

Contemporary Politics in Bangladesh: From Fifth Amendment to Fifteenth Amendment

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Abstract

Constitution in any organized community reflects the will of the people—their cherished hopes and aspirations. It is a symbol of distinct national identity, institutionalized behavior and ecological context. Hence "constitution is the way of life the state has chosen for itself". As a principle guide constitution sets institutional conditions of living, the principles of governance, the principles of transparency and the principles of all development intervention of the government and citizen bodies. Fundamental principles are ways of doing things 'the state has chosen for itself'. Constitutional scheme of allocation of policy responsibilities enable the government to operate public policy with institutionally designed sets of rules, procedures, acts, and statutes. The committee on constitution amendment may perhaps think to clean our constitution considering the characteristics of good constitution. Thinking about reprinting the constitution according to judicial decision and on the basis of recommendations for necessary modifications is to steer clear of all that may be rejected on the score of redundancy closing all the scope of politics of killing and seizure of power at the gun point.

Introduction

Bangladesh won its independence from Pakistan in 1971 after a genocidal struggle that left hundreds of thousands dead and displaced tens of millions. Since then, the country has roughly split its time between democratic and authoritarian rule. As happened in many newly independent states in the twentieth century, the champions of national independence came to power through elections and then refused to leave. Also typically, the one-party regime born of that refusal soon fell to a restive military. Seventeen years passed before another fairly-elected civilian government came to power, starting the longest spell of more or less democratic government in the country's still-short history.

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Only for the issues of trivial significance constitutional changes could not be advocated. There were so many issues in the realm of development. They ought to be addressed by legislation. Any change in GO-NGO relation, for example, does not require constitutional amendment. Women rights can be covered by women development policy. We do not want any separate provision regarding constitutional guarantee for minority communities or disadvantaged groups to safeguard their rights. Great Britain is run by convention. Trust on government is a fundamental value ensuring good governance in Great Britain. What is prescribed or proscribed is not mentioned in the UK constitution. There remains a conventional relationship between the government and the governed guided by mutual trust and confidence.

Article 42 of the constitution provides for constitution amendment by a party having a two-third majority in the parliament. The ruling government by a brute majority can make unilateral move to amend constitution but it may resent the opposition. In the recent past political analysts pointed finger at approving any draft amendments for deleting or twisting a certain provision that were unwarranted being politically motivated. Such irrational moves by the immediate past government irked the opposition.

This is about constitutional amendment in Bangladesh. The constitution of the People Republic of Bangladesh has been amended sixteen times so far. The study attempts to analysis facts about amendments laying a good stress of importance on fifth and fifteen amendments.

Like many other democratic countries our constitution is flexible amenable changes and readjustment. We should avoid any unilateral move for senseless amendments like 5th and 7th amendments and certain major changes to drastically alter basic essence of the constitution--the changes that may be knocked down by the judiciary. We want our constitution as a sacred document written in the blood of the martyrs should come back to 1972 tract-the original text with four state principles. The historic court verdict making it absolutely clear that all amendments made during military regimes ar null and void-ultr vires in other words perhaps hinted that 1972 constitution was staging a comeback. Even then with fifteen amendment we wonder whether fifteen amendments would fulfill the expectations of the progressive section of the intellectuals and think tanks? The article attempts to narrate the antecedents in connection with constitution amendments focusing on fifth and fifteen amendments.

Constitutional Amendment

Every state has its own constitution to enable governance to sustain. In fact the thing like nexus between the government and the governed is well structure in the political constitution. "The word constitution has been used in two senses. One, as a document embodying the rules that regulate the government. The second, as a set of legal and extra-legal rules that establish and govern the government. These extra-legal rules include customs, understandings, practices etc. It is impossible to study the constitution as a mere set of rules as separate from the other general principles (both legal and non-legal) and other rules enacted by the legislature which are supplementary to the constitution. These laws are sometimes called organic laws. The constitution in many countries merely laws down the broad and general principles of various institutions. It is these organic rules that regulate how exactly they are constituted and how they function."(K. C Wheare 1966).

As the supreme law of the land constitution shapes institutional structures that serve to provide broadly based guidelines to help the government to determine the forward course of action. What government does to act upon public demands and to set priorities or allocate values is determined by legal procedures and processes contained in constitutional provisions. Constitutional scheme of allocation of policy responsibilities enable the government to operate public policy with institutionally designed sets of rules, procedures, acts, and statutes.

State policy guides function of modern constitutional government both implicitly and explicitly. It is an instrument of special sanctity giving a sense of direction in Policymaking, rules- making, administration and adjudication, election and electoral governance. As a principle guide constitution sets institutional conditions of living, the principles of governance, the principles of transparency and the principles of all development intervention of the government and citizen bodies. Fundamental principles are ways of doing things 'the state has chosen for itself'.

Constitution in any organized community reflects the will of the people-their cherished hopes and aspirations. It is a symbol of distinct national identity, institutionalized behavior and ecological context. Hence "constitution is the way of life the state has chosen for itself". "A system of fundamental political institutions is constitution" (Finer1949: 116)

Fundamental political institutions include among others: forms of governments, legislative branch, executive, judiciary, electorate, bureaucracy, various committees and commissions, inter-governmental linkage, political parties, pressure groups and press.

As an "autobiography of power relationship" (Finer 1949:116) constitution is, in large measure, an instrument of apportioning power status to the ruling elite, counter elite, defining the position of the opposition, limiting exercise of state of power and regulating the relationship between the ruler and the ruled. While recognizing the authoritative positions of the institutional structures like the cabinet, bureaucracy, planning commissions, parliamentary committees and other policy making bodies constitution provides suitable mechanism for protecting liberty within which the individual is allowed freedom of action and a large variety of civil and political rights. Fundamental rights thus stated in the constitution of Bangladesh are a marked expression of citizen status in a civil society.

The dominant policy actors, say, Head of the government, Ministers, State Ministers, Deputy Ministers and Government Secretaries can act within the domain of authority set by the constitution. The American constitution accentuates organic separation of power coupled with check and balance as the fundamental political institution. This is an instrument not only of the dominant policy actors but also the consumers of public policy linking something of the values like liberty, public choice and human rights. Constitution's scheme of checks and balances is the means for maintaining the separation of power, balancing it with the concepts of individual liberty and human rights. Most of the democratic constitutions have established linkages enabling each organ of government to check and balance the others. The three organs of government are responsive to each other through this institutional linkage and thus ensure a modicum of good governance.

In theory institutional activities are based on guiding principles. Particularly the structure of state policy is explicit involving legal matters. In USA important policy clusters operate within the institutional framework. Here judicial interpretation is conspicuous; it may declare any policy decision of the public organizations to be of no force or effect, which are in conflict with the supreme law of the land (Haines 1951).

Judicial interpretation of the USA constitution bespeaks of judicial supremacy

-a remarkable aspect judicial process. The American constitution accentuates organic separation of power coupled with check and balance as the fundamental political Institution. This is an instrument not only of the dominant policy actors but also the consumers of public policy inking something of the values like liberty, public choice and human rights. Equal and independent legislative executive, and judicial branches are established in the USA constitution to control the abuse of power. The Supreme Court in USA can declare unconstitutional an act of the elective branches. Until the 1930's the court resorted only in frequently to judicial review. Since 1950's the exercise of judicial review has become more common. The theoretical reconciliation of judicial review with majority rule remains difficult. The American system of governance justifies judicial review based on conception of the democratic process that stress the importance of minority rights as well as majority rule (Edward III and Sharknsky 1978:52).

Constitution of the Different World

Constitutionally defined fundamental principles of state policies are a pure value orientation pattern designed to guide policy action and functioning to the public system. The 'perceived course of action', projection of objectives and goal- settings are all policy Making function within the constitutionally defined politico-administrative super structure Sanctity of the constitution as a sacred document is maintained by properly arranging things to fit well in a real system perspective in accordance with the fundamental principles. State policy guides function of modern constitutional government both implicitly and explicitly. It is an instrument of special sanctity giving a sense of direction in broad Policymaking, rules- making, administration and adjudication. As a principles guideIt sets institutional conditions of living, the principles of governance, the principles of transparency and the principles of all development intervention of the government and citizen bodies. Fundamental principles are ways of doing things 'the state has chosen for itself '. The constitution of the people's republic of Bangladesh contains fundamental principles of the state policy. "The principles set ... shall be fundamental to the governance of Bangladesh, shall be applied by the state in the making of laws, shall be a guide to the interpretation of the constitution and of the other laws of Bangladesh, and shall form the basis of the work of the state and of its citizens, but shall not be Judicially Enforceable". (60B 1994).

Controversies over what is 'constitutionally permissible behavior' and what is 'constitutionally prescribed' are difficult to resolve. The judiciary actually plays much of a part in resolving such controversies. In countries like USA, Australia, Canada, Switzerland, Germany, Austria, Norway, Japan and India judicial reviews with the involvement of law and constitutional experts examine the rationale of policy development at the legislative, executive and bureaucratic level by determining the constitutionality of such institutional actions. (Mason 1962). In England social policy making process is subservient to judicial interpretation. "The Supreme Court of India may through its decisions, give new interpretations to some of the articles of the constitution which may amount to a new policy." (Sapru 1994).

Public policies are authoritatively predetermined set of decisions in which public institutions are the dominant factors. Budgeting and programming through project and planning on the development side; and laws, ordinances, rules, statues and decrees on the legal side, -- are all drawn upon institutional sanction with the government of the state as the keystone of processing and authoritative allocation of values.

Unconstitutional executive action in any policy sector invoked against a group or section may invite judicial intervention. Rehabilitation program implemented at the primary stage through forceful eviction of the sex workers from the red light area of Narayangonj was termed as a violation of human right as stated in article 11 of the constitution of the Peoples Republic of Bangladesh.

Independence of Judiciary should have been a major policy concern. Even then there is an example of turning down a court decision in contravention of articles 109 and 116 of the constitution.

Constitutional recognition of fundamental rights has humanitarian underpinnings that shape the direction of all legal operations associated with public policy. Article 26 of the constitution of the People's Republic of Bangladesh provides that all existing laws inconsistent with fundamental rights become void. (GOB 1994) Fundamental rights include among others: equality before law, equality of opportunities in public employment, right to protection of law, protection to life and personal liberty, prohibition of forced labor, protection in respect of trial and punishment, freedom of movement, freedom of profession or occupation, freedom of religion, rights to property,

and prohibition of discrimination on grounds of religion, race, caste, sex and place of birth. Public policy on the substantive area like women development conforms to the provision of the constitution providing for the participation of women in national life. The policy area of women participation as a target group has been stressed upon with utmost concern. This constitutional obligation of the government enables it to take necessary steps towards promoting improvement of women with all the avenues of participation in the mainstreams of community life. Policy advocacy roles of the public promotional agencies as well as NGOs in favour of the recent neo-social movement like women emancipation are aimed at fulfilling such obligation.

Fifth Amendment of Bangladesh

The Fifth Amendment Act amended the Fourth Schedule to the constitution by adding a new paragraph 18 thereto, which provided that 'all amendments, additions, modifications, substitutions and omissions made in the constitution during the period between 15 August 1975 and 9 April 1979 (both days inclusive) by any Proclamation or Proclamation Order of the Martial Law Authorities had been validly made and would not be called in question in or before any court or tribunal or authority on any ground whatsoever.'

According to the 5th Amendment of the constitution which was adopted on 6th April 1979, the major obligations had been protected as below according to the Liton (2010).

- 1) The Capture of power by Khandakar Mustaque Ahmad as President (15th August, 1975 - 6 November 1975) declared as legal.
- 2) The appointment of Chief Justice Abu Sadat Mohammad Sayem as President (6 November, 1975 - 1977) declared as legal.
- 3) The post of Chief Martial Law Administrator as held by Major Gen. Ziaur Rahman (7 November 1976 - June 1978) and successive captured Presidency post of him declared as legal.
- 4) Nobody would challenge the murder of Sheikh Muzibur Rahman and his family members (of 15 August 1975) and all other related killings in the court under any circumstances (Indemnity Bill).
- 5) Multiparty system had been re-instead instead of one party system, like Baksal (Bangladesh Krishak Shramik Awami League).
- 6) The provisions of Secularism and Socialism had been abolished from the constitution.

The fifth Amendment ratified all actions including those that destroyed the basic character of the country's constitution and made it subordinate to martial law proclamations, orders and regulations made during around four years after August 15, 1975 (Shakhawat Liton 2010).

Amendments, additions, modifications, substitutions and omissions were indiscriminately made to the constitution during the martial law regime that began immediately after the brutal assassination of Bangabandhu Sheikh Mujibur Rahman (Shakhawat Liton 2010).

These actions changed the fundamental principles of state policy, destroyed the secular character of the constitution, allowed politics based on religion, and provided political rights to the anti-Liberation War forces and war criminals (Shakhawat Liton 2010)..Besides, Bengali nationalism was replaced by Bangladeshi nationalism through the fifth amendment passed during the regime of military ruler Ziaur Rahman (Shakhawat Liton 2010).

According to the 2005 High Court verdict, the amendment undermined the very sovereign character of the Republic. Article 1 of the constitution says 'Bangladesh is a unitary, independent, sovereign republic to be known as the People's Republic of Bangladesh.' Former chief justice Mustafa Kamal interpreted Article 1 of the constitution. He said in his book "Bangladesh Constitution: Trends and Issues", "Article 1 distinguishes Bangladesh from a dependency or a colony or a federating unit. Bangladesh has opted for a republican form of government. So, any kind of monarchy, oligarchy, aristocracy or dictatorship is an anathema to its republican character" (Shakhawat Liton 2010).

Justice Shahabuddin Ahmed said "sovereignty belongs to the people, and supremacy of the constitution as the solemn expression of the will of people, democracy, republican government, unitary state, separation of powers, independence of judiciary and fundamental rights are basic structures of the constitution." "These are the structural pillars of the constitution and they stand beyond any change by amendatory process," he observed. Trial of war criminals stopped and their political rehabilitation began with the scrapping of the Bangladesh Collaborators (Special Tribunal) Order 1972 by Khandaker Mushtaque Ahmed, who assumed presidency and put the country under martial law (Shakhawat Liton 2010).

Article 8 of the original constitution, which speaks of the four fundamental principles of state policy--nationalism, socialism, democracy and secularism, was amended to omit secularism and insert the words "absolute trust and faith in Almighty Allah". The principle of socialism was also given a new explanation, saying "socialism would mean economic and social justice". The amendment totally omitted article 12, which contained secularism and freedom of religion. "These changes were of fundamental in nature and changed the very basis of our war for liberation and also defaced the constitution altogether," the High Court observed in its verdict, which, it said, transformed secular Bangladesh into a "theocratic state" and "betrayed one of the dominant causes for the war of liberation of Bangladesh" . (Shakhawat Liton 2010).

Historic Court Verdict

The Supreme Court in the final verdict passed judgment in favour of High court orders. So Fifth Amendment to the constitution is declared null and void.

After dismissing the two leave-to-appeals petitions, the six-member bench of the "Appellate Division headed by chief Justice Md Tafazzal Islam pronounced the judgment as saying, "The petitions are dismissed with modifications and observations." But the "modifications and observations" were not available immediately. Some lawyers were of the views that following the petitions' dismissal, the country will go back to the 1972 constitution"

In view of a writ petition High court bench comprising Justice ABM Khairul Haque and Justice ATM Fazle Kabir declared illegal the Fifth Amendment to the constitution. Dismissal of the two leave-to appeal petitions by the highest court of appeal vacated the stay on the operation of the high court ruling invalidating the 5th amendment of the constitution. According to the information received from English daily: "After the apex court order, attorney general Mahbubey Alam told reporters that following the Supreme Court order the rule of the law is established" "It was a great victory for establishing the rule of law. Following the Supreme Court order 'martial law' has been eradicated from the constitution," he added.

The chief law officer of the state said: "Following the apex court verdict, the possibility of any future military takeover ends forever in the country.

The name of Bangladesh is now included in the list of countries which are not familiar with military.

Defense counsel Advocate TH Khan, who appeared for the BNP secretary general, told newsmen that the people were eagerly waiting to see the judgment. But the court rejected our petitions after the six-day hearing. It was too short a time for raising our legal points in the hearing on an important case, he noted. "We are hopeful amid frustration after hearing about modifications and observations' over the HC judgment during the apex court order. Now we are waiting to see what kind of modifications and observation would be in the Supreme Court order."

As the present government withdrew its appeal petition against High court order enabling the Apex court to pass the final judgment there is ample scope for constitution of 1972 to come back to its original form with a little modification. The court decision upheld the four principles of course. The fact is that no body except the parliament has any right to amend constitution. Whatever amendment may be brought to 1972 constitution it should be done within constitutional-legal framework not other way round.

The military regime in a seemingly changed political scenario modified state policy by issuing proclamations (Amdt.) Order of 1977. Regime's definition of ideological frame work or value orientation pattern clearly shows up in the modified version of state policy, such as, the principle of absolute trust and faith in the Almighty Allah in the place of secularism. This was antithesis to the institutional formation based on secular values. Socialism is redefined to denote economic and social justice. (GOB 1994). The regime after August 15, 1975 moved with conspirational design to undo the values of liberation war as reflected in the fundamental principles of the original constitution. It made a frantic effort to reconfigure ideological formation of the state through Fifth Amendment to the constitution.

In his instant reaction, the former Law Minister Shafique Ahmed said the SC ruling has in fact restored the spirit of the 1972 constitution. Attorney General Mahbubey Alam said the implications of the court's decision could be known once the judgment's copy is available. It is however sure that the constitution would have nothing called "martial law", he noted. The HC verdict asserts that imposing martial law or usurping power by any extra-constitutional means would always be illegitimate. Replying to a query,

Mahbubey Alam said there would be no need for parliament to pass any bill in this regard'.

SC in a reviewed 5th amendment judgment asked JS to condone some actions of martial law. In the verdict upper court also revoked Care taker system. It asked the government to settle the valid demand of the owner of the Moon cinema hall with three months of the reviewed 5th amendment judgment.

Fifteenth Amendments

"The Parliament of Bangladesh, the Jatiyo Sangsad, passed the Constitution (Fifteenth Amendment) Bill 2011 on 30 June 2011 to amend its Constitution. The Bill which contained 15 proposals was passed, while opposition parties were boycotting Parliament, by the division vote with a majority of 291-1. It scrapped the provision of the caretaker government system for holding general election. However, amendments moved by ruling alliance opposing Islam as the State religion and religion based politics were rejected. Islam has been retained as the State religion along with Bismillahi-Ar-Rahmanir-Rahim. The Fifteenth Amendment had shaken the entire Constitution and put the whole nation into long term political uncertainty. In this article, I aim to briefly identify the main features of the Fifteenth Amendment, discuss briefly how the provision of the caretaker government was repealed and then to analyse the legitimacy and the legality of the said Amendment. Based on the analysis and assessment, I will try to draw some conclusions."(Barrister Nazir Ahmed)

It has been passed on 30 June 2011 in the 9th Parliament. This Amendment has been done on the basis of the HC/SC verdicts on 5th, 7th and 13th Amendments of the Constitution.

Key Issues of 15th Amendment of the Constitution

- 1) Caretaker system abolished
- 2) Elections to be held under incumbent cabinet
- 3) Islam as State religion and 'Bismillah-Ar-Rahman-Ar-Rahim' retained above the preamble.
- 4) Removal of 'Absolute Faith and Trust in Allah' from the constitution.
- 5) Revival of Article 12 to restore Secularism and freedom of religion.
- 6) Maintains the provision allowing religion-based politics.
- 7) Denies recognizing the indigenous people, will be termed as tribal and ethnic minorities

- 8) The people of Bangladesh shall be known as Bangalees as a nation and citizens of Bangladesh shall be known as Bangladeshis
- 9) Inserted articles 7A and 7B in the Constitution after Article 7 in a bid to end take-over of power through extra-constitutional means and highest level of punishment would be awarded for those power capturers by extra-constitutional means.
- 10) Basic provisions of the constitution are not amendable.
- 11) In the case of a dissolution Parliament by any reason, election should be held within 90 days of such dissolution.
- 12) Increasing the number of women reserve seats to 50 from existing 45.
- 13) The Supreme Command of the defense services shall vest in the President and the exercise thereof shall be regulated by law.
- 14) The Chief Justice shall be appointed by the President, and the other judges shall be appointed by the President in consultation with the Chief Justice.
- 15) The portrait of the Sheikh Mujibur Rahman shall be preserved and display at the offices of the President, the Prime Minister, the Speaker, and the Chief Justice and in head and branch offices of all government and semi-government offices, autonomous bodies, statutory public authorities, government and non-government educational institutions, embassies and missions of Bangladesh abroad.
- 16) Incorporation of speech of Sheikh Mujibur Rahman on March 7, 1971, declaration of independence by Mujibur Rahman after midnight of March 25, 1971 and the proclamation of Independence declared at Mujibnagar on April 10, 1971.

Conclusion and Recommendations

The committee on constitution amendment may perhaps think to clean our constitution considering the characteristics of good constitution. Thinking about reprinting the constitution according to judicial decision and on the basis of recommendations for necessary modifications is to steer clear of all that may be rejected on the score of redundancy closing all the scope of politics of killing and seizure of power at the gun point. There will be no scope for communalism and using religion to political advantage. Secularism that will be institutionally reincarnated does not necessary denotes anti-God or blasphemy.

We welcome 'the interaction between the special parliamentary committee on constitutional amendments and various political and social groups of society. Recommendations have been made, reservations have been voiced and clarity has wiped away certain misgivings that might arise if the upcoming amendment was not handled with care. We would like to examine if all this was reflected in the draft amendment. May be some amendments come into conflict with constitutional provision on fundamental rights. The committee needs to be careful about it. The report of the institutional amendment committee after a good deal of revision perhaps made public through website.

The care taker concept was contained in the 13th amendment to the constitution. The care taker government (CTG) was facing a great challenge. It is not that the CTG system has lost its creditability for flawed election. It rather conducted free and fair elections since its inception in 1996. Only the concept has turned out to become shrouded in controversies. Even the party that fought for fair election under CTG was turning against it for the reasons best known to it. And the then government (now the main opposition), opposed the move for CTG as unconstitutional. It had to reluctantly accept CTG yielding to opposition pressure.

The New CTG promulgated a new set of rules 'curbing political activities and laying down detailed guidelines for the media to tighten the state of emergency. According to the emergency power rules 2007 "Provocative activities , including meeting, gathering, procession, , rally, hartal, strike, lock out and other public functions of political parties , trade union, clubs or associations, have been suspended until further order or until the state of emergency is withdrawn". There were restrictions on broadcasting or telecasting harmful or provocative activities on the electronic media or internet. "No photo or film of such activities will be published or broadcast/telecast in the media" "The government can ban rallies, meetings, blockades, statements and harmful or provocative activities and take action against such activities to maintain discipline and peace."

The reasons behind scrapping care taker concept are not far to seek. Despite the fact that care-taker concept since its journey from first interim government led by President Shahabuddin Ahmed has been effective in preparing a level playing field for perfect political competition and holding fair elections for democratic transition the way things were governed during

the incumbency of Latifur Rahman and Fakhruddin Ahmed generated a lot of controversies. Also, in 1996 there was an abortive coup to topple CTG led by Habibur Rahman. The story of running care-taker administration based on state of emergency semblance of quasi-military rule is unusual full of blunders and fantasies. CTG system as a semi-military rule continuing for two years was unconstitutional rendering many a political leader (both AL and BNP) victim of atrocities and grilling. Also unconstitutional was involvement in policy making to delay the process of managing election. The period preceding general election under CTG wrecked havoc with massive destruction and crack down on the political actors associated with the immediate past political government. Now the Chambers of Commerce full of tycoons advocated scrapping of caretaker government contained in 13th amendment to the constitution. Many a think tank was in favour of abolishing CTG for the possibility of military take over in the event of the dysfunctions of CTG could be ruled out. However any reasonable bent of mind would like to support wider national consensus and even referendum before reprinting the constitution.

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