

## **Non-Party Care-taker Government: Expectations, Reality and Reforms**

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### **Introduction:**

Bangladesh has completed thirty-seven years of journey as an independent state since 1971. Among this period of on-going, the first two decades (1971-1990) of its politics are marked by a series of successful and abortive military coups, movements for the restoration of a democratic system, rigged elections, an ineffective legislature, and omnipotence of chief executives who misused the constitutional institutions and administration to materialize their personal ill wills. After the fall of H.M. Ershad Bangladesh entered into a new era by reintroducing parliamentary form of government in 1991 by the Twelfth Amendment of the Constitution.

From 1971 eight parliamentary elections were held in Bangladesh, five conducted by party government and three by Non-Party Care-taker Governments (hereinafter mentioned as NCG) before and after its inclusion in the Constitution. Starting with the very first parliamentary election in 1973 each election until parliamentary election of February 1991- whether it presidential, parliamentary, local govt. or a referendum was marred by different form and degree of violence, intimidation, fake voting, capturing polling centers, counting frauds, alteration of results at higher levels and announcing doctored results in the state run electronic media<sup>1</sup>.

Three parliamentary elections (27 February 1991, 12 June 1996 and 1 October 2001) were conducted by NCGs since 1991, the first one by NCG formed by a consensus of major political parties and the other two were under the constitutional arrangement. But despite constitutional arrangement the NCG has not been proved as the most effective method to ensure a free and fair election. Besides the anomalies in the system itself, due to some dubious steps of the present government and the last NCG it has become a national concern to be revised and reformed. But before going to the formal discussion let us have an idea about Free and Fair election.

### **The concept of free and fair election:**

Democracy is the system based on the idea that the authority to govern shall be derived from the will of the people. For this, election is taken as sine qua non in every democratic country. But election alone cannot assure democracy since incumbents can use the resources of the state to tamper with the election process.

To describe the election credible, the adjective frequently used, is free and fair. But the concept is yet to be defined in its exactness. In general, a free electoral process includes<sup>2</sup>:

- freedom of speech and expression by electors, parties, candidates and the media;
- freedom of association and assembly;
- freedom of access to and by electors to transmit and receive political and electoral information messages;
- freedom to register as an elector, a party or a candidate;
- freedom from violence, intimidation or coercion;
- freedom of access to the polls by electors, party agents and accredited observers;
- freedom to exercise the franchise in secret, and
- freedom to question, challenge and register complaints or objections without negative repercussions.

A Fair election is one, which includes:

- an independent, non-partisan electoral organization to administer the process;
- guaranteed rights and protection through the constitution and electoral legislation and regulations;
- equitable representation of electors provided through the legislation;
- clearly defined universal suffrage and secrecy of the vote;
- equitable and balanced reporting by the media;
- equitable opportunities for the electorate to receive political and voter information;
- accessible polling places;
- equitable treatment of electors, candidates and parties by election officials, the government, the police, the military and the judiciary;
- an open and transparent ballot counting process, and
- election process not disrupted by violence, intimidations or coercion.

It is also the duty of every candidate or political party to abstain from engaging in violence, respect the rights and freedoms of others and accept the outcome of a free and fair election. States should take the necessary legislative steps and other measures, in accordance with their constitutional processes, to guarantee the rights and institutional framework for periodic and genuine, free and fair elections, in accordance with their obligations under international law<sup>3</sup>.

But one should bear in mind that democratic values are deeply rooted in western countries whereas they are only being planted in the third world. Therefore, because of difference in culture, tradition, and a relatively shorter history of democratic practice, the meaning of free and fair in the context of Bangladesh would not be the same as in the west. Free and fair election, in the context of Bangladesh, refers to an election, which is not necessarily flawless, not free from all irregularities, or not absolutely perfect. However, an election, which is free from relatively major irregularities or where the irregularities were not systemic and did not

<sup>2</sup> Front eras Communes: *Elections in Latin America*.

<sup>3</sup> Inter-Parliamentary Union (Switzerland): *Declaration on criteria for Free and Fair election*.

alter the outcome of the election, could be termed free and fair as long as the observed results grossly reflect the will of the electorate, irregularities are random and not sponsored by the state<sup>4</sup>. Given the short history of practicing democracy, illiteracy of the people, inadequate infrastructure, weakness of democratic and political institutions, the standard acceptable for an election to be termed free and fair would be invariably different from that in western countries. Despite these shortcomings the native politicians attempted to ensure free and fair election in Bangladesh by introducing NCG system in the constitution through its Thirteenth Amendment.

#### **The concept of NCG in Bangladesh:**

The NCG system was constitutionally introduced in Bangladesh in 1996. But the concept of care-taker government is not new in political science. In countries like Britain, Canada, New Zealand it is conventional that the outgoing governments act as care-taker governments. In USA the outgoing President acts as President for a period of about ten weeks even after the designate is elected. But these care-taker heads of government are neither expected nor suspected of using the state power to unduly influence the conduct of the election.

But the situation in most developing countries poses a different scenario. These countries are mainly guided by the “incumbents never lose” phenomenon, where the parties in power try their best in the election – lawful or unlawful, to remain in power<sup>5</sup>. Here election is taken as a device for ascending to or for remaining in power rather than being an instrument of representation.

Like the most developing countries having the general lack of trust in running government to conduct free and fair elections Bangladesh had a miserable experience of post-independence governments in administering elections. Along with the failure of political governments the contribution of successive military regimes in destroying the faith of the people in party government’s ability to conduct free and fair elections led to the demand for conducting general elections under an impartial care-taker government since mid-eighties. Different form of care-taker governments have been proposed by political parties on different occasions, the most common one being under proposed leadership of the Chief Justice of the Supreme Court due to his apparent dignity and credibility.

The first formal demand for a Care-taker government can be traced back in January 1981 in the 7 points demand placed by the Jamaat-e Islami but it did not turn into a national demand. The concept gained momentum when the three major alliances engaged in a pro-democracy movement in the late 1990s, which led to the resignation of H.M.Ershad. Chief Justice Shahabuddin Ahmed took over the presidency as Acting President and administered the parliamentary election. But at that point in time there was no permanent arrangement of Care-taker Government to conduct future elections.

The demand for a NCG on a permanent basis arose when the opposition raised allegations of massive rigging, intimidation, and violence against the ruling party in the Magura-2 by-election

<sup>4</sup> *Supra* 1, p.3.

<sup>5</sup> *ibid.*

held in March 1994. The Awami League viewed the by-election result as “forcibly stealing” its candidate’s victory by a massive demonstration of hooliganism. A survey conducted by the *Dhaka Courier*, the most widely circulated English weekly of the country, found that 78 percent of the respondents believe that there was rigging in Magura-2 by-election<sup>6</sup>.

Widespread allegations of rigging in the by-election helped the opposition parties to unite and launch a concerted movement for the installation of an NCG to observe future parliamentary elections. But the immediate response of the treasury bench was entirely negative. A new dimension added to the political crisis in December 1994 when 147 opposition MPs resigned from the Jatiya Sansad (JS). In August 1995 the Speaker declared that the seats of 147 MPs fell vacant from 20 June 1995 due to their unauthorized absence from the JS for 90 consecutive sitting days. The JS itself was dissolved in November 1995 and the sixth JS polls were scheduled for February 1996.

All major opposition parties not only boycotted the sixth JS polls, they appealed to the electorate not to participate in what they called a “farical exercise”. The elections failed to end the political stalemate rather added fuel to the on-going movement<sup>7</sup>. At last, the Constitution (Thirteenth Amendment) Bill, 1996 providing the NCG system was unanimously passed by the sixth JS on 26 March, the day of the silver jubilee of Bangladesh’s independence.

#### **Analysis of the NCG system:**

The NCG was introduced with the apparent noble object of ensuring a free and fair election. Since the passing of the 13th Amendment several law suits were filed in the High Court Division challenging its legality on the ground of its unrepresentative character as such violating the basic structure of the Constitution. However, found that no unconstitutional acts were done by the Amendment. Though the decision was taken to institutionalize and strengthen democracy, but within a short span of time this system has been proved defective due to the drawbacks of its own. And unfortunately it was either overlooked or not taken into consideration by the opposition demanding for it. The major defects of the system can be summarized as follows:

#### **A. Appointment of the Chief Adviser and other Advisers:**

As per article 58C the post of Chief Adviser has been confined primarily to four persons, namely (a) the last retired Chief Justice of the Supreme Court (b) retired next before the last retired Chief Justice (c) the last retired judge of the Appellate Division (d) judge retired next before the last such retired judge. The last three can be appointed only if the former one is not available or unwilling to hold the office. If no one is found from the above mentioned list the President should in consultation with the major political parties appoint a Chief Adviser. Otherwise the President shall assume the functions of the Chief Adviser in addition to his own function under the Constitution.

<sup>6</sup> *Dhaka Courier*, 8 April 1994, p.7

<sup>7</sup> Stanley Kochanek, *Bangladesh in 1996: The 25th Year of Independence*, Asian Survey, Vol37, No.2, February 1997, p.137.

This provision enables the government to predetermine the next Chief Adviser and to appoint a person of its own choice as the head of the NCG. This allegation raised mainly because of the Fourteenth Amendment of the Constitution made by the present government raising the retirement age of Supreme Court judges from 65 to 67, though being in a similar constitutional position, nothing was changed for the Chief Election Commissioner and other Election Commissioners<sup>8</sup>. This extension of retirement age enables former CJ K.M. Hasan to be appointed as Chief Adviser of the forthcoming NCG who was the International Affairs Secretary of the BNP during Ziaur Rahman and had felt embarrassed to hear Bangabandhu murder case.

This kind of predetermination also enabled the last Chief Adviser to order the transfer and reassignment of 13 secretaries within minutes of taking oath. It seems that his mind was set even before he took his oath of office. He did it even before the appointment of other Advisers.

#### **B. Responsibility of the NCG:**

According to article 58C the NCG shall be collectively responsible to the President. In its strict sense this provision fails to fulfill the pre-requisite of a neutral NCG. As the key figure in NCG neutrality of the President is very important for ensuring a fair election. But he is a person elected by his parent party. He has never declared publicly that he is ceased to be a member of any political party. So he remains a member of the running government party.

#### **C. Executive authority of the NCG:**

When a political government runs the country, the President in the exercise of all his functions, save only that of appointing the Prime Minister and the Chief Justice of the Supreme Court shall act in accordance with the advice of the Prime Minister requiring his/her counter-signature. But this provision is not applicable during the period of NCG. And during this interregnum period the President may promulgate an Ordinance under article 93 amending the law relating to parliamentary election without taking recourse to the advice of the Chief Adviser, despite the fact that the Chief Adviser is entrusted with the status of a Prime Minister.

#### **D. Ill defined terms:**

Under the constitutional arrangement, the NCG shall discharge its function as an interim government and shall carry on the "routine functions" and except in case of necessity for the discharge of such functions it shall not make any "policy decision". But the Amendment has not explained or defined these two terms. They require sound interpretations. These two expressions are related to circumstances on ground that depend on a variety of factors and NCG is put to give full meaning of the phrases used in the Constitution, besides the Supreme Court<sup>9</sup>.

#### **E. Controlling the Army by the President:**

The 13th Amendment has given the President not only control over the Ministry of Defence and therefore the armed forces, it has also given him the authority to declare a state of emergency.

<sup>8</sup> G.M. Quader, *Can the Opposition's Reform Proposal ensure level ground for election?*, *The Daily Star*, 9 April 2006.

<sup>9</sup> Harun-Ur-Rashid, *The Care-taker conundrum*, *The Daily Star*, 28 June 2006.

This unfettered power of the President may create dangerous situations like the abortive coup of May 1996. Also during the election of 2001, the Chief Adviser faced several problems regarding the use of army. When requested by the Chief Adviser, the President refused to use the army to recover illegal arms. The President also did not want the early deployment of the army as requested by the Chief Adviser to restore peace in the sensitive areas of the country. The army was supposed to aid the civil administration in conducting the election but it was found that the armed forces were empowered to arrest and this power was misused<sup>10</sup>.

In short, the 13th Amendment has practically established a quasi-presidential system of government, at least, for ninety days. Because it has given almost the same power to the President what was exercised by him prior to the ousting of H.M. Ershad. And this is not only inconsistent with parliamentary form of government but also a great hindrance to administer a free and fair election.

### **Proposed Reforms:**

#### **A. Appointment of Chief Adviser and other Advisers:**

To have a neutral and impartial Chief Adviser a panel should be made consisting of all retired CJs (except those who have already served as CAs) and all retired judges of the Appellate Division from which the President in consultation with the parties having representation in the parliament should pick some one as the Chief Adviser. But no Chief Justice or retired judge who had any involvement in any political party or had served in any capacity in the service of the Republic being nominated by a government before his becoming a judge would be appointed as the Chief Adviser or an Adviser. The President will appoint the other advisers in consultation with the Chief Adviser. In this case the President may seek the opinion of the political parties.

To make this system more effective, appointment and promotion of judges on political consideration must be shunned in order to maintain the respect, dignity and neutrality of the judiciary.

#### **B. Accountability of the NCG:**

In recent times questions also arose about the accountability and transparency of the NCG. All governments whether elected or appointed should be responsible to the people. The parliament may pass some laws to make the interim government more accountable and transparent. Thus the responsibility of the NCG will be shifted from the President to the Parliament<sup>11</sup>. But care should be taken so that political parties do not put extreme pressure on the NCG making it weak and ineffective.

#### **C. Executive authority of the NCG:**

The President shall act on the advice of the Chief Adviser during the Care-taker Government in keeping conformity with parliamentary form of government.

<sup>10</sup> Sheikh Hasina, *1 October Election: Vote Rigging: Imprisoned Democracy-Helpless People*, *The Daily Janakantha*, 31 January 2002.

<sup>11</sup> M. Obaidul Huq, *Reforms of the Care-taker Government*, *The New Nation*, 29 November 2004.

**D. Defining “routine functions” and “policy decision”:**

The routine duties of the NCG and decisions constituting policy should be precisely demarcated to avoid any unnecessary debate and suspicion. It will enable the NCG to discharge their prescribed duties and to assist the Election Commission in holding the general elections.

**E. Assignment of the Defence Ministry:**

The Ministry of Defence should be under the authority of the Chief Adviser during its tenure. The rationale for putting the armed forces under the President is not clear since no other ministries have been given the same privilege. The excuse of “unelected” character of the NCG remains unconvincing. The Chief Adviser should have operational control of all the ministries, and that is where the control of the Defence Ministry should also revert<sup>12</sup>. And furthermore, if an “unelected” person can hold the charge of all the other ministries by virtue of his being the Chief executive, no logic can be strong enough to put a particular ministry outside its operational control.

**Responsibility for the Reform:**

Any change in the NCG system will require a constitutional amendment. The present government with its two-thirds majority in the parliament is in a better position to amend the Constitution. Keeping the basic concept intact, it is in the interest of the democratic development in Bangladesh that amendment in the Constitution should be made before the forthcoming general election. Besides government, it is also the responsibility of civil societies, media and the citizens to ensure a free and fair election. Because, the right of everyone to take part in the government of his/her country is a crucial factor in the effective enjoyment of Human rights and fundamental freedoms.

**Conclusion:**

The NCG, which was introduced to strengthen democracy, has become a threat to it. So, the reforms proposal shall be carried out to make the system work to the benefit of the country, as it will enhance the smooth transition of power. Although, the proposed reforms only cannot ensure a fair ground for election. Besides the NCG system the EC should also be reformed and electoral laws should be amended like the preparation and maintaining correct voter list, issuance of voter ID cards, introducing push-button voting machines and absentee ballot (to allow those who will not be able to vote on election day to cast their ballots prior to the election). Steps should also be taken to eradicate the use of black money and musclemen in election period. Thorough politicization of administration and gross misuse of government funds and authority must be stopped.

The NCG is based on good judgment, neutrality and honesty of an individual or a group of individuals<sup>13</sup>. To make it effective these notions must be preserved. Any deviation from it might endanger the democratic system itself. Since, politics is the art of possible; let us hope for the best.

<sup>12</sup> Brig. Gen. Shahedul Anam Khan, Care-taker Government, President and the armed forces, *The Daily Star*, 29 June 2006.

<sup>13</sup> Shah A.S.M. Kibria, The Neutral Care-taker Government: An Assessment, *The Daily Star*, 4 November 2001.