educational qualifications, their assets and liabilities and those of members of their immediate family; their annual income and sources of income and those of their immediate family; the amount of income tax they paid during the last 3 (three) years, their interests in business and their criminal records. This information should be made available to the public and should be widely disseminated. These returns should be scrutinized by competent experts engaged by the Election Commission.
- (2) The Election Commission should properly post such documents filed by candidates on its website.
- (3) Candidates who make incorrect or false declarations should incur punishment including disqualification.
- (4) The Election Commission should develop a database to store information provided by candidates.
- (5) The legal provision which disqualifies candidates who are listed as “loan defaulters” to banks should be strictly enforced.
- (6) There should be effective implementation of the requirement for submission of the detailed accounts of all election expenses, and the source from which those expenses are met, which should be subject to scrutiny by competent experts. Detailed reports of election expenses must be filed within a mandatory time limit, which should be strictly enforced. A stringent enforcement measure would be to make timely submission of the statement of election expenses a pre-condition for the publication of the election result in the official Gazette.

E. MEASURES TO PREVENT IMPERSONATION AND FALSE VOTING

The following measures are aimed to prevent impersonation and false voting:

- (1) Immediate dissemination of information that voters in each case should check the entries relating to themselves in the computerized electoral roll and move for corrections, if needed. For this purpose, access to the updated electoral roll shall be afforded to voters as early as possible. There is currently a controversy regarding the mode of preparation of the voter's list. The questions awaiting adjudication in a pending appeal before the Supreme Court include the appropriateness of a new list, ignoring the existing list. Also, the impartiality of enumerators and registration officers appointed by the Election Commission, many of whom seem to be drawn from the ranks of the ruling party, is seriously questioned.
- (2) Issuance of photo identity cards, or preparation of a voter's list with photographs (or bio metric information) being incorporated in the voter's list.
- (3) Use of voting machines of the type that were reportedly used successfully in the recent Indian election and, if possible, to ensure that such machines are available in all voting centres.

F. MEASURES TO ENSURE LEVEL PLAYING FIELD AND TO REDUCE ELECTION EXPENSES

The following reform proposals are intended to provide a level playing field among candidates:

- (1) Projection meetings should be organized by the Election Commission.
- (2) Party-sponsored political meetings should be regulated as to limit their number and the expenses permissible for a single meeting.
- (3) Limits should be placed on publicity and expenses for this purpose should be strictly enforced.
- (4) Radio and T.V. time shall be equitably allocated and strict limits shall be placed on expenses on radio and T.V. publicity, as well as advertisements. Compliance with the expenses and time limits should be monitored and strictly enforced.
- (5) The Election Commission should strictly enforce those regulations and recommendations so that any violations of limits are dealt with by prompt and effective action while the election process is underway. If violation is established the candidate, in case of a serious violation, should be liable to be disqualified.

G. DEMOCRATIC GOVERNANCE AND TRANSPARENCY WITHIN POLITICAL PARTIES

The following proposals relate to the need for a regulatory framework for political parties:

- (1) Political parties are the key players in the arena of elections. A regulatory framework relating to internal governance of political parties and disclosure requirements at present under the existing law is applicable only to parties which exercise the option to

register with the Election Commission. This is strictly optional. The view is widely shared (though not by the larger parties) that effective regulation is necessary and, therefore, registration should be made mandatory.

(2) By appropriate legislation, the provision for registration should be made mandatory for political parties to ensure democratic internal governance including periodic elections of office bearers.

(3) Political parties should be required to submit audited financial statements to the Election Commission, which should also be posted on the Election Commission's website.

(4) Political parties should be required to provide for participation of voters in local constituencies in the nomination process. Granting of nominations on payment of large contributions and also nomination of people recently retired from Government service (to eliminate the practice of Government officials using their last years in public service to prepare the ground for their own election) should be prohibited.

III. CONCLUDING OBSERVATIONS

There is a national consensus supporting electoral reforms to ensure a free and fair election and for an effective "caretaker government". It is important for the Election Commission to be impartial so that it can effectively discharge its role. An effective caretaker government is a necessary complement to ensure that the state machinery is impartial.