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Research article

# The politics of constitutional amendments in Bangladesh: The case of the non-political caretaker government

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## ABSTRACT

The Fifteenth Amendment to the Bangladesh Constitution removed the provision for elections under a non-political caretaker government, which allowed for three successful elections in the country. The removal of the non-political caretaker government provision resulted in countrywide violence and an election without participation by the major opposition groups in 2014. This article studies the context in which recent constitutional amendments, (in relation to the non-political caretaker government) have been passed, particularly the Fifteenth Amendment to the Bangladesh Constitution. The article argues that constitutional amendments in Bangladesh have been used in an instrumentalist way for political expediency which, in turn, gives electoral advantage to the ruling party. Democratic institutions and institutions of accountability have been utilised by successive governments in order to pass constitutional amendments that favour the ruling party. The article highlights the Special Committee Report on the Fifteenth Amendment and the Thirteenth Amendment judgment by the Supreme Court, which declared the caretaker government provision unconstitutional and therefore gave the government the legitimacy it required to amend the Constitution. The study of constitutional amendments in relation to the non-political caretaker government provision also illustrates how political parties have demanded or rejected constitutional amendments depending on whether they are in government or in the opposition.

*Keywords:* Bangladesh, non-party caretaker government, constitution, constitutional amendments, politicisation

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[http://dx.doi.org/  
10.5339/irl.2015.9](http://dx.doi.org/10.5339/irl.2015.9)

Submitted: 12 May 2015  
Accepted: 21 June 2015  
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## 1. INTRODUCTION

The Constitution of Bangladesh came into operation on 16 December 1972, and has been observed to be 'truly a democratic Constitution'.<sup>1</sup> The Constitution established that it would be the supreme law of the country, protecting fundamental rights, and providing for a parliamentary form of government amongst other provisions. Article 142 of the Constitution conferred power on Parliament to amend the Constitution through a two-third majority in Parliament. The amendatory process is justified as an essential requirement in any constitution in order to be able to fix imperfections within a constitution and allows it to change alongside societal progression throughout time.<sup>2</sup> However, while an amendatory process is essential to the stability of a constitution over time, it also opens up scope for abuse by legislatures and constitutions can be amended in a way that they begin to reflect the will of particular political interests rather than the will of the people.

In a research paper published by the Australian Parliament, Scott Bennett noted the following: "[n]ot the least of the criticisms of the (political) parties has been the inconsistency in their stance on constitutional amendment. Most notably this has involved supporting issues while in government, which are then opposed when submitted by their opponents".<sup>3</sup> This is not an uncommon observation about political parties. Another study observed that one of the major challenges for constitutional reform is the enticement in politics to focus on short-term, partisan gain.<sup>4</sup> The study cites examples from eight countries and highlights that, in reforming constitutions, the interest of the incumbent or current political elite strongly affects the direction of the reform, and short-term interests of the incumbent can often take precedence over long-term national interest.<sup>5</sup> There are different ways in which political party interest can overtake the amendatory process including private interests and partisan interests. Private interests refer to the personalized ambition of the party leadership while partisan interest refers to the interest of specific political parties and how these interests are promoted through constitutional amendment.<sup>6</sup> In Bangladesh, soon after the Constitution came into operation, constitutional amendments have been used in order to change the nature of the polity and serve the interests of the ruler or the ruling party.

To date, there have been fifteen amendments made to the Bangladesh Constitution. Of these, the most important are the Fourth, Fifth, Eighth, Twelfth, Thirteenth and Fifteenth. In 1974, only two years after the Constitution came into operation, Sheikh Mujib, the first president of the country, used a supermajority in Parliament to pass the Fourth Amendment to the Constitution, which replaced the parliamentary form of government with a presidential form, established a one party system, and curtailed the powers of the *Jatiyo Sangsad* (National Parliament). After the murder of Sheikh Mujib and his family in 1975, Bangladesh entered into fifteen years of autocratic rule. During this time, President Zia used Parliament to pass the Fifth Amendment to the Constitution, which legitimized all the actions of the martial law authority between 1975 and 1979. The Fifth Amendment also deleted secularism as one of the basic principles of state and inserted the words '*Bismillah-ar-Rahman-Ur-Rahim*' ('In the name of God, the Most Gracious, the Most Merciful') into the preamble, in order to gain support from the Muslim majority of the country. In similar fashion, President Ershad used the Seventh Amendment to legitimize his regime. The Eighth Amendment declared Islam the state religion; the Twelfth Amendment repealed the Fourth and returned Bangladesh to the original parliamentary form of government. Other amendments during the authoritarian years were also used to manipulate the basis of the formation of the nation in order to promote each leader's version of Bangladeshi identity.<sup>7</sup>

<sup>1</sup>Mahmudul Islam, *Constitutional Law of Bangladesh*, 18 (2<sup>nd</sup> ed., 2012).

<sup>2</sup>Walter Dellinger, *The Legitimacy of Constitutional Change: Rethinking the Amendment Process*, 97 *Harvard Law Review* 386, 387 (1983).

<sup>3</sup>Scott Bennett, *Politics and Public Administration Group*, The Politics of Constitutional Amendment Parliament of Australia (23 June, 2003), [http://www.aph.gov.au/About\\_Parliament/Parliamentary\\_Departments/Parliamentary\\_Library/pubs/rp/rp0203/03rp11](http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp0203/03rp11).

<sup>4</sup>Martin van Vliet, Winluck Wahiu, Augustine Magolowondo, Anne-Mieke van Breukelen, *Constitutional reform processes and political parties: principles for practice* (NIMD, The Hague, 2012).

<sup>5</sup>*Id.*

<sup>6</sup>Vliet, *supra* note 4 at 15–16.

<sup>7</sup>See generally, Tazeen M. Murshid, *State, nation, identity: The quest for legitimacy in Bangladesh*, 20 *Journal of South Asian Studies* 1 (1997).

This article examines the Thirteenth, Fourteenth and Fifteenth Amendments to the Bangladesh Constitution insofar as they relate to the non-political caretaker government (NCG) provision and the political circumstances under which they were passed. The Thirteenth Amendment provided for the routine assumption of power by an interim, unelected, NCG, usually headed by a former Chief Justice, prior to every national election. In a country mired in political confrontation and mistrust between political parties, this provision allowed for three successful national elections with an alternation of power at each of the elections. However, the Fourteenth Amendment passed in May 2004 made the caretaker government controversial by raising the retirement age of Supreme Court judges. The immediate past Chief Justice usually headed the NCG and the Fourteenth Amendment led to accusations that the retirement age was raised in order to ensure that the next head of the NCG would be a Chief Justice loyal to the government. Following major political crisis and violence protesting the Fourteenth Amendment a state of emergency was declared in 2007 that lasted for two years. After the emergency upon Bangladesh's returned to democratic rule the constitutionality of the NCG was challenged at the Supreme Court. In 2011, the Appellate Division of the Supreme Court of Bangladesh (the Bangladesh Supreme Court constitutes of the High Court Division and the Appellate Division) declared the NCG provision, (and therefore the Thirteenth Amendment) unconstitutional on the grounds that it violated the basic structure of the Constitution, namely democracy, because the interim government was an unelected one.<sup>8</sup> However, the Court also held that the NCG provision should be kept in place for the next two parliamentary elections in order to maintain peace and stability in the country.<sup>9</sup> A Special Committee on the Fifteenth Amendment was also formed in order to advise Parliament a year before the amendment was passed. The Special Committee had unanimously resolved that the NCG provision ought to be retained,<sup>10</sup> however, curiously it did not state this decision in the final report. The Awami League (AL) government, which has been in power since 2008, oversaw the passage of the Fifteenth Amendment in 2011, which repealed the Thirteenth Amendment.<sup>11</sup> Despite dissent from the opposition, civil society and voters, the AL led supermajority Parliament disregarded the direction given by the Court that the NCG should remain in place for two more national elections.

The two largest political parties in Bangladesh, the AL and the Bangladesh Nationalist Party (BNP), have both argued for and against the NCG provision, depending on whether they have been in government or in opposition: the institution of the NCG has always been supported by the opposition and resisted by the incumbent. It was the AL, which initially rallied for the NCG system when it was in opposition in 1996, refusing to take part in the usual constitutional processes and going to the streets when their demand was not met, while the BNP stated a NCG would be undemocratic and unconstitutional. In 2014, the tables turned and the BNP took to the streets and demanded reinstatement of the NCG provision, while the AL argued that it is unconstitutional and undemocratic. In the sections that follow, this article illustrates how constitutional amendments have fallen prey to the tug of war between these two political parties and how they have tried to use amendments in order to manipulate the NCG provision so that it would serve their partisan requirements.

This article highlights the 2011 Appellate Division judgment on the Thirteenth Amendment and the Special Committee proceedings on the Fifteenth Amendment, arguing that these institutions and judgments have been manipulated in an attempt to lend credibility to a controversial amendment. The study of constitutional amendments in relation to the NCG and the background conditions that prompted such reform provides a method of studying when politicians have been willing to reassess the Constitution, and to what extent amendments have reflected the interests and aspirations of the people in terms of how they wish to be governed. This article shows how constitutional reform in Bangladesh and the demand or rejection of the NCG by political parties, has been used instrumentally to serve party political expediency as opposed to reflecting the will of the people of the time.

<sup>8</sup>*Abdul Mannan Khan v. Bangladesh*, 64 DLR (AD) 169.

<sup>9</sup>*Id.*

<sup>10</sup>From the proceedings of the fourteenth meeting of the Special Committee on the Fifteenth Amendment to the Constitution, held on 29 March 2011. Copy of the proceedings on file with the author. Translations are the author's own.

<sup>11</sup>Bangl. Const. (Fifteenth Amend.) Act, 2011.

## 2. INCREASING PARLIAMENTARY MAJORITIES AND THE EASY PASSAGE OF CONSTITUTIONAL AMENDMENTS: THE PATHOLOGIES OF POLITICS IN BANGLADESH

The People's Republic of Bangladesh is a unitary state with a unicameral Parliament (known as the *Jatiyo Sangshad* (hereinafter, JS)) consisting of 300 directly elected members from single territorial constituencies. There are also provisions for indirectly elected reserved seats for women.<sup>12</sup> Directly elected members are elected on a first-past-the-post basis. There is no requirement for an absolute majority and no turnout requirement. Since 1991, elections in Bangladesh have been held every five years (except between 2007-2008 during a two year state of emergency declared by the army-backed NCG), with an alternation of power each time, until the latest national election held on 5 January 2014.

Article 142 of the Constitution confers power on Parliament to amend the Constitution. The procedural requirements for constitutional amendments are slightly different and stricter than the requirements for normal Bills. A Bill for the amendment of the Constitution must contain a long title expressly stating that it seeks to amend a provision of the Constitution, and must mention which provision it seeks to amend. A Constitutional Amendment Bill must be passed by at least a two-third majority in Parliament before it can be presented to the President for his or her assent and the President has only seven days to return the Bill or is deemed to have given assent.<sup>13</sup> The procedure set down by Article 142 are non-derogable and any diversion from the procedural requirements will render the amendment void. While an amendatory provision is commonplace within constitutions, the Bangladesh Constitution has an added provision, which has been one of the greatest burdens for democratic consolidation. Article 70 of the Bangladesh Constitution prohibits floor-crossing<sup>14</sup> by the members of Parliament. This has far reaching consequences on accountability and the proper role of Parliament as the watchdog that keeps the executive in check.<sup>15</sup>

The requirement of a two-third majority for constitutional amendments was inserted into the Constitution with a view of making the passage of constitutional amendments difficult, requiring broad consensus from parliamentary representatives. However, Bangladeshi Parliaments show a trend of increasingly strong majorities, (Table 1 is an illustration of the increasingly strong majorities in Parliament since 1991) and coupled with the ban on floor-crossing, this means that any Bill introduced by the government gets passed with an overwhelming majority.

Sobhan argues that the principal feature of Bangladesh's democratic politics is the emergence of a stable two-party system – the BNP and the AL. The duopolistic dominance of the two major parties, he argues has “... encouraged their insensitivity to the concerns of minor parties, their direct supporters, their voters and even to the concerns of their party rank and file”<sup>16</sup> – the sense of arrogance within the leadership of both parties being premised on the belief that within the duopolistic system, the voters have no option but to vote for one party or the other. The immediate result of this ‘hegemonistic perspective’ of the two dominant parties, according to Sobhan, has been to perpetuate the exclusionary exercise of parliamentary power by both the AL and the BNP. In his words: “(In) successive Parliaments, the majority parties have denied equitable time-sharing with the opposition both in Parliament as well as over the official electronic media. Nor have successive regimes made any more than token attempts to consult the opposition on issues of policy and governance.”<sup>17</sup> This exclusionary mode of politics is seen as one of the primary reasons for driving the opposition out of Parliament and into the streets, the end result being a dysfunctional Parliament.<sup>18</sup>

<sup>12</sup>Bangl. Const. art. 65.

<sup>13</sup>Bangl. Const. art. 142.

<sup>14</sup>Floor-crossing occurs when a member of a parliamentary party votes against their party.

<sup>15</sup>Sabbir Ahmed, *Article 70 of the Constitution of Bangladesh: Implications for the Process of Democratisation*, 30 *BISS Journal*, Jan. 2010 at 24.

<sup>16</sup>Rehman Sobhan, *Structural Dimensions of Malgovernance in Bangladesh*, *Economic and Political Weekly*, 4 Sep. 2004, at 4101.

<sup>17</sup>*Id.*

<sup>18</sup>M. Moniruzzaman, *Party Politics and Political Violence in Bangladesh, Issues Manifestation and Consequences*, 16 *South Asian Survey*, 2009, at 81.

**Table 1. Majorities in the Jatiyo Sangshad**

Parliament (Election year)	Ruling party (Coalition)	Number of seats belonging to the ruling party (Coalition)
Fifth (1991)	BNP	158
Seventh (1996)	AL	179
Eighth (2001)	BNP (Four Party Alliance)	216
Ninth (2008)	AL (Grand Alliance)	262
Tenth (2014)	AL	245

Source: www.parliament.gov.bd

Notes: 1. Opposition is MPs of parties not supporting the government or government coalition except for the 2014 election when JP, an AL ally, formed the opposition after the election.

2. Government MPs include all MPs of government coalitions.

3. Women's reserved seats, which are indirectly elected are not included.

The reason for Bangladesh's 'dysfunctional democracy' has been partly attributed to the 'historical baggage' carried by the dynastic leaders of the two main political parties,<sup>19</sup> the BNP and the AL – both of which question the very legitimacy of the other to participate in politics. Being dynastic, the parties are characterized by a lack of internal democracy with a highly centralized and personalized internal governance structure vesting near absolute power in the party chairperson.<sup>20</sup> The Bangladesh Rural Advancement Committee's (hereinafter, BRAC) 'State of Governance in Bangladesh, 2006'<sup>21</sup> report terms this "the rise of partyarchy," a system where the winning party enjoys the monopoly of power for the duration of their electoral term. As the report notes, "[t]he innermost circle has de facto command over the entire party, legislature, parliamentary committees, procurement policies, development allocations, bureaucracy and law and order enforcement agencies."<sup>22</sup> Thus, ruling parties hardly face any resistance when passing constitutional amendments. And these amendments have been strategically calculated in order to protect the continuing rule of the incumbent. The study of the constitutional amendments in relation to the NCG provision will illustrate the author's contention.

### 3. THE BACKGROUND TO THE NCG AND THE THIRTEENTH AMENDMENT

In 1991, Bangladesh returned to a parliamentary form of government after fifteen years of authoritarian rule under President Ershad. Political parties united to oust President Ershad and joined together with a common demand for a non-party caretaker government for the purpose of holding elections. Elections held under Ershad's rule throughout the 1980s were mired in controversy, and Gyasuddin Molla writes that Ershad resorted to many of the same tactics of control as his predecessor Ziaur Rahman.<sup>23</sup> Both Zia and Ershad attempted to use electoral politics in order to legitimise their authoritarian regimes, and Bangladesh had not experienced credible elections under a democratic regime since 1973.<sup>24</sup> Historically, politicians and voters had little reason to trust in elections and electoral institutions in Bangladesh,<sup>25</sup> and so the central demand in the late 1980s was for elections under a NCG.

The movement against Ershad reached its height in November 1990 when the opposition alliance, (consisting of the BNP, the AL, the Jamaat-e-Islami (JI) and other smaller parties and alliances) gave a joint declaration stating that they would boycott and resist any elections under the present regime and that they would only join polls to elect a Parliament under a caretaker

<sup>19</sup>For an account of the history of the AL and the BNP and sources of personal antagonism between the two leaders, Sheikh Hasina and Khaleda Zia, see, Stanley A. Kochanek, *Patron-Client Politics and Business in Bangladesh* (Sage Publications, 1994).

<sup>20</sup>Mohammad Mozahidul Islam, *The Toxic Politics of Bangladesh: A Bipolar Competitive Neopatrimonial State?*, 21 *Asian Journal of Political Science*, 153-154 (2013).

<sup>21</sup>Bangladesh Rural Advancement Committee, (hereinafter, BRAC) is the largest NGO in Bangladesh.

<sup>22</sup>Manzoor Hasan, et al., *The State of Governance in Bangladesh 2006*, Centre for Governance Studies, BRAC University & BRAC Research and Evaluation Division, 20 (December, 2006).

<sup>23</sup>Gyasuddin Molla, *Democratic Institution Building Process in Bangladesh: South Asian Experience of a New Model of a Caretaker Government in a Parliamentary Framework*, Working Paper No. 3, 6, South Asia Institute Department of Political Science, University of Heidelberg, (2000).

<sup>24</sup>Nizam Ahmed, *From Monopoly to Competition: Party Politics in the Bangladesh Parliament (1973–2001)*, 76 *Pacific Affairs* 55, 60 (2003).

<sup>25</sup>Habib Zafarullah and Muhammad Yeahia Akhter, *Non-Political Caretaker Administrations and Democratic Elections in Bangladesh: An Assessment*, 35 *Government and Opposition*, 345, 347 (2000).

government headed by a “non-partisan and neutral person who will not be associated with any political party directly or indirectly, and he will not contest the elections of President, Vice-President or Parliament. No minister of his caretaker government will participate in any election.”<sup>26</sup> Ershad’s government was unable to resist this demand, and Shahabuddin Ahmed, the Chief Justice at the time, was handed power in accordance with Article 50 of the Constitution. This was possible because Shahabuddin Ahmed replaced the incumbent Vice President. He then assumed the presidency after Ershad resigned.<sup>27</sup> Shahabuddin Ahmed then formed a caretaker government in order to hold a national election for Parliament. Elections were held on 27 February 1991, and were generally observed to be free and fair.<sup>28</sup>

The BNP formed the first democratically elected government since 1973, but within a few years of its tenure the AL and other opposition parties began to accuse it of manipulating the electoral process and institutions.<sup>29</sup> Bangladesh faced a serious political crisis for two years from 1994, until fresh elections were held in June of 1996 under a NCG.<sup>30</sup> The political deadlock that ensued began in March 1994 with the Magura parliamentary by-election. The main opposition party, the AL, along with the JP and JI, charged the BNP government with vote-rigging and began to agitate for the appointment of a NCG to supervise new elections.<sup>31</sup> According to Article 123 of the Constitution, new elections would have to be held in February 1996. To press home their demand, the opposition parties boycotted Parliament *en masse* and enforced a series of *hartals* (nationwide strikes). When the BNP government continued to refuse to budge on the NCG issue, naming the demand undemocratic and unconstitutional, all 147 members of Parliament of the three opposition groups resigned on 28 December 1994. The BNP dissolved Parliament in November 1995 and planned to hold elections within 90 days of the dissolution as per Article 123 of the Constitution. The opposition continued to threaten electoral boycott unless a NCG was put in place via constitutional amendment.<sup>32</sup>

On 15 February 1996, parliamentary elections were held without the participation of any major opposition parties. The elections resulted in a landslide victory for the BNP, which won 289 of the 300 seats. However, voter turnout was less than 15 per cent of the eligible electorate, and it is thought by most analysts and independent observers that the BNP engaged in massive vote-rigging.<sup>33</sup> The elections were reminiscent of those held under previous authoritarian rulers in Bangladesh, and confirmed that Bangladeshi political parties were not ready to hold neutral elections under a majoritarian government. The failure of the election added fuel to the opposition demand for the creation of a NCG to conduct elections, and the opposition parties declared an indefinite non-cooperation movement beginning on 9 March 1996.

Finally, the BNP government gave in and the BNP-controlled Parliament passed the Thirteenth Amendment to the Constitution. The Thirteenth Amendment changed the original Constitution in that it provided for a NCG to oversee elections once Parliament was dissolved, rather than the Prime Minister and other Ministers holding office until the general parliamentary election was held. It mandated an eleven-member NCG to conduct the election. The immediate past Chief Justice was the first choice to become the head of the NCG. After incorporating the Thirteenth Amendment into the Constitution, elections were held on 26 March 1996. The AL came to power and the elections were generally accepted as free and fair.<sup>34</sup> However, while the Thirteenth Amendment followed opposition and civil society demands, it was passed without dialogue with the opposition or other sectors of society, without the input from parliamentary committees, and by a Parliament without an opposition, resulting in several weaknesses in the NCG provision.<sup>35</sup>

The NCG provision allowed for three successful elections, but from its creation it was also flawed on many levels. It was vague about the tenure of the interim government, and it provided for the

<sup>26</sup>Molla, *supra* note 23, at 6.

<sup>27</sup>Zafarullah & Akhter, *supra* note 25, at 351.

<sup>28</sup>Zafarullah & Akhter, *supra* note 25, at 354.

<sup>29</sup>Molla, *supra* note 23, at 10.

<sup>30</sup>Stanley A. Kochanek, *Bangladesh in 1996: The 25th Year of Independence*, 37 *Asian Survey*, 136 (1997).

<sup>31</sup>Golam Hossain, *Bangladesh in 1994: Democracy at Risk*, 35 *Asian Survey* 172 (1995).

<sup>32</sup>Kochanek, *supra* note 30, at 136.

<sup>33</sup>Molla, *supra* note 23, at 6.

<sup>34</sup>Zafarullah & Akhter, *supra* note 25, at 361.

<sup>35</sup>Ali Riaz, *Bangladesh in Turmoil: A Nation on the Brink?* Testimony before the Subcommittee on Asia and the Pacific Committee on Foreign Affairs, United States House of Representatives (November 20, 2013).

former Chief Justice to head the NCG. This led to allegations that Supreme Court judges are increasingly recruited on the basis of systematic political calculation in order to ensure that the near future Chief Justice, who heads the NCG, will remain loyal to the appointing party. The Thirteenth Amendment also created an opportunity for the power of the Prime Minister and the President to be concentrated in one individual. Despite these flaws, the NCG worked well until 2006 when the system faced its first serious crisis.

#### 4. THE FOURTEENTH AMENDMENT AND THE EMERGENCY OF 2007

In 2001, the BNP was once again in power and introduced the Fourteenth Amendment. The Fourteenth Amendment raised the number of reserved seats for women, made it mandatory to put up portraits of the Prime Minister in government offices, and raised the retirement age of Supreme Court judges by two years, amongst other provisions. The Fourteenth Amendment was widely viewed as a partisan decision favoring the ruling party's objectives because—with the rise in retirement age—the next NCG would be headed by a perceived BNP-inclined Chief Justice, KM Hasan.<sup>36</sup> KM Hasan would not have been the first choice to head the NCG had the retirement age not been raised.<sup>37</sup> According to the Thirteenth Amendment, the President would choose the Chief Advisor from amongst recently retired Chief Justices, but traditionally it was expected that the last retired Chief Justice would lead the NCG.<sup>38</sup> By raising the retirement age of judges, KM Hasan would become the last retired Chief Justice before the next parliamentary election and he could be appointed as the head of the NCG in accordance with previous practice. The Fourteenth Amendment was strongly opposed by opposition groups and civil society on the grounds that raising the retirement age of Supreme Court judges would make both the judiciary and the NCG controversial. Opponents argued that the Fourteenth Amendment could lead to accusations that judicial appointments were being made in order to ensure that the head of the NCG would be sympathetic to the appointing party.<sup>39</sup> Despite protests, the controversial Amendment was passed without bipartisan support or extensive public consultation.<sup>40</sup>

As the BNP's second term during Bangladesh's democratic phase was coming to an end in October 2006, the opposition led by the AL raised their objection to the appointment of KM Hasan, as the head of the NCG because of his past involvement with the BNP.<sup>41</sup> The opposition parties alleged that the Fourteenth Amendment raised the retirement age of Chief Justices so that the ruling party could appoint KM Hasan as Chief Advisor of the NCG.<sup>42</sup> Although KM Hasan eventually refused to take this office, his possible appointment became one of the major issues leading to the violence, which in turn led to the declaration of emergency in 2007. The Fourteenth Amendment—a controversial amendment passed in the face of vehement opposition, during an opposition boycott of Parliament—serves as an example of how constitutional amendments in Bangladesh's recent history have become politicized and serve the interests of the ruling party at the expense of national interest.

Parliament was dissolved in October 2006 after the government's five-year term, as stipulated in the Constitution, and a NCG was appointed in order to hold elections. However, the opposition AL and its allies accused the BNP and its allies of installing its supporters into the NCG and the Election Commission (EC), and claimed that the voter list was grossly inflated.<sup>43</sup> D.T. Hagerty notes that "[t]he NCG and EC were demonstrably tilted towards the BNP, and election specialists noted that Bangladesh had a voting-age population of roughly 80 million people but a voter list totaling 93 million."<sup>44</sup> The AL boycotted these elections and announced that it would struggle to prevent

<sup>36</sup>Supriya Singh, *Bangladesh in 2006: Teetering political edifice and democracy*, Institute of Peace and Conflict Studies Special Report (No. 35, March 2007).

<sup>37</sup>*Id.*

<sup>38</sup>Farooq Sobhan, *Bangladesh: The Present Situation And Future Outlook*, Socio-Political and Economic Challenges in South Asia, 91 (Tan Tai Yong ed., SAGE Publications, 2009).

<sup>39</sup>Haroon Habib, *A controversial amendment*, 21 *Frontline: World Affairs*, 5-18 (5 June 2004).

<sup>40</sup>*Id.*

<sup>41</sup>Singh, *supra* note 36, at 1–2.

<sup>42</sup>Morshedul Islam, *Assumption of the Office of Chief Advisor of the Non-Party Caretaker Government in Bangladesh: A Critical Politico-Legal Analysis*, 7 *Journal of Law, Policy and Globalization*, 21 (2012).

<sup>43</sup>Singh, *supra* note 36, at 3–4.

<sup>44</sup>D.T. Hagerty, *Bangladesh in 2007: Democracy interrupted, political and environmental challenges ahead*, 48 *Asian Survey*, 177,178 (2008).

them from taking place. The prevention strategy consisted of widescale street agitation, violence, and the declaration of *hartals*.

Following months of political wrangling, and the opposition's prevention strategy of non-stop *hartals* and violence, the then President, Iajuddin Ahmed declared himself the Chief Advisor of the NCG, overlooking other possible constitutional options.<sup>45</sup> The opposition intensified its protests, forcing Iajuddin Ahmed to resign from the post of Chief Advisor on 11 January 2007.<sup>46</sup> On the same day, President Iajuddin declared a state of emergency. The elections, which were to be held on 22 January 2007, were postponed indefinitely, and the sitting NCG (which the AL accused of being partisan) was replaced by a new NCG. The officials of the new NCG were drawn mainly from the private sector. The main agenda of the new NCG comprised an anti-corruption drive amongst politicians and businessmen, and the task of reforming the electoral system and holding elections. The new NCG had the backing of the army and the international community, but concerns existed about the role of the army in the formation of the NCG and the extent of its control over the transitional government during its two-year tenure.<sup>47</sup> During the emergency administration, the NCG interpreted its mandate broadly, and arrested thousands of politicians and businessmen on charges of corruption. Most of the charges did not stand in court, and the anti-corruption drive itself became plagued by the perception of political favouritism, and according to NGO observers had "limited impact on reducing overall corruption."<sup>48</sup> The two-year state of emergency, and the delay in holding elections, led to anxiety about whether Bangladesh would return to democratic rule, weakening the legitimacy of the NCG.<sup>49</sup>

The NCG finally held elections on 29 December 2008, and the AL came to power with an overwhelming majority. The voter turnout was the highest in the history of Bangladesh, at 85.26 per cent,<sup>50</sup> confirming the people's mandate and faith in democracy after two years of emergency rule. Questions persisted about the constitutionality of the NCG, as its mandate was to undertake routine government functions, and its main objective to hold democratic elections within ninety days of its swearing in.<sup>51</sup> Upon assuming power, the AL government passed the Fifteenth Amendment to the Constitution which repealed the system of the NCG in Bangladesh. This was the single most far-reaching and problematic legislative act of the Ninth Parliament.

The Fifteenth Amendment and the abolition of the NCG provision by the AL was particularly disappointing because the NCG had initially been a demand of the AL (along with JI and JP) and brought about by AL mobilization. Bangladesh faced months of violence and the economy came to a standstill in 1996 because of the AL movement demanding a NCG to hold elections.<sup>52</sup> People rallied behind the AL at the time and gave Sheikh Hasina and her party overwhelming support both in observing *hartals* and strikes and then in electing her and the AL to power.<sup>53</sup> In fact, Sheikh Hasina went on record stating that the NCG was her 'brainchild'.<sup>54</sup> The abolition of the NCG by the AL makes their original demand in 1996, which had mass public support, seem opportunistic and partisan. Rather than the NCG demand being one that showed the AL's commitment to furthering democracy, it now appears the demand for the NCG was for reasons of party interest. By repealing the NCG provision when the AL had a supermajority in Parliament, it has shown that it has no genuine commitment to the NCG as it claimed in 1996. Rather, the AL

<sup>45</sup>Joyeeta Bhattacharjee, *A Year of Caretaker Government in Bangladesh*, available at, [http://www.observerindia.com/cms/export/orfonline/modules/analysis/attachments/Bangladesh\\_Annual\\_Review\\_1202130305567.pdf](http://www.observerindia.com/cms/export/orfonline/modules/analysis/attachments/Bangladesh_Annual_Review_1202130305567.pdf), (last accessed, 21 August 2014).

<sup>46</sup>*Id.*

<sup>47</sup>Hagerty, *supra* note 44, 177.

<sup>48</sup>Human Rights Watch, *Bangladesh: Events of 2008* <<http://www.hrw.org/en/node/79296>> (accessed on 26 August 2014).

<sup>49</sup>Bhattacharjee, *supra* note 45, at 1.

<sup>50</sup>Voter turnout data for Bangladesh, IDEA, available at, <<http://www.idea.int/vt/countryview.cfm?CountryCode=BD>> (accessed on 11 March 2014).

<sup>51</sup>AKM Masudul Haque, *Emergency Powers and Caretaker Government in Bangladesh*, 1 Journal of the Australasian Law Teachers Association, 92 (2008) available at, <<http://www.austlii.edu.au/au/journals/JIALawTA/2008/9.pdf>> (accessed on 21 August 2014).

<sup>52</sup>Kochanek, *supra* note 30, at 137.

<sup>53</sup>Joseph Devine, *NGOs, Politics and Grassroots Mobilisation: Evidence from Bangladesh*, 1 Journal of South Asian Development 77, 83 (2006).

<sup>54</sup>Abdur Razzaq, *13th Amendment and future of democracy*, The Daily Star, 11 June 2011, available at, <<http://archive.thedailystar.net/newDesign/news-details.php?nid=189434>> (accessed 7 September 2014).



repealed the provision when it no longer served their political purpose of winning the election. On the other hand, the BNPs current demand for elections under a NCG is weakened because it too called the system undemocratic when it was in power and resisted enacting the Thirteenth Amendment for as long as it could.<sup>55</sup>

Thus, the NCG provision has been one that political parties demand or reject based on political expediency. Whenever a party is in power, it calls the NCG undemocratic and whenever it is in opposition, it refuses to participate in elections unless held under a NCG. In line with this attitude of the two major political parties to the NCG, the AL government abolished the NCG system in 2011 through the Fifteenth Amendment, despite the majority of Bangladeshis wanting elections under a NCG.<sup>56</sup> The abolition of the NCG system cleared the way for elections to be held under the incumbent government. Thus, demand for the NCG has always been based on partisan and momentary interest of political parties, and constitutional amendments in relation to the NCG has been partisan and unreflective of the will of the people.

## 5. EVENTS LEADING UP TO THE FIFTEENTH AMENDMENT

### A. The Supreme Court Judgment

In Bangladesh, Parliament is often viewed as a forum for the government to pass laws for partisan purposes.<sup>57</sup> As discussed above, the tradition of strong, centralized executive power is enhanced by structural features of the Bangladeshi parliamentary system: the tendency of elections to produce large majority governments, opposition boycotts, and strong party discipline underlined by the Article 70 constitutional ban on floor-crossing. Constitutional amendments, which require a two-third majority, have a history of being passed without effective opposition in Parliament. Like the Fourteenth Amendment, the Fifteenth Amendment, which abolished the NCG system, was passed amidst an opposition boycott of Parliament, with only one dissenting vote cast by an independent member of Parliament.<sup>58</sup> As a result, the judiciary became the institution seen as the custodian of the Constitution and its values against encroachment by the executive government.<sup>59</sup>

In January 2000, a Supreme Court lawyer filed a writ petition with the High Court Division of the Supreme Court challenging the Thirteenth Amendment on the grounds that it was “violative of democracy, a basic and fundamental structure of the Constitution.”<sup>60</sup> In 2004, the High Court Division of the Supreme Court upheld the Thirteenth Amendment on the grounds that it had “not affected or destroyed any basic structure or feature of the Constitution”<sup>61</sup> because the NCG provision did not negate democracy, in fact it was an aid to democracy because it allowed for free, fair and acceptable elections.<sup>62</sup> However, in 2005, an appeal against the High Court Division ruling was filed with the Appellate Division of the Supreme Court. On 10 May 2011, the Appellate Division gave its verdict on the Thirteenth Amendment. In its verdict, the Appellate Division declared the Thirteenth Amendment unconstitutional on the grounds that it allowed for an unelected government to assume power and therefore was undemocratic and went against the basic structure of the Constitution.<sup>63</sup> The Appellate Division opined that:

[ . . . ] the basic constituent of our Constitution is the administration of the Republic through their elected representatives. These two integral parts of the Constitution form a basic element, which must be preserved and cannot be altered. The Parliament has power to amend the Constitution but such power is subject to certain limitation, which is apparent from a reading of the preamble. The broad contours of the basic elements and fundamental features of the Constitution are delineated in the preamble.<sup>64</sup>

<sup>55</sup>Kochanek, *supra* note 30, at 138.

<sup>56</sup>T.J. Dhaka, *Bangladeshi politics: Trench warfare*, The Economist, 20 November 2013, available at, <<http://www.economist.com/blogs/banyan/2013/11/bangladeshi-politics>> (accessed 5 September 2014).

<sup>57</sup>Ahmed, *supra* note 24, at 62.

<sup>58</sup>Riaz, *supra* note 35, at 7.

<sup>59</sup>For an analysis of judicial constitutional activism please see, Ridwanul Hoque, *Taking justice seriously: judicial public interest and constitutional activism in Bangladesh*, 15 Contemporary South Asia 399-422 (2006).

<sup>60</sup>*Abdul Mannan Khan v. Bangladesh*, Civil Appeal No. 139 of 2005 with *Civil Petition for Leave to Appeal No. 596 of 2005*, 534.

<sup>61</sup>*Id.* at 535.

<sup>62</sup>*Id.*

<sup>63</sup>*Id.* at 383.

<sup>64</sup>*Id.*

Thus, according to the majority judgment of the Appellate Division, the protection of democracy, which is a pledge in the preamble of the Constitution, means that the exercise of governmental powers, even for a temporary period, by an unelected NCG is destructive of the democratic values ensured by the Constitution. Further, the Supreme Court decided, that because Article 56 of the Constitution states that if the President has to appoint a Prime Minister or Ministers in between dissolution of Parliament and the next general election, only persons who were members of Parliament immediately before the dissolution could be appointed,<sup>65</sup> the appointment of a NCG violated Article 56, as the NCG cabinet did not consist of members of Parliament.

The Appellate Division overturned the decision of the High Court on the grounds that all powers belong to the people, and the people's participation in the affairs of the state are ensured through their elected representatives. According to the judgment, being represented by elected representatives is the 'main fabric' of a parliamentary form of government. Thus, the 'main fabric' of the Constitution, which is that the people will be represented by elected representatives, cannot be altered even for a short period.<sup>66</sup>

The Supreme Court of Bangladesh followed the basic structure jurisprudence since 1989,<sup>67</sup> and in the Thirteenth Amendment judgment, the court reiterated that, while Article 142 gives Parliament the right to add, alter, substitute or repeal provisions of the Constitution through a two-third majority, it does not give Parliament the right to abrogate, annul or change the basic features or structures of the Constitution. The power to amend does not include the right to damage or destroy the structure and the identity of the Constitution.

However, it also stated that the elections for the future Tenth and Eleventh Parliaments may be held under the NCG system based on the principles *quod alias non est licitum, necessitas licitum facit*<sup>68</sup> (that which otherwise is not lawful, necessity makes lawful), *salus populi suprema lex*<sup>69</sup> (safety of the people is the supreme law) and *salus republicae est suprema lex*<sup>70</sup> (safety of the State is the Supreme law). Thus, the Appellate Division left open a scope for the government to hold elections under the NCG formula, at least in the immediately foreseeable elections in order to avoid political violence and conflict. A proper reading of the judgment would recognize that the Supreme Court advised that the removal of the NCG provision before the next election would put the safety of the people and the State at risk.<sup>71</sup>

In his dissenting judgment, Abdul Wahab Miah J., declared that the Thirteenth Amendment was constitutional. He stated that free and fair elections is a prerequisite for democracy, and that party governments in Bangladesh, when in power, have used the government machinery to affect the fairness of the election.<sup>72</sup> According to Abdul Wahab Miah J., the Thirteenth Amendment was passed to preserve and ensure democracy and effective participation of the people in the affairs of the Republic and was a valid amendment of the Constitution. He further opined that the Thirteenth Amendment did not amend Article 56 by appointing an interim cabinet consisting of individuals who were not members of Parliament, but had "merely provided additional measures to be operative during a very short period when the general parliamentary election would be held."<sup>73</sup>

During the hearing on the legality of the Thirteenth Amendment, eight of the most senior lawyers in Bangladesh were called to submit their opinions as *amici curiae*.<sup>74</sup> Out of the eight, five *amici curiae*, Dr. Kamal Hossain, TH Khan, Mahmudul Islam, Amirul Islam and Rokanuddin Mahmud recommended retaining the NCG system unchanged. Of those that recommended keeping the NCG

<sup>65</sup>Article 56, Constitution of Bangladesh

<sup>66</sup>*Abdul Mannan Khan v. Bangladesh, Civil Appeal No. 139 of 2005 with Civil Petition for Leave to Appeal No. 596 of 2005*, 385.

<sup>67</sup>*Anwar Hossain v. Bangladesh*, 1989, 18 CLC (AD).

<sup>68</sup>*Re: Constitution of Bangladesh (Thirteenth Amendment Act Case)* ADC Vol. IX (A) (2012).

<sup>69</sup>*Id.*

<sup>70</sup>*Id.*

<sup>71</sup>Dr. Kamal Hossain, member of the constituent assembly of 1972, SC lawyer, former cabinet member of the AL. This view was expressed during an interview conducted by the author on 20 December 2013. Interview on record with author.

<sup>72</sup>*Abdul Mannan Khan v. Bangladesh, Civil Appeal No. 139 of 2005 with Civil Petition for leave to appeal No. 596 of 2005*, 535.

<sup>73</sup>*Id.*

<sup>74</sup>Ashutosh Sarkar, *Caretaker system declared illegal*, The Daily Star, 11 May 2011, available at, <<http://archive.thedailystar.net/newDesign/cache/cached-news-details-185142.html>> (accessed on 7 September 2014).

provision as it is, Dr. Kamal Hossain and Amirul Islam were both members of the drafting committee of the Bangladesh Constitution. Two suggested alternatives to the NCG formula, but were in favour of keeping some sort of special election-time government in place. Only Ajmalul Hossain QC argued against the NCG system and was in favour of holding elections under a political government cabinet.<sup>75</sup> The judges themselves were divided in their opinion: of the seven judges of the Appellate Division, four declared the Thirteenth Amendment unconstitutional, and three dissented. However, only a summary verdict was issued on 10 May 2011, in the form of a unanimous judgment declaring the Amendment unconstitutional. The dissenting opinions were not made public for another fourteen months, when the full judgment was released. Nonetheless, even in the summary verdict, the judges gave weight to the view, expressed by the *amici curiae*, that anarchy might ensue should the election be held under a party government and therefore allowed the next two parliamentary elections to be held under a NCG, as long as Parliament amended the provision to ensure that neither the former Chief Justices or other judges of the Appellate Division would head the NCG.<sup>76</sup>

This ruling opened space for the AL government to abolish the NCG system and hold elections under its administration. While it is hard to say what would have happened had the full verdict and the dissenting opinions been released earlier, what we do know is that the government did not wait for the publication of the full judgment before passing the Fifteenth Amendment, nor did it pay heed to the advice of the *amici curiae* or the concerns expressed by the Supreme Court about the conduct of elections under a partisan government. The concern in this regard is that the AL government's compliance with the Supreme Court ruling was tainted with opportunism serving partisan interests. Under the terms of the ruling, it would have been legal to conduct the tenth and eleventh parliamentary elections under the NCG system on the grounds of necessity and in the interests of the safety of the state (on the condition that the provision for the former Chief Justice and Appellate Division judges as head of the NCG was removed in order to prevent the appearance of a politicized judiciary).

## B. The Special Committee on the Fifteenth Amendment

It is a convention of the Westminster Parliament that small bodies of members, seen as representing the House itself, are given "the consideration of questions, which, as involving points of detail or questions of technical nature, are unsuited to the House as a whole."<sup>77</sup> This select committee system helps to increase the efficiency of the legislature and save time in the House to increase expertise, and, perhaps most importantly, increase legislative control over the government by being more representative in partisan composition, having the ability to scrutinize bills in detail and receive expert opinions. Members are also allowed to speak and vote against the party line during committee meetings.<sup>78</sup> Kaare Strøm characterizes parliamentary committees as "among the most important features of legislative organization in contemporary democracies,"<sup>79</sup> and Philip Laundry notes that "all Parliaments work to a greater or lesser extent through committees."<sup>80</sup>

Special committees are a feature of Bangladeshi parliamentary convention, also. Article 76(1) of the Constitution provides that Parliament shall appoint from amongst its members, standing committees for public accounts, privileges and such other standing committees as the Rules of Procedure of Parliament require. Chapter 27 of the Rules of Procedure provides for special committees for matters of public importance. Rule 209 of the Rules of Procedure provides that all committees must prepare a report for presentation in front of the Parliament and Rule 206 sets out that the deliberations and decisions taken during committee meetings in Bangladesh are to be recorded.<sup>81</sup> Unanimous decisions taken by parliamentary committees are usually recommended in the final report. Despite the Rules of Procedure, Nizam Ahmed observes that the track record of

<sup>75</sup>*Id.*

<sup>76</sup>*Re: Constitution of Bangladesh (Thirteenth Amendment Act Case) ADC Vol. IX (A) (2012).*

<sup>77</sup>Malcolm Jack, Thomas Erskine May et al., *Erskine May: Parliamentary Practice*, 604 Butterworth Law (19<sup>th</sup> ed., 1976).

<sup>78</sup>For a detailed understanding of the workings of the Committee system in Bangladesh, see, Nizam Ahmed, *Parliamentary Committees and parliamentary government in Bangladesh*, 10 *Contemporary South Asia* 11–36 (2001).

<sup>79</sup>Kaare Strøm, *Parliamentary Committees in European Democracies*, 4 *The Journal of Legislative Studies* 1, 21 (1998).

<sup>80</sup>Philip Laundry, *Parliaments in the Modern World*, 96 (Dartmouth Publishing: Aldershot, 1989).

<sup>81</sup>Rule 206, *Bangl. Rules of Procedure of Parliament*.

parliamentary committees in Bangladesh shows that structural/procedural, political, and behavioural drawbacks discourage their effective working. According to Ahmed, “rarely are reports produced by different committees debated in the House; hence the recommendations made in these reports do not have any chance of being implemented.”<sup>82</sup> However, traditionally, committees in Bangladesh do submit reports to the Parliament and these reports contain the decisions taken in the committee meetings.

The Special Committee on the Fifteenth Amendment (which abolished the NCG provision) would seem to support this view. It failed to report on the rich debate and discussion that took place during its meeting on the provision for a NCG.<sup>83</sup> This author was able to get transcripts from the fourteenth meeting of the Special Committee, held on 29 March 2011, of which the agenda was “solely [to] assess the policy of the caretaker government regime.”<sup>84</sup> The transcript shows that the Committee, despite coming to an agreement about the NCG provision, failed to include this in its final report, issued three months later, suggesting an inappropriate degree of influence by the executive.

The Special Committee suffered from many of the problems observed with parliamentary committees in Bangladesh. The Committee was formed on 21 July 2010 in accordance with Ordinance 266 of the Ordinance of Parliamentary Proceedings upon a proposal being put forward by the Prime Minister in order to support, advise, and give recommendations on the proposed Fifteenth Amendment. The Committee comprised of fifteen members chaired by Sajeda Chowdhury, Deputy Leader of the House and vice-chaired by Suranjit Sengupta, a senior AL politician. All but three of the remaining members belonged to the ruling AL, the exceptions were Anisul Islam Mahmud of the JP, Rashed Khan Menon of the Workers Party, and Hasanul Haq Inu of JASAD (at the time of writing, the latter two members are Minister for Civil Aviation and Tourism and Information (Media) in the current AL government). All three parties belonged to the ruling coalition. The nature of the Ninth Parliament, in which the AL and its coalition partners held over 270 out of the 300 seats, demonstrates the difficulties facing parliamentary institutions such as special committees that ordinarily provide a check on majoritarian and party politics in the legislature.

To blame the ruling party alone and the nature of the Committee would be failing to see the whole picture. The Committee heard expert opinions from all sectors of society—a first for Bangladesh. Almost one hundred important personalities submitted opinions in front of the Committee, including five former Chief Justices, eighteen renowned law and constitutional experts, twenty-six academics and intellectuals, and twenty-six newspaper editors. Political parties also submitted their opinion, amongst them representatives of the AL, JP, Jatiyo Samajtantrik Dal, Bangladesh Workers Party, Ganatantrik Party and Bangladesh National Awami Party (NAP). However, all political parties in the BNP alliance failed to appear, despite receiving invitations (with the exception of JI, which did not receive an invitation).

Khaleda Zia, in her reply to the invitation sent by Chairperson Sajeda Chowdhury,<sup>85</sup> stated that the BNPs refusal to participate was because the Minister for Law and Parliamentary Affairs made a statement that the proposed Constitution, which was still to be passed by Parliament, was the present Constitution of the country. It was only after receiving complaints against this statement that the co-chairperson of the Special Committee clarified that this was a *draft* proposal to be passed by Parliament. Thus, the BNP refused to participate in the Special Committee hearings because it appeared that “the Committee was simply a farce in order to ensure the government’s political gain.”<sup>86</sup> This decision, however, deprived the Committee and eventually the legislature and the people of the country of the BNP’s opinion in an official forum. Thus avoiding formal, institutional expression of its dissent, the BNP again called on its followers to go to the streets

<sup>82</sup>Ahmed, *supra* note 24, at 29.

<sup>83</sup>Fourteenth meeting of the Special Committee, *supra* note 10.

<sup>84</sup>Fourteenth meeting of the Special Committee, *supra* note 10.

<sup>85</sup>Letter from Sajeda Chowdhury, Chairperson of the Special Committee for the Fifteenth Amendment to the Constitution to Khaleda Zia dated 20 April 2011, Matter No. 11.412.009.29.01.029.2010.122. A copy of the letter is on file with author. Translation is the author’s own.

<sup>86</sup>Letter from Khaleda Zia to Chairperson of the Special Committee for the Fifteenth Amendment to the Constitution dated 24 April 2011, Matter No. 1(1)11/ letter/80. A copy of the letter is on file with the author. Translation is the author’s own.

once the Fifteenth Amendment was passed. This is a common phenomenon in Bangladesh, where politics is taken out of Parliament and to the streets through parliamentary boycotts. The reasons behind this are manifold, including the extreme dominance of Parliament by the government, the ban on floor-crossing, the rejection of opposition motions and not giving opposition MPs a fair chance to speak.<sup>87</sup>

Despite lack of input from the opposition, the Special Committee during its fourteenth meeting, which was held with the sole purpose of discussing the Thirteenth Amendment, was overwhelmingly in favour of leaving the NCG provision in place. While there was some debate on how the head of the NCG and the advisors would be chosen, who could head the NCG, the tenure of the NCG and how to limit its capacity to declare a state of emergency, almost every member except Fazle Rabbi Miah, were in favour of leaving the NCG system in place for at least the tenth parliamentary election. In his concluding remarks at the end of the meeting, Suranjit Sengupta, the co-chairperson stated that, “[w]e all agree that in spite of all the limitations of the present system of the NCG, the conclusion is that it should remain.”<sup>88</sup>

The impression that party political influence interfered with the proper functioning of the Special Committee is bolstered by the fact that the final report of the Special Committee does not contain the decision of the fourteenth meeting, and mentions nothing at all about the NCG provision. The Special Committee submitted its final report to Parliament on 5 June 2011, after a year of deliberations and discussion on the Fifteenth Amendment. In this report, the Committee gave fifty-one recommendations on different provisions of the Constitution, including changes to the preamble, to the section on state religion, freedom of religion, trial of war criminals, women’s representation in Parliament, presidential powers, selection of Supreme Court judges, limitations on state of emergency, and much more. However, no mention of the NCG provision was made at all. This is odd because, even though many of the recommended amendments went against the basic platform of the BNP, the BNP’s greatest opposition at the time was the issue of the deletion of the Thirteenth Amendment.<sup>89</sup>

Following the report and a parallel report from the Law, Justice and Parliamentary Affairs Standing Committee discussing the draft Bill, the Constitution (Fifteenth Amendment) Bill 2011 was finalised. The salient features of the Bill included the abolition of the NCG system, that elections be held under the incumbent cabinet, that Islam be retained as state religion (but that all other religions be given ‘equal status’), that ‘*Bismillah-Ar-Rahman-Ar-Rahim*’ be retained in the preamble, that Article 12 be revived to restore secularism and freedom of religion, that the people of Bangladesh be defined as ‘Bangalees’ and the citizens of the country be known as ‘Bangladeshi’, that Article 7A and 7B be inserted into the Constitution to make the abrogation or suspension of the Constitution an offence in order to end the takeover of power through extra-constitutional means, and to declare that the basic provisions of the Constitution are not amendable. The Bill also clarified that elections would have to be held within ninety days of the dissolution of Parliament and increased the number of reserved seats for women.

Much of the advice of the Committee was included in the Fifteenth Amendment, suggesting that the failure of the Committee to make any statement about the NCG despite extensive submissions and discussion was opportunistic; in the end, this lent the Thirteenth Amendment the legitimacy of both a Special Committee report and a Supreme Court judgment, but the Amendment itself was made in disregard of important qualifications and recommendations made in both.

The abolition of the NCG, in turn, led Bangladesh to the crisis it faced in the months leading up to the 5 January 2014 elections, and to yet another election boycotted by opposition parties.<sup>90</sup> This is contributing to a trend which brings into question the nature of democracy in Bangladesh, and gives rise to doubts about the democratic legitimacy of the Bangladesh Parliament, to which this article now turns.

<sup>87</sup>Moniruzzaman, *supra* note 18 at 92.

<sup>88</sup>Fourteenth meeting of the Special Committee, *supra* note 10 at 4.40. All translations are the author’s own.

<sup>89</sup>Interview with Khaleda Zia, Bangladesh will never be a safe haven for militants, *The Telegraph*, 16 March 2014, available at, <<http://www.telegraphindia.com/1140316/jsp/7days/18086545.jsp>> (accessed 19 March 2014).

<sup>90</sup>See generally, Ole Solvang, *Democracy in the crossfire: opposition violence and government abuses in the 2014 pre- and post-election period in Bangladesh* (Human Rights Watch: New York, 2014).

## 6. THE CONSEQUENCES OF THE FIFTEENTH AMENDMENT

Since the enactment of the Fifteenth Amendment, opposition parties have argued for the reinstatement of the NCG provisions and have threatened to boycott any elections held under the ruling party's administration. Finally, on 2 December 2013, following weeks of violent protests, strikes and *hartals*, the BNP and its eighteen-party alliance announced that it would boycott the 5 January 2014 elections. With the government refusing to reinstate the NCG provisions and the opposition refusing to accept any election without it, the United Nations became involved in order to attempt to break the deadlock after the death of an estimated 200 people since late October 2013 in election-related violence.<sup>91</sup> From 6-9 December 2013, UN Assistant Secretary General for Political Affairs, Oscar Taranco, visited Dhaka, meeting with the Prime Minister, the Foreign Minister, and leaders of major political parties, including Khaleda Zia. He also met with the Chief Election Commissioner and representatives of civil society, the media and the diplomatic community to exchange views and to stress that the next national election should be peaceful, inclusive, and credible, giving voters real choice at the polls.<sup>92</sup> Taranco's visit, however, failed to create any consensus between the government and the opposition.<sup>93</sup> The Prime Minister proposed an 'all party' caretaker government, stating that, rather than amending the constitution again against the judgment of the Supreme Court, an all-party cabinet could be sworn in with her as the head of the cabinet.<sup>94</sup> She offered the BNP any ministry they wanted, but insisted that the BNP should join elections within the present constitutional framework. However, the BNP refused to join in any election under any government headed by the Prime Minister, instead insisting on a 'non-party' caretaker government provision—which would require another constitutional amendment. The Election Commission had, at this time, already announced the election schedule and the government refused to postpone elections in order to negotiate with the BNP.

Even until a week before elections, civil society in Bangladesh was hurriedly scrambling to seek a postponement of the elections and make the two parties come to some sort of consensus in order to hold an inclusive and democratic election. On 28 December 2013, a citizen's dialogue was held at the Lake Shore Hotel, arranged jointly by the Centre for Policy Dialogue, Sushashoner Jonno Nagorik (SUJAN), Ain O Salish Kendra (ASK) and Transparency International Bangladesh. The theme of this dialogue was 'Bangladesh in Crisis: Citizens' Concern.' More than sixty civil society, academic, and business community members spoke at the occasion, and agreed overwhelmingly that the 5 January elections needed to be postponed, and some sort of political agreement was needed in order to hold an inclusive, democratic election. The main demands of citizens from all sectors appeared to be a stop to the political violence, the postponement of the 5 January election, and the continuation of dialogue between political parties in order to hold an election with bipartisan participation. The government claimed that the election had to be held on 5 January because Parliament had already been dissolved.<sup>95</sup> Members of the citizens' dialogue, for example, respected constitutional lawyer, Rafiqul Haque's claimed that the elections could be deferred up to ninety days even after the dissolution of the Ninth Parliament under the constitutional framework.<sup>96</sup>

Despite this urging from civil society, the business community, and the international community, the AL government went ahead with the 5 January 2014 election. Leading up to election day, opposition groups declared a series of strikes and *hartals*, which often became violent. Protestors burned buses and cars that defied the strikes, and the police shot at protestors. On polling day

<sup>91</sup>Tahmima Anam, *Bangladesh's Non-Election*, The New York Times, 28 Jan. 2014, available at, <[http://www.nytimes.com/2014/01/29/opinion/anam-bangladeshs-non-election.html?\\_r=0](http://www.nytimes.com/2014/01/29/opinion/anam-bangladeshs-non-election.html?_r=0)> (accessed 14 April 2014).

<sup>92</sup>Bangladesh Mission by Mr. Oscar Fernandez-Taranco, Assistant Secretary General for Political Affairs, 6–9 December 2013, Report by UNDP, available at, <[http://www.bd.undp.org/content/bangladesh/en/home/presscenter/pressreleases/2012/12/09/bangladesh-mission-by-mr-oscar-fernandez-taranco-assistant-secretary-general-for-political-affairs-6-9-december-2012-/>](http://www.bd.undp.org/content/bangladesh/en/home/presscenter/pressreleases/2012/12/09/bangladesh-mission-by-mr-oscar-fernandez-taranco-assistant-secretary-general-for-political-affairs-6-9-december-2012-/)> (accessed 20 April 2014).

<sup>93</sup>*Imperative following Taranco's failed mission*, The Bangladesh Today, 12 December 2013, available at, <<http://thebangladeshtoday.com/news/2013/12/imperative-following-tarancos-failed-mission/>> (accessed on 20 April 2014).

<sup>94</sup>*Bangladesh PM Hasina proposes all-party election cabinet*, BBC New Asia, 18 October 2013, available at, <<http://www.bbc.co.uk/news/world-asia-24583020>> (accessed on 26 August 2014).

<sup>95</sup>Q&A: *Bangladesh general elections*, BBC News Asia, 3 January 2014, available at, <<http://www.bbc.co.uk/news/uk-25584962>> (accessed 8 September 2014).

<sup>96</sup>Press Report on the dialogue, *Bangladesh in Crisis: Citizens' Concerns*, Centre for Policy Dialogue, 29 December 2013, Dhaka.

itself there were eighteen deaths due to election-related violence; polling stations were torched, and voter turnout was low. There were allegations that even under these circumstances, vote-stealing was taking place in some polling centres, and the BNP termed the elections a ‘scandalous farce.’<sup>97</sup>

The Tenth Parliament was sworn in on 12 January 2014, again following an election without participation by the major opposition parties. One hundred and fifty-three seats were uncontested. An opposition was formed by Rowshan Ershad of the JP, who joined the election with her own, following in defiance of Muhammad Ershad’s (Head of the JP) directions. In sum, Bangladesh now has a Parliament without effective opposition, and all MPs actually belong to the same political alliance. The major opposition party in Bangladesh has been marginalized, their leaders arrested on vague charges, and fear is currently growing around the government becoming increasingly authoritarian.<sup>98</sup>

## 7. CONCLUSION

The narrative of constitutional amendments in Bangladesh, especially in relation to the NCG is a reflection of the broader malaise of politics in the country. The crux of the pathology of politics in Bangladesh lies in the inherent belief of dynastic political leaders in their right to rule and their conviction that the opposition has no legitimate right to participate in politics. Both Sheikh Hasina, who is the daughter of Sheikh Mujib and Khaleda Zia, who is the widow of Ziaur Rahman, question the very legitimacy of the other to exist, let alone to play a role in politics, as discussed above. The dynastic mindset of political leaders coupled by a culture of patronage and charismatic rule has led to the failure of internal democracy within political parties and sycophantic conformity from party members. Leadership positions have never been challenged, even when parties have suffered defeat in general elections. This leads to the complete centralisation of power in the hands of the leadership. Rahaman notes that “[t]here is no example in our recent political history that any leader of these two parties has braved to oppose any proposal or decision of their chiefs. They (the chiefs) remain the key sources of power in their parties.”<sup>99</sup>

The dynastic mindset of leaders along with Bangladesh’s first-past-the-post majoritarian system of government, which leads to party dualism, has further sealed the arrogance of the leadership of the AL and the BNP. Given the extreme centralisation of power backed by voting patterns and institutional structures that allow ruling parties to monopolize the Parliament, it is hardly surprising that the story of the NCG has played out as it has. Despite over twenty years of democratic rule in Bangladesh, political parties are not yet comfortable with the principles of democracy and constitutionalism. Political leaders view elections more as a reaffirmation of their right to lead rather than the methodology by which the people express their choice of leaders. Thus, whenever the people have chosen the ‘other’, political leaders have rejected election results causing agitation on the streets. Indeed, to date there has not been a single election in democratic Bangladesh, held under a political government, that has not resulted in a win for the incumbent. Neither has there been a single election held under a NCG that did not result in an alternation of power.

This brings the paper to its conclusion on when political parties have made a demand for the NCG or rejected it as undemocratic. The NCG was a demand of the AL when in opposition, because at the time it needed an institution in place that could be trusted to hold free and fair elections. Today, it is the AL that has removed the NCG provision and called it undemocratic. Thus, as far as the NCG is concerned, arguments over its place in the democratic Constitution of Bangladesh and demands for amendments in relation to it, have been made dependant upon political expediency. While the AL demand for a NCG in 1996 was a demand backed by popular support, the Fifteenth Amendment and its removal of the NCG provision by an AL government brings to question the current AL government’s motive. The BNP’s resistance to the Fifteenth

<sup>97</sup>Mahfuz Siddique, *Clashes and boycott mar Bangladesh election*, BBC News Asia, 5 January 2014, available at, <<http://www.bbc.com/news/world-asia-25602436>> [accessed on 2 April 2014].

<sup>98</sup>Bangladesh: A Tragic Backward Slide on Human Rights’, *Human Rights Watch*, 21 January 2014 <<http://www.hrw.org/news/2014/01/21/bangladesh-tragic-backward-slide-human-rights>> (accessed 26 August 2014).

<sup>99</sup>Muhammad Rahaman, *Origins and Pitfalls of Confrontational Politics in Bangladesh*, 14 South Asian Survey 101 (2007).

Amendment illustrates its own motives of expediency; the BNP used similar arguments to resist the NCG in 1996 as the AL is using today.

Further, the manner in which each of the constitutional amendments have been passed in relation to the NCG also point to the pathologies of politics in Bangladesh. It would appear that executive control of the legislature (as the amendatory organ) has seen these Amendments passed despite resistance by opposition parties and civil society. In passing the Fourteenth and Fifteenth Amendments, constitutional institutions have been used as an instrument of executive power rather than serving as a source of checks and balances. The Fourteenth Amendment made the judiciary and judicial appointments controversial when it raised the retirement age of Supreme Court judges, quite possibly in order to ensure that the last retired Chief Justice would be partial to the incumbent. When passing the Fifteenth Amendment, the government used the Supreme Court and the parliamentary Special Committee to justify the amendment. Both Amendments were passed without regard to the violence and political deadlock they would ensue, and the recommendation of the Supreme Court was disregarded. The primary consideration seems to have been securing elections under the incumbent's administration in order to continue to rule. This, in turn, subverted the right of citizens to choose their government by ensuring that no serious opposition parties would participate in the 2014 election. The Special Committee's failure to mention the NCG in its final report in 2011 is a further confirmation of the level of executive control over what is meant to be an institution of accountability. Despite unanimous agreement amongst the Special Committee members to retain the NCG provision, its failure to mention this decision in the final report reeks of executive interference and sycophantic conformity.

The 'all or nothing' nature of Westminster parliamentarism, whereby it produces clear winners and losers, serves to raise the political stakes. This is difficult to reconcile with the feudalistic foundations of Bangladeshi politics, its historical lack of democratic institutionalisation, and the associated pathological issues that characterize political incentives in the country. Westminster parliamentarism, combined with the forces that shape political incentives in Bangladesh, serve to doubly raise the stakes of political contest. As Budge and McKay note, the Westminster system has been discarded in most of Britain's former colonies because of its inability to cope with regional divisions.<sup>100</sup> Bangladesh may not have regional or ethnic divisions, but so long as politics continue to be characterized by patrimonial dynasties that propagate histories and identities that are antithetical to each other, the winner-take-all dynamic will continue. Provisions such as the NCG and constitutional amendments will continue to fall prey to the machinations of political party interests and their demand for perpetual rule and unchallenged authority.

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<sup>100</sup>Ian Budge and David H. McKay, *Developing democracy: Comparative research in honor of J.F.P Blondel* (Sage, London, 1994) 199.