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**FREE AND FAIR ELECTIONS IN BANGLADESH AND THE  
ILLUSION OF A NEUTRAL CARETAKER GOVERNMENT**

A.K.M. MASUDUL HAQUE\*

Holding of periodic free and fair elections remains a big challenge in Bangladesh. In order to ensure free and fair elections the Constitution (Thirteenth Amendment) Act 1996 was passed paving the way for a unique constitutional arrangement of a “care-taker” non-partisan government. Two general elections were held under these amendments. The 3<sup>rd</sup> general election was scheduled to be held on 22 January 2007, but the major opposition parties and civil society groups raised objections regarding massive manipulations of the care-taker government and the election commission by the departing government. They decided to boycott the election and subsequently the country was plunged into widespread political violence leading to declaration of state of emergency and the postponement of the election. The ability to manipulate elections under the 13th Amendment resulting in chaotic events in Bangladesh clearly raises questions about the adequacy and even the necessity of such an amendment. This paper analyses the events in the country leading to the declaration of emergency from a politico-legal perspective in the light of the Thirteenth Amendment. It contends that the Thirteenth Amendment is inconsistent with the basic structure of the Constitution. The paper argues that enforceability of the Constitution and its spirit will remain elusive unless there is sincere willingness on the part of political parties and a culture is developed within the political parties and larger civil society to abide by the provisions along with the spirit.

**I INTRODUCTION**

The periodic holding of free and fair elections based on universal adult franchise is an integral part of any democratic society. However in many developing countries elections

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are being manipulated by the people in power. One way of solving the problem of manipulation is to build institutions and norms with proper checks and balances. An independent election commission is one example of an institution established to ensure the holding of free and fair elections. However in Bangladesh, even despite the existence of an electoral commission, elections are regularly manipulated and electoral rules are flouted. Consequently, an innovative idea of holding elections under a non-party caretaker government was conceived as a solution. It was perceived that the non-party caretaker government would have no motivation to manipulate the electoral process. Thus, the *Constitution (Thirteenth Amendment) Act, 1996* was passed requiring all future general elections in Bangladesh to be held under the auspices of a non-party caretaker government.<sup>1</sup> Under this arrangement, government at the end of its tenure rather than going into a caretaker mode should hand over power to a non-party caretaker government whose members are barred from contesting the election. The Amendment provided that after the resignation of the government before a scheduled general election the President shall invite the immediate past Chief Justice of the country to become the Chief Adviser (head of the government) of the caretaker government.

Two general elections have been held under the *Constitution (Thirteenth Amendment) Act, 1996*. Both these elections were widely accepted as reasonably free and fair, and resulted in the change of government in a peaceful manner.<sup>2</sup> First, the Awami League (AL) party won the 1996 election by defeating the Bangladesh Nationalist Party (BNP) led government of 1991- 1996. Then, the four party coalition government headed by the BNP was elected in 2001 with more than 3/4<sup>th</sup> majority defeating the immediate past AL government. Thus, it appeared that democracy in Bangladesh was on the path to consolidation.

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<sup>1</sup>. For a critical analysis of various provisions of the Thirteenth Amendment see M.Rafiqul Islam, 'Free and Fair General Elections in Bangladesh under the Thirteenth Amendment: A Political-Legal Post-Mortem', (July-December, 1996) 26 *Politics Administration and Change*, 18-31.

<sup>2</sup>. An international election observer team comprising of the representatives of the United States and the European Union headed by former US President Jimmy Carter monitored the poll and expressed their satisfaction over the holding of the election in 2001. For detail comments of the International Observer Team see the *Bangladesh Observer*, 23 June 2001.

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In October 2006 the BNP led coalition government completed its five year tenure and resigned. The President then assumed the office of the Chief Adviser (CA) of the care-taker government and retained his position as the President as the immediate past Chief Justice declined to accept the position of the CA amidst objections from the major opposition parties on the ground that his appointment as Chief Justice was manipulated by the government.

The *Thirteenth Amendment* provided for a number of options to appoint the Chief Adviser of the care-taker government. Without exhausting other options the President assumed the office himself. This has created a number of controversies including a challenge as to the validity of the assumption of the position of CA by the President in the Supreme Court. The way the Chief Justice interfered in the proceedings of this challenge and in another case concerning various disclosures by the candidates before the election, created widespread resentment and even violent outbursts both inside and outside the court. These unprecedented interventions of the Chief Justice in judicial proceedings concerning matters of direct public interest precipitated the problems. The failure of the President as the Chief Adviser of the care-taker government in maintaining neutrality further deepened the crisis.

Evidently the *Constitution (Thirteenth Amendment) Act 1996* failed to ensure free and fair election in Bangladesh as there were seeds of failure latent in it. Events surrounding the 2006-7 general election also raise questions about the sincerity of the BNP government in enacting the amendment in 1996. In hindsight, it is clear that the Act was drafted in such a way as to allow the government in power to retain its control over the affairs of the care-taker government through the President who is a nominee of the departing government and legally is not accountable to anyone.

This paper will deal with the manipulation of election process, the circumstances leading to the formation of the 2006 care-taker government in combining the two positions (head

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of the state and head of the government) under a parliamentary system, the role of the Supreme Court and subsequent constitutional and political crisis culminating in the declaration of a state of emergency. The paper will specially highlight the role of the Supreme Court which added pure octane to the fire of recent constitutional crisis that engulfed Bangladesh and the anarchy that followed.

This paper recognises the importance of formal legal provisions and institutions but emphasises that law and legal institutions should be seen as symbols of attempts to implement the law's underlying tasks, and, in the course of this, as providing political resources which individuals and groups can utilise to gain their ends. Indeed, an adequate approach to public law, including constitutional law, should be to investigate public policy, and to ask what demands government makes of the constitutional and legal systems in seeking to achieve its objectives, how those systems respond to those expectations, and the problems created by those responses for the government. Thus public law is a tool used to achieve certain ends. The use of public law may occur directly either through the moulding of social processes by regulatory rules or through the establishment and definition of institutions.

The paper concludes that election is merely a method in a wider democratic system to legitimise a government. Without bringing necessary wider socio-economic reforms half hearted electoral reforms in isolation alone can not yield desired results. Structural changes though necessary can never be successful without substance. Institutions and rules governing those institutions holding of periodical free and fair elections to choose a government would only achieve their objectives if there is sufficient trust and confidence in the system and a wider acceptance by the people. This will only happen when law becomes a culture rather than mere collection of rules with various procedures and institutions.

## **II BANGLADESH AND ITS GOVERNMENTAL SYSTEM**

As a former British colony Bangladesh inherited the common law system with fusion of some characteristics of civil law system. It has a written constitution and has a unitary Westminster form of government with a unicameral parliament elected for a five year term.<sup>3</sup> The parliament comprises 345 members of whom 300 members are elected directly through universal adult suffrage based on a first past the poll electoral system and the remaining 45 members are reserved for women only to be elected by the parliament itself.<sup>4</sup> This is done to ensure participation of women in the political life of the country. However, women are free to contest any of the 300 seats. In fact between February 1991 and October 2006 both the Prime Minister and the leader of the opposition were women and neither was elected from the reserved quota. The whole country is divided into 300 constituencies and each constituency is represented by a member of the parliament. Any one over the age of 18 is eligible to vote and voting is not compulsory.

The party or coalition of parties that commands a majority in the parliament forms the government. In this system there is a formal titular head of the state (the President) and a

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<sup>3</sup>. The Constitution of Bangladesh came into effect from 16<sup>th</sup> December 1972. The original constitution adopted a multi-party Westminster type of government. However, in January 1975 the Constitution was amended and changed the form of government to a single party hybrid presidential system in line with French Presidential system with sharing of powers between the President and the Prime Minister, with more executive powers given to the President. In August 1975 in a military coup the President was killed. The new military government headed by Gen. Zia amended the Constitution by a proclamation of *Martial Law Ordinance* paving way for a multi-party democracy rather than a single party state. However, it retained the French hybrid system with executive powers in the President. Gen Zia was killed in May 1981 and his civilian Vice-President was formally elected in November 1981 as the President of the Republic. Within four months of election into office the government was overthrown by yet another military coup. The military government did not change the system of government. The events in 1990 forced the military dictator to resign and the Chief Justice of the country became the President of the Republic by a consensus of all political parties without formal amendment of the Constitution. This was a care-taker government responsible to hold a free and fair election. General election was held in 1991 and the widow of the military ruler killed in 1981 became the Prime Minister. The new Parliament in its first session ratified the acts of the care-taker government to legitimise its actions including allowing the care-taker President to resume his old position of Chief Justice. The government on 15 September 1991 held a referendum which amended the Constitution to switch over to the Westminster system.

<sup>4</sup>. 30 seats were reserved for women till 2004. However, the *Constitution (Fourteenth Amendment) Act 2004* increased the number to 45. See Article 65(3).

powerful executive head of the government (the Prime Minister). The President is elected by the Parliament. Consequently the President is likely to be a nominee of the party in power. It is clear that the Thirteenth Amendment introduced a Presidential form of government during the tenure of the caretaker government. In short, the constitution of Bangladesh instituted a parliamentary system of government between the period of election and dissolution of parliament and a Presidential system in the interim.

### **III ELECTIONS IN BANGLADESH: A CRITICAL APPRAISAL OF CONSTITUTIONAL PROVISIONS**

Part VII (articles 118 – 126) of the Constitution of Bangladesh deals with elections. The Election Commission is entrusted with conducting elections and is required to “be independent in the exercise of its functions” and subject only to the Constitution and any other law. Article 118(1) of the Constitution says,

There shall be an Election Commission for Bangladesh consisting of a Chief Election Commissioner and such number of other Election Commissioners, if any, as the President may from time to time direct, and the appointment of the Chief Election Commissioner and other Election Commissioners (if any) shall, subject to the provisions of any law made in that behalf, be made by the President.<sup>5</sup>

The Constitution did not precisely fix the number of commissioners to be appointed. Thus it left it to the government to decide on the number. Moreover, the Election Commission though legally independent is within the administrative set up of the Prime Minister’s secretariat. There is no formal advisory body to advise the Prime Minister as to who may be suitable for appointment. Consequently, the appointment is left in the hands of the Prime Minister who has no obligation to consult opposition parties or the Parliament. There is no parliamentary committee or scrutiny process to oversee the

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<sup>5</sup>. In a Parliamentary system the President is obliged to act in accordance with the advice of the Prime Minister. Since the President is the ceremonial head of the state all actions of the Republic are done in the name of the President.

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appointment. Thus the Prime Minister has a free hand in appointing the election commissioners. Since 1975 almost all commissioners have been appointed based on their perceived political loyalty.

This is the key source of election manipulation. The party in power with the help of loyal election commissioners ensures appointments of loyal personnel to key positions. This lack of independence increases the likelihood that voter lists can be and will be manipulated – for example by including people who are long deceased, and deliberately not registering people likely to vote against the government. The loyal Chief Election Commissioner ignores irregularities such as the control of polling booths by thugs loyal to the ruling party, not allowing representatives of opponents to be present during polling or at the time of counting at the polling stations, casting false votes, supply of ballot papers to the government candidate's polling agents at the polling centres, intimidation of people likely to vote against a government candidate, and changing the results of counting the votes.

The successful holding of a fair general election by a non-party care-taker government in 1991 influenced the demand for a permanent constitutional arrangement for a non-party care-taker government on the model of the 1990 care-taker government to conduct all future general elections. The refusal of the government to consider such an amendment of the Constitution resulted in the boycott of the Parliament by all opposition parties and subsequent resignation of all opposition parliament members.. A Commonwealth delegation tried unsuccessfully to mediate between the government and the opposition.<sup>6</sup> The government called a general election to be held on 15 February 1996. All major political parties, including the ultra-right religious party, Jamat-e-Islami, with whose support the BNP was able to form the government in 1991, boycotted the election. Voter

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<sup>6</sup>. The representatives of the Commonwealth Secretary-General, Sir Ninian Stephen went to Dhaka for mediation between the government and the opposition parties on 27 October 1994. For details see *Dhaka Courier*, 28 April 1995: 10-11; *Jai Jai Din*, 1 December 1994: 4-7 and 31 May 1994: 4-6.

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turn out was between 10 – 15%. Even in this one sided election, massive electoral fraud and manipulation were witnessed.<sup>7</sup>

A civil disobedience movement intensified following the manipulated election. The election was condemned internationally especially by Bangladesh's development partners and other donor agencies. In the absence of any opposition party in the new parliament, and in the wake of massive unrest bringing the country almost to a standstill, many government servants also resigned. Thus the government was forced to introduce the *Thirteenth Amendment Bill* in the newly elected parliament paving the way for a care-taker government to hold all future general elections as demanded by the opposition.

#### **IV THIRTEENTH AMENDMENT AND GENERAL ELECTIONS (1996-2001)**

The *Thirteenth Amendment Bill* inserted a new Article, being Article 55A concerning the application of Chapter II, and added a new Chapter IIA. This new Chapter within Part IV of the Constitution consisted of a new Article 58(A-D). It also amended a few other articles of the Constitution. These changes provided for the formation of a non-political neutral care-taker government headed by the Chief Adviser (CA) with the status and privileges of the Prime Minister.<sup>8</sup> Article 58C (1) says that, the 'Non-Party Care-taker Government shall consist of the Chief Adviser at its head and not more than ten other Advisors, all of whom shall be appointed by the President'. The CA would exercise the executive power of the Republic during the tenure of the care-taker government. The tenure of the CA commences from the moment of taking the oath of office and ends when a new Prime Minister is sworn in after the general elections. The advisers must be under 72 years of age and qualified to stand as candidates in parliamentary elections. Article 58C(7) requires that the members of the care-taker government must not be 'members of

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<sup>7</sup>. For the manipulations and rigging see Bangladeshi national dailies, 16-20 February, 1996.

<sup>8</sup>. 'The Chief Adviser shall have the status, ... .. and privileges, of a Prime Minister and an Adviser shall have the status, ... .. and privileges, of a Minister.' Article 58C(11), *Constitution of Bangladesh*.

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any political party or of any organisation associated with or affiliated to any political party', and not permitted to stand as candidates in the ensuing election.

The problem with the 13<sup>th</sup> Amendment was that it contradicted the very structure of the government, being the Westminster system of government, by converting the Presidency into a holder of real power rather than nominal ceremonial powers.<sup>9</sup> A well known authority on the Bangladesh Constitution very succinctly characterized the Thirteenth Amendment in the following words,

It is a hasty and ill-thought out act of a politically besieged Parliament desperately looking for a technical ploy to camouflage its political agenda. The people of Bangladesh sought and fought for a non-party caretaker government within a parliamentary system, not an all powerful President in a Presidential system. Legally, the Thirteenth Amendment falls far short of its constitutionality. Politically, it is a contemptuous betrayal of the shared expectation of the people expressed beyond doubt in a referendum on 15 September 1991.<sup>10</sup>

The Bill received Presidential assent on 28<sup>th</sup> March 1996 and the government had to resign and the Parliament was dissolved. A new care-taker government was sworn in on the following day. The general election was held on 12<sup>th</sup> June 1996 which was again free and fair. In this election the opposition AL won most seats but was short of forming a government in its own right. However, the Jatiyo Party (JP) headed by former military dictator Gen. Ershad along with the lone member elected from Jatiyo Shamajtratrik Dal, decided to support the majority party to form the government. After the election the Parliament elected 30 female members, 28 of whom were AL nominees, and of whom

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<sup>9</sup>. The Thirteenth Amendment has clothed the President with many powers during the duration of the care-taker government and these powers are not usually enjoyed by a titular President under a Westminster system of government. Article 58B.3 of the Constitution says that the executive power of the Republic is to be exercised by or on the authority of the Chief Adviser in accordance with the advice of the non-party caretaker government. This article is drafted in line with the characteristics of the parliamentary form of government. However Article 58B.2 made the Chief Adviser and other advisers collectively responsible to the President. The President is empowered to terminate the appointment of the chief adviser and other advisers. This effectively means that the caretaker government can remain in office during the pleasure of the President. Moreover, the Thirteenth Amendment placed the Ministry of Defence under the absolute control of the President during the tenure of the caretaker government. The Chief Adviser of the caretaker government cannot advise the President on matters of defence during its tenure.

<sup>10</sup>. Rafiqul Islam, above n 2, 29.

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came from JP. With the election of 28 new AL female Members of the Parliament, the government had the necessary majority to remain in power.

At the end of its term in 2001 the AL handed over power peacefully to the caretaker government. This was the only time in the history of Bangladesh that power was peacefully handed over by the departing government. However, that does not mean that the AL Government did not try to manipulate the election. In appointing new Election Commissioners including the Chief Election Commissioner, the AL Government did not consult wider civil society groups or the opposition parties. The main criterion used in appointing election commissioners was their perceived political loyalty. The care-taker government under the leadership of the immediate past Chief Justice of the country, soon after assumption of office, took a number of steps, including transferring people allegedly appointed by the previous government, to influence the election.

The four party alliance government headed by the BNP with two other ultra rightist Islamic parties (Jamat-e-Islami and Islami Oikko Jote) and JP won the 2001 general election with more than 3/4<sup>th</sup> majority.<sup>11</sup> During its term of office between 2001-06, the government continually manipulated the constitutional process, either by appointing people loyal to it or by designing institutions and rules to perpetuate its rule.

## **V MANIPULATIONS BETWEEN 2001-06**

The newly-elected four-party coalition government appointed Mr Justice K M Hasan as the new Chief Justice, ignoring the long held tradition of appointing the senior most judge of the Appellate Division of the Supreme Court as Chief Justice.<sup>12</sup> Mr Justice K M

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<sup>11</sup>. The majority was enough to amend the constitution.

<sup>12</sup>. In Bangladesh Supreme Court is the apex court of the country. The Supreme Court is divided into two divisions, High Court Division and the Appellate Division. The Appellate Division is comprised of seven judges. The judges of the High Court Division are appointed by the President on recommendation by the Chief Justice. However, in the last few years there were many instances when judges have been appointed by the President on advice from the government without the recommendation of the Chief Justice. If any vacancy arises in the Appellate Division then the senior

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Hasan before becoming a judge of the High Court Division was the International Secretary of BNP. The judges in Bangladesh can remain in office till they have attained 65 years of age. Mr Justice K.M. Hasan would complete his tenure by becoming 65 years of age, much earlier than the end of the term of the government. According to the long held judicial tradition, the next senior judge of the Appellate Division of the Supreme Court would then become the new Chief Justice. Once more the new Chief Justice would then complete his term of office before the end of the term of the government on attaining 65 years of age, and the government would be required to appoint a third Chief Justice within its tenure. In that case the head of the caretaker government to conduct third general election would be the second Chief Justice as the last one would continue his term of office while the second one would be the immediate past Chief Justice.

The government clearly manipulated the appointment of the Chief Justice in order to make sure that Mr Justice K.M. Hasan becomes the head of the care-taker government once a general election was called. When Mr Justice K.M. Hassan retired at the age of 65, the government then appointed a new Chief Justice, Mr Justice Mudassir Hossain, overlooking once more two other senior judges of the Appellate Division of the Supreme Court. The government then amended the Constitution by extending the retirement age of judges from 65 to 67 so that the newly appointed Chief Justice, Mr Justice Mudassir Hossain, would retire after the formation of the care-taker government. Without this amendment Mr Justice Mudassir Hossain being the immediate past retiring Chief Justice would become the CA of the care-taker government and not Mr Justice K.M. Hassan. The amendment made sure that Mr Justice K.M Hasan remains as the immediate past Chief Justice so that he can assume the office of the Chief Advisor of the care-taker government and not Mr Justice Mudassir Hossain.

Apart from this the government took a number of measures which were seen as steps towards manipulation of the upcoming general election. From day one in office it started

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most judge (in terms of seniority of service as a judge) of the High Court is elevated to the position. Again this norm has been violated by appointing junior judges by super ceding the seniors. The Chief Justice is generally the senior most judge of the Appellate Division.

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reorganising the election commission, the police, the civil service, the army, public service commission, university administrations etc. Hundreds of police and defence officers lost their jobs. In short, all branches of administration were filled up with supporters of the party. Officials perceived to be supporters of opposition parties were removed from the job or given less important assignments, while the supporters of the party were promoted.<sup>13</sup> Officers who were perceived to be non-political were either denied promotion or were not given any responsibility and made ‘officer-on-special duty’.<sup>14</sup>

The Election Commission was filled with hard core government supporters. The Election Commission appointed 345 new sub-district (upazila) election officers from amongst the cadres of the governing parties.<sup>15</sup> The government then created a new elite police force, Rapid Action Battalion (RAB), comprising of personnel from the Police, the Army, the Air-Force and the Navy, in the name of dealing with a deteriorating law and order situation. Hundreds of people died in the custody of this force and the official explanation for each death in custody was always the same – when friends of the detainee tried to snatch the accused, the accused died in cross-fire during the course of the gunfight that followed. Relatives of the victims have claimed to be too, afraid to lodge any complaints.<sup>16</sup>

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<sup>13</sup>. The prime minister approved many promotions at the end of her tenure. There were no posts yet 332 more officers were promoted based on their perceived loyalty to the government. During its tenure in office around 1595 officials were promoted to the post of deputy secretary, 532 to joint secretary, 201 to additional secretary and another 76 to secretary.  
<http://www.thedailystar.net/2006/10/16/d6101601149.htm>

<sup>14</sup>. Over 300 deputy secretaries were made “officer on special duty on political grounds.” Posts do not exist, still 332 more promoted, <http://www.thedailystar.net/2006/10/16/d6101601149.htm>

<sup>15</sup>. Administratively, Bangladesh is divided into 6 Divisions, 64 Districts and 464 Upa Zila (sub-districts),

<sup>16</sup>. The deaths of hundreds of accused in the RAB custody is widely reported in the daily news papers including the RAB official explanation of death in a cross-fire. So far, most people who died in RAB custody in the name of so called “cross-fire” are known notorious criminals. This extra-judicial killing in the style of summary execution, though very popular amongst the population looking for a retrieve from the deteriorating law and order situation, not only undermine the basic “rule of law” but also is a clear no-confidence in the system of justice.

**VI JUDICIARY BETWEEN 2001 AND 11 JANUARY 2007**

“When the 4 party alliance came to power, it did not confirm the services of 15 additional judges appointed during the previous Awami League rule, though most of these judges had the Chief Justice’s recommendations in favour of them.”<sup>17</sup> The ‘government appointed 45 additional High Court judges in its five year term.’<sup>18</sup> Of these 45 judges, 19 new judges of the Supreme Court have been appointed on a single day solely on political considerations and in some cases against the advice of the Chief Justice. Reportedly it is the highest number of one-time appointment of High Court judges ever in the history of the country.<sup>19</sup> It is alleged that due diligence was not shown by the government in the appointment of 19 High Court judges. According to Article 95 of the Constitution, an individual to be appointed as a judge must have experience of practicing before the Supreme Court for a minimum of ten years. Many of the newly appointed judges, although enrolled in the Supreme Court, did not have any meaningful experience of practicing before the Supreme Court.<sup>20</sup>

There was even an allegation of tampering with the LLB marks sheet against one of the newly appointed judges – an allegation which is still being litigated.<sup>21</sup> Two of the judges were confirmed over the objection of the chief justice. It is, thus, clear that these judges

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<sup>17</sup>. Julfiqar Ali Manik, ‘5 Years Alliance Rule Review: Judiciary made to wobble’, <http://www.thedailystar.net/2006/11/01/d6110101108.htm>

<sup>18</sup>. Ibid.

The new Chief Justice appointed after declaration of the state of emergency raised his concern repeatedly over the grave situation created by appointing incompetent party affiliates as judges of the Supreme Court and the way previous Chief Justice acted. According to the current Chief Justice it would take at least twenty years to clear the mess created in the judiciary. The opinion of the Chief Justice is publicized in all Bangladeshi news papers. *The New Nation*, 3 March 2007. In a speech the Honourable Chief Justice had stated that there was a *proloy* or catastrophe -- a calamity of serious magnitude -- in the appointment of judges. In a recent roundtable meeting held at the Supreme Court premise, he expressed the concern that the seeds that were planted would not give a good harvest. See Badrul Alam Majumdar, ‘My Lord, we beg you to act’, *The Daily Star* (Dhaka), 21 August 2007.

<sup>19</sup>. Julfiqar Ali Manik, see note 18.

<sup>20</sup>. Ibid. See also Mahfuz Anam, ‘My Lord we beg to differ: But we share CJ’s vision for a better higher judiciary’, *The Daily Star* (Dhaka), 13 August, 2007.

<sup>21</sup> The Chittagong University cancelled the LL.B certificates of a number of lawyers including Mr Justice Faraizee on grounds of tempering with the result. Mr Justice Faraizee subsequently resigned as consequence of cancellation of his LL.B certificate by the university and protests from lawyers demanding his removal.

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were appointed without proper assessment of their capacity and competence, making the appointments at best faulty, if not outright illegal.

There were also instances of blatant politicization of the judiciary. For example, Dhaka divisional Special Judge Rezaul Karim Chunnu was seen addressing the ruling party's rally in Kishoreganj while he was a sitting judge. No action was taken against him. The judge subsequently resigned and formally joined BNP.<sup>22</sup>

Recently an editor of an English daily cited a few examples of miscarriage of justice by the Supreme Court and the role played by the former Chief Justice.<sup>23</sup> For instance, when Justice MA Aziz was appointed the Chief Election Commissioner in 2005, the appointment was challenged on constitutional grounds. The relevant High Court bench's authority to hear writs was revoked by the Appellate Division of the Supreme Court after it issued a rule and as a result of which the case was never heard.

Another example was *Abdul Momen Chowdhury and others vs. Government*.<sup>24</sup> The High Court bench in May 2005 held that candidates for parliamentary elections were required to disclose 8 different items of information, including their educational qualifications, income, assets, loans, criminal records etc., to be submitted along with their nomination papers in the form of affidavits. The purpose of this judgment was to empower the voters so that they could make informed decisions, and to prevent criminal elements from being elected to parliament.

In July 2005 one Mr Abu Safa filed a leave to appeal petition against this judgment of the High Court Division. The Supreme Court secretariat objected to Mr. Safa's petition on the ground that he was a stranger and had nothing to do with the original case. However, his

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<sup>22</sup>. Ibid.

<sup>23</sup>. Mahfuz Anam, 'My Lord we beg to differ: But we share CJ's vision for a better higher judiciary', *The Daily Star* (Dhaka), 13 August, 2007.

<sup>24</sup>. Writ Petition 2561/2005.

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interests as a potential candidate for the upcoming elections were affected by the May decision and he was allowed to swear an affidavit to file the appeal.

It was in what happened next that the real problem lay. Notice of the leave to appeal hearing was not served on the defendants (Election Commission (EC) and the Chief Election Commissioner). Although notices were sent to the three lawyers, who were the original plaintiffs in the case, they were sent to the Bangladesh Supreme Court. With such an address, naturally the notices did not reach them. Consequently, a Division Bench of the Appellate Division, headed by the Chief Justice, granted leave to appeal after an ex-parte hearing. However, no stay order was given against the High Court decision. Even though the case involved a matter of serious public interest, the court did not express any concerns about the absence of nearly all parties.

The next episode was much more dramatic. After the leave to appeal was granted, the original petitioners filed a caveat and waited for the hearing before the regular bench. The usual practice when a caveat is filed is to ensure the presence of the relevant parties and to hear them. On 19 December 2005 -- four days after the court went for the winter recess and a mere two days before the deadline for filing the nominations for the parliamentary elections scheduled to be held on 22 January 2006 -- lawyers of the ruling party approached the vacation chamber judge of the Supreme Court who stayed the High Court order. The chamber judge did so in a closed hearing surreptitiously, hidden from the public, and without informing the original party on whose petition the High Court had passed the judgment.

The judge of the vacation bench did not raise any questions before issuing the stay on this important judgment involving public interest, even though a four-judge bench of his seniors, headed by the Chief Justice, had decided not issue any such stay. Interestingly, the stay order was transmitted instantaneously to the EC, which implemented it on the same day. In addition, the vacation judge issued a stay on the entire judgment for all

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candidates, even though Mr. Safa only objected to disclosing his own educational qualifications.

Interesting, later investigation revealed that the whole case was a fictitious one. Mr. Safa had not bought, nor submitted, nomination papers at his Chittagong-3 (Sandwip) constituency. His name was not even on the existing electoral roll. He even could not be traced in Sandwip.

The drama that unfolded during the subsequent hearing of the appeal before the four-judge bench, headed by the chief justice, clearly dented the moral authority and prestige of the judiciary in the eyes of the citizens. During the hearing, the lawyer for the original plaintiffs, Dr. Kamal Hossain, challenged the maintainability of the appeal itself because of the fraud perpetrated in obtaining the leave to appeal. He claimed that Mr. Safa was used by some interested quarter. According to *Dr. Mohiuddin Farooque vs. Bangladesh* a person who serves the interests of others should not be allowed to file public interest litigation.<sup>25</sup> In addition, Dr. Hossain brought before the Court the allegations of forgery against Mr. Safa and, in support, offered to show a video tape featuring Mr. Safa's wife, his relatives, and the local chairman. He also asked the court to direct the opposing lawyers to produce Mr. Safa, who was absconding, before the court. Unfortunately, the court ignored Dr. Hossain's pleas.

The lawyers who moved the petition for leave to appeal were all BNP supporters. However, realizing that they were all exposed the senior lawyers withdrew, one after another, from the case during the appeal hearing. Consequently, the junior lawyer of Mr. Safa pleaded the case and argued against the disclosure of the educational qualification of candidates. However, he had no objection to disclosing the other information required by the High Court judgment. The court, to the utter surprise of all, granted the appeal.

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<sup>25</sup>. 17 BLD(AD)1977.

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The order allowing the appeal, overturned the requirements of disclosure in their entirety, although Mr. Safa's lawyer had objected to the disclosure of the educational qualification only. However, within two and half hours of allowing the appeal, the court, over the vehement objections of Dr. Kamal Hossain and following the mediation of the Attorney General, withdrew its earlier order.<sup>26</sup>

Another example of attempts to manipulate the electoral process is the writ petition challenging the legality of President Iajuddin Ahmed's assumption of the post of the chief adviser. The petition claimed that the President did not follow all the provisions of the Thirteenth Amendment concerning the appointment of the Chief Adviser (CA). '... Under the provisions of the constitution the President ought to have approached the chief justice who retired before Justice KM Hasan and if he was unavailable then the constitution provided that he was to approach the other former retired chief justice who retired immediately before Justice KM Hasan.' Article 58C (4) provides that the retired judges of the Appellate Division were to be considered for the job if any of the retired chief justices is not available provided that he is not disqualified by reason of age. 'There is nothing on record to show that he made any approach to them and that they declined to take up the job,' read the petition. Moreover, 'the president did not bother to have any meaningful dialogue or constructive consultation with all major parties to find a qualified person to be the Chief Adviser and in an unusual haste he appointed himself to the Chief Adviser under tight security', it read.

In short, the petitioner claimed in the writ petition that President Iajuddin without exhausting the mandatory provisions of the article 58C (3) (4) and (5) of the constitution assumed the functions of Chief Adviser violating the oath of office which he took to protect and defend the constitution when he became the President. 'And therefore he is required to show under what authority he is holding the office without appointing or firm offers to appoint other person/persons mentioned in the said article and as such his appointment is without lawful authority and is of no legal effect'. The petitioner also

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<sup>26</sup>. The implication of this leave to appeal had far reaching ramifications. Based on the High Court's judgment on disclosures, five by-elections were held.

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asked the High Court bench to verify ‘... whether the Chief Adviser is legally holding the office as it is apparent that his appointment as the Chief Adviser has violated not only the constitutional provisions but also his neutrality having been elected by a political party whose shadow looms large on his horizon’.

The subject of the writ petition was one of the most important ones before the higher courts. Not only in asking for an interpretation of the Constitution but also because it dealt with a crucial matter facing the nation at that moment in time. After hearing the petition, the honourable judges of the High Court Bench announced that they would pronounce their ruling the following day. But just when they were about to pronounce their ruling, a note from the then Chief Justice, hand carried by the Attorney General, informed the judges concerned that the whole proceeding had been stayed. It is unprecedented for a Chief Justice to stay a hearing while it is in progress. Rarer still is the staying of a case when the bench is about to pronounce its ruling as there is always scope for an appeal to the Appellate Division headed by the Chief Justice.

This unprecedented move by the Chief Justice created a situation of chaos. Demonstrators converged on the Chief Justice's chamber, and there were incidents of vandalism, and burning of cars on the court premises. Arrest warrants were issued against eminent lawyers. All of that left the judiciary tainted and the image of the Chief Justice tarnished.<sup>27</sup>

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<sup>27</sup>. There are many other examples of judiciary acting in the interest of the ruling party. On 1<sup>st</sup> November 2006 the former law minister moved a petition before a vacation judge of the Appellate Division and got the functions of the Anti-Corruption Commission (ACC) stayed up to 21<sup>st</sup> January 2006, ie up to holding of the now postponed general election so that ACC cannot investigate into corruption of ministers and officials of the immediate past government. The move for the order was aimed at turning the commission dysfunctional during the caretaker government's tenure so that before the election corruptions of the former ministers and other beneficiaries of the previous government cannot be investigated.

## VII THE ROLE OF THE PRESIDENT AND THE CURRENT CRISIS

On 20 October 2006 the 14 party opposition alliance declared that it would launch massive street agitations, indefinite strikes and blockades to protest against handover of power to Justice K.M. Hasan.<sup>28</sup> On 27 October Justice K.M. Hasan indicated his unwillingness to take the oath as Chief Adviser to the caretaker government. On 29 October 2006 the President assumed the office of chief adviser to the caretaker government. The President then appointed a 10 member advisory council. The President as the chief adviser to the caretaker government failed to demonstrate his neutrality. Two more election commissioners were appointed without any consultation with the Council of Advisers. Both these new appointees were well known supporters of the outgoing BNP government. One of them was also an aspirant to get nomination from the BNP in the upcoming general election. He often ignored the advice of the Advisers and in many cases acted without consulting them. Consequently four advisers resigned in protest. The opposition maintained its demand for reconstitution of the Election Commission and resignation of the Chief Election Commissioner. Finally, the Chief Election Commissioner, rather than resigning, decided to go on leave for 90 days. In other words, he decided to step aside during the election period.

Once more almost all major opposition parties decided to boycott the general election, as they feared that free and fair election was not possible under a caretaker government headed by the all powerful President ready to act in favour of a political party. The country was fast heading towards a civil war. The chiefs of the Army, Navy and Air-Force on 11 January 2007 (that is 11 days before the scheduled general election on 22 January 2007) forced the President to resign from the position of the Chief Adviser, to declare a state of emergency, and to postpone the general election.<sup>29</sup> All political

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<sup>28</sup>. *The Daily Star* (Dhaka), 20 October 2006.

<sup>29</sup>. The events of 11 January 2007 have been reported on some national dailies on 11 and 12 January 2008 marking the first anniversary of the military appointed care-taker government. Under the emergency rules the government enjoys wider powers and the activities of the government is beyond criticism and there is no scope of any judicial review. All political activities, including political meetings and gatherings, demonstration, protest, criticism of the government are prohibited. Though the constitutional validity of the government is in doubt but the government in all its public declarations and pronouncements have committed itself to hold a free and fair credible election by

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activities were banned. Declaring emergency in addressing the nation over radio and television the President finally admitted flaws in the process of updating the voter list. Indicating deferment of the polls he also said, "Any election without the participation of all the parties will not be acceptable at home and abroad."<sup>30</sup> The following day a former governor of the Bangladesh Bank (central bank of the country) was appointed as the Chief Advisor to the caretaker government to head a new 10 member caretaker government. The new caretaker government is fully backed by the armed forces.

### VIII CONCLUSION

The Thirteenth Amendment Bill was introduced in such a way so as to show that the government was keen to ensure that the future elections are free and fair. However, in a country which has a written constitution the law-making power of the parliament was limited by its constitutionality under Article 7 of the Constitution. In *Hamidul Huq Chowdhury v Bangladesh*<sup>31</sup> and *Anwar Hossain Chowdhury and Others v Bangladesh*<sup>32</sup> the Supreme Court held that the amending power of Parliament is not original, but derives from the Constitution, and that Parliament lacks the competence to amend the basic structure of the Constitution. The Parliament is seen as a donee or creation of the Constitution. Therefore, it lacks competence to amend any provision contrary to the basic structure of the Constitution. By turning the system into a Presidential during the caretaker period the thirteenth Amendment lacks constitutional validity.<sup>33</sup>

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December 2008. A number of reforms are underway towards holding of a general election including providing a photo identity to all voters to avoid fake voting and a preparation of a credible voter list is underway with the assistance of the armed forces. The actions of the new military backed care-taker government is beyond the scope of this paper and may violate emergency rules. Bangladesh was ruled by direct and indirect martial law between 1975 – 1991. This time the military did not directly take over power but there is no doubt as to who runs the country.

<sup>30</sup> . Reported in all Bangladeshi dailies of 12 January 2007.

<sup>31</sup> . [33 DLR 9 1981) 394]

<sup>32</sup> . [BLD 1989]

<sup>33</sup> . For a discussion of 'basic structure' theory see A K M Masudul Haque, *Critical Reflections on Law and Public Enterprises in Bangladesh*, unpublished PhD thesis submitted at the University of Warwick, 1991; also see M. Rafiqul Islam, 'The Seventh Amendment to the Constitution of Bangladesh: A Constitutional Appraisal' (1987) 58 *Political Quarterly*, 326-27].

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Before the February election, when the opposition parties demanded the amendment of the constitution for holding all future general elections by replicating the 1990 caretaker government headed by the Chief Justice which proved to be successful in holding a free and fair election, the BNP proposed to hold the election under the care-taker government headed by the President.<sup>34</sup> The Thirteenth Amendment incorporated many characteristics of the BNP's original proposal by making the caretaker government subservient to the President and also by making the institution of the Presidency more powerful. Moreover, though the first two general elections held under the Thirteenth Amendment were hailed as a success but it did not work for the third time. This failure gives rise to a variety of questions. The Bangladesh experience also shows how the first option of electing the Chief Adviser politicised the judiciary and there were manipulations in appointing the Chief Justice of the country. This politicisation ultimately affected both the judiciary and the society.

However, the so called neutral caretaker government under the Thirteenth Amendment is far from being non-political and as such there is a possibility of compromise of neutrality. If the last option of appointment of the Chief Adviser is followed as in October 2006 i.e a care-taker government under the President nominated by the departing government then not only there is a possibility of breach of neutrality but bias become a reality as evidenced by the activities of President Iajuddin between October 2006 and 11 January 2007. There was no need to amend the Constitution in violation of the basic structure of the constitution itself. The amendment facilitating the formation of the care-taker government to hold free and fair election should have been based on the basic structure and the spirit of the Constitution. The lesson from Bangladesh is very clear. Law by itself cannot effectively work in a society unless other surrounding factors including the level of economic development and the socio-political environment are conducive to its effectiveness. Law must be considered as only a factor in the interplay of wider complexities of other factors like politico-economic and social conditions. Law can only

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<sup>34</sup> . For BNP alternatives see *Dhaka Courier*, 28 April 1995.

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be effective when the rule of law and law becomes a part of the wider culture. Otherwise, no matter how smartly law is drafted it is ultimately destined to fail. Despite many problems of poor drafting of the *Thirteenth Amendment* and the way it was passed in the parliament without any debate in the parliament or outside, two general elections held in 1996 and 2001 were widely accepted as reasonably free and fair. These two elections were held under the care-taker government headed by the two former Chief Justices who tried to remain committed in holding a free election. In other words, the Amendment was achieving its objectives. However, it did not work at all in 2006. Clearly what is more important is not the law but its culture.