

CONSTITUTIONAL RESILIENCE AND BANGLADESH

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ABSTRACT

Constitutional Resilience is an important aspect which is often undermined in major leading democratic countries around the world. The subject is so diverse and varied, that from human rights, to the accountability of the government to secularism this particular matter touches all objects. In this paper through the process of introducing such factors like populism which has greatly impacted democracies around the world and at the same time terms such as unconstitutional constitutional amendments we try to analyze as per how truly resilient the constitution of Bangladesh actually is. We have also focused on some of the key points in the history of Bangladesh which has put the notion of secularism in the country under major threat. There have also been comparisons made between the constitutions of Bangladesh with India and the United States of America, since there is no actual way to find out the resilience of a particular country's constitution.

BACKGROUND

There have been dramatic challenges to constitutional democracies around the world, in regards to governance driven by longstanding problems which are becoming more urgent in the present day these include the climate crisis, economic inequality and national identity amongst others. ⁱA rise in populism can be seen in, some of the older democratic countries around the world namely India, United States of America and the United Kingdom, which can be seen in variety of forms, on both the right and left of politics. ⁱⁱIn Bangladesh, which is relatively a new democracy compared to these other countries, populism can be seen on the rise, compounding of such other crises of legitimacy it faces. If we have a look in the twentieth century, Europe populism was a precursor to the collapse of democratic constitutions in both Germany and Italy.ⁱⁱⁱ In order to truly understand as per how resilient is our democratic constitution or the constitution of Bangladesh, we really need to ask ourselves considering the serious problems confronting our democracy as to whether our Constitution can survive in the first place and perform effectively despite these challenges?

WHAT IS CONSTITUTIONAL RESILIENCE?

When, we want to think about as per how the democratic constitution performs, at a time of being confronted by major challenges, the evaluation criteria would be a useful way to begin to think or analyze about it. Firstly, we really need to understand what constitutional resilience truly means and in order for that we need to know that under the current context resilience incorporates about the ideas about the capacity of the constitution at the very least to survive or endure.^{iv} In scenarios when the Constitution, faces major, often unanticipated challenges and crises resilience at that point of time goes beyond this to incorporate more expensive notions of what the constitutions can and should do. Thicker accounts of resilience are often taken, once it goes beyond mere survival. In this sense, there is likely to be contestation to what exactly constitutes resilience.

CONSTITUTIONAL RESILIENCE AND SECULARISM IN BANGLADESH

A constitution in a supposed scenario can remain “true to itself”, which means to its central mandates and values, also at the same time can withstand challenges and crises by being resilient in a thicker sense. This clearly means that even if the country goes through a crisis scenario the constitution is able to maintain its essence. In the face of such challenges, it does not mean the resilient constitution remains wholly unchanged, as it may even change radically at times due to the change in social and political contexts. ^vThe constitution’s underlying mandates and values should remain consistent with such changes. In the country of Bangladesh where the two concepts of spiritual commitment to Islam and a cultural affiliation to being a Bangladeshi, in regards to celebrating its various cultural festivals the two concepts are not mutually exclusive. Even though Bangladesh had been founded on secular principles, in the perception of the western world, Bangladesh has been heralded as an example of a model Muslim country. And, we have also seen that the people of Bangladesh had taken great pride in its unique syncretic nature. The very embodiment of the creation of Bangladesh was ethno-nationalism which conflicted with Islamic religious nationalism. The secular characteristics of the Constitution of Bangladesh, had faced a serious threat after the assassination of Bangabandhu Sheikh Mujibur Rahman, on 15th August 1975. The secular edifice was chipped away by successive governments. The 5th amendment of the Constitution by Ziaur Rahman, removed secularism which was drafted in the original constitution in the year of 1977. This particularly amendment had allowed religious based politics to flourish in Bangladesh. After this, in the year of 1988, Islam was declared as the state religion by HM Ershad. In its 2010, landmark judgment the concept was reinstated as a historical decision by the Supreme Court of Bangladesh, scrapped the bulk of the 5th amendment. ^{vi}This particular amendment had allowed religious based politics to flourish in Bangladesh. Due to the conflict with the supreme law of the land (Constitution of Bangladesh), the religious based parties in the country were demanded to amend their charter by the Election Commission.

THE IMPACT OF CONSTITUTIONAL RESILIENCE IN BANGLADESHI SECULARISM

The ways in which various institutions are set up by a Constitution such as the parliament and the executive which end up fitting and working together are highlighted through the notion of the resilience which suggests a way of thinking about such matters of the constitution.^{vii} Therefore, a criteria and property which applies to a system of interconnected institutions is known as resilience. There are some obvious attractions which exists within the notion of constitutional resilience, but it needs to be refined and put into context for it to have some practical use and for its further development^{viii}. Article 2A which read that “The State Religion of the Republic is Islam, but other religions may be practiced in peace and harmony in the Republic” was amended in the Constitution which now reads that “The State Religion of the Republic is Islam, but the State shall ensure equal status and equal right in the practice of the Hindu, Buddhist, Christian and other religions”.

THE COMPARISON OF CONSTITUTIONAL RESILIENCE BETWEEN BANGLADESH AND USA

It is very important to understand how a resilient constitution actually looks like, as currently there are no preset guidelines through which one can judge one nations’ constitution to be more resilient than another. So therefore, there needs to be some set criteria which may be constructed internationally to assess these criteria. A lot of critics for example often claim that the Presidency of Donald Trump, showed the resilience of the US Constitution.^{ix} This is said due to the fact that in the US Constitution there are some checks and balances being present through which the President is accountable for his actions and it has been seen in multiple circumstances that have been widespread efforts made to impeach the President from office, through the constitutionally provided mechanism of impeachment. This clearly shows in a scenario where, if the President is not acting according to the Constitution, constitutional resilient can be seen through the actions, which can be taken against him. Similarly, in accordance to Article 52 of the Bangladeshi Constitution, impeachment law is laid down,

through which the President can be held accountable, if his not being able to carry out his duties or if his actions are going against the values of our Constitution. ^x

HOW CONSTITUTIONAL RESILIENCE IS AFFECTED BY PERSPECTIVE

The most difficult aspect of defining constitutional resilience is the fact that, resilience is something which just like morals varies from person to person. A person's values and partisan's reference, entangles this matter. While one person may demonstrate for a constitution's resilience, it becomes evidence of rigidity from another point of view. Amongst many examples of democracy in action attacks on the Constitution which undermines its reliance can be thought as one of them. ^{xi}This is one of the major reasons as per which supporters of President Trump think that constitutional problems are one of the major reasons for which there is unwillingness amongst the President's opponents to accept the legitimacy of the 2016 US Presidential Elections. If we start looking once again from the context of Bangladesh where secularism as a sustainable common platform had always withstood challenges from Islamisation of certain section of Bangladeshi society, which can be seen in the news-media more often than not, we get to understand how such a notion is true to our country as well. It is also important to understand between the clear distinction between the resilience of special institutions that are established by the Constitution and the resilience of the Constitution in itself. ^{xii}

UNCONSTITUTIONAL CONSTITUTIONAL AMMENDMENTS

In a scenario when we talk about the Constitutional Resilience, the role of Supreme Court and the aspects of unconstitutional amendments in Bangladesh should also be discussed. One of the major judicial innovations which has empowered courts around the world to invalidate duly enacted constitutional amendments is known as the basic structure doctrine (BSD) or "unconstitutional constitutional amendments".^{xiii} The Appellate Division (AD) of the Supreme Court of Bangladesh broke new grounds by invalidating a provision which was in its original 1972 constitution but it was repealed in 1979 and was later on reintroduced through the Sixth

Amendment in 2014.^{xiv} Supported by a two-third majority in the Parliament the sixteenth amendment made judges removable upon a Presidential order. Previously such an action could be done on the recommendation of a Supreme Judicial Council (SJC) which consisted of two of the most senior justices from the Appellate Division alongside the Chief Justice of Bangladesh. ^{xv}To understand this aspect further, in a one of the recent articles authored by David Landau, Rosalind Dixon, and Yaniv Roznai discusses whether or not a provision which existed in the original constitution should be judicially deemed as unconstitutional. The authors through various arguments try to establish the point that the judicial review which that of an original constitutional provision can be evaluated by exploring the “delegation argument”, the “pragmatic” and “stability” argument which is brought forward to the Supreme Court in a particular case. There are three steps through which this process can be broken down.^{xvi}

THE THREE STEPS OF JUDICIAL REVIEW

In the first step any kind of review of an original constitutional text itself would be ostensibly foreclosed by the delegation argument. It should be beyond the purview of the courts to weigh in on their validity as original provisions are the handiwork of the omnipotent constitutional power rather than the limited delegated amendment power. ^{xvii}The justifications secondly to rely on BSD to forestall constitutional amendments or replacements that “pose a realistic threat to liberal democracy” are pragmatic.^{xviii} The most persuasive to counter “abusive constitutionalism” on this account is the use of the unconstitutional constitutional amendment doctrine. This is very important particularly in regards to when constitutions are easily amended or replace through constitutional process. The abolishment of the Non-Party Caretaker Government of Bangladesh, can be thought of as a prime example of this matter, as it was widely considered as a political move, which goes against the provisions of the original constitution which was drafted in 1972.^{xix} In a scenario such as this the question comes in as per whether or not there is a way to progress on this issue of resilience through an objective set of criteria followed globally rather than through institutional interpretations?

PROBLEMS BEHIND THE NOTION OF CONSTITUTIONAL RESILIENCE

The major problem behind finding a notion of resilience that has a widespread acceptance across different countries and context. The risk behind trying to define “resilience” in its general terms is number one it might not have a widespread acceptance and number two the definition might work within the context of certain countries but not others. Resilience may be much less useful in the context of Bangladesh the reason being is the fact that it might be better to focus on the institutional weakness of the legislature, in the context of Bangladesh, whereas for example in a country such India the term resilience would be very useful when assessing the constitutional context of contemporary India. ^{xx}

IS DEMOCRACY UNDER THREAT IN BANGLADESH?

The things which help to protect the essence of a constitution and its fundamental mandates and values and forms the mechanisms of resilience, may include things such as constitutional law provisions, norms and institutional culture. A lot of people often point out the fact that Bangladesh is not going through its best democratic phase at the moment. Even though the democracy in Bangladesh during the last eighteen years, the democracy in Bangladesh had gotten a certain degree of consolidation, but the more important aspect to focus on is on the fact that the democratic intuitions namely the Supreme Court could not make significant progress in consolidating the democracy of the country. ^{xxi} The politicians have been behaving autocratically in recent years which has led to them rewarding the political supporters and punishing the opposition, this goes on to prove as per how the country has gone through a period of ‘illiberal democracy’. The bureaucracy, judiciary, police or even legislature are often curbed by partisan, financial and personal interests. ^{xxii}

THE CONSTITUTION AND THE SEPARATION OF POWER IN BANGLADESH

It should also be noted that the concept of separation of power has received a violent blow in the Constitution of Bangladesh. The ‘assignment of powers’ of the Republic to the three organs of the government is what the Constitution has essentially done. In regards to speaking about the resilience of the Bangladeshi Constitution it can be often found out that in the current regime of the country both the judiciary and legislature with the leviathan omnipotence of the executive, can be thought to being paralyzed by it.^{xxiii} The theory of separation of power which is widely regarded throughout the constitution can be seen all but gone in today’s Bangladesh. The importance of an independent Supreme Court, which is capable of being their own independent judgment not only limited to certain important provisions of the Constitution but also other aspects can be seen all but gone.^{xxiv}

THE IMPORTANCE OF PRESIDENTIAL POWER IN BANGLADESH

Even though the problems of Democracy may hunt Bangladesh within the current circumstances, the prospects of Democracy make her hopeful of a sustainable future. The government has proclaimed its decision to the Law Commission to have a full proof review of the constitution, in such a scenario where several amendments can further be made into the constitution which has been, drafted in 1972, the question of constitutional resilience once again comes into play.^{xxv} It is also very important to understand the fact that, even though the President is the constitutional head of the People’s Republic of Bangladesh, in reality the President only performs such functions which can be said as ceremonial and is just like a titular executive. The Cabinet under the leadership of the Prime Minister performs real executive power of the State. The President always acts in accordance to the Prime Minister apart for appointing the Prime Minister and the Chief Justice. The prestigious institution of Presidency should not enjoy a mere subsistence is a wide and mass rooted belief in the minds of most people.^{xxvi} The secretariat of the President should be strengthening and the powers and functions of the President should be increased to have greater resilience of the constitution. But in regards to boost the resilience of a constitution we cannot simply rely on the President of

our country. There have to be other multiple actors, who have widespread role to play in this matter. They are namely but not limited to legislature and political parties, administrative bodies, political leaders, the citizens of the country, the courts (specifically) the supreme court, the military, the media and various other international actors such as the UN, EU, World Bank and certain global or regional powers such as India. In an orthodox sense some of these actors may not be described as “constitutional actors”.^{xxvii}

THE ACTORS WHO STOP CONSTITUTIONAL RESILIENCE

The work for securing resilience may be ongoing but even though many say that Bangladesh is going through a constitutional crisis and the current political climate may be calm but a major crisis looms, the citizens needs to be more precaution and aware in regards to certain aspects. If we look at some of the major world country’s constitutional resilience may not be the most desirable goal. The situation can be similar to the time of Apartheid in South Africa, where the fundamental mandates and values of the constitution are such that it would be more harmful than beneficial for people, if the resilience of such a constitution is sustained.^{xxviii} But this is not true for the Bangladeshi Constitution as Part III of the Constitution clearly talks about freedom of speech, and freedom to express of oneself but we often see freedom of speech being restricted despite the provisions being laid out in the constitution.

CONCLUSION

The 1971 Liberation War, was one which was fought on the basis for a democratic nation, for the independence to speak our own mother tongue and most importantly for the freedom of expressing oneself without the violation of any law. The first Constitution of Bangladesh, which was drafted in 1972 was drafted on these following grounds. In a scenario, where freedom of speech and democracy is under threat, it is the responsibility as well as the duty of the common people of the country to make sure that the highest law of the land which is the Constitution always sustains. In the due process of doing so, the people would be making the Constitution more resilient than ever before.

ENDNOTES

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