

Democratic Audit of the Parliament of Bangladesh: A Framework of Analysis

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1. Introduction

This paper would attempt to chalk out the theoretical framework for a Democratic Audit of the parliament of Bangladesh. While the current paper does not attempt the Audit itself, it lines out the contours and criteria of the proposed Audit and its implication for Bangladesh. David Beetham's Four Prong theory of Democratic Audit Model may be saturated into three broader aspects of legislature as a democratic institution. As part of the over-all Audit, accountability and institutional theories associated with each of those three aspects could then be explained and tested in relation to Bangladesh Parliament.

2. Four-Fold Sectionalisation of Democratic Audit Model

Beetham's Democratic Audit sees democracy firstly, as a set of principles or regulative ideals like popular control and political equality etc, and secondly, as some institutions and practices through which these principles are realised. As part of his Audit, Professor Beetham would ask four questions to see whether and how far a system is democratic. The fourfold sectionalisation of Democratic Audit are: first, existence and scope of *free and fair elections*, second, degree of *openness, accountability and responsiveness of the government*, third, *the quality of protection for citizens*; and fourth, *democratic society* ensured through pluralism, popular and media access in the state institutions and processes.¹

While Professor Beetham's Audit tools may be accused of being a Westminster system being widely adopted around the world, its institutional arrangements should have a universal relevance. Yet, had there been any substantial differences of situation, experience and political perspective, suitable audit criteria and appropriate standards of assessment might be formulated chosen.² Bangladesh being a common law heritage and declaredly Westminster parliamentary system, Beetham's fourfold sectionalisation should be an appropriate theoretical framework for an institutional investigation to its strength and weaknesses.

3. Three Prong Evaluation of the Parliament of Bangladesh

For scrutinising the legislative branch of the state, a careful saturation of fourfold sectionalisation in Democratic Audit Model would lead us to three boarder perspectives:

- 1) Parliament as a Representative Institution

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¹ David Beetham, *The Idea of Democratic Audit in Comparative Perspective*, *Parliamentary Affairs*, Oxford University Press, Volume 52, Issue 4, 1 October 1999, Pages 567-581, <https://doi.org/10.1093/pa/52.4.567> at p 570

² *Ibid*, p 577-78

- 2) Parliament as an Accountability Institution
- 3) Parliament as an Accountable Institution

3.1. Parliament as a Representative Institution

Studies on Bangladesh parliament are predominantly about its constitutional roles, law making and oversight. Quality of representation the parliament has in Bangladesh has not been addressed in the academic circle too much. The successive governments emphasised 'elected' nature of the parliament. On the other hand, civil society critics and opinion leaders were branded 'unelected' and hence less entitled to question the elected 'representatives'.³ Recent debate over the invalidation of Caretaker Government System⁴ and the constitutional amendment on judges' removal⁵ has re-ignited the debate over parliament's actual position as the "sole representative" of the people. The representative character and role of the parliament will be addressed in this dissertation in a systematic way that would enable us to answer the following questions –

- 1) How fair is the electoral process in Bangladesh?
- 2) How reflective of popular will is the current First Past the Post system?
- 3) How equal is the representation of different groups of citizens?
- 4) How much quality is there in the representation?

3.2. Parliament as an Accountability Institution⁶

Parliament is placed in a highly strategic position to scrutinise the executive and other branches of the Republic. Parliament of course in its turn is answerable to its constituency (the electorates).⁷ Horizontal accountability system works within the systems and structures.⁸ In this sense, horizontal accountability provides capacity for state institutions to check abuses by other institutions.⁹ Parliament does this through its legislative power and oversight powers. An analytical account of the legislative process and oversight tools in disposal of Bangladesh Parliament would necessarily call for an evaluation of the Government Backbenchers, Opposition Members and Parliamentary Committees. Under the Horizontal Accountability structure, the thesis will investigate the oversight structure of the parliament of Bangladesh and the role of Opposition, Government Back Benchers and Parliamentary Committees within the oversight structure. In this relation the theory of Party modes developed by Professor Anthony King would be a convincing testing tool.

³Rounaq Jahan, *The Parliament of Bangladesh: Representation and Accountability*, *The Journal of Legislative Studies*, 21:2, 250-269, DOI: 10.1080/13572334.2014.975470, p 3

⁴ The Caretaker Government system as introduced via the 13th amendment (1996) was overturned by the 15th Amendment (2011) Tusher, H. J. (2012, August 11). Unelected people not to be in government: AL, allies respond to BNP's reported formulas. *The Daily Star*. Retrieved from <http://archive.thedailystar.net/newDesign/news-details.php?nid=245670>. which provided for an NCG for 90 days to organise parliamentary elections

⁵ 16th Amendment to the Constitution sought to reassert the parliament's power the judges' removal. The original constitution in 1972, Jashim Ali Chowdhury and Nirmal K Shah (2017), *Advocate Asaduzzaman Siddiqui v. Bangladesh: Bangladesh's Dilemma with Judges' Impeachment*, *Indian Journal of Comparative and Administrative Law*

⁶ Webster Siame Kameme, *The Vertical and Horizontal Accountability in The Malawi Parliamentary Democracy*, PhD Dissertation, University of Hull (2015); Craig T. Borowiak, *Accountability and Democracy: The Pitfalls and Promise of Popular Control*, Oxford University Press, 2011.

⁷ Fox, J., 2000. Civil society and political accountability: Propositions for discussion, Available at: [www.CTORANDGOVERNANCE%2FResources%2FAccountability Governance](http://www.CTORANDGOVERNANCE%2FResources%2FAccountability%2FGovernance), at p.1

⁸ L Morlino (2002), *What is a "Good" democracy? Theory and empirical analysis*, Available at: [http://ies.berkeley.edu/research/files/CP02/CP02 What is Good Democracy](http://ies.berkeley.edu/research/files/CP02/CP02%20What%20is%20Good%20Democracy), at p. 4

⁹ Sahni, P. and Vayunandan, E (2010) *Administrative Theory*, PHI Learning Private Limited, London.

King tested the patterns of executive-legislator relations in Britain, France, and West Germany. This study would attempt one with Bangladesh. Questions for consideration under King's party modes will be how far it could be utilised to explain the performances of the Government Back Bench, Opposition and Parliamentary Committees in Bangladesh?

Anthony King's Party Modes

King has set forth several modes of parliamentary interaction that occur within the political parties – intra-party, opposition, non-party, and cross-party modes. *The intra-party mode*, for example, depends greatly on the extent of legislative independence. For example, the parliamentary leadership in Germany is independent from the persons holding the executive positions. Government backbenchers hold a strong say in the legislative affairs. Additionally, the committee system being totally non-partisan, members have almost independence in shaping the legislation. On the other hand, in Britain, though the leadership in the parliament is separate from the prime minister, party whipping is stronger than its German counter-part. Government backbenchers are also less independent than the Germans.¹⁰ Party members mostly withheld causing embarrassment for the party leadership in control of the government. Party remains the most formidable channel for political career opportunities.¹¹

In the Opposition mode, legislature and its internal mechanisms leave scope of opposition beyond a mere symbolic opposition. As per King's Analysis, British and French Parliaments being primarily deliberative bodies, opportunities for Opposition are few. Opposition's case role remains that of watching the government from outside the government and raising the other side of the argument in policy discourse. Germany's greater legislative capacity and the power of committees gives to the Opposition more opportunities than the British and French counter parts. Depoliticized nature of the committee system also permits effective opposition where the opposition point of view is seen as not merely partisan.¹²

The Cross-party and Non-party modes are best suitable for legislatures which may be like Polsby's transformative parliament mentioned earlier. Here, the partisanship per se is relatively unimportant. The more a legislature's activities are committee oriented, the more non-partisan or cross-partisan modes comes to play. The cross-party mode is particularly supported by the existence of coalitional government.¹³

3.3. Parliament as an Accountable Institution

The theory of Vertical Accountability or Political Accountability, also referred to as direct-accountability, occurs when institutions are called upon to explain and justify their performances to the public (electorates). Apart from being an institution of horizontal accountability, parliament is also important as an institution with vertical accountability.¹⁴

¹⁰ G Loewenberg and SC Patterson (1997) *Comparing Legislatures*, University Press of America, p. 133

¹¹ Bert A. Rockman, *Legislative-Executive Relations and Legislative Oversight*, *Legislative Studies Quarterly*, Vol. 9, No. 3 (Aug., 1984), pp. 387-440, Washington University, Stable URL: <http://www.jstor.org/stable/439490>, Accessed: 02-06-2018 16:57 UTC P 406-409 at p 406

¹² *Ibid*, 407

¹³ *Ibid*

¹⁴ R Staphenurst, N Johnston and R Pellizo (2006) *The role of parliament in curbing corruption*. Available online:

While assessing the parliament of Bangladesh as an Accountable institution, the thesis would touch upon two fundamental issues –

First, whether the MPs are primarily to act as legislators or as representatives of the people? To put the questions alternatively, how much constituency services are desirable of the MPs? And whether the MPs' constituency role would affect the doctrine of separation of power as enshrined in the constitution of Bangladesh?

Second, whether the MPs represent their electorates as their trustee on the first place or they act merely as agents of their respective political parties? To what extent article 70 of the constitution of Bangladesh (anti-defection clause) shifts the balance towards either of the trustee or agent roles?

MPs' Constituency Role and Separation of Power

Members of Parliaments usually discharge three functions – representative, legislator and scrutinizer. Representative role indicates that MPs elected as representatives of their electorates must have some accountability towards his/her support base. To this end, constituency services constitute an important part of the MPs' role of representation. Maintaining a direct touch with the locality, attending the local issues and sponsoring the local causes to the appropriate branch of the Executive are considered an extremely important role for the Members of Parliament particularly when re-election from the constituency depends heavily upon the local units of parties and their support base.

The problem of the trichotomous roles of law making, scrutinizing and representing is however one of balancing. In unstable democracies with institutional weaknesses and capacity deficit in parliament, the representative aspect of the parliament memberships get more and more prominence and MPs behave more like a local leader than a national lawmaker. The electorates in general also shows a 'cognitive lacking' about the representative functions of the MPs.¹⁵ People in general put greater emphasis on their MPs paying more attention to the local issues than to the national policy discourses. Bangladesh has been particularly stricken by this conventional wisdom. Independent self-government at the local level has been severely curtailed by excessive interference by the MPs in local governments.

According to article 59(1) of the constitution of Bangladesh, the local government bodies in every administrative unit of the state are entrusted with local development works. Parliament "shall, by law, confer powers on the local government bodies, including power to impose taxes for local purposes, to prepare their budgets and to maintain funds".¹⁶ Parliament is therefore constitutionally bound to allow the local government bodies a full autonomy. Practically the MPs dominate the local government policy

<http://wbi.worldbank.org/wbi/Data/wbi/wbicms/files/drupalacqua/wbi/The%20Role%20of%20Parliament%20in%20Curbing%20Corruption.pdf>, p.2

¹⁵ Muhammad Sayadur Rahman, *Role of the Members of Parliament in the Local Government of Bangladesh: Views and Perceptions of Grassroots in the Case of Upazila Administration*, Public Organiz Rev (2013) 13:71–88

¹⁶ Article 60 the Constitution of Bangladesh

making and governance. Relationship of the MPs with local government bodies in their constituencies are that of conflict, collusion and subordination.¹⁷

Involvement of the MPs in the local government institution has been the root cause of over politicization of local governance as well as mis-governance at central level. It has affected the quality of law making as well. The Supreme Court of Bangladesh caught the issue in two cases namely - *Barrister Ziaur Rahman Khan v. Bangladesh* 20 BLD (HCD) 120 and *Anwar Hossain Monju v. Bangladesh* BLT (HCD) 86

In *Barrister Ziaur Rahman Khan*, a Member of Parliament challenged a notification calling the meeting of Thana Co-ordination Committee without prior consultation with him. Unfortunately, the Court failed to appreciate the role of a Member of Parliament in the local government and development issues from the right perspective. It accepted the contention of the MP to held that MPs have an interest in overseeing their local governance:

Members elected from a particular constituency have overall and multi-faced responsibilities to look after the welfare of their constituencies and their involvement in the development work of their constituencies as far as possible is desirable. The spirit of any democratic constitution including ours is to involve the locally elected member of Parliament not only national matters but also in local matters or in the development activities of his constituency.

The illusion of *Barrister Ziaur Rahman* disappeared in *Anwar Hossain Monju*. In this writ petition, Mr Anwar Hossain Monju, an Opposition MP from Pirojpur in the 8th Parliament challenged a government notification appointing 62 Ministers in charge of 62 districts all over the country. The concern of Mr. Monju was that his role as an MP in development of his locality would be illegally interrupted by these 'Ministers'.

The plain argument of the petitioner was that neither any provision nor the over-all scheme of the Constitution approves such 'Ministers'. Rather as a side effect, the democratic governance of the local government units suffers a setback. The government lawyer discharged his burden by simply referring the 'precedent' of 1980s when such ministers were frequently appointed by the then military regime. The Court in its epoch-making judgment filled up the omissions in the arguments of the parties. Justice ABM Khairul Haque emphasised on democratic governance of local government. The court believed neither the MP challenging the District Ministers nor the impugned Ministers had any role in functioning of the local government units.

Problem of *Barrister Ziaur Rahman* and *Anwar Hossain Monju* is that the cases take a completely opposite outlook to a common problem. While former accepts a sweeping power of "supervision" in the MPs hand, the later denies it all together. Therefore, this dissertation would need to argue for a middle ground between the two. It will need to attempt a principled analysis of the separation of power and check and balances between legislative branch and executive branch on the one hand and the MPs constituency role on the other hand.

¹⁷ N Ahmed, T Ahmed & M Faizullah (2011) *Working of Upazila Parishad in Bangladesh: A study of twelve upazilas*, UNDP Dhaka

Trustee and Delegate Model of Representation

Edmund Burke is the proponent of a famous controversy of democratic representation: Should MPs act according to the will of the people or according to their independent judgment? Burke's famous speech to the electors of Bristol in 1774 runs as follows:

Parliament is not a congress of ambassadors from different and hostile interests, which interests each must maintain, as an agent and advocate, against other agents and advocates; but Parliament is a deliberative assembly of one nation, with one interest, that of the whole - where not local purposes, not local prejudices, ought to guide, but the general good, resulting from the general reason of the whole.¹⁸

The controversy therefore indicates preference between local interests of constituencies or those of the one nation. Burke prioritises the national interests. There is however argument that Burke's national interest criterion was becoming obsolete even in his own days. The idea of instructed delegates taking instructions from their districts is an old day concept. Apart from presenting the grievances of their people, early day representatives were unlikely to deliberate on national policy *vis-a-vis* the king.¹⁹

However, the development of the relationship between king and parliament in Britain made this agency theory of representation gradually obsolete. With the growth of parliamentary sovereignty, the agents-of-district-interests became less significant. National interests rather than the geographical ones became more and more prominent. Apart from Burke's view of political representation, delegate model has been questioned from two other normative points of view: First, modern politics are controlled by national controversies over which electoral districts' positions are not uniform. Second, it totally misses the existence of political parties in democratic process.²⁰ Modern democratic process has more or less replaced the constituents with the organised political parties. Programs and manifestos of the political parties have the tendency to bind the MPs to their party directives. In that sense, the Burkean controversy of representation may now be re-described as being one between the interests of the parties and of the nation.

Now, if the MPs are to be considered the agents of their parties, the original Burkean controversy does not fade away at all. To be considered an ideal substitute for the interests of the nation -

1. Political parties must present clearly defined policy alternatives to the voters.
2. internal party cohesion or discipline must be sufficient to implement their policy program.
3. voters must vote rationally, have policy preferences and know the differences between programs of different political parties.²¹

If any or either of these conditions is not met, MPs' agent or delegate status in relation to their parties is most likely to be in conflict with their trustee status in relation to the nation as a whole. Therefore, the Burkean controversy of mandate-independence remains alive. The controversy remains even more relevant for Bangladesh given the presence of an

¹⁸ A H Birch (1972), *Representation*, London, Macmillan at p 39

¹⁹ *Ibid*, at p 24-37

²⁰ M Kent Jennings and Thomas E Man, *Elections at Home and Abroad Essays in Honour of Warren Miller*, Michigan University Press, 1994 p 243

²¹ *Ibid* p 252

anti-Floor Crossing clause in the constitution. Article 70 of the Constitution of Bangladesh endangers a MP voting against his own political party with losing his seat in parliament.

Article 70 has been considered the most controversial provision of the Constitution of Bangladesh. The article has been accused of causing a major set-back in parliament's oversight power. The judiciary also took a conservative attitude in interpreting the article 70. First judicial cognisance of the article was *Abdus Samad Azad v. Bangladesh* 44 DLR 354. Six MPs from the opposition party in the 5th Parliament (Awami League) challenged the President's Election 1991. The Act introduced Open Ballot voting in Presidential Election, while the original constitution specifically provided that the election should be in Secret Ballot. A Division Bench of High Court Division of the supreme court of Bangladesh comprising F.H.M Habibur Rahman and Abdul Hasib JJ was divided on whether to accept the writ or not. The issue was then thrown to the Single Bench consisting Anwarul Hoque Chowdhury J.

Barrister Amirul Islam, one of the leading lawyers of the country, appearing on behalf of petitioners argued that the 1991 Act would unnecessarily attract the vice of article 70 in presidential election. MPs voting in Open Ballot system would run the risk of losing his seat, if he votes against the presidential candidate nominated by his party. Barrister Islam argued that article 70 being a restrictive provision in the free exercise of opinion and judgments, it must be interpreted in a restrictive fashion and it should govern the essential legislative functions of the MPs only. Election of the President, being an extra ordinary special function, cannot be brought within the operation of Article 70, Barrister Islam argued. Islam's line of argument is essentially this - If the sole purpose of Article 70 is to prevent malicious defection and unnecessary defeat of the Cabinet in the floor, it should be limited only to the essential legislative affairs. Talking from an originalist point of view, the intention of the framers of the Constitution not to allow Article 70 operate in Presidential Election was evident in the Second Schedule of the original Constitution which provided for Open Ballot voting.

Barrister M Aminul Islam, the then Attorney General of Bangladesh, took a strict and conservative stance. To support the Open Ballot voting, he argued that political parties should get priority above all in public affairs. MPs are bound by the party mandate and directions. People elect them on the basis of party and so the electorate of a particular electoral area has a right to know for whom their representatives are voting. Interestingly, the Court did not pay much attention to restrictive reading argument. It rather interpreted the article in broadest possible way:

There is a self-imposed restriction in Constitution itself which speaks of the role of a political party and its manner of influence upon a member of a political party, voted to Parliament under its ticket. A MP is thus not a free agent to act while voting in parliament.²²

This being the position of the judiciary in relation to article 70, Bangladesh's position over Burkean Mandate-Independence controversy remains problematic. Article 70, as is understood by the judiciary, has apparently relegated the MPs to a mere delegate status. This dissertation would attempt to see whether and how much the overall representative

²² *Abdus Samad Azad v. Bangladesh* 44 DLR 354. Para 26

character of parliament is affected by the article 70. And also, whether the reach of article 70 is actually as perverse as it appears to be.

4. Concluding Remarks

While the purpose of this paper is to present the framework for a Democratic Audit of Bangladesh Parliament, the preliminary insights we get from the above suggests that Parliament of Bangladesh might yield very marginal indications of strengths. Still the proposed Democratic Audit would pave a more comprehensive and scientific basis for testing the institutional contours of the parliament of Bangladesh. Any academic investigation of the Parliament is therefore highly likely to yield more concrete and practical research output for parliamentary reform.