

A Critical Analysis of the Need for Constitutional Reforms for Democracy in Bangladesh

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Abstract: In Bangladesh, Constitution is the supreme law. The Constitution of Bangladesh started its journey as 'The Constitution of the People's Republic of Bangladesh' on 16th December 1972. It is a written Constitution having 153 articles. The Constitution is founded on four pillars known as nationalism, socialism, democracy, and secularism. Among these four fundamental principles of state policy, democracy has been given more priority in the Constitution. And this is because the Constitution was adopted democratically by the Constituent Assembly. From the preamble to some other provisions of the Constitution, democracy is reflected. At the same time, some provisions of the Constitution are contradicting the concept of democracy. The 50-year lifespan of the Bangladesh Constitution was ended on December 16, 2022. It has been altered seventeen times over this journey. Most of these modifications, with the exception of two or three, were passed to further the interests of the ruling party rather than those of the country and its people. The Constitution contains a number of inconsistencies that make it difficult to enact democracy in the state. This paper will discuss democracy in the light of the Bangladesh Constitution and try to point out the contradicting provisions of the Constitution with democracy and suggest possible constitutional reforms.

Keywords: Bangladesh Constitution, Amendment, Article, Democracy, President, Prime Minister

1. Introduction

The constitution is called the mirror of the State. It shows the nature of the State, the formation of the government, the rights of the people, and the relationship between the government and the people. Citizens' rights are outlined in a constitution and are safeguarded from governmental misuse. As a result, minority rights are protected. It also restricts and balances government power in relation to other participants and institutions [9]. Bangladesh became independent on 26th March 1971 and she got her constitution, named 'The Constitution of the People's Republic of Bangladesh' on 16th December 1972, on the first victory anniversary, after a historic struggle for national liberation. It is important to note here that there were two interim Constitutions of Bangladesh. During the time of the liberation war, from 10th April 1971 to 10th January 1972, 'The Proclamation of the Independence' and from 11th January 1972 to before the commencement of 'The Constitution of the People's Republic of Bangladesh 1972', and 'The Provisional Constitution of

Bangladesh Order', were the two interim Constitutions of Bangladesh.

The basic goal of the state is to "...realize through the democratic process a socialist society, free from exploitation a society in which the rule of law, fundamental human rights and freedom, equality, and justice, political, economic, and social, will be secured for all citizens," according to the third part of the preamble of the Bangladeshi Constitution [15].

Though the preamble and also some other parts of the Bangladesh Constitution make democracy, rule of law, equality, and justice the fundamental aims of the State, still some provisions in the Constitution are contradicting these aims.

Bangladesh Constitution completed its 50 years in 2022 on 16th December. During this journey, it has been amended seventeen times. Except for two or three, most of these amendments were enacted to serve the interests of the ruling

party rather than the needs of the nation and its citizens [1]. Still, there are many contradictory provisions in the constitution which create a bar to implement democracy in the state. These inconsistencies will be discussed in this paper along with potential changes.

2. Democracy

2.1. Meaning

The word 'democracy' is derived from two Greek terms *demos* and *kratia*. The first one is used to mean people and the latter one is used to mean rule [13]. US President Abraham Lincoln defined democracy as, the 'government of the people, by the people and for the people. Democracy is demarcated by John Calhoun as not the rule of the majority but the diffusion of power, representation of interests, and recognition of minorities [13]. Schmitter and Karl described democracy as a form of government in which voters indirectly hold rulers accountable for their public deeds through the conflict and cooperation of their elected representatives. According to the Cambridge Dictionary democracy means the belief in freedom and equality between people, or a system of government based on this belief, in which power is either held by elected representatives or directly by the people themselves [4]. At present, we may define democracy as a form of government system where people rule themselves directly or indirectly through their elected representatives [13].

2.2. Requisites of Democracy

In a state to promote democracy, some elements are indispensable such as:

- a) *Liberty and Equality of the People*: The main basis of democracy is the liberty and equality of the people [2]. People must have the liberty of their person and property and without reasonable ground, there should be no classification among people of the country.
- b) *Fraternity*: To make democracy a fruitful peaceful atmosphere in the country is essential and without fraternity or brotherliness among citizens, it is not possible [2].
- c) *People are the source of all power*: In a democratic State people is the real owner of all power and the government exercises its power on behalf of the people [2].
- d) *Assurance of fundamental rights of the people*: In a democracy, fundamental rights are guaranteed by the constitution of the State and must have judicial enforcement. A democratic country must assure that people will get enough rights and benefits to lead a life with dignity [13].
- e) *Strong Opposition Parties*: In a democracy, an opposition party is called an alternative government. By active criticism, the opposition party or parties keep the government under pressure and play a role in making the public aware of government activities.

- f) *Accountability of the Government*: For democracy, good governance must be ensured and accountability of the government ensures such good governance. Where the government is accountable to the people directly or impliedly, there will be less chance of abuse of power. The type of government accountability generally depends on the constitution of the state.
- g) *Freedom of Media*: It is said that in democracy criticism of the government is not only permitted but also encouraged. Without the freedom of mass media, constructive criticism of the government is not possible.
- h) *Independence of the judiciary*: Independence of the judiciary is considered one of the most essential elements of democracy because as a guardian of the constitution the highest division of the judiciary protects people's rights and justifies the constitutionality of government activities.
- i) *A neutral Election Commission*: Free, fair, and neutral election is essential for democracy in a state. Without an impartial election commission, such an election is not possible [13].

3. Democracy Under Bangladesh Constitution

The constitution of Bangladesh from 1972 adopted a republican system of government with the sovereignty of the people at the top of the power pyramid, rejecting monarchy, oligarchy, or aristocracy [5]. Altogether, the preamble, articles 7, 8, 9, 11, 32, 37, 38, 39, 57, 59, 60, 65, 123, and 142 speak of a complete democracy in the Republic [5]. Here, the Bangladesh Constitution's provisions for the elements or requisites of democracy are highlighted:

3.1. Liberty and Equality of the People

In Bangladesh Constitution, there is an assurance of liberty and equality of the people by the preamble, fundamental principles of state policy, and also by the fundamental rights. The preamble of the constitution strongly declares that it should be the basic goal of Bangladesh to establish a socialist society in a democratic way where there shall be no exploitation and for all citizens rule of law, political, social, and economic fundamental human rights, freedom, equality shall be secured [15]. Moreover, article 11 of the Bangladesh Constitution affirms democracy as a fundamental state policy where fundamental human rights and freedom of the people must be guaranteed [15]. Furthermore, there is a provision for equality of opportunity to all citizens in Article 19.

Liberty and Equality of the people are also ensured by fundamental rights. In Article 27 it is said that every citizen is equal before the law and no one shall be deprived of life or personal liberty unless in accordance with the law, according to Article 32 [15].

3.2. Fraternity

Behind the creation of Bangladesh, the historical war of independence, fraternity, or brotherliness had a great role and for this reason, 'nationalism' is the first fundamental principle of state policy. Under Article 9, it is said that the root of Bangalee nationalism shall be the unity and solidarity of the Bangalee nation [15].

3.3. People Is the Source of All Power

In Bangladesh people is the owner of all powers of the state. The preamble's opening sentence reads, "We, the people of Bangladesh, having proclaimed our independence on the 26th day of March 1971 and through a historic struggle for national liberation established the independent, sovereign People's Republic of Bangladesh" [15].

Again, directing to democracy, article 11 of the constitution declared that with the actual participation of the elected representatives of the people at all levels, Bangladesh shall be a democracy [15].

3.4. Assurance of Fundamental Rights of the People

From Article 27 to Article 44 there are 18 fundamental rights for the citizens and if any person is deprived of his or her fundamental right shall be through Article 44 and Article 102. But how far these 18 fundamental rights are enough to enable a person to lead a life with dignity is a question of fact.

3.5. Strong Opposition Parties

Multiparty political system is followed in Bangladesh. After a general election, the political party which gets the majority seats in the parliament forms the government and other participating political parties stay as opposition parties.

3.6. Accountability of the Government

Constitutionally the ruling party that is the prime minister and other cabinet members shall be accountable to the parliament collectively [15].

3.7. Freedom of Media

As an element of democracy Bangladesh Constitution guaranteed freedom of the press [15].

3.8. Independence of the Judiciary

Independence of the judiciary is considered a basic structure of the constitution [3]. Separation of the judiciary and independence of the judiciary is acknowledged by Bangladesh Constitution. As a fundamental principle of state policy, article 22 creates an obligation on the government to separate the Judiciary from the executive organs of the govt, and finally, the government separated the judiciary in 2007.

The Chief Justice and other judges are given the authority to act independently while carrying out their responsibilities under Article 94. According to Article 116A, all members of the judicial branch and all magistrates shall use their judicial

powers independently [15].

Additionally, the supreme court has the constitutional power to make judicial reviews of all activities of the government under Article 102 (2) [15]. The Supreme Court could use this authority to invalidate any law if it conflicts with the Constitution's guarantees of fundamental rights or any other provision [11].

3.9. A neutral Election Commission

A neutral election commission is essential to make democracy strong. Bangladesh Constitution ensures the independence of the election commission. Constitutionally the CEC and other EC (maximum 4) shall be appointed by the president for 5 years and shall be removed according to the same procedure that applies to the judges of the Supreme Court according to the Act passed by the Parliament [15]. In this regard, recently the parliament has passed the Chief Election Commissioner and other Election Commissioners Appointment Act 2022. Since 2009 there is a separate Election Commission Secretariat for administering administrative functions of the Commission.

To ensure the impartiality of the CEC and other EC, the Constitution prohibits the reappointment of these persons in any other service of the republic [15].

4. Contradictory Provisions of Bangladesh Constitution with Democracy

One of the fundamental principles of the state policy of Bangladesh is democracy. The preamble, article 11, and some other provisions of the Bangladesh Constitution contain elements of democracy. There are mentions of liberty and equality of the people, fraternity or brotherliness, people are the source of all state power, fundamental rights of the people, cohabitation of the ruling party and opposition parties, freedom of media, etc. in the Constitution. But at the same time, some major loopholes in the Bangladesh Constitution create an obstacle to ensuring democracy. Here such loopholes are pointed out:

4.1. Responsible Government Is Not Ensured by the Constitution

A Westminster-style parliamentary form of government was promised in the 1972 Bangladesh Constitution, but due to certain of its repressive elements, it was unable to be implemented [10]. According to article 55(3) of the current Constitution, the government is jointly accountable to the parliament. In practice, this kind of accountability is ineffective because the parliament lacks the authority to remove any minister for failing to uphold their obligations.

In Bangladesh Constitution, there are provisions for the impeachment of the president under Article 52, and the impeachment of the Speaker and Deputy Speaker under Article 74 but there is nothing in the Constitution for the

impeachment of the prime minister and the ministers who run the government power.

As per the inner meaning of Article 58(2) ministers are individually responsible to the prime minister as the prime minister may request any minister to resign, the minister has to resign otherwise he will be terminated by the president according to the advice of the prime minister [15]. This article alerts a minister that s/he has to satisfy the prime minister to continue his official existence.

The exercise of powers when a constitutional office becomes vacant is specifically addressed in the constitution of Bangladesh. For instance, the Speaker will perform the President's duties while the President is not there [15]. When the Speaker is not present, the Deputy Speaker takes over, and when neither the Speaker nor the Deputy Speaker is present, a member of parliament designated by the Parliamentary Rules of Procedure assumes the Speaker's duties [15]. The next senior judge of the Appellate Division will perform the duties and responsibilities of the Chief Justice in his or her absence [15]. But interestingly the Bangladesh Constitution is silent about who shall exercise the powers and functions of the Prime Minister in his absence.

Article 70 is another barrier to not assuring responsible government. This article was added to the constitution to prevent floor-crossing, although it is frequently utilized to pass laws that are beneficial to the party enacting them [6]. This article pronounces that any member of the legislature who votes against his or her party will forfeit their membership in the legislature [15]. For this reason, a member of parliament has to support the party's decision in the parliament even though it goes against his morality. So ruling party always feels safe in the parliament due to this article 70.

4.2. Lack of Independence of the Judiciary

An independent judiciary is a prerequisite of democracy. Though in articles 22, 94, and 116A the Constitution declares for the independence of the judiciary due to the presence of some other provisions of the Constitution like 96, 98, and 99 the independence of the judiciary cannot be ensured.

Article 96: This article is related to the security of service of the judges of the Supreme Court. Following the 16th amendment, Parliament now has the authority to dismiss Supreme Court justices. Based on the writ petition, named, Advocate Asaduzzaman Siddiqui and others vs. Bangladesh (WP 9989/2014), the Supreme Court declared this amendment void and viewed it in favor of the re-establishment of Supreme Judicial Justice. A review of the writ petition is still pending before the Appellate Division. If Article 96 is not revived with the re-establishment of the Supreme Judicial Justice and the power is given to the parliament, then the independence of the judiciary will be threatened.

Article 98: This article empowers the President that if he is satisfied he may appoint any number of judges for any Division of the Supreme Court for two years which may be extended for one further term. Here there is no mention of consultation with the Chief Justice. This article creates scope

for executive influence in the appointment of the judiciary as the president has to do this after taking advice from the prime minister [15].

Article 99: According to this article, a judge of the Supreme Court, after his/her retirement, may be appointed in some government offices which are not the office of profit. According to articles 66(3) and 147(4), the offices of president, prime minister, speaker, deputy-speaker, minister, minister of state, deputy minister, chairman & members of the public service commission, comptroller, and auditor general, among others, are not for profit. In reality, these posts are very attractive and expected posts to anyone. Naturally, it may influence a judge to become biased during his/her service in the Supreme Court which is not friendly to the independence of the judiciary of a state.

4.3. Deficiency of a Neutral Election Commission

The neutral functioning of an organization highly depends on the impartial appointment of eligible persons. This is indispensable for Election Commission. Article 118 of the Constitution states that the President shall appoint the Chief Election Commissioner and other Election Commissioners in accordance with the Act that was passed by the Parliament [15]. To comply with this Constitutional mandate finally, the parliament has passed the Chief Election Commissioner and other Election Commissioners Appointment Act 2022.

According to this Act, the chief election commissioner and other election commissioners shall be appointed by the president from a list of recommendations submitted by the "Search Committee" [14]. Here the search committee recommends two names for each post and then the president selects one person from the recommended list [14]. But due to the constitutional mandate of Article 48(3), the president has to do this according to the prime minister's advice. And thus, neutral appointment in the Election Commission is influenced by the executive. Again, fair elections are impossible without an impartial government that supervises the administration and the police force [12].

5. Required Constitutional Reforms to Ensure Democracy in Bangladesh

5.1. Necessary Reforms for Responsible Government

Under Article 55(3) ministers should be made responsible individually and also to the parliament. Impeachment provisions for the Prime minister and ministers must be inserted in articles 57 and 58.

Moreover, interestingly the Bangladesh Constitution is silent about who shall exercise the powers and functions of the Prime Minister in his absence. The constitution has been amended seventeen times but still, this issue fails to draw the attention of the lawmakers. So, the provision relating to the exercise of powers in the absence of the Prime minister should be included. Abolition of Article 70 so that members of the parliament can give their votes freely.

5.2. To Ensure the Impartial Role of the President

As the president must carry out all of his duties on the advice of the prime minister, with the exception of appointing the chief justice and the prime minister [15], it is essential to have a president who is more democratic. That provision of 'Secret Ballot' of the original Constitution should be revived in the Constitution.

Furthermore, the ambit of the prime minister's advice to the president under Article 48(3) must be limited. Some important issues like the appointment of the Chief Election Commissioner and other Election Commissioners and additional judges of the Supreme Court must be made without involving the Prime Minister's advice.

5.3. To Safeguard the Independence of the Judiciary

Under Article 96, the removal power of the judges of the Supreme Court should be in the hand of a judicial organization under the control of the Supreme Court. Then while appointing additional judges of the Supreme Court under Article 98, advice from the Chief Justice to the president must be required.

Again, the reappointment of retired judges of the Supreme Court in non-judicial posts though not the office of profit must be prohibited. It would be better to increase the age limit of the judges of the Supreme Court.

6. Conclusion

As the will and aspiration of the people of Bangladesh, democracy is considered one of the main pillars of the Bangladesh Constitution. The state has a constitutional obligation to create a socialist society through a democratic process and to protect everyone's basic human rights. But some of the Constitutional provisions are contradicting the concept of democracy which has been pointed out in the paper. Bangladesh Constitution has been amended seventeen times but still, these contradictory provisions were not amended. In an interview with New Age, the head of the Constitution Drafting Committee (1972), D. Kamal Hossain, indicated his support for constitutional changes to increase government accountability while preventing restrictions on the activities of other political parties [8]. Though the government has already announced its choice to transmit the constitution for an A-to-Z review to the Law Commission [7] still no such effective step is taken by the government to fulfill this announcement. Now it becomes essential to form a constitutional reform committee with experts and according to their recommendations bring necessary reforms to the constitution.

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