

Quandary of Utilitarianism and Constitutionalism in the Constitution: A Study of the Historical and Recent Factualism of Bangladesh

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Abstract

Constitutionalism, in general, postulates the notion in which government in a state holds the limited power of its operational podium of vicissitudes. Here government belonging to the state-power considers circumstantial factualism of populace life taking into welfare ambience. From this stance, utilitarianism takes place in constitutionalism that affirms greater happiness for the greater numbers. Although it does not mean the highest presence of justice, here minimal or quasi-utility level delineates the likely egalitarianism as the prerequisite of justice prevalent in society. Bangladesh from both historical and current perspectives produces the decay of utilitarianism in the distinct scenarios that the country experienced bitterly in its journey. So, normally, the country foils to march even on the road to utilitarianism as consequence reveals. The study mainly aims to explore the quandaries of constitutionalism and utilitarian aspects in the constitutional developments of Bangladesh. Besides, it also seeks to demonstrate or appraise some notable facts' incorporation; either it posses positivity or not, in the constitution of Bangladesh widely called the factualism.

Key Words

Constitutionalism, Constitutional Amendment, Utilitarianism, Factualism.

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1 Introduction

The birth of Bangladesh was a unique phenomenon in that it was the first nation state to emerge after waging a liberation war against a postcolonial state.¹ Since the independence of the country in 1971 through a bloody war, uncertainty and volatility have been permanent features of its society and politics. Vulnerability in making decisions by actors shapes the country of its as usual entity as the developing countries and it, in its real form, is the least developed country (LDP) in the world. Although resource mismanagement and socio-economic failures in the key aspects of the country confer the identity of developing country, political atmospheres amassed with dilemmas and confrontations also breed shadowy environments chiefly in the road to constitutionalism, which shows the infinitive discontents of whatever seeks the partisan and group interest articulation beyond the development of state as a whole. That's why partisan and group interest persuasion often acts even against the utilitarian aspects of what Jeremy Bentham avowals 'the greater happiness for the greater numbers' reconciled with quasi-room for the establishment of justice to have its solid intention to satisfy at least gargantuan quantity of people in the society. Leaders of the different ages acquired its goal attainment to scratch even the fundamental principles of state policy of the constitution through incorporating whimsical jargons in the constitution; other provisional scraping of constitution away from fundamental state policy is a typical case. So, from the factual aspects, people of the country were compelled to obey the capricious amendments of the constitutional provisions taken by the governments of different ages of Bangladesh that bought about immense volatilities in all spheres of the country via economy, politics and culture.

2 Conceptual Framework

Constitutionalism

The idea of constitutionalism has intrigued American lawyers, political scientists, and historians since at least the late nineteenth century. Along the way, the word has acquired a multitude of meanings. Constitutionalism is the idea, often associated with the political theories of John Locke and the "founders" of the American republic, that government can and should be legally limited in its powers, and that its authority depends on its observing these limitations.² The political economist Walton H. Hamilton, for example, stressed the written-ness of constitutions: "Constitutionalism is the name given to the trust which men repose in the power of words engrossed on parchment to keep a government in order". Constitutional historian Charles McIlwain, however, declared that "in all its successive phases, constitutionalism has one essential quality: it is a legal limitation on government". Recently, scholars from many disciplines have revisited the traditional views of constitutionalism and begun to ask new questions about the very nature of the concept. They have brought to the task contemporary methodologies,

comparative perspectives, and new historical insights.³ A successful constitution is likely to attempt no more than to seek to coordinate a populace on the limited set of values that are widely shared. This will obviously be a smaller set in a pluralist society than in, say, a society in which virtually everyone is strongly committed to a common set of religious beliefs. No issue on which two major groups strongly disagree can be easily constitutionalised. Arguably the only way to bring order to a pervasively pluralist society with divergent values on many issues is to protect an array of individual rights and liberties and to coordinate on an open economy.⁴ In sum, when a constitution governs a pluralist, individualist society, it must be relatively limited in its scope and perhaps it must often even be vague. A strictly religious constitution might be very exacting in what it regulates and enables.⁵ Thus, constitutionalism is meant for what constitution in a country inserts pluralists' view beyond group's interest articulation in the limited power enjoyed by the government in the process of governance.

Utilitarianism

Utilitarianism as a formal theory of moral ethics had its genesis with Jeremy Bentham in the late 18th century. In 1789, Bentham published an article namely *An Introduction to the Principles of Morals and Legislation*, which articulated that nature has placed mankind under governance of two sovereign masters, pain and pleasure.⁶ So, utility, from which the word 'Utilitarianism' is derived, means the sum of pleasures over pains, or happiness.⁷ The implication of utility was clearly used by Bentham as "Act always to promote the greatest happiness for the greatest numbers".⁸ If we explain it in terms of public policy of government, we will find a great lack of this theory of Bentham. We have known with Bentham's theory that if a public policy makes everybody or the whole society slightly better off even if some individuals are left slightly worse off in other ways as a result of that policy, then the policy is just. An example of utilitarian public policy would be a directive of the government of Bangladesh to deduct Tk. 10 annually from each bank account of the depositors.⁹

This had been done in pursuance of the World Bank directive to mobilize domestic revenues in order to be qualified for further loan. This excise duty of the government does not take into account the financial capability of the savers or variations in the amount of money in each account. Thus, a poor saver who could manage to save Tk. 30 and put it in a bank, instead of providing dividend, his capital would come to zero at the end of the third financial year. So, the term—"the greatest happiness for the greatest numbers" that is, according to Bentham, the catalyst in acquiring the principle of equality for establishing social justice in the society has been criticized on the ground that it does not take into consideration the individual variations of the people's attachment to the modernity in the society. "A utilitarian public policy in an unequal society cannot be just",

says Nicholas Henry, "because it reduces the welfare of the least well off people in the society, even if it is for the net benefit for the whole society".¹⁰ Although aspects of utility move for the least well-off people in society, it could be taken as the rudimentary steps towards the full well off society thereby, accepting this concept of Utilitarianism as the quasi-just or justified system for the human welfare.

Factualism

Factualism generally refers to an ambience full of facts, information and events either in the form of tranquility or of strident in any affair. Basically, it results in pro-and anti-move of two or more than two groups of people who aims to achieve the prescribed goals in the realm of interest articulation. Although it confesses the outer phase of field orientation, psychological traits of factualism are enormous in the philosophical study. From this point, Field, the commendable author, wishes to rephrase the question of the epistemic status of particular belief in terms of whether it is good to hold that belief. And, as Field himself notes, assessing whether an action is good is hardly a straightforward manner.¹¹ In many situations, it might be more conducive to none's psychological well being for one to believe a falsehood than to know the truth. Indeed, cases demonstrating the health benefits stemming from taking placebos are excellent examples that even one's physical well-being can be positively affected by believing falsely. Furthermore, Field suggests that one weigh reliability against explanatory and predictive power in assessing justificatory methods.¹² The immediate difficulty for it as with the problem stemming from the myriad choices available in the idealization of a given evidential system, there are going to be a huge number of definitions for the good against which judge the value a particular belief.¹³ Thus, factualism fashions the imaginative or falsified beliefs to ease the boisterous facts that makes pain in human body. Beyond human body, it is functional in all affairs e.g. political, socio-economic and religious fields where men foil to identify the real facts and often are compelled to obey what happened to them. This is the process in which some enjoy vast privileges and residuary classes fall into deprivation which correlates to the concept of Utilitarianism in its practicality.

3 Implication of Constitutionalism, Utilitarianism and Factualism in the Context of Bangladesh

Nationalism and Religion

Though the state of Bangladesh started its journey on a secular basis of nationhood, religion soon became an important component. The nationalist movement of the East Bengalis was predicated on Bengali nationalism, which had a distinct secular orientation based on Bengali language and culture. Seeds of this nationalism were sown in 1948 when Muhammed Ali Jinnah, the father of the nation, declared in Dhaka that Urdu would be the state language of Pakistan. The new state of Pakistan also used religion as a tool

for constructing Pakistani nationhood. Bengali language and culture were alleged to be influenced by Hinduism.¹⁴ Thus, in 1949 the central minister for education openly proposed the introduction of Arabic script for Bengali. It was argued that: Not only Bengali literature, even the Bengali alphabet is full of idolatry. Each Bengali letter is associated with this or that god or goddess of Hindu pantheon ... Pakistan and Devanagari script cannot co-exist. It looks like defending the frontier of Pakistan with Bharati soldiers! ... To ensure a bright and great future for the Bengali language it must be linked up with the Holy Quran ... Hence the necessity and importance of Arabic script.¹⁵ Although the government of West Pakistan declared to use Arabic alphabet reading Bengali language, there is the great lacks to follow Al Qura'nic instructions in even their statehood also. It shows they approached beyond constitutionalism from the governmental side where unlimited power exercising became the result and they stated against utilitarian aspects through violating the heartiest demand of the greater numbers of people to speak in Bengali language. So, from the point of factualism, West wing's subversive attitudes failed to achieve intentional endeavors although they got people of East Pakistan realize the multifarious options viz-Muslim identity, integration of Pakistan, development orientation etc.

But East Bengalis perceived this use of religion as a tool of domination. To counterpoise this "Islamic" nationalism, a secular nationalism emerged in East Bengal that was militant in its emphasis on the Bengali language and culture. The Language movement, which continued from 1948 to 1952, acquired an emotional and politicized content for the Bengalis on 21 February 1952 when Pakistan authorities opened fire on students in Dhaka when they were protesting the imposition of Urdu as the state language, resulting in the death of four. By the mid-1960s the Bengalis had moved on to the demands for economic and political autonomy as discrimination and domination of the West Pakistani ruling elite over the Bengalis were evident in all spheres of life.¹⁶ It is well evident that secularism made the language movement successful; but an argument can be inserted here to introduce linguistic nationalism. Not secularism but nationalism assisted language movement to culminate in the zenith of its success.

Secularism and Religion

The new state indeed based itself on a secular plank. The constitution of Bangladesh, adopted by the Bangladesh Parliament on 4 November 1972, in its preamble paragraph 2 accepted "nationalism", "socialism", "democracy" and "secularism" as state principles. In the context of Bangladesh, Sheikh Mujibur Rahman, the father of the nation, defined it in the words that secularism does not mean the absence of religion. Hindus will observe their religion; Muslims will observe their own; Christians and Buddhists will observe their religions. No one will be allowed to interfere in others' religions. The people of Bengal do

not want any interference in religious matters. Religion cannot be used for political ends.¹⁷ To implement the above, Article 12 of the constitution stated that the principle of secularism shall be realized by the elimination of: a) communalism in all forms; b) the granting by the state of political status in favor of any religion; c) the abuse of religion for political purposes; and d) any discrimination against, or persecution of persons practicing a particular religion.¹⁸ Article 38, paragraph 2 of the constitution further states that no person shall have the right to form or be a member or otherwise take part in the activities of, any communal or other association or union, which in the name or on the basis of any religion has for its object, or pursues a political purpose.¹⁹ The provision of constitution related to secularism in what sense is legitimate is of Awami League espoused and followed the principle of secularism. No people, despite Islam lover, in country took part against their decision of incorporating secularist principles in the constitution of Bangladesh on account of being the only force (Awami League) that liberated the country. This discloses the absolute power enjoyed by the government that is contrary to the idea of constitutionalism. From the utilitarian viewpoints, it requires downbeat outlook in this sense that greater people were not satisfied greatly with integrating the principles of secularism. Factualism functioned because of being realized by the people; but people were fully loyal to the victor of the time.

The Mujib regime was brought to an abrupt end through his gruesome murder by a group of army officers on the night of 15 August 1975.²⁰ Following a number of coups, Major-General Zia ur Rahman emerged as the strong man in government. Zia—a fervent nationalist and freedom fighter—represented the spirit of the liberation war of Bangladesh.²¹ Islamic ideals were also incorporated into the constitution with the surveillance of President Ziaur Rahman. By the proclamation of Order no. 1 of 1977, the ideal “Bismillah-ar-Rahman-ar-Rahim” (In the Name of Allah, the Beneficent, the Merciful) was inserted at the beginning of the constitution above the preamble. Through the same proclamation, Article 8, clause 1 was substituted by the principles of absolute trust and faith in the Almighty Allah, nationalism, democracy and socialism meaning economic and social justice, together with the principles derived from them ... shall constitute the fundamental principles of state policy.²²

Thus the principle of secularism, as set forth in Article 8 as one of the state principles, was dropped from the constitution. Article 12, through which communal political parties were banned in Bangladesh, was also dropped from the constitution, as was Article 9, which stressed the lingual and cultural unity of Bengali nationalism. Article 6 clause 2 stated that citizens of Bangladesh were now to be known as Bangladeshis instead of Bengalis. These changes were given effect through the Fifth Amendment to the constitution on 5 April 1977. After taking those of the crucial matters into the

constitutional provision, general masses congratulated President Ziaur Rahman and his policy was also accepted by all Muslim worlds. For having populace support towards the incorporation of Islamic religious values e.g. Bismillah-ar-Rahman-ar-Rahim, principles of absolute trust and faith in the Almighty Allah in the constitutional provisions, Ziaur Rahman's policy was adaptive with the principle of constitutionalism and with the values of utilitarianism. Factualism didn't appear here due to have real aspects that say the real demand of people in country. The acceptance of the fact of 'Bangladeshi nationalism' shows its convenience from the people's concern of their identity which differs with West Bengal people who live in India.

Zia was assassinated in May 1981 by a group of army officers. His death brought another change in the contours of state nationalism, which moved from the "liberal Islamic nationalism" of Zia toward "Islamic nationalism" under General H.M. Ershad, who assumed power through a bloodless coup in March 1982 by overthrowing the elected BNP government of Justice Abdus Sattar. Ershad accepted the Bangladeshi model of nationhood but made it more rigid and totalitarian by giving it a totally Islamic orientation. This move was ostensibly taken to secure and legitimize his own power base; unlike Zia, Ershad was not a freedom fighter and, more importantly, he was generally considered to be a usurper of power.²³ Ershad de-emphasized the "Bengaliness" (unlike Zia) of the Bangladeshi nationalism and instead attempted to consolidate the Islamic contours of this model of nationalism. February 21, which stands as the very epitome of secular Bengali nationalism, was given an Islamic twist by Ershad. In early 1983 he declared that the drawing of "Alpana" (painted designs) on the premises of the Shaheed Minar was an un-Islamic practice and should be substituted with recitations from the Holy Quran. Referring to the significance of February 21 he declared: "This time the movement is for the establishment of an Islamic state".²⁴

This stand negated the very spirit of the day, as it symbolized the struggle of Bengalis to fight the hegemony of West Pakistanis in the name of Islam. The policy could not be implemented due to strong opposition from the entire Bengali community, which cherishes its Bengali heritage as much as its religious beliefs. But it did suggest the course that the policy was about to take. Ershad based his policy of Islamization on two planks: (1) mosque-centered society, and (2) Islam as the state religion. Through the Eighth Amendment to the Constitution of Bangladesh on 7 June 1988, Islam was declared as the state religion of Bangladesh (Article 2, Clause A) with the provision that other religions may be practiced in peace and harmony in the republic.²⁵ Islam was thus adopted as a cardinal feature of Bengali's nationalism. Ershad's access to the Islamization process was accomplished with the introduction of Fifth Amendment of the constitution taken by Ziaur Rahman. General Ershad observed the consistence of political environment

from the people's side in Bangladesh after the foreword of incorporating Islamic values in the politics. That's why he lastly culminated in the last resort in taking Islam as the state religion of the country. Some people assume that Ershad circumspectly engaged himself in this brave initiative to make his tenure long through achieving people's support. In fact, people's acceptance and satisfactions symbolize the practice of constitutionalism and utilitarianism by General Ershad. But Ershad entered into the aspects of factualism in disguise of real leader or ruler although mass people realized after long days pass.

Dilemma Concerning Amendments of the Constitution

Incidences happen fiercely even in the constitutional amendments in which governments of different ages didn't keep themselves away from merely amending the constitution; rather they amended the amendments of the constitution. For instance, 4th amendment has been replaced by the 12th amendment of the constitution of Bangladesh. The Constitution (Fourth Amendment) Act 1975 was passed on 25 January 1975. Major changes were brought into the constitution by this amendment. The presidential form of government was introduced in place of the parliamentary system; a one-party system in place of a multi-party system was introduced; the powers of the Jatiya Sangsad were curtailed; the Judiciary lost much of its independence; the Supreme Court was deprived of its jurisdiction over the protection and enforcement of fundamental rights.²⁶ Twelfth Amendment Act, known as the most important landmark in the history of constitutional development in Bangladesh, was passed on 6 August 1991. Through this amendment the parliamentary form of government was re-introduced in Bangladesh; the president became the constitutional head of the state; the Prime Minister became the executive head; the cabinet headed by the prime minister became responsible to the Jatiya Sangsad.... Moreover, through Article 59 of the constitution this act ensured the participation of the people's representatives in local government bodies, thus stabilizing the base of democracy in the country.²⁷ Introduction to 4th amendment of constitution especially adding its major provisions such as one party namely BAKSAL, loss of judicial independence etc. lucidly shows the contradictory approach of government to the constitutionalism and it is as same as utilitarian aspects where mostly all people disheartened in persuasion of their interest. But the fourth amendment filled the prerequisite of factualism in which people grabbed the entailment having no other alternatives. But twelfth amendment of the constitution fulfilled the principles of both constitutionalism and utilitarianism and sat against all means of factualism.

And last phase of the country discloses the massive constitutional amendments through omission and replacement of the articles of the constitution of Bangladesh. Introduction of fifteenth amendment of the constitution takes the country to an exclusive horizon full of dilemmas and confrontations not merely amongst distinct parties but groups,

communities etc. The Bangladesh Parliament has passed a crucial amendment to the Constitution, scrapping the caretaker government system for holding polls and restoring secularism but retaining Islam as the state religion. Under the caretaker system, introduced in 1996, general elections are overseen by non-partisan caretaker governments. The constitutional changes incorporate strict provisions against military takeovers, stating that capture of state power and suspension or staying the operation of the Constitution will be treated as treachery and a subversive act. Parliament has been empowered to hand down maximum penalty to those usurping state power.²⁸ The fifteenth amendment focuses on the curtailment of fifth, seventh and thirteenth amendments of Bangladesh. Since the ban on the seventh amendments of the constitution has become time-necessitated due to have the provision of militarization added in the constitution, residuary two amendments (fifth and thirteenth) passed in the parliament beyond people's stance. Some people espouse the curtailment of the part adding military take over; but rest part of fifth constitution relating to Islamic values' incorporation is of course unwise decision from the governmental side.

Some insert particular point that Fifth Amendment put in the presence of one-fifth non-elected (nominated or technocrat) members in the cabinet of the country. But at present, there are one tenth members as technocrat in the cabinet of Awami League-led government. So, they sharply and tacitly curtail the Fifth Amendment through introducing fifteenth amendment of the constitution of Bangladesh. The last point is the greater instance of factualism that government takes. Besides, all people's entity as Bangladeshi provided in the fifteenth amendment of the constitution is opposed by the Tribal people belonging separate ethnic identity, who are living in the Chittagong Hill Tracts, situated in the Southern-east part of Bangladesh. The ban on the thirteenth amendment and part of the Fifth Amendment go against the principles of both constitutionalism and utilitarianism because of having absolute power exercising by the government that mass people are dissatisfied with it.

4 Epilogue

From the analytical point, it is to apprehend that policy-decay of incumbent authority has brought about melancholic circumstances in both pre-and post-liberated Bangladesh. Although West Pakistani ruler didn't practice the real values of Islam, they stressed on holding Al-Qura'nic guidance through the declaration of reading Bengali with using Arabic alphabet. Their verbal announcement what was claimed by them determines the adherence of Islam. But Pakistani state was governed by accepting the norms of secularism and militarization. So, policy-decay became the utmost outcome of West Pakistan prior to the liberation of Bangladesh. Leaders of post-war Bangladesh didn't avert themselves to contest in marathon race of interpreting or of taking decisions on all

facts on their behalf. Changes were apparent in administrative policies as well. The Second Parliament of Bangladesh met on 21 May 1979 and started its session with recitation from the Quran only; previously, citations were made from the holy books of all religions. Zia also encouraged the use of certain non-Bengali words and slogans. The Bengali slogan "Joi Bangla," which was akin to the Indian slogan "Jai Hind," was replaced by "Bangladesh Zindabad" (Zindabad is an Urdu word that means long live), which is closer to "Pakistan Zindabad".²⁹ And subsequent history of the country was full of dilemma and confrontation that aforesaid part of the study discloses. So, policy-decay of concern authority in pre-and post-independent period directs the country, which is not akin to the principles of constitutionalism and utilitarianism that are called the ancillary agents to accelerate the wheel of democracy in a country. Likewise these, there are many facts of what incumbent authority took in their tenure to overthrow the counteparts who act as political parties in Bangladesh. So, political stability yet conform the principles of democracy in the country although all of them intend to march on the way of democratization.

5 Conclusion

From the aforementioned discussion, it is to say that since its inception to present, Bangladesh more briskly faces its challenges to take necessary plans for its greater development concerning political, economic, societal and over all cultural panorama. Protagonists of various ages stride out composing state ingredients into mounting figure. They dreamt such a thing never be pursued either their lacks of articulating objects or of enthusiasm in the mechanization of seeking interest of definite fields of orientation.³⁰ So, the conditions as claustrophobia has remained constant in Bangladeshi affair and it never came at the sight as an ancillary outline for country's convenience. Some analysts ascribe it the leadership crisis where leaders, in most cases, seek their individual interests through smashing their core value of leadership. Aristotle's experience of elucidation is more okay in figuring out the trends of our leaders from the birth to present Bangladesh as an independent country in the world.³¹ He said, 'The sense of the value of "ruling and being ruled in turn" is derived from the experience that the ruler may use his power to subordinate the lives of the citizens of the state not to the common good but to his own private purposes'³² that goes against the sanctified approach to constitutionalism and utilitarianism. It is well evident that marathon race of political leaders originated with factualism bears the tragedy for the country. Not accuracy but likely accuracy like utilitarianism almost needs for the political stability of a developing country like Bangladesh and incumbent, in this regard, should play in the ground of constitutionalism in which governmental power is exercised in balanced mode. Lastly, if the state like Bangladesh runs even under the device of constitutionalism and utilitarianism through avoiding historical and pro-tempore factualism, the optimism of welfare state could be achieved.

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