

THE THIRTEENTH AMENDMENT TO THE CONSTITUTION OF BANGLADESH (1996): A CRITICAL ASSESSMENT

Md. Aminul Islam¹, Mansoureh Ebrahimi², Kamaruzaman Yusoff³

Islamic Civilization Academy, Faculty of Social Sciences and Humanities,
Universiti Teknologi Malaysia, Skudai, Johor Bahru, 81310,
MALAYSIA.

mansoureh@utm.my

ABSTRACT

A constitution provides major guideline for national governance and should hold compatible provisions for functional regularity, law and order. Due to societal changes over time, circumstances may give cause to amend a constitution such as the Thirteenth Amendment to the Constitution of Bangladesh (1996), which established provisions for a non-politically affiliated caretaker government for the specific purpose of ensuring free and fair elections. After successful implementations for three terms, a Fifteenth Amendment (2011) has since abolished the need for elections under a caretaker government. The present study ascertains the context in which the Thirteenth Amendment was rescinded and identifies causes for its abolition. The authors applied 'Historical Institutionalism Approach Theory' (Hall & Taylor) to analyze the Thirteenth Amendment's functional role. This theory proposes three stages of Institutional history: prior issues giving cause for creation, historical factors and institutional structure. The present study addresses institutional structure with a qualitative approach to analysis that achieved our objectives. The study's findings support reformation of the Thirteenth Amendment rather than abolition.

Keywords: Constitution, Caretaker Government, Parliamentary Institution.

INTRODUCTION

Complicated constitutional issues can imperil democratic transitions and obstruct the functioning capacity of governmental institutions. Blichner and Fossum (1997:3) defined three analytical elements involved in the genesis a constitution: organization, deliberation and affirmation. Several constitutional flaws in the cited Thirteenth Amendment hindered the functional role of appointed caretaker governments (CG). Hence, the authors attempted to identify weaknesses in the Thirteenth Amendment that plagued CGs. Left unattended; these matters allowed military intervention, which, in turn, abolished the CG. The latter was intended to be a structured institutional body that implemented several roles with a view to circumvent problems incumbent with political parties and politicians as well as socio-economic and culture milieus. From this perspective, we approximate the 'Historical Institutionalism Approach' to analysis.

Theoretical Frame Work

We adopted Hall and Taylor's 'Historical Institutional Approach' to analyze the functional role of the Thirteenth Amendment by applying the structural institutional component. Historical institutional analysis focuses on "bringing the state back in" with respect to political analysis. The theory is neither exceptional nor especial but rather represents the application of social science to institutions to reveal outcomes from socio-political and economic conducts during transformations over time. It therefore requires comparative analyses of praxis from the perspectives of ethnic institutions and relies heavily on case studies, as mentioned in Steinmo's approach to institutional history (2008: 1–166); although

the term ‘historical institutionalism’ was not coined until the early 1990s. According to Steinmo, (2008: 151-178), Historical Institutionalism is a social science method that examines institutions to identify sequential transformations in political, economic and social behavior over time (Ibid).

In their study of institutional change vs. various capitalist approaches, Hall and Thelen opined the following:

Historical institutionalism focuses on how institutions, which are understood as sets of regularized practices with rule-like qualities, organize actions and outcomes. This perspective tends to emphasize sequences of development, timing of events, and phases of political change. It examines not only the asymmetries of power related to the operation and development of institutions, but also path dependencies and unintended consequences that result from such historical developments.

Peter Hall and Rosemary Taylor (1996: 938) developed ‘*new institutionalism*’ in 1996 stating; “*Historical institutionalism tends to conceptualize the relationship between institutions and individual behavior in relatively broad terms.*” They divided their approach into three categories: Historical Institutionalism, Rational Choice, and Sociological Institutionalism. Figure 1 depicts their historical approach as a theoretical framework.

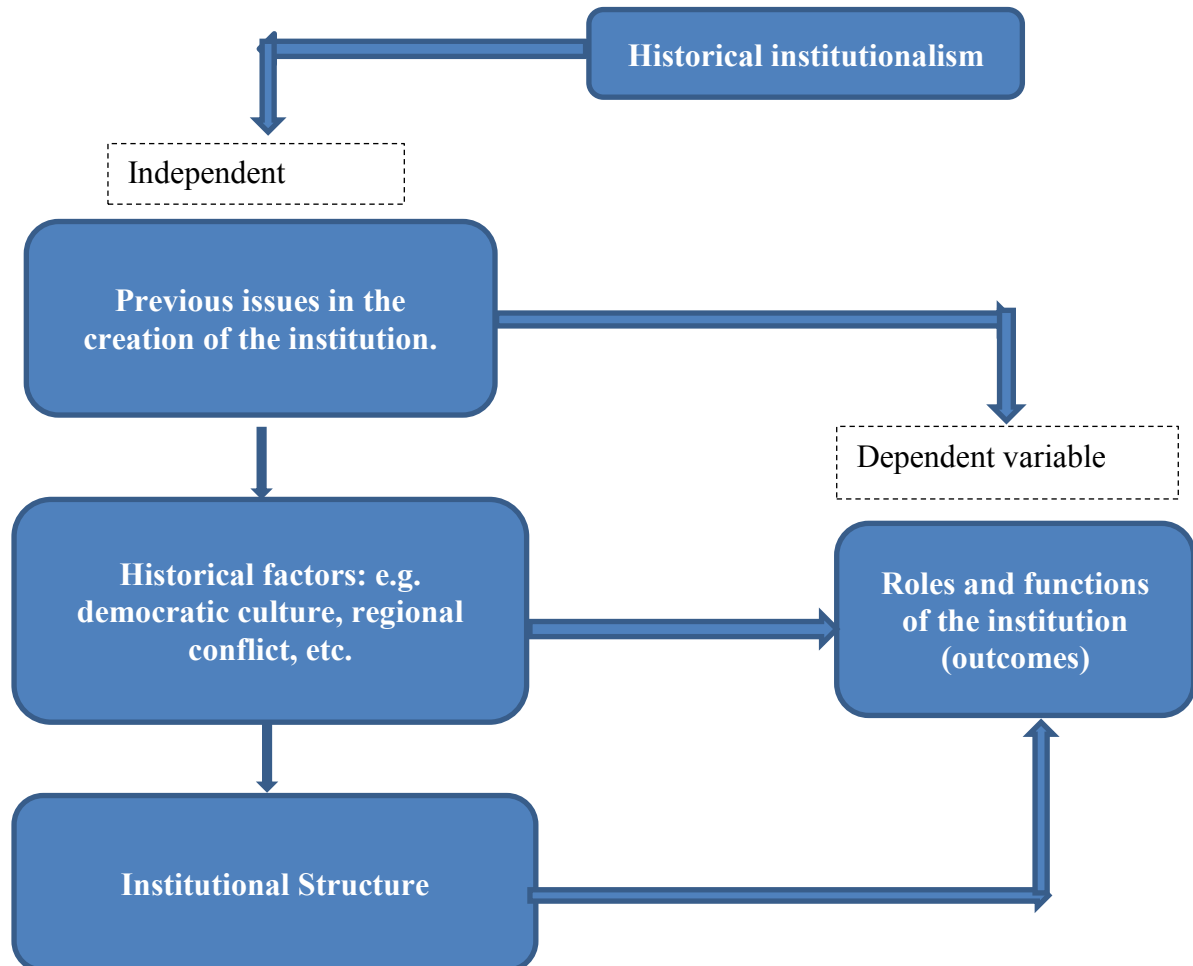


Figure 1. Theoretical Framework: Hall and Taylor

Source: adopted from Hall and Taylor (1996:938)

Accordingly, this paper employs historical institutionalism to analyze roles and challenges presented to the CG and their impacts on Bangladesh politics. For our purposes, we coin coated the CG as an institution and did our best to clearly describe overall circumstances from 1991 to 2014. These include the amendment, the election commission’s role, voter list reformation, power handovers (to elected government and elected government to CG), actions taken against corruption and criminals, political activity, conduct of politicians, and military involvement.

We also used historical institutionalism to describe a developmental action framework for how it is that political destabilization, lack of trust in political parties, a weak democratic culture, lack of military professionalism, constitutional drawbacks and foreign intervention combined to influence and challenge the CG. Our literature review found no application of this theoretical framework for such an analysis. Figure 2 outlines of our approach to this framework.

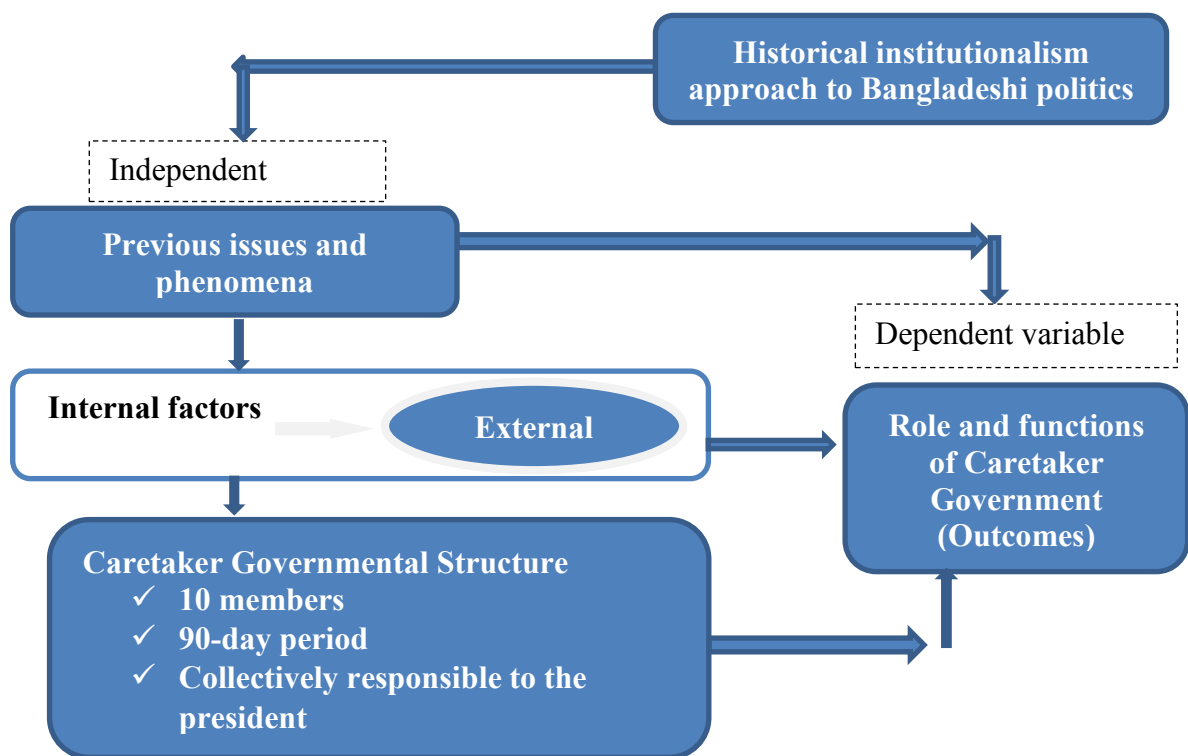


Figure 2. Theoretical framework of analysis

Internal factors such as political instability, a lack of military professionalism and constitutional drawbacks significantly impacted the CG. Justice Latifur Rahman (2003:147) argued that the greatest challenges confronting the CG were political conflict, political instability, corruption, a lack of political party accommodation and the absence of checks and balances. Shahjahan Bhuiyan (2003:33-51) reported that constitutional drawbacks also stymied CG functionality. He suggested an effective process to constitutional amendment necessitated three fundamental elements: organization, deliberation and affirmation, none of which were adequately considered when forming the CG. Finally, Schaffer (2002:76–83) wrote that the Thirteenth Amendment emerged out of a lack of trust between the general public and the government, and also between oppositional political parties and the party in power. The amendment adjusted the political process with Article 58(A), which gave Bangladesh a presidential government that clearly affected CG functions (Bhuiyan 2003:43).

Partisan President

Parliament elects a president on a partisan basis. The ruling party generally selects a loyal candidate who is then, hopefully, elected by parliament members. It is at the full discretion of the ruling party to mention the president's name as either non-partisan or a party member. On the basis of our analysis, we argue that the Thirteenth Amendment to the constitution might have functioned better had it stipulated a non-partisan president. Nonetheless, the ruling party selects a loyal president to obtain advantage (Islam 1999:166).

The 2001 CG, for example, desired a reform of the penal code ordinance that proved impossible due to Presidential veto (*The Daily Star*, 12Nov2006). The constitution had been amended by Article 61 of the Thirteenth Amendment, which granted the president absolute power over the country during CG tenure. Such authority is characteristic of a presidential form of government, and is not parliamentary. The amendment thereby granted supreme power to the President, authority not granted to an elected government under the constitution. Thus, the president became an unaccountable tyrant who was not directly elected by the people. For example, on 20 May 1996, three weeks before the parliamentary election in June, the president, Abdur Rahman Biswas, removed the military chief and two senior military staff members without consulting with the CG. Hence, the president exercised unbridled power over the military. Under a parliamentary government, although the president is the supreme military authority, he exercises power via the prime minister, a matter the Thirteenth Amendment failed to address. Consequently, this circumstance decreased the CG's power to protect law and order during elections.

Adverse Balance of Power

The Thirteenth Amendment also provided for a chief advisor and other ten assistant advisors to the CG with status and power akin to prime minister and ministers. Practically speaking, however, this purchased subservience to the president with no real power vested in the advisors as per customary practice (Halim 2008:462). Article 58E states, "*During the period of caretaker government, provisions in the constitution requiring the president to act on the advice of the prime minister or upon his prior counter-signature will be ineffective.*" Moreover, "*The non-party caretaker government shall be collectively responsible to the president*" (Article 58B2). On the other hand, "*The Caretaker Government has no authority to make any policy decision except in the case of necessity.*" Thus, the president retained the power to cancel any policy decision taken by the CG.

Whereas the chief advisor and all members of the CG are non-political/non-partisan and in power for only for three months for the purpose of holding a parliamentary election, no prospective power was to function within their ranks. This was ostensibly intended to permit wide latitude, conferring constitutional power equivalent to that of a prime minister.

Structural Problem

The Thirteenth Amendment's draft was completely controlled by the ruling government party (BNP). Their officers composed the manuscript, then scrutinized, revised and proposed it to parliament without opposition. It passed quickly and without consultation or review by a constitutional specialist as well as any debate, discussion or public scrutiny. Hence, the amendment's illicit status and the process of its formation created numerous future challenges.

According to Article 58C, the CG consists of a chief advisor as head over ten additional advisors to oversee forty-two ministries throughout the country. This presented daunting difficulties for all eleven members to control national challenges for three months without

policy formatting functions or experience in governing the country. The CG was thereby condemned to self-generate remarkable difficulties.

In addition, the Thirteenth Amendment made no provision to appoint a ‘citizen’ as chief advisor; preferably a retired chief justice or judge from the appellate division of the Supreme Court. A confusing passage in Article 58C (4) states: “... *no retired chief justice is available* ...” which has been interpreted variously to exclude ‘all retired chief justices’ or ‘last retired’ and even ‘next to last’. Similarly, the phrase in Article 58B(2), “*collective responsibility*”, also remains unclear. Neither did the Constitution clarify the power and duty of the chief advisor as to autonomy *cum* independence from subsidiary CG officials.

The Election Commission and Electoral Laws

Professor Rounaq Jahan believed Bangladeshis were presented with an opportunity to enjoy freedom after the restoration of democracy and establishment of the CG in 1990 (Jahan, 2008). A previously egregious offense to democracy was to be removed with the holding of free and fair elections of parliamentarians. But since 1990, five parliamentary elections have been held with each one subject to several electoral laws in the absence of one permanent law; thus giving rise to problems that reflected negatively on Bangladeshi politics.

As an important organ of the country, the election commission is constitutionally independent and intended to conduct and supervise election related functions. Articles 118(4) (5), 120, 119 and 126 of the Constitution refer to the independent election commission as follow:

- Election commission independently perform its functions.
- An election commissioner is equivalent to a Supreme Court Justice and shall follow the same rules for removal from office.
- The President shall, when so requested by the Election Commission, make available such staff as may be necessary for the discharge of its functions.
- The superintendence, direction and control of preparations for the electoral rolls for the offices of President and parliamentarian and the conduct of such elections are vested in the Election Commission.
- It shall be the duty of all executive authorities to assist the election commission in the discharge of its functions. (pp. 42).

Although the Constitution ensured election commission independence, different provisions negated this autonomy (Islam, Ebrahimi & Yusoff, 2017: 819). According to ‘Allocation of Business’ rules for different ministries and divisions (Schedule 1, Rules of Business, 1996): “*The election commission secretariat shall be allocated to the prime minister’s secretariat,*” thereby providing obstacle-neutral functioning.

Although election commissioners were equal to Supreme Court Justices and Article 119 granted leave for independence, practical control over the election process was anything but autonomous. Under Article 39 (Representation of the People Order (RPO) 1972) “*Returning officers who are Deputy Commissioners of local government have the major function of proclaiming parliamentary election results whereas the election commission only publishes the name of a returned candidate in an official Gazette*”. Returning officers could, therefore, easily change election results if they chose and the election commission had no power to obstruct or punish them. At the district level, the election commission controlled a District Election Officer (DEO). However, during polling, the Returning Officer played the major role. By law, the DEO functioned as a subordinate to the Deputy Commissioner/Returning Officer, with a status lower than the Upozila Nirbahi Officer (UNO).

To remedy infractions of electoral rules and indiscipline, some dispensations were afforded by the RPO, 1972. A candidate could file a petition regarding election irregularities to the election tribunal. But tardy proceedings by the tribunal often gave candidates cause for impatience. In most cases, petitions would not take a decision until after parliament was dissolved. As of 2006, only 39 of 225 petitions had been decided (Table 1).

Table 1. Functionality of Election Tribunal 1973-2006

Parliament	No. of election petitions	No. of petitions decided
First Parliament 03Mar1973 to 15Aug1975	4	0
Second Parliament 18Feb1979 to 24Mar1982	40	3
Third Parliament 07May1986 to 06Dec1987	106	3
Fourth Parliament 03Mar1988 to 06Dec1990	13	1
Fifth parliament 27Feb1991 to 24Nov1995	31	19
Sixth Parliament 19Mar1996 to 30Mar1996	0	0
Seventh Parliament 14Jul1996 to 13Jul2001	0	0
Eighth Parliament 28Oct2001 to 27Oct2006	31	13

Source: Md. Abdul Halim, 2008, CCB Foundation, Dhaka.

Another way to impede election commission performance involved workload. According to Article 119 of the Constitution, “*The major functions of the election commission are superintendence, direction and control of preparing electoral rolls for elections to the office of president and parliament; and conducting such elections*”. But a huge responsibility involved local elections that were also conducted by the election commission. Thus, during local elections, the commission carried an extra burden of fifty thousand local offices.

Election Commission under Political Controversy

Although the Constitution declared the election commission’s independence, it was unable to find shelter from political storms. Members of the commission always appointed persons loyal to the ruling political party. On 23 March 2005, for example, Appellate Division Justice M. A. Aziz was appointed Chief Election Commissioner (CEC) but was instantly rejected by the main opposition party (Karlekar 2005:243). He failed to present himself as a neutral person during his first exam at the Narsingdi by-election. In reaction to charges of rigging the election, Justice M. A. Aziz explained, “*I do not have miracle power to remedy the circumstance*” (*The Daily Star*, 24June2005). Hence, making certain that anybody with “miracle power” can rig an election.

The election commission undertook a series of programs to reform electoral rules that cancelled 1982 electoral roll ordinances (Hussain 2012). Initially, the commission prepared a fresh voter list. According to the Ordinance No. LXI (30Dec1982), “*Only the Election Commission can develop a voter list but cannot prepare a fresh voter list.*” They filed a court

case by process of writ petition. The High Court Division directed the Election Commission to develop the conventional voter list instead of a fresh voter list. The GC then appointed two more election commissioners on 17 January 2006 to grant majority support for the CEC. Opposition parties called for a general strike on 22 January to reject the recruitment of new election commissioners.



Source: *The Daily Star* (Oct 30, 2008).

The CEC controversy concerned political partisanship and the formation of a new voter list. After forming the 2006 CG, an effort was made to establish election commission neutrality but Mr. Aziz refused to resign as chief election commissioner. The president finally forced him to take ninety days leave (Hossain 2013).

On October 29, 2006, President Dr. Iajuddin Ahmed appointed himself chief advisor of the CG and then appointed ten advisory council members. But when Mr. Aziz went on leave, the President appointed two more election commissioners under Article 118(1) without consulting the advisory council (Riaz 2015:64). The Awami League's fourteen party grand alliance rejected the appointment. Thereafter, election commissioner Justice Mahfuzur Rahman declared himself acting CEC (Halim, 2008) a position for which the Constitution made no provision. The crisis became fatal when the CEC fixed a date for the submission of nomination papers for the general election on December 21, 2006. The opposition boycotted the election and demanded a full Election Commission makeover and correction of voter lists before the polls. Both the CG and the Election Commission were of a mind to hold the 9th Parliamentary election on January 22, 2007 but without properly updating the existing voter list. Prominent people were astonished as these troublesome issues remained unaddressed prior to announcing the election date. Moreover, most members of the CG remained uninformed. On September 11, 2006, the *National Democratic Institution for International Affairs* (NDI) published a report saying, "There were about 1.22 million extra (fake) voters added to the amended voter list". The report also said, "political violence was on the rise and thousands of people were injured and thirty people had been beaten to death" (NDI, Sep 11, 2006).

The above discussion on the 2006-2007 political crisis raised the following questions:

1. Why was the election cadastre announced without informing CG advisors?
2. Why did President Dr. Iajuddin Ahmed assume the office of chief advisor of the CG?

3. Why was all this so quickly accomplished prior to announcing the voter list?

All prior elections under CG auspices had updated the voter list before announcing an election date. The 7th Parliamentary Election of June 12, 1996 had been declared forty-six days before the election. The 8th Parliamentary Election was held on October 01, 2001 and declared forty-three days before the election. The 9th Parliamentary Election was announced fifty-six days before polling on January 22, 2007. Some delays to ease the debate with the ruling party could have been made, notwithstanding, but the Election Commission did not bother. Under a three-month limitation, entire electoral functions were to be finished by January 25, 2007, leaving only three days for re-election functions.

Partisanship played by the Election Commission and President caused a political crisis that caused the military to intervene and proclaim an emergency on January 11, 2007.

Constitutional Validity of Appointing Dr. Iajuddin Ahmed as Chief Advisor to the CG

The BNP led a four party alliance during its five-year tenure as of October 27, 2006. Before handing over power, the ruling government had nearly installed a loyalist, K. M. Hasan, as chief advisor of the CG. President Dr. Iajuddin Ahmed had already earned the nickname “Mr. Yes-Uddin” for his well-known partisanship. The Election Commission, Secretariat and government agencies had been politicized as government-loyal interests with a view to regain power via the 9th Parliamentary Election. Hence, Justice K. M. Hasan declared he had no interest in becoming chief advisor to the CG. When he refused the position, the President assumed the post without remedy via Thirteenth Amendment available options. The Awami League’s fourteen party alliance began a nationwide protest against the appointment and decided to boycott the general election on January 22. Three written petitions were filed to challenge this self-appointment, all questioning the constitutionality of the President’s decision (Ahmed 2010:27), which, according to Article 58C (3, 4, 5, 6), was in violation of his oath to serve the Constitution.

When Justice K. M. Hasan refused the office, under Article 58C, the president should have offered the job to Chief Justice Mahmudul Amin Chowdhury. But the BNP absurdly argued this was invalid because the Constitution made no provision for a third-in-line Chief Justice, seeing the second-in-line Mainur Reza Chowdhury had died. The third option under the constitution was Justice M. A. Aziz, a recently retired Justice of the appellate court. But this option was not possible because he already held the Constitutional post of Chief Election Commissioner. The fourth option under the constitution was the next retired Appellate Justice Hamidul Haque, who also held a post as Director General of the Judicial Administration Training Institute. The President did not offer him the post because BNP objected.

Therefore, the President clearly did not function neutrally. Had he suffered the decision under Article 58C, he might have sent the matter to the Supreme Court for consultation. The question therefore comes to mind that if the President could not find a non-partisan candidate for the position of Chief advisor, how is it he found ten non-partisan candidates to fill the council of advisors.

Politicized Judiciary

After his assumption of the office of Chief Advisor, three written petitions were filed against him based on the following arguments:

1. The president’s assumption of the office of Chief Advisor is unconstitutional and illegal.

2. To take a decision by the Chief Advisor without consulting the advisory council is unconstitutional and illegal.
3. Announcing the election schedule before correcting the voter list is illegal (Halim 2008).

On November 30, 2006, the High Court Division was prepared to issue a ruling but the Attorney General argued for a transfer to a larger bench because of the constitutional importance (*The Daily Star*, July 24, 2009). The bench had decided to rule after a lunch break at 2 pm but the Attorney General and former law and parliament affairs minister, Mr. Moudud Ahmed, went to the Chief Justice office to obtain a stay. Sadly, during those few minutes before the issue of a ruling, Nisi, the Chief Justice of the Supreme Court enforced a stay order by exercising his constitutional power. Another former Chief Justice, Mustafa Kamal, commented as follows: “*Although the Chief Justice is entrusted with this constitutional power it is unprecedented in judicial history that he would issue a stay order but only the purpose of show cause*” (*The Daily Prothom-alo*, Dec 04, 2006).

CONCLUSION

The CG’s mission was to organize free and fair elections. We have stated the basic features of the Thirteenth Amendment and explored related issues and provisions that led to the abolition of the CG. Theoretically, institutional stability depended on its structure. In this case, the CG structure was far too weak to govern the country peacefully. Moreover, it appears that elements of the Thirteenth Amendment were not properly applied. Nonetheless, Bangladesh’s democratization is ongoing and we expect the country to pursue democratic rule when next amending the constitution.

REFERENCES

- [1] Ahmed, N. (2010). Party politics under a non-party caretaker government in Bangladesh: The Fakruddin interregnum (2007–2009). *Commonwealth & Comparative Politics*, 48(1):27.
- [2] Amendment Article 61, Thirteenth Amendment of the Constitution: *The constitution of the people's republic of Bangladesh*, p. 130.
- [3] Article 58B (2). Thirteenth Amendment of the constitution: *The constitution of the people's republic of Bangladesh*, p. 128.
- [4] Article 58C. Thirteenth Amendment of the constitution: *The constitution of the people's republic of Bangladesh*.
- [5] Blichner, L.C. & Fossum, J.E. (1997). *Modern Constitution Making*. Newfoundland: Canadian Political Science Association, , pp. 3.
- [6] Buiyan, S. (2003). The Caretaker Government in Bangladesh: An appraisal of its Formation. Germany: Centre for the Development of Research (ZEF), No. 40, pp. 33–51,
- [7] Halim, M. (2008). *Constitution, Constitutional Law and Politics: Bangladesh Perspective*. Dhaka: CCB Foundation, pp. 462.
- [8] Hall, P.A. & Taylor, RCR (1996). Political science and the three new institutionalisms. *Political Studies Association*, 44(5):938.
- [9] Hussain, M. S. (2012). *Electoral Reform in Bangladesh 1972–2008*. Dhaka: Palok Publishers.
- [10] Hussain, M.S. (2013). Nirbachan commissione pach bochor 2007–2012 (Five years in election commission 2007-2012)". Dhaka: Palok Publishers.
- [11] Islam, M.R. (1999). *Development, governance and environment in south Asia: A focus on Bangladesh*. Macmillan, p. 166.
- [12] Islam, M.A., Ebrahimi, M. & Yusoff, K. (2017). Major factors in the establishment of a caretaker government as an institution in Bangladesh. *Man in India*, 97(2):815-828.
- [13] Jahan, R. (2008). The challenges of institutionalizing democracy in Bangladesh. No. 39, ISAS working paper.
- [14] Karlekar, H. (2005). *Bangladesh: the next Afghanistan?* London: Sage Publications, p. 243.
- [15] Ordinance No. LXI, The electoral rolls Ordinance 1982, 30 December 1982. Bangladesh: Ministry of law, justice and parliament affairs.
- [16] Rahman L (2003). *Tattabodhayak Sarkarer dinguli o amar katha (The days of caretaker government and my version)*. Dhaka: Ayesha Rahman, pp. 147.
- [17] Report of the National Democratic Institute (NDI) pre-election delegation to Bangladesh's 2006/2007 Parliamentary Elections; 11 September 2006, Dhaka.
- [18] Riaz, A. (2015). *Bangladesh: An introduction to South Asian politics*. NY: Rutledge, p. 64.
- [19] Rules of Business 1996, Schedule 1, Cabinet Division, Government of the People's Republic of Bangladesh, p. 3.

- [20] Schaffer, (2002). Back and Forth in Bangladesh. *Journal of Democracy*, 13(1):76–83.
- [21] Steinmo, S. (2008). “What is historical institutionalism?” In Porta DD & Keating M (Eds). *Forthcoming Theories in the Social Sciences*. England: Cambridge University Press, pp. 1–166.
- [22] Steinmo, S. (2008). *Historical institutionalism. Approaches and methodologies in the social sciences*. England: Cambridge University Press, PP.151-178.
- [23] The constitution of the people’s republic of Bangladesh, with latest amendment (2016): 42.
- [24] *The Daily Prothom-alo*. 04 December 2006.
- [25] *The Daily Star*, 24 June 2005.
- [26] *The Daily Star*. 12 November 2006.
- [27] *The Daily Star*. 24 June 2009.
- [28] *The Daily Star*. 30 October 2008.
- [29] The Representation of People Order 1972, Chapter III, Section 39, President’s Order no. 155 of 1972, 26 December 1972, Bangladesh: Legislative and Parliamentary Affairs division, Ministry of Law, Justice and Parliamentary Affairs.