Doctrine of Political Question in Constitutional Litigation of Bangladesh: A Quest for Theoretical Framework

Submitted By

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Declaration

It is declared that this research Study offered for examination for the PhD degree is solely the author's own work and all the sources used or quoted have been acknowledged by complete references. It is further declared that this research has not been submitted elsewhere for obtaining any other degree or for any other academic purposes.

It is also declared that the Study consists of 120808 words (including all). [Footnotes 32476 words and Bibliography 6402 words].

It is acknowledged that the author earlier wrote an article on the issue of 'political question' from the perspectives of Bangladesh Constitution that got published under the title of 'The Domain of the Doctrine of Political Question in Constitutional litigation: Bangladesh Constitution in Context' (2017) 17 (1 & 2) *Bangladesh Journal of Law* 1. The Study has used this earlier writing of the author on occasions. However, each time it used the earlier work, it presented a revised or improved version. Sections 1.1.1., 1.1.2. of Chapter 1, Section 3.1. of Chapter 3, Sections 6.1.2.1.1., 6.2.1., 6.2.2., 6.2.3.1.1., 6.2.3.2., 6.2.3.3., 6.3. of Chapter 6, and Sections 7.2., 7.6., 7.7. of Chapter 7 of the Study have used the earlier work with significant revision and improvement. Had the article not been written, perhaps this research Study would not have been undertaken today. It is due to writing of the article that the author realized how vastly important an area of constitutional law has so far remained unattended. The author also realized that the confusion and uncertainty that surrounds political question both among judges and academia cannot be adequately addressed within the limited space of an article and a more rigorous, thorough and extensive research initiative needs to be pursued. The present Study has been undertaken in view of this realization and to further this objective.

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Certificate

This is to certify that the thesis entitled *Doctrine of Political Question in Constitutional Litigation of Bangladesh: A Quest for Theoretical Framework* is researched by Moha. Waheduzzaman under my supervision and guidance. The researcher submits the thesis to the University of Dhaka in partial fulfillment of the requirements for the degree of Doctor of Philosophy.

No part of the thesis has been submitted for any degree or examination in any other University or academic institution. The researcher has fulfilled all the requirements for submission of the thesis as prescribed by the rules of the University of Dhaka. I, therefore, recommend the thesis for submission and evaluation for the award of the degree of Doctor of Philosophy.

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List of Abbreviations

AD	Appellate Division
Constitution 1972	Constitution of the People's Republic of Bangladesh, 1972
FPSP	Fundamental Principles of State Policy
FRs	Fundamental Rights
HCD	High Court Division
SC	Supreme Court
UK	United Kingdom
US	United States
US Supreme Court	United States Supreme Court

Abstract

Judicial review is an essential attribute of the exercise of judicial power by the Supreme Court. As opposed to *express* limit, this Study holds that there may be also *interpretive* limit on the Court's power of judicial review. And 'political question' is a mean to give expression to the *interpretive* limit of Court's power of judicial review. Political question refers to a certain category of constitutional issues entrusted to the special responsibility of elected branches of government. As to these issues, the Court should refrain from exercising the power of judicial review for doing otherwise would be to encroach upon the powers and responsibilities of the co-ordinate branches of government. In other words, judicial intrusion into these areas of elected branches' responsibility would simply invade 'separation of powers' as maintained in the Constitution.

The term 'political question' is the creation of the US Supreme Court. In US Supreme Court's view, judicial intrusion into matters of *substantive political judgment* amounts to encroaching into elected branches' responsibility and thereby violating 'separation of powers' as maintained in the Constitution. The Bangladesh Supreme Court has simply failed to grasp this meaning of political question as obtained in the US jurisdiction. This results into two-fold problems. *First*, the Court may decline to exercise jurisdiction wrongly terming an issue as 'political question' which is not truly a political question. *Second*, the Court assumes (or might assume) jurisdiction into areas of elected branches' responsibility which are really susceptible of being 'political questions' and thereby invading 'separation of powers' as observed in the Constitution.

In this backdrop, the Study has in view the objective of constructing a theoretical framework regarding the application of the doctrine of political question in the adjudication of constitutional matters. As part of conceptual clarity, the Study distinguishes political question from other grounds of refusal, such as, the grounds of *locus standi*, ripeness and mootness; relates political question with the concept of 'justiciability'; and identifies also the other distinguishing features of political question. The Study identifies some apparently seeming issues and distinguishes them from a true political question to avoid confusion and uncertainty.

So far the theoretical framework of the doctrine itself is concerned, the Study needed a workable basis to construct it. The Study finds that basis in *unbounded* discretion of the elected branches of government. A political question arises out of the elected branches' exercise of power under the Constitution. And Constitution often confers power upon the elected branches without imposing any limitation for exercise of the power. Question may then be raised: is judicial review of elected branches' decision permissible when the power has been conferred without imposing any limitation? If the answer is (or may be) no, it may then be said that elected branches' action in relation to those powers rest with their *unbounded* discretion. This is how political question based on the principle of 'separation of powers' is ultimately related to *unbounded* discretion. Based on this understanding, the Study defines political question as "constitutional issues committed to the unbounded discretion of the elected branches of government" and constructs the theoretical framework of the doctrine on that basis.

In so constructing the theoretical framework, the Study adopts a four faceted interrelated themes or inquiries: the *discretionary* powers of government; differentiating *unbounded* from *bounded* discretion; complying *unbounded* discretion with 'rule of law'; and, justifying political accountability of elected branches for political questions. The Study identifies the following issues as susceptible of political question analysis under the Bangladesh Constitution: executive's power of promulgation of Ordinance and proclamation of emergency, appointment powers of the executive, political branches' power in relation to war, foreign relations powers of the executive, directing the legislature to enact law, and parliament's authority to amend the Constitution.

The Study's significance lies, *inter alia*, in three main aspects. *First*, the theoretical framework it presents would accomplish the broader task of guiding the Supreme Court in appreciating its proper role and scope of power vis-a-vis the other co-ordinate branches of government. *Second*, the Study would be of guidance for the Court not only to ensure proper application but also to avoid misapplication of the doctrine in a given case. *Third*, all including the Judges, academicians and political branches would now be conscious that some issues of the Constitution are indeed political questions and the Court would be transgressing its limit when decides to adjudicate a political question.

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CHAPTER 1
INTRODUCTION

Background and Objectives

In modern democracies, judicial review is viewed as an essential attribute of the exercise of judicial power by the courts. The Bangladesh Supreme Court also exercises the power and ensures, *inter alia*, obedience of governmental bodies to laws and Constitution. There are, however, two express constitutional limitations on the Supreme Court's power of judicial review. The first limitation relates to exceptions to the rule of judicial review and the second one relates to those matters as to which jurisdiction of the Supreme Court has been barred by the Constitution.[1]

This Study holds the view that there may be also "interpretive limits" of the Supreme Court's power of judicial review in addition to express constitutional limitations. And 'political question' is a mean to give expression to the interpretive limits of Supreme Court's power of judicial review. Political question refers to a certain category of constitutional issues entrusted to the special responsibility of elected branches of government. As to these issues, the Supreme Court should refrain from exercising the power of judicial review for doing otherwise would be to encroach upon the powers and responsibilities of the co-ordinate branches of government. In other words, judicial intrusion into these areas of elected branches' responsibility would simply invade 'separation of powers' as maintained in the Constitution.[2]

If 'separation of powers' is taken for granted as basis of political question, the doctrine of political question should then be regarded as the incident of every Constitution since no modern government may now be said to have founded without maintaining a minimum of 'separation of powers' in its Constitution. Political question thus cannot be viewed as the characteristic of US jurisdiction only where it is said to have been originated or featured

[1] For detail on the express constitutional limitation on the Supreme Court's power of judicial review, see, *infra*, Chapter 2 (Section 2.1.5.) (p. 51) of the Study.

[2] For author's elaborated view of political question and its characteristics, see, *infra*, Chapter 2 (Section 2.3.) (p. 71) of the Study.

prominently.[3] A political question, therefore, exist irrespective of the nature of government the Constitution has chosen for itself (unitary or federal; parliamentary or presidential; republican or monarchical etc.) as well as whether the constitutional system is based on a rigid 'separation of powers' or not.[4]

No author who undertakes the issue of political question denies that there are some core questions of 'substantive political judgment' where judiciary should stay its hands off. But none has come forward with some manageable standard/s to differentiate those 'non-justiciable' from the 'justiciable' legal questions. Indeed, the whole literature of political question remains in a state of confusion and uncertainty. Political question has also been regarded a difficult constitutional concept to grasp. In Israeli jurisdiction, they usually employ the term 'justiciability' to mean political question. In dealing with the term 'justiciability', Justice Zilberg of the Israeli Supreme Court once wrote:

> I am doubtful that we shall ever discover in the world a sage who shall be able to precisely define the meaning of this term . . . I can confess, without shame, that even I have not ever grasped the nature of this monstrous creation . . . A precise legal analysis cannot be found that will allow us to grasp the content of this concept.[5]

Question naturally arises, why is it so difficult to grasp political question as a constitutional concept? This Study finds the reason in numerous factors which may be differentiated as four distinct strands of confusion: (a) reaching merit of an issue and other related phenomena; (b) political question vis-a-vis other forms of judicial behaviour; (c) politically sensitive cases; and (d) the imperfect theories of political question.

A. Reaching Merit of an Issue and other Related Phenomena

One fundamental feature of political question is that it relates to the denial of a court's reaching merit of a constitutional issue. This indicia of political question is entangled with

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[3] For the political question doctrine's origin and development in US jurisdiction, see, *infra*, Chapter 3 (Section 3.1.1.) (p. 90) of the Study.

[4] For detail on author's view of 'separation of powers' as basis of the doctrine of political question, see, *infra*, Chapter 2 (Section 2.3.3.3.) (p. 76) of the Study.

[5] HC 295/65, *Oppenheimer v Minister of Interior and Health* 20 (1) PD 309, 328. Quoted in Ariel L. Bendor, 'Are There Any Limits To Justiciability? The Jurisprudential And Constitutional Controversy In Light Of The Israeli And American Experience' (1997) 7 (2) *Ind. Int'l &Comp. L. Rev.* 336.

some other related phenomena. The Study identifies below three phenomena which should be distinguished from political question to avoid confusion.

(i) The Two Stages of Review of Constitutional Dispute. For the sake of clarity at least one should remember that there may be two stages of review involved in a constitutional dispute. They are the preliminary estimate of merit and substantive merit review of the issue. Political questions relate to the denial of only courts' reaching the substantive merit of the issue and not reaching simply the preliminary estimate of merit of the case. A failure to maintain the distinction may simply lead to misunderstanding of the nature of issue involved in political question.[6]

(ii) The Variety of Grounds for Denial of Reaching Substantive Merit. Apart from political questions, there are also other grounds for a court's denial of reaching substantive merit of an issue. For example, the courts deny reaching substantive merit of an issue when proper plaintiff does not bring the suit (*locus standi*) or the issue is not yet ripe for judicial consideration (ripeness) or the issue has become moot due to change of circumstances of the case (mootness) or the issue falls under one of the exception clauses of judicial review or jurisdiction of courts as to the reviewable matter is barred by the Constitution.

In all of the abovementioned grounds, the court makes preliminary inquiry (preliminary estimate of merit) just to decide whether either of the grounds is present to deny substantive merit review of the issue. If either of the grounds is found to successfully operate, the courts refrain from reaching substantive merit of the issue. So far all these grounds for denial of reaching substantive merit of an issue is concerned, one should know precisely the underlying reason/purpose of such denial on political question ground at the one hand and the reason/purpose of such denial on other grounds at the other hand. This would help clarifying the concept of political question as distinguished from other grounds of denial of reaching substantive merit of a constitutional issue. [7]

(iii) The Denial of Reaching Substantive Merit and the Denial of Remedy. Denial of reaching substantive merit of an issue which is the characteristic mark of political question should be

[6] For detail on the two stages of review of constitutional disputes, see, *infra*, Chapter 2 (Section 2.3.3.5.) (p. 78) of the Study.

[7] For detail on how political question is distinguished from other grounds of denial of reaching substantive merit of an issue, see generally, *infra*, Chapter 2 (Section 2.3.3.) (p. 74) of the Study.

distinguished from denial of remedy on equitable ground/s. The court may withhold constitutional relief even after reaching the sustentative merit of the issue simply, for example, on the ground that the applicant did not come with clean hands. To be emphasized, political question relates not to remedial stage of the judicial proceeding but reaching the substantive merit of the issue itself upon whose determination the court's granting of the remedy depends.[8]

B. Political Question vis-a-vis other Forms of Judicial Behaviour

Political question gives expression to a distinct rule of judicial behaviour that compels courts not to reach substantive merit of a constitutional issue due to functioning of the principle of 'separation of powers'. It is reflective of proper role of courts in a constitutional democracy. Political question thus functions as a tool or mechanism to determine judicial power in the context of 'separation of powers'. Political question is different in this distinguished meaning from other expressions of judicial behaviour, such as, judicial self-restraint, judicial discretion, and judicial deference. The latter categories of judicial behaviour have nothing to do with the principle of 'separation of powers' and do not inhibit courts reaching substantive merit of an issue. Instead, they operate at the substantive merit review stage of a judicial proceeding and may vary in degree depending on the facts and circumstances of the case and approach of the judge in question.[9]

C. Politically Sensitive Cases

Political question has no connection with politically sensitive cases. Constitutional issues are more often than not politically sensitive. Therefore, a constitutional issue is justiciable even if politically sensitive so long it does not concern 'separation of powers'. On the contrary, a constitutional issue that concerns 'separation of powers' would be non-justiciable even if it is *not* politically sensitive.[10]

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[8] See, *infra*, Chapter 2 (Section 2.2.1.) (p. 53) of the Study that deals with 'rules of practice' of the Supreme Court in exercising writ jurisdiction. The Court may withhold relief even after reaching substantive merit of the issue if the applicant is found guilty on equitable ground/s.

[9] The Study elaborately deals 'judicial self-restraint, 'judicial discretion' and 'judicial deference' as apparently seeming issues that are not truly political questions. See, *infra*, Chapter 7 (Sections 7.4., 7.5. and 7.6. respectively) (pp. 247-254) of the Study.

[10] The Study elaborately deals 'politically sensitive cases' as apparently seeming issue that is not truly political question. See, *infra*, Chapter 7 (Section 7.7.) (p. 254) of the Study.

D. The Imperfect Theories of Political Question

The other reasons of confusion and uncertainty as to the meaning and content of political question result from the theories themselves that seek to explain the nature of political question.[11] The failure of the existing approaches to adequately theorize political question[12] in a way has imparted more credibility to those literatures that argue against political question.[13]

The above is just a brief account of why one cannot easily grasp political question and why political question is a monstrous concept in constitutional law.[14] The Bangladesh Supreme Court has also failed to grasp the real meaning of political question in cases of its own jurisdiction.[15] The Study is both descriptive and normative. It describes the senses in which the term 'political question' has so far been meant [16] and prescribes in what sense the term ought really to mean.[17]

The Study has in view two prime objectives. *First*, to determine the proper province of political question as distinguished from the seeming issues and concerns just delineated above.[18] *Second*, on that ascertained province, to construct a theoretical framework of the doctrine of political question in constitutional litigation of Bangladesh.[19] The achieved goals would in turn accomplish the broader task of guiding the Supreme Court in appreciating its proper role and scope of power vis-a-vis the other co-ordinate branches of government. The Supreme Court would be cautious so as not to encroach on the responsibilities of political

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[11] For theories of political question/approaches in analyzing political question, see, *infra*, Chapter 1 (Section 1.1.) (p. 18) of the Study.

[12] For inadequacy of the existing theories in analyzing political question, see, *infra*, Chapter 1 (Section 1.2.) (p. 25) of the Study.

[13] The Study meets the objections of those who argue against political question. See, *infra*, Chapter 3 (Section 3.1.3.) (p. 114) of the Study.

[14] Justice Zilberg of the Israeli Supreme Court regards "justiciability" (by "justiciability", he meant 'political question') a "monstrous creation" of constitutional law. See, *supra* text accompanying note 5.

[15] See, *infra*, Chapter 4 (p. 129) of the Study.

[16] See, *infra*, Chapter 1 (Section 1.1.) (p. 18) of the Study that deals some distinct approaches to political question. See also Chapter 3 (Section 3.1.) (p. 90) that deals with the origin and development of the doctrine in US jurisdiction and Chapter 4 that reflects the view of Bangladesh Supreme Court on political question. They are reflective of the senses in which the term 'political question' has so far been meant.

[17] For the sense in which the term 'political question' ought really to mean, see generally, *infra*, Chapter 2 (Section 2.3.) (p. 71) of the Study. They contain this author's view of political question and its distinctive features.

[18] For the differences between political question and seeming issues and concerns of constitutional law, see, *infra*, Chapter 2 (p. 40) and Chapter 7 (p. 240) of the Study.

[19] For author's theoretical framework of the doctrine of political question, see, *infra*, Chapter Six (p. 172) of the Study.

branches of government and thereby disturb the power balance the Constitution maintains among the three organs of government.

Since the Study aims to construct a theory of political question, it is essential to know the approaches that have already made an attempt to explain the nature of political question. The following Section sketches a brief account of the approaches that already exist in the literature of political question.

1.1. The Approaches in Analyzing Political Question

The doctrine of political question has been originated in the US jurisdiction. Later on, the doctrine has either been accepted or rejected in other jurisdictions. Since the doctrine is regarded predominantly a feature of the US jurisdiction, the Study considers only the literatures of the United States and Bangladesh.[20] Furthermore, the Study considers mainly those literatures that indicate some distinctive approaches to political question. The Study discerns four approaches from the literatures of US and Bangladesh jurisdictions. They may be distinguished as the *classical* approach, *prudential* approach, *functional* approach, and *discretionary power* approach. The approaches are outlined below in brief.

1.1.1. Classical Approach

Of the four approaches to political question, the classical approach is one that is commonly viewed in contradistinction to the prudential approach to the doctrine. According to this approach, the existence of a political question doctrine depends on the Constitution's text itself. The work of Professor Herbert Wechsler perhaps best represents the classical approach to the political question doctrine.[21] Wechsler posits that "the courts have both the title and the duty when a case is properly before them to review the actions of the other branches in the light of constitutional provisions, even though the action involves value choices, as invariably action does"[22] and may not avoid this role for prudential reasons.[23] Therefore, as Wechsler

[20] Besides this Section, see also, *infra*, Chapter 3 (Section 3.1.) (p. 90) of the study for commentaries of the doctrine in US jurisdiction. For commentaries of the doctrine in Bangladeshi jurisdiction, see, *infra*, Chapter 1 (Sections 1.1.4. and 1.2.) (pp. 23, 25) and Chapter 4 (p. 129) of the Study.

[21] Herbert Wechsler, 'Toward Neutral Principles of Constitutional Law' (1959) 73 *Harvard Law Review* 1.

[22] ibid 19.

[23] The courts thus "grounds its decisions on principle, rather than on an *ad hoc* measuring of the expediency of deciding a particular case one way or the other" (internal citation omitted). Jared P Cole, 'The Political

says, "the only proper judgment that may lead to an abstention from decision is that the Constitution has committed the determination of the issue to another agency of government than the courts."[24]

In determining whether the Constitution has committed so, the judiciary does not abdicate its duty to interpret the Constitution because, as Wechsler clarifies, "all the doctrine can defensibly imply is that the courts are called upon to judge whether the Constitution has committed to another agency of government the autonomous determination of the issue raised, a finding that itself requires an interpretation."[25] Thus, according to this version of the doctrine, although political questions emanate from the text of the Constitution itself, the doctrine of political question is not inconsistent with the premise of an inflexible judicial duty to decide cases [26] because judiciary's review of a claim should end only if the interpretive exercise concludes that the matter is delegated for final resolution to the political departments of the government.[27]

1.1.2. Prudential Approach

In contrast to Wechsler's classical approach, Professor Alexander Bickel articulates prudential approach based on his idea of "passive virtues" of the judiciary.[28] The central thrust of Bickel's argument is that the court ought to refrain, in a number of situations, from deciding cases brought to it. All the devices that a court may employ for not so deciding a case have collectively been termed by Bickel as the "passive virtues."[29] By employing the methods of "passive virtues", Bickel argues, the judiciary can preserve its legitimacy as an unelected institution of the government.

Question Doctrine: Justiciability and the Separation of Powers' *Congressional Research Service (CRS) Report* (prepared for Members and Committees of Congress) (2014) 7.

24 Wechsler (n 21) 9. For Wechsler's view of constitutional issues regarded as political questions in US jurisdiction, see, *ibid*, 8-9.

25 ibid 7-8.

26 JP Mulhern, 'In Defense of the Political Question Doctrine' (1988) 137 (97) *University of Pennsylvania Law Review* 110.

27 Amanda L. Tyler, 'Is Suspension a Political Question?' (2006) 59 *Stanford Law Review* 363. This write up of classical approach is indeed an improved version of what the author earlier wrote in his article on political question, see, *infra*, Waheduzzaman (n 48) 14.

28 Alexander M. Bickel, *The Least Dangerous Branch* (London 1962).

29 ibid 111.

Bickel particularly contends that courts frustrate the will of the people when declares a legislation or an executive branch action to be unconstitutional.[30] Judicial invalidation of the will of people in turn risks losing legitimacy of the judiciary. At the same time, judicial decisions upholding the constitutionality of law may also "risk legitimating unprincipled or harmful policies."[31] Bickel, therefore, argues that "rather than risk losing legitimacy by invalidating a law or entrenching a poorly conceived policy choice by upholding it, a court may exercise the passive virtues by refraining from adjudicating the case at all."[32] And one method Bickel identifies of practicing the "passive virtues" is by invoking the political question doctrine to decline adjudication of a case.[33] The Following well-known passage containing a list of factors animates Bickel's vision of a political question doctrine:

> Such is the foundation, in both intellect and instinct, of the *political question doctrine*: the Court's sense of lack of capacity, compounded in unequal parts of (a) the strangeness of the issue and its intractability to principled resolution; (b) the sheer momentousness of it, which tends to unbalance judicial judgment; (c) the anxiety, not so much that the judicial judgment will be ignored, as that perhaps it should but will not be; (d) finally ("in a mature democracy"), the inner vulnerability, the self-doubt of an institution which is electorally irresponsible and has no earth to draw strength from.[34]

This prudential model suggests that the judiciary should expend its legitimacy capital quite cautiously.[35] Incorporation of prudential elements into the political question doctrine surely expands the range of cases in which a court should stay its hand off. This results largely from Bickel's differing view of the institution of judicial review. Professor Wechsler views judicial review as following directly from the Constitution.[36] Bickel, on the other hand, views such review in practical terms and as born of prudential considerations.[37] Thus, Bickel holds, when courts choose not to reach questions due to their political nature, they do so based not on interpretive principles, but instead on prudence and flexibility.[38] Bickelian framework of the

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30 ibid 16-17.
31 JP Cole (n 23) 7.
32 ibid.
33 ibid 7-8.
34 Bickel, *Least Dangerous* (n 28) 184 (emphasis added); Alexander M. Bickel, 'The Supreme Court 1960 Term Foreword: The Passive Virtues' (1961) 75 (40) *Harvard Law Review* 75.
35 Tyler (n 27) 364. Bickel in fact emphasized on "the wide area of choice open to the Court in deciding whether, when, and how much to adjudicate." Bickel, The Passive Virtues (n 34) 79.
36 Wechsler (n 21) 3-6.
37 Tyler (n 27) 363.
38 ibid 363-64. In Bickel's view, political question doctrine simply resists being domesticated in the fashion in which Professor Wechsler articulates. Rather, Bickel says, "There is something different about it, in kind, not in degree, from the general "interpretive process"; something greatly more flexible, something of prudence,

institution of judicial review thus establishes that court's power of refusal to decide cases is rooted not in considerations of constitutional command but of prudence. [39]

1.1.3. Functional Approach

As opposed to the classical and prudential approach, Professor Fritz Scharpf seeks to explain the doctrine in terms of "functional limitations of the judicial process."[40] For Scharpf, it is unpersuasive to explain the political question doctrine purely in terms of an opportunistic retreat from prickly issues born of prudential considerations.[41] Nor can the doctrine be simply justified on the ground that there were no applicable legal norms to decide the case.[42] The doctrine, in Scharpf's view, rather presupposes the relevance of such norms.[43] But those norms will not be applicable to decide a political question case since they are among consideration of extra-legal factors which lie beyond judicial capacity or are the responsibility of the political branches of government. The extra-legal factors are of such quality that renders a principled judgment impossible. In Scharpf's own words:

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not construction and not principle" (internal citation omitted). Bickel, The Passive Virtues (n 34) 46. Bickel viewed prudence as the antithesis of principle: "The antithesis of principle in an institution that represents decency and reason is not whim, nor even expediency, but prudence". ibid 51. Bickel, therefore, did not mean by "prudence", "predilectional, sentimental, or irrational." ibid 79.

One may find a reflection of Bickelian prudential approach in Finkelstein's analysis of the term also: "There are certain cases which are completely without the sphere of judicial interference. They are called, for historical reasons, "political questions". The term applies to all those matters of which the court, at a given time, will be of the opinion that it is impolitic or inexpedient to take jurisdiction. Sometimes this idea of inexpediency will result from the fear of the vastness of the consequences that a decision on the merits might entail. Sometimes it will result from the feeling that the court is incompetent to deal with the particular type of question involved. Sometimes it will be induced by the feeling that the matter is "too high" for the courts. But always there will be a weighing of considerations in the scale of political wisdom." Finkelstein, 'Judicial Self-Limitation' (1924) 37 *Harvard Law Review* 344-45. Finkelstein explains the doctrine in terms of Court's instinct for political survival which would persuade it to avoid the decision of "prickly issues" and "contentious questions" touching the "hyper-sensitive nerve of public opinion". ibid 339, 363.

[39] Bickel's view of the institution of judicial review and the rationale for courts having the discretionary power of refusal to decide a case have been summed up by Mulhern in these words: "Bickel justified judicial review as a tool for ensuring that government remains appropriately principled. He believed that the judiciary should be entrusted with such a tool because it is the institution best able to derive principles from our "enduring values" and to educate the public concerning those principles. To perform this function, he concluded, the courts must have discretion to avoid issues when the time is not right for their resolution. He identified the *political question doctrine* as one device courts can use to exercise this discretion." (Emphasis added). Mulhern (n 26) 110-11. This write up of prudential approach is the improved version of what the author earlier wrote in his article on political question, see, *infra*, Waheduzzaman (n 48) 14-15.

[40] Fritz W. Scharpf, 'Judicial Review and the Political Question: A Functional Analysis' (1966) 75 (4) *Yale law Journal* 596.

[41] ibid 566.

[42] ibid.

[43] ibid.

> Legislative and executive decisions are surely subjected to, and occasioned by, manifold compulsions, pressures and temptations of economic, social, political (domestic and international) and military necessity, expediency or opportunity – extra-legal factors, that is, the relevance of which for the political departments is obvious, and which the Court also may not completely disregard in its determination of the validity of such decisions. If such extra-legal factors may call for the application of the political question doctrine, one may well ask whether there will ever be circumstances which would permit judicial intervention on grounds of principle.[44]

In Scharpf's view, a satisfactory explanation of the political question doctrine is necessarily tied to the specifics of individual cases due to the functioning of extra-legal factors of the kind quoted above.[45] Scharpf identifies some functional factors and considerations which if present courts should decline judicial review for doing otherwise would be to overreach the limits of its own responsibility.[46] The three specific Scharpfian factors are: (a) difficulties of access to information; (b) the need for uniformity of decisions; and, (c) the deference to the wider responsibilities of the political department.[47]

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[44] ibid 562.

[45] ibid 567.

[46] ibid.

[47] For detail on the three factors, see, ibid, 567-83. The first factor raises doubt as to judicial competence to decide matters where the court is not seized of full information as to the clarification of relevant facts and laws submitted before it. Scharpf submits that in cases of difficulties to gain relevant information, the court may redefine the substantive standards in the absolute or abstract terms of an unqualified grant of power or an unqualified limitation upon power, whichever appears more desirable to the Court. In Scharpf's view, an information problem which is inherent in an issue may justify the application of the political question doctrine. Scharpf argues that this functional limit is clearer in foreign relations matters but would seem weaker when the court is faced with purely domestic issues. Yet, in domestic issues also, the inadequate information may be significant for decisions relating to ratification of constitutional amendments, legislative enactments and during civil war.

Scharpf justifies the second functional factor on the practical need to ensure uniformity in governmental actions particularly in matters of foreign relations. This functional limit somewhat reflects the court's deference to the prior decision of another organ within the latter's sphere of specific responsibility. A typical example of this is the recognition of foreign governments by political departments of the state. In cases of these kinds, there cannot be any exception to the rule that all departments of the government speak in a single voice.

Scharpf's third factor acknowledges that the court should hesitate to circumscribe the freedom of action of the political departments which have a responsibility for dealing matters of its own spheres within the broader context beyond the limits of the court's power to shape and control. To do otherwise, would be to frustrate or embarrass the political branches' conduct or action especially in the foreign relations matters.

Scharpf, however, recognizes limitations where the above described functional limitations of judicial process should not be applicable to deny judicial review of an issue. Scharpf discerns two specific limitations: where a fundamental right of an individual is at stake; and, where competing claims among the departments of the federal government or between the federal government and the states are concerned. For these limitations, see, ibid, 583-86.

For an earlier account of functional approach to the political question doctrine, see, JP Frank, Political Questions, in Supreme Court and Supreme Law (Cahn ed. 1954). Frank identifies the need for a quick decision making, judicial incompetence, avoidance for unimaginable situation and clear prerogative of another branch of government as functional justification for political questions.

1.1.4. Discretionary Power Approach

This approach is grounded on the supposition that a wider discretionary power entrusted to the political departments leaves a room for a political question to arise.[48] A theory of political question constructed in this way somewhat resembles Wechsler's classical approach to political question. Recall, Wechsler suggests that because the Constitution "commits" certain matters to the political branches for handling, it follows that the courts shall have no say on such matters.[49] Stated otherwise, this sounds like simply asking whether the Constitution has committed the relevant matter to the *discretion* of the political branches.

A political question founded on *discretionary* powers also fits squarely with Chief Justice Marshall's holding on the US Supreme Court's power of judicial review and limit of such power in constitutional grant of power in certain matters upon the elected branches of government. Marshall in his seminal *Marbury v Madison* [50] decision suggests nothing more than that "to the extent that the Constitution assigns unchecked "discretion" over a matter to the political branches, the courts may not second-guess decisions made within the scope of that delegated authority."[51]

Marshall's observations that come closest to political question holding based on discretionary powers of government is this: "By the constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own *discretion*, and is accountable only to his country in his political character, and to his own conscience." [52] Bickel also understands Wechsler's thesis in discretionary term that fits comfortably with *Marbury* holding: "what it does, in conformity with *Marbury v. Madison*, is to render a constitutional adjudication that the matter in question is confided to the *uncontrolled discretion* of another department."[53]

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[48] This author adopted this approach in his article on political question, see, Moha. Waheduzzaman, 'The Domain of the Doctrine of Political Question in Constitutional Litigation: Bangladesh Constitution in Context' (2017) 17 (1 & 2) *Bangladesh Journal of Law* 1.
[49] See, *supra* text accompanying note 24.
[50] *Marbury v Madison* 5 (1803) US (1 Cranch) 137 (hereafter *Marbury*).
[51] Tyler (n 27) 378.
[52] *Marbury* (n 50) 165-66 (emphasis added).
[53] Bickel, Passive Virtues (n 34) 45 (emphasis added).

But the problem is that the Constitutions of states themselves do not distinguish between controlled and uncontrolled discretionary powers of government. Indeed Constitution of any state simply confer powers on the elected branches without even mentioning the term 'discretion' while conferring those powers on the respective branches of government. This is where both Wechsler's thesis and Marshall's *Marbury* holding are limited since their thesis either expressly or by inference at least refers to the term 'discretion' relevant to political question analysis but provide courts no guidance as to how should they distinguish between controlled and uncontrolled discretionary powers of political departments. Tyler regards the distinguishing task as an overwhelming challenge: "As yet, no one has come forward with a principled framework for isolating those matters that are conferred to the unchecked discretion of the political branches. This is hardly surprising, for such a task presents overwhelming challenges."[54]

This author in the abovementioned article attempted to construct a theoretical framework of the doctrine of political question on the basis of discretionary powers of government. [55] Although the author made no conscious attempt to fill the vacuum of Wechsler's thesis or Marshall's *Marbury* holding, his approach clearly suggests that a distinction may be drawn between bounded and unbounded discretionary powers of the government. In author's submission, political questions could be found in any modern Constitution and they are not incidents of US Constitution only which is characterized by presidential and federal form of government based on a rigid separation of powers. Identifying first the distinguishing mark of unbounded discretion, the author considered some specific issues of Bangladesh Constitution to determine whether or not they should be regarded as political questions. To make the theory logically coherent, the author finally was concerned to establish that his idea of unbounded discretion does not contradict 'rule of law' – an objective sought to be achieved in the Preamble of the Constitution.[56]

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[54] Tyler (n 27) 379.

[55] Waheduzzaman (n 48).

[56] To the best of the knowledge of this author, there is only another article on political question from the Bangladesh perspective apart from author's own work. See, Md. Zahirul Islam, 'Does Bangladesh Need the Political Question Doctrine?'(2017) 7 *Indian Journal of Constitutional Law* 127. Islam traces the historical origin of the doctrine in US jurisdiction, determines the relationship of the doctrine with court's power of judicial review, and discusses some Bangladeshi cases on political question. But finally advocates against the existence of the doctrine in Bangladesh fearing that the doctrine would impair democracy, rule of law and constitutionalism without adequately substantiating his arguments though. Paradoxically, however, the author, at the same time, admits that not all questions may be justiciable in a court of law due to *separation of powers* concerns. But on what criteria courts should differentiate those "non-justiciable" from the "justiciable" questions? The author does not at all deal or is completely silent on this vexed question.

Even in the face of author's earlier work on the subject, a thorough and considered research initiative is essential both from the perspective of Bangladesh and abroad. The Study rationalizes this in the following Section of the Chapter.

1.2. The Rationale of the Study

The Study disapproves both Professor Bickel's prudential approach and Professor Scharpf's functional approach as theories to explain the nature of political question. The reasons for disregarding these approaches may be considered in brief. Bickel's prudential approach is, *inter alia*, likely to confuse political question with politically sensitive cases. Constitutional disputes are often politically sensitive. Therefore, anyone considering Bickel's prudential version as the correct theory of political question may simply reject the doctrine on a fear that many constitutional issue would then fall beyond the scope of judicial review.[57] Furthermore, if Bickel's prudence may counsel against justiciability of an issue, same prudence may counsel in favour of justiciability of some other issue/s. [58] Bickel provides courts no formidable guidelines as to when should prudence dictate courts to take up a constitutional question for judicial review.[59]

Professor Scharpf's functional approach also misstates the nature of political question. One functional factor Scharpf identifies is the difficulties of access to information.[60] This factor otherwise implies that the court could have adjudicated the issue if necessary information were available to it. In view of this author, the court could not have done so because political question addresses the issue itself, that is, if an issue is found to be a political question, the courts must stay their hands off irrespective of whether they are seized of full information necessary for disposal of the case.[61] Another factor Scharpf identifies is the deference to the

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[57] To recall Bickel's prudential theory, see, *supra* text accompanying note 34. For more criticism of Bickel's prudential approach, see, *infra*, Chapter 3 (Sections 3.1.3.1. and 3.1.3.2.) (p. 114, 115) of the Study (Professor Louis Henkin and Professor Martin Reddish respectively criticizes Bickel's theory). See also Robert J. Pushaw Jr., 'Justiciability and Separation of Powers: A Neo-Federalist Approach' (1996) 81 *Cornell Law Review* 465-67, 501, 502.

[58] For a view of how prudential concerns might counsel in favour of the exercise of judicial review, see, Richard Posner, Breaking the Deadlock: The 2000 Election, The Constitution, and the Courts 143, 163 (2001).

[59] For a general critique of Bickel's "passive virtues", see, Gerald Gunther, 'The Subtle Vices of the "passive virtues" – A Comment on Principle and Expediency in Judicial Review' (1964) 64 *Columbia Law Review* 1.

[60] See, *supra* text accompanying note 47.

[61] In fact, Scharpf also holds the view that political question addresses the issue itself. This becomes clear when he distinguishes political question from ripeness and standing and observes: "In short, all these forms of avoidance affect the individual case only, not the constitutional issue as such . . . The political question, by

wider responsibilities of the political departments.[62] This simply states the functional factor as such but does not explain why courts should defer to the views of political departments as to certain areas of responsibility. Is it not that the reason, as this Study envisages, lies in the principle of 'separation of powers'? If yes, Scharpf's exposition also lacks in properly theorizing the nature of political question.

In contrast to Bickel's prudential approach or Scharpf's functional approach, Wechsler's classical approach or Marshall's *Marbury* holding comes closer to properly analyzing the nature of political question.[63] But neither Wechsler nor Marshall provides any workable guidelines by which courts should distinguish between checked and unchecked discretionary powers of government. Instead of filling this vacuum of the theses of Wechsler and Marshall, scholars simply identify the deficiency of their work and as such reject them as a viable theory to adequately expound the nature of political question.[64]

In view of the above, the present Study attempts to conduct a thorough and full-fledged research to properly theorize the constitutional issue termed as 'political question'. As opposed to the US classical, prudential and functional approaches, the Study's approach should be distinguished as "interpretive" approach based on the idea of unbounded discretion of political branches of government. Now, one may, at first sight, assume that any theory of political question based on unbounded discretion is the same as Professor Wechsler suggests in his classical approach. But that is not really so. Wechsler's classical approach, on a proper

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contrast, is not premised upon the specific constellation of the individual case; it attaches to the issue itself." Scharpf (n 40) 536-37. In this regard, see also this remark of Scharpf: "When using the procedural techniques of abstention, the Court still retains its ultimate responsibility for dealing and enforcing the constitutional principle which is at stake; it remains the "protector and proclaimer of the goals." But when it holds that a question is "political" rather than "judicial", the Court renounces this responsibility altogether, and leaves the performance of this function to the political institutions." ibid 538. Scharpf rightly appreciates the nature of political question in holding that political question addresses the constitutional issue as such but his functional factor of "difficulties of access to information" contradicts his own view of political question since the factor carries in itself the idea that the issue (which is otherwise a political question) could have been adjudicated if all necessary information were available or made available to the court.

62 See, *supra* text accompanying note 47.

63 For Wechsler's thesis and Marshall's *Marbury* holding, see, *supra* text accompanying notes 49-53.

64 Professor Louis Henkin and Professor Martin Redish, for example, criticize Wechsler while they argue against political question. For their criticisms of Wechsler's classical approach, see, *infra*, Chapter 3 (Sections 3.1.3.1. and 3.1.3.2.) (p. 114, 115) of the Study. [This Study, however, rejects the objections raised by Henkin and Redish against political question (see, *infra*, Chapter 3 (Section 3.1.3.3.) (p. 119) of the Study)]. Tyler, on the other hand, identifies the element 'discretion' in Wechsler's thesis or Marshall's *Marbury* holding but does not make any attempt to distinguish between checked and unchecked discretionary powers of political branches of government. Instead, he regards the distinguishing task as an overwhelming challenge, see, *supra* text accompanying note 54.

estimate, should be styled as "textual commitment" or "textualist" approach and not a true interpretive approach. The reasons are as provided below.

Recall, Wechsler regards matters as political questions when text of the Constitution commits those matters to the political branches of government.[65] This depiction implies or rather confuses one that possibly all constitutional grants of powers to the political branches are confided to these branches' *uncontrolled* discretion and, therefore, are political questions. But in view of this author, such constitutional grant of power may only give a *prima facie* assumption that the issue is confided to the discretion of the political branches and as such political question due to the functioning of the principle of 'separation of powers'. This particular understanding of political question requires distinguishing *first*, between discretionary powers and other instances of powers that may not strictly or appropriately be termed as discretionary powers. *Secondly*, since, in view of this author, political questions are only those issues that are committed to the unbounded discretion of the political branches,[66] it essentially requires identifying some sound and rational principle/s to distinguish between bounded and unbounded discretionary powers of government. *Thirdly*, since political question founded in this way is a function of the principle of 'separation of powers', the principle needs to be balanced with the counteractive principle of 'rule of law'. *Finally*, one needs also to justify only political accountability of the political departments for political questions.

Having understood the things in this way, the Study regards political question as a form of *interpretive* limit of court's power of judicial review. As a form of theoretical exposition, this may simply be identified as "interpretive" approach distinguished from Professor Wechsler's mere "textual commitment" or "textualist" approach.[67] However, since the central idea of "unbounded discretion" is not completely new as the idea is at least implicit in Wechsler's thesis or in Marshall's *Marbury* holding, Study's interpretive approach may be viewed as a conscious attempt to fill the vacuum of Wechsler's thesis or Marshall's *Marbury* holding.[68]

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[65] See, *supra* text accompanying notes 24 & 25.

[66] For detail on the meaning of 'political question' as this Study envisages, see, *infra*, Chapter 2 (Section 2.3.) (p. 71) of the Study.

[67] See, *supra* text accompanying notes 24 & 25.

[68] For Wechsler's thesis and Marshall's *Marbury* holding, see, *supra* text accompanying notes 49-53.

True, the author in his published article sought to determine the province of political question on the basis of discretionary powers.[69] But the said article addressed mainly one research question: how should the Bangladesh Supreme Court differentiate "political" from "legal" questions of constitutional issues? The author defined political question and accomplished the task of the article considering some specific issues of the Bangladesh Constitution.[70] Author's published work, therefore, is limited on a number of grounds. The Study first highlights the vital aspects that were not at all addressed in author's earlier work.

First, this Study both envisages the principle of 'separation of powers' as the constitutional basis for the doctrine in any jurisdiction including Bangladesh and establishes that Bangladesh Constitution maintains such a separation of powers among organs of government to substantiate a case for political question.[71] The published article was rather completely silent on this crucial aspect associated with political question. *Second*, this Study regards political question as a form of *interpretive* limit and as such distinguishes it from the grievance doctrines (standing, ripeness and mootness) of Article 102 of the Constitution.[72] The Study substantiates additionally why a traditional *locus standi* analysis should be regarded insufficient for political questions.[73] *Third*, the Study explores the essential characteristics of political question that in effect helps clarifying the concept of political question itself.[74]

Fourth, so far the doctrine's theoretical exposition is concerned, the Study adopts "interpretive" approach which is distinct from the American approaches in this regard.[75] Furthermore, the Study also determines how the author's interpretive approach is both related to and different from Professor Wechsler's textualist approach to political question or Chief Justice Marshall's *Marbury* holding in this regard.[76] *Fifth*, the author in the earlier work sought to fit his idea of 'unbounded discretion' comfortably with 'rule of law' to make the theory of political question a logically coherent one. The present Study, besides doing so,

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69 Waheduzzaman (n 48).

70 The author defined political question as issues "committed to the *unbounded* discretion of the other coordinate branches of the government." (Emphasis original). ibid 4.

71 The Study establishes 'separation of powers' as constitutional basis for the doctrine in Bangladesh. See, *infra*, Chapter 5 (Section 5.3.) (p.166) of the Study.

72 See, *infra*, Chapter 2 (the three sub-sections of Section 2.2.2.2.) (p. 55) of the Study.

73 See, *infra*, Chapter 2 (Section 2.3.3.6.) (p. 84) of the Study.

74 See, *infra*, Chapter 2 (the six sub-sections of Section 2.3.3.) (p. 74) of the Study.

75 For the American approaches (classical, prudential, and functional), see, *supra*, Chapter 1 (Sections 1.1.1., 1.1.2., and 1.1.3.) (pp. 18, 19, 21) of the Study.

76 For Wechsler's thesis and Marshall's *Marbury* holding, see, *supra* text accompanying notes 49-53.

also considers that there is a further need to justify political accountability of the political departments for political questions.[77]

Besides the above vital aspects, the present Study differs from the earlier work on some other significant grounds. The earlier work considered the origin and development of the political question doctrine in US jurisdiction only. [78] The present Study, besides doing so, also portrays the doctrine's status in Indian and Pakistani jurisdictions. [79] The earlier work examined only the propriety of arguments of Professor Louis Henkin and Professor Martin Redish that advocates against the existence of political question. The present Study, in addition to their argument, also mentions some other authors of recognized merit who have adverse stance against political question doctrine of any kind.[80]

In addition to the above, the present Study differs from the earlier work also in terms of considering specific issues of Bangladesh Constitution. The author in his earlier work took into account ordinance making power, emergency power, prerogative of mercy, appointment powers, and foreign relations powers to determine whether they should be regarded as political questions of the Bangladesh Constitution. The author was of the view that President's exercise of power in relation to promulgation of Ordinance, proclamation of emergency and prerogative of mercy are not political questions.[81] But political branches' foreign relations powers and executive's power of appointment were opined to be political questions.[82] The author identified 'exclusion of judicial review', 'judicial deference', and 'cases involving political ramifications' as some of the apparently seeming issues but not political questions.[83]

The present Study expands on the reasoning or justifications of the issues already considered in the published work. Furthermore, in addition to them, the Study takes into account some

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77 For justification of political accountability only for political questions, see, *infra*, Chapter 6 (Section 6.4.) (p. 229) of the Study.

78 See, Waheduzzaman (n 48) 5-14; 16-19. This Study presents an improved and enlarged version, see, *infra*, Chapter 3 (Section 3.1.) (p.90) of the Study.

79 See, *infra*, Chapter 3 (Section 3.2.) (p. 122) of the Study.

80 For Henkin and Redish's arguments in the published work, see, Waheduzzaman (n 48) 19-23. For an account of authors who raise theoretical objections against the doctrine, see generally, *infra*, Chapter 3 (Sections 3.1.3.1. and 3.1.3.2.) (pp. 114, 115) of the Study and *infra*, Chapter 3 (n 195) (p. 121). The author examines those arguments but denies their worth in political question as defined in the Study (see, *infra*, Chapter 3 (Section 3.1.3.3.) (p. 119) of the Study).

81 See, Waheduzzaman (n 48) 25-35.

82 ibid 35-38.

83 ibid 43-47.

other issues of the Bangladesh Constitution, such as, the legislative authority of making law, parliament's authority to amend the Constitution, directing the legislature to enact law which shall include in particular the issue of judicial enforcement of Fundamental Principles of State Policy (FPSP). The published work addressed executive's power of appointment only generally and as such omitted to deal the executive's power of appointment of Judges of the Supreme Court. This Study particularly inquires whether this power of the executive should be regarded as a political question or not.[84]

To be noted, the author in his earlier work held President's power of promulgation of Ordinances and proclamation of emergency *not* to be political questions. This Study regards it only as a traditional approach and proposes additionally a political question approach for these issues of the Constitution. To hold them as political questions, the Study differentiates ordinary statutes from constitutional law as power granting norms upon authorities of the state. In this respect, the Study of necessity distinguishes also between reasonableness review standard of administrative decisions of statutory authorities and constitutional decisions of the highest dignitaries of the state.[85]

The earlier work discussed in short the ouster of jurisdiction of courts, judicial deference, and cases involving political ramifications as some of the apparently seeming issues that should not be viewed as political questions. Besides expanding on them, the present Study includes in this category also exceptions to judicial review, privileges and immunity, judicial self-restraint, and judicial discretion.[86] Finally, as regards research questions, it should be emphasized that the author's earlier work could only deal insufficiently some of the research questions and omitted *in toto* to deal some other research questions as presented in this Study.[87]

In view of the above explained background of both home and abroad, the Study undertakes this research venture to construct a theoretical framework of the doctrine of political question. A framework that would be constructed mainly in view of the Bangladesh Constitution but

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[84] For author's stand on all these issues of Bangladesh Constitution including the executive's power of appointment of the Judges of the Supreme Court, see generally, *infra*, Chapter 6 (p 172) of the Study.

[85] See, *infra*, Chapter 6 (Section 6.1.2.1.2.) (p. 180) read with Chapter 2 (Section 2.3.3.6.) (p. 84) of the Study.

[86] For the apparently seeming issues that are not truly political questions, see generally, *infra*, Chapter 7 (p. 240) of the Study.

[87] For Research Questions, see, *infra*, Chapter 1 (Section 1.4.) (p. 31) of the Study. For author's earlier work, see, Waheduzzaman (n 48).

would hold good for any jurisdiction that maintains a minimum of 'separation of powers' in its Constitution. In so constructing of the doctrine's theoretical framework, the Study passes through important assumptions and arguments. The Study proceeds to reflect on those assumptions.

1.3. Major Assumptions Underlying the Study

There are indeed numerous assumptions and arguments that pervade through the entire Study. It is identified here some major assumptions that underlie the Study. Since the Study's aim is to construct a theoretical framework of the political question doctrine, the *first* and foremost assumption is that Bangladesh needs or should have a political question doctrine.[88] Since the theory of political question is based on the principle of 'separation of powers', the *second* assumption is that the Bangladesh Constitution preserves 'separation of powers' among the organs of government to maintain a claim for political question.[89] Since political question revolves around the idea of 'unbounded discretion', the *third* assumption is that the theory of political question the Study envisages does not contradict the counteractive principle of 'rule of law'.[90] Since political questions deny judicial intrusion into certain specific areas of elected branches' responsibility, the *fourth* assumption is that for these questions it is better that the political departments should remain only politically accountable.[91] Since political question is a form of interpretive limit on court's power, the *fifth* assumption is that the superior courts' power of judicial review is not absolute and may be illegitimate when makes inroad into the domain of the other co-ordinate branches of the government.[92] Since the author distinguishes apparently seeming issues of Constitution from a true political question, the *sixth* assumption is that the apparently seeming issues exist and they cause confusion and uncertainty in determining the exact meaning and content of political question.[93]

1.4. Research Questions of the Study

The Study considers some specific questions in its broad attempt to construct a theoretical framework regarding the application of the doctrine of political question in Bangladesh. The

[88] The author establishes this assumption in Chapter 4 (Sections 4.2. and 4.3.) (pp. 142, 148) of the Study.
[89] The author establishes this assumption in Chapter 5 (Section 5.3.) (p. 166) of the Study.
[90] The author establishes this assumption in Chapter 6 (Section 6.3.) (p. 223) of the Study.
[91] The author establishes this assumption in Chapter 6 (Section 6.4.) (p. 229) of the Study.
[92] The author establishes this assumption in Chapter 6 (Section 6.4.) (p. 229)of the Study.
[93] The author establishes this assumption in Chapter 7 (Sections 7.1. to 7.7.) (240-256) of the Study.

questions are framed as the Study proceeds Chapter-wise and not divided as the main and subsidiary questions. The Study principally inquires the following questions:

(a) When may a constitutional issue be termed as a *political* as distinguished from a *legal* question? [94]

(b) Has the *American* doctrine of political question been correctly dealt with/applied by the Supreme Court of Bangladesh in cases of its own jurisdiction? [95]

(c) How should Bangladesh develop a clear *theoretical framework* regarding the application of the doctrine of political question in the adjudication of constitutional matters? [96]

(d) How should one distinguish the *apparently seeming issues* from a true political question to avoid confusion and uncertainty? [97]

1.5. Significance of the Study

The Study bears significance in the field of constitutional law of both home and abroad. It should be of particular interest in our jurisdiction since it deals with a relatively unexplored area of Bangladesh constitutional law. Following features are highlighted to reflect on the originality and significance of the Study both from the perspectives of Bangladesh and other jurisdictions.

Filling up the Vacuum of Wechsler's Thesis or Marshall's Marbury Holding. Professor Wechsler's classical approach or Chief Justice Marshall's *Marbury* holding either expressly or by implication at least refers to 'discretion' or 'unchecked discretion' in dealing with

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[94] For author's definition of 'political question' as well as the distinctive features of 'political question', see, *infra*, Chapter 2 (Section 2.3.) (p. 71) of the Study. See also, *infra*, Chapter 6 (p. 172) that presents the theoretical framework of the doctrine and Chapter 7 (p. 240) that distinguishes 'political question' from the other apparently seeming constitutional issues or questions.

[95] See, *infra*, Chapter 4 (p. 129) of the Study. Chapter 4 first establishes that the American doctrine of political question has not been correctly dealt with by the Bangladesh Supreme Court. It then shows that currently there does not exist any political question doctrine in Bangladesh, but justifies the necessity of such a doctrine in its jurisdiction.

[96] See, *infra*, Chapter 6 (p. 172) of the Study.

[97] See, *infra*, Chapter 7 (p. 240) of the Study. See, *supra* text accompanying note 87 (the author could not adequately deal research questions (a), (c) and (d); and, did not at all address research question (b) in his earlier work on the subject).

powers of political branches of government. But neither Wechsler nor Marshall guides courts as to how should they distinguish between checked and unchecked discretionary powers of the government. No scholar also has yet come forward to fill this vacuum of classical strand of the doctrine. The present Study in an attempt to construct a theory of political question on the basis of 'unbounded discretion' fills the void of Wechsler's thesis or Marshall's *Marbury* holding in this regard.[98]

The Jurisprudence of Discretionary Powers. Since the Study constructs the theory of political question on the basis of 'unbounded discretion', the concept of discretionary powers of political branches would become more illuminated. Constitution confers powers of various nature and dimensions upon dignitaries of the state. The Study would help judges and others responsible for constitutional interpretation to differentiate a discretionary power from other instances of power that may not strictly be termed as a discretionary power. Again, so far discretionary powers themselves are concerned, the Constitution itself does not distinguish between bounded and unbounded discretionary powers of government. The Study would be of guidance for anyone including the superior courts to differentiate unbounded from bounded discretion on the basis of some sound and rational principle.

The Feasibility of a Political Question Doctrine in Bangladesh. The Study would help any person interested in Bangladesh Constitutional Law to appreciate whether or not a political question doctrine may exist within the framework of Bangladesh Constitution and, if so, within what limits such a doctrine exists.

The Application and Misapplication of the Doctrine. The Study provides workable criteria to distinguish "political" from "legal" questions of Bangladesh Constitution. This would help the Judges of the Bangladesh Supreme Court to identify accurately a political question so as to decline jurisdiction in matters involving 'substantive political judgment'. The Study also distinguishes a true political question from the apparently seeming issues or concerns of the Constitution. This would help removing the confusion and uncertainty that exists in legal atmosphere regarding political questions. The Study, therefore, works not only to ensure proper application but also to avoid misapplication of the doctrine.

[98] For Wechsler's thesis and Marshall's *Marbury* holding, see, *supra* text accompanying notes 49-53.

Transgressing the Limits by Courts. One is commonly accustomed to think of transgression of constitutional limits by the political branches of government. The Study shows that even judiciary may be charged for overreaching its adjudicative sphere. Besides the academicians and Judges, the political branches would also now be conscious of the fact that some issues of the Constitution are indeed political questions and the Court would be transgressing its limit if undertakes to adjudicate a political question.

The Universal Application of the Doctrine. The Study grounds the constitutional basis of the doctrine in the principle of 'separation of powers'. Since every Constitution maintains a minimum of 'separation of powers' among the governmental organs, this is a general basis rendering the doctrine capable of universal application irrespective of the nature of the government the Constitution has chosen for itself (unitary or federal; parliamentary or presidential etc.) as well as whether the constitutional system is based on a rigid 'separation of powers' or not. Therefore, the probable outcomes of the research may generally hold good for any jurisdiction founded on constitutional democracy and professing 'rule of law' in its Constitution.

The Development of Knowledge. The Study deals with an otherwise overlooked but vastly important area of constitutional law. The Study if published should contribute to develop more knowledge on the subject. Further scholarly initiatives expected to be undertaken would profoundly enrich knowledge in this particular field of constitutional law.

1.6. Scope of the Study

The Study develops a theoretical framework of the doctrine of political question on the basis of discretionary powers. However, the framework of the doctrine is built on constitutional discretion of highest dignitaries of the state as opposed to statutory discretion of other public functionaries of the state. Statutory conferment of discretionary powers that are mostly the subject matter of administrative law are also dealt with but only to reflect on the meaning, nature, kinds and scope of a discretionary power. The Study thus maintains distinction between constitutional discretion of political branches of government and statutory discretion of other public officials of the state.[99]

[99] See, *infra*, Chapter 6 (Section 6.1.1.) (p. 172) of the Study.

In the analysis of discretionary powers, the term 'reasonableness' feature very prominently. But a distinction should be maintained between reasonableness as part of the requirement of substantive law and reasonableness review standard of governmental decisions. Political question relates only to the latter and not to the former phenomena. Reasonableness, for example, appears in the context of fundamental rights: doctrine of reasonable classification in right to equality; reasonable and non-arbitrary law in right to protection of law; imposition of reasonable restrictions on certain fundament rights etc. In these cases, the term 'reasonable' form part of the substantive law of those relevant fundamental rights. The Study considers these types of 'reasonableness' also but only to differentiate them from reasonableness review of political branches' decision that truly concerns the political question analysis.[100]

In constructing the framework of the doctrine, the Study takes into account issues of many and varied dimensions of Bangladesh Constitution: ordinance making power, emergency power, prerogative of mercy, legislative authority of making law, parliament's authority to amend the Constitution, appointment powers of the executive, foreign relations powers of the political departments etc. It should be borne in mind that these examples are only illustrative and not exhaustive of what should or should not be regarded as political questions within the framework of the Bangladesh Constitution.

The Study presents a theoretical framework of the doctrine mainly in view of the Bangladesh Constitution. But argues at the same time that the proposed model of the doctrine would equally hold good for any jurisdiction founded on 'separation of powers' and professing 'rule of law' in its Constitution. A political question, therefore, exists irrespective of the nature of the government the Constitution suggests (unitary or federal; parliamentary or presidential; republican or monarchical etc.) as well as whether the constitutional system is based on a rigid 'separation of powers' or not.

The Study examines the political question doctrine's origin, development and current status in the American jurisdiction. The Study also inquires in brief the doctrine's status in India and Pakistan. But the Study is not principally comparative merely because it takes into account these jurisdictions where the doctrine has either been born or featured prominently or

[100] See, *infra*, Chapter 6 (Section 6.1.2.1.2.) (p. 180) of the Study.

as neighbouring jurisdictions in the adjudication of constitutional matters. They merely serve as a background study of the thesis.

Sovereign immunity, act of state doctrine and similar other issues and concerns of international law fall beyond the scope of the Study.

1.7. Methodology of the Study

The Study aims to develop a theoretical framework of the doctrine of political question in constitutional litigation of Bangladesh. As such, it is essentially a doctrinal type of research venture. However, the Study though mainly theoretical has practical implications and importance since it reflects on the limits or scope of judicial review power of the Apex Court of Bangladesh. Although the issue of 'political question' has attracted increased attention globally in the recent past,[101] it still suffers from the lack of a comprehensive and coherent theoretical framework that may be applicable for any specific jurisdiction or globally. Therefore, much could be gained by this theoretical research project.

As a theoretical type of research work, it follows the content analysis method. It interprets as well as critically analyzes the key cases and constitutional provisions of Bangladesh, United States, India, and Pakistan. However, the Study is not comparative simply because it takes into account some foreign jurisdictions. To state otherwise, it is not comparative in the traditional sense of conducting case studies of one or more foreign legal systems. It may be said to be comparative only in the broader sense of seeking more comprehensive patters of constitutional behaviour as to the issue of 'political question' from a review of some relevant jurisdictions that have dealt with the issue.

[101] For scholarly commentaries on the doctrine in US jurisdiction, see, *supra*, Chapter 1 (Sections 1.1.1., 1.1.2. and 1.1.3.) (pp. 18, 19, 21) and, *infra*, Chapter 3 (Section 3.1.) (p. 90) of the Study. For Bangladeshi commentaries, see, *supra* notes 48 and 56. The doctrine has attracted attention in African jurisdictions also. See, for example, Wahab O. Egbewole and Olugbenga A. Olatunji, 'Justiciability Theory Versus Political Question Doctrine: Challenges of the Nigerian Judiciary in the Determination of Electoral and other Related Cases' (2012) *The Journal Jurisprudence* 117; M Mhango, 'Separation of Powers and the Application of Political Question Doctrine in Uganda' (2013) 6 *African Journal of Legal Studies* 249; M Mhango, 'Separation of Powers in Ghana: The Evolution of the Political Question Doctrine' (2014) 17 (6) *PELJ* 2704. The doctrine has received attention in other jurisdictions as well. See, for example, Po Liang Chen & Jordan T. Wada, 'Can the Japanese Supreme Court Overcome the Political Question Hurdle?' (2017) 26 (2) *Washington International Law Journal* 349; Yap Po Jen, 'Exploring the Political Question Doctrine in Hong Kong' (2017) 29 *Singapore Academy of Law Journal* 690.

Besides the cases and constitutional provisions of the aforesaid jurisdictions, the Study also considers secondary sources like journal articles and reference books on the subject of the political question doctrine. The Study critically examines them to determine what has already been done and what yet requires to be done in this important field of constitutional law. It thus considers both primary and secondary resources and utilizes them for purposes of the Study. A critical analysis of existing body of case law of Bangladesh Supreme Court is undertaken to show how the Court has failed to grasp the real meaning of the American doctrine of political question.

The Study constructs a theory of political question which relates different concepts such as, judicial review, justiciability, political question, *locus standi*, rule of law, and political accountability to each other in a coherent form. The Study furthermore distinguishes the apparently seeming constitutional issues from a true political question to avoid confusion and uncertainty. The Study grounds the doctrine's constitutional basis in the principle of 'separation of powers'. Since 'separation of powers' is a general basis capable of universal application, the Study claims that the theoretical framework it constructs mainly in view of the Bangladesh Constitution should hold good for other jurisdictions as well. Most part of its enquiries should transcend any specific boundaries and its outcome should be applicable irrespective of the nature of the governmental system of a country. In short, the Study offers fresh insights into the topic under consideration and constructs a theoretical framework that addresses the puzzling issue of political question.

1.8. Synopsis of Chapters of the Study

The Study has been divided into 8 Chapters. Chapter 1 (present one) introduces one with the background, rationale, significance, research questions, scope, objectives, assumptions and methodology of the Study.

Chapter 2 conceptualizes political question within the framework of Bangladesh Constitution. It establishes political question as a form of *interpretive* limit on the Supreme Court's power of judicial review and explores its distinctive nature and characteristics as a form of interpretive limit. It distinguishes political question from the standing, ripeness and mootness doctrines and other related phenomena.

Chapter 3 traces the historical origin and development of the doctrine. It, however, considers only the jurisdiction of United States where the doctrine has been born and the two neighbouring jurisdictions of India and Pakistan. It first takes into account the jurisdiction of United States: outlines the doctrine's historical origin and development in the US Supreme Court, seeks to identify the basis on which the US Supreme Court grounds the doctrine's theoretical foundation, and meets the theoretical objections of some scholars of recognized merit who argue against the existence of political question doctrine of any kind. It then explores the doctrine's status in the Indian and Pakistani jurisdictions.

Chapter 4 reflects on the attitude of Bangladesh Supreme Court toward political question. It finds that the Judges of the Bangladesh Supreme Court simply have failed to grasp the real meaning of political question in cases of its jurisdiction. It then seeks to justify the necessity of the doctrine of political question in Bangladeshi jurisdiction.

Chapter 5 deals with the principle of 'separation of powers' as constitutional basis of the doctrine in Bangladesh. First of all, it reflects on the meaning and substance of the principle of 'separation of powers' in constitutional jurisprudence. It then explores the characteristic features of the principle of 'separation of powers' as observed in the Constitutions of UK and USA. It finally establishes that the Bangladesh Constitution maintains 'separation of powers' among organs of the government to substantiate a claim for political question.

Chapter 6 presents the theoretical framework of the doctrine on the basis of unbounded discretionary powers of the political branches of government. As a necessary corollary, it searches for the essential mark of discretionary power, the differentiating criteria of unbounded discretion and furthermore seeks to establish that the idea of 'unbounded discretion' does not contradict with the counteractive principle of 'rule of law'. It considers specific issues of the Bangladesh Constitution to determine whether or not they should be regarded as political questions. Finally, it justifies political accountability only of the political departments for political questions.

It is difficult to grasp political question as a constitutional concept. It frequently gets confused with some other apparently seeming issues of the Constitution. Chapter 7 identifies those issues of the Constitution that are not truly political questions. This is of particular

importance since it helps both clarifying the concept of political question itself as well as judges avoiding misapplication of the doctrine in a given case.

Chapter 8 first summarizes the Study's arguments and incidents of political question as a form of *interpretive* limit on the Supreme Court's power of judicial review. It then offers the potentials for further research on the subject and lastly expresses the concluding words of the Study.

CHAPTER 2
CONCEPTUALIZING JUDICIAL REVIEW AND POLITICAL QUESTION

Introduction

Since the Study regards political question as a form of interpretive limit on Supreme Court's power of judicial review, it is vital to know the attributes of judicial review itself. Keeping in view the objective, this Chapter seeks to elucidate the essential characteristics of judicial review and ascertains its relationship with political question. The Chapter comprises of three Sections. Section 2.1. outlines the source, nature and scope, and express constitutional limitations of Supreme Court's power of judicial review. Section 2.2. reflects on the conditions that need to be satisfied before one may claim constitutional relief in exercise of Court's power of judicial review. Section 2.3. defines political question, identifies issues of Bangladesh Constitution susceptible of political question analysis and explores the distinctive features of political question as distinguished from other incidents of judicial review observed in Sections 2.1. and 2.2. of this Chapter of the Study.

2.1. The Power of Judicial Review and the Constitution

2.1.1. Allocation of Sovereign Power

A Constitution is generally regarded as the fundamental law of a state outlining the principles upon which the government is founded.[1] Constitutions of states deal, *inter alia*, with powers of the highest dignitaries of the state. Thus, one of the main features of state Constitutions is that they regulate the division of sovereign powers among organs of government, designate the persons upon whom the authority to exercise such powers may be vested, and determine the manner in which the power is to be exercised.[2] Bangladesh constitutionally is a "People's Republic"[3] wherein the people are the repository of all sovereign powers of the state. To this effect, Article 7 (1) of the Constitution contains a unique provision: "All powers in the Republic belong to the people, and their exercise on behalf of the people shall be effected

1 Amir-ul Islam, 'Status of an Usurper: A Challenge to the Constitutional Supremacy and Constitutional Continuity in Bangladesh' (1997) 2 *The Chittagong University Journal of Law* 1.
2 ibid.
3 See, Article 1 of the Constitution.

only under, and by the authority of, this Constitution." In *Dr. Mohiuddin Farooque v Bangladesh* [4], Mustafa Kamal J focuses the 'people centric' and 'home-grown' nature of the Bangladesh Constitution in these words:

> This Constitution of ours is not the outcome of a negotiated settlement with a former colonial power . . . It is the fruit of a historic war of independence, achieved with the lives and sacrifice of a telling number of people for a common cause making it a class apart from other Constitutions of comparable description. It is a Constitution in which the people features as the dominant actor. It was the people of Bangladesh who in exercise of their own self-proclaimed native power made a clean break from the past unshackling the bondage of a past statehood and adopted a Constitution of its own choosing. The Constitution, historically and in real terms, is a manifestation of what is called "the People's Power". The people of Bangladesh, therefore, are central, as opposed to ornamental, to the framing of the Constitution.[5]

Parts IV, V and VI of the Constitution provides for the establishment of executive, legislative and judicial organs of the government. They contain detail provisions regarding these branches' composition, powers and respective functions. These organs of the government, therefore, owe their existence and authority directly to the Constitution. However, in terms of Article 7 (1) of the Constitution, they merely represent and exercise the sovereign power originally belonged to the people. Thus, their powers are constitutionally the powers of the people themselves and they exercise, as Mustafa Kamal J says, "not their own indigenous and native powers but the powers of the people on terms expressed by the Constitution."[6]

As stated above, Constitutions of states besides distributing powers among organs of government also direct the persons as to whom the exercise of such powers may be entrusted. Upon whom the Bangladesh Constitution vests the exercise of the people's sovereign power? One will find that Article 55 (2) of the Constitution vests in the Prime Minister the executive powers of the Republic. Likewise, Article 65 (1) of the Constitution vests the legislative powers of the Republic in the Parliament to be known as the House of the Nation. As to the judicial powers, Article 94 (1) of the Constitution provides for the establishment of an apex court to be known as the Supreme Court of Bangladesh comprised of two divisions - the Appellate Division and the High Court Division.[7] In this respect, it may be pertinent to

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4 (1997) 49 DLR (AD) 1 (hereafter *Dr. Mohiuddin Farooque*).
5 ibid 14.
6 ibid.
7 See, Chapter I (The Supreme Court) of Part VI of the Constitution.

mention that the Bangladesh Constitution, unlike many other constitutions of the world, also contains provision regarding the Subordinate Judiciary.[8] And interestingly enough, the Constitution, besides the Supreme Court and the Subordinate Courts, also makes separate provisions for Administrative Tribunals.[9]

Here one thing is clearly noticeable, that is, while there is express vesting of the executive and legislative powers of the Republic in the Prime Minister and the Parliament, there is no such express vesting of the judicial powers of the Republic in the Judiciary. It may be argued that although the Constitution is silent about vesting of the judicial power of the Republic, the power is vested in courts with Supreme Court at the apex when one reads Paragraph 6 of the Fourth Schedule[10] with Part VI of the Constitution. Paragraph 6 of the Fourth Schedule expressly provides for the continuity of the incumbent Chief Justice and the Judges of the erstwhile High Court (of Pakistan) in the new constitutional dispensation of Bangladesh and the transfer of legal proceedings from the previous Courts to the two Divisions of the Bangladesh Supreme Court. In *Mujibur Rahman v Bangladesh*, [11] Mustafa Kamal J rightly held:

> Our Constitution, therefore, expressly intended that the previously existing Superior Courts shall continue to function, albeit in a new dispensation and the subordinate courts too shall continue to function. Although the Constitution itself omitted to confer judicial power on the Supreme Court and the Subordinate Courts by any express provision, there can be no doubt whatsoever that the Supreme Court and the Subordinate Courts are the repository of judicial power of the State, because they have been previously existing and the Constitution allows them to function, although in a new form.[12]

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8 See, Chapter II (Subordinate Courts) of Part VI of the Constitution.

9 See, Chapter III (Administrative Tribunals) of Part VI of the Constitution.

10 Fourth Schedule of the Constitution contains the 'transitional and temporary provisions' under Article 150 (1) of the Constitution. Provisions contained in Paragraphs 6 and 7 of the Fourth Schedule are in relation to The Judiciary (both Supreme Court and Subordinate Courts) established under Part VI of the Constitution.

11 (1992) 44 DLR (AD) 111 (hereafter *Mujibur Rahman*).

12 ibid 128. In support of the view, the learned Judge quoted with approval this observation of Lord Diplock in *Hinds v The Queen*: "As respects the judicature, particularly if it is intended that the previously existing Courts shall continue to function, the Constitution itself may even omit any express provision conferring judicial power on the judicature." (1976) 1 All ER 353. See, *Mujibur Rahman*, ibid.

Thus, under our Constitution, the judicial power of the Republic is by implication at least vested with the Judiciary.[13] It is, therefore, required, albeit in brief, to reflect on this branch of the government.

2.1.2. Judiciary and the Attributes of Judicial Power

The judicial branch of the government is mainly understood to mean a system of courts of law for the administration of justice and the judges presiding over these courts. The purpose of Bangladesh judicial system is also the administration of justice. To achieve the purpose, Article 104 of the Constitution manifestly empowers the Supreme Court to issue any order it deems fit for ensuring 'complete justice' in a case. The Article reads: "The Appellate Division shall have power to issue such directions, orders, decrees or writs as may be necessary for doing *complete justice* in any case or matter pending before it, including orders for the purpose of securing the attendance of any person or the discovery or production of any document."[14] And the judiciary, both the apex and the subordinate courts, performs this function of administering justice through exercising "judicial power" of the Republic. It then requires to be seen the attributes of this sovereign "judicial power" originally belonged to the people under Article 7 (1) of the Constitution.

The United States (US) Supreme Court defines "judicial power" as the "right to determine *actual controversies* arising between diverse litigants, duly instituted in courts of proper jurisdiction".[15] The determination of the controversy or settling the dispute necessarily involves the hearing of parties, admission of proofs and evidence, interpretation and

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[13] However, as already mentioned, apart from the Supreme Court (Chapter I) and Subordinate Courts (Chapter II), Chapter III of Part VI of the Constitution contains provision for the establishment of Administrative Tribunals. Do these tribunals exercise "judicial power" of the state? The question was considered by the Appellate Division in *Mujibur Rahman*. MH Rahman J held that the administrative tribunals created under Article 117 of the Constitution exercise judicial power of the state, but Mustafa Kamal J took the contrary view that administrative tribunals are not wielder of the judicial power of the state. For detail, see, *Mujibur Rahman* (n 11) 120,128. Article 102 (5) of the Constitution creates exception to the Supreme Court's power of judicial review and refers, among other courts and tribunals, to the administrative tribunals constituted under Article 107 of the Constitution. In view of this author, the implication of the exception clause of Article 102 (5) read with Article 117, and the fact that the Administrative Tribunals, besides the Supreme Court and Subordinate Courts, form part of "The Judiciary" established under Part VI of the Constitution give rise to the logical conclusion that the administrative tribunal also exercises judicial power of the state. Therefore, the view of MH Rahman J seems to be more sound and rational in this regard. See also *Bangladesh v Zahangir Hossain* (1982) 34 DLR (AD) 173 (discussing when an administrative tribunal may be said to exercise the power quasi-judicially).

[14] Emphasis added.

[15] *Muskrat v United States*, 219 US 346,361 (1911) (emphasis added) (hereafter *Muskrat*).

application of law on the ascertained facts, and finally pronouncing a 'binding judgment' on the parties before it. In reaching its decision or, so to say, the 'binding judgment', the courts usually rely on the legal materials available in the legal system including the Constitution and statutes. In other words, judges base their decisions on the predetermined rules or sound principles of law.[16]

However, the questions of 'actual controversy' and 'binding judgment' *Muskrat* [17] identifies as incidents of "judicial power" in US system may not equally hold good for Bangladeshi jurisdiction. Article III of the US Constitution refers to "cases" or "controversy" which counsels against issuing advisory opinion by the US Supreme Court.[18] By contrast, Article 106 of the Bangladesh Constitution expressly confers the Advisory Jurisdiction upon the Appellate Division of the Supreme Court.[19] The Appellate Division, in its discretion, may always exercise this Advisory Jurisdiction in the absence of any concrete "case" or "controversy". And any opinion rendered by the Supreme Court on a point of law sought by the President is also *not* binding on the President. Howsoever persuasive force the opinion may carry in fact; in the eyes of law, it carries no authoritatively binding force.[20] Thus, the US requirements of *actual* 'case' or 'controversy' and 'binding judgment' may not always form the incidents of the exercise of "judicial power" in Bangladeshi jurisdiction.[21]

In the context of analyzing the attributes of a court's "judicial power", one should know also that a court's exercise of "judicial power" and having "jurisdiction" over a subject matter though may have close relationship, the expressions should not be used interchangeably. Jurisdiction when used in relation to courts means the authority of a court to exercise judicial

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16 Due to the limited space, the author does not consider here the question of what judges do or should do when they receive no guidance from manifest provisions of the Constitution or statutes in deciding cases.

17 *Muskrat* (n 15).

18 See, Article III, Section 2, Clause 1 of the United States (US) Constitution.

19 Article 106 reads: "If at any time it appears to the President that a question of law has arisen, or is likely to arise, which is of such a nature and of such public importance that it is expedient to obtain the opinion of the Supreme Court upon it, he may refer the question to the Appellate Division for consideration and the division may, after such hearing as at thinks fit, report its opinion thereon to the President."

20 For Appellate Division's exercise of the Advisory Jurisdiction under Article 106 of the Constitution, see, *Special Reference no. 1 of 1995* (1995) 47 DLR (AD) 111 (hereafter *Special Reference no. 1 of 1995*).

21 However, the provision of advisory jurisdiction as contained in Article 106 of the Bangladesh Constitution should be regarded only an exception to the rule that courts exercise "judicial power" to decide only actual case or controversy. In fact, Bangladesh Constitution also recognizes this general rule when it embodies the expression "aggrieved person" in Article 102 of the Constitution. In view of this author, three distinct sub-rules (standing, ripeness and mootness) may subsume under the said expression of the Article. The sub-rules in effect inhibit the Supreme Court from exercising "judicial power" in the absence of any concrete case or controversy. For detail, see, *infra*, Section 2.2.2.2. (p. 55) of the Study.

power in a specific case. In this sense, jurisdiction is the prerequisite to the exercise of judicial power in a given case.[22] Conversely, judicial power is the totality of powers a court exercises when it assumes jurisdiction over a subject matter and hears and decides the matter. In view of this author, the power of "judicial review" of the apex court of any country is one of the powers of such 'totality of powers' a court possesses when it assumes jurisdiction for deciding a subject matter. It is then necessary to see what this power of "judicial review" means within the framework of the Bangladesh Constitution.

2.1.3. Judicial Review Power of the Supreme Court

A written Constitution implies for a limited government the power of each organ being controlled by the Constitution. Each organ of the government is obliged to act within the limitations prescribed by the Constitution. No governmental organ can claim superiority to the other. Rather, it is the Constitution which is superior to all other organs of the government. This principle of 'constitutional supremacy' is implicit and inherent in all written Constitutions of the world even where the Constitution makes no express provision to that effect. The Framers of Bangladesh Constitution took additional care to remove all doubt and ambiguity in this regard and expressly declared that "This Constitution is, as the solemn expression of the people, the *supreme law* of the Republic."[23]

Naturally, an institution with some extra-ordinary power is required to oversee that no organ of government transgresses the limit set by the Constitution and thereby maintains supremacy of the Constitution. The task is invariably entrusted to the higher judiciary of any state. And the extra-ordinary power with which the higher judiciary accomplishes the task is the power of judicial review. In our jurisdiction, the Supreme Court performs this task of maintaining supremacy of the Constitution and in this sense acts also as the guardian of the Constitution. This exercise of the power of judicial review, however, does not render the Supreme Court a

[22] This general rule, however, admits exceptions particularly when the apex court assumes jurisdiction in constitutional matters. For example, the Bangladesh Supreme Court, on a number of occasions, has held that the Supreme Court, even where any ouster clause provision excludes jurisdiction of courts, has the power to declare an action to be without lawful authority if it is totally without jurisdiction (*coram non judice*) or is vitiated by *mala fide* or bad faith. See, for example, *Jamil Huq v Bangladesh* (1982) 34 DLR (AD) 125 (hereafter *Jamil Huq*); *Khandker Mostaque Ahmed v Bangladesh* (1982) 34 DLR (AD) 222; *Saheda Khatun v Administrative App. Tribunal* (1998) 3 BLC (AD) 155; *Mohammadullah v Secretary, Home Affairs* 1996 BLD 18; *Syed Abdul Alim v DC, Dhaka* (2006) 58 DLR 74.

[23] See, Article 7 (2) of the Constitution (emphasis added).

superior organ of the government. It still remains as the co-ordinate and co-equal organ with the two other organs of the government.

By ensuring compliance with the provisions of the Constitution by the co-ordinate branches of government, the Supreme Court no doubt performs a delicate task but does so only in fulfillment of its constitutional obligation. Mahmudul Islam rightly appreciates the rationale of judicial review: "Courts exercise the power of judicial review on the basis that powers can be validly exercised only within their true limits and a public functionary is not to be allowed to transgress the limits of his authority conferred by the Constitution or the laws."[24] If the power of judicial review is then taken for granted, where lies the source of this power of the Bangladesh Supreme Court?

Article 102 of the Constitution may be said to be the source of the Supreme Court's power of judicial review which the Court exercises through writ jurisdiction. The Court may issue five different kinds of writs exercising power under Article 102 (2) of the Constitution. The High Court Division, on the application of any person aggrieved, may direct a person performing any functions in connection with the affairs of the Republic to refrain from doing that which he is not permitted by law to do (writ of prohibition), or to do that which he is required by law to do (writ of *mandamus*).[25] The Court, on the application of any person aggrieved, may also declare that any act done or proceeding taken by a person performing functions in connection with the affairs of the Republic has been done or taken without lawful authority and is of no legal effect (writ of *certiorari*).[26]

While the above mentioned writs may be issued only on the application of an 'aggrieved person'[27], the other two types of writs, writs of *habeas corpus* and *quo-warranto*, may be issued on the application of any person. Regarding these latter category of writs, the Constitution provides that the High Court Division may make an order directing that a person in custody be brought before it so that it may satisfy itself that he is not being held in custody

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[24] Mahmudul Islam, *Constitutional Law of Bangladesh* (3rd edn, Mullick Brothers 2012) 590.
[25] See, clause (a) (i) of Article 102 (2) of the Constitution.
[26] See, clause (a) (ii) of Article 102 (2) of the Constitution.
[27] Here, the expression 'aggrieved person' does not mean a person who has 'direct and personal interest'; rather, it is enough for the person to have only 'sufficient interest' in the matter. This is how the issue of *locus standi* (standing) was liberalized by the Supreme Court in its historic judgment of *Dr. Mohiuddin Farooque v Bangladesh*. For detail, see, *Dr. Farooque* (n 4) and, *infra*, Section 2.2.2.2.1. (p. 56) of the Study.

without lawful authority (writ of *habeas corpus*),[28] or requiring a person holding or purporting to hold a public office to show under what authority he claims to hold the office (writ of *quo-warranto*).[29]

It is essential to know the nature and various dimensions of the Supreme Court's power of judicial review as delineated above.

2.1.4. Nature and Scope of Judicial Review

The Study begins by emphasizing that the Constitution in its Article 102 (2) does not mention by name the five types of writs just mentioned above or nowhere in the Article has the word 'writ' been used. But the wording of Article 102 (2) may only mean or refer to the above named writs that have historically been issued by the Common Law Courts in England. Therefore, judicial review in Bangladesh, at the minimum, also means such powers of the Supreme Court as is possessed by the Common Law Courts of England. In a traditional UK sense, it means the power of superior courts "to hold illegal and hence unenforceable any action by a public official or any judicial or quasi-judicial act or proceeding of subordinate courts and tribunals or other administrative bodies and to enforce their performance of statutory duty."[30]

However, in a system of written Constitution, the power of judicial review means something more than is understood to mean in this traditional UK sense. It includes, for example, the power of the superior courts to strike down a law passed by Parliament on the ground of its repugnance to the Constitution. Does the Bangladesh Constitution contain any express provision to this effect?

One will find that Article 102 (2) of the Constitution that incorporates provisions for the issuance of writs does not specifically mention that the Court may review also laws and declare any such law void on the ground of its repugnance to the Constitution. In the absence of express provision in the said Article, Article 7 (2) of the Constitution is of significant guidance in this regard. After declaring the supremacy of the Constitution, Article 7 (2)

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[28] See, clause (b) (i) of Article 102 (2) of the Constitution.
[29] See, clause (b) (ii) of Article 102 (2) of the Constitution.
[30] Mustafa Kamal, *Bangladesh Constitution: Trends and Issues* (2nd edn, University of Dhaka 1994) 137.

further goes on to say, "and if any other law is inconsistent with this Constitution that other law shall, to the extent of the inconsistency, be void." [31] While this provision itself could be interpreted to confer on the Supreme Court the plenary power of judicial review over all kinds of legislation, Article 26 contains a separate provision for fundamental rights (hereafter FRs). The said Article not only declares the existing law inconsistent with FRs to become void,[32] but also enjoins the state not to make any law inconsistent with FRs embodied in Part III of the Constitution. Any law so made shall, to the extent of such inconsistency, be void.[33] Thus, though judicial review of legislation is implicit in a written Constitution,[34] the Framers of Bangladesh Constitution leaves no doubt for its Supreme Court to exercise the power when Article 102 (2) is read with Articles 7 (2) and 26 of the Constitution. His lordship K Hossain CJ in *Jamil Huq v Bangladesh* [35] rightly observed the true import of the Preamble, Article 7, Article 26 and Article 108 of the Constitution in the formative period of the country's judicial history:

> A combined reading of the provisions set out above indicates that full judicial power have been conferred by Bangladesh Constitution on the supreme judiciary as an independent organ of the State. It has power to declare a law passed by the legislature inconsistent with the Constitution or fundamental rights *ultra vires.*[36]

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31 See, *supra* text accompanying note 23.

32 See, Article 26 (1) of the Constitution.

33 See, Article 26 (2) of the Constitution. See also Article 44 of the Constitution that makes the right to move to the High Court Division for the enforcement of FRs itself a fundamental right. In this respect, the author should take note of the fact that Article 102 (1) of the Constitution embodies separate provisions empowering the High Court Division to enforce FRs. It states that the High Court Division, on the application of any person aggrieved, may give such directions or orders to any person or authority including any person performing any function in connection with the affairs of the Republic, as may be appropriate for the enforcement of any of the FRs conferred by Part III of the Constitution. In view of this provision, it may be construed that Article 102 (1) confers power on the High Court Division to enforce FRs, while Article 102 (2) confers power of judicial review in other (non-fundamental rights) matters. Mahmudul Islam (n 24) 593. In passing, it should also be noted that the scope of operation of FRs seems to be wider in our Constitution than that of the non-fundamental rights matters. Because Article 102 (1) empowers the High Court Division to enforce FRs against *any* person or authority including any person performing any function with the affairs of the Republic. On the contrary, the power of judicial review (as to non-fundamental rights matters) under Article 102 (2) applies *not* to any person or authority but only to a person performing any function in connection with the affairs of the Republic.

34 For example, the US Constitution does not specifically confer on its Supreme Court the power of judicial review of legislation. But the US Supreme Court exercises this power and also declares any law passed even by the federal legislature void if found repugnant to any provision of the Constitution. For a recent case/authority on this, see, *Zivotofsky ex rel. Zivotofsky v Clinton*, 132 S. Ct. (2012) (hereafter *Zivotofsky*). The US Supreme Court has extended the power to judicial review of legislation also based on Chief Justice Marshall's *dicta* in *Marbury v Madison* 5 (1803) US (1 Cranch) 137 (hereafter *Marbury*).

35 *Jamil Huq* (n 22).

36 ibid 129.

In England, the principle of 'parliamentary sovereignty' prevails as constitutional system of the country. This constitutional principle manifests itself in the power of the British Courts. The British Courts may, by issuing the ancient writs, ensure observance of public officials with laws but the Courts may not strike down the law itself. Justice Mustafa Kamal succinctly puts this: "Any law enacted by Parliament and receiving the assent of the Crown becomes the law of the land and is *ipso facto* beyond overturning by the British Courts."[37] On the contrary, the Bangladesh Supreme Court can not only compel obedience of state officials to laws but also can declare any such law void if found to be inconsistent with any provision of the Constitution.[38]

Judicial review of laws is thus an essential attribute of the Bangladesh Constitution. But can the scope of judicial review go beyond the power of the review of legislation? Anyone familiar with the development of constitutional law particularly in Bangladesh and India knows that the power has been extended to include also the review of constitutional amendments. In Bangladesh, for example, the Parliament passed the Constitution (Eighth Amendment) Act, 1988 to amend, *inter alia*, Article 100 of the Constitution. The amendment set up six permanent Benches of the High Court Division outside capital and the President was authorized to fix by notification the territorial jurisdiction of the permanent Benches. The amendment was challenged in what has now popularly come to be known as the Constitution (8^{th} Amendment) Case.[39]

The Supreme Court of Bangladesh, to declare the said amendment *ultra vires*, enunciated the principle of basic structure of the Constitution. According to this principle, alteration of the basic structures of the Constitution amounts to destruction and Parliament in the name of amendment cannot destroy the Constitution. In view of the Court, the High Court Division with plenary judicial power over the entire Republic is a basic structure of the Constitution. On the basis of this finding, the Appellate Division held that the 8th Amendment having set

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[37] Mustafa Kamal (n 30) 138. However, after the passing of the Human Rights Act of 1998, the British Courts may issue 'declaration of incompatibility' if a law is found to be inconsistent with any provision of the Human Rights Act. Parliament then amends the law so as to bring it in conformity with the Human Rights Act. Thus, the Courts themselves cannot strike down the law. In this way, parliamentary sovereignty is still technically retained in England.

[38] For judicial review of laws under Bangladesh Constitution, see, *Mujibur Rahman* (n 11); *Kudrat-E-Elahi Panir v Bangladesh* (1992) 44 DLR (AD) 319 (hereafter *Kudrat-E-Elahi Panir (AD)*). Though in both the cases the laws were unsuccessfully challenged, one will certainly find them as illustrative cases of judicial review of legislation within the framework of the Bangladesh Constitution.

[39] *Anwar Hossain Chowdhury v Bangladesh* 1989 BLD (Spl) 1=41 DLR (AD) 165 (hereafter *Anwar Hossain Chowdhury*; or, *Constitution (8^{th} Amendment)* case).

up six permanent Benches outside Dhaka and thereby destroying the unitary character of the High Court Division has altered the basic structure of the Constitution and is, therefore, void. Subsequently, the Court has also declared the 5th,[40] 7th,[41] 13th,[42] and 16th[43] Amendments of the Constitution unconstitutional.

In *Constitution (8th Amendment)* case,[44] the Supreme Court found, *inter alia*, the 'supremacy of the Constitution' and 'rule of law' as basic structures of the Bangladesh Constitution. Since without an independent judiciary with the power of judicial review these principles of the Constitution cannot be achieved, judicial review *per force* must also be taken to be a basic structure of the Bangladesh Constitution.

In view of the overall analysis thus far made, the author may now summarize the nature and scope of the power of judicial review of Bangladesh Supreme Court. Regarding its nature, it may be said that judicial review, as opposed to a Common Law remedy as prevalent in England, is a constitutional conferment in our jurisdiction and hence cannot be taken away by any ordinary legislation. Furthermore, in light of the decision of the *Constitution (8th Amendment)* case,[45] this power of the Court cannot be taken away or curtailed even by a constitutional amendment.[46]

As to its scope, it is manifest that it means at the minimum such powers of the Supreme Court as is enjoyed by the Common Law Courts of England through issuing the ancient writs. At the next level, it includes the power to review legislation on a combined reading of Articles 102 (2), 7 (2) and 26 of the Constitution. To these, the judicial precedent of *Anwar Hossain Chowdhury* [47] has added the power of review of constitutional amendments. And in view of Articles 102 (1), 26 and 44 of the Bangladesh Constitution, as says Justice Mustafa Kamal, it

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[40] See, The Constitution (5th Amendment) Act's Case: *Bangladesh Italian Marble Works Ltd v Bangladesh* 62 DLR (HCD) 70; *Khondker Delwar Hossain v Bangladesh Italian Marble Works Ltd* 62 DLR (AD) 298=2010 BLD (Spl) (AD) 1 (hereafter *Khondker Delwar Hossain*; or, *Constitution (5th Amendment)* case).

[41] See, The Constitution (7th Amendment) Act's Case: *Siddique Ahmed v Bangladesh* 2013 Counsel (Spl) 1 (hereafter *Siddique Ahmed*; or, *Constitution (7th Amendment)* case).

[42] See, The Constitution (13th Amendment) Act's Case: *Abdul Mannan Khan v Bangladesh* 2012 20 BLT (Special Issue) (AD) 1 (hereafter *Abdul Mannan Khan*; or, *Constitution (13th Amendment)* case).

[43] See, The Constitution (16th Amendment) Act's Case: *Bangladesh v Adv. Asaduzzaman & Others* 2017 CLR (Spl) (hereafter *Adv. Asaduzzaman & Others*; or, *Constitution (16th Amendment)* case).

[44] *Anwar Hossain Chowdhury* (n 39).

[45] ibid.

[46] Here the author only states the law as it is found to have developed through case law. For author's view on the legitimacy/propriety of Court's judicial review of constitutional amendments, see, *infra*, Chapter Six (Section 6.2.3.5.) (p. 213) of the Study.

[47] *Anwar Hossain Chowdhury* (n 39).

may also "embrace the power of a Court to enforce the fundamental rights guaranteed by the Constitution and also to declare a law or an official action to be invalid if it contravenes a fundamental right."[48]

However, the Bangladesh Supreme Court exercises the power of judicial review subject to some limitations. The limitations expressly imposed by the Constitution are as outlined below.

2.1.5. Constitutional Limits of Judicial Review

The power of judicial review of the Bangladesh Supreme Court is not beyond any limit under the Constitution. The Constitution, like the elected branches of the government, also circumscribes the powers of the Supreme Court. There are some express provisions in the Constitution that create exceptions to judicial review: laws relating to disciplined force fall outside the purview of judicial review (Article 45); laws intended to give effect to Fundamental Principles of State Policy (FPSP) set out in Part II of the Constitution, laws specified in the First Schedule of the Constitution, and laws providing for detention, prosecution or punishment of any person for genocide, crimes against humanity or war crimes and other crimes against international law are exempted from judicial review (Article 47); judicial review is barred under Articles 31, 35 and 44 of the Constitution for a person to whom clause (3) of Article 47 applies (Article 47A); and, a court or tribunal established under a law relating to the defence services of Bangladesh or any disciplined force or a tribunal to which Article 117 applies is not amenable to the power of judicial review of the Supreme Court (Article 102 (5)).[49]

Likewise, the Constitution also contains provisions that manifestly oust the jurisdiction of the Court in certain matters: advice tendered by the Prime Minister to the President shall not be enquired into in any court (Article 48 (3)); the validity of the proceedings in Parliament shall not be questioned in any court (Article 78 (1)); certificate under the hand of the Speaker that the Bill is a Money Bill shall be conclusive for all purposes and shall not be questioned in any

[48] Mustafa Kamal (n 30) 137.
[49] For detail on exceptions to judicial review, see, *infra*, Chapter 7 (Section 7.1.) (p. 240) of the study.

court (Article 81 (3)); and, the validity of election law and elections shall not be called in question in any court (Article 125).[50]

These are instances of express constitutional limitation that exemplify how the Supreme Court of Bangladesh also functions in terms of the Constitution. Can there, however, be any other limitation on the Supreme Court's power of judicial review under the Bangladesh Constitution? In view of this Study, there may be also interpretive limits on the Supreme Court's power of judicial review which find expression in constitutional issues termed as 'political questions'. Therefore, to apprehend fully the concept of 'political question', it is essential to explore its nature and characteristics as a form of interpretive limit.

But the concept of 'political question' this Study envisages is related to the conditions that need to be satisfied before one may claim relief in judicial review. It is vitally intertwined with the grievance sub-rules (*locus standi*, ripeness and mootness) of Article 102 in general and with the issue of *locus standi* in particular.[51] The Study, therefore, proceeds to analyze the preconditions of availing constitutional remedies with special emphasis on the question of applicant's *locus standi* before articulating 'political question' as a form of interpretive limit on the Supreme Court's power of judicial review.

2.2. The Conditions of Obtaining Relief in Judicial Review

The author divides the preconditions of obtaining constitutional relief into two broad categories. *First*, rules of practice or the self-imposed rules of court. *Second*, rules which may have previously been honoured simply as rules of practice but for being embodied in the Constitution now have become part of the law of the Constitution. They are, therefore, rules founded on the Constitution itself. The Study considers both categories of rules for a fuller understanding of the characteristics of judicial review within the framework of Bangladesh Constitution.

[50] For detail on absence of jurisdiction, see, *infra*, Chapter 7 (Section 7.2.) (p. 241) of the study.

[51] The author has shown how the three sub-rules (standing, ripeness and mootness) subsume under the grievance rule ('person aggrieved') of Article 102 of the Constitution. See, *infra*, Chapter 2 (Section 2.2.2.2.) (p. 55) of the Study.

2.2.1. Rules of Practice

Except for the writ of *habeas corpus* and enforcement of FRs, the other writs are generally discretionary.[52] The Court exercises discretion in accordance with judicial consideration and well established principles.[53] These principles of the Court are simply termed as *rules of practice* based on sound and proper exercise of discretion. And since remedies given in writ jurisdiction are mainly equitable in nature, considerable portion of such rules are but equitable principles relating to the conduct of the petitioner. For example, there is a rule that requires the petitioner to come with clean hands and his petition may be rejected for improper conduct which includes *mala fide*, fraud, suppression of material facts and the like. Again, acquiescence of the petitioner is a fact that may be taken into consideration in granting relief by the Court. Waiver and election may also debar a party from making a certain claim.[54] Similarly, the Court may not inquire into belated or stale claims. That is to say, to avail remedy in writ jurisdiction the petitioner must come to the Court without inordinate delay.[55] Likewise, the Court may not allow the petitioner to challenge legality of an action after reaping benefits.[56]

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[52] The writ of *habeas corpus* under Article 102 (2) (b) (i) is not discretionary since it is obligatory on the part of the High Court Division to be satisfied that a person is not being held in custody illegally or in an unlawful manner. Again, the enforcement of FRs under Article 102 (1) is also not discretionary since Article 44 of the Constitution makes the right to seek enforcement of FRs itself a fundamental right. Hence, once the Court finds that a fundamental right has been violated it is under constitutional obligation to grant the necessary relief.

[53] It should be noted that even in the non-discretionary cases of the enforcement of FRs and writ of *habeas corpus*, the Court exercises jurisdiction taking into account the laws of procedure, evidence, limitation, *res judicata*, and the like. Article 107 of the Constitution has empowered the Supreme Court to make rules for regulating the practice and procedure of the Court. No rule regarding the procedure on the writ jurisdiction has been made under the said Article. During the Pakistan period, in exercise of the power under the High Courts (Bengal) Order, 1947, certain rules were made regarding writ petitions under Article 170 of the Pakistan Constitution of 1956. By virtue of section 24 of the General Clauses Act, 1897 those rules are applicable in respect of the writ petitions under Article 102 of the Bangladesh Constitution. See, Appendix IV of the Rules of the High Court of Judicature for East Pakistan, 1960, vol. 1, Chapter XI, pp. 253-255.

[54] See, *Bangladesh v Mahbubuddin Ahmed* (1998) 50 DLR (AD) 154 (dismissal of a public servant and his contesting in the election to Parliament was held to have accepted his dismissal from service as otherwise he could not contest in the Parliamentary election).

[55] See, *Ekushey Television LTD. v Dr. Chowdhury Mahmood Hasan* (2002) 54 DLR (AD) 130; *Raquibuddin Ahmed v Syndicate, Dhaka University* (2005) 57 DLR 63.

[56] There are some other *rules of practice* that do not relate to the conduct of the petitioner but the Court follows them as a matter of principle. Writ petitions are generally disposed of on affidavits and on facts admitted by the opposing contenders. The Court will not embark upon to decide disputed questions of fact in writ jurisdiction. Judicial review, therefore, is available not for review of facts but for review of law based on accepted facts. Another principle the Court follows is that the writ will not issue on mere technicalities. In other words, the issues raised in writ petition must not be trivial but substantial.

2.2.2. Rules Founded on the Constitution

There are two other rules the Supreme Court follow in granting relief in the exercise of writ jurisdiction. They are: *first*, there is no other equally efficacious remedy provided by law and *second*, the petitioner seeking relief, except for the writs of *habeas corpus* and *quo-warranto*, is an 'aggrieved person'. These rules cannot simply be termed as *rules of practice* or self-imposed rules of the Court since being embodied in Article 102 they have now become part of the law of the Constitution. The first rule has been termed as 'rule of exhaustion' and the second rule as 'rule of grievance' for purposes of analysis in this Study. It is essential to reflect on the meaning and content of the two 'constitutional rules' in brief.

2.2.2.1. Rule of Exhaustion

The 'rule of exhaustion' springs from the constitutional mandate that the Court for issuing any writ should first satisfy itself that "no other equally efficacious remedy is provided by law."[57] The petitioner, therefore, should exhaust all statutory remedies before he can maintain a writ petition before the Supreme Court.[58] This 'rule of exhaustion' furthers an important objective for the judiciary. It ensures not only an orderly procedure which is the essence of judicial process but also respect due to the subordinate judiciary. The Supreme Court rightly observes, "In principle where an alternative remedy is available an application under Article 102 may not be entertained to circumvent a statutory procedure."[59] In the same vein, Mahmudul Islam also observes that "Issuance of writs when alternative remedies were not availed would undermine the subordinate courts and tribunals."[60]

The expression 'efficacious remedy' usually refers to the remedies provided by the particular statute that has created the rights and obligations of the parties in question. Therefore, if the Court is satisfied that the remedy under the statute is efficacious, there can be no question of going into the merit of the case or asking the question whether the respondent was fair or

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57 See, Article 102 (2) of the Constitution.

58 However, the bar of 'efficacious remedy' contemplated in Article 102 (2) is not attracted when infringement of FRs is alleged under Article 102 (1) of the Constitution.

59 *Dhaka Warehouse v Collector, Customs* 1991 BLD (AD) 327, para 12 (hereafter *Dhaka Warehouse*).

60 Mahmudul Islam (n 24) 787.

upright.[61] In *Shafiqur Rahman v Certificate Officer*,[62] the Appellate Division noted the true import of the rule:

> . . . if the alternative remedy is adequate and equally efficacious, in that case such an alternative remedy is a positive bar to the exercise of the writ jurisdiction even though the writ concerned is in the nature of *certiorari*.[63]

However, the question of inquiring into the 'exhaustion rule' (an equally efficacious statutory remedy) comes into the scene only if the application is filed by an 'aggrieved person'. It is, therefore, vital to know the meaning and incidents of the expression 'aggrieved person' under Bangladesh Constitution.

2.2.2.2. Rule of Grievance

Except for the writs of *habeas corpus* and *quo-warranto*, the applicant must be an 'aggrieved person' to invoke jurisdiction of the High Court Division under Article 102 of the Constitution. The 'grievance rule' springs from the said expression of Article 102 and is reflective of an essential attribute of the exercise of judicial power of the Republic. It has been seen earlier that courts only pronounce 'binding judgment' in a concrete 'case' or 'controversy' and does not answer academic questions.[64] Grievance necessarily implies or involves adversariness that lead to a 'case' or 'controversy'. Therefore, pronouncing 'binding judgment' in a concrete 'case' or 'controversy' is also the rule in our jurisdiction and advisory opinion that may be rendered by the Appellate Division under Article 106 of the Constitution forms only an exception to the rule.[65]

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61 ibid 793.

62 (1977) 29 DLR (SC) 232.

63 ibid 245. To ascertain the meaning of the expression "efficacious remedy", see, *Mehboob Ali v West Pakistan* (1963) 15 DLR (WP) 129. The Pakistan Supreme Court interpreted "adequate remedy" which is equivalent to "efficacious remedy" appearing in Article 102 (2) of the Bangladesh Constitution. For detail of the case, see, Mahmudul Islam (n 24) 794-96. See also *Bangladesh Power Development v Asaduzzaman* (2004) 9 BLC (AD) 1; *Abdullah Harun v Additional District Judge* (2004) 56 DLR 654; *BADC v Artha Rin Adalat* (2007) 15 BLT (AD) 363 (the Court found statutory remedy efficacious and hence the writ petition was held not to be maintainable). However, the provision of 'efficacious remedy' that requires alternative remedies to be exhausted is not absolute. For exception to the 'rule of exhaustion', see, *Dhaka Warehouse* (n 59); *Shah Alam v Mujibul Haq* (1989) 41 DLR (AD) 68; *MA Hai v TCB* (1988) 40 DLR (AD) 206; *Farzana Haque v Dhaka University* (1990) 42 DLR 262. There are also cases where statute though provides remedy but the remedy is not held to be *equally* efficacious as that may be provided by the High Court Division in exercise of its writ jurisdiction. See, for example, *Azharuddin v ADC (Rev)* (1967) 19 DLR 489; *Tafijul Haq v Bangladesh* 1998 BLD (AD) 269; *Collector of Customs v Abdul Hannan* (1990) 42 DLR (AD) 167; *Fazlul Huq Chowdhury v Bangladesh* (1978) 30 DLR 144.

64 See, *supra*, Chapter 2 (Section 2.1.2.) (p. 43) of the Study (Judiciary and the Attributes of Judicial Power).

65 See, *supra* note 19 and the accompanying text. See also *supra* note 21.

When perceived in the above sense, the 'grievance rule' of Bangladesh Constitution is similar to Article III 'case' or 'controversy' requirement of the US Constitution.[66] The US Supreme Court has emanated several justiciability doctrines out of Article III's 'case' or 'controversy' requirement.[67] It is submitted that three distinct sub-rules may also subsume under the "grievance rule" of Article 102 of the Bangladesh Constitution: *locus standi* (standing), ripeness and mootness. They are elaborated below.

2.2.2.2.1. *Locus Standi*

Restrictive View. The expression 'aggrieved person' appearing in Article 102 has not been defined by the Constitution itself. In the absence of any constitutional definition, one needs to look at how courts of different jurisdictions have interpreted the term. The leading English case on *locus standi* is *Exparte Sidebotham*,[68] in which the Court held that a person aggrieved is a man "who has suffered a legal grievance, a man against whom a decision has been pronounced which has wrongly deprived him of something, or wrongfully refused him something, or wrongfully affected his title to something."

Subsequently, this restrictive view of standing was adopted by courts of other jurisdictions including Bangladesh. The Pakistan Supreme Court adopted the restrictive approach in *Tariq Transport v Sargodha-Bhera Bus service*: ". . . a person seeking judicial review . . . must show that he has a *direct personal interest* in the act which he challenges before his prayer for review is entertained."[69] In an earlier decision, the Bangladesh Supreme Court also echoed somewhat a similar view:

> We also are of the opinion that any person who is affected by any order can maintain a petition under article 102. In order to show that they have been affected, it is necessary to establish that they have some right in the subject matter of the dispute and that they are affected by the impugned orders.[70]

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66 See, *supra* note 18 and the accompanying text.

67 Standing, ripeness, mootness and the doctrine of political question are the four main justiciability doctrines the US Supreme Court has emanated out of Article III's 'case' or 'controversy' requirement. For detail, see, however, *infra*, Chapter 2 (Section 2.3.3.2.) (p. 75) of the Study and also, *infra*, Chapter 2 (n 144) (p. 75).

68 [1880] 14 Ch. D. 458.

69 (1959) 11 DLR (SC) 140, 150 (emphasis added) (the Court held this view in exercise of the power of judicial review under Article 170 of the Pakistan Constitution of 1956).

70 *Eastern Hosiery MSBS Samity v Bangladesh* (1977) 29 DLR 694, 679.

Thus, over the years, the superior courts of different jurisdictions accepting this restrictive view of standing maintained that the petitioner must have some direct personal interest in the subject matter of the dispute to invoke jurisdiction of the court. But this restrictive view of standing has an adverse effect on the rule of law and good governance. Schwartz and Wade rightly comment:

> Restrictive rules about standing are in general inimical to a healthy system of administrative law. If a plaintiff with a good case is turned away, merely because he is not sufficiently affected personally, that means that some government agency is left free to violate the law, and that is contrary to public interest.[71]

Liberalized View: United Kingdom. With the increase of governmental functions, the English Courts found it necessary to liberalize the rule of standing to uphold rule of law. Justice Mustafa Kamal describes four Blackburn cases where the issue of standing was liberalized by the British Courts.[72] In all four Blackburn cases, the duty owed by the public authorities was to the general public and not to an individual or to a determinate class of individuals. But the British Courts found Mr. Blackburn to have standing in all four cases since, in view of the Court, Mr. Blackburn had 'sufficient interest' in the performance of the public duty.[73] Lord Denning graphically presented the gradual change of the law of standing in English jurisdiction:

> Now I come to a matter of moment. When there is an abuse or misuse of power, who can bring a case before the Court? Can any member of the public come? Or must he have some private right of his own?
>
> During the 19th century the Courts were reluctant to let anyone come unless he had a particular grievance of his own. He had usually to show that he had legal right of his own that had been infringed or some property of his own that had been injuriously affected. It was not enough that he was one of the public who was complaining in company with hundreds or thousands of others. But during

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71 Schwartz and Wade, *Legal Control of Government* (1972) 291.

72 Mustafa Kamal (n 30) 162. The four Blackburn cases are: *R v Commissioner of Police of the Metropolis, ex parte Blackburn* [1968] 2 QB 118; *Blackburn v Attorney General* [1972] 1 WLR 1037; *R v Police Commissioner, ex parte Blackburn* [1973] QB 241; *R v GLC ex parte Blackburn* [1976] 1 WLR 550.

73 See, for example, *R v Commissioner of Police of the Metropolis, ex parte Blackburn* [1968] 2 QB 118 (the Court held that every responsible citizen has an interest in seeing that the law is enforced and that is sufficient interest in itself to apply for *certiorari* or *mandamus*). See also, *R v GLC ex parte Blackburn* [1976] 1 WLR 550 (in granting standing to Mr. Blackburn, the Court observed: "On this point, I would ask: Who then can bring proceedings when a public authority is guilty of misuse of power? Mr. Blackburn is a citizen of London. His wife is a ratepayer. He has children who may be harmed by the exhibition of pornographic films. If he has no sufficient interest no other citizen has").

> the 20th century the position has been much altered. In most cases now the ordinary individual can come to the Courts. He will be heard if he has a "sufficient interest" in the matter in hand.[74]

Subsequently, the liberalized rule of standing developed through the Blackburn cases was put into a statutory form by the Supreme Court Act, 1981[75] and by the time the House of Lords was deciding the case of *IRC v Federation of Self-Employed*,[76] the Court was only asking whether the applicant had 'sufficient interest' in the matter and not whether he was an 'aggrieved person'.

Liberalized View: India and Pakistan. This wave of development also reached Pakistan and India. Article 184 (3) of the Pakistan Constitution of 1973 does not require a person to be aggrieved for filing writ petition before the Supreme Court. The Pakistan Supreme Court took advantage of the absence of the expression 'person aggrieved' to take a liberal view of standing in its jurisdiction. In *Benazir Bhutto v Pakistan*,[77] for example, the Court held that as the provision of Article 184 (3) is open-ended, the proceedings could be maintained by an individual whose FRs are violated or by a person *bona fide* alleging violation of FRs of a class or a group of persons as there is no rigid incorporation of the notion of aggrieved party in Article 184 (3) of the Constitution.

The Indian Constitution stands *pari materia* with the Constitution of Pakistan on this point. The Constitution of India, either in Article 32 or in Article 226, has not mentioned who can apply for enforcement of FRs and other constitutional remedies available in judicial review. The Indian Supreme Court followed only a time honoured tradition in requiring that the petitioner must be an 'aggrieved person'. The emergence in India of *pro bono publico* litigation (litigation at the instance of a public spirited citizen) espousing the cause of others

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74 Lord Denning, *The Discipline of Law* (Butterworths 1979) 113. Quoted in Mustafa Kamal (n 30) 161-62.

75 In England, the new Rules of Court were brought into force in January, 1978. Order 53 introduced a comprehensive system of judicial review. By Rules 1 (1) and 1 (2) it enabled an application to cover, under one umbrella, all the remedies of *certiorari*, *mandamus* and prohibition and also a declaration and injunction. In Order 53, Rule 3 (5) it was laid down that the applicant must have "a sufficient interest" in the matter to which the application relates. Section 31 of the Supreme Court Act, 1981 reproduced in statutory form the provision of Order 53 of the Rules of the Supreme Court which were introduced pursuant to the Law Commission's Report on Remedies in Administrative Law published in 1976.

76 [1981] 2 All ER 93.

77 PLD 1988 SC 416.

has been facilitated by the absence of any constitutional provision as to who can apply for a writ.[78]

However, the presence or absence of the expression 'person aggrieved' in the Constitution neither concludes nor forecloses the issue of *locus standi* in a writ petition.[79] Krishna Iyer J who pioneered the concept of Public Interest Litigation (PIL) in the Indian Supreme Court had to justify the expansive view of *locus standi* in its jurisdiction even though the expression 'aggrieved person' was not present in its Constitution:

> Test litigation, representative actions, *pro bono publico* and like broadened forms of legal proceedings are in keeping with the current accent on justice to common man and a necessary disincentive to those who wish to bypass the real issue on merits by suspect reliance on peripheral, procedural shortcomings . . . Public interest is promoted by a spacious construction of *locus standi* in our socio-economic circumstances and conceptual latitudinarianism permits taking liberties with individualization of the right to invoke the higher courts where the remedy is shared by a considerable number, particularly when they are weaker.[80]

SP Gupta v President of India [81] involved challenge by several advocates of different Bars the action of the Government in transferring some Judges of the High Courts. In according standing to the petitioners, Justice Bhagwati laid down a definite jurisprudential basis for PIL in Indian jurisdiction:

> Where a legal wrong or a legal injury is caused to a person or to a determinate class of persons by reason of violation of any constitutional or legal right or any burden is imposed in contravention of any constitutional or legal provision or without authority of law or any such legal wrong or legal injury or illegal burden is threatened and such person or determinate class of persons is, by reason of poverty, helplessness or disability or socially or economically disadvantaged position, unable to approach the Court for relief, any member

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78 *Bangladesh Sangbadpatra Parishad v Bangladesh* (1991) 43 DLR (AD) 126 (hereafter *Bangladesh Sangbadpatra Parishad*).

79 Mahmudul Islam (n 24) 844.

80 *Mumbai Kamgar Sabha v Abdulbhai* AIR 1976 SC 1455. The jurisprudential mould of this expansive view of the issue of *locus standi* is again highlighted by Krishna Iyer J in *ABSK Sangh (Rly) v Union of India*: "Our current processual jurisprudence is not of individualistic Anglo-Indian mould. It is broad-based and people-oriented, and envisions access to justice through 'class actions', 'public interest litigation', and 'representative proceedings'. Indeed, little Indians in large numbers seeking remedies in Courts through collective proceedings, instead of being driven to an expansive justice in our democracy. We have no hesitation in holding that the narrow concept of 'cause of action' and 'person aggrieved' and individual litigation is becoming obsolete in some jurisdictions." AIR 1981 (SC) 298.

81 AIR 1982 SC 149.

> of the public can maintain an application . . . seeking judicial redress for the legal wrong or injury caused to such person or determinate class of persons.[82]

In view of the above liberalized rule of standing, not only an individual Indian whose interest is adversely affected but also other persons including the voluntary societies, representative organizations and trade unions may come to test the validity of a law or an action of a public official in which their own direct personal interests are not involved but in which they have a sufficient interest.

Liberalized View: Bangladesh. Now it would be interesting to see that in Bangladesh the Supreme Court took a liberal view of standing even before PIL gained a foothold in India. Shortly after the commencement of the Constitution in 1972, a case of grave constitutional importance, namely, *Kazi Mukhlesur Rahman v Bangladesh* [83] came for consideration before the Supreme Court of Bangladesh. The case involved a challenge by an advocate the legality of the Delhi Treaty of 1974 regarding demarcation of the land boundary between Bangladesh and India. In justifying the *locus standi* of the appellant, the Appellate Division stated:

> The fact that the appellant is not a resident of South Berubari Union No. 12 or of the adjacent enclaves involved in the Delhi Treaty need not stand in the way of his claim to be heard in this case. We heard him in view of the constitutional issue of grave importance raised in the instant case involving an international treaty affecting the territory of Bangladesh and his complaint as to an impending threat to his certain fundamental rights guaranteed by the Constitution, namely, to move freely throughout the territory of Bangladesh, to reside and settle in any place therein as well as his right of franchise. Evidently, these rights attached to citizen are not local. They pervade and extend to every inch of the territory of Bangladesh stretching up to the continental shelf.[84]

The Court not only decided the question of appellant's *locus standi* in the instant case but also clarified the nature of the issue of *locus standi* itself:

> It appears to us that the question of *locus standi* does not involve the Court's jurisdiction to hear a person but of the competency of the person to claim a hearing, so that the question is one of discretion which the Court exercises upon due consideration of the facts and circumstances of each case.[85]

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82 ibid para 17.
83 (1974) 26 DLR (AD) 44 (hereafter *Kazi Mukhlesur Rahman*).
84 ibid 53.
85 ibid 52.

Some definitive conclusions on the issue of *locus standi* may be drawn from Supreme Court's observations in *Kazi Mukhlesur Rahman*.[86] *First*, standing involves the right of an applicant to claim hearing and not Court's jurisdiction over the subject matter in question. *Second*, the Court will hear a person (grant *locus standi*) if he agitates a constitutional question of grave importance. *Third*, when FRs are involved, the impugned matter need not affect a purely personal right of the applicant touching him alone – it is enough if he shares the right in common with others. *Fourth*, it is a matter of discretion on the part of the Court to grant *locus standi* to an applicant which the Court shall exercise judiciously taking due consideration of the facts and circumstances of each case.[87]

Although *Kazi Mukhlesur Rahman* [88] decided in the instant case the issue of standing of the appellant, the landmark judgment in Bangladesh involving the issue of *locus standi* is *Dr. Mohiuddin Farooque v Bangladesh* [89] popularly known as the BELA's case.[90] In this case, the Appellate Division accepted the grievance of Dr. Farooque against the Flood Action Plan (FAP) of the government. To ascertain the meaning of the expression 'person aggrieved', the Court observed that Article 102 of the Constitution should not be viewed as "an isolated island above or beyond the sea level of the other provisions of the Constitution."[91] Taking into account the relevant provisions including the pronounced scheme and objectives of the Constitution, the Court could not but hold that "There is no question of enlarging *locus standi* or legislation by Court. The enlargement is written large on the face of the Constitution."[92]

Quite in an artistic way, the Court expressed that 'person aggrieved' means "not only any person who is personally aggrieved but also one whose heart bleeds for his less fortunate fellow beings for a wrong done by the government or a local authority in not fulfilling its constitutional or statutory obligations." [93] In light of these high holdings, the Appellate

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86 *Kazi Mukhlesur Rahman* (n 83).

87 This author agrees with the view that standing relates to applicant's right to claim a hearing and does not involve Court's jurisdiction but finds the view of the Court that *locus standi* is a matter of discretion confusing. *Locus standi* embodied in Article 102 is now a constitutional precondition that requires being satisfied for vindicating grievances in writ jurisdiction. In a preliminary review of the matter, if *locus standi* of the party is found to be lacking, the Court will not reach the substantive merit of the issue. For more on the distinction between preliminary and substantive merit review of an issue, see, *infra*, Chapter 2 (Section 2.3.3.5.) (p. 78) of the Study. See also, *infra*, Chapter 2 (n 164) (p. 81) of the Study.

88 *Kazi Mukhlesur Rahman* (n 83).

89 *Dr. Mohiuddin Farooque* (n 4).

90 BELA stands for Bangladesh Environmental Lawyers' Association.

91 *Dr. Mohiuddin Farooque* (n 4) 13.

92 ibid 15.

93 ibid 24.

Division declared the law of *locus standi* of Article 102 of the Bangladesh Constitution in these words:

> The traditional view remains true, valid and effective till today insofar as individual rights and individual infractions thereof are concerned. But when a public injury or public wrong or infraction of a fundamental right affecting an indeterminate number of people is involved, it is not necessary, in the scheme of our Constitution, that the multitude of individuals who have been collectively wronged or injured or whose collective fundamental rights have been invaded are to invoke the jurisdiction under Article 102 in a multitude of individual writ petitions, each representing his own portion of concern. Insofar as it concerns public wrong or public injury or invasion of fundamental rights of an indeterminate number of people, any member of the public . . . espousing that particular cause is a person aggrieved and has right to invoke the jurisdiction under Article 102.[94]

A careful reading of the judgment would reveal that a person without being personally affected may be a 'person aggrieved' under Article 102 only when a public wrong is involved in the dispute and insofar individual rights and infractions are concerned, as the judgment holds, "the traditional view remains true, valid and effective till today"[95] meaning the person to be regarded aggrieved should suffer a direct personal harm or injury. These two facets of the ruling of *Dr. Mohiuddin Farooque* [96] are vital for understanding the Court's approach in subsequent cases of *locus standi*.

For example, in *Bangladesh Sangbadpatra Parishad,*[97] the High Court Division denied standing to the association of newspaper-owners who challenged an award given by the Wage Board. Since the case did not involve any public wrong and since there was no difficulty on the part of the newspaper owners themselves to challenge the award, the Appellate Division rightly confirmed the decision of the High Court Division in denying standing to the association of newspaper-owners. On the contrary, in *Bangladesh Retired Government Employees' Welfare Association v Bangladesh,*[98] the High Court Division rightly accepted the standing of the said association holding, "Since the association has an interest in ventilating the common grievance of all its members who are retired Government

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94 ibid 15.
95 ibid.
96 *Dr. Mohiuddin Farooque* (n 4).
97 *Bangladesh Sangbadpatra Parishad* (n 78).
98 (1994) 46 DLR 426.

employees, in our view, this association is a 'person aggrieved'" under Article 102 of the Constitution.

Like its Indian counterpart, the Bangladesh Supreme Court now widely allows PIL to further the causes of justice. In this respect, it should be mentioned that although *Dr. Mohiuddin Farooque* [99] may be viewed as the first case to initiate prospect for PIL in Bangladesh, the two other subsequent cases, namely, *Ekushey Television LTD v Dr. Chowdhury Mahmood Hasan* [100] and *Engineer Mahmudul Islam v Bangladesh* [101] should be regarded as imparting PIL a firm footing in our jurisdiction. In these cases, the Supreme Court not only sought to elucidate the nature of PIL but also to expound the jurisprudential basis for PIL in Bangladesh jurisdiction. In the *ETV* case, for example, the Appellate Division explained the nature of PIL vis-a-vis private disputes as under:

> The nature of public interest litigation is completely different from traditional case which is adversarial in nature whereas PIL is intended to vindicate rights of the people. In such a case benefit will be derived by a large number of people in contrast to a few. PIL considers the interest of others and therefore, the court in a public interest litigation acts as the guardian of all the people whereas in a private case the court does not have such power. Therefore, in public interest litigation the court will lean to protect the interest of the general public and the rule of law vis-a-vis the private interests. Where the rule of law comes in conflict with third party interests the rule of law will, of course, prevail.[102]

The case of *Engineer Mahmudul Islam v Bangladesh* [103] involved a challenge of approval of the project of container terminal by the Board of Investment. Having found the allegation of non-application of mind, negligence and arbitrariness against members of the Board of Investment its basis, the Court accorded standing to the petitioner. The following passage of the judgment is reflective of Court's jurisprudence of PIL:

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[99] *Dr. Mohiuddin Farooque* (n 4).

[100] (2002) 54 DLR (AD) 130 (popularly known as ETV case) (hereafter ETV case).

[101] (2003) 55 DLR 171 (hereafter *Engineer Mahmudul Islam*).

[102] *ETV* case (n 100). As to the gradual shift of the meaning of *locus standi*, the Court remarkably observed, "From the above, it appears that the Courts of this jurisdiction have shifted their position to a great extent from the traditional rule of standing which confines access to the judicial process only to those to whom legal injuries are caused or legal wrong is done. The narrow confines within which the rule of standing was imprisoned for long years have been broken and a new dimension is being given to the doctrine of locus standi."

[103] *Engineer Mahmudul Islam* (n 101).

> Justice delivery system in this part of the world is based on the principle of liberty and justice for all. Public interest litigation means the legal action initiated in a court of law for the enforcement of rights and interests of the citizens in general or a section thereof. The judiciary is to play a vital and important role not only in preventing and remedying abuse and misuse of power but also to eliminate injustice. It must not be forgotten that the cause of justice cannot be allowed to be thwarted by any procedural technicalities. An action may be maintained for judicial redress brought before it by a citizen provided from such action the State will be benefited.[104]

Thus, in the Bangladesh jurisdiction, besides a person who is personally affected, any person vindicating the causes of public interest may invoke the writ jurisdiction of the Supreme Court under Article 102 of the Constitution. However, in this much liberalized view of the rule of standing which at its extreme allows a person to espouse the cause of another, there is always a probable case of concern which should not be lost sight of. This Study identifies two genuine cases of concern. *Firstly,* this liberal view of standing, one may argue, allows court to hear and decide issues without the presence of the proper party. *Secondly,* the Court, on this expansive view of standing, may entertain a person who has no real interest in the matter or has come to generate merely public sensation or has come with some oblique motive.

It would be pleasing to appreciate that the Court in its leading *Dr. Mohiuddin Farooque* [105] verdict involving the issue of *locus standi* not only addressed both these issues of concern but also provided guidelines to be followed by the High Court Division in subsequent cases. As to the first issue of concern, ATM Afzal CJ held: "The Court in considering the question of standing in a particular case, if the affected party is not before it, will enquire as to why the affected party is not coming before it and if it finds no satisfactory reason for non-appearance of the affected party, it may refuse to entertain the application."[106] As regards the second issue of concern, Mustafa Kamal J (the author Judge of the case) laid down the following rule of caution:

> The High Court Division will exercise some rules of caution in each case. It will see that the application is, in fact, espousing a public cause, that his interest in the subject matter is real and in the interest of generating some publicity for himself or to create mere public sensation, that he is acting *bona fide*, that he is not a busybody or an interloper, that it is in the public interest to

[104] ibid.
[105] *Dr. Mohiuddin Farooque* (n 4).
[106] ibid 5.

> grant him standing and that he is not acting for a collateral purpose to achieve a dubious goal, including serving a foreign interest.[107]

The Supreme Court's denial of *locus standi* in some cases may be fully appreciated only when that is judged in light of the above-quoted observations of *Dr. Mohiuddin Farooque*.[108] For example, in *BRAC v Professor Mozaffar Ahmed*[109], the Appellate Division rightly denied standing to the applicant since there was nothing in the writ petition to show that the applicant moved the High Court Division for and on behalf of himself as also of other less fortunate persons of the society who have no source or means to invoke the writ jurisdiction though the applicant was seeking remedy against an alleged public wrong or injury.

Similarly, in *Moudud Ahmed v Anwar Hossain Khan*[110], the Appellate Division rightly observed that a person cannot have *locus standi* even in a public interest litigation when he initiated the proceeding not to vindicate the cause of the people in general or that of a group in the society who are for some seasons not in a position to vindicate their cause before the court, but to serve the cause of somebody other than the cause of public nature or a cause of a vulnerable group in the society.[111]

On the contrary, in the *Constitution (Sixteenth) Amendment* case,[112] although the petitioners were not directly affected by the Sixteenth Amendment of the Constitution, yet as Advocates, they were rightly held to have sufficient interest in the matter:

> From the facts and circumstances of the present case, it transpires that the petitioners as Advocates of the Supreme Court of Bangladesh are very much concerned with the independence of the Judiciary, separation of powers and establishment of rule of law. In a word, like Judges, they are also stakeholders in the administration of justice without let or hindrance from any quarter. It goes without saying that they are not busybodies or interlopers. Given this

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[107] ibid 15. In this respect, the observation of Mahmudul Islam is also noteworthy. The author writes: "In a quo-warranto proceeding there is no requirement of an application by a 'person aggrieved'. Even then the court inquires whether an applicant has an interest in the matter and whether he is approaching the court *bona fide* or with an oblique motive. When an application for *mandamus*, *certiorari* or prohibition is required to be filed by a 'person aggrieved', the court will have all the more reason to ask why the affected party is not coming forward and what is the motive of the applicant" (internal citation omitted). Mahmudul Islam (n 24) 851.

[108] *Dr. Mohiuddin Farooque* (n 4).

[109] (2002) 54 DLR (AD) 36.

[110] (2008) 60 DLR (AD) 108.

[111] See also *Chairman, Civil Aviation Authority v KA Rouf* (1994) 46 DLR (AD) 145; *Alauddin Sikder v Bangladesh* (2004) 56 DLR (AD) 130; *Salauddin Shoaib Chowdhury v Bangladesh* (2009) 17 BLT (AD) 89.

[112] 24 BLT (Special Issue) (HCD) 1.

> situation, I cannot deny their *standing* in filing the writ Petition before the High Court Division under article 102 of the Constitution.[113]

The foregoing discussion, within the limited scope of the present Study, adequately reveals the jurisprudence of *locus standi* in Bangladeshi jurisdiction. But, as stated earlier,[114] the 'grievance rule' of Article 102, besides *locus standi*, also includes within its scope the sub-rules of ripeness and mootness. The nature of these sub-rules as component parts of the grievance rule also deserves to be elucidated in brief.

2.2.2.2.2. Ripeness

The rule of ripeness considers whether a petitioner has brought a case too early for adjudication. If the rule of *locus standi* ensures that the plaintiff is the proper party to assert a claim, the rule of ripeness ensures that the court is adjudicating such claim at a proper point of time. The case of *Kazi Mukhlesur Rahman v Bangladesh* [115] may be considered again to understand ripeness as one of the forming parts of the 'grievance rule' of Article 102 of the Constitution.

The facts which gave rise to the case of *Kazi Mukhlesur Rahman* [116] may shortly be stated as thus. The executive heads of the government of Bangladesh and India entered into a Treaty concerning the demarcation of land boundary between them.[117] In pursuance of the Treaty, India will retain southern half of south Berubari Union No. 12 and the adjacent enclaves, and in exchange Bangladesh will retain the Dahagram and Angarpota enclaves. The appellant in his petition before the High Court Division prayed for a declaration that the Treaty involving cession of the territory of Bangladesh was without lawful authority and of no legal effect. The appellant particularly contended that he was under an impending threat of deprivation of his fundamental rights of movement and franchise under respective provisions of the Constitution. The High Court Division summarily dismissed the petition but granted leave to appeal under Article 103 (2) (a) of the Constitution.

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[113] ibid (emphasis added). But see *SN Goswamy v Bangladesh* (2003) 55 DLR 332 (hereafter *SN Goswamy*) (the High Court Division negatived the *locus standi* of an Advocate who challenged the appointment of some Judges as Judges of the Appellate Division of the Supreme Court).

[114] See, *supra*, Chapter 2 (Section 2.2.2.2.) (p. 55) of the Study.

[115] *Kazi Mukhlesur Rahman* (n 83).

[116] ibid.

[117] The Delhi Treaty signed on 16th day of May 1974.

On appeal, the Appellate Division had to consider, *inter alia*, whether the appellant had standing to raise the objection as well as whether the issue raised was ripe for adjudication. In view of the grave constitutional questions involved in the case, such as, the ambit of executive power under Article 55 (2) of the Constitution and the threat to appellant's some of the precious fundamental rights, the Appellate Division accepted appellant's *locus standi* [118] but dismissed the appeal on the ground that the issue brought to the notice of the Court was not yet ripe for judicial interference. In reaching this conclusion, the Appellate Division particularly took note of Article 5 of the Treaty wherein it was clearly stated that the agreement shall be subject to ratification by the governments of Bangladesh and India and that the agreement shall be effective only after the exchange of the Instruments of Ratification has taken place.[119]

As to the executive's authority to enter into Treaty, the Appellate Division held that treaty-making falls within the ambit of executive power under Article 55 (2) of the Constitution but a Treaty involving determination of boundary, and more so involving cession of territory, can only be concluded with the concurrence of Parliament by necessary enactment.[120] In the face of express stipulation contained in Article 5 of the Treaty,[121] the Court held that the Delhi Treaty of 1974 though dispositive in nature cannot be held to be an executed treaty; something is yet to be done before it can be so. In this view of the matter, the Court held that the appellant's prayer is *premature* because there can be no question of a document being declared to be without lawful authority and of no legal effect when the document itself stipulates that it will be effective only on the happening of a certain event in future, namely, the exchange of Instruments of Ratification.[122]

Thus, *Kazi Mukhlesur Rahman*[123] bears significance not only from the *locus standi* standpoint but also from the perspective of ripeness in the exercise of High Court Division's writ jurisdiction under Article 102 of the Constitution. And ripeness, simply to relate it with the expression 'grievance' of Article 102, may be interpreted to mean that the court will not

[118] See, above notes 84 and 85 and the accompanying texts.
[119] *Kazi Mukhlesur Rahman* (n 83) 48-49.
[120] ibid 58. Subsequently, in light of the decision of *Kazi Mukhlesur Rahman*, the Constitution (Third Amendment) Act, 1974 was enacted on 28 November 1974 to give effect to the said exchange of territory under the Delhi Treaty, 1974.
[121] See, *supra* text accompanying note 119.
[122] *Kazi Mukhlesur Rahman* (n 83) 54.
[123] *Kazi Mukhlesur Rahman* (n 83).

entertain a writ petition on premature grievances.[124] We may now proceed to analyze another component of the grievance rule, that is, mootness.

2.2.2.2.3. Mootness

If standing ensures a proper party for litigating an issue and ripeness the proper point of time for adjudicating the issue, mootness ensures that the court invokes jurisdiction to resolve only "live" issues. The rule of mootness requires that an actual case or controversy (that is, a 'live" issue) should exist not only when the lawsuit is filed or when review is granted by the appellate court, but throughout all stages of the proceeding. An issue may become moot when a controversy initially existing at the time the lawsuit was filed is no longer "live" due to a change in the law or in the status of the parties involved, or due to an act of one of the parties that dissolves the dispute.[125]

The case of *Kudrat-E-Elahi Panir v Bangladesh* [126] may be regarded as a standard familiar example in our jurisdiction to understand the issue of mootness in constitutional litigation. The short facts of the case are as thus. Ordinance No. LIX of 1982 was promulgated by the then government to constitute Upazila Parishads, the third tier of the local government. To run and manage certain local government functions, the Ordinance transferred some powers and functions of the government in the Upazila Parishads. However, the new government formed after the general election of February 1991 promulgated Ordinance No. XXXVII (later on made Act No. II of 1992) abolishing the Upazila Parishads altogether and vesting in the government all rights, powers, authorities and privileges of the dissolved Upazila Parishads.

The Repealing Ordinance and the Act were challenged by some Chairmen of the dissolved Upazila Parishads on specific grounds involving substantial questions of law as to the interpretation of the Constitution. *First*, they contended that the Ordinance being inconsistent with Articles 9 and 11 runs against the spirit of the Constitution and become void by

[124] On ripeness or premature grievances, see also, *Usmania Glass Sheet v STO* (1970) 22 DLR (SC) 437; *Kamaluddin v Secretary, Ministry of Land* (2004) 56 DLR (AD) 212; *Sadek Hossain Khoka v Election Commission* (2009) 17 BLT 221; *Abdus Sattar Khan v DG, Bureau of Anti-Corruption* (2010) 15 BLC 73.

[125] Mootness: An Explanation of the Justiciability Doctrine, Congressional Research Service (CRS) Report (prepared for Members and Committees of Congress) (2007) (for the quoted reference, see, Summary of the Report).

[126] *Kudrat-E-Elahi Panir (AD)* (n 38).

operation of Article 7 (2) of the Constitution. *Second*, they also argued that the Ordinance is violative of Article 59 of the Constitution which provides that local government in every administrative unit shall be entrusted to bodies composed of elected representatives of the people. *Third*, existence of circumstances that renders immediate action necessary is a precondition for promulgation of Ordinance under Article 93 of the Constitution. They contended that the government presented no fact to show that circumstances existed which rendered immediate legislation necessary.

As to the first ground of challenge, the Court held that Articles 9 and 11 being Fundamental Principles of State Policy (FPSP) are not judicially enforceable in view of article 8 (2) of the Constitution.[127] As regards the second ground of challenge, the Court agreed that all local government units must conform to Article 59 of the Constitution. But since Upazila Parishads were never designated by law to be an administrative unit for the purposes of Article 59, the Court held that the abolition of Upazila Parishads did not attract the mischief of Article 59 of the Constitution.

Regarding the third ground of challenge, one will find that the Court did not at all consider this ground for disposal of the case. Why did not the Court consider this ground in reaching its decision? The answer is rooted in the reason that the third ground of challenge in fact involved the issue of mootness. Parliament in its first meeting following the promulgation of the impugned Ordinance approved the Ordinance and made it an Act of Parliament within the time prescribed by the Constitution. Therefore, though the Court was of the view that President's satisfaction as to the existence of circumstances rendering immediate action necessary was not totally excluded from judicial scrutiny, this ground for assailing the impugned Ordinance was no longer available due to the aforementioned change in the circumstances of the case.

It has been seen that an issue may become moot due to an act done by one of the parties involved in the dispute.[128] This exactly happened in *Kudrat-E-Elahi Panir*. [129] The third

[127] Part II of Bangladesh Constitution contains Fundamental Principles of State Policy (FPSP) (from Articles 8-25). Article 8 (2) enumerates some important uses of FPSP but at the same time expressly declares them to be judicially non-enforceable. For a critical appraisal of the judgment of *Kudrat-E-Elahi Panir (AD)* in relation to its interpretation of Article 8 (2) and the FPSP, see, Moha. Waheduzzaman, 'Judicial Enforcement of Socio-Economic Rights in Bangladesh: Theoretical Aspects from Comparative Perspective' in Dr. M. Rahman (ed.) (2011) 12 *Human Rights and Environment* 64-68.

[128] See, *supra* note 125 and the accompanying texts.

ground of challenge involved in the case became "moot" due to Parliament's turning the impugned Ordinance into an Act of Parliament within the constitutionally prescribed period of time. In terms of grievance rule of Article 102, it may be said that the appellant's *grievance* in relation to the third ground of challenge was no longer "live" or, in other words, his *grievance* in relation to that issue ceased to exist due to a change of circumstance in the case.[130]

Thus, the expression 'person aggrieved' not only involves the issue of *locus standi* but also the issues of ripeness and mootness. In other words, it both addresses questions of who (*locus standi*) and when (ripeness and mootness) of the issue of grievance of Article 102 of the Constitution.

This Section of the Study overall has reflected on the conditions that need to be satisfied before one may claim constitutional remedies in the exercise of High Court Division's writ jurisdiction. Some of these conditions are observed as rules of practice and some as constitutional rules themselves. Therefore, *locus standi* founded on the Constitution and being one of the sub-rules of the 'grievance rule' of Article 102 is just one of the above enumerated preconditions for claiming relief in judicial review.

This Study holds political question as a form of interpretive limit on Court's power of judicial review. As a form of interpretive limit, political question is both related to and different from the issue of *locus standi*. The next Section of the Study establishes a case for political question in Bangladesh, explores its essential attributes as a form of interpretive limit, and distinguishes it from *locus standi*, ripeness and mootness, the forming components of the 'grievance rule' of Article 102 of the Constitution.

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[129] *Kudrat-E-Elahi Panir (AD)* (n 38).

[130] On mootness, see also, *Guruswamy v Mysore* AIR 1954 SC 592; *Kartar Singh v Piara Ram* AIR 1976 SC 957; *AK Roy v India* AIR 1982 SC 710; *Raquibuddin v Syndicate, Dhaka University* (2005) 57 DLR 63.

2.3. Political Question: Interpretive Limits of Judicial Review

2.3.1. The Meaning of a Political Question

Political questions which in addition to express constitutional limitations[131] place interpretive limit on Court's power of judicial review is founded on the principle of 'separation of powers'.[132] In the United States, where the doctrine of political question has originated, the constitutional system is based on a rigid separation of powers and the system of government is federal and presidential.[133] On the contrary, Bangladesh Constitution is not based on a rigid separation of powers and the governmental system is unitary and parliamentary. But a political question this Study envisages depends neither on a rigid separation of powers nor on the particular form of government the Constitution has chosen for itself. In view of this author, political questions may spring even from a flexible and dynamic separation of powers as is maintained in the Constitution of ours. If an issue is found to be a 'political question', the issue would not be resolved by courts of law. Instead, its resolution, that is, its compliance or non-compliance will be adjudged or ensured in a political forum or process.

The Study defines political question as the constitutional issues committed to the unbounded discretion of the other co-ordinate branches of government. But constitutional clauses do not come up with footnotes designating issues which are political questions and which are not. Eventually it rest with the judiciary to identify political questions through interpreting the relevant provisions of the Constitution. In the interpretive process, the court may essentially require balancing the counteractive principles of 'separation of powers' at the one hand and 'rule law' at the other hand. Issues in the process so identified as "political questions" will be exempted from judicial review due to the functioning of the principle of 'separation of powers'. Since limitation springs from interpretive process of the judicial department, the Study views political question as a form of "interpretive limit" on Court's power of judicial review.

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[131] See, *supra*, Chapter 2 (Section 2.1.5.) (p. 51) of the Study.

[132] For political question doctrine's foundation in the principle of 'separation of powers' in Bangladeshi jurisdiction, see, *infra*, Chapter 5 (Section 5.3.) (p. 166) of the Study.

[133] For detail on political question in US jurisdiction, see, *infra*, Chapter 3 (Section 3.1.) (p.90) of the Study.

2.3.2. Issues Susceptible of a Political Question Analysis

Political question as defined in this Study is arguably an antithesis to the constitutional mandate of 'rule of law' embodied in the Preamble of the Constitution. Hence, its acceptance, at the first sight, may not be easy to the mind of any Bangladeshi constitutionalist. It may, therefore, be useful to enumerate issues of Bangladesh Constitution that are susceptible of a political question analysis. This would also help contextualizing the issue of political question with specific provisions of the Constitution. Some constitutional issues of this kind are as provided below.

Executive's Satisfaction of Facts. There are certain provisions in the Bangladesh Constitution that relate to satisfaction of the executive as to the existence of facts. For example, Article 93 of the Constitution empowers the President to promulgate Ordinances if he is satisfied that circumstances exist which render immediate action necessary. Similarly, Article 141A of the Constitution authorizes the President to issue Proclamation of Emergency if he is satisfied that grave emergency exists in which the security or economic life of Bangladesh is threatened due to war or external aggression or internal disturbance. Is the executive's satisfaction as to the existence of these facts justiciable?

If yes, the stand taken by the elected branches in these 'high matters of political judgment' may ultimately get substituted by the judiciary which jeopardizes the principle of 'separation of powers' since power in these critical areas of responsibility is constitutionally vested with the political branches of government. If no, the chance remains for arbitrary exercise of power that runs counter to 'rule of law'. If the judiciary entertains the issue for adjudication, the accountability of government is ensured judicially by a court of law. If the issue is otherwise held to be judicially non-justiciable, the accountability is left to be ensured by political means only. Political question as defined in this Study refers to the latter course of action the Supreme Court may alternatively follow in deciding issues of the kind just mentioned above.

Prerogative of Mercy. Article 49 of the Constitution confers power on the President to grant pardons, reprieves and respites and to remit, suspend or commute any sentence passed by any court, tribunal or other authority. The question whether this prerogative power of the President is justiciable or not should attract political question analysis.

Appointment Power of the Executive. The power of appointment in the highest constitutional offices of the state belongs to the executive. For example, the President appoints, *inter alia*, the Ministers[134], the Chief Justice and other Judges of the Supreme Court[135], the Attorney-General[136], the Comptroller and Auditor-General[137], the Chief Election Commissioner and other Election Commissioners[138], and the Chairman and other Members of the Public Service Commission.[139] Any petition challenging that the appointment of a person in any such offices has been arbitrary or unreasonable essentially involves a political question analysis on the part of the Supreme Court.

Foreign Relations Powers of the Elected Branches. The executive and the legislative organs of the government exercise foreign relations powers in terms of the Constitution. Can the elected branches' exercise of foreign relations power, such as, the recognition of foreign government, declaration of war and peace, be successfully challenged in a court of law? These issues also cannot be adjudicated without taking recourse to a political question analysis.

Determining the Validity of Constitutional Amendments. An Act of parliament must conform to the Constitution since Constitution is the supreme law of the land. But a constitutional amendment brought about by parliament becomes part of the supreme law itself. In view of the matter, can the Court determine validity of a constitutional amendment in exercise of its power of judicial review? The issue may seem to be a settled one in view of recent judicial development but the Court's judgment to be well reasoned and substantiated must consider also the political question aspect into its analysis.

Directing the Legislature to Enact Law. The Constitution enjoins upon parliament to make law regarding certain matters. For example, the parliament has been authorized by Article 95 (2) (c) of the Constitution to enact law prescribing qualifications for Judges of the Supreme Court. Similarly, the state has been enjoined to adopt effective measures to implement the

[134] Article 56 (2) of the Constitution.
[135] Article 95 (1) of the Constitution.
[136] Article 64 (1) of the Constitution.
[137] Article 127 (1) of the Constitution.
[138] Article 118 (1) of the Constitution.
[139] Article 138 (1) of the Constitution. However, by virtue of Article 48 (3) of the Constitution, the President, except for the appointments of Prime Minister and Chief Justice, exercises the power in accordance with the advice of the Prime Minister. Thus, the real executive power in relation to appointment belongs to the Prime Minister.

FPSP of Part II of the Constitution. Can the Supreme Court direct the legislature to enact law to regulate the matters enjoined by the Constitution? These issues are also prone to a political question analysis and the Supreme Court cannot decide on them disregarding altogether the political question aspect in its judgment.

The abovementioned provisions considered by way of illustration should be enough to clarify the issue of political question in Bangladeshi jurisdiction. Whether these kinds of issues should be adjudicated by the Supreme Court or kept beyond judicial oversight will be examined later on in this Study.[140] But if the above cited provisions could establish a preliminary case for political question, the Study should attempt to elucidate the essential characteristics of political question within the framework of Bangladesh Constitution.

2.3.3. The Characteristics of a Political Question

Some significant attributes of constitutional issues termed as "political questions" may be envisaged under the Bangladesh Constitution. For convenience, the author deals them under these headings: (a) political question and grievance rule; (b) jurisdiction and political question; (c) separation of powers; (d) the legal/political divide; (e) justiciability and political question; and, (f) *locus standi* and political question.

2.3.3.1. Political Question and Grievance Rule

As stated earlier, political question is a form of "interpretive limit" as opposed to express constitutional limit on judicial review power of the Supreme Court.[141] As a form of interpretive limit, political question differs from standing, ripeness, and mootness doctrines emanated from the 'grievance rule' of Article 102 of the Constitution. The latter doctrines address the parties to the case or the factual context of the proceeding.[142] As such, they leave open the possibility of later adjudication of the dispute once the proper plaintiff is found (standing) or the facts of the case are properly developed (ripeness/mootness).[143] Political question, by contrast, addresses the issue of the case itself. Once an issue is found to be a

[140] See, *infra*, Chapter 6 (p. 172) of the study.
[141] See, *supra*, Chapter 2 (Section 2.3.1.) (p.71) of the Study.
[142] Ron Park, 'Is the Political Question Doctrine Jurisdictional or Prudential?' (2016) 6 *UC Irvine Law Review* 257.
[143] ibid.

political question, the Court will never adjudicate the issue without making any further inquiry into questions of standing, ripeness, and mootness.

2.3.3.2. Jurisdiction and Political Question

A distinction should be drawn between jurisdiction over a subject matter that is conferred upon courts by law and political question whose concern is with how appropriate it is that the matter be decided in courts of law. In American jurisdiction, the doctrines of standing, ripeness, mootness, and political question are all said to have emanated from the "case" or "controversy" requirement of article III of the Constitution.[144] And, the federal courts, they say, lack jurisdiction if either of the doctrines involved in a case.[145] This portrayal simply confuses the issue of jurisdiction with the nature and purposes these doctrines serve in any system including the US jurisdiction.

As has already been observed, unlike the political question doctrine, the standing, ripeness, and mootness doctrines do not consider the issue as such.[146] Hence, even where these doctrines involve, the courts may always reach merits of the case and grant necessary relief if proper party is found or facts of the case are properly developed at a later point of time. Therefore, it cannot be said of these doctrines that the court did not have jurisdiction over the subject matter out of which the issue arose for determination. True, political question bars reaching merit of the issue once and for all. But even for these questions, it is ultimately the court which determines whether the issue involves an area that should be immune from judicial scrutiny. This exercise itself requires consideration of the issue the court should refrain from deciding upon. Therefore, even in case of political question, no *a priori* rejection of the petition is possible without some preliminary inquiry of the merit of the case.

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[144] ibid (Park argues that the earlier federal cases referred to Article III "case" or "controversy" requirement as basis for the doctrines of standing, ripeness and mootness only; and held the origin of political question doctrine in the principle of 'separation of powers'; it is only the cases of modern time that refer to Article III "case" or "controversy" requirement as basis for the doctrine of political question). Park holds the view of earlier federal cases as correct statement of law. This author is in agreement with the view Park. In a recent article, Harrison also argues that if originally understood the US Supreme Court's political question cases have nothing to do with the subject matter jurisdiction of the Court. See, John Harrison, 'The Political Question Doctrines' (2017) 67 *American University Law Review* 457.

[145] For example, in relation to the mootness doctrine, it was held "due to lack of jurisdiction, federal courts have no power to consider the merits of a constitutionally moot case" *Powell v McCormack*, 395 US 486, 496 (1969) (hereafter *Powell*) (quoted in the CRS Report (n 125) 2).

[146] See, *supra*, Chapter 2 (Section 2.3.3.1.) (p. 74) of the Study.

None of the doctrines, therefore, should be expressed in terms of lack of jurisdiction over the subject matter it concerns. Instead of entangling them with jurisdiction, a better course would be to search for the doctrines' source and purpose they serve in the constitutional system. For example, the source of the doctrine of political question lies in the principle of 'separation of powers' both in the Bangladesh and the US jurisdiction. So far the other three doctrines are concerned, they may properly be said to have emanated from the "case" or "controversy" requirement of Article III of the US Constitution.[147] In Bangladeshi jurisdiction, the same should be said to have originated as three distinct sub-rules of the "grievance rule" of Article 102 of the Constitution.[148]

The purposes these doctrines serve in the constitutional system of a country are also different. The grievance doctrines (standing, ripeness and mootness) ensure that a court does not issue advisory opinions. Deciding an issue when proper plaintiff is not before court or when the issue is unripe for judicial consideration or when the case is moot results only in an advisory opinion that has no tangible effect. Political question, by contrast, functions to preserve 'separation of powers' among organs of government.

2.3.3.3. The Principle of Separation of Powers

Political question arises from the structure of our government and the Constitution's division of powers and responsibilities between the three organs of government. The evident purpose is to ensure that courts do not usurp the powers of the elected branches of government. Political question thus functions to prevent impermissible infringement upon 'separation of powers' that is caused when a court of law involves itself into a question that has been committed to the unbounded discretion of the co-ordinate branches of government.

However, a political question founded on 'separation of powers' has met serious objection by some authors of high standing in this sub-continent. Holding *rigid* separation of powers as basis for political question in US constitutional system, Seervai, a leading exponent on Indian constitutional law, has concluded that the doctrine has no place to ground in the context of Indian constitutional system.[149] Mahmudul Islam, in Bangladeshi context, also finds no

[147] See, *supra* note 18.
[148] See, *supra*, Chapter 2 (Section 2.2.2.2.) (p.55) of the Study.
[149] SM Seervai, *Constitutional Law of India* (New Delhi 1996) 2636-42.

justification for the application of the doctrine of political question within the framework of its Constitution.[150]

To reiterate again, a political question is not an incident of only *rigid* separation of powers and federal and presidential forms of government as characterized by the US Constitution. A political question, as envisaged in this Study, may be the characteristic mark of any Constitution in the world, since, in today's world, there is no Constitution not founded even on *flexible* separation of powers among organs of government. And a political question holding is essential to preserve 'separation of powers' to the extent it is maintained in the respective Constitution. Thus, there may be argument for a political question irrespective of the *nature* of the government the Constitution has chosen for itself as well as whether the constitutional system is based on a *rigid* separation of powers or not.

2.3.3.4. The Legal/Political Divide

True, the Study maintains a dichotomy between legal and political questions of constitutional issues. But this is not to mean that the legal and political questions are to be viewed as the "two distinct and self-exclusive categories."[151] Any such idea if ever made by any person would be without foundation since the law in general and constitutional law in particular is "the expression of political, value-laden, and interest-ridden considerations."[152] Ariel Bendor rightly observes, "Even a military action, or an action within the sphere of foreign affairs, or similar political actions, in the common meaning of the term, carries a legal aspect to which the law is not indifferent."[153] Highlighting this aspect of law Justice Aharon Barak of Israeli Supreme Court once observed:

> Every action - be it ever so political or policy - related – is encompassed within the universe of the law and there exists with respect to it a legal norm holding whether that action is permitted or prohibited. The claim that 'the matter is not a legal matter but a clearly political matter', confuses wholly different entities. That a matter is 'clearly political' is not enough to remove it from being also a 'legal matter'. . . The political domain and the legal domain are two different domains. They neither exclude one another nor render the

[150] Mahmudul Islam (n 24) 605.
[151] Ariel L. Bendor, 'Are There Any Limits To Justiciability? The Jurisprudential And Constitutional Controversy In Light Of The Israeli And American Experience' (1997) 7 (2) *Ind. Int'l &Comp. L. Rev.* 333.
[152] ibid.
[153] ibid 334.

> other superfluous. They operate in different spheres. The same action that can be encompassed by the one can be encompassed by the other as well. The political nature of an action does not negate its legal aspect, and its legal aspect does not negate its political aspect.[154]

Thus, the legal/political divide of constitutional issues the Study maintains is not intended to mean for them two distinct and self-exclusive categories. Rather, it is simply recognition of the limitations of superior courts in answering every constitutional question that might be brought before it. This point would become clearer in the following Section of the Study that seeks to characterize political question in justiciability framework.

2.3.3.5. Justiciability and Political Question

The superior courts may deny its exercise of the power of judicial review holding the issue non-justiciable. What really judges mean when they use the expression "justiciable" or rather "non-justiciable" or "justiciability" in relation to deciding an issue? Though there is already enough legal material on the subject, [155] there still remains considerable uncertainty as to its meaning and scope. [156] Two plausible explanations may be provided for uncertainty as to the expression's exact content. *First*, failure to maintain a distinction between preliminary review

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[154] 910/86 *Ressler v Minister of Defense*, 42 (2) PD 441, 547 (1986) (Hebrew) (hereafter *Ressler*) (quoted in Ariel Bendor (n 151) 334). For reference to the case, see also, Ariel L. Bendor & Zeev Segal, 'The Judicial Discretion of Justice Aharon Barak' (2011) 47 (2) *Tulsa Law Review* 473.

[155] See, for example, Ariel Bendor, Limits To Justiciability (n 151) 311; Aharon Barak 'The Supreme Court 2001 Term – Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy' (2002) 116 (16) *Harvard Law Review* 19; AHARON BARAK, THE JUDGE IN A DEMOCRACY (2006); Margit Cohn, 'Form, Formula and Constitutional Ethos: The Political Question/Justiciability Doctrine in Three Common Law Systems' (2011) 59 *The American Journal of Comparative Law* 675; Ariel L. Bendor & Zeev Segal, Judicial Discretion of Justice Barak (n 154) 465; Rivka Weill, 'The Strategic Commonlaw Court of Aharon Barak and its Aftermath: On Judicially-led Constitutional Revolutions and Democratic Backsliding' (2020) 14 (2) *Law & Ethics of Human Rights* 227. For more commentaries on "justiciability", see, *supra*, Chapter 1 (Section 1.1.) (p. 18) of the Study that deals with distinct approaches to political question (literature on 'political question' invariably touches on "justiciability").

[156] Studying the three Common Law Systems of Israel, United States and United Kingdom, Margit Cohn summarizes the elements of "justiciability" in these words: "In the three systems studied, the classical or text book definitions of the doctrine state three elements. First, the political question doctrine is considered a threshold, preliminary barrier. Designed to exempt courts from delving into the difficult issues involved, it should be applied prior to the substantive or merit review stage. Secondly, when applicable, respondents are granted an absolute shield from review. When an issue is found to be non-justiciable, applicants cannot succeed; the strength of their arguments is immaterial. Some courts have subjected this element to several exceptions, for example in cases of blatant illegality, the infringement of protected human rights, or a material breach of proper procedure, but these are considered refinements of the rule and do not challenge it as such. Finally, the political question doctrine is viewed as a distinct rule of judicial behaviour, to be differentiated from other limits on review, such as, court jurisdiction (determined by statute either by delineating the powers of a judicial instance or by setting ouster clauses that deny judicial redress in defined contexts), judicial discretion or deference (which can vary in degree and are applied during merit review), and the doctrines of state immunity, acts of state, and public interest privilege." Margit Cohn (n 155) 677-78.

stage and substantive merit review stage of a judicial proceeding. *Second*, there is a tendency to confuse the term "justiciability" with some other expressions, such as, "politically sensitive issue", "issues involving political ramifications", "difficult issues", "judicial discretion", "judicial deference" and so on.

To understand the distinction between preliminary review stage and substantive merit review stage of a judicial proceeding, the author considers again the examples of standing, ripeness, mootness and political question. In all four doctrines, the judges make preliminary review of the merit of the case because without some sort of judicial engagement it is not possible on the part of court of any jurisdiction to decide on whether the party lacks standing or the issue is unripe or is moot or involves a 'separation of powers' concern. If either of the doctrines is found to successfully operate, the judges deny substantive merit review of the issue involved in the case.

To further clarify the point, one may consider cases of standing, ripeness and mootness from our jurisdiction. In *Bangladesh Sangbadpatra Parishad*,[157] for example, the Supreme Court had to make a preliminary review of the merit of the case just to decide on the *locus standi* of the association of newspaper-owners and on a positive finding, the Court denied substantive merit review of the issue i.e., challenge of the impugned award given by the Wage Board.[158] In *Kazi Mukhlesur Rahman*,[159] the Court as a preliminary review of the matter inquired whether or not the issue is ripe for judicial consideration. Upon finding that the issue is unripe, the Court declined substantive merit review of the issue, i.e., the challenge of the Delhi Treaty of 1974 that purported to infringe some FRs of the petitioner.[160] Similarly, in *Kudrat-E-Elahi Panir*,[161] the Court first satisfied itself whether or not the third ground of challenge of the impugned Ordinance became moot in the instant case. Upon a positive finding, the Court refrained from substantive merit review of the issue, i.e., President's satisfaction of facts rendering immediate legislation necessary.[162]

In a similar way, the Court, when the case involves a political question argument, should inquire as a preliminary matter whether the issue really concerns 'separation of powers'

[157] *Bangladesh Sangbadpatra Parishad* (n 78).
[158] See, *supra* text accompanying note 97.
[159] *Kazi Mukhlesur Rahman* (n 83).
[160] See, *supra* text accompanying notes 115-124.
[161] *Kudrat-E-Elahi Panir (AD)* (n 38).
[162] See, *supra* text accompanying notes 126-130.

among organs of government. Upon consideration of relevant constitutional provisions if the issue is found to be a political question, the Court would deny substantive merit review of the issue involved in the case.

Thus, the term "justiciability" in a meaningful sense relates or should relate only to the "substantive merit review" of an issue. And when understood in this sense, the term may not be limited to the four doctrines just explained above but may be applicable also to exceptions to judicial review and ouster of jurisdiction of courts. Substantive merit review may then be denied by a court of law on a variety of grounds. The court may hold the issue "non-justiciable" and withhold substantive merit review because the matter falls under one of the exception clauses of judicial review, or the court's jurisdiction as to the reviewable matter is barred by law, or the party has no standing, or the issue under consideration is unripe or moot or involves concerns of 'separation of powers'.

There is thus no difficulty in the term "justiciability" so long one understands precisely on what ground the disputed issue is regarded "non-justiciable" and so long the term is used solely with respect to substantive merit review of the issue. Besides this, to understand better, one should learn also the underlying purpose or reasoning of denying substantive merit review in the abovementioned instances. For example, the reason for denying substantive merit review of political questions is that they serve the purpose of preserving 'separation of powers' among organs of government whereas the doctrines of standing, ripeness and mootness function to ensure that the courts do not become forum for issuing academic or advisory opinions.[163]

Therefore, problem may occur only when one fails to appreciate the useful distinction between the two stages of review of a constitutional dispute and seeks to relate the term to preliminary stage review of the issue. In the sense of preliminary stage review, no issue is "non-justiciable" and in the sense of substantive merit review, an issue may be "non-justiciable" not only on political question ground but on all of the abovementioned grounds though the reason for their "non-justiciability" may be different from each other.

[163] See, *supra*, Chapter 2 (Section 2.3.3.2.) (p. 75) of the Study.

Thus, the limitation the term "justiciability" implies is one that relates only to substantive merit review of the issue as opposed to preliminary review stage of the proceeding. Perceived in this sense, the term "justiciability", in Bangladeshi jurisdiction, may be applied to give expression to the limitation placed upon Supreme Court by express constitutional limitation (exception to judicial review and ouster of court's jurisdiction), by the grievance rule of Article 102 (standing, ripeness, and mootness) and by the 'separation of powers' concerns (political question). [164]

Justiciability, therefore, has no connection with such expressions as "difficult issues", "politically sensitive issue", "judicial discretion", "judicial deference" and the like. Except for the abovementioned grounds of justiciability, an issue would be justiciable even if it is politically sensitive or, in other words, it is a case involving 'political ramifications'.[165] And so far 'judicial discretion" and "judicial deference" are concerned, they do not relate to the

[164] This is meaning or scope of "justiciability" in the broadest possible sense of the term. Exceptions to judicial review and ouster of court's jurisdiction are included since whether an issue falls within the rule or forms an exception to the rule of judicial review may be surely known only after the court pronounces its view on the matter. Same is also true for ouster of court's jurisdiction. Therefore, although these two grounds embody express constitutional limitation on court's power of review, the two stages review analysis (preliminary review and substantive merit review) hold good for these two grounds as well. In this broadest sense, standing, ripeness and mootness are also included since due to the successful operation of these doctrines substantive merit review is denied at least in the instant case although the issue may substantively be adjudicated at a later point of time if proper party is found or facts of the case are properly developed. Political question fits most as a "justiciability" doctrine since it addresses the issue itself, that is, if a constitutional issue is found to be a "political question", it will never be adjudicated in a court of law.
At this stage, an insightful reader may validly argue that if scope of "justiciability" is so broad why should not it include within its scope such rules as the 'rule of exhaustion', and rules of practices, such as, acquiescence, waiver, and other rules of the kind relating to the conduct of the petitioner (see, *supra*, Chapter 2 (Sections 2.2.1. and 2.2.2.1.) (pp. 53, 54) of the Study). It should be borne in mind that "justiciability" relates to denial of substantive merit review of an issue. In these instances, the Court may reach the merits (substantive review) of the issue but may simply *withhold* the constitutional relief since the plaintiff did not come with clean hands (fraud, *mala fide* or suppression of material facts etc.) or did not exhaust the statutory remedies, as the case may be. [And this is why a relief in writ jurisdiction is sometimes said *discretionary*; however, it is discretionary only when the Court denies relief for equitable rules of practices relating to the conduct of the petitioner; the Court *must* withhold relief if the petitioner is not found to have exhausted statutory remedies since 'rule of exhaustion' being embodied in Article 102 is now a constitutional precondition before the Court may grant relief in exercise of its writ jurisdiction].
On the contrary, no question of substantive review should arise in a case where the issue is a political question. Similarly, the standing, ripeness, and mootness doctrines rightfully debar substantive review of the issue since the dispute not satisfying the 'grievance' requirement of article 102, there is no 'case' or 'controversy' in the eye of law. And so far the express constitutional limitations are concerned, one should not forget that political question is a form of interpretive limit on court's power of review. Being interpretive limit, if political question may exempt substantive merit review of a constitutional issue, this is then truer for a constitutional issue involving limitation based on express provision of the Constitution.
In this respect, the position of some other jurisdictions may be considered, albeit in brief. In the United States, for example, the term "justiciability" connotes all judicial techniques used as threshold barriers for review and includes principally standing, ripeness, mootness, and the doctrine of political question. In the United Kingdom and Israel, the term is dedicated only to the political question doctrine. See, Margit Cohn (n 155) 677.

[165] For cases involving 'political ramifications', see, *infra*, Chapter 7 (Section 7.7.) (p. 254) of the Study.

substantive merit review of an issue rather they are applied after the judges have already reached the substantive merits of the issue and may vary in degree depending on particular facts of the case, conduct and character of parties to the dispute, and the approach of a particular judge.[166]

It is now adequately clear what "justiciability" should exactly connote in our jurisdiction and how 'political question' as a form of interpretive limit on Court's power of judicial review should be related to the term. However, any research venture that does not consider Justice Barak's account of justiciability remains incomplete. Political question this Study envisages may be contextualized with Barak's analytical framework also.

Justice Barak in his famous *Ressler* decision [167] contemplated two forms of justiciability: normative justiciability and institutional justiciability. [168] In Barak's view, "normative justiciability comes to answer the question whether there exist legal criteria sufficient to determine a dispute presented before the Court."[169] As to this kind of justiciability, Barak held that "there are always norms to decide the issue, even in spheres of war and peace, diplomacy and foreign relationships, and composition of the government."[170] In his words: "Every act is permitted or forbidden in the world of law. There is no act to which the law does not apply. There is no legal vacuum."[171] Law, therefore, has or should have a say on every action or decision of human beings, government authorities or private corporations. This is what is meant by Barak's statement that "law fills the whole world".[172]

Barak thus rejects the idea of normative non-justiciability. Alongside normative justiciability, there exists institutional justiciability in Barak's view.[173] Institutional justiciability concerns the question of whether the dispute should be adjudicated in a court of law at all. In Barak's words: "The question is not whether it is possible to decide the dispute according to the law

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[166] For 'judicial discretion' and 'judicial deference', see, *infra*, Chapter 7 (Sections 7.5. and 7.6. respectively) (pp. 249, 252) of the Study.
[167] *Ressler* (n 154).
[168] From a terminological point of view, it would seem that normative justiciability may be termed "law-ability", as opposed to the institutional justiciability, which may be termed "litigatibility". Bendor (n 151) 315 (in footnote 9).
[169] *Ressler* (n 154) 474.
[170] Weill (n 155) 245.
[171] *Ressler* (n 154) 477.
[172] BARAK, THE JUDGE (n 155) 179 (Quoted in Ariel Bendor & Zeev Segal (n 154) 473). There are others who hold a contrary view. For a brief account of the contrary views, see, Bendor (n 151) 322-37.
[173] Regarding the interrelationship between the two kinds of justiciability, see, Bendor (n 151) 356-77.

and in court; the answer to that question is yes. The question is whether it is desirable to decide the dispute-which is normatively justiciable-according to legal criteria in court."[174] Institutional justiciability, therefore, concerns itself with appropriateness rather than judicial capabilities. In this context, Barak considered three main arguments typically raised in favour of the recognition of institutional non-justiciability.[175] They are: separation of powers, democracy, and public confidence in the judicial system.[176]

Interestingly, Barak rejected the possibility of institutional non-justiciability on the grounds of 'separation of powers' and 'democracy'.[177] Instead, Barak was more concerned with 'public confidence in the judicial system'. If the courts do not intervene, the public will lose confidence in the law. At the same time, there may be special cases where judicial intervention might lead to loss of public confidence in the system.[178] In such cases only of loss of public confidence in courts, Barak would recognize institutional non-justiciability in Israeli system:

> . . . in special circumstances, in which the fear of harm to public confidence in the judges outweighs the fear of harm to public confidence in the law, should use of it be considered . . . the list of such circumstances is not closed . . . it is determined, in the end, by the judicial life experience and according to the judge's expert sense.[179]

Barak, however, did not specifically indicate for which cases this would be true. Barak, therefore, offered little guidance regarding the possible identification of cases in which the loss of public confidence in courts would justify non-intervention. To summarize Justice Barak's justiciability formula, no case should be found non-justiciable for a lack of legal standard. Judges should concern themselves only with institutional suitability of review of the issue in question. Political question as defined in this Study suits with institutional justiciability in Barak's analytic framework of the term. Barak finds institutional non-justiciability in rare cases of loss of public confidence in courts whereas this Study finds institutional non-justiciability in issues dubbed as "political questions" and anchors it in the principle of 'separation of powers'.

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[174] BARAK, THE JUDGE (n 155) 183; *Ressler* (n 154) 488-89.
[175] Weill (n 155) 246.
[176] ibid.
[177] *Ressler* (n 154) 491-92.
[178] ibid 492-96.
[179] Quoted in Cohn (n 155) 694.

From the above analysis, it should be clear that the legal /political divide the Study maintains should not be understood to mean for them distinct and self-exclusive categories. Rather, political questions are also in essence legal in the sense that legal norms may also be applied for their resolution but for 'separation of powers' concern only, the Court should refrain from applying those legal norms.[180] Perhaps, this would become further clear in the following Section of the Study that examines the relevance of *locus standi* analysis in political question cases.

2.3.3.6. *Locus Standi* and Political Question

The Study defines political question as the constitutional issues committed to the unbounded discretion of the co-ordinate branches of government.[181] Regarding these issues, therefore, nobody can claim that his right or interest has been affected since they lie with uncontrolled discretion of political departments of government. As a necessary corollary, nobody can claim to have a 'cause of action' to challenge actions of the government pertaining to these matters. Any such challenge is liable to be dismissed due to lack of standing of the petitioner. Therefore, one may very well argue, political question issues may be analyzed within *locus standi* framework under the 'grievance rule' of Article 102 of the Constitution. And if just a *locus standi* analysis is sufficient, question naturally arises: why should then one need to have a separate doctrine to deal these questions?

The answer lies in what sense this Study uses the expression "unbounded discretion" in relation to political questions. Barak's idea of normative justiciability should be considered again to clarify the point. In what sense Barak held that the "law fills the whole world"[182] to reject normative non-justiciability of an issue? Indeed, prior to *Ressler*,[183] Barak's first

[180] The distinction between legal and political questions of constitutional issues would be unsatisfying only when they are viewed as "distinct and self-exclusive categories" which this Study does not maintain so. Hans Kelsen observes in this regard: "the legal or political character of the dispute does not depend, as the traditional doctrine seems to assume, on the nature of the dispute, that is to say, on the subject matter to which the dispute refers, but on the nature of norms to be applied in the settlement of the dispute. A dispute is a legal dispute if it is to be settled by the application of legal norms, that is to say, by the application of existing law." Hans Kelsen and Robert W. Tucker, *Principles of International Law* (Holt, Rinehart and Winston 1966) 525.

[181] See, *supra*, Chapter 2 (Section 2.3.1.) (p. 71) of the Study.

[182] See, *supra* text accompanying note 172.

[183] *Ressler* (n 154).

ground-breaking decision in public law was the *Yellow Pages* case. [184] In this case, Barak held that an administrative body must act with reasonableness, and a lack thereof may be the ground for invalidating the decision. By reasonableness requirement of an administrative decision, Barak meant that an administrative body must weigh all relevant considerations that pertain to the purpose of the decision, and that it must further give proper weight to the different considerations.[185]

After Barak's *Yellow Pages* [186] decision, the Israeli Supreme Court started to review the reasonableness of administrative decisions as an independent ground for judicial intervention.[187] When Barak said "law fills the whole world"[188], he simply meant that if there were no other applicable legal norms or standards to decide the case, the Court could always inquire whether or not the governmental decision was reasonable. In this way, Barak's *Yellow Pages* [189] proposition was crucial and Barak indeed cited the *Yellow Pages* [190] proposition to reject normative non-justiciability in *Ressler*. [191] In short, requiring all administrative decisions to be reasonable (*Yellow Pages*) meant that all issues could be justiciable (*Ressler*).[192]

The above analytical framework of Barak is useful in our understanding of political question founded on unbounded discretion. Recall the issues regarded susceptible of political question analysis in Bangladeshi jurisdiction: executive's satisfaction of facts; prerogative of mercy; executive's power of appointment; foreign relations powers of the elected branches; determining the validity of constitutional amendments; and, directing the legislature to enact law.[193] In these matters in particular as well as in matters of these kinds in general, the Constitution simply confers power on the elected branches without prescribing any condition or limitation for exercise of the power. Now, on what ground it may be perceived that the actions of the elected branches relating to these matters may be challenged? Since power is given without prescribing any limitation, to follow Barak's approach, judges may decide

[184] HCJ 389/80 *Yellow Pages v Broadcasting Authority*, 35 PD 421 (1980) (Isr.) (hereafter *Yellow Pages* case) (quoted in Weill (n 155) 236).
[185] Weill (n 155) 237.
[186] *Yellow Pages* (n 184).
[187] Weill (n 155) 239.
[188] See, *supra* text accompanying note 172.
[189] *Yellow Pages* (n 184).
[190] ibid.
[191] Weill (n 155) 246.
[192] ibid 248.
[193] See, *supra*, Chapter 2 (Section 2.3.2.) (p. 72) of the Study.

simply reasonableness of the decision of the co-ordinate branches. Thus, any such challenge involving political question issues of the abovementioned kinds would virtually involve a reasonableness review of the elected branches' decision.

This Study accepts the above explained analytical framework of Barak to reject normative non-justiciability of an issue but disagrees that the same reasonableness review standard may equally be applied in the review of elected branches' decision. In extending reasonableness review standard of administrative actions to the constitutional decisions of elected branches, Barak simply failed to appreciate or rather overlooked the nature and character of the two kinds of exercise of power. Administrative powers are exercised largely on the basis of ordinary legislation and do not usually concern 'separation of powers' whereas constitutional decisions are taken by the highest dignitaries of the state and involve 'separation of powers' concern. If administrative powers are allowed to be unchecked, then, rule of law is at stake and courts must uphold the rule of law. On the contrary, if constitutional discretion of the elected branches in political question cases is allowed to be unchecked, then, it is a question of balancing between the counteractive principles of 'rule of law' at the one hand and 'separation of powers' at the other hand.

At this stage, one should recall that Barak did not rule out the possibility of institutional non-justiciability altogether. Barak rejected institutional non-justiciability on grounds of 'separation of powers' and 'democracy' but acknowledged its possibility on the ground of 'public confidence in courts'. Barak was too naive when, to deny institutional non-justiciability on 'separation of powers' ground, held that separation of powers required judicial supervision, that is, judicial review over governmental bodies' exercise of authority and discretion.[194] Instead, it may be that judicial engagement in issues concerning 'separation of powers' causes loss of public confidence in courts.

To substantiate the argument, the Study considers some typical issues susceptible of political question analysis: declaration of war and peace, appointment and dismissal of ministers, determination of emergency rendering immediate action necessary, recognition of foreign government, and so on of the same kind. Do we think that our Constitution contemplates judicial interference in elected branches' decision in these matters? If yes, then, all powers of

[194] Weill (n 155) 246.

the Republic cannot be said to belong to the people that should be exercised by the *three* different organs of the government rather all powers are vested in and should be exercised by *one* organ of the government alone, the judiciary. Thus, Barak should have appreciated that court's impermissible infringement on 'separation of powers' may itself be the cause of loss of public confidence in courts. And political questions are nothing but constitutional issues that give expression to the limitation placed upon courts by this very principle of 'separation of powers'. Perceiving whole things in this way, this author could not but submit wholly to the view of Justice Elon, another Judge of the Israeli Supreme Court:

> We, the judges, howsoever wise and farsighted we may be, what do we have to do with the considerations that go into the waging of war or the initiation of diplomacy? . . . In my view, what is unreasonable is to reasonably expect that a court of law should examine the reasonableness of such matters.[195]

Political questions, therefore, are issues as to which even reasonableness review of elected branches' decision is impermissible. At this stage, one should think of the essence of the principle of 'rule of law'. So far as the exercise of power by an authority is concerned, 'rule of law' requires that the power should be exercised non-arbitrarily or rather in a reasonable manner. Now, if this requirement of reasonableness as component of 'rule of law' may be done away with regarding a certain class of issues, then, it may be said that those issues virtually rest with unbounded discretion of the authority dealing with them. This exactly happens with political questions as defined in this Study, "a certain category of constitutional issues committed to the unbounded discretion of the elected branches of the government" due to the functioning of the principle of 'separation of powers'.

This particular understanding explains why a simple *locus standi* analysis is insufficient for political questions. In common meaning of the term, the rule of *locus standi* requires that the plaintiff has a 'cause of action' to maintain the lawsuit. Plaintiff's 'cause of action' depends on the infringement of a right or an interest based on statutes. In constitutional litigation, this typical perception of *locus standi* suits most when plaintiff's fundamental rights are infringed and as such he is somehow directly and personally aggrieved by actions of the government. But, as we have seen earlier, in constitutional litigation the plaintiff can maintain a suit if he

[195] HC 90/1635, *Gerjevski v Prime Minister*, 45 (1) PD 749, 771 (hereafter *Gerjevski*) (quoted in Bendor (n 151) 328).

has only 'sufficient interest' in the matter.[196] Only with this extended meaning of *locus standi*, may a political question issue be challenged in a writ petition under Article 102 of the Constitution.

But, this Study contends, that is also not possible. To understand, let us contextualize the 'sufficient interest' thesis of *locus standi* in some paradigm examples of political question cases. Can a petitioner, for example, successfully challenge the discretion of executive's appointment and dismissal of Ministers, or the declaration of war and peace, or the recognition of foreign government, or the initiation of diplomacy simply on the ground that he has 'sufficient interest' in seeing that the government exercises power in relation to these matters reasonably? If yes, power even in relation to matters of high (indeed highest) magnitude of 'substantive political judgment' shift from political branches to judiciary and simply invades 'separation of powers'. If no, there is, then, one should acknowledge, limit of the principle of 'rule of law'.

Therefore, as opposed to the ordinary *locus standi* analysis of 'cause of action' founded on statutory rights, political question cases involve balancing between the competing principles of 'rule of law' and 'separation of powers'. The superior courts essentially require drawing the demarcating line between the two counteractive principles, that is, where 'rule of law' ends and 'separation of powers' starts functioning to leave certain issues of constitutional law for observance/enforcement by political means only.[197]

Additionally, since political question is a form of interpretive limit, it necessarily needs to be distinguished from some other interpretive techniques of judges, such as, judicial self-restraint, judicial discretion, judicial deference etc. Furthermore, the issue of 'political question' must not also be confused with a case involving 'political ramifications'. All these special attributes demand that in addition to and/or as opposed to the rule of *locus standi*, the issue of political question should have a jurisprudence of its own.

[196] See, *supra*, Chapter 2 (Section 2.2.2.2.1.) (p. 56) of the Study.

[197] This simply means there can be no 'legal limitation' on elected branches' power when the matter is found to be a political question. For justifiability of political accountability for political questions, see, *infra*, Chapter 6 (Section 6.4.) (p. 229) of the Study.

Summary and Assessment

To summarize, political question, in addition to *express* constitutional limitation, puts *interpretive* limit on the Supreme Court's power of judicial review. As a justiciability doctrine, political question is distinguished from the *grievance* doctrines (standing, ripeness, and mootness) of Article 102 in general and the issue of *locus standi* in particular. So far the dichotomy between legal and political questions of constitutional issues are concerned, that is only to separate a cluster of issues as to which the Court should refrain from applying legal norms to decide the dispute. Otherwise, political questions are also in their essence legal but for 'separation of powers' concern only the Court withholds its function of judicial review. The question is as to the institutional propriety of the judiciary rather than its capability so far these issues are concerned. To put it in Barak's justiciability framework, political questions limit institutional justiciability of questions that are normatively fully justiciable. Hence, the legal/political divide the Study maintains must not be understood to mean for them the two distinct and self-exclusive categories.[198]

The Study endeavours to construct the theoretical framework of the doctrine of political question in the above meaning only. However, before making any such attempt, it is necessary first to reflect on how superior courts of some relevant jurisdictions, such as, the United States, India and Pakistan, and Bangladesh approach or pour content to the expression 'political question'. The immediately following two Chapters (Chapters 3 & 4) of the Study are designed to fulfill the task.

[198] Rightly observes Bendor, "Indeed, even with respect to the more common understanding of political questions, which identifies them with questions relating to the areas of foreign policy and national security, to the internal relations of governmental institutions, and sometimes also to questions of macro-economics, there is no basis to viewing a dichotomy between such political questions and legal questions." Bendor (n 151) 333. See, *supra*, Chapter 1 (note 94 and accompanying text) (p. 32) of the Study.

CHAPTER 3
GENESIS OF THE DOCTRINE OF POLITICAL QUESTION IN CONSTITUTIONAL LITIGATION

Introduction

Before delving into Bangladesh jurisdiction, it is essential to know the genesis of the doctrine of political question in American jurisdiction where it is said to have been originated and the neighbouring jurisdictions of India and Pakistan. To accomplish the task, the Chapter has been divided into two broad Sections. Section 3.1. that deals with American jurisdiction is comprised of three sub-sections. Sub-section 3.1.1. traces the doctrine's origin and development in the US Supreme Court. It takes into account the US Supreme Court's seminal *Marbury* decision to the doctrine's most recent judicial consideration up to *Zivotofsky*. Sub-section 3.1.2. identifies the doctrine's theoretical foundation in the US jurisdiction. Sub-section 3.1.3. meets with the objections raised against foundation of the doctrine in the US jurisdiction. It particularly considers the merits of arguments of Professor Louis Henkin and Professor Martin Redish and concludes that their arguments against the doctrine are not theoretically well founded. Section 3.2. comprised of two sub-sections seeks to inquire into the doctrine's status in India and Pakistan.

3.1. The Doctrine in the Country of its Origin – the United States

3.1.1. Origin and Development of the Doctrine in the US Supreme Court

Article III of the US Constitution restricts the jurisdiction of federal courts to adjudicating actual 'cases' and 'controversies'.[1] Emanating from Article III, the US Supreme Court has articulated several justiciability doctrines including the doctrine of political question.[2] After its inception in an *obiter dictum*,[3] the doctrine has been applied both by the Supreme Court and lower federal courts encompassing subject matters of varied ranges and dimensions including, *inter alia*, the disputes in relation to election, impeachment, guarantee clause and

1 See, Article III, Section 2, Clause 1 of the United States (US) Constitution.

2 Other justiciability doctrines that have been emanated from Article III of the US Constitution are standing, ripeness, mootness, and the prohibition against issuing advisory opinion. See, however, *supra*, Chapter 2 (Section 2.3.3.2.) (p. 75) and, *supra*, Chapter 2 (note 144) (p. 75) of the Study.

3 *Marbury v Madison*, 5 (1803) US (1 Cranch) 137 (hereafter *Marbury*). For detail, see, *infra*, Chapter 3 (Section 3.1.1.1.) (p. 91) of the Study.

the equal protection clause under the Constitution. A detailed enumeration of all such cases and every such subject matter surely falls beyond the scope of this Study. Hence, the doctrine here will be understood in light of some selected but significant cases decided by the Apex Court of the United States – the Supreme Court. And to understand well how the meaning and scope of the doctrine has developed over time as well as to know the doctrine's current status before the courts of United States, the Study arranges the cases not according to their subject matter, but in order of time as provided below.[4]

3.1.1.1. *Marbury*: The Birth of Judicial Review and Political Question

The origins of the political question doctrine in US jurisdiction can be traced back to Chief Justice Marshall's opinion in *Marbury v Madison*.[5] In the case, Marbury sought an order of *mandamus* to compel the secretary of state to deliver to him his commission as a justice of the peace. After a detailed review of the facts, Marshall found that Marbury's appointment as justice of the peace pursuant to a congressional statute was complete. Therefore, as Marshall held, to withhold Marbury's commission would be an act not warranted by law but violative of a vested legal right.[6]

Having found that Marbury had a right to the commission and that this right had been violated, Marshall addressed the question of Marbury's remedy: "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection."[7] Marshall went on to say: "where a specific duty is assigned by law, and individual rights depend on the performance of that duty, . . . the individual who considers himself injured, has a right to resort to the laws of his country for a remedy."[8]

Ironically, Marshall acknowledged that a writ of *mandamus* was indeed the appropriate remedy[9] but concluded that the Court lacked jurisdiction to issue the writ. Marshall admitted

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4 In this Section, the Study presents an improved and enlarged version of what this author earlier wrote on the origin and development of the doctrine of political question in US jurisdiction, see, Moha. Waheduzzaman, 'The Domain of the Doctrine of Political Question in Constitutional Litigation: Bangladesh Constitution in Context' (2017) 17 (1 & 2) *Bangladesh Journal of Law* 5-14.

5 *Marbury* (n 3).

6 ibid 162.

7 ibid 163.

8 ibid 166.

9 ibid 173.

that section 13 of the Judiciary Act of 1789 passed by the Congress had authorized the Supreme Court "to issue writs of *mandamus* in cases warranted by the principles and usages of law, to any courts appointed or persons holding office, under the authority of the United States."[10] But Marshall distinguished between the discretionary political powers and the mandatory legal duties of the President and his secretary of state to deny issuing *mandamus* against Madison, the secretary of state.

Article III of the US Constitution confers original jurisdiction upon the US Supreme Court in "all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party."[11] In Marshall's view, a *mandamus* directed against executive as to a matter in the performance of which he has a discretion would amount to an unwarranted expansion of original jurisdiction of the Supreme Court conferred by the said Article of the US Constitution.[12] Marshall particularly identified the President's nomination of executive and judicial officers and his conduct of foreign affairs as constitutional questions confided to the discretion of the President and hence should lie beyond judicial scrutiny.[13]

Since Marshall found nomination of judicial officers as a matter confided to the discretion of the President, he, on this reasoning, denied *Mandamus* to Marbury even in the face of section 13 of the Judiciary Act of 1789 that conferred power upon the Supreme Court to issue *Mandamus* in appropriate cases.[14] What Marshall wrote underpinning the proper role of courts in the US constitutional system, had subsequently become the canonical statement for classical strand of the political question doctrine:

> The province of the court is, solely, to decide on the rights of individuals, not to enquire how the executive, or executive officers, perform duties in which they have a *discretion*. Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.[15]

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10 ibid.
11 See, US Constitution, Article III, section 2, clause 2.
12 *Marbury* (n 3) 173.
13 ibid 166-67.
14 See, *supra* text accompanying note 10. For criticism of Marshall's interpretation of section 13 of the Judiciary Act of 1789, see, Otis H. Stephens, 'John Marshall and the Confluence of Law and Politics' (2004) 71 *Tennessee Law Review* 247.
15 *Marbury* (n 3) 170 (emphasis added). See also, *supra*, Chapter 1 (text accompanying note 52) (p. 23) of the Study.

In this passage, Marshall clearly sought to distinguish between issues of law that the courts must resolve and matters that have come to be known as political questions which the courts must refrain from adjudicating.

In any jurisdiction, it has now been common to cite *Marbury* as the authority for a superior court's power of judicial review referring to this classic remark of Marshall: "it is emphatically the province and duty of the judicial department to say what the law is." [16] Marshall elaborated his view of judicial power in these words:

> Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each. So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules govern the case.[17]

This, Marshall said, is of the essence of judicial duty.[18] Marshall also clarified that in case of conflict between ordinary law and Constitution, Constitution shall prevail: "If then the courts are to regard the constitution and the constitution is superior to any ordinary act of the legislature, the constitution, and not such ordinary act, must govern the case to which they both apply."[19]

Marshall's *Marbury* opinion thus both represents the 'fountainhead of judicial review' [20] and serves as basis of 'political questions'[21] as the certain category of constitutional issues that should lie beyond judicial oversight.[22] However, it appears from the above-quoted passage [23]

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16 ibid 177.

17 ibid 177-78.

18 ibid 178.

19 ibid. The quoted assertion of Marshall is strikingly similar to Alexander Hamilton's observation in *Federalist No.* 78 that the duty of the American courts is "to declare all acts contrary to the manifest tenor of the constitution void." Quoted in Stephens (n 14) 242.

20 See, *supra* text accompanying notes 16-19. Stephens, however, observes that "Marshall's ultimate assertion of the power of judicial review in *Marbury* has strong historical roots that pre-date ratification of the United States Constitution." Stephens (n 14) 242-43. For detail, see, ibid 241-45.

21 See, *supra* text accompanying note 15.

22 In this respect, it may be pertinent to note that there are authors who regard *Marbury* as a strategic decision. Fallon, for example, observes that "Marshall ingeniously engineered a decision that gave formal victory to Madison, but rested on a foundation of judicial power, not impotence." Richard H Fallon, 'Marbury and the Constitutional Mind: A Bicentennial Essay on the Wages of Doctrinal Tension' (2003) 91 (1) *California Law Review* 10. The author observes again: "By framing and resolving the issues as he did, Marshall turned *Marbury v. Madison* into an enormous strategic victory for judicial power . . . But because Marbury received

that in view of Marshall political questions include only those matters where the President is entrusted by the Constitution with discretion but not matters that implicate individual rights.[24]

3.1.1.2. *Luther*: Further Strengthening the Case of Political Question

Luther v Borden [25] demonstrates that political questions may be found even in areas that implicate individual rights. In this case, Luther, the plaintiff, sought damages for trespass to his Rhode Island home. Defendants without denying the fact of breaking into plaintiff's house argued that they did so in the service of the state government. Plaintiff countered that the government to which defendants referred was not the lawful government of Rhode Island. At the time of the Dorr Rebellion in the 1840s, Rhode Island was operated under a charter established by King Charles II in 1663. Luther challenged the charter government as violating the Guarantee Clause under Article IV, Section 4 of the US Constitution which provides that the "United States shall guarantee to every State in this Union a Republican form of government."

Thus, the question of whether Luther should be granted remedy ultimately involved the Court's determining which of the two governments was the lawful government of Rhode

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no remedy, there was no judicial command to the executive branch for Madison to defy or for opponents of judicial power to denounce." ibid 11. The author goes on to say: "Marshall's broad interpretation of the statute enabled him to hold the statute unconstitutional, thereby establishing the precedent of judicial review, even as he avoided a collision with the Jefferson administration by denying Marbury any relief." ibid 19. See also Stephens (n 14) 245, 247.

Cases in which courts fail to enforce individual rights are often criticized. *Marbury*, by contrast, is invariably regarded as a judicial triumph. Identifying this aspect, Fallon holds Marbury's political and prudential face as "the best possible face to represent the school of constitutional thought that emphasizes the need for judicial prudence." Fallon, ibid 20. Laurence Tribe imagines a scenario had *Marbury* Court not been a prudential court: '"hence the writ shall issue' – at which point all hell breaks loose, Jefferson tells Madison to defy the Court, Marshall and several colleagues are impeached and convicted, and the next 200 years look entirely different." Laurence H Tribe, 'Erog v. Husb *and Its Disguises*: *Freeing* Bush v. Gore *from Its Hall of Mirrors* (2001) 115 *Harvard Law Review* 170, 303. Quoted in Fallon, ibid. Tribe suggests for the present courts to act with prudential sensibility as Marshall did in *Marbury*: "What the Court needs now is not a curtailment of the power that *Marbury* established, but a return to the contextual self-awareness that *Marbury* displayed. How much and when the Court should decide depends on the constitutional principle to be vindicated, the political controversy in which a controversy is embedded, and the social, cultural, and historical sources at play." Tribe, ibid 304. Quoted in Fallon, ibid.

[23] See, *supra* text accompanying note 15.

[24] See, Erwin Chemerinsky, Constitutional Law, Principles and Politics (2006) 129-30. For other early authority on political question in US jurisdiction, see, *Ware v Hylton* 3 US (3 Dall.) (1796) (the Court declined to rule on the question of whether a treaty had been broken); *Martin v Mott* 25 US (12 Wheat.) (1827) (the Court held that the President acting under legislative authorization had the exclusive and unreviewable power to decide when the militia would be called). See also *Foster v Neilson* 27 US (2 Pet.) (1829); *Garcia v Lee* 37 US (12 Pet.) (1838); *Williams v Suffolk Insurance Co.* 38 US (13 Pet.) (1839).

[25] 48 (1849) US (7 How.) 1 (hereafter *Luther*).

Island: charter government or rebellion government.[26] Writing for the Court, Chief Justice Taney recognized that the Constitution directs the United States to guarantee every state a republican form of government but argued that only Congress could determine what government is established in a state and whether it is republican. The Court emphasized that the decision of the Congress "is binding on every other department of the government, and could not be questioned in a judicial tribunal."[27]

In short, the US Supreme Court found Guarantee Clause under Article IV of its Constitution a political question. The scope of political question was broadened with *Luther* decision as the Supreme Court had found political questions in areas not solely committed to President's discretion but when rights of an individual are implicated. While *Marbury* identified some matters entrusted to the executive branch as political questions, *Luther* confirmed that certain matters committed to the discretion of Congress could also pose political questions.[28] *Luther* firmly established in American jurisdiction that there are indeed political questions – that is, matters that are informed by political considerations and the judiciary should stay its hands off to adjudicate those matters because their resolution is more proper within the political branches of government.

3.1.1.3. Towards the Emergence of a Doctrine on Political Question: The *Pre-Baker* Cases

After *Luther* firmly established the case of political question in US jurisdiction,[29] gradually there emerged a doctrine on political question, that is, "some issues [of the Constitution] are

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[26] The Dorr Rebellion was initiated by a group of citizens led by Thomas Dorr. They objected to the existing state Constitution (charter of King Charles II of 1663) that significantly restricted the right to vote and sought in 1841 to form an alternative government. Luther, the plaintiff, contended that the Dorr group was the government of Rhode Island at the time of defendant's trespass to his home. Accordingly, the Court was required to decide which government (charter or rebellion) was the true government of Rhode Island. See, Tara Leigh Grove, 'The Lost History of the Political Question Doctrine' (2015) 90 *New York University Law Review* 1925 (observing that Dorr's supporters did not ultimately gain control over Rhode Island but the Dorr Rebellion did lead to considerable reform). See also William M Wiecek, *The Guarantee Clause of the US Constitution* (Cornell University Press, Ithaca 1972) (noting that the newly formed Dorr government met for two days and then adjourned, ibid 95; noting also that due to the Dorr Rebellion, Rhode Island ultimately adopted a new Constitution that greatly expanded suffrage and thus "Dorr and his sympathizers . . . lost the battle but won the war", ibid 99). Quoted in Grove, ibid.

[27] *Luther* (n 25) 42.

[28] Jared P Cole, 'The Political Question Doctrine: Justiciability and the Separation of Powers' *Congressional Research Service (CRS) Report* (prepared for Members and Committees of Congress) (2014) 4.

[29] *Luther* (n 25). See, *supra*, Chapter 3 (Section 3.1.1.2.) (p. 94) of the Study.

for the political branches, not the federal judiciary, to confront and resolve."[30] The Study identifies three political question cases of this period that deserve specific mentioning: *Pacific States Telephone & Telegraph Co. v Oregon*;[31] *Coleman v Miller*;[32] and, *Colegrove v Green*.[33]

Like in *Luther*, the US Supreme Court was again presented with challenge arising under the Guarantee Clause in *Pacific States*.[34] During the late nineteenth century, a number of States adopted measures for implementing direct democracy in which laws could be enacted directly by the people. The State of Oregon was at the forefront of this direct democracy movement. In 1902, Oregon amended its Constitution to adopt the measures of initiative and referendum. The people of Oregon, pursuant to the constitutional amendment, initiated a law which was voted on and promulgated by the Governor in 1906. The new law imposed a two percent tax on the gross receipts of telephone and telegraph companies as a licence fee for doing business within the State of Oregon.[35]

Pacific States, an Oregon corporation, refused to pay the tax asserting that the law violated the Guarantee Clause for it was adopted by a popular initiative, rather than by the state legislature.[36] To put the company's argument succinctly: "the vital element in a republican form of government . . . is *representation*. Legislation by the people directly is the very opposite."[37] Oregon, citing *Luther*, argued that the determination of whether a state conforms to republican form of government is a political question and hence rest with the Congress and with the Executive. Pacific States strongly disputed that the US Supreme Court should be bound by the political branches' determination of the republican nature of Oregon's government.

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30 Rachel E Barkow, 'More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy' (2002) 102 (2) *Columbia Law Review* 300.

31 223 US 118 (1912) (hereafter *Pacific States*).

32 307 US 433 (1939) (hereafter *Coleman*).

33 328 US 549 (1946) (hereafter *Colegrove*).

34 For Guarantee Clause, see, Section 4, Article IV of the US Constitution: "United States shall guarantee to every State in this Union a Republican form of government."

35 *Pacific States* (n 31) 135-36.

36 Grove (n 26) 1940 (internal citation omitted).

37 ibid (emphasis original) (internal citation omitted). Pacific States thus in effect argued that the Oregon Constitution improperly permitted the people to legislate by initiative and referendum. *Pacific States* (n 31) 137.

The US Supreme Court dismissed Pacific States' claim holding that "the enforcement of the Guarantee Clause, because of its political character, is exclusively committed to Congress."[38] Justice White, writing for the unanimous Court, elaborated the reasoning in these words:

> We premise by saying that, while the controversy which this record presents is of much importance, it is not novel. It is important, since it calls upon us to decide whether it is the duty of the courts or the province of Congress to determine when a State has ceased to be republican in form and to enforce the guarantee of the Constitution on the subject. It is not novel, as that question has long since been determined by this court conformably to the practice of the government from the beginning to be political in character, and therefore, not cognizable by the judicial power, but solely committed by the Constitution to the judgment of Congress.[39]

In reaching the decision, the Court explored the nature of issue/s exactly involved in the case. For example, the Court found that Pacific States did not claim that it could not be required to pay the impugned tax, or that it was denied an opportunity to be heard as to the amount of tax imposed, or that there was anything otherwise intrinsically involved in the law which violated any of its constitutional rights.[40] The Court emphasized that "if such questions had been raised, they would have been justiciable, and therefore would have required the calling into operation of judicial power."[41] On the other hand, the Court noted, the challenge on the impugned law was of a different kind. In Court's characterization:

> its essentially political nature is at once made manifest by understanding that the assault which the contention here advanced makes it not on the tax as a tax, but on the State as a State. It is addressed to the framework and political character of the government by which the statute levying the tax was passed. It is the government, the political entity, which (reduced the case to its essence) is called to the bar of this court not for the purpose of testing judicially some exercise of power assailed on the ground that its exertion has injuriously affected the rights of an individual because of repugnancy to some constitutional limitation, but to demand of the State that it establish its right to exist as a State, republican in form.[42]

Based on the above reasoning, the Court held the constitutional challenge to the initiative and referendum power under Guarantee Clause a political question which the Court lacked

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38 *Pacific States* (n 31) 133, 136-37.
39 ibid 133.
40 ibid 150.
41 ibid.
42 ibid 150-51.

jurisdiction to decide: "As the issues presented . . . are, and have long . . . been, definitely determined to be political and governmental, and embraced within the scope of the powers conferred upon Congress, and not therefore within the reach of judicial power, it follows that the case presented is not within our jurisdiction."[43]

After *Pacific States*, the most significant case on political question was *Coleman v Miller*.[44] This time the US Supreme Court had to determine not any Guarantee Clause claim but validity of a constitutional amendment by Congress. In 1924, the US Congress proposed an amendment, known as the Child Labour Amendment, to the Constitution. The Kansas Legislature rejected the amendment in 1925. However, the amendment was still pending and the Kansas Legislature voted to ratify it in 1937. A group of Kansas state legislators objected

[43] ibid 151. An early observer objected the *Pacific States* Court's characterization of political question issue as lack of jurisdiction of the Court: "The case is significant in that the court declined jurisdiction. The mere fact that a political question was involved will not explain this ruling. A political question is a question of fact which may arise in any kind of case and has no bearing on the jurisdiction of the court. The rule is merely that, instead of examining such a question on its merits or submitting it to a jury, the court will, if possible, find out how the political departments of government have decided it, and will then follow that decision . . . Many cases involving political questions have been decided by the Supreme Court." Note, 'Initiative and Referendum' (1912) 25 *Harvard Law review* 644, 644. See also Melville Fuller Weston, 'Political Questions' (1925) 38 *Harvard Law Review* 296, 327 (analyzing *Pacific States* as a case where the plaintiff improperly asserted a broad structural claim. An analysis that may today be described as an assertion that the plaintiff lacked *standing* or a 'cause of action' under the Guarantee Clause. To quote Weston, the plaintiff claimed a "constitutional right . . . not to person or property . . . but to political existence and integrity." ibid 322-26); Grove (n 26) 1942-43 (observing Court's analysis in *Pacific States* as baffling, "Much of the opinion suggests that the case required it to rule on the validity of the entire Oregon government and "every . . . statute passed in Oregon since the adoption of the initiative and referendum." Such assertions were clearly overstated. After all, as Pacific States itself emphasized, the Court was "not asked to declare Oregon not to be a State" but "merely to . . . pronounce" that a single provision of the state constitution "violates one or more provisions of the Federal Constitution"" (internal citation omitted); N Williams, 'Direct Democracy, the Guarantee Clause, and the Politics of the Political Question Doctrine: Revisiting *Pacific Telephone*' (2008) 87 *Oregon Law Review* 979, 1003 (noting that there is no support for the view that the Constitution entrusts the enforcement of the Guarantee Clause exclusively to the political branches); Bickel and Schmidt, *History of the Supreme Court of the United States: The Judiciary and Responsible Government, 1910-21* (Cambridge University Press, Cambridge 1984) 311 (arguing that the Guarantee Clause refers to the United States, not Congress or the President, as the guarantor of republican government, and there is nothing in the term United States that necessarily excludes the Federal Judiciary); WM Wiecek (n 26) 264 (observing that Congress is in an exceptionally poor position to guarantee republican government in the States). For more criticisms of the US Supreme Court's interpretation of the Guarantee Clause both in *Luther* and *Pacific States*, see, R Pushaw, 'Bush v Gore: Looking at Baker v Carr in A Conservative Mirror' (2001) *Constitutional Commentary* 362 (arguing that the Court unwarrantedly imposed an absolute political question bar in *Pacific States* for issues involved in the Guarantee Clause); R Pushaw, 'The Presidential Election Dispute, the Political Question Doctrine, and the Fourteenth Amendment: A Reply to Professors Krent and Shane' (2001) *Florida State University Law review* 603 (noting that although *Luther* did not hold that all claims under the Guarantee Clause raised political questions, the Court created such an absolute bar in *Pacific States* in 1912); E Chemerinsky, 'Cases Under the Guaranty Clause Should Be Justiciable' (1994) *University of Colorado Law Review* 872-79 (pointing many obvious flaws with argument that when Guarantee Clause claims are involved, an entire government need to be declared unconstitutional if found to be *not* republican).

[44] *Coleman* (n 32).

to the amendment arguing that the ratification was not done within 'reasonable time' and thus violated Article V of the Constitution.[45]

The US Supreme Court by a plurality of 7:2 Judges declined to reach the merit of Kansas state legislators' claim who objected to the ratification. The seven Justices concluded that the validity of Kansas state legislature's ratification of the impugned amendment was a 'political question' only for Congress to decide. The Court noted that Article V of the Constitution spoke only of ratification, but was silent concerning rejection.[46] Accordingly, the Court held that only Congress, and not the courts, "has the final determination of the question whether by lapse of time its proposal of the amendment had lost its vitality prior to the required ratifications."[47]

It may be pertinent to take note of the splintered opinion of the Court. Writing for a three-Justice plurality, Chief Justice Hughes held that whether a proposed amendment 'lost its vitality through lapse of time' is for Congress for decide.[48] Four other Justices who joined in a concurring opinion adopted a very different approach. Writing for that group, Justice Black argued that the amendment process is "'political' in its entirety, from submissions until an amendment becomes part of the Constitution, and is not subject to judicial guidance, control or interference at any point."[49] Justices Butler and McReynolds dissented and urged the Court

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[45] Article V of the US Constitution says, "The Congress, whenever two thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three fourths of the several states, or by conventions in three fourths thereof, as the one or the other mode of *ratification* may be proposed by the Congress; provided that . . . in the Senate" (emphasis added).

[46] *Coleman* (n 32) 450. For Article V's speaking only of ratification, see, *supra* note 45.

[47] ibid 456.

[48] ibid 451, 456. See, Barkow (n 30) 259. Chief Justice Hughes distinguished the issue presented in *Coleman* from the Court's decision in *Dillon v Gloss* 256 US 368 (1921) (hereafter *Dillon*). Barkow summarizes how Chief Justice Hughes distinguished *Coleman* from *Dillon*: "In *Dillon*, the Court had reviewed whether Congress could properly place a seven year ratification limit on the Eighteenth Amendment, and had upheld the limit as a "reasonable time." Chief Justice Hughes explained that *Dillon* had not reached the question as to whether the Court should determine what constitutes a reasonable time when Congress has not exercised its power to fix one. Rather, that case established only that Congress has the power to fix the time limit. The Court itself could not establish a time when Congress has not acted, Chief Justice Hughes explained, because there are no criteria for a judicial determination, and such a decision would involve "an appraisal of a great variety of relevant conditions, political, social and economic"" (internal citation omitted). Barkow (n 30) 259. These Justices, therefore, would have also reviewed the issue presented in *Dillon*.

[49] ibid 459 (Black J concurring, joined by Roberts, Frankfurter & Douglas JJ). See, Barkow (n 30) 259-60. Justice Black insisted that Congress's determination that an amendment "conforms to the commands of the Constitution" "'conclusively binds the judges, as well as all other citizens, and subjects of . . . government.'" ibid 457-58. See, Grove (n 26) 1945 (internal citation omitted). These Justices, therefore, "would not have reviewed the issue presented in *Dillon*." Barkow (n 30) 260.

to decide the case on the merits. They asserted that the amendment was invalid for not being ratified within a reasonable time.[50]

The next important political question case is *Colegrove v Green* [51] involving the legislative apportionment question. The Constitution of the several States of the United States provided that there should be revision in the State of Congressional Representative Districts according to the figures disclosed by successive censuses of population in those States.[52] Pursuant to the constitutional requirement, the State of Illinois passed statute governing the apportionment of congressional districts. A group of Illinois citizens alleged that the congressional districts created by the impugned legislation lacked compactness of territory and approximate equality of population. In short, the congressional districts were severely malapportioned, diluted their voting power, and thus violated, *inter alia*, the Equal Protection Clause of the Fourteenth Amendment.[53]

The Court in a sharply divided opinion refused to entertain holding legislative apportionment a political question. A three-Justice plurality led by Justice Felix Frankfurter [54] held that the Constitution "conferred upon Congress exclusive authority to secure fair representation by the States." [55] The Constitution, thus, Frankfurter went on to say, "precludes judicial correction" of the alleged evil of malapportionment.[56] Interestingly, as Barkow observes, Justice Frankfurter "did not address separately the petitioners' Fourteenth Amendment claim."[57] Justice Frankfurter merely "observed that the history of apportionment reveals its

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50 ibid 470-474 (Butler J dissenting).

51 *Colegrove* (n 33).

52 SM Seervai, *Constitutional Law of India* (New Delhi 1996) 2638.

53 See, Sections 1 & 2 of the Fourteenth Amendment of the US Constitution. Section 1 deals with citizenship and civil rights: "All persons . . . wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law." Section 2 deals with apportionment of representatives: "Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote . . . in such State."

54 Justices Reed and Burton joined Justice Felix Frankfurter.

55 *Colegrove* (n 33) 554-55. See, clause 1, section 4 of Article I of the US Constitution: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing [choosing] Senators."

56 ibid. Frankfurter's plurality opinion also suggested that "the plaintiffs lacked standing, because they asserted an injury to Illinois as a polity rather than a personal injury, and that the Court the power to order the equitable remedy sought by the plaintiffs." Grove (n 26) 1946 [in footnote 197]. See, *Colegrove* (n 33) 552.

57 Barkow (n 30) 261. Barkow elaborates: "Instead, he [Frankfurter] stated generally that "no court can affirmatively remap the Illinois districts so as to bring them more in conformity with the standards of fairness for a representative system. At best we could only declare the existing electoral system invalid."

"embroilment in politics" and concluded that courts ought not to enter this "political thicket.""[58] As to enforcement of these kinds of questions, Frankfurter made the following canonical statement:

> The Constitution has left the performance of many duties in our governmental scheme to depend on the fidelity of the executive and legislative action and, ultimately, on the vigilance of the people in exercising their political rights.[59]

Justice Rutledge in his separate opinion concurred with *Frankfurter* plurality on a different ground. He firmly believed that the issue involved in the case was not a political question.[60] But he would "nevertheless dismiss the complaint for want of equity, given that the case was "of so delicate a character.""[61] Justice Rutledge, therefore, argued that the concerns raised by Justice Frankfurter should be better addressed as a matter of equitable remedies.[62]

Justice Black, joined by Justices Douglas and Murphy, dissented arguing that the case did not present a non-justiciable political question.[63] These Justices contended that malapportionment in the instant case denied voters the equal protection of laws and that the Court should have decided in favour of the plaintiffs.[64]

3.1.1.4. Modern Articulation of the Doctrine in *Baker*

The modern application of the doctrine of political question stems from the Supreme Court's decision in *Baker v Carr*.[65] In *Baker*, the question raised in *Colegrove* [66] with reference to the State of Illinois was raised in respect of the State of Tennessee. Like in *Colegrove*, the

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This would "bring courts into immediate and active relations with party contests." Instead, he [Frankfurter] argued, the remedy for unfair districting lies with state legislatures or with Congress" (internal citation omitted). Barkow, ibid.

58 *Colegrove* (n 33) 554-56. See, Barkow (n 30) 260.

59 ibid 556.

60 ibid 564-65 (Rutledge J concurring). To be precise, Justice Rutledge from the Court's precedent found the issue of 'legislative apportionment' not to be a political question.

61 ibid 565 (Rutledge J concurring). Barkow (n 30) 261.

62 ibid. See, Barkow, ibid.

63 ibid 569-73 (Black J dissenting). See, Grove (n 26) 1946.

64 ibid. See, Grove, ibid. For some other political question cases of this period, see, *Kennett v Chambers* 55 US (14 How.) (1852); *Doe v Braden* 57 US (16 How.) (1854); *United States v Holliday* 70 US (3 Wall.) (1866); *Jones v United States* 137 US (1890); *Russian Socialist Federated Soviet Republic v Cibrario* 235 NY (1923); *Hirabayashi v United States* 320 US 81 (1943); *Korematsu v United States* 323 US 214 (1944); *Chicago & Southern Air Lines Inc. v Waterman Steamship Corp.* 333 US 103 (1948).

65 369 US 186 (1962) (hereafter *Baker*).

66 *Colegrove* (n 33). For detail, see, *supra* text accompanying notes 51-64.

plaintiffs in *Baker* alleged severe malapportionment of election districts, "such that the votes of individuals in some districts were accorded less weight."[67] Thus, the plaintiffs in particular contended, the reapportionment statute violated the Equal Protection Clause of the Constitution [68] by failing to guarantee "one person, one vote."[69]

By a majority of 6:2, the US Supreme Court upheld the contention of the plaintiffs.[70] In reaching the conclusion, the Court distinguished claims brought under the Guarantee Clause from claims under the Equal Protection Clause. In view of the Court, while the Guarantee Clause did not contain "judicially manageable standards which a court could utilize independently in order to identify a State's lawful government",[71] standards "under the Equal Protection Clause are well developed and familiar".[72] In short, to compare *Baker* with *Colegrove*, while *Colegrove* declined to resolve Guarantee Clause challenge to State apportionment of Congressional districts, *Baker* upheld Equal Protection Clause challenge to apportionment scheme. Thus, the question previously thought to be non-justiciable was held to be well within the competence of the Court to decide. *Baker*, therefore, reversed an unbroken line of precedent dating back to *Luther* decided in 1849.[73]

Paradoxically, however, the *Baker* Court that rejected political question argument in the instant case had provided the most famous explication of the doctrine till date. Justice Brennan, writing for the Court, gave the doctrine its fullest judicial treatment to date and identified some defining characteristics of a political question in these words:

> It is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a *political question*, although each has one or more elements which identify it as *essentially a function of the separation of powers*. Prominent on the surface of any case held to involve a *political question* is found-
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> (i) a textually demonstrable constitutional commitment of the issue to a coordinate political department; or

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67 Grove (n 26) 1960. See, *Baker* (n 65) 192-95.
68 For Equal Protection Clause of Fourteenth Amendment of the US Constitution, see, *supra* note 53.
69 *Baker* (n 65) 187-88.
70 See, for detail, Seervai (n 52) 2638-2639.
71 *Baker* (n 65) 223.
72 ibid 226. See, Cole (n 28) 5.
73 *Luther* (n 25). For detail of US Supreme Court's *Luther* decision, see, *supra*, Chapter 3 (Section 3.1.1.2.) (p. 94) of the Study.

(ii) a lack of judicially discoverable and manageable standards for resolving it; or
(iii) the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or
(iv) the impossibility of a court's undertaking independent resolution without expressing lack of the respect due to coordinate branches of government; or
(v) an unusual need for unquestioning adherence to a political decision already made; or
(vi) the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[74]

In the instant case, the Court concluded, none of the criteria was applicable and that the plaintiffs' equal treatment challenge should succeed.[75] The later Supreme Court cases have, for the most part, rested on Justice Brennan's formulation of six criteria to identify a political question. In the words of Mulhern: "Most cases do little more than cite *Baker v. Carr*. A few discuss Justice Brennan's criteria in some depth, but none adds much to our understanding of those criteria." [76]

3.1.1.5. The *Post-Baker* Application of the Doctrine up to *Zivotofsky*

After *Baker*,[77] the US Supreme Court's most significant political question cases are: *Powell v McCormack*;[78] *Walter Nixon v United States*;[79] *Bush v Gore*;[80] and, *Zivotofsky v Clinton*.[81]

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[74] *Baker* (n 65) 217 (emphasis added). It should be noted that Justice Brennan did not argue that one of his enumerated criteria should lead to automatic dismissal. Rather, this should occur, as Brennan stated, only when "one of these formulations is inextricable from the case at bar." ibid. Furthermore, Brennan emphasized, the cases of sheer illegality would not enjoy immunity of judicial review. Thus, for example, in foreign relations cases, the Court may intervene "if there has been no conclusive governmental action." ibid 212. Again, as regards challenges to validity of enactments, "if the enrolled statute lacks an effective date, a court will not hesitate to seek it in the legislative journals in order to preserve the enactment." ibid 215. Similarly, dealing with Congress's power in relation to Indian tribes, Brennan observed that "it is not meant by this that Congress may bring a community . . . within the range of his power by arbitrarily calling them an Indian tribe," and the courts "will not stand impotent before an obvious instance of a manifestly unauthorized exercise of power." ibid 216-17. Finally, Justice Brennan's most important reservation probably relates to his emphasis on the reviewability of 'individual rights-based' claims. For example, in *Baker* itself, Brennan read the plaintiffs' argument as an 'equal treatment' claim instead of a 'guarantee clause' claim to hold the state 'legislative apportionment' issue justiciable.

[75] ibid 226, 237. It is, however, noticeable that the *Baker* Court did not explain precisely how these criteria were to be applied in future cases, nor did it describe the relative weight of each criterion. Cole (n 28) 6. In *Vieth v Jubelirer*, however, a plurality of the Court, applying the doctrine, observed that they "are probably listed in descending order of both importance and clarity". 541 US 267, 277 (2004). See, Cole (n 28) 6.

[76] JP Mulhern, 'In Defense of the Political Question Doctrine' (1988) 137 (97) *University of Pennsylvania Law Review* 107-08 (internal citation omitted).

[77] *Baker* (n 65). For detail of US Supreme Court's *Baker* decision, see, *supra*, Chapter 3 (Section 3.1.1.4.) (p. 101) of the Study.

[78] 395 US 486 (1969) (hereafter Powell).

[79] 506 US 224 (1993) (hereafter *Nixon*).

To deal first with *Powell* and *Nixon*, while *Colegrove* and *Baker* show the contrasting attitude of the Court regarding legislative apportionment disputes, the cases of *Powell* and *Nixon* reflect also the same attitude of the Court but in disputes concerning Congressional procedure under the Constitution. *Powell* [82] involved a challenge brought by Adam Clyton Powell, a member-elect of the House of Representatives who had been excluded from his seat pursuant to a House Resolution.[83] The precise issue to be decided was whether the Court could review the Congressional decision that the plaintiff was "unqualified" to take his seat.[84] Considering the summary of the defining characteristics of a political question in *Baker*, Warren CJ held that the only critical one, in this case, was whether there was a 'textually demonstrable constitutional commitment to the House to determine in its sole discretion the qualification of members'.[85] After a full discussion, he concluded that it was not so committed.[86] Thus, in view of *Powell* Court, the force of a political question argument depends in great measure on the resolution of the 'textual commitment' question.

Seervai observes that the US Supreme Court's determination that the political question doctrine did not bar its review of the challenge of a Congressional decision indicates the narrowness of the application of the doctrine.[87] The same is pointed out in the Congressional edition of the US Constitution:

> The effect of Powell (v. McCormack) is to discard all the *Baker* factors inhering in a *political question* with the exception of the *textual commitment* factor and that was interpreted in such a manner as seldom if ever to preclude a judicial decision on the merits.[88]

In *Nixon*,[89] the Court was asked to review the procedural integrity of a federal judge's impeachment by the Senate. The Constitution by express provision delegates to the Senate the "Sole power to try all impeachments".[90] The Senate invoked Impeachment Rule XI, a

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80 531 US 98 (2000) (hereafter *Bush*).
81 *Zivotofsky ex rel. Zivotofsky v Clinton*, 132 S. Ct. (2012) (hereafter *Zivotofsky*).
82 *Powell* (n 78).
83 ibid 489-95. See, Cole (n 28) 14.
84 Cole, ibid (internal citation omitted).
85 Seervai (n 52) 2641.
86 ibid.
87 ibid 2640.
88 See the Congressional Edition of the Constitution of the United States of America, 4th ed., at p. 669 (emphasis added). Quoted in Seervai (n 52) 2641.
89 *Nixon* (n 79).
90 See, clause 6, section 3, Article I of the US Constitution.

Senate procedural rule which permits a committee to take evidence and testimony.[91] The committee after completion of its proceedings provided the full Senate with a transcript and report.[92] The Senate then considered arguments from both sides and voted to convict and remove the judge from office. Judge Nixon thereafter brought a suit arguing that the use of a committee to take evidence violated the Constitution's requirement that the Senate "try" all impeachments.[93]

The Court, however, dismissed the challenge noting that the constitutional grant of sole authority to Senate to try all impeachments meant the "Senate alone shall have the authority to determine whether an individual should be acquitted or convicted".[94] Observing the fact that the impeachment functions as the only check on the Judicial Branch by the Legislature, the Court explained that the important 'separation of powers' concerns would be implicated if the "final reviewing authority with respect to impeachments was placed in the hands of the same body that the impeachment process is meant to regulate".[95]

In reaching the conclusion, the Court sought to distinguish *Nixon* from *Powell*. Article I, Section 5 of the US Constitution provides that the Congress shall determine the qualifications of its members. And Article I, Section 2 prescribes three requirements for House membership – a Representative must be at least 15, have been a US citizen for at least 7 years, and inhabit the State he represents. In view of the *Nixon* Court, a finding that the House had unreviewable authority to decide its members' qualifications would violate another provision – i.e. Article I, Section 2 – of the Constitution.[96] In other words, in view of the *Nixon* Court, whether the three requirements in the Constitution were satisfied was textually committed to the Congress, "but the decision as to what these qualifications consisted of was not".[97] On the contrary, the *Nixon* Court held, leaving the interpretation of the word "try" with the Senate did not violate any "separate provision" of the Constitution.[98]

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91 Cole (n 28) 13.
92 ibid.
93 ibid.
94 *Nixon* (n 79) 231.
95 ibid 235. See, Cole (n 28) 14.
96 Cole, ibid.
97 *Nixon* (n 79) 236-37. See, Cole (n 28) 14.
98 *Nixon* (n 79) ibid. See, Cole (n 28) ibid.

So far as the *Baker* factors are concerned as the defining characteristics of a political question, *Nixon* concurred in great measure with *Powell*. The *Nixon* Court held that the word "try" "lacks sufficient precision to afford any judicially manageable standard of review of the Senate's actions"[99] which strengthens the conclusion that there is 'textually demonstrable constitutional commitment' of the issue to a co-ordinate branch.

The case of *Bush v Gore* [100] involved Presidential election dispute the resolution of which is entrusted by Article II of the Constitution to the States and Congress at least in the first instance. The relevant clauses are in the 12th Amendment dealing with the counting of ballots cast by the electros. It states that "The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted". [101] Furthermore, if no candidate has a majority of the electoral votes cast and counted, the choice of who is to become President devolves upon the House of Representatives.[102] The 12th Amendment begins with these words, "The Electors shall meet in their respective States".[103] In view of Tushnet, the dispute in *Bush* involved identifying exactly who the electros were, and nothing in the 12th Amendment suggests that resolving disputes over identity is committed to Congress.[104] The author argues that the Constitution in the 12th Amendment says something about counting electoral votes but nothing about what to do when someone says, 'This is not a valid vote'.[105]

A majority of the US Supreme Court held in *Bush* that the system devised by the Florida Supreme Court violated the principles of 'equal protection' and 'due process' rights of individual voters because their votes were being counted improperly and/or arbitrarily due to, *inter alia*, the various recounts ordered by the State officials. Concurring opinion of the three justices found Florida Supreme Court's action as a violation of Article II itself.[106] They founded their opinion on the basis that "the State Supreme Court's judgment respecting the

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[99] *Nixon* (n 79) 229. See, Amanda L. Tyler, 'Is Suspension a Political Question?' (2006) 59 *Stanford Law Review* 369 (suggesting that "the Court's line drawing in this context is hardly a model of clarity", because "the Court now routinely reviews what is properly deemed "commerce" subject to federal regulation, but has declined to rule on what "try" means in the Impeachment Clause (a matter of procedural justice on which the courts would seem to be far more qualified to speak") (internal citations omitted).

[100] *Bush* (n 80).

[101] See, Amendment XII of the US Constitution.

[102] ibid.

[103] ibid.

[104] Mark V Tushnet, 'Law and Prudence in the Law of Justiciability: The Transformation and Disappearance of the Political Question Doctrine' (2002) 80 *North Carolina Law Review* 1228.

[105] ibid 1227.

[106] Rehnquist CJ, Scalia J and Thomas J concurring.

recount removed the question of the selection of electors for President and Vice-President from the legislature to a judicially directed process overseen by the State Supreme Court".[107] In support of an order which vacated the State Court's conclusion as to how a recount was to be managed, the concurring judges stated, "this enquiry does not imply a disrespect for the State courts but rather a respect for the constitutionally prescribed role of the State legislatures".[108]

What is, however, most notable in this Study's context is that no one said anything at all about the justiciability of the challenges raised in *Bush* on the ground of the doctrine of political question.

The most recent case the Study considers for discussion here is *Zivotofsky v Clinton*.[109] In *Zivotofsky*, the US Supreme Court rejected application of the doctrine of political question in the instant case involving an individual's statutory claim. A Congressional statute provided that the Secretary of State, upon request of individuals, should list the place of birth as Israel on the passports for United States citizens born in the city of Jerusalem.[110] Zivotofsky was an American citizen born in Jerusalem. He sought to have his passport read "Jerusalem, Israel" as the place of birth. The State Department refused him being consistent with the department policy to "not write Israel or Jordan" as the birthplace of someone born in Jerusalem.[111] Zivotofsky then sought judicial relief – a declaratory judgment and a permanent injunction directing the Secretary of State to list "Jerusalem, Israel" as his place of birth.[112]

The D.C. Court of Appeals affirmed dismissal of the case on the ground that it involved a non-justiciable political question.[113] The court argued that "only the Executive – not Congress and not the courts – has the power to define US policy regarding Israel's sovereignty over Jerusalem and decide how best to implement that policy".[114]

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[107] D Geoffrey Cowper, Q.C. and Lorne Sossin, 'Does Canada Need a Political Questions Doctrine?' (2002) 16 *Supreme Court Law Review* 349.
[108] ibid.
[109] *Zivotofsky* (n 81).
[110] Cole (n 28) 20 (internal citation omitted).
[111] *Zivotofsky* (n 81) 1425. See, Cole, ibid (internal citation omitted).
[112] *Zivotofsky* (n 81) 1426. See, Cole, ibid.
[113] Cole, ibid.
[114] *Zivotofsky* (n 81) 1232. See, Cole, ibid 20-21.

Reversing the decision, the US Supreme Court held that the political question doctrine did not bar adjudication of the plaintiff's claim.[115] Central to the Court's reasoning was its understanding of the precise legal question at issue in the case – whether the statute granting the plaintiff a right was constitutional, rather than whether a court may adjudicate Jerusalem's political status.[116] Court elaborated that Zivotofsky merely seeks enforcement of a specific statutory right which required the Court to determine if the plaintiff interpreted the statute correctly and whether the statute was constitutional.[117] Thus, the framing of the question in this particular fashion ruled out the possibility of any kind of application of the doctrine of political question in the instant case. The Court, however, did not overrule any of its past decisions that had found political questions. Instead, it recognised the first two *Baker* factors as relevant in finding whether an issue to be resolved is a political question or not.[118]

The approach of the *Zivotofsky* Court indicates that the vitality of the doctrine still remains in American context though within a narrower scope than *Baker* suggested. This continuing validity of the doctrine in the US Supreme Court calls for a critical examination of the foundation on which the doctrine may be said to have been built. The Study, therefore, now seeks to identify the doctrine's theoretical foundation in US jurisdiction.

3.1.2. Exploring the Doctrine's Foundation in US Jurisdiction

Although this author earlier has identified three distinct approaches to political question (classical, prudential and functional) in US jurisdiction,[119] Professor Wechsler's textual commitment and Professor Bickel's prudential strands are viewed as the dominant or mostly accepted approaches to political question.[120] Accordingly, the author now endeavours to

[115] Cole, ibid 21.
[116] ibid.
[117] ibid.
[118] *Zivotofsky* (n 81) 1427. For the first two (or, all) *Baker* factors, see, *supra* text accompanying note 74. For other important political question cases of this period, see, *Gilligan v Morgan* 413 US (1973); *United States v Nixon* 418 US 683 (1974); *Goldwater v Carter* 444 US (1979); *Davis v Bandemer* 478 US 109 (1986); *United States v Munoz-Flores* 495 US (1990); *Vieth v Jubelirer* 541 US (2004); *Lexmark International Inc. v Static Control Components, Inc.* 134 S.Ct. (2014).
[119] See, *supra*, Chapter 1 (Sections 1.1.1., 1.1.2. and 1.1.3.) (pp. 18, 19, 21) of the Study.
[120] See, for example, Barkow (n 30) 247 (treating the constitutionally based strand of the doctrine as 'classical'; and, treating the nonconstitutionally based strand of the doctrine as 'prudential' and does not distinguish between its functional and nonfunctional aspects); Martin H Redish, 'Judicial Review and the "political Question"' (1985) 79 (5 & 6) *Northwestern University Law Review* 1043 (arguing that the functional aspect/approach is 'merely a subset' of the prudential doctrine). See, however, David Cole, Note, 'Challenging Covert War: The Politics of the Political Question Doctrine' (1985) 26 *Harvard International Law Journal* 164 (recognizing three versions of the political question doctrine: the classical or constitutional

explore whether the US Supreme Court cases invoking the political question doctrine to decline to adjudicate a case were founded either on Wechsler's textual commitment standard or on Bickel's prudential model or on the both.[121]

Although a significant number of cases involving political question doctrine have come before the US Supreme Court,[122] the framework within which the doctrine's theoretical foundation may be discerned and evaluated are only few. Accordingly, it has been tried here to determine the extent to which the US Supreme Court cases reflect the classical and prudential versions of the doctrine in large measure with reference to five important Supreme Court's decisions. The cases are:

- *Marbury v Madison*; [123]
- *Luther v Borden*; [124]
- *Baker v Carr*; [125]
- *Walter Nixon v United States*; [126] and
- *Zivotofsky v Clinton*. [127]

Marbury, as has already been observed, besides assuming the power of judicial review, also originated in US jurisdiction the notion of political questions.[128] Chief Justice Marshal traced political questions' pedigree to the text of the Constitution itself when he said: "Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court."[129] *Marbury* thus represents the classical strand or Professor

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version which is the most important and most persuasive aspect of the doctrine; the functional version which may be more descriptively accurate than normatively defensible; and, the prudential version which Professor Alexander Bickel advocated).

[121] The Study presents an improved and enlarged version of what this author earlier wrote on this, see, Waheduzzaman (n 4) 16-19.

[122] See, *supra*, Chapter 3 (the 5 sub-sections of Section 3.1.1.) (pp. 90-108) of the Study.

[123] *Marbury* (n 3).

[124] *Luther* (n 25).

[125] *Baker* (n 65).

[126] *Nixon* (n 79)

[127] *Zivotofsky* (n 81).

[128] See *supra* text accompanying notes 15-22.

[129] See *supra* (n 15). In terms of discretionary power analysis, this simply means, because some questions are committed by the Constitution to the unchecked discretion of Congress or President, there is no place for judicial scrutiny. See, *Marbury* (n 3) 165-66.

Wechsler's 'textual commitment' standard as opposed to Professor Bickel's prudential strand of the doctrine.[130]

Luther involved a challenge against the charter government of Rhode Island at the time of Dorr Rebellion in the 1840s. Supreme Court held that the matter is committed to the discretion of Congress and hence only Congress could determine under Article IV of the US Constitution what government is established in a State and whether it is republican. At first sight, it might seem that only 'textual commitment' standard (the classical model) has been responsible for the decision in *Luther*. But the Court, in fact noted, in addition, certain prudential considerations that weighed against the judicial resolution of the case, such as the chaos that would ensue if the Court invalidated a State's government.[131]

Chief Justice Taney particularly noted that the President had expressed his willingness to support the charter government with military force. This led him to conclude: "Certainly no court of the United States, with a knowledge of this decision, would have been justified in recognizing the opposing party as the lawful government."[132] Concern over problems of proof associated with any attempt to determine the legitimacy of an established government also played an important role for the decision in *Luther*.[133] For this reason, the Supreme Court in *Baker* characterized *Luther* as a case resting in part on the "lack of criteria by which a court"[134] could make the determination.[135]

Thus *Luther* decision though expressly based on 'textual commitment' standard, it may be said to have been informed by prudential considerations as well. As Barkow observes: "The

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[130] Barkow sums up the essence of classical strand of political question doctrine very lucidly: "In other words, although judicial review is the norm, there are exceptions, which are expressed in "particular provisions in the Constitution." Hamilton therefore recognized a constitutionally based political question doctrine, or what can be termed the "classical" formulation of the doctrine. The Constitution carves out certain categories of issues that will be resolved as a matter of total legislative or executive discretion. Under this view of the doctrine, judicial abstinence is not merely prudential or expedient, but constitutionally required. Application of the classical political question doctrine does not depend on the particular parties in the case or on the particular remedy being sought. It is a doctrine that is rooted in the text and structure of the Constitution itself" (internal citation omitted). Barkow (n 30) 246-48.
In an early commentary on political question, Weston also traced the doctrine's pedigree to constitutional text: "the line between judicial and political questions in a given constitutional situation is the line drawn by the constitutional delegation, and none other." See, for detail, Weston (n 43) 298-99, 331.

[131] *Luther* (n 25) 39-40. See, Cole (n 28) 4.

[132] *Luther* (n 25) 44.

[133] Mulhern (n 76) 104 (in footnote 16).

[134] *Baker* (n 65) 222-23.

[135] Cole (n 28) 4.

Court's analysis in *Luther* thus shows how prudential factors colored the Court's application of the classical political question doctrine, but the opinion makes clear that the Court's holding was anchored in the text and structure of the Constitution itself."[136] In short, there was simply "a textual anchor to the prudential analysis."[137]

Modern application of the doctrine of political question stems from the decision of the Supreme Court in *Baker*. The Court rejected the application of the doctrine in the instant case but provided six factors that could present political questions. [138] The court, however, did not explicitly identify the doctrine's foundation. But the factors it listed appear to include both constitutional and prudential considerations. Comment of Tyler is worth mentioning: "the Supreme Court's most famous explication of the political question doctrine, in *Baker v. Carr*, adopts a variant on Bickel's formulation, albeit with a small nod to Wechsler's emphasis on constitutional text". [139] Supreme Court's heavy reliance on the Bickelian prudential framework is evident from the following observations of the Court itself:

> The political question doctrine is 'essentially a function of the separation of powers', existing to restrain courts 'from inappropriate interference in the business of the other branches of Government', and deriving in large part from *prudential* concerns about the respect we owe the political departments.[140]

Lawrence Tribe, however, has proposed that three separate models emerge from Supreme Court's explication of the doctrine in *Baker*: the *Classical* model, consisting of the first clause; the *Functional* model, consisting of the second and third clauses; and the *Prudential* model, consisting of the final three clauses. [141] In Barkow's view, *Baker's* first factor and perhaps the second (depending on whether it is used to inform the first) reflect the classical strand of the doctrine and the remaining four factors and perhaps the second reflect the

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[136] Barkow (n 30) 257 (internal citation omitted).

[137] ibid 255. Shemtob also holds the similar view that the Court in *Luther* alongside the textual justification invoked a more prudential concern, that is, if courts were allowed to decide what states were republican, it would risk disuniformity and collective confusion. See, *Luther* (n 25) 41 (raising a series of convoluted scenarios which the courts would have to resolve). Zachary Baron Shemtob, 'The Political Question Doctrines: *Zivotofsky v. Clinton* and Getting Beyond the Textual-Prudential Paradigm' (2016) 104 *The Georgetown University Law Journal* 1005.

[138] For *Baker's* six factors, see, *supra* text accompanying note 74.

[139] Tyler (n 99) 364.

[140] *Baker* (n 65) 217 (emphasis added).

[141] Tribe, *American Constitutional Law* (2nd edn, 1988) 96. For *Baker's* six factors, see, *supra* note 138.

prudential strand of the doctrine.[142] In view of Shemtob, cases like *Luther* represent *Baker's* first factor, that is, "a textually demonstrable constitutional commitment of the issue to a coordinate political department"; cases like *Coleman* represent *Baker's* second factor, that is, "a lack of judicially discoverable and manageable standards for resolving" the issue at hand; and, Baker's final four factors represent prudential or practical concerns that "courts might face by entering the political thicket."[143]

From the above, it transpires that scholars simply differ as to which *Baker* factor should actually represent which strand of the doctrine or whether functional aspect should be treated separately or it should be treated merely as a sub-set of prudential strand of the doctrine.[144] None, however, deny that *Baker* as such recognizes both the classical and prudential models of the doctrine.[145]

In the subsequent case of *Nixon* that accepted the political question doctrine to decline adjudication of Judge Nixon's impeachment by Senate, the Court invoked both constitutional and prudential factors in express terms: "In addition to the *textual commitment* argument, we are persuaded that the *lack of finality* and the *difficulty of fashioning relief* counsel against justiciability."[146] The Court further observed that judicial review of impeachments could create considerable political uncertainty, if, for example, an impeached President sued for judicial review.[147]

The *Nixon* Court also noted that the *Baker* factors combining constitutional and prudential elements may be interdependent. The Court explained that whether an issue is 'textually committed' to another branch of government is not completely separate from whether there exist 'judicially manageable standards' to adjudicate the issue. A lack of standards, Court

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[142] See, Barkow (n 30) 265. Barkow does not distinguish between functional and nonfunctional aspects of the prudential strand of the doctrine, see, *supra* note 120. For *Baker* factors, see, *supra* note 138.

[143] See, Shemtob (n 137) 1007. For *Baker* factors, see, *supra* note 138. For *Luther* and *Coleman*, see, *supra*, Chapter 3 (Sections 3.1.1.2. and 3.1.1.3. respectively) (pp. 94, 95) of the Study.

[144] See, *supra* note 120 and *supra* text accompanying notes 141-143.

[145] See, Shemtob (n 137) 1008 (appreciating *Baker* by noting that the *Baker* factors "lent analytic coherence to what was previously ad hoc decision making based more on a vague sense of what judges found political than on any principled criteria"). See, by contrast, Jill Jaffe, 'The Political Question Doctrine: An Update in Response to Recent Case Law' (2011) 38 *Ecology Law Quarterly* 1042 (holding that the *Baker* Court failed to discuss scholarly justifications or examine the purpose of the doctrine); Jared S Pettinato, 'Executing the Political Question Doctrine' (2006) 33 *Northern Kentucky Law Review* 63 (arguing that the *Baker* factors have no cohesive guiding principle). Quoted in Jaffe, ibid (in footnote 64).

[146] *Nixon* (n 79) 224, 236 (emphasis added).

[147] ibid 236. See, Cole (n 28) 14.

held, can "strengthen the conclusion that there is a textually demonstrable commitment to a coordinate branch."[148] Thus, the courts' application of the constitutional and prudential factors may not always have clear lines of differentiation, with the "analyses often collapsing into one another."[149]

Finally, in the more recent case of *Zivotofsky* that involved plaintiff's enforcement of a specific statutory right, the majority opinion of the Court described political questions as controversies involving the first two *Baker* factors.[150] Interestingly, the Court did not expressly disclaim reliance on prudential factors to find that a case presented a political question.[151] It simply omitted the prudential factors in its analysis.[152] Justice Sotomayor, joined in part by Justice Breyer, issued a concurring opinion.[153] Justice Sotomayor's opinion included all six *Baker* factors and explained that they represented "three distinct justifications for withholding judgment on the merits of a dispute."[154] Majority's silence on *Baker's* prudential factors and also the failure to address Sotomayor's concurrence has led one commentator to conclude that "the political question doctrine's prudential factors may have survived."[155] In *Alaska v Kerry*,[156] for example, the court applied *Baker's* second, fourth and sixth factors to hold that the plaintiff's claim presented a political question.

An appraisal of the abovementioned important political question cases quite adequately reveals the US Supreme Court's reliance on both the *textual commitment* and *prudential*

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[148] *Nixon* (n 79) 228-29.
[149] *Alperin v Vatican Bank*, 410 F. 3d 532, 544 (9th Cir. 2005).
[150] *Zivotofsky* (n 81) 1427. The first two *Baker* factors include "a textually demonstrable constitutional commitment of the issue to a coordinate political department" and "a lack of judicially discoverable and manageable standards for resolving it." For all six *Baker* factors, see, *supra* text accompanying note 74.
[151] Cole (n 28) 24.
[152] ibid.
[153] *Zivotofsky* (n 81) 1431-35 (Sotomayor J concurring). See, Cole (n 28) 24.
[154] *Zivotofsky* (n 81) 1431 (Sotomayor J concurring). See, Cole (n 28) 21. According to Justice Sotomayor, "the Constitution itself requires that another branch resolve the question presented" when the first *Baker* factor involves (*Zivotofsky*, ibid 1432); the second and third *Baker* factors "reflect circumstances in which a dispute calls for decision making beyond courts' competence" (*Zivotofsky*, ibid); and, the final three *Baker* factors "address circumstances in which prudence may counsel against a court's resolution of an issue presented" (*Zivotofsky*, ibid). Justice Sotomayor thus clearly divided the *Baker* factors into three distinct categories: classical (first factor), functional (second and third factors) and prudential (final three factors). In *Goldwater v Carter* 444 US 996, 998 (1979), Justice Powell also subjected the doctrine to a similar tri-partite examination: (i) Does the issue involve resolution of questions committed by the text of the Constitution to a coordinate branch of government? (ii)Would resolution of the question demand that a court move beyond areas of judicial expertise? (iii) Do prudential considerations counsel against judicial intervention? See, Ariel L. Bendor, 'Are There Any Limits To Justiciability? The Jurisprudential And Constitutional Controversy In Light Of The Israeli And American Experience' (1997) 7 (2) *Ind. Int'l &Comp. L. Rev.* 312 (in footnote 2). See, for the relationship between functional and prudential aspects of the doctrine, *supra* note 144.
[155] Cole (n 28) 24 (internal citation omitted).
[156] 972 F. Supp, 2d 1111, 1130 (D. Alaska 2013). See, Cole (n 28) 24 (in footnote 250).

considerations to identify an issue as a political question. Credibility of these foundations of the doctrine, however, has been challenged by some authors in their scholarly commentaries on the doctrine. Therefore, the Study would now like to take note of the views that have questioned the very foundation of the doctrine.

3.1.3. Meeting the Objections against Foundation of Political Question

In contrast to those who sought to justify a political question doctrine,[157] Professor Louis Henkin and Professor Martin Redish have put forward forceful arguments against the existence of the doctrine. This Study terms Henkin's approach as 'decision on merits' argument and Redish's approach as 'inconsistency with judicial review' argument against the doctrine of political question. The Study both presents and examines the worth of their arguments and argues that their approaches are not theoretically well founded in the ultimate analysis.[158]

3.1.3.1. Louis Henkin: Decision on Merits Argument

Professor Henkin challenges the notion that certain domains of constitutional adjudication fall outside judicial cognizance. Henkin argues: Since judicial review is now firmly established as a keystone of our constitutional jurisprudence, a doctrine that finds some issues exempt from judicial review cries for strict and skeptical scrutiny.[159] After engaging in such scrutiny, Henkin concludes that the Supreme Court had not applied the political question doctrine to make any such exceptions.[160] To substantiate the conclusion, Henkin distinguishes decisions rejecting claims that another branch of government exceeded the limits of its power from those refusing to consider the merits of such claims at all. As long as the court reaches the merits of such a claim, Henkin sees no extraordinary exception to judicial review. Only if courts are entirely deaf to some set of constitutional claims do they "forego their unique and paramount function of judicial review of constitutionality."[161]

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[157] See, *supra*, Chapter 1 (Sections 1.1.1., 1.1.2. and 1.1.3.) (pp. 18, 19, 21) of the Study for Professor Wechsler, Bickel and Scharpf's approach supporting the political question doctrine.

[158] The Study presents an improved and enlarged version of what this author earlier wrote on this point, see, Waheduzzaman (n 4) 19-25.

[159] Louis Henkin, 'Is There a "Political Question" Doctrine?' (1976) 85 *Yale Law Journal* 600.

[160] ibid 600-25.

[161] ibid 599.

Henkin contends that the Court never invokes the doctrine without either reaching the merits of the claims at issue, however subtly, or disposing of that claim on procedural or equitable grounds.[162] Henkin thus holds the view that in most of the political question cases "the act complained of violates no constitutional limitation on that power, either because the Constitution imposes no relevant limitations, or because the action is amply within the limits prescribed."[163] Therefore, Court's decisions are on the merits.

In accordance with the arguments, Henkin posits that "many of the cases celebrated as emblematic of the political question doctrine are better read as involving meritless claims."[164] To him, *Luther v Borden*, for example, was nothing more than "a run-of-the-mill case in which the Court reached the merits"[165] and concluded that "the actions of Congress and the President . . . were within their constitutional authority and did not violate any prescribed limits or prohibitions."[166] Thus, the doctrine, in Henkin's view, is nothing more than shorthand for courts rejecting constitutional claims on the merits.

Finally, so far as the Bickelian prudential considerations are concerned, Henkin argues that they come into play only at the remedial stage as opposed to the stage of determining whether to decide the issue at all. And Henkin does not find the denial of a particular, or any, equitable remedy as an exception to judicial review.[167] Henkin, therefore, concludes that the political question doctrine does not exist in American jurisdiction.

3.1.3.2. Martin Redish: Inconsistency with Judicial Review Argument

Disputing Henkin's conclusion, Professor Redish points out that "despite Professor Henkin's valuable insights, however, a political question doctrine does in fact exist."[168] To establish his point, Redish makes the interesting argument that cases refusing to characterise an issue as a political question add to the evidence that the doctrine exists, because "if no political question doctrine existed, there would have been no need for the Court to expend so much effort to

[162] ibid 605-06, 617-22.
[163] ibid 601.
[164] Tyler (n 99) 376.
[165] ibid.
[166] Henkin (n 159) 608.
[167] ibid 606.
[168] Redish (n 120) 1032 (internal citation omitted).

explain why the doctrine was inapplicable."[169] Professor Redish thus accepts that a political question doctrine exists in American jurisdiction but argues that the doctrine should not exist. To him, any exception to the rule of justiciability is inconsistent with the place of judicial review in American constitutional system. Accordingly, he advocates for the total and complete repudiation of the doctrine by attacking both Professor Wechsler's classical and Professor Bickel's prudential version of the political question doctrine.

Wechsler's classical version has made a formidable attempt to construct a principled political question doctrine. Because the existence of a *textually demonstrable commitment* which Wechsler identified as the characteristic mark of a *political question* would limit political questions to a well-defined and seemingly principled group.[170] But a theory that turns on *constitutional commitment* criterion will more often than not come up short, for judicial review itself is nowhere mentioned in the Constitution.[171] Professor Redish is skeptical that anyone can articulate a basis for selecting some power-granting provisions for review and exempting others since "constitutional clauses do not come with footnotes attached saying which clauses are enforceable through judicial review and which are not."[172] Finding a *demonstrable constitutional commitment* may be nothing more than equivalent of determining that the matter is one on which the Constitution does not actually impose limitations in the first instance.[173] Redish concludes that the abdication of the review role of the Court when constitutional text commits the matter to political branches or the constitutional text grants a power in absolute terms "is unacceptable because it disregards long accepted principles of judicial review."[174]

In responding to Professor Bickel, Professor Redish criticizes *four justifications* of judicial abstinence that he distills from Bickel's theory.[175] Mulhern summarizes the justifications of Bickel in these words: *first*, the intractability of an issue to principled resolution; *second*, the judiciary's lack of institutional capacity to review particular judgments of the political branches; *third*, the judicial humility that flows from the judiciary's undemocratic nature; and

[169] ibid 1033.
[170] Tyler (n 99) 366.
[171] Redish (n 120) 1042.
[172] Steven G. Calabresi, 'The Political Question of Presidential Succession' (1995) 48 *Stanford Law Review* 157.
[173] Tyler (n 99) 366.
[174] Redish (n 120) 1039.
[175] Mulhern (n 76) 115.

fourth, fear that the judiciary's authority and legitimacy will be undermined by a blatant disregard of its decision by the political branches.[176]

Professor Redish outright rejects the *first three* justifications by demonstrating that they give us no basis for distinguishing political questions from all other constitutional issues.[177] In regard to the *first justification*, Redish observes that a substantial portion of all constitutional review takes place without the benefit of an inflexible governing principle to provide a clear standard for judicial decision.[178] Thus, the Court would strangle the institution of judicial review if they refrain from reviewing whenever an issue did not lend itself to the principled resolution.[179]

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[176] ibid.

[177] ibid.

[178] Redish (n 120) 1047. See, Mulhern (n 76) 115 (in footnote 70).

[179] Redish (n 120) 1047-50. See, Mulhern, ibid (in footnote 70). In this respect, it may be noted that this prudential consideration of Bickel, that is, "intractability of an issue to principled resolution" somewhat resembles *Baker's* second factor: "lack of judicially discoverable and manageable standards for resolving an issue". In Scharpf's view, the US Supreme Court in *Coleman* declined judicial review of federal constitutional amendment process (reasonableness of ratification of constitutional amendment by Kansas State legislature) due to this factor of *Baker*. The *Coleman* Court observed: "In short, the question of a reasonable time in many cases would involve, as in this case it does involve, an appraisal of a great variety of relevant conditions, political, social and economic, which can hardly be said to be within the appropriate range of evidence receivable in a court of justice . . . On the other hand, these conditions are appropriate for the consideration of the political departments of the Government. The questions they involve are essentially political and not justiciable." See, *Coleman* (n 32) 453-54. Citing this observation of the Court, Scharpf holds that *Coleman* typically reflects *functional* approach to political question due to one of his identified grounds of functionality, that is, the "difficulties of access to information." See, Fritz W. Scharpf, 'Judicial Review and the Political Question: A Functional Analysis' (1966) 75 (4) *Yale law Journal* 567, 569-71. This author, however, has already shown why *functional* approach on this ground should be regarded as an imperfect theory of political question. See, *supra*, Chapter 1 (texts accompanying notes 60 & 61). In this respect, Tyler's observation on *Nixon* Court's refusal to rule on "try" may also be relevant to this Bickelian prudential consideration or the *Baker's* second factor: "In all events, the Court now routinely reviews what is properly deemed "commerce" subject to federal regulation, but has declined to rule on what "try" means in the Impeachment Clause (a matter of procedural justice on which the courts would seem to be far more qualified to speak); this suggests that the Court's line-drawing in this context is hardly a model of clarity" (internal citations omitted). Tyler (n 99) 369. For detail of *Nixon* (n 79), see, *supra*, Chapter 3 (Section 3.1.1.5.) (p. 103) of the Study.
Some earlier commentators also sought to explain political question in terms of applicable legal norms. Field, for example, tried to explain political question cases in terms of "a lack of legal principles to apply to the questions presented." Field, 'The Doctrine of Political Questions in the Federal Courts' (1924) 8 *Minnesota Law Review* 485, 512. Scharpf characterizes this as "cognitive" approach to political question and outright rejects it on the ground that the superior courts always creatively discover legal principles when there are no applicable legal norms governing the situation. In support of his argument, Scharpf observes that the English Common Law and a large portion of the American constitutional law have developed and flourished in this way. See, Scharpf, ibid, 555-56. Professor Jaffe restated the question of legal norms in this way: "We have seen that the Constitution grants to the President certain powers . . . But there may be something about the nature of these powers which, in addition to their constitutional assignment, marks them as "political." Many of the questions that arise are of the sort for which we do not choose, or have not been able as yet to establish, strongly guiding rules. We may believe that *the job is better done without rules, or that even though there are applicable rules, these rules should be only among the numerous relevant considerations.*" Jaffe, 'Standing to Secure Judicial Review: Public Actions' (1961) 74 *Harvard Law Review* 1265, 1303 (emphasis added). Scharpf characterizes this as "normative" approach and divides it into two

As regards the *second justification*, Redish holds that if courts actually doubted its institutional capacity to review particular judgments of the other branches of government and acted on that doubt, judicial review would have been effectively eliminated as a check on those branches.[180] Redish also counters Bickel's *third justification* for judicial abstinence by holding that the undemocratic nature of the judiciary might support an argument against any judicial review. Judiciary's undemocratic nature does not give us grounds for selective exceptions to the general rule that the judiciary will measure governmental action against the requirements of the Constitution.[181] Redish thus rejects any theory of abdication based itself on political considerations because that risks undermining the very respect for the institution of judicial review that the Court should seek to preserve.[182]

With respect to the *fourth justification*, Redish notes that the outright disobedience of Court decisions will be rare. Political branches of the government, according to Redish, are very unlikely to ignore judicial decisions. Even if they did, Redish doubts that the "courts' prestige would suffer more as a result of being ignored than it would if courts turned their backs on sensitive constitutional issues."[183] Scharpf rightly comments: however controversial the issues avoided in political question cases may have been, they cannot possibly have been more hotly disputed than any number of important cases that the Court has decided on the merits.[184] Even if Court's decisions are ignored or disobeyed by the political branches that do not, in turn, undercut the Court's legitimacy for it is the natural corollary of the fact that the courts, by design, "have neither FORCE nor WILL but merely judgment."[185] Hence, "once we make the initial assumption that judicial review plays a legitimate role in a constitutional

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alternative rationales: "the job is better done without rules" and "even though there are applicable rules, these rules should be only among the numerous relevant considerations." The first rationale seems to be plainly unpersuasive and Scharpf rightly comments on this rationale: "If we are sure that certain congressional or presidential decisions should not be governed by legal principles, then I fail to see why the Court should not make that clear by ruling on the merits that these decisions are valid (because not unlawful)." Scharpf, ibid, 559. The second rationale appears "extremely persuasive" to Scharpf for that resembles in large measure with his *functional* approach to political question. See, Scharpf, ibid, 560. But this author disapproves Scharpf's *functional* theory of political question itself. See, *supra*, Chapter 1 (texts accompanying notes 60-62) (pp. 25-26) of the Study.

For an understanding of why *Baker's* second factor pertaining to "judicially discoverable and manageable standards" or the Bickelian prudential consideration of "intractability of an issue to principled resolution" should be less persuasive as one of the defining characteristics of political question, one may consult also Justice Barak's idea of "normative justiciability". For this author's critical estimate of Justice Barak's idea of justiciability, see, *supra*, Chapter 2 (Sections 2.3.3.5. and 2.3.3.6.) (pp. 78, 84) of the Study.

[180] Mulhern (n 76) 115 (in footnote 70).

[181] Redish (n 120) 1045-46. See, Mulhern, ibid (in footnote 70).

[182] Redish (n 120) 1061.

[183] Mulhern (n 76) 115. See, Redish (n 120) 1053-55.

[184] Scharpf (n 179) 552.

[185] The Federalist No. 78, at p. 465 (Alexander Hamilton) (Clinton Rossiter edn, 1961).

democracy, we must abandon the *political question doctrine*, in all of its manifestations" – Redish concludes.[186]

3.1.3.3. Examining the Merits of Arguments of Henkin and Redish

In contrast to the views of both Henkin and Redish, this Study holds that a political question doctrine does exist and, furthermore, may also exist irrespective of the nature of the constitutional system or the form of government the State has adopted for itself. This calls for, at least, a minimum response to the arguments of Henkin and Redish against the existence of the political question doctrine of any kind.

Recall, Redish suggests that the abdication of judicial review role of the Courts is unacceptable even when the constitutional text grants to the political branches powers in absolute terms.[187] This, in turn, means that a court's power of judicial review is absolute since it does not admit exception even when the power is granted in absolute terms by the Constitution. In other words, Redish's analysis suggests an inference that the judiciary, an unelected branch of the government, may have absolute power in playing of its role although Constitution itself cannot confer a similar power upon the other political branches of the government that are elected by the people.

Recall, again, Redish argues against the classical version of the political question doctrine by rejecting any theory that turns on *constitutional commitment* criterion since judicial review itself is nowhere mentioned in the Constitution.[188] One can legitimately attack Redish following Redish's own style of argument: how can then Redish himself so strongly advocate for an absolute judicial review role of the Courts when judicial review itself is nowhere mentioned in the Constitution? Redish's argument that might come closest to an answer to this question is his view that "once we make the initial assumption that judicial review plays a legitimate role in a constitutional democracy, we must abandon the *political question doctrine*, in all of its manifestations."[189]

[186] Redish (n 120) 1059-60 (emphasis added).
[187] See, *supra* text accompanying note 174.
[188] See, *supra* text accompanying note 171.
[189] See, *supra* note 186.

True, one needs to establish judicial review role of the Courts as legitimate in a constitutional democracy. Redish, in the above quoted argument,[190] also assumes the legitimacy of the review role of the Courts but that does not adequately address or answer the question: why cannot there be an exception to the rule of judicial review once it is established or assumed that courts play a legitimate role in a constitutional democracy? The exception proves the rule. Is judicial review such an absolute rule that admits no (or that should not admit any) exceptions? If yes, then the former inference in the form of a question reappears: If judiciary, being unelected, can be *absolute* in its power, why cannot the elected branches be *absolute* in the exercise of power at least in some extra-ordinary circumstances? This Study, therefore, holds that Redish's view that the political question doctrine should not exist since any exception to the rule of justiciability is inconsistent with the place of judicial review in US constitutional system is not theoretically well-founded.

Now returning to Henkin's *decision on merits* argument, the central thrust of Henkin's argument is that "most of the *political question* cases involved decisions by the Court that the Constitution gave the political branches discretion to decide what to do and the political branches had not abused their discretion, or that the Constitution placed no limits on the discretion of the political branches to decide what to do."[191] Henkin thus in a way accepts that Constitution may grant *absolute* or *unrestricted* powers to the political branches with respect to some matters. But, in Henkin's view, one needs no special doctrine to explain the review role of the Courts when the act complained of violates no constitutional limitation on the power of political branches because the Constitution imposes no relevant limitations. Since there is no limitation, political branches cannot be held to have violated any provision of the Constitution; the decision of the Court, therefore, is on the merits; one needs no special doctrine to explain the nature of the review role of the Court in this matter and hence a political question doctrine does not exist – this precisely is the line of argument of Henkin. The matters, however, are not as simple as Henkin envisions the things.

When Constitution commits a matter to the unbounded discretion of the political branches of government, true, judiciary cannot inquire into the propriety of the exercise of that power but the political branches nevertheless remain politically accountable to the people for their actions or inactions with respect to that matter. Therefore, such a question may appropriately

[190] ibid.
[191] Tushnet (n 104) 1206 (emphasis added).

be dubbed as a "political question" and for such questions a doctrine might also exist because important questions are associated with it. What is a discretionary power? How can one differentiate *bounded* from *unbounded* discretion? And whether conferment of *absolute* discretionary power comports with the concept of *rule of law* – are questions that need to be inevitably answered for identifying an issue as a political question.[192]

We are then articulating *unbounded discretion* as the basis for exempting judicial review of the courts from other instances of power-granting provisions amenable to judicial review. Since "political" questions based on the premise of *unbounded discretion* cannot be distinguished from "legal" questions without an answer to the abovementioned vital questions, this Study holds that a doctrine with respect to such questions exists, namely, the political question doctrine.[193]

At this stage, some may argue that even if Henkin fails to adequately defend his thesis, a separate doctrine is not needed to deal these questions. These people may take refuge to the traditional *locus standi* analysis: when Constitution confers unchecked discretionary power on the political branches or virtually imposes no limitation on their power, nobody may be said to have *locus standi* to challenge governmental actions pertaining to these matters. Even Professor Alexander Bickel fell into this *locus standi* trap while dealing with classical strand of the doctrine: "Therefore, in a pure sense, he has no standing, there is no case."[194] But this Study has already considered why a traditional *locus standi* analysis should be regarded insufficient to deal political questions.[195]

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[192] Furthermore, one needs also to justify political accountability alone of the political branches for political questions. For justifiability of political accountability of political questions, see, *infra*, Chapter 6 (Section 6.4.) (p. 229) of the Study.

[193] In passing, it should also be noted that Henkin's understanding of Bickel's prudential considerations are also problematic (for Henkin's argument against Bickelian prudential considerations, see, *supra* text accompanying note 167). Henkin's way of perceiving Bickel's prudential considerations simply tends to blur the distinction between the two related phenomena: a court's 'denial of reaching merit of an issue' and a court's 'denial of remedy on equitable grounds'. In view of this author, they should be distinguished from each other to perceive accurately the concept of political question. For author's drawing of distinction between them, see, *supra*, Chapter 1 (text accompanying note 8) (p. 16) of the Study.

[194] Alexander M. Bickel, 'The Supreme Court 1960 Term Foreword: The Passive Virtues' (1961) 75 (40) *Harvard Law Review* 43.

[195] See, *supra*, Chapter 2 (Section 2.3.3.6.) (p. 84) of the Study. For more commentaries that have some adverse stance against political question, see, Wayne McCormack, 'The Justiciability Myth and the Concept of Law' (1987) 14 *Hastings Constitutional Law Quarterly* 595; Wayne McCormack, 'The Political Question Doctrine – Jurisprudentially' (1993) 70 (4) *University of Detroit Mercy Law Review* 793; Mark V Tushnet (n 104) 1203; Richard H Fallon, Jr., 'The Linkage Between Justiciability and Remedies – And Their Connections To Substantive Rights' (2006) 92 *Virginia Law Review* 633; GM Parsons, 'Gerrymandering

3.2. The Status of the Doctrine in India and Pakistan

3.2.1. India

In the Indian jurisdiction, the question of political question was famously discussed for the first time in the case of *State of Rajasthan v Union of India*.[196] The Majority Court refused to apply the doctrine in respect of the question of justiciability of the satisfaction of the President regarding the existence of emergency.[197] However, the observations of the Minority Court suggest that they were inclined to adopt the doctrine of political question.[198] Justice Untwalia adopted a very limited power of judicial review where political issues were involved and opined that the Court should not enter into "the prohibited field".[199] Justice Goswami observed that the Court should be concerned with legal rather than political disputes. Justice Fazal Ali adopted a similar judicial stance when postulated that, "The Court does not possess the resources which are in the hands of the Government to find out the political needs that they seek to observe and the feelings or the aspiration of the Nation that require a particular action to be taken at a particular time."[200] Justice Bhagwati referred to the phrase "political thicket" coined by Frankfurter J in *Colegrove* [201] and argued that the doctrine is necessary if the Court is to retain its legitimacy with the people.[202]

In *AK Roy v Union of India*,[203] the Indian Supreme Court viewed the doctrine with cautious reservation. After a brief reference to the doctrine in the US Jurisdiction, Chandrachud CJ concluded that even in the United States the doctrine was under a cloud, and the doctrine had become "a little more than a play of words".[204] As to the *Rajasthan Case's* [205] holding on the doctrine, he made the following remarks:

> The *Rajasthan Case* is often cited as an authority for the proposition that the courts ought not to enter the 'political thicket'. It has to be borne in mind that

&Justiciability: The Political Question Doctrine After Rucho v. Common Cause' (2020) 95 (4) *Indiana Law Journal* 1295.

196 AIR 1977 SC 1361 (hereafter *State of Rajasthan*).
197 Mahmudul Islam, *Constitutional Law of Bangladesh* (3rd edn, Mullick Brothers 2012) 604.
198 Seervai (n 52) 2636.
199 *State of Rajasthan* (n 196) 1422-23.
200 ibid 1436.
201 *Colegrove* (n 33).
202 See, Seervai (n 52) 2636.
203 AIR 1982 SC 710 (hereafter *AK Roy*)
204 See, Seervai (n 52) 2642.
205 *State of Rajasthan* (n 196).

> at the time when that case was decided, Article 356 contained clause (5) which was inserted by the 38th Amendment, by which the satisfaction of the President mentioned in clause (1) was made final and conclusive and that satisfaction was not open to be questioned in any court on any ground. Clause (5) has been deleted by the 44th Amendment and, therefore, any observations made in the *Rajasthan Case* on the basis of that clause cannot any longer hold good. It is arguable that the 44th Constitution Amendment Act leaves no doubt that judicial review is not totally excluded in regard to the question relating to the President's satisfaction.[206]

In *Minerva Mills Ltd. v Union of India*,[207] Justice Bhagwati observed that merely because a question has a political complexion, that by itself is no ground why the Court should not perform its duty under the Constitution, if the issue otherwise raises an issue of constitutional determination. Similarly, in *BR Kapur v State of Tamil Nadu*,[208] the Court echoed the same when held that it is the duty of the Court to interpret the Constitution and that the Court should perform this duty regardless of the fact that the answer to the question would have a political effect.

The Court considered the question of the doctrine's legitimacy and scope in Indian jurisdiction also in the case of *RC Poudyal v Union of India*.[209] It was argued that the terms and conditions of admission of a new territory into the Union of India are eminently political questions which the Court should refrain from deciding for the reason that these questions lack adjudicative disposition. The Court conceded that the exercise of such powers was guided by political issues of considerable complexity, many of which may not be judicially manageable. The Court, however, cautioned that for that reason, it cannot be held that the respective Article confers on the Parliament an unfettered power which was immune from judicial scrutiny.

3.2.2. Pakistan

The Supreme Court of Pakistan also considered the question of the political question doctrine's applicability in its jurisdiction. As to the doctrine's acceptability, the Court, in

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[206] See, Seervai (n 52) 2642-43 (internal citation omitted). See also *Madhav Rao Scindia v India* AIR 1971 SC 530 (per Shah J) ("constitutional mechanism in a democratic polity does not contemplate existence of any function which may qua the citizens be designated as political and orders made in the exercise whereof are not liable to be tested for their validity before the lawfully constituted courts").

[207] AIR 1980 SC 1789 (hereafter *Minerva Mills Ltd*.)

[208] (2001) 7 SCC 231 (hereafter *BR Kapur*).

[209] AIR 1993 SC 1804. (hereafter *RC Poudyal*)

Abdul Baqui Baluch v Pakistan unequivocally held that the question of whether an emergency has ceased to exist is a political question which is outside the competence of the courts to decide. [210] However, in *MK Achakzai v Pakistan*, the Court held a sharply contrary view: "This 'political question doctrine' is based on the respect for the Constitutional provisions relating to separation of power among the organs of the State. But where in a case the Court has jurisdiction to exercise power of judicial review, the fact that it involves political question, cannot compel the Court to refuse its determination." [211]

In later cases, the Court followed the course taken in *MK Achakzai*. In *Pakistan Lawyers Forum v Federation of Pakistan and Others*, the Court observed that applying the doctrine would amount to abdication of judicial power and hence ruled against adopting the doctrine as a means of keeping away from difficult legal questions with political undertones. [212] Again in *Watan Party and others v Federation of Pakistan and others*, the Pakistan Supreme Court observed that whether there existed a non-justiciable political question was to be decided on a case-by-case basis. The Court further held that the existence of a political question did not suffice to oust the Court of its jurisdiction.[213]

Summary and Assessment

American jurisdiction. After a brief survey of the significant cases made, it can fairly be concluded that the doctrine of political question, though originated in *Marbury* opinion, got a basis for its modern application with *Baker* decision that articulated a list of criteria for deciding whether or not to invoke the doctrine in a given case.[214] However, the US Supreme Court has not invoked the last four of the six criteria in any recent case involving political question argument for the decision. For example, in the more recent case of *Zivotofsky*, the Court rejected application of the doctrine in the instant case but still recognised as components of the doctrine the first two *Baker* factors: a textually demonstrable commitment

[210] (1968) 20 DLR (AD) 249,262 (hereafter *Abdul Baqui Baluch*). See, Mahmudul Islam (n 197) 605.
[211] PLD 1997 SC 426, 518 (hereafter *MK Achakzai*). See also *Farooq AK Leghari v Pakistan* PLD 1999 SC 57. See, Mahmudul Islam (n 197) 605.
[212] PLD (2003) Lahore 371 (hereafter *Pakistan Lawyers Forum*). See, Md. Zahirul Islam, 'Does Bangladesh Need the Political Question Doctrine?'(2017) 7 *Indian Journal of Constitutional Law* 152-53.
[213] PLD (2012) SC 292 (hereafter *Watan Party and others*). See, Zahirul Islam, ibid, 153.
[214] See generally, *supra*, Chapter 3 (Section 3.1.1.) (p. 90) of the Study for US Supreme Court's *political question* cases. For detail of *Marbury* and *Baker*, see, *supra*, Chapter 3 (Sections 3.1.1.1. and 3.1.1.4.) (pp. 91, 101) of the Study.

of the issue to the political branches and the lack of judicially manageable standards for resolving the issue.[215]

The *Zivotofsky* majority, however, did not overrule *Baker's* prudential considerations. They simply omitted the prudential factors in their analysis. However, Justice Sotomayor, in her concurring opinion, listed all six *Baker* factors to identify an issue as a political question. The continuing vitality of the doctrine led this Study to make an in-depth inquiry of political question's foundation in US jurisdiction. After a thorough and full-fledged engagement, the Study finds that the US Supreme Court cases rely heavily both on Professor Wechsler's *textual commitment* standard (the *classical* theory) and Professor Bickel's *prudential* theory of political question.[216]

To state in brief, the classical theory of political question is based on constitutional requirement. It represents the idea that some constitutional questions fall beyond the purview of the judiciary since those questions have been assigned by the Constitution itself to the other co-ordinate branches of government.[217] Prudential doctrine, by contrast, is more of a judicial discretion to abstain from judicial review. As Barkow succinctly puts it: "Unlike the classical strand of the doctrine, the prudential political question doctrine is not anchored in an interpretation of the Constitution itself, but is instead a judge-made overlay that courts have used at their discretion to protect their legitimacy and to avoid conflict with political branches."[218]

Going deeper into the root of analysis, the *Baker* Court expressly acknowledged that the political question doctrine is "essentially a function of the *separation of powers*."[219] The Court also specifically noted that as a function of 'separation of powers', the political question cases implicated only the Federal Judiciary's relationship to the other co-ordinate

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[215] For detail of *Zivotofsky*, see, *supra*, Chapter 3 (Section 3.1.1.5.) (p. 103) of the Study. For the *Baker* factors, see, *supra* text accompanying note 74.

[216] See, *supra*, Chapter 3 (Section 3.1.2.) (p. 108) of the Study.

[217] See, by contrast, Grove (n 26) 1908 (arguing that "the current political question doctrine does not have the historical pedigree that scholars attribute to it. In the nineteenth century, "political questions" were not constitutional questions but instead were factual determinations made by the political branches that courts treated as conclusive in the course of deciding cases"). For more on the meaning of political question according to classical strand of the doctrine, see, *supra* note 130 and *supra* text accompanying note 30. See also, *supra*, Chapter 1(Section 1.1.1.) (p. 18) of the Study.

[218] Barkow (n 30) 253. For more on the prudential strand of the doctrine, see, *supra*, Chapter 1 (Section 1.1.2.) (p. 19) of the Study.

[219] See, *supra* text accompanying notes 74 and 140.

branches of the Federal Government, and not the Federal Judiciary's relationship to the States.[220]

Professor Henkin and Professor Redish have challenged the foundations of the doctrine in US jurisdiction. This Study also disapproves Professor Bickel's prudential theory of political question.[221] The Study, therefore, approves Professor Redish's arguments against Professor Bickel's prudential considerations. The Study, however, finds Professor Henkin's understanding of Bickelian prudential considerations itself as problematic and confusing. So far their arguments against classical version of the doctrine are concerned, the Study responds them and find that both Professor Henkin's *decision on merits* argument and professor Redish's *inconsistency with judicial review* argument are not theoretically well founded. They have thus both failed to adequately defend their theses against *classical* strand of the political question doctrine.[222]

Indian and Pakistani jurisdictions. The Indian jurisprudence is yet to properly identify a 'political question'. It transpires from the cases that they have not defined in adequately clear terms the Indian Supreme Court's limitations in dealing with such questions.[223] In some instances, the Court has also confused 'political question' with 'cases involving political ramifications'.[224]

Approving Justice Brennan's formulation of *rigid* 'separation of powers' as the basis for the doctrine in the US constitutional system and identifying some notable differences between the powers and position of the President of United States and the President of India, Seervai

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[220] See, *Baker* (n 65) 210, 211.

[221] See, *supra*, Chapter 1(texts accompanying notes 57-59) (p. 25). It is interesting to note how Barkow also disfavors the prudential political question doctrine: "Although *Baker* gave us a new test for political questions that seemed quite flexible, the case actually signaled the beginning of the end of the prudential political question doctrine. In fact, in the almost forty years since *Baker v. Carr* was decided, a majority of the Court has found only two issues to present political question, and both involved strong textual anchors for finding that the constitutional decision rested with the political branches. At the same time, the Court has sent signals that the prudential doctrine was disfavored" (internal citations omitted). Barkow (n 30) 267-68. See also this remark of Barkow to the same effect: "And, because of the weakness of the prudential strand of the doctrine, many have advocated the abandonment of the doctrine in its entirety. These calls for abandonment should apply only to the prudential strand of the doctrine. As these commentators rightly point out, there is no principled basis for distinguishing the cases that are avoided on prudential grounds from those that are decided. It would be difficult to determine, ex ante, when the prudential factors listed in *Baker* would dictate abstention and when they would permit review" (internal citations omitted). Barkow, ibid 333.

[222] See, *supra*, Chapter 3 (Section 3.1.3.) (p. 114) of the Study.

[223] See, *supra* texts accompanying notes 196-209.

[224] See, *supra* texts accompanying notes 207 and 208. This Study distinguishes 'political question' from 'cases involving political ramifications', see, *infra*, Chapter 7 (Section 7.7.) (p. 254) of the Study.

concludes that the doctrine has no place to ground in the context of Indian constitutional system.[225] These observations of Seervai seem to rule out the possibility of having any kind of political question doctrine in a system not based on *rigid* 'separation of powers' or in a system of government that is *parliamentary* as opposed to *presidential*.[226] As opposed to these views, this Study holds that a political question doctrine may exist independently of the nature of the government as well as whether the constitutional system is based on a *rigid* 'separation of powers' or not.[227]

The Pakistan Supreme Court has also not been able to adopt any uniform approach toward 'political question'.[228] The Court failed to appreciate the distinction between 'political question' and 'difficult legal questions' or 'issues having political overtones,[229] and wrongly entangled 'political question' with 'ousting of a court's jurisdiction'.[230]

One Pakistani author argues that the Pakistan Supreme Court should avoid determining the validity of extra-constitutional power by disposing of the case on narrower grounds. Where this was not possible, the courts should have decided the issue a non-justiciable political question.[231] This Study holds the contrary view that the determination of constitutional legitimacy of a regime cannot be a political question.[232]

This Study's approach towards political question resembles in part with the *classical* strand of the doctrine as prevalent in American jurisdiction. The Study, however, goes even beyond the *classical* strand's pedigree of constitutional text, that is, Professor Wechsler's 'textual commitment' standard or Marshall's *Marbury* holding to frame a theory of political question.[233] For presenting the theoretical framework of the doctrine, it is, however,

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[225] Seervai (n 52) 2637-38. See, Waheduzzaman (n 4) 3.
[226] Waheduzzaman, ibid 4.
[227] See, *supra*, Chapter 1 (texts accompanying notes 1- 4) (pp. 13-14) of the Study. See also, *supra*, Chapter 2 (Section 2.3.3.3.) (p. 76) of the Study. Earlier this author argued the same, see, Waheduzzaman (n 4) 4.
[228] See, *supra* texts accompanying notes 210 & 211.
[229] See, *supra* text accompanying note 212. This Study distinguishes 'political question' from 'cases involving political ramifications', see, *infra*, Chapter 7 (Section 7.7.) (p. 254) of the Study.
[230] See, *supra* text accompanying note 213. For distinction and interrelationship between 'political question' and 'jurisdiction', see, *supra*, Chapter 2 (Section 2.3.3.2.) (p. 75) of the Study.
[231] Tayyab Mahmud, 'Praetorianism and Common Law in Post-Colonial Settings: Judicial Responses to Constitutional Breakdowns in Pakistan' (1993) 4 *Utah Law Review* 1294.
[232] See, *infra*, Chapter 4 (Section 4.1.1.) (p. 129) of the Study and Chapter 4 (Section 4.2.) (texts accompanying notes 80-87) (pp. 142-43) of the Study.
[233] For Professor Wechsler's thesis or Chief Justice Marshall's *Marbury* holding, see, *supra*, Chapter 1(texts accompanying notes 49-53) (p. 23) of the Study. For understanding how this Study's approach towards political question differ from their *classical* strand of the doctrine (or, in other words, how it goes even

necessary to know first how the Bangladesh Judiciary has responded to the hitherto discussed American doctrine of Political question. The next Chapter of the Study has been designed to accomplish the task.

beyond their *classical* strand of the doctrine), see, *supra*, Chapter 1(texts accompanying notes 65 & 66) (p. 27) of the Study. See also, *infra*, Chapter 6 (p. 172) of the Study that presents a theoretical framework of the doctrine and Chapter 7 (p. 240) that distinguishes apparently seeming issues from a true political question as envisaged in this Study.

CHAPTER 4
JUDICIAL RESPONSE TO THE DOCTRINE OF POLITICAL QUESTION IN BANGLADESH

Introduction

This Chapter deals with the approach of Bangladesh Supreme Court towards political question. The Study answers some of the research questions [1] and establishes an important assumption [2] in this Chapter. It is comprised of three Sections. Section 4.1. takes into account cases of many and varied dimensions to reflect on how Bangladesh judiciary has responded to the issue of political question. It considers, for example, cases on the determination of legitimacy of a regime, hartal issues, President's power to promulgate Ordinances and the power of pardon, and *en masse* boycott of Parliament by the members of Parliament. Section 4.2. makes critical appraisal of Bangladesh Supreme Court's interpretation of the term 'political question'. Upon finding that the doctrine has not been correctly dealt with by the Bangladesh Supreme Court, Section 4.3. seeks to justify the necessity of a political question doctrine in Bangladesh.

4.1. The View of the Supreme Court of Bangladesh on Political Question

There are, however, only few cases in which the expressions either of 'political question' or 'justiciability' were directly employed by the Bangladesh Supreme Court in deciding issues of its jurisdiction. For convenience of discussion, the Study groups them into such subject matters as provided below.

4.1.1. Determination of Constitutional Legitimacy of a Regime

The first case in the judicial history of independent Bangladesh in which the Supreme Court expressed its views on 'political question' is *Dulichand Omraolal v Bangladesh*.[3] The facts of the case may be narrated in brief. On the out-break of 1965 war between India and Pakistan, the Government of Pakistan declared emergency under Article 30 of the Pakistan Constitution of 1962. The Defence of Pakistan Ordinance was promulgated thereunder and

[1] See, *supra*, Chapter 1 (note 95 and the accompanying text) (p.32) of the Study.
[2] See, *supra*, Chapter 1 (note 88 and the accompanying text) (p. 31) of the Study.
[3] (1981) 33 DLR (AD) 30 (hereafter *Dulichand*).

under the authority of this Ordinance, the Defence of Pakistan Rules 1965 (hereafter Defence Rules) was framed. In exercise of the power under Rule 181 of the Defence Rules, the Governor of the then East Pakistan took over the control and management of the appellant's firm considering it 'enemy property' under Rules 161 and 169 of the Defence Rules. Subsequently, under Rule 182 of the Defence Rules, the then East Pakistan Enemy Property Management Board vested the appellant's firm (or, the enemy property) in the Additional Custodian of Enemy Property.[4]

Emergency was withdrawn meanwhile on 16.02.1969 but on the same date the Enemy Property (Continuance of Emergency Provisions) Ordinance 1969 was promulgated.[5] Section 2 of this Ordinance sought to continue in force some of the provisions of the Defence of Pakistan Rules 1965 including Rules 161 and 169 that defined 'enemy' and 'enemy property' respectively and Rule 181 that empowered to carry on business of enemy property and Rule 182 that empowered to collect the debt of enemy property and to deal with the vesting and administration of enemy property.[6]

Therefore, by virtue of Section 2 of the said Ordinance No. 1 of 1969[7], the appellant's property was continued to be managed as 'enemy property' till he challenged the orders and directions declaring its business and properties as 'enemy property' and prayed for the surrender of its management and control to the appellant firm before the High Court Division in a writ petition.[8]

The petition was dismissed by the High Court Division. On appeal before the Appellate Division, the appellant challenged the impugned orders of the respondent, *inter alia*, on the ground that the relevant provisions of the Defence of Pakistan Rules 1965 in respect of enemy property became invalid because Ordinance No. 1 of 1969 which kept alive the provisions of the said Defence Rules ceased to be a valid piece of legislation.[9] In support of the contention, the appellant alleged that the transmission of power from President Ayub Khan to General Yahya Khan and Yahya Khan's abrogation of the Constitution was illegal

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4 ibid 31-32.
5 Ordinance No. 1 of 1969.
6 Section 2 of the Ordinance, however, continued in force those Rules of the Defence of Pakistan Rules 1965 subject to some modification. See, *Dulichand* (n 3) 33.
7 See, *supra* text accompanying note 5.
8 Writ Petition No. 121 of 1973. See, *Dulichand* (n 3) 31, 32.
9 *Dulichand* (n 3) 32.

and unconstitutional. Yahya Khan, therefore, was a usurper and as such the Provisional Constitutional Order which provided, *inter alia*, continuity of Ordinance which included also the Ordinance No. 1 of 1969 was without any constitutional validity. Ordinance No. 1 of 1969, therefore, as the appellant argued, ceased to exist as a valid piece of legislation and was not an existing law on 25th March 1971 which could continue in terms of Laws Continuance Enforcement Order, 1971.[10]

Dispelling the contention of the appellant, the Court held that so far as Bangladesh is concerned, the legal validity of a law should be looked at from the perspectives of the Proclamation of Independence made on 10th April 1971, the Laws Continuance Enforcement Order 1971 and the Constitution of Bangladesh 1972.[11] So far as the question of legitimacy of Yahya Khan's regime was concerned, the Court held the issue to be a "political question" which the Court should not inquire:

> As regards argument of Constitutional legitimacy of Yahya Khan, all that need be said is that this is a *political question* which the Court should refrain from answering, if the validity or legality of the Law could otherwise be decided. [12]

4.1.2. Legality of Hartal as Means of Protest

In *Abdul Mannan Bhuiyan v State*,[13] the Appellate Division of the Supreme Court considered questions pertaining to 'hartal'[14] as a means of protest. The short facts of the case are as this. The High Court Division issued a *suo moto* rule upon the appellant under section 561A of the Criminal Procedure Code (CrPC) to show cause as to why the pro-hartal and anti-hartal activities should not be declared as cognizable offences and the criminal courts and police should not be directed to take action accordingly.[15] The rule was made absolute [16] and against this judgment of the High Court Division, the appellant preferred a criminal appeal to the Appellate division of the Supreme Court.[17]

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10 ibid 36-37.
11 ibid 37.
12 ibid (emphasis added).
13 (2008) 60 DLR (AD) 49 (hereafter *Abdul Mannan Bhuiyan*).
14 'Hartal' is a Bangla word for the analogous English term 'Strike'. According to Webster's Dictionary, 'strike' means a temporary stoppage of normal activity undertaken as a protest.
15 *Abdul Mannan Bhuiyan* (n 13) 50.
16 ibid 51.
17 ibid 50.

The appellant submitted that 'hartal' being a historically recognized right is a "political issue" which cannot be resolved in a court of law.[18] In view of the Court, three specific issues arose that need to be decided for disposal of the case: (a) whether in the absence of any proceeding pending in any inferior court or before the Division Bench of the High Court Division, the learned Judges of the High Court Division had jurisdiction under section 561A of the CrPC to issue a *suo moto* rule upon the appellant; (b) whether the impugned order of the High Court Division infringed the FRs of the citizens of Bangladesh under Articles 37, 38 and 39 of the Constitution; and (c) whether the High Court Division acted beyond its authority in entering into the impermissible domain of making law to declare the pro-hartal and anti-hartal activities as cognizable offences.[19]

As to the first issue, the Court thoroughly examined section 561A of the CrPC and observed that the relevant provision may be invoked only if the High Division is satisfied either (i) that an order passed under the Code would be rendered ineffective, or (ii) that the process of any court would be abused, or (iii) that the ends of justice would not be secured.[20] The Court rightly noted that each of these parts of section 561A refers to a pending proceeding before any court and this is true even for the third part (that the ends of justice would not be secured) because the third part starts with "or" which is conjunctive and not disjunctive.[21] In such view of the matter, the Court held that in the absence of any proceeding pending in any court amenable to the jurisdiction of the High Court Division, the High Court Division had no authority to exercise its inherent power under section 561A of the CrPC and thereby to issue a *suo mo*to rule upon the appellant.[22]

Regarding the second issue, the Court enumerated Articles 37, 38 and 39 of the Constitution but found that the High Court Division issued *rule nisi* and then made the rule absolute declaring pro-hartal and anti-hartal activities as cognizable offences but no rule was issued challenging 'hartal' as such. Therefore, as the Court held, it is nobody's case that 'hartal' is illegal.[23] As regards the third issue, the Court noted that the Bangladesh Constitution is based

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18 ibid.
19 ibid 51.
20 ibid 52. Section 561A of the CrPC reads "Saving of inherent power of High Court Division: Nothing in this Code shall be deemed to limit or affect the inherent power of the High Court Division to make such order as may be necessary to give effect to *any order under this Code* or to *prevent abuse of the process of any Court* or otherwise to *secure the ends of justice*" (emphasis added).
21 ibid.
22 ibid.
23 ibid.

on the spirit of 'separation of powers'[24] and hence the High Court Division acted *ultra vires* in declaring pro-hartal and anti-hartal activities as cognizable offences. The Court reiterated that the business of making law is one of Parliament: "offence can be created only by law, by an act of the Parliament and not by any legal pronouncement by any court."[25]

It is, therefore, no surprising that the Court did not rule on the appellant's submission that 'hartal is a political issue not resolvable in a court of law' [26] since in Court's view 'hartal' as such was not challenged as a guaranteed fundamental right under Article 39 (2) (a) of the Constitution.[27] Interestingly, however, even after holding that the question whether 'hartal' *per se* is legal was not involved in the dispute, the Court commented on the virtues and vices of 'hartal' and held it to be a political question:

> No issue was raised in this appeal about the legality or desirability of hartal. The virtues and vices of hartal is a *political question* and this court in exercise of its judicial self-restraint declines to enter into such *political thicket*, particularly in absence of any Constitutional imperative or compulsion.[28]

The legality of hartal *per se*, however, was directly challenged in the case of *Khondaker Modarresh Elahi v Bangladesh*.[29] In this case, the petitioner, a practicing advocate of the High Court Division, sought a declaration that the calling of hartal on 18.04.99 or on any other day is illegal and without lawful authority. The petitioner contended that the calling and holding of hartal for whatever purpose is not contemplated by the Constitution.[30] Negativing the contention, the Court held that Articles 37, 38 and 39 of the Constitution embody the basic democratic rights of the citizens subject only to reasonable restriction imposed by law. The Court specifically stated 'hartal' as a means of expression guaranteed by the Constitution: "A call for hartal without any threat expressed or implied would in my view be

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24 ibid 53.
25 ibid 54.
26 See, *supra* text accompanying note 18.
27 The Court , however, nevertheless expressed its opinion as to the legality of hartal *per se*: "We have no hesitation in holding that enforcing hartal by force leading to violence, death and damage to the life and property of the citizens is not only illegal but also liable to be detested and punished as per law of the land in existence. These are already cognizable offences under the Penal Code and other penal laws of the land. But hartal or strike *per se* enforced through persuasion unaccompanied by threat, intimidation, force or violence is a democratically recognized right of the citizens guaranteed under the Constitution." See, *Abdul Mannan Bhuiyan* (n 13) 53.
28 ibid 54 (emphasis added).
29 (2001) 21 BLD (HCD) 352 (hereafter *Khondaker Modarresh Elahi*).
30 ibid 355.

an expression of protest which is guaranteed by Article 39 (2) (a) of our Constitution."[31] The Court unequivocally declared its view on the question of legality of 'hartal': "it is my view that call for hartal *per se* in not illegal but where any call for hartal is accompanied by threat it would amount to intimidation and the caller for hartal or strike would be liable under the law of the land."[32]

MA Aziz J concurred with the judgments delivered by Mainur Reza Chowdhury and Syed JR Muddassir Husain JJ. But surprisingly even after conceding that hartal is a means of expression protected by Article 39 (2) (a) of the Constitution and as such not *per se* illegal, the learned Judge held that the hartal was a "political issue" that should in all fairness be decided by the politicians themselves. To quote him:

> Hartal is a *political issue*. It is resorted to and supported by the parties in opposition while it is criticized and opposed by the party in power. So the determination whether hartal is good or bad depends on the position held by the political parties. As such this *political issue* should in all fairness be decided by the politicians themselves without unnecessarily burdening this court to adjudicate something it is not empowered to.[33]

4.1.3. President's Power to Promulgate Ordinances

Article 93 of the Constitution empowers the President to promulgate Ordinances if, *inter alia*, he is satisfied that circumstances exist which render immediate action necessary. The question is whether the satisfaction of the President regarding the existence of the emergent situation is *justiciable*. The Study cites here two cases where the Supreme Court, *inter alia*, embarked on this issue.

The first of the cases considered for discussion is *Ahsanullah v Bangladesh*.[34] In 1982, the then President promulgated an Ordinance named the Local Government (Upazila Administration Reorganization) Ordinance 1982. Under the Ordinance, the country was

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[31] ibid 366 (per Mainur Reza Chowdhury J).

[32] ibid (per Mainur Reza Chowdhury J). In so deciding for the legality of 'hartal', the Court, however, noted that calling for and observance of hartal cause hardship for the citizens because they cannot pursue their profession and work out of fear. The Court responded this by quoting with approval what Justice Kennedy said while concurring in the Texas case: "The hard fact is that sometimes we must make decisions we do not like. We make them because they are right, right in the sense that the law and the Constitution, as we see them, compel the result." See, ibid 368.

[33] ibid 375 (emphasis added).

[34] (1992) 44 DLR (HCD) 179 (hereafter *Ahsanullah*).

divided into several Upazilas and for every Upazila an Upazila Parishad was constituted as a body corporate.[35] This Ordinance, however, was repealed by another Ordinance, namely, the Local Government (Upazila Parishad and Upazila Administration Reorganization) (Repeal) Ordinance 1991 (Ordinance No. 37 of 1991). This Repealing Ordinance of 1991 was challenged by the petitioners for being violative of Articles 8, 9, 11, 59 and 60 of the Constitution and that it was not promulgated in compliance with the requirements of Article 93 of the Constitution.[36] As to Article 93, the petitioners particularly contended that "no circumstances existed to render immediate action necessary to make and promulgate the impugned Ordinance and as such the impugned Ordinance was made without lawful authority."[37]

Md. Abdul Jalil J and Naimuddin Ahmed J differed as to whether the impugned Ordinance contravened Article 9 of the Constitution [38] but shared the same view as to the question of *justiciability* of the President's satisfaction as to the existence of circumstances rendering immediate action necessary. Both Judges held the issue to be non-justiciable. To quote Md. Abdul Jalil J: "Whether the circumstances exist rendering immediate action necessary or not, is not a matter to be decided by the Court. It depends exclusively on the satisfaction of the President which cannot be questioned in Court."[39] Naimuddin Ahmed J more eloquently expressed the same view:

> The satisfaction of the President required for acting under Article 93 of the Constitution is the exclusive satisfaction of the President and a Court is not empowered to inquire whether actually the circumstances existed rendering immediate action necessary. It is the satisfaction of the President and the President alone. The grounds of such satisfaction cannot be questioned in any Court.[40]

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35 ibid 183.
36 ibid 182.
37 ibid.
38 Abdul Jalil J observed that Article 9 of the Constitution is not a mandatory provision but is an enabling one and as such "there is no mandate that no Local Government institution can be abolished if necessary. Hence the impugned Ordinance cannot be said to be inconsistent with Article 9." See, ibid 184. Naimuddin Ahmed J, by contrast, held that "had the Upazila Parishads been found to be Local Government institutions within the meaning of Article 9 of the Constitution the impugned repealing Ordinance would be in contravention of the said Article and would be liable to be struck down to the extent of the inconsistency by operation of clause (2) of Article 7 of the Constitution." See, ibid 195. In the end, however, both Judges decided to discharge the rule because Upazila Parishads were not found to be designated as 'administrative units' by any law for the purpose of Article 59 of the Constitution.
39 ibid 185.
40 ibid 188. In *Kudrat-E-Elahi Panir v Bangladesh* (1992) 44 DLR (AD) 319 (hereafter *Kudrat-E-Elahi Panir (AD)*), the Appellate Division did not consider this issue for disposal of the dispute because the issue had

The issue came up again for judicial consideration in the case of *Idrisur Rahman v Bangladesh*.[41] The case involved determination of constitutionality of the Supreme Judicial Commission Ordinance, 2008 (Ordinance No. VI of 2008) promulgated during the period of Non-Party Care Taker Government.[42] The Ordinance had in view the objective of formation of a commission for selection and recommendation of the best and most suitable persons for being appointed as Judges of the Supreme Court.[43] The commission was to be constituted with total 9 members of whom 4 are senior most Judges of the Appellate Division including the Chief Justice as Chairman of the commission, 2 are senior most Judges of the High Court Division, and the other three members being the Law Minister, the Attorney-General and the President of Supreme Court Bar Association.[44]

The Ordinance, however, was challenged, *inter alia*, on the ground that the circumstances rendering immediate action necessary as required by Article 93 of the Constitution was not met for promulgation of this Ordinance.[45] The respondent pleaded that the power of the President to make and promulgate an Ordinance depends on his subjective satisfaction and hence President's satisfaction regarding the existence of the circumstances requiring immediate action necessary cannot be questioned in any Court.[46]

MA Rashid J did not address the question of *justiciability* of Presidential satisfaction as a threshold matter. His lordship simply held that no circumstances existed which rendered immediate action necessary for promulgating the impugned Ordinance.[47] On the other hand, Nazmun Ara Sultana J rightly observed that the question of whether the satisfaction of the

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become moot due to subsequent change in circumstances of the case. See, *supra*, Chapter 2 (Section 2.2.2.2.3.) (texts accompanying notes 126-130) (pp. 68-70) of the Study.

41 (2008) 60 DLR (HCD) 714 (hereafter *Idrisur Rahman*).

42 Chapter IIA was inserted in the Constitution by the Constitution (Thirteenth Amendment) Act, 1996 to introduce Non-Party Care Taker Government to act as an interim Government for holding free and fair election. The amendment, however, was declared void and unconstitutional by the Supreme Court in the case of *Abdul Mannan Khan v Bangladesh* 2012 20 BLT (Special Issue) (AD) 1 (hereafter *Abdul Mannan Khan*; or, *Constitution (13th Amendment)* case). Finally, the Constitution (Fifteenth Amendment) Act, 2011 (Act XIV of 2011) omitted Chapter IIA from the Constitution. See, section 21 of Act XIV of 2011.

43 *Idrisur Rahman* (n 41) 742.

44 ibid.

45 The other grounds of challenge involved, for example, (a) during the period of Non-Party Care Taker Government, the President has no power to promulgate the impugned Ordinance formulating a policy decision; (b) circumstances as specified in Article 93 of the Constitution did not exist at all necessitating promulgation of this Ordinance; (c) the Ordinance is against the constitutional scheme; (d) the Ordinance is inconsistent with the Constitution and the constitutional convention; (e) the Ordinance touched the basic structure of the Constitution which is beyond the Ordinance making power of the President. See, ibid 737, 740, and 742.

46 ibid 736.

47 ibid 730.

President regarding existence of emergent situation is *justiciable* or not needs to be decided first before she could examine the grounds agitated by the petitioner for challenging the impugned Ordinance.[48]

And after a review of some of the Indian authorities and the view of Mahmudul Islam on the point, her lordship, in contrast to the *Ahsanullah* verdict,[49] held the issue to be justiciable: "when the validity of an Ordinance is challenged on the ground of absence of requisite circumstances as specified in the Constitution the Court cannot refuse to look into the matter on the ground of *nonjusticiability*."[50] In her lordship's view, there is no reason to hold that the President's satisfaction regarding existence of emergent situation in the matter of promulgating Ordinances is not justiciable.[51]

4.1.4. President's Power of Pardon

Article 49 of the Constitution confers upon President the prerogative of mercy. In exercise of the power, the President may grant pardons, reprieves and respites and to remit, suspend or commute any sentence passed by any court, tribunal or other authority. As in Article 93 of the Constitution just discussed above,[52] the question here is also whether or not this power of the President is *justiciable*.

The issue was touched upon by the Appellate Division in the case of *Bangladesh v Kazi Shaziruddin Ahmed*.[53] The case involved the issue of remission of sentence by the President passed against the writ petitioner-respondent, an engineer who was then in the service of the Government of Bangladesh. The said engineer was found guilty of obtaining pecuniary advantage by corrupt and illegal means under section 5 (2) of the Prevention of Corruption Act, 1947 read with the Criminal Law Amendment Act,1985 and Regulation II and 12 of the

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48 ibid 736.
49 See, *supra* texts accompanying notes 39 & 40.
50 *Idrisur Rahman* (n 41) 737 (emphasis added).
51 ibid. In this respect, it may be mentioned that the learned Judges also differed as to the question of validity of the impugned Ordinance. MA Rashid J held the Ordinance *ultra vires* the scheme and spirit of the Constitution and, as such, unconstitutional. See, ibid 734. Nazmun Ara Sultana J, by contrast, found no *vires* with the Ordinance except for the provision contained in sub-section (4) of section 9 of the Ordinance. In her lordship's view, therefore, only this portion of the Ordinance for being inconsistent with the very object of the Ordinance is liable to be declared void. See, ibid 743-744.
52 See, *supra*, Chapter 4 (Section 4.1.3.) (p. 134) of the Study.
53 (2007) 15 BLT (AD) 95 (hereafter *Kazi Shaziruddin Ahmed*).

Martial Law Regulation No. 1 of 1982.[54] The Chief Martial Law Administrator sentenced him to suffer rigorous imprisonment for 14 years and to pay the fine of TK. 50 lacs. The Government confiscated his house at Gulshan for realizing the fine and took over possession thereof.[55]

The convicted engineer preferred an application to the President for commuting his sentence. The President agreed to remit the unexpired portion of the sentence on an undertaking that he would not claim his house at Gulshan.[56] He accepted this conditional remission of his sentence but subsequently again made a prayer to the President for return of his Gulshan house upon receipt of TK. 50 lacs which the President denied. Being aggrieved, he filed writ petition and the High Court Division held that Article 49 of the Constitution did not authorize the President to make any conditional order thereof.[57]

Against this judgment of the High Court Division, the respondent-appellant (Government of Bangladesh) filed appeal to the Appellate Division. Reversing the decision of the High Court Division, the Appellate Division held that "the power of the President under Article 49 of the Constitution may be conditional or unconditional"[58] and "not subject to any constitutional or judicial restraints except that it cannot be used to enhance the sentence."[59] The Court declared this prerogative power of the President to be a non-justiciable issue:

> The power conferred under Article 49 of the Constitution gives the widest power to the President and no word of limitation can be indicated in the said Article and the order so passed by the President is obviously an administrative in nature as the head of the State and it cannot be *justiciable* in the Court of law.[60]

4.1.5. *En Masse* Boycott of Parliament

The expression 'political question' perhaps featured most prominently in our jurisdiction in a dispute involving walkout and boycott of Parliament. The dispute, however, did not reach the

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54 ibid 96.
55 ibid.
56 ibid.
57 ibid 96-97.
58 ibid 98.
59 ibid 97.
60 ibid (emphasis added). The Court repeated this assertion, "we hold that the power of the President conferred under Article 49 of the Constitution cannot be questioned by any Court." ibid 98.

Court in the usual course of an actual case or controversy but by way of reference made by the President to the Supreme Court.[61] The President sought opinion of the Court on some questions of law arising out of the continuous absence of some members of Parliament consequent upon their walking out of the House first and then resorting to boycott of the Parliament.[62]

The President framed specifically four questions for the Court to answer: (a) Can the walkout and the consequent period of non-return by all the opposition parties be construed as 'absent' from Parliament without leave of Parliament occurring in Article 67 (1) (b) of the constitution resulting in vacation of their seats in Parliament? (b) Does boycott of the Parliament by all members of the opposition parties mean 'absent' from the Parliament without leave of Parliament within the meaning of Article 67 (1) (b) of the Constitution resulting in vacation of their seats in Parliament? (c) Whether ninety consecutive sitting days be computed excluding or including the period between two sessions intervened by prorogation of the Parliament within the meaning of Article 67 (1) (b), read with definition of 'sessions' and 'sittings' defined under Article 152 (1) of the Constitution? and (d) Whether the Speaker or Parliament will compute and determine the period of absence? [63]

To decide the reference questions, the Appellate Division offered hearing from representative section of and constitutional experts at the Bar.[64] While nobody disputed the Appellate Division's advisory jurisdiction under Article 106 of the Constitution,[65] some of the learned counsels, such as, Dr. Kamal Hossain and Syed Ishtiaq Ahmed, raised objection as to the

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61 Special Reference No. 1 of 1995 (1995) 47 DLR (AD) 111 (hereafter *Special Reference No.1 of 1995*).

62 ibid 113. A brief account of walkout and boycott of the sessions of Parliament may be given: All opposition members of the Parliament including the leader of the opposition except Mr. Suranjit Sen Gupta staged a walkout in protest of a statement made by the then Information Minister. Subsequently, the Deputy Speaker expunged the statement but the opposition members nevertheless did not return to the House. While the opposition members were acting as such, the by-election of Magura constituency was held. The opposition brought allegation of severe rigging in the election and declared that unless fresh election was held in Magura after cancelling the result declared by the Election Commission, they would not return to Parliament. While negotiation were going on to resolve the problem, the opposition added a new demand, namely, the ruling party must introduce a bill in the Parliament with a view to amending the Constitution to provide for holding at least three parliamentary elections under the caretaker government. For compelling the ruling party to concede to the demand, the opposition started boycotting the sessions of Parliament. The opposition continued boycotting the sessions of Parliament and on 28.12.94. all members of the opposition parties handed over their resignation letters to the Speaker.

63 ibid 116.

64 ibid 113.

65 See, *supra*, Chapter 2 (note 19) (p. 44) of the Study.

maintainability of the reference on political question ground. ATM Afzal CJ summarised their objection in these words:

> Their main objections that the matter under Reference is essentially one between the Parliament and its members and the opinion asked for eminently lies within the domain of the Parliament. The Reference raises a *political question rather than legal* which the Court generally eschews.[66]

To negate the contention, the learned Chief Justice reviewed the law of political question in US jurisdiction referring particularly the US Supreme Court's *Baker v Carr* decision and the juristic opinions of Holmes J, Schwartz and Seervai and concluded that "there is no magic in the phrase "political question"."[67] Mustafa Kamal J, however, without delving into political question analysis, read these counsels' arguments as that the reference questions "fall within the primary and exclusive competence of Parliament and its Speaker"[68] and hence it would be "inappropriate for this Court to answer the Reference as it will pre-empt and usurp that jurisdiction."[69]

To establish the fallacy of these arguments, the learned Judge inquired into the relevant provisions of the Constitution and the Rules of Parliamentary Procedure relating to vacation of seats of the members of Parliament and found that the work that the secretary of Parliament does under Rule 180 is ministerial in nature; the role of the Speaker under Rule 178 (3) is a communicating role; and the role of the secretary under Rule 178 (4) is a formal one.[70] His lordship, therefore, concluded that no jurisdiction has been conferred upon Parliament to declare a seat vacant under Article 67 (1) (b) of the Constitution and consequently this Court while answering the reference questions would not be pre-empting or usurping the jurisdiction of the Speaker or Parliament.[71]

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66 *Special Reference No. 1 of 1995* (n 61) 119 (emphasis added).
67 ibid 120.
68 ibid 130.
69 ibid.
70 ibid 132-33.
71 ibid 133. In his lordship's view, Article 67 (1) (b) of our Constitution is an automation clause, the role of the secretary of Parliament being only to maintain a register of attendance of members (Rule 180 of the Rules of Procedure) and the role of the Speaker being limited to bring the fact of vacancy to the notice of the House (Rule 178 (3) of the Rules). ibid 132. In this respect, it should also be noted that Mustafa Kamal J was conscious that the Court's jurisdiction has been barred as to "internal proceedings of Parliament" under Article 78 (1) of the Constitution. But his lordship was clearly of the view that the President has not asked the Court to answer any question that fairly concerns the "proceedings of Parliament". Rather the questions referred to the Court relate to an interpretation of certain words of the Constitution. And in so far as the interpretation of any word or words of the Constitution is concerned, the Supreme Court is the final arbiter.

In such view of the matter, the Court unanimously held for deciding the reference questions.[72] With regard to the first two questions, Mustafa Kamal J aptly remarked that the questions asked is only one not two – whether walkout or boycott under the circumstances is "absent from Parliament without leave of Parliament" within the meaning of Article 67 (1) (b) of the Constitution.[73] The Court unequivocally opined that walkout and boycott both entail absence and therefore directly attract the word "absent" occurring in Article 67 (1) (b) of the Constitution.[74] Question Nos. 3 and 4 were considered comparatively simpler. As to question No. 3, the Court opined that the period between two sessions intervened by prorogation of the Parliament should be excluded in computing ninety consecutive sitting days. As to question No. 4, the Court opined that it is the Speaker who shall compute and determine the period of absence.[75]

The learned Judge described this interpretive role of the Court "not as a wrecker but as a rescuer, not as an interloper but as a guide, not as an usurper but as a beacon light." ibid 133.

72 See, *supra* text accompanying note 63.

73 *Special Reference No. 1 of 1995* (n 61) 133.

74 Mustafa Kamal J elaborated: "The Constitution in Article 67 (1) (b) has allowed members of Parliament to remain absent for any reason whatsoever for eighty-nine consecutive sitting days without the leave of Parliament and it does not matter whether this period is consumed by an individual member or by some members en bloc by illness, absence from the country, walk-out or boycott. Eighty-nine consecutive sitting days of absence is the permissible limit upto which the leave of Parliament is not necessary for any kind of parliamentary or unparliamentarily behaviour. But once this permissible limit is crossed, the guillotine will apply and the member "shall vacate his seat"." ibid 134. ATM Afzal CJ explained the rationale of the rule: "The scheme of the Constitution is that if a member or members of Parliament remain absent without the leave of Parliament for ninety consecutive sitting days he or they do it on pain of vacating his or their seats. The philosophy behind this is that his or their constituencies cannot be left unrepresented in the Parliament for an indefinite period." ibid 127.

75 ibid 130. Before parting with the reference opinion of the Court, the Study would like to take note of the fact that the reference was objected by Dr. Kama Hossain and Syed Ishtiaq Ahmed on some other grounds. Syed Ishtiaq Ahmed, for example, submitted that the reference is incapable of being answered as there are "factual gaps" or material omissions in the statement of facts. ibid, 121. The Court, however, emphatically declared that any information gap as to when walk-out ended and boycott began is immaterial in answering the reference questions (per Mustafa Kamal J, ibid 133). Dr. Kamal Hossain and Syed Ishtiaq Ahmed raised yet another ground, that is, the Court needs not to answer the reference questions because some appeals are already pending in this Division in which similar questions as in the reference are involved. ibid, 121. The Court differed with this view with an observation that the exercise of advisory jurisdiction and the exercise of appellate jurisdiction are exercises of two different kinds and in a pending appeal the parties are free to re-agitate any question of law on which an opinion has been given in an advisory capacity, in the light of the facts of the cases themselves (per Mustafa Kamal J, ibid 133). The learned counsels objected the reference on yet another ground, that is, the Court should avoid embarrassment by not pronouncing any opinion because the co-ordinate organs of the state may not abide by the Court's opinion. They said that the political storm which had given rise to this reference will pass away but the honour and dignity of this Court is too precious to be risked and whittled down by any side-wind. ibid, 121. The Court rejected this assertion also: "The possibility of non-acceptance is not a premise with which the Court will start the exercise of an advisory role. Rather the Court will presume that the honour done to this Court by soliciting an opinion on some questions of law will be supplemented by its acceptance and adherence. The consideration that the opinion may not be honoured has never deterred any Court from answering a Reference" (per Mustafa Kamal J, ibid 133).
Dr. Zahir, Mr. SS Halder and Mr. ABM Nurul Islam contended that the reference as made is misconceived because the opposition members of the Parliament are absent not within the meaning of Article 67 (1) (b) but because they are no longer members of Parliament having vacated their seats by resignation on 28.12.1994.

The Study would now critically examine the SC's interpretation of the term 'political question' with a broader view to justifying the necessity of the doctrine in Bangladesh.

4.2. Critical Appraisal of SC's Interpretation of the Term Political Question

The answer to the question of whether Bangladesh should have a political question doctrine lies initially at least in the inquiry of whether or not the doctrine has been correctly dealt with by the Bangladesh Supreme Court. Recall, this Study disapproves both prudential and functional strands and instead considers the classical strand of the doctrine as the most viable approach to explain political question.[76] According to this classical version, the political question doctrine applies to issues that courts determine are best resolved within the politically accountable branches of the government – Congress or the Executive branch.[77] And in view of this Study, constitutional issues may be dubbed as political questions when they are committed to the unbounded discretion of the other co-ordinate branches of the government.[78] It will be seen that in neither of these senses of political question can the abovementioned decisions of the Bangladesh Supreme Court [79] be regarded as proper or accurate one.

Let us begin with *Dulichand*.[80] In resolving the dispute, the Court had to determine whether Ordinance No. 1 of 1969 was a valid piece of legislation so far as the independent Bangladesh is concerned. Recall, the Court itself held that the validity of the said Ordinance depended on the relevant Bangladeshi documents, such as, the Proclamation of Independence

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ibid, 128. This Study holds that this submission of the learned counsels had merit because due to the resignation ultimately of the opposition members, the issue of walkout and boycott resulting into absence from Parliament without leave of Parliament for ninety consecutive days was no longer a "live" dispute or the issue became "moot" due to the aforementioned change in the circumstances. (For this Study's discussion on mootness as a component part of the 'grievance rule' under Article 102 of the Constitution, see, *supra*, Chapter 2 (Section 2.2.2.2.3.) (p. 68) of the Study; the Court in *Kudrat-E-Elahi Panir (AD)* (n 40) did not reach the merit of the issue of whether the circumstances rendering immediate action necessary was present to promulgate the impugned Ordinance simply because the issue by that time became moot due to circumstantial changes in the facts of the case). But does this rule of "mootness" equally apply in the exercise of Court's advisory jurisdiction? We could have got an answer had the Court adequately responded to these counsels' submission. Unfortunately the Court merely recalled their submission but did not give any answer.

[76] See generally, *supra*, Chapter 1 (Section 1.2.) (particularly texts accompanying notes 57 to 68) (pp. 25-27) of the Study. See also, *supra*, Chapter 3 (note 221) (p. 126) of the Study.

[77] Jared P Cole, 'The Political Question Doctrine: Justiciability and the Separation of Powers' *Congressional Research Service (CRS) Report* (prepared for Members and Committees of Congress) (2014) 2. See also, *supra*, Chapter 3 (note 217) (p. 125) of the Study.

[78] See, *supra*, Chapter 2 (Section 2.3.1.) (p. 71) of the Study.

[79] See generally, *supra*, Chapter 4 (Section 4.1.) (pp. 129-142) of the Study.

[80] *Dulichand* (n 3).

made on 10th April 1971, the Laws Continuance Enforcement Order 1971 and the Constitution of Bangladesh 1972, and not on whether Yahya Khan's regime was valid and constitutional.[81] But the Court nevertheless embarked on the issue and held that the question of determining the constitutional legitimacy of Yahya Khan's regime was a 'political question'.[82]

The first thing to be told on Court's *Dulichand* verdict is that since the issue of determining Yahya Khan's regime was not at all necessary for deciding the case, Court's observation on the same is merely a *dictum* and not *ratio decidendi* on which the decision rested. As a *dictum*, it did not, however, correspond the meaning the term 'political question' has obtained in American jurisdiction.[83] Constitutions of all states contain provisions providing for orderly change of the governmental power. Determining the constitutionality of any regime in light of those provisions can never be a political question.

Determining these questions certainly may have political overtones but, as this Study has already envisaged, 'politically sensitive cases' and 'political question' as a constitutional concept are entirely different concerns.[84] That *Dulichand's* dictum does not represent the law in this field was subsequently established by the decision of the Supreme Court of Pakistan and that too with respect to Yahya Khan's regime itself. In *Asma Jilani v The Government of Punjab*,[85] the Pakistan Supreme Court overruled *Dosso* [86] and held in no ambiguous terms that the Martial Law proclaimed by Yahya Khan was illegal and that his assumption of power on 25th March, 1969 was wholly unconstitutional. Yahya Khan, as per *Asma Jilani*, was, therefore, simply a usurper.[87]

The cases dealing with 'hartal' issues are subjected to the same objection. In *Abdul Mannan Bhuiyan*[88], for example, the Appellate Division, on a proper perusal of section 561A of the CrPC, rightly held that the impugned orders of the High Court Division issuing *suo moto* rule on the appellant was made without lawful authority since the relevant provision of the CrPC

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81 See, *supra* text accompanying note 11.
82 See, *supra* text accompanying note 12.
83 See, *supra* note 77.
84 See, *supra*, Chapter 1 (note 10 and accompanying text) (p. 16) of the Study.
85 PLD 1972 SC 139.
86 *State v Dosso* (1959) 11 DLR (SC) 1.
87 For detail, see, Mahmudul Islam, *Constitutional Law of Bangladesh* (3rd edn, Mullick Brothers 2012) 100-01. See, *supra*, Chapter 3 (note 232) (p. 127) of the Study.
88 See, *supra* note 13.

did not contemplate issuing *suo moto* rule in the absence of any pending proceeding.[89] The High Court Division, therefore, overstepped its limits by creating the pro-hartal and anti-hartal activities as cognizable offences.[90] The Appellate Division itself recognized that the question of whether hartal *per se* is legal or not was never any issue in the case.[91] Even after holding this, the Court unnecessarily observed in its *dicta* that "the virtues and vices of hartal is a *political question* and this court in the exercise of its judicial self-restraint declines to enter into such *political thicket*".[92]

Let us examine to what extent the 'virtues and vices of hartal' are a relevant fact in hartal disputes to be remarked upon by the Court. It should be remembered that the courts while deciding disputes are usually confronted with two kinds of questions – questions of fact and questions of law. In an issue dealing with hartal, what acts or events may constitute hartal may be regarded as a question of fact. On the contrary, whether hartal as a means of protest is legal or illegal is a question of law to be determined with reference to the relevant laws and the Constitution. Virtues and vices of hartal are, therefore, neither a question of fact nor a question of law to be decided by the Court. The answer to the question whether hartal is good or bad depends, to a large extent, upon the value judgment of a person – it is a matter of personal taste or preference. To some hartal may be good and for others it may be bad and there may still be some others having a mixed reaction to it. Thus, not only the politicians but any person including judges, lawyers or even an ordinary citizen may have his own opinion regarding the virtues and vices of hartal.[93]

The Court's above remark[94] on the virtues and vices of hartal was simply unwarranted. Furthermore, since the term political question has obtained a distinguished meaning in constitutional jurisprudence, the passing remark of the Court that "the virtues and vices of hartal is a *political question*"[95] is, therefore, improper and objectionable. In all events, this kind of *casual* and *inadvertent* remarks especially from the Apex Court of a country is

89 See, *supra* text accompanying notes 20-22.
90 See, *supra* text accompanying notes 24-25.
91 See, *supra* text accompanying notes 23 & 28.
92 See, *supra* text accompanying note 28.
93 The author presented the same argument against the Court's opinion on the virtues and vices of hartal in his earlier work, see, Moha. Waheduzzaman, 'The Domain of the Doctrine of Political Question in Constitutional Litigation: Bangladesh Constitution in Context' (2017) 17 (1 & 2) *Bangladesh Journal of Law* 48-49.
94 See, *supra* note 92.
95 ibid.

undesirable and hence should be avoided because, instead of clarity, that simply leads one to confusion.[96]

Unlike *Abdul Mannan Bhuiyan*,[97] the legality of hartal *per se* was directly challenged in *Khondaker Modarresh Elahi*.[98] The Court rightly held that 'hartal' unattended by threat or compulsion is a form of expression and also a means of protest guaranteed by Article 39 (2) (a) of the Constitution as one of the most basic democratic rights of the citizens.[99] This holding of the Court clearly manifests that the legality of 'hartal' is a *judicial* as opposed to *political* question to be determinable in a court of law. But even after deciding so, MA Aziz J observed that 'hartal' is a "political issue" that should in all fairness be decided by the politicians themselves.[100]

It is unclear what really the learned Judge meant by terming 'hartal' as a "political issue". Surely his lordship did not mean by "political issue" a political right since the Fundamental Rights embodied in Part III of the Constitution are basically civil and political rights which are always enforceable in a court of law. If his lordship meant by this that 'hartal' is a 'politically sensitive issue', then this Study has already asserted that *cases involving political ramifications* and *political question* as a constitutional concept are distinct phenomena.[101] If his lordship meant by this the question of banning 'hartal' by an ordinary piece of legislation, then again it is a *legal* as opposed to a *political* question in the sense that the validity of such law may always in a properly constituted case be determined in light of Article 39 (2) (a) of the Constitution. On the contrary, if his lordship simply meant the question of whether 'hartal' is good or bad, then it is liable to be subjected to the same criticism as this Study has just made above in relation to *Abdul Mannan Bhuiyan*.[102]

So far the judicial inquiry into Presidential satisfaction as to the existence of emergency situation under Article 93 is concerned, the Court did not directly use the term 'political question' but simply held the issue to be either justiciable or non-justiciable. The *Ahsanullah* Court held the issue to be non-justiciable whereas the *Idrisur Rahman* Court found the same

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96 The author made the same remark earlier, see, Waheduzzaman (n 93) 49.
97 See, *supra* note 13.
98 See, *supra* note 29.
99 See, *supra* text accompanying notes 30-32.
100 See, *supra* text accompanying note 33.
101 See, *supra*, Chapter 1 (note 10 and accompanying text) (p. 16) of the Study.
102 See, *supra* text accompanying notes 88-96.

to be justiciable.[103] Against the High Court Division's *Ahsanullah* verdict, the Appellate Division did not consider going into the merit of the issue since by that time the issue became moot due to change in the circumstances of the case.[104] Thus, due to Appellate Division's not considering the issue in *Kudrat-E-Elahi Panir (AD)* and the High Court Division's conflicting opinion in *Ahsanullah* and *Idrisur Rahman*, the law remains unsettled as to this issue under Article 93 of the Constitution.

However, as has been said, the High Court Division both in *Ahsanullah* and *Idrisur Rahman* refereed to "justiciability", a term that has close proximity with "political question" as a constitutional concept.[105] As a justiciability issue, the question of Presidential satisfaction as to the existence of certain facts concerns 'separation of powers' among the organs of government. The Study has already shown that these types of questions virtually involve 'reasonableness review' of the political branches' decisions and in explaining them the traditional *locus standi* analysis should be regarded insufficient.[106] These are typically questions susceptible of a political question analysis.[107] But neither in *Ahsanullah* nor in *Idrisur Rahman* had the Court taken recourse to a political question analysis concerning 'separation of powers' among organs of government. It simply went for deciding the question of justiciability of the issue without either substantiating the grounds of its decision at all [108] or seeking to substantiate it from a true 'political question' perspective.[109]

As in *Ahsanullah* and *Idrisur Rahman*, the Court in *Kazi Shaziruddin Ahmed* [110] also without referring expressly to the political question doctrine employed the term "justiciability" while ruling on the President's power of pardon under Article 49 of the Constitution. The Court was required to decide only whether the power of the President under Article 49 may be both conditional and unconditional and not the threshold question of whether the prerogative of mercy as such is a justiciable issue or not.[111] While the Court rightly held that the power may be both conditional and unconditional,[112] it unnecessarily embarked on the threshold question

[103] See, *supra* text accompanying notes 34 to 51.
[104] See, *supra* note 40.
[105] See, *supra*, Chapter 2 (Section 2.3.3.5.) (p. 78) of the Study.
[106] See, *supra*, Chapter 2 (Section 2.3.3.6.) (p. 84) of the Study.
[107] See, *supra*, Chapter 2 (Section 2.3.2.) (p. 72) of the Study.
[108] *Ahsanullah* (n 34) (*supra* text accompanying notes 34-40) (the question was held non-justiciable).
[109] *Idrisur Rahman* (n 41) (*supra* text accompanying notes 41-51) (the question was held justiciable).
[110] *Supra* note 53.
[111] See, *supra* text accompanying notes 53-57.
[112] See, *supra* text accompanying note 58.

and held it to be non-justiciable.[113] It is submitted that the threshold question so far as that makes judicial inroad into the reasonability of President's exercise of the said power, it involves a 'reasonableness review' of executive branches' decision and, therefore, subject to the same criticism the Study has just made above against *Ahsanullah* and *Idrisur Rahman* in issues arising under Article 93 of the Constitution.[114]

In the *Special Reference No. 1 of 1995*,[115] the Court was merely asked to give its opinion as to whether walkout and boycott would attract the word 'absent' under Article 67 (1) (b) of the Constitution so as to vacate seats of members of Parliament. Some learned counsels argued that the issue is a 'political question' and its determination would mean for Court to pre-empt and usurp the primary and exclusive jurisdiction of Parliament.[116] It is submitted that this moot issue involved in the reference was completely a legal question that could be answered by taking recourse to interpreting some words of Constitution and Rules of Parliamentary Practice. Mustafa Kamal J followed this path.[117] But his lordship ATM Afzal CJ, to dispel the contention of those counsels, reviewed some cases and comments on political question only and held that "there is no magic in the phrase "political question"."[118]

The above wordings of ATM Afzal CJ carry within it somewhat the idea that 'political question' as a constitutional concept is devoid of any content. But it has already been seen that the term has obtained distinguished meaning in constitutional jurisprudence especially in US jurisdiction.[119] Therefore, instead of holding the above, the learned Chief Justice should have tried to gather the meaning of political question in US jurisdiction and held that the questions presented in the reference did not correspond the meaning(s) ascribed to 'political question' in American jurisdiction.

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[113] See, *supra* text accompanying note 60.
[114] See, *supra* text accompanying notes 105-109.
[115] *Supra* note 61.
[116] See, *supra* text accompanying notes 65-66.
[117] See, *supra* text accompanying notes 68-71.
[118] *Supra* note 67.
[119] See generally, *supra*, Chapter 3 (Section 3.1.) (p. 90) of the Study.

4.3. Justifying the Necessity of a Political Question Doctrine in Bangladesh

The above critical appraisal quite adequately reveals that the American doctrine of political question has not been correctly dealt with by the Bangladesh judiciary.[120] The term has largely been misunderstood and misinterpreted by the Supreme Court. As such, it may be said with some credibility that currently there does not exist any political question doctrine in Bangladesh.[121] But the Study argues that such a doctrine should exist in our jurisdiction.[122] Recall, what this Study really means by political question. The Study envisages political question as certain issues of constitutional law that should be immune from judicial oversight due to the functioning of the principle of 'separation of powers' among organs of government.[123] And on this meaning of the term, political question has nothing to do with constitutional issues that may sometimes be politically sensitive.[124]

Had there been a doctrine on political question in the above meaning, the Bangladesh Supreme Court would not have entangled purely legal questions with politically sensitive cases that are not in the true sense of the term 'political question' in *Dulichand*, *Abdul Mannan Bhuiyan*, *Khondaker Modarresh Elahi* and the *Special Reference of 1995*.[125] And in *Ahsanullah*, *Idrisur Rahman* and *Kazi Shaziruddin Ahmed*, the Court would have engaged more to justify its decision from the perspective of a true 'political question' analysis as this Study suggests instead of simply holding the issues to be either justiciable or non-justiciable.[126] To state otherwise, the Court in the former class of cases wrongly stated the issues involved in the dispute as 'political questions' whereas in the latter class of cases that were truly susceptible of a 'political question' analysis, the Court improperly omitted discussion towards that direction.[127]

Apart from the abovementioned cases involving political question argument, a political question analysis in our jurisdiction should be considered relevant in relation to some other

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[120] See, *supra* note 1.
[121] ibid.
[122] See, *supra* note 2.
[123] See, *supra*, Chapter 2 (Sections 2.3.1. and 2.3.3.3.) (pp. 71, 76) of the Study.
[124] For politically sensitive issues but that are not political questions in the true sense of the term, see, *infra*, Chapter 7 (Section 7.7.) (p.254) of the Study.
[125] See, *supra*, Chapter 4 (Sections 4.1.1., 4.1.2. and 4.1.5.) (pp. 129, 131, 138) of the Study.
[126] See, *supra*, Chapter 4 (Sections 4.1.3. and 4.1.4.) (pp. 134, 137) of the Study.
[127] The latter class of cases, that is, *Ahsanullah*, *Idrisur Rahman* and *Kazi Shaziruddin Ahmed* involved the issue of promulgation of Ordinances and power of pardon. For analysis of these issues from a 'political question' perspective, see, *infra*, Chapter 6 (Sections 6.1.2.1.2. and 6.2.2.) (pp. 180, 193) of the Study.

constitutional issues, such as, directing the legislature to enact law, determining the validity of constitutional amendments and judicial enforcement of Economic, Social and Cultural (ESC) rights under Part II of the Constitution. The Study does not hold these issues at the very first instance political questions barring judicial review of the Court. Rather, the Study only argues that these issues of the Constitution genuinely attract a political question analysis which neither the Bar nor the Bench should omit in their submission or judgment. It will be seen later on in this Study that each of these questions were considered by the Court but neither the Bar raised any objection as to maintainability of the suit on political question ground nor the Bench on its own felt any urge to inquire whether the issue involved in the dispute was a political question.[128]

To restate again, political questions are constitutional questions committed to the unbounded discretion of the political branches of government. As to these issues, the political branches can be held only politically accountable to the people. The actions or inactions of the political branches pertaining to these issues cannot be subjected to judicial scrutiny. Due to the absence of a political question doctrine on this meaning, the Supreme Court failed to infuse political question insights into its analysis whenever necessary [129] and inaccurately termed issues political questions that were not truly political questions but only issues involving political ramifications.[130] And if looked at from a broader perspective, the doctrine would remind the Court of its proper reach/role travelling beyond of which would be to encroach on the domain of the other co-ordinate branches of government. Whole things perceived in this way, the Study could not but hold that Bangladesh should have a political question doctrine in its jurisdiction.[131]

Summary and Assessment

To conclude the Chapter, the Supreme Court of Bangladesh has dubbed an issue 'political question' on occasions.[132] It has declined adjudication of an issue referring directly or indirectly as ground for such refusal the doctrine of political question. The Court, however, did not explain the sense and meaning in which it had used the expression 'political question'

[128] See, *infra*, Chapter 6 (Section 6.2.3.) (p. 197) of the Study.
[129] See, *supra* text accompanying notes 126 and 128.
[130] See, *supra* text accompanying note 125.
[131] See, *supra* note 2.
[132] See generally, *supra*, Chapter 4 (Section 4.1.) (pp. 129-142) of the Study.

in a given case. In this respect, it should be emphasized that the term 'political question' has obtained a distinguished meaning in constitutional jurisprudence after its inception as a doctrine in American jurisdiction. Therefore, unless the Bangladesh Supreme Court attributes a different meaning for the term 'political question', anyone may legitimately conclude that the expression has been used in the same sense in which it is understood in American jurisdiction. But the issues or matters the Supreme Court of Bangladesh has dubbed as 'political questions' in cases of its own jurisdiction do not really correspond the meaning it has obtained in American jurisdiction.[133] Simply speaking, the Bangladesh Supreme Court has failed to grasp the real meaning and contours of the doctrine of political question in a given case. It has not been able to correctly deal with or apply the doctrine in cases of its own jurisdiction.[134] Cases involving political ramifications are frequently confused with 'political questions' in the proper sense of the term.[135]

All in all, the position of the Bangladesh Supreme Court regarding the very existence of the doctrine within the framework of its Constitution is unclear. In this backdrop, a thorough research study on the subject was a demand of the day. This Study simply has undertaken that venture with a view to constructing a clear theoretical framework regarding the application of the doctrine of political question in the adjudication of constitutional matters with special reference to the Bangladesh Constitution. Any such attempt essentially requires establishing first the constitutional basis for application of the doctrine in its jurisdiction. The next Chapter of the Study therefore seeks to establish the doctrine's basis in Bangladeshi jurisdiction.

[133] For meaning of the doctrine in American jurisdiction, see generally, *supra*, Chapter 3 (Section 3.1.) (p. 90) of the Study.
[134] See generally, *supra*, Chapter 4 (Section 4.2.) (p. 142) of the Study. See also *supra* notes 120 & 1 and accompanying texts.
[135] See, *supra* text accompanying note 125.

CHAPTER 5
CONSTITUTIONAL BASIS FOR APPLICATION OF THE DOCTRINE IN BANGLADESH

Introduction

The Chapter is comprised of three Sections. Section 5.1. draws on the essence of 'separation of powers' as a constitutional principle. It identifies the crux of the meaning and justification of the principle and distinguishes it from the two other allied, if not identical, principles of constitutional law, that is, the principles of 'division of powers' and 'checks and balances'. Section 5.2. briefly reflects on how 'separation of powers' is maintained in the Constitutions of UK and USA. Section 5.3. establishes that Bangladesh Constitution maintains 'separation of powers' among the co-equal and co-ordinate branches of government to substantiate *political question* arguments in its jurisdiction.[1] Recall, the same principle forms basis of the doctrine in American jurisdiction.[2] However, although the constitutional basis of the doctrine for both the jurisdictions may be same, there would be differences between the Bangladeshi and US models of the doctrine.[3]

5.1. The Substance of the Principle of Separation of Powers

5.1.1. The *Trias Politica* Model of Separation of Powers

The State comprises of four elements: fixed territory, permanent population, government and sovereignty. The sovereign powers of the government are generally classified as the legislative power of making rules, the executive power of enforcing those rules and the judicial power of adjudicating disputes by applying those rules.[4] To avoid autocracy in the exercise of the three powers, they are usually entrusted to three different organs: a legislature, an executive and a judiciary. This is commonly referred to as the *trias politica* model of separating the governmental powers of the state. It is to be noted that all three governmental

1 See, *supra*, Chapter 1 (note 89 and the accompanying text) (p. 31) of the Study.
2 See, *supra*, Chapter 3 (note 219 and the accompanying text) (p. 125) of the Study.
3 See, *supra*, Chapter 3 (note 233 and the accompanying text) (p. 127) of the Study.
4 Mahmudul Islam, *Constitutional Law of Bangladesh* (3rd edn, Mullick Brothers 2012) 90.

powers in this *trias politica* model are emphatically in relation to laws: "the Legislature makes, the executive executes, and the judiciary construes, *the law*." [5]

The origins of the principle of 'separation of powers' may be traced back to English writers and controversialists of the mid-seventeenth century who argued for the separation of legislative and executive (then including judicial) functions of government, seeing in this a means to restrain the abuse of governmental power.[6] Subsequently, the principle was more fully developed and refined by the English Philosopher John Locke and French philosopher Baron de Montesquieu. In his *Second Treatise of Civil Government* (1690), Locke justifying 'separation of powers' between executive and legislative wrote:

> It may be too great a temptation to human frailty, apt to grasp at power, for the same persons who have the power of making laws, to have also in their hands the power to execute them, whereby they may exempt themselves from Obedience to the Laws they make, and suit the Law, both in its making and execution, to their own private advantage.[7]

Decades later Montesquieu in his *The Spirit of the Laws* (1748) proposed the *trias politica* model of separation of powers between the executive, legislative and judicial when he wrote: "All would be lost if the same man or the same ruling body, whether of nobles or of the people, were to exercise these *three powers*, that of law-making, that of executing the public resolutions, and that of judging crimes and civil causes." [8] Montesquieu clearly had in view the objectives of securing liberty and the avoidance of tyrannical exercise of power when he advocated for his *trias politica* model of separation of powers among the three organs of government:

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5 Per Chief Justice Marshall of US Supreme Court quoted by Pakistan Supreme Court in *State v Ziaur-Rahman and Others* PLD 1973 SC 49. See, the Constitution (16th Amendment) Case: *Bangladesh v Adv. Asaduzzaman & Others* 2017 CLR (Spl) 216-17(emphasis added) (per S Mahmud Hossain J) (hereafter *Adv. Asaduzzaman & Others*; or, *Constitution (16th Amendment)* case).

6 *Bangladesh v Md Aftabuddin* (2010) 15 BLC (AD) 41 (per Md Abdul Matin J) (hereafter *Md Aftabuddin*).

7 John Locke, *Second Treatise of Civil Government* in M Cohen and N Fermon (eds) Princeton Readings in Political Thought: Essential Texts Since Plato (Princeton University Press, Princeton 1996) 243. Vile writes that Locke had distrust both of Kings and of legislatures which made him unwilling to see power concentrated in the hands of either of them. For this reason and for reasons of efficiency and convenience, Locke concluded that the executive and legislative powers should be in separate hands. In Vile's exact words: "Locke argued that the legislative and executive powers should be placed in separate hands for the sake of efficiency, on the grounds of the division of labour. Laws which take only a short time to pass need "perpetual execution", and therefore there must be an executive always in being. The representative nature of the legislature renders it too large, and therefore too slow, for the execution of the law." MJC Vile, *Constitutionalism and the Separation of Powers* (2nd eds, 1998) 67.

8 Baron de Montesquieu, *The Spirit of the Laws*, Book XI, Chapter 6 (1748). Quoted in *Md Aftabuddin* (n 6) 41 (emphasis added) (per Md Abdul Matin J).

> When the legislative and executive powers are united in the same person, there can be no liberty, because apprehensions may arise lest the same monarch or senate should enact tyrannical laws to execute them in a tyrannical manner. Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would then be the legislator. Were it joined to the executive power, the judge might behave with all the violence of an oppressor.[9]

Montesquieu indeed visited to England in 1729-31. He was persuaded that the English liberty was preserved by its institutional arrangements. The English system of governance led him to say: "Experience has always demonstrated that he who has power in his hand is inclined to abuse it. Executive, Legislative and Judicial power should not be united in the hands of a single person or body of persons, for such a combination would destroy liberty." [10]

The above analysis, so far Locke and Montesquieu are concerned, shows that the justification of the principle of 'separation of powers' lies in securing liberty of the individuals against state oppression or excessiveness, or in preventing the abuse of power, or in the avoidance of tyranny or autocratic exercise of power.[11] And if Vile's interpretation of Locke is correct, the principle besides these objectives also furthers the objective of bringing efficiency in performing functions of the government.[12] With this understanding of the justifications of the principle, we may now turn to explore the vital characteristics of this *trias politica* model of separation of powers.

5.1.2. What Does the Principle of Separation of Powers Basically Embrace?

In simple terms, the principle requires that the legislative, executive and judicial functions of the government should not be united in the same hands or the same body of men. Instead, the

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9 Baron de Montesquieu, *The Spirit of the Laws* (1748) 163 (translated by Anne Cohler, Cambridge University Press, New York 1989).

10 Venkata Rao, *A History of Political Theories* (Chand and Co. Pvt. Ltd., New Delhi, 1972) 387.

11 See, Jeremy Waldron, 'Separation of Powers in Thought and Practice' (2013) 54 (2) *Boston College Law Review* 454 (the author argues that when Montesquieu justifies 'separation of powers' in securing liberty of the individuals, he offers little more than tautologies. Waldron expresses the tautology of Montesquieu's arguments in these words: "the failure to separate powers leads to arbitrariness because it involves *a failure to separate the powers*." ibid (emphasis original) (internal citation omitted). For detail of Montesquieu's tautologies, see, ibid 434, 453-54. Waldron, however, does not doubt the proposition that separated powers ensure liberty. He simply shows that Montesquieu did not explain adequately why separation of powers is necessary for liberty or how separation of powers ensures liberty and points out one would like from such a respected "oracle" an account of why the said proposition would be true. ibid.

12 See, *supra* note 7. See also Robert J. Pushaw Jr., 'Justiciability and Separation of Powers: A Neo-Federalist Approach' (1996) 81 (2) *Cornell Law Review* 402-04 (the author argues the same that 'separation of powers' besides the "liberty and tyranny" rationale also brings efficiency in government).

powers should be allocated to three distinct bodies of men to secure liberty and to avoid tyranny in the exercise of power. This is typically referred to as the "functional" separation of powers of the government. Both Locke and Montesquieu argued mainly for this "functional" separation while presenting their theories of separation of powers.[13] Locke, for example, argued for investing legislative power in a large legislative assembly while making of his discussion on political or civil liberty:

> Legislative assembly should be placed in a collective Bodies of Men, call them Senate, Parliament, or what you please. By which means every single person became subject, equally with other the meanest men, to those Laws, which he himself, as part of the Legislative had established: nor could any one, by his own authority, avoid the force of the Law, when once made, nor by any pretence of Superiority, plead exemption, thereby to Licence his own, or the Miscarriages of any of his Dependents.[14]

Locke in the above passage desires to vest the law making power in a large assembly with a solemn objective in view, that is, the promulgation of non-arbitrary laws for "oppressive laws are less likely if the law-makers are ordinary citizens and have to bear the burden of the laws they make themselves."[15] But surely the objective would not be achieved if the same law makers may have control over the application of the law, that is, if the law makers can make prosecutorial decisions or participate in adjudication.[16] For then they will have the power to direct the burden of the laws they make away from themselves.[17] Therefore, to avoid arbitrariness, one must further separate the function of law making from the other functions of execution and adjudication.[18]

The above is precisely the line of arguments or proposition of Locke. Whether Locke's proposition that 'separation of powers' secures liberty or avoids arbitrariness is true or not is altogether a different inquiry.[19] But there may be no doubt in this that his arguments revolve precisely around "functional" separation of the sovereign powers of government. Waldron very succinctly puts it:

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13 For Locke and Montesquieu's theory of separation of powers, see *supra* notes 7-12 and the accompanying texts.

14 John Locke, *Two Treatise of Government* (Peter Laslett eds., Cambridge University Press 1988) (1690) 329-30. Quoted in Waldron (n 11) 445-46.

15 Waldron (n 11) 446.

16 ibid.

17 ibid.

18 ibid 446-47.

19 Waldron, for example, though concedes that 'separation of powers' may be necessary for securing liberty but contends that that may not be sufficient. ibid, 447.

> Locke's argument is not the most sophisticated argument in the world, but it is an interesting one. And it has the advantage of pointing specifically to *functional* separation. It is not a theory about the dispersal of power as such, or about checks and balances. It is a theory specifically oriented to the Separation of Powers.[20]

At modern times Vile's Book *Constitutionalism and the Separation of Powers* is considered a great work on the subject.[21] In this Book, Vile attempts to provide a pure definition of 'separation of powers' distinguished from the adjacent principles of 'division of powers' and 'checks and balances'. He formulates the pure definition of the principle in the following way that takes into account the "functional" aspect in its focal point:

> It is essential for the establishment and maintenance of political liberty that the government be divided into three branches or departments, the legislature, the executive, and the judiciary. To each of these three branches there is a corresponding identifiable function of government, legislative, executive, or judicial. Each branch of the government must be confined to the exercise of its own function and not allowed to encroach upon the functions of the other branches. Furthermore, the persons who compose these three agencies of government must be kept separate and distinct, no individual being allowed to be at the same time a member of more than one branch.[22]

The functional separation of powers so emphasized by all including Locke and Montesquieu is probably best understood when that is seen in contradistinction to a ruler contemplated by Thomas Hobbes. Hobbes we know was an ardent advocate of unified powers and an adamant opponent of separation of powers. The various powers of government are, Hobbes said, indivisible, incommunicable, and inseparable. According to Waldron, this Hobbesian view of sovereign is susceptible of two alternative interpretations: (i) a Hobbesian ruler exercising the united powers of sovereignty in a crude undifferentiated way and (ii) his exercising those powers as separable incidents of his authority, even though they are united in one set of hands.[23]

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[20] ibid 447 (emphasis added).

[21] See, *supra* note 7.

[22] Vile (n 7) 14. It is interesting to note that Vile, like Locke and Montesquieu, also seeks to justify 'separation of powers' on the ground that it would likely secure *liberty* of the individuals. He begins by saying, "It is essential for the establishment and maintenance of *political liberty*" (emphasis added). ibid 14.

[23] Waldron (n 11) 449.

Waldron holds Hobbes's sovereign as a ruler of the latter type who does not rule in an undifferentiated way.[24] Hobbes's sovereign thinks it is important, says Waldron, that "there be legislation created and promulgated prior to the exercise of sovereign power against any person, so that people know where they stand and so there is no misunderstanding. And he envisages courts – which are of course the sovereign's courts – to deal with the application of the laws."[25] Waldron draws on the distinction between the above two types of sovereign in a more illuminating way in the following passage:

> I think this distinction is important between (i) a sovereign who just blurs the distinction between the powers that he has because, in crude and simple terms, they are all *his*, and (ii) a sovereign who unites all power in his person but nonetheless articulates the powers in his exercise of them. For a Type (i) absolutist, power is just exercised in a lashing-out kind of way. Not only is the one person judge, jury, and executor, but he barely discerns the difference between adjudicating, fact-finding, and punishment.[26]

In short, the Hobbesian ruler of type (ii) if compared to the ruler of type (i) has an important merit in that even if he is a ruler who will not cede power to any co-ordinate authority, he somewhat is aware that political power is something articulated rather than simple; he is, at the least, sensitive to identification and awareness of the differentiated functions.[27] Now the crux of the question is: does the principle of 'separation of powers' merely satisfy itself to have this merit of the Hobbesian ruler of the latter type? The answer is emphatically NO. The principle of 'separation of powers' requires something more of a Hobbesian ruler of the latter type in that the principle concerns itself not only with an abstract identification and awareness of differentiated functions but also insist upon an actual separation of institution, office, and personnel of the government.[28]

Thus, so far the principle of 'separation of powers' is concerned, it is important not only that the functions of government be conceived as distinct but also that they be distinguished in institutional space.[29] And when we speak of "distinct" functions, we mean that 'separation of powers' principle counsels a qualitative separation of the different functions of government –

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[24] ibid.
[25] ibid.
[26] ibid.
[27] ibid 450, 456.
[28] ibid 450.
[29] ibid 465.

legislation, executive administration, and adjudication.[30] The "functional" separation which is ordinarily understood to be the meaning of 'separation of powers' principle thus incorporates two fundamental elements/aspects: the three distinct functions implying for a qualitative separation (Hobbes's sovereign mostly possesses this quality) and different institutional arrangements (Hobbes's sovereign lacks this quality) for exercising those distinct functions of the government. Both these facets of the principle of 'separation of powers' have found classic expression in the eloquent words of Waldron:

> The principle takes the basic process of governance and divides it conceptually into three main functions: enacting a law, adjudicating disputes on the basis of a law, and administering a legal decision. This conceptualization suggests two things. It suggests, *first*, that it is a mistake to think of the exercise of political power as something simple – as, for example, a straightforward use of coercive force by public authority. And *secondly*, it suggests that each of the phases into which the principle divides the exercise of power, is important in itself, and raises issues of distinct institutional concern.[31]

From the above analysis, it transpires that the two components of the principle of 'separation of powers' endorses and upholds the distinct character of each of the three main functions of the government.[32] To state otherwise, the principle ensures respect due to the character and distinctiveness of the various functions of government.[33] Rightly comments Waldron: "The legislature, the judiciary, and the executive – each must have its separate say before power impacts on the individual."[34] After knowing what really the principle of 'separation of powers' embraces,[35] we may now turn to analyze how the principle is related to and different from adjacent principles of 'division of powers' and 'checks and balances'.

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30 ibid 434. Waldron elaborates: "The Separation of Powers Principle holds that these respective tasks have, each of them, an integrity of their own, which is contaminated when executive or judicial considerations affect the way in which legislation is carried out, which is contaminated when legislative and executive considerations affect the way the judicial function is performed, and which is contaminated when the tasks specific to the executive are entangled up with the tasks of law-making and adjudication." ibid 460. For further explanation of Waldron's emphasis on "qualitative" separation, see, ibid 460-66.

31 ibid 456 (emphasis original).

32 ibid 463.

33 ibid 466.

34 ibid 459.

35 There are, however, people who worry about whether the "functional" separation envisaged in the Separation of Powers Principle is archaic. Vile, for example, refers to the emergence of such terms as 'quasi-judicial', 'delegated legislation', or 'administrative justice' and comments that the functional concepts of the doctrine of the separation of powers were inadequate to describe and explain the operations of government. See, Vile (n 7) 6, 11. Waldron does not think that Vile actually accepts the obsolescence of the doctrine, but he sees the problem as important. Waldron, ibid 443. This Study is of the view that the examples which Vile cites may be good examples of something that is somewhat akin to the exceptions to the principle of 'separation of powers' and, therefore, proves only that there can be no absolute separation of powers. Vile's concern,

5.1.3. The Proximity between Separation of Powers and Adjacent Principles

The 'separation of powers' principle does not operate alone as a canonical principle of any constitutional system. It works along with two other associated, if not identical with, principles of constitution: *first*, the 'division of powers' principle and *second*, the 'checks and balances' principle. They form a close-knit set of principles that work both separately and together as touchstones of institutional legitimacy.[36] It is necessary to elucidate their interrelationship to apprehend fully the institutional structure of a Constitution or even to understand better the 'separation of powers' principle itself.

As has already been discussed, the 'separation of powers' principle focuses on the separation of functions of government from one another.[37] The 'division of powers' principle, by contrast, functions to avoid too much concentration of political power in the hands of any one person, group, or agency.[38] However, the 'separation of powers' principle is interrelated with the 'division o powers' principle in that the former might be thought of as a means to the latter. Because if someone wants to divide governmental powers, what would be better than to begin by dividing the power of a judge from that of a legislator and from that of an executive official.[39] Again, the two principles may be different in that "the Division of Powers might require a much finer-grained division than Separation of Powers can supply: it might look for bicameral division within the legislature, for example, or it might look to reject any theory of the unified executive."[40]

As an adjacent principle of 'separation of powers, the principle of 'checks and balances' is somewhat given more attention and importance than the principle of 'division of powers'. The principle of 'checks and balances' "requires the ordinary concurrence of one governmental entity in the actions of another, and thus permits one entity to check or veto the

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therefore, does not and also cannot challenge the integrity of the Separation of Powers Principle as such. Posner and Vermeule referring to the separation of powers as "suffering through an enfeebled old age" also say that we should not shed tears for something we cannot anymore have. Eric A Posner & Adrian Vermeule, *The Executive Unbound: After the Madisonian Republic* (2010) 5, 208. Waldron aptly responds to Posner and Vermeule: "Okay. But as we dry our eyes and look clearheadedly to the future, we will see the concerns about undifferentiated governance (endorsed by an undifferentiated process of elective acclamation) still standing there, concerns we would not have recognized but for our thinking through this forlorn principle." Waldron, ibid 467.

36 Waldron, ibid 438.

37 See, *supra*, Chapter 5 (Section 5.1.2.) (p. 153) of the Study.

38 Waldron (n 11) 433, 438.

39 ibid 440.

40 ibid.

actions of another." [41] Friedrich says the same couched in a different language: "doctrine of checks and balances requires that after the main exercise has been allocated to one person or body, care should be taken to set up a minor participation of other person or bodies." [42] In simple terms, the principle ensures that the exercise of power by any one power-holder is balanced and checked by the exercise of power by other power-holders.[43] All the three branches have checks and balances over each other to maintain the balance of power and not to exceed the constitutional limits.[44]

Waldron describes the three principles and poses this important question: does the principle of separation of powers have any meaning over and above the two other principles? [45] He thinks it does and thereupon explores aspects of the separation of powers that are independent of what may one value in the principles of checks and balances and division of power.[46] Waldron identifies *integrity* or *distinctiveness* of the three functions and *articulated governance* as two vital aspects that should be ascribed to the principle of separation of powers apart from or in addition to the value of the two adjacent principles.[47] Waldron comments reflecting on the interrelationship and differences of the three principles in the following apt words:

> The importance of the Separation of Powers principle is predicted on the vital distinction between various functions of governance – legislative, adjudicative, and executive – considered in and of themselves, and the vitality

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41 ibid 438.

42 Carl J Friedrich, *Constitutional Government and Democracy* (4th edn) 184. Quoted in Mahmudul Islam (n 4) 90.

43 Waldron (n 11) 433.

44 The Constitution 16th Amendment Case (n 5) 265.

45 Waldron (n 11) 433-34.

46 ibid 434.

47 Waldron elaborates the two vital components: "So, to anticipate briefly: the question is what, specifically, is the point of the separation of powers? And the answer I shall give is two-fold. I look first to the *integrity* of each of the distinguished powers or functions – the dignity of legislation, the independence of the courts, and the authority of the executive, each understood as having its own role to play in the practices of the state. Secondly, I look to the value of *articulated*, as opposed to undifferentiated, modes of governance. The idea is instead of just an undifferentiated political decision to do something about X, there is an insistence that anything we do to X or about X must be preceded by an exercise of legislative power that lays down a general rule applying to everyone, not just X, and a judicial proceeding that makes a determination that X's conduct in particular falls within the ambit of that rule, and so on. Apart from the integrity of each of these phases, there is a sense that power is better exercised, or exercised more respectfully so far as its subjects are concerned, when it proceeds in this orderly sequence" (emphasis added). Waldron, ibid 434-35. On the value of the two components, Waldron writes elsewhere: "For even if the principle is dying a sclerotic death, even if it misconceives the character of modern political institutions, still it points to something that was once deemed valuable – namely, *articulated government through successive phases of governance each of which maintains its own integrity* – and may still be valuable even though we cannot have the benefit of it anymore" (emphasis original). Waldron, ibid 467.

> of that distinction may be of little interest – certainly little inherent interest – from the point of view of Division of Power and Checks and Balances. All that the Division of Power Principle cares about is that power be dispersed; it does not care particularly what the dispersed powers are. And all that Checks and Balances cares about is that power checks power or be required to concur in another power's exercise; again what the powers are that counterpoise each other in this balance is of incidental interest.[48]

The above analysis adequately reveals the particular traits of the principle of 'separation of powers' distinguished from the adjacent principles of 'division of powers' and 'checks and balances'. It has also been observed that the principle of 'separation of powers' does not work alone but along with the enumerated adjacent principles. Maybe that the Bangladesh Constitution would not be an exception to this. But before moving to analyze the features of 'separation of powers' of Bangladesh Constitution, it would be profitable to reflect on the 'separation of powers' as maintained in the Constitutions of UK and USA – two paradigm examples of modern constitutionalism.

5.2. Separation of Powers in the Constitutions of UK and USA

5.2.1. In the UK Constitution

In England, the theorists located sovereignty in "king-in-Parliament".[49] Hence, governmental powers were classified in terms of the activities of the "King-in-Parliament".[50] Legislative power consisted of enacting, amending, or repealing statutes. Executive power included not merely the ministerial task of carrying out laws but also broad discretionary authority to conduct foreign affairs, and to appoint civil and military officers.[51] Executive power extended to judicial processes including the King's Bench's discretionary authority to issue writs at the instance of any individual who claimed that the government's conduct was illegal.[52] However, despite the absence of a distinct judicial power, courts were independent and had discrete function – the application of pre-existing law to a particular set of facts. And this

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48 ibid 442.

49 They located sovereignty in the People only during revolutions. Once People had consented to or formed a new government, sovereignty re-vested in the "King-in-Parliament". See, Pushaw (n 12) 400.

50 Pushaw, ibid, 400-01.

51 ibid.

52 The prerogative writs were of these five types: writs of prohibition, *certiorari*, *mandamus*, *quo warranto*, and *habeas corpus*.

function was exercised both in common law cases and in actions brought under the prerogative writs.[53]

Montesquieu conceptualized 'judicial power' as a distinct component of government and not merely as an extension of executive authority.[54] Pushaw reflects on how Montesquieu explained why it had to be kept separate:

> First, judicial and executive power had to be divorced to avoid a tyranny in which "the judge might behave with violence and oppression". Second, if judicial power were "joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control", because decisions would reflect the judge's personal opinion rather than existing legal rules.[55]

William Blackstone reiterated Montesquieu's ideas about separating judicial from executive and legislative power, but defended England's permanent, independent courts.[56] English theorists accepted the idea that governmental power should be divided and that different people should exercise the major governmental functions. Blackstone indeed adapted Montesquieu's strict doctrine, reworking his central idea to incorporate the theory of mixed government.[57] In the mixed government, monarchical, aristocratic and democratic elements were joined and held in equilibrium, rather than strictly separated.[58] Thus, only partial separation of powers was required to achieve a mixed and balanced constitutional structure.[59] Ivor Jennings also interpreted Montesquieu's words to mean not that the legislature and the executive should have no influence over the other, but rather that neither should exercise the power of the other.[60]

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53 Pushaw (n 12) 402.

54 ibid 405.

55 ibid 406. It is interesting to note that even judicial power may pose threat to liberty. Pushaw writes, "Even if cabined, however, judicial power potentially posed the greatest threat to liberty. While the political branches formulated general rules, only judicial power –which applied that law to specific circumstances – could lead directly to a loss of freedom. Therefore, it had to (1) be vested not in permanent tribunals but in temporary juries; (2) follow established judicial procedures; and (3) result in final judgments based on the letter of the law. These strict controls would render judicial power insignificant compare to legislative and executive authority (internal citation omitted). See, Pushaw, ibid.

56 Pushaw, ibid 406.

57 Hilaire Barnett, *Constitutional and Administrative Law* (4th edn, Cavendish Publishing 2002) 106.

58 *Md Aftabuddin* (n 6) 41. See also Pushaw (n 12) 404 ("Balanced government was related to the ancient theory that mixing the basic forms of government – monarchy, aristocracy, and democracy (e.g., King, Lords, and Commons) – ensured stability and protected liberty). Pushaw further observes that the English 'separation of powers' that establishes mixed government discourages rash or arbitrary action and encourages consultation and cooperation. Pushaw, ibid.

59 Barnett (n 57) 106-07.

60 ibid 106. Pushaw aptly elucidates the nature of English system of 'separation of powers': "Eighteenth century theorists like Montesquieu accepted the premise that liberty hinged on keeping government powers

In an attempt to explain the nature of English 'separation of powers', Barnett considers a range of possible hypothetical constitutional arrangements: (a) absolute power residing in one person or body exercising executive, legislative and judicial powers: no separation of powers; (b) power being diffused between three separate bodies exercising separate functions with no overlaps in functions or personnel: pure separation of powers; (c) and, powers and personnel being largely – but not totally – separated with checks and balances in the system to prevent abuse: mixed government and weak separation of powers.[61] Barnett holds that it is to this third category that the Constitution of the United Kingdom most clearly subscribes.[62] Barnett reflects both on the essence of 'separation of powers' as well as the characteristics of English 'separation of powers' in these words:

> The separation of powers doctrine does not insist that there should be three institutions of government each operating in isolation from each other. Indeed, such an arrangement would be unworkable, particularly under a constitution dominated by the sovereignty of parliament. Under such an arrangement, it is essential that there be a sufficient interplay between each institution of the state. For example, it is for the executive, for the most part, to propose legislation for parliament's approval. Once passed into law, Acts of Parliament are upheld by the judiciary. A complete separation of the three institutions could result in legal and constitutional deadlock. Rather than a pure separation of powers, the concept insists that the primary functions of the state should be allocated clearly and that there should be checks to ensure that no institution encroaches significantly upon the function of the other.[63]

In Barnett's view, therefore, there are significant departures from the pure doctrine under the United Kingdom's Constitution, and it must be conceded that, while the doctrine is accorded respect, it is by no means absolute.[64] Barnett summarizes the status of the principle under the UK Constitution:

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separated and in different hands. Nonetheless, they recognized that pure separation among independent, unrestrained branches was unworkable. Consequently, they argued that separation of powers must be complemented by checks and balances, whereby each department had a limited right to review and control the others' actions. For example, the King could share in the legislative power by vetoing bills. Conversely, Parliament could hold executive officials accountable for their administration of the laws and could exercise final judicial power to impeach and punish judges and executive officers (except the king) who had abused their authority. Moreover, the upper legislative chamber, the House of Lords, could reconstitute itself as a "court" and exercise supreme appellate judicial power. Finally, within the legislature, popular and aristocratic bodies checked each other." Pushaw (n 12) 404-05.

61 Barnett (n 57) 107.

62 ibid.

63 ibid.

64 ibid 105.

> *The separation of powers is certainly neither an absolute nor a predominant feature of the British constitution. Nevertheless, it is a concept which is firmly rooted in constitutional tradition and thought.* Judicial assertions of the importance of the doctrine are explainable in light of the constitutional position of judges in relation to parliament. The concept of separation of powers offers the judiciary a protective device both for the protection of the independence of the judiciary and against allegations of judicial intrusion into matters more appropriate to parliament or the executive. The reluctance of judges to be drawn into such matters is reflected particularly strongly in relation to matters of the royal prerogative and parliamentary privilege. *Accordingly, to deny the relevance of some form of separation of powers would be to misconstrue the evidence. The separation of powers is a principle respected under the constitution which exerts its influence on each of the fundamental institutions of the state. While the separation of powers is ill defined and is not accorded absolute respect, it ought not to 'be lightly dismissed'.*[65]

5.2.2. In the US Constitution

The *trias politica* model of 'separation of powers' envisioned by Montesquieu was evolved into a philosophy in the United States Constitution of 1789.[66] The operation of the principle, however, was qualified by a machinery of 'checks and balances'.[67] Writing in defense of such arrangements, Madison in his Federalist No. 47 justified the philosophy of the principle in these words:

> The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, or many and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny. Were the federal Constitution, therefore, really chargeable with this accumulation of power, or with a mixture of powers, having a dangerous tendency to such an accumulation, no further arguments would be necessary to inspire a universal reprobation of the system. I persuade myself, however, that it will be made apparent to everyone that the charge cannot be supported, and that the maxim on which it relies has been totally misconceived and misapplied. N order to form correct ideas on this important subject it will be proper to investigate the sense in which the preservation of liberty requires that the three great departments of power should be separate and distinct.[68]

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65 ibid 133-34 (emphasis added).

66 For *trias politica* model of 'separation of powers', see, *supra*, Chapter 5 (Section 5.1.1.) (p. 151) of the Study.

67 For proximity between 'separation of powers' and the adjacent principle of 'checks and balances', see, *supra*, Chapter 5 (Section 5.1.3.) (p. 158) of the Study.

68 See, *Md Aftabuddin* (n 6) 41. In *Myers vs United States* 272 US 52, 71, L Ed 160, Justice Brandeis also emphasized on precluding *tyranny* when held that "The doctrine of separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power." Waldron sees the justification of the US system of 'separation of powers' and 'checks and balances' in a variety of reasons.

According to Madison, "mankind is moved less by reason than by passion, less by benevolence than by self-interest".[69] As Alexander Hamilton puts it: "Why has government been instituted at all? Because the passions of men will not conform to the dictates of reason and justice without constraint".[70] Separated powers along with checks and balances are paramount among the several "interior" and "exterior" constraints described in the Federalist Nos. 10, 47, and 51.[71] In *Abdul Mannan Bhuiyan,* Abdul Matin J succinctly depicts the nature of US model of 'separation of powers' and 'checks and balances':

> Madison writing in the Federalist stated that the three branches of the federal government were to be separate, each serving as a check upon the other. Although not totally separate, the viability of each branch was guaranteed by giving it sufficient power to defend itself against the actions of the other branches. Furthermore, when any branch overstepped its constitutionally defined role, the other branches could act to check the abuse.[72]

The first three Articles of the US Constitution (Articles I, II, and III) contains broad and general provisions distributing sovereign powers among the three organs of government. Article I vests in Congress "legislative powers" – authority to make rules reflecting the electorate's policy preferences in eighteen areas.[73] Article II vests in President "the executive power" to administer the laws faithfully, and confers eleven other traditional executive functions.[74] Article III vests in federal courts "the judicial power" – the authority to expound pre-existing legal rules in a particular fact situation in nine types of "Cases" and "Controversies".[75]

To quote him: "Indeed, "the great problem to be solved" at the time of the founding "was to design governance institutions that would afford 'practical security' against the excessive concentrations of political power. That was important for a number of reasons: (a) It was important perhaps purely to reduce the amount of power in anyone's hands and thus the amount of damage to liberty or other interests that any fallible or corrupt official might be able to inflict; (b) Or maybe competition between dispersed centers of power might have been thought healthy and productive; (c) Or we may want there to be multiple centers of recourse – many places to which citizens can appeal, when they are not receiving satisfaction from other centers of government; (d) Or perhaps its value was purely symbolic (and no less important that): it was crucial, I think, to republican thought in America to avoid the institution, internally of any sovereign power within the Constitution, comparable to the "sovereignty" of the British Parliament" (internal citation omitted). Waldron (n 11) 440.

69 See, *Abdul Mannan Bhuiyan v State* (2008) 60 DLR (AD) 54 (hereafter *Abdul Mannan Bhuiyan*).

70 ibid (Federalist No. 15).

71 ibid 54.

72 ibid.

73 Pushaw (n 12) 415-16.

74 ibid 416-17.

75 ibid 417-18.

The above tripartism of 'separation of powers' was qualified by the provisions of 'checks and balances', that is, "specific, limited rights to share in (or interfere with) the functions of another branch".[76] Pushaw cites the following important examples of the US system of 'checks and balances':

> The Federalists adopted and modified the two classic English checks. First, like the King, the President had discretion to veto legislation, but this power could now be overridden by a two-thirds vote of Congress. Second, the Constitution incorporated British impeachment procedures, authorizing the lower legislative house to impeach executive officials and judges and the upper chamber to exercise judicial power by trying these cases and rendering a final, unreviewable judgment.
>
> The Constitution also required the President to share with the Senate certain powers formerly considered exclusively executive – for example, appointing federal officers and judges and conducting foreign affairs. In short, the politically accountable branches shared responsibility for policymaking.[77]

As to the checks on the judicial department, Pushaw identifies these political constraints on the judiciary: Congress can (a) remove federal judges for misconduct; (b) control federal court personnel and jurisdiction; and (c) spearhead amendments to overturn Supreme Court decisions.[78] These checks together with the nature of judicial power (especially in its inability to impose decisions by force) eliminated any danger of encroachment by the judiciary on the domain of political departments.[79]

In the US constitutional system, a law must be passed by both houses of Congress, approved by the President, and adjudged constitutional by the Court. This structural mechanism (tripartite model of 'separation of powers' accompanied by a system of 'checks and balances') minimizes the likelihood of oppressive laws, thereby promoting liberty.[80] At the same time, the process is not so byzantine as to make the passing, executing, and adjudicating the laws unduly onerous.[81]

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[76] ibid 428.
[77] ibid (internal citation omitted) 428-31.
[78] ibid 433-34.
[79] ibid 434.
[80] ibid.
[81] ibid.

5.3. Separation of Powers Observed in the Bangladesh Constitution

With respect to the US Constitution, Pushaw remarks, "Just as a skeleton cannot be observed but shapes a body, the phrase "separation of powers" cannot be found in the Constitution yet structures the document. Indeed, it was "the sacred maxim" of government."[82] The Study submits that the same is true for the Constitution of Bangladesh also. Under Article 7 of the Constitution, People are the repository of all powers of the Republic. Parts IV, V and VI respectively of the Constitution have created three distinct branches of government i.e. the Executive, the Legislature, and the Judiciary with specific powers and functions assigned to them. The sovereign will of the people, therefore, are expressed through distinct activities of these organs of the government.[83]

While writing for 'separation of powers' of Bangladesh Constitution, Mahmudul Islam observes, "What the Constitution has done can very well be described as an assignment or distribution of the powers or functions of the Republic to the three organs of the government."[84] The author elsewhere perceives somewhat same: "The Constitution provides for separation of powers in the sense that no one organ can transgress the limit set by the Constitution or encroach upon the powers assigned to the other organs. The result is that unless the Constitution has expressly provided otherwise, no one organ can wield the powers of the other organs."[85] These observations of Mahmudul Islam simply describes that powers have been assigned to three distinct branches of government or distribution of powers among the organs as such but do not reflect on the nature of such distribution or the nature of 'separation of powers' contemplated by the Constitution.

To reflect on the nature of 'separation of powers' of Bangladesh Constitution, it is necessary first to ascertain the meaning of "pure" or "strict" or "absolute" separation of powers. In view of Barnett, separation of powers is "pure' when powers are "diffused between three separate bodies exercising separate functions with no overlaps in functions or personnel".[86] Barnett's concise exposition may be supplemented by one statement of Madison that depicts in some detail the meaning of "pure" separation of powers:

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82 ibid (internal citation omitted) 412.
83 For detail of the "Allocation of Sovereign Power", see, *supra*, Chapter 2 (Section 2.1.1.) (p. 40) of the Study.
84 Mahmudul Islam (n 4) 91.
85 ibid 92.
86 See, *supra* texts accompanying note 61.

> The powers delegated by this constitution, are appropriated to the departments to which they are respectively distributed: so that the legislative department shall never exercise the powers vested in the executive or judicial; nor the executive exercise the powers vested in the legislative or judicial; nor the judicial exercise the powers vested in the legislative or executive departments.[87]

It is often said that a "pure" 'separation of powers' in the above meaning is neither possible nor desirable. [88] The Constitutions of United States and Bangladesh are based on the *trias politica* model of separation of powers.[89] Since Montesquieu is the pioneer of this model,[90] the Study should inquire whether Montesquieu at all meant by his *trias politica* model a "pure" or "absolute" 'separation of powers'. It is submitted that Montesquieu himself did not mean by the principle an "absolute" 'separation of powers' among the organs of government. That Montesquieu did not really mean so is evident from this remark of Pushaw: "Eighteenth century theorists like Montesquieu accepted the premise that liberty . . . Nonetheless, they recognized that pure separation among independent, unrestrained branches was unworkable. Consequently, they argued that separation of powers must be complemented by checks and balances, whereby each department had a limited right to review and control the others' actions." [91]

Pushaw's another remark is also noteworthy that point to the same fact that Montesquieu did not mean "absolute" 'separation of powers': "Madison and his colleagues did not simply . . . to prevent one branch from exceeding its limits or usurping another's authority. Nor did they include in the Constitution a provision requiring absolute separation of powers, for Montesquieu and his model government, England, had recognized the "impossibility and inexpediency" of "totally separate and distinct" branches." [92] While writing for the English system of 'checks and balances', Sir Ivor Jennings also said that Montesquieu did not mean that the legislature and the executive should have no influence over the other, but rather that neither should exercise the power of the other.[93]

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87 Pushaw (n 12) 412 (in footnote 93).
88 See, *supra* texts accompanying notes 86 & 87.
89 See, *supra*, Chapter 5 (Section 5.1.1.) (p. 151) of the Study.
90 See *supra* texts accompanying notes 8-10.
91 Pushaw (n 12) 404. For detail, see, *supra* note 60.
92 ibid (internal citation omitted) 427-28.
93 See, Barnett (n 57) 106. See also *supra* text accompanying note 60.

In Bangladesh, the Court initially seems to be confused as to what Montesquieu really meant by 'separation of powers'. Interestingly, the same Judge adopted different meaning of 'separation of powers' as conceived by Montesquieu. In *Abdul Mannan Bhuiyan*, MD Abdul Matin J interpreted Montesquieu's words to mean "absolute" 'separation of powers' when said, "It is true that *there is no such thing as absolute or unqualified separation of power in the sense conceived by Montesquieu* but there is however, a well marked and clear-cut functional division in the business of the Government . . . " [94] In *Md Aftabuddin*, the same Judge held that Montesquieu did not mean "absolute" 'separation of powers' among the organs of government. To quote his lordship:

> From these facts, by which Montesquieu was guided, it may clearly be inferred that in saying "There can be no liberty where the legislative and executive powers are united in the same person or body of magistrates", or "If the power of judging be not separated from the legislative and executive powers", he did not mean that these departments ought to have no partial agency in, or no control over, the acts of each other, His meaning, as his own words import, and still more conclusively as illustrated by the example in his eye, can amount to no more than this, that where the whole power of one department is exercised by the same hands which possess the whole power of another department, the fundamental principles of a free constitution are subverted.[95]

It is submitted that the view of Abdul Matin J in *Md Aftabuddin* [96] as opposed to the view in *Abdul Mannan Bhuiyan* [97] correctly represents the meaning of 'separation of powers' or the Montesquieu's *trias politica* model of 'separation of powers'.[98] This view resembles with the views of Pushaw [99] and Ivor Jennings [100] as to Montesquieu's understanding of the principle. Abdul Matin J cites some provisions of Bangladesh Constitution to show departure from pure application of the principle in its jurisdiction:

> In the scheme of our Constitution the division of power is not absolute. The executive can legislate under certain circumstances. Reference may be made to Articles 62(2), 93 and 115. Parliament cannot make law, relating to the appointment of judicial officers and magistrates exercising the judicial functions which has to be provided for by the President under Article 115 of

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94 *Abdul Mannan Bhuiyan* (n 69) 54 (emphasis added).
95 *Md Aftabuddin* (n 6) 42.
96 ibid.
97 See, *supra* text accompanying note 94.
98 For *trias politica* model of 'separation of powers', see, *supra*, Chapter 5 (Section 5.1.1.) of the Study.
99 See, *supra* texts accompanying notes 91 & 92.
100 See, *supra* text accompanying note 93.

> the Constitution. On the other hand, Parliament can cause a fall of executive Government and impeach the President. The Parliament through its standing committees can review the execution of laws and investigate and enquire into the activities or administration of ministers. Reference may be made to Article 76. Judiciary, on the other hand, under Articles 107 and 113 make rules. The Parliament at the same time can adjudicate certain disputes and hold the power to its own privileges and to punish those who offend against them.[101]

The above-quoted few examples are only exceptions to the rule of 'separation of powers' of Bangladesh Constitution.[102] Since powers and responsibilities of the government are too complex and interrelated to be neatly compartmentalized, no democratic system exists with an absolute separation of powers or an absolute lack of separation of powers. Bangladesh Supreme Court rightly observed in the *Constitution 16th Amendment Case*:

> It is the basic postulate under the Constitution of Bangladesh that the legal sovereign powers have been distributed to the legislature to make law; the executive to implement the law; and the judiciary to interpret the law within the limit set by the Constitution. Complete separation of power is no where found in the constitutional system of the world. Some overlaps are inevitable in the street of application of this doctrine. The judiciary, the executive and the legislature have generally managed to work out a compromise formula. It is hope that there will never arise a stalemate situation in which one organ's function have been completely subverted by the others.[103]

The above analysis adequate reveals that the principle of 'separation of powers' is one of the basic features of the Bangladesh Constitution. Like any other jurisdiction including the jurisdictions of UK and USA,[104] the principle operates in our jurisdiction subject to some exceptions.[105] However, due to those exceptions, it cannot be said that the principle does not exist or is not any salient feature of Bangladeshi jurisdiction. It may thus be concluded that the Bangladesh Constitution maintains 'separation of powers' among organs of government to substantiate a claim for 'political question'.[106]

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[101] *Md Aftabuddin* (n 6) 43. The learned judge also noted that "the separation doctrine means *functional separation* and when there is no conflict in the function i.e. if the secretary is not functioning as judge at the same time there is no conflict with the doctrine." See, ibid (emphasis added). For 'functional separation', see, *supra*, Chapter 5 (Section 5.1.2.) (p. 153) of the Study.

[102] ibid. When it states that the executive can legislate under certain circumstance; or, that the parliament cannot make law relating to the appointment of judicial officers; or, that the judiciary can make rules, these are simply exceptions to the rigid rule of 'separation of powers'. Whereas when it says that parliament can cause a fall of the executive and impeach the President, that is an example of the operation of the adjacent principle of 'checks and balances'.

[103] *The Constitution 16th Amendment Case* (n 5) 266.

[104] For 'separation of powers' in UK and USA, see, *supra*, Chapter 5 (Section 5.2.) (p. 160) of the Study.

[105] See, for example, *supra* text accompanying note 101. See also *supra* note 102.

[106] See, *supra*, Chapter 1 (note 89 and accompanying text) (p. 31) of the Study.

Summary and Assessment

The idea of ‘separation of powers’ when first emerged in mid-seventeenth and eighteenth centuries meant only separation of executive from legislative function since judicial function was viewed merely as an extension of the executive authority. It was Montesquieu who first conceptualized judicial function as distinguished from executive function. With this the *trias politica* model of ‘separation of powers’ emerged, that is, the Legislative, the Executive, and the Judicial. The theorists provided three main rationales in justifying the principle: the principle (a) avoids tyranny; (b) promotes liberty of the individuals; and, (c) brings efficiency in administering functions of government.

The *trias politica* model of ‘separation of powers’ basically means or embraces a *functional* separation of powers and functions among the organs of government. The *functional* separation not only means an abstract identification and awareness of differentiated functions but also insists upon an actual separation of institution, office, and personnel of the government. In actual functioning of the business of government, the principle of ‘separation of powers’ is not found to operate in isolation of but in conjunction with two other adjacent principles, i.e., the principles of ‘division of powers’ and ‘checks and balances’. The ‘division of powers’ principle functions to avoid too much concentration of power in the hands of any one person, group, or agency. The two houses (bicameralism) of legislative assembly is a standard familiar example of the “division of powers’ principle. The principle of ‘checks and balances’ operates to ensure that the three departments have partial agency or control over the acts of each other.

The principle of ‘separation of powers’ even in the sense in which it was conceived by Montesquieu did not mean an “absolute” separation of powers. Separation of powers is “absolute” when powers are distributed among three separate bodies and they exercise separate functions with no overlaps in functions or personnel. Separation of powers in this strict sense is neither possible nor desirable and nowhere found to operate in modern world including UK and USA. Instead, the UK and US governments are mostly characterized by the operation of all three adjacent principles of ‘separation of powers’, division of powers’, and ‘checks and balances’.

Like other Constitutions of the world, the Bangladesh Constitution also divides governmental powers and assigns them to three distinct departments, that is, the Executive, the Legislature, and the Judiciary. There are, however, exceptions to the rigid rule of 'separation of powers' and provision of 'checks and balances'. Exceptions do not deny but prove the rule. Recall, the Study grounds the political question doctrine's basis in the constitutional principle of 'separation of powers'[107] and this Chapter establishes that Bangladesh Constitution preserves such 'separation of powers' among the organs of government to maintain a claim for 'political question'.[108]

[107] See, *supra*, Chapter 1 (notes 2, 3 and 4 and accompanying texts) (pp. 13-14) of the Study.
[108] See, *supra* note 106.

CHAPTER 6
PRESENTING A THEORETICAL FRAMEWORK FOR THE DOCTRINE IN BANGLADESH: UNBOUNDED DISCRETION

Introduction

This Chapter comprises of four Sections. Section 6.1. seeks to ascertain the meaning of discretionary powers government. The Section in particular determines whether executive's satisfaction of facts in the promulgation of Ordinances and proclamation of emergency involve exercise of discretionary powers on the part of the political branches of government. It considers also the case of legislative authority of making law. Section 6.2. first identifies the criteria to distinguish between bounded and unbounded discretionary powers of government. It then considers specific issues of the Bangladesh Constitution, such as, the prerogative of mercy, appointment powers of the executive including the power of appointment of Judges of the Supreme Court, political branches' power in relation to war, foreign relations powers of the executive, directing the legislature to enact law, and parliament's authority to amend the Constitution. The Study decides whether these instances of the exercise of power by the political branches involve unbounded discretion and as such may be termed as 'political questions' of the Constitution. Section 6.3. establishes that 'political question' as defined in this Study or founded on the idea of 'unbounded discretion' does not contradict 'rule of law'.[1] Section 6.4. justifies political accountability only of the political departments for political questions.[2] It argues that Supreme Court's power of judicial review is not absolute and makes inroad into the domain of political departments when decides on political questions.[3]

6.1. Understanding the Discretionary Powers of Government

6.1.1. Meaning of a Discretionary Power

A power may be said to be a discretionary one when the authority conferred with such power may have an option to decide one thing instead of the other. Discretion, therefore, is closely

1 See, *supra*, Chapter 1 (note 90 and accompanying text) (p. 31) of the Study.
2 See, *supra*, Chapter 1 (note 91 and accompanying text) (p.31) of the Study.
3 See, *supra*, Chapter 1 (note 92 and accompanying text) (p. 31) of the Study.

associated with choice. Authors who have pursued the subject emphasize the same as the characteristic mark of discretion. Davis, for example, says 'a public officer has discretion whenever the effective limits on his power leave him free to make a *choice* among possible courses of action or inaction'.[4] In the same vein, Galligan observes that discretion in its broadest sense denotes an area of autonomy within which decision-making is to some extent a matter of personal judgment and autonomy.[5] Hawkins regards discretion as the space, as it were, between legal rules in which legal actors may exercise *choice* – which may be formally granted or may be assumed.[6]

For any legal system it should be true that discretionary powers reside at all levels of the legal system from the legislature to field level executives and allows the respective functionaries to exercise their choices in decision-making.[7] However, discretionary powers would be much more visible in the everyday discretionary behaviour of judges and other public officials who act under relevant legislation.[8] A statutory conferment of discretionary power upon courts and tribunals may be considered here to apprehend fully the substance of a discretionary power. For example, a statute may provide that if a person is found with possession of stolen goods the court *may* presume the person to be a thief. Since here the expression used by the statute is '*may*', one can say that the court has a discretion in the matter because the court on the basis of the fact of possession of stolen goods may regard the person as a thief or may otherwise call for proof of such person's being a thief from the prosecution. Similarly, penal statutes of every state on many occasions provide that the court may impose fine or imprisonment or both as punishment for an offence. Here again, one can say that the court has been given discretionary power since it may convict the offender only with fine or with imprisonment or with both.[9]

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4 Kenneth Culp Davis, *Discretionary Justice: A Preliminary Inquiry* (Louisiana State University Press, 1969) 4.

5 Denis Galligan, *Discretionary Powers – A Legal Study of Official Discretion* (Clarendon Press, 1986) 21.

6 Keith Hawkins, 'The Use of Legal Discretion: Perspective from Law and Social Science' in Keith Hawkins (ed), *The Uses of Discretion* (Clarendon Press, 1992) 11.

7 Mohammad Nazmuzzaman Bhuian, 'Discretion in Translating Law into Action: A Jurisprudential Analysis' (2012) 23 (2) *Dhaka University Law Journal* 86. See also Hawkins (n 6) 12 (as to what discretionary powers do, Hawkins observes that the discretionary power not only permits the realization of the law's broad purposes, but also allows officials sometimes to distort the spirit of law or to assume a legal authority they do not in fact possess).

8 Nazmuzzaman Bhuian, ibid.

9 The author provided these examples also in his earlier work on the subject, see, Moha. Waheduzzaman, 'The Domain of the Doctrine of Political Question in Constitutional Litigation: Bangladesh Constitution in Context' (2017) 17 (1 & 2) *Bangladesh Journal of Law* 26.

Bhuian rightly appreciates that discretionary powers are much more visible in the everyday discretionary behaviour of judges and other public officials who act under relevant legislation.[10] But discretionary powers of this kind exercised under statutory law are the subject matter of administrative law only. On the contrary, political questions are truly the subject matter of constitutional law since they are "constitutional issues committed to the unbounded discretion of the political branches of government."[11] Political questions thus involve constitutional discretion as opposed to statutory discretion; furthermore, they concern the discretionary authority of political branches of government (the executive or the legislative) as opposed to ordinary discretionary power exercised by judges [12] or field level executive officials.

In view of the above, the Study maintains distinction between constitutional discretion of highest dignitaries of the state i.e., the executive and the legislative and statutory discretion of other public officials of the state.[13] While the latter category of discretionary power may be perceived to reflect fully on the meaning, nature, kinds and scope of a discretionary power, it is only the former category of discretionary power that leaves a room for a political question to arise. Hence, the Study now proceeds to reflect on this category of discretionary power with reference to Bangladesh Constitution.

6.1.2. Understanding Constitutional Discretion of Political Branches

To perceive constitutional discretion of political branches, the Study takes into account by way of example three specific issues of Bangladesh Constitution: ordinance making power of the President, emergency power of the President, and the legislative authority of making law. The first two instances of the power of the President would be discussed under a common head – executive's satisfaction of facts.

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[10] See, *supra* text accompanying note 8.

[11] For definition/meaning of political question, see, *supra*, Chapter 2 (Section 2.3.1.) (p 71) of the Study.

[12] However, it should be borne in mind that when Judges of any Court/Superior Court exercise discretionary power under the Constitution, that is no doubt an exercise of constitutional discretion. But political questions relate to the discretionary power of political branches of government only, i.e., the executive and the legislative, and not the constitutional discretionary powers of any Court/ Superior Court.

[13] See, *supra*, Chapter 1 (note 99 and the accompanying text) (p.34) of the Study. At this stage, one may become curious to know the distinction between political and administrative executives. For such distinction, see, *Secretary, Ministry of Finance, Government of Bangladesh v Masdar Hossain & others* (2000) 20 BLD (AD) 104, 127 (hereafter *Masdar Hossain*).

6.1.2.1. Executive's Satisfaction of Facts (Ordinances and Emergency)

Article 93 of Bangladesh Constitution empowers the President to promulgate Ordinances if he is satisfied that circumstances exist which render immediate action necessary. Similarly, Article 141A of the Constitution authorizes the President to issue Proclamation of Emergency if he is satisfied that grave emergency exists in which the security or economic life of Bangladesh is threatened due to war or external aggression or internal disturbance. These provisions of the said Articles relate to satisfaction of the executive as to the existence of certain facts. The vexed question is whether the executive's satisfaction as to the existence of these facts justiciable?

This Study envisages two plausible answers or rather the explanations for the above posed question: (a) traditional approach (b) political question approach. The traditional approach holds the issue to be justiciable. On the contrary, an approach based on political question argument may hold otherwise and would reflect on the discretionary authority of the executive involved in the issue. The Study thoroughly considers both the approaches as provided below.

6.1.2.1.1. Traditional Approach

For convenience of discussion, the Study deals the same issue involved in promulgation of Ordinances and proclamation of emergency under separate headings: (i) ordinance making power and (ii) emergency power.[14]

Ordinance Making Power. Article 93 of Bangladesh Constitution empowers the President to promulgate Ordinances. But such power is not unfettered, the exercise of which is always subject to certain conditions and limitations. A careful reading of the provisions contained in the Article reveals at least three limitations: (a) non-existence of parliament or absence of parliamentary session; (b) the existence of circumstances rendering immediate action necessary; and (c) making and promulgating the Ordinance proportionate to the needs of such circumstances. Question has been raised as to whether the satisfaction of the President regarding the existence of the emergent situation is justiciable or not.

[14] The author expressed this traditional view in his earlier work on the subject, see, Waheduzzaman (n 9) 26-30. This Study presents the same view with necessary adjustments and minor improvements.

In *Bhagat Singh v Emperor* [15] the petitioners challenged the existence of the emergent situation for validity of an Ordinance promulgated by the Governor-General under section 72 of the Government of India Act, 1919. The Privy Council held that the satisfaction of the Governor-General regarding existence of emergent situation is not justiciable. Privy Council reasoned that emergency demands immediate action, and that action is prescribed to be taken by the Governor-General. Emergency connotes a state of matters calling for drastic action which is to be judged as such by the Governor-General and him alone. Any other view, Privy Council emphasized, would render utterly inept the whole provision.

The same question was raised in Indian jurisdiction in the leading case of *AK Roy v India*.[16] The Indian Supreme Court rejecting the government's plea of political question held in express terms that "judicial review is not totally excluded in regard to the question relating to the President's satisfaction."

Dealing with the same issue, the Bangladesh Supreme Court in *Ahsanullah v Bangladesh* [17] held that the satisfaction of the President regarding existence of the circumstances requiring immediate action cannot be questioned in Court. However, in the more recent case of *Idrisur Rahman v Bangladesh* [18] the Court has observed that the President's satisfaction regarding the existence of an emergent situation in the matter of promulgating Ordinances is justiciable. According to traditional approach, the view of the Court in *Idrisur Rahman* represents the correct statement of law in this regard under our constitutional dispensation and the decision held in *Ahsanullah* regarding the question of justiciability of Presidential satisfaction is erroneous. The reasons for the view are as stated below.

True, Ordinance making is an exercise of the legislative power. But that does not make President's power of law making similar in effect to that of the power of Parliament. Life of an Ordinance is very limited and always subject to the approval of Parliament. Parliament's power of legislation is not subject to any condition precedent, but the power of the President to promulgate Ordinance is subject to some conditions precedent and the fulfillment of a

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15 AIR 1931 PC 111.
16 AIR 1982 SC 710 (hereafter *AK Roy*).
17 (1992) 44 DLR (HCD) 179 (hereafter *Ahsanullah*). For detail on *Ahsanullah*, see, *supra*, Chapter 4 (Section 4.1.3.) (p. 134) of the Study.
18 (2008) 60 DLR (HCD) 714 (hereafter *Idrisur Rahman*). For detail on *Idrisur Rahman*, see, *supra*, Chapter 4 (Section 4.1.3.) (p. 134) of the Study.

condition precedent is ordinarily justiciable.[19] Again Parliament having the plenary power of legislation, a law enacted by Parliament cannot be set aside on the ground of *mala fide* – it is only a question of competence and the issue of motive is generally irrelevant. On the other hand, any action taken by the executive government can be challenged on the ground of *mala fide*. Therefore, the power of legislation by the executive being conditional the issue of *mala fide* or collateral purpose cannot be excluded.

The Supreme Court of Bangladesh in *Idrisur Rahman* [20] itself has approved some reasons as to why the power of the President to promulgate Ordinance under Article 93 should be *justiciable*. *Firstly*, the President acts as an executive when he promulgates an Ordinance; *secondly*, there is no ouster clause of jurisdiction in Article 93 like Article 48(3), 78(1), 81(3) of the Constitution and *thirdly*, Article 93 says about proportionality which inherently requires *objective* satisfaction.[21]

However, the Court may follow the guidelines suggested by the Indian Supreme Court while dealing with the question of Presidential satisfaction in relation to the promulgation of an Ordinance:

> When an Ordinance is challenged on the ground of absence of emergency, the court will start with a presumption of the existence of an emergency and the person who challenges the Ordinance will have a great burden of showing the absence of emergency which is not easily discharged as the executive's assertion of the existence of emergency will be given due and proper weight. Every casual and passing challenge to the existence of the necessary circumstances cannot be entertained.[22]

But as to the core question of justiciability of Presidential satisfaction in the exercise of the power of judicial review of the Court, the traditional approach would fully endorse the view of Mahmudul Islam expressed in the following words:

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19 SM Seervai, *Constitutional Law of India* (3rd ed) 826.

20 *Idrisur Rahman* (n 18).

21 ibid 725, 737 (emphasis added). See also the contentions of Ajmalul Hossain, QC (the learned counsel argues that the power under Article 93 is very limited for the executive, which is transient in nature. This is a residual legislative power delegated by the Constitution to the President. He further observes that in developed democracies like UK, USA, and Australia, there is no provision for Ordinance making by the head of the state. Ordinance making is therefore, not the norm of democracy but an exception. Ordinance making power, therefore, should be exercised sparingly and only in rare situation and circumstances specified under Article 93). ibid 724.

22 *AK Roy* (n 16) 725.

> Under our constitutional dispensation, the requisite satisfaction is really that of the executive government on whose advice the President has to act and there is no reason why this satisfaction like all satisfaction of the executive should not be justiciable and why an Ordinance shall not be declared void if it becomes absolutely clear that there was no emergency or that it was promulgated mala fide.[23]

Abovementioned reasons and observations of the learned judges and authors adequately explain why under the traditional approach there should not be any reason to hold the satisfaction of the President in the matter of promulgating Ordinance non-justiciable. In short, the satisfaction of the President is *objective* satisfaction which is justiciable and can be questioned by the Court in the exercise of its power of judicial review. Therefore, "if the executive promulgates an Ordinance where on the face of it there was no necessity of taking immediate action, the Supreme Court has the power, nay the duty, to prevent the executive from overstepping the limits set by the Constitution."[24]

Emergency Power. Article 141A of Bangladesh Constitution authorises the President to issue a proclamation of emergency if he is satisfied that a grave emergency exists in which either the security or the economic life of Bangladesh or any part thereof is threatened by (a) war or external aggression or (b) internal disturbance. Thus, the validity of a proclamation of emergency under the said Article depends upon the satisfaction of the executive about the existence of two things: (i) there is war, external aggression or internal disturbance and (ii) security or economic life of Bangladesh or any part thereof is threatened by such war, external aggression or internal disturbance. The question is whether the satisfaction of the President as to the existence of the two things is justiciable.

The traditional approach would hold that the satisfaction of the President being in reality the satisfaction of the Prime Minister and the Cabinet is not outside the purview of judicial scrutiny. And the Presidential satisfaction under Article 141A should be justiciable for the same reason the satisfaction of the President in respect of emergent need for promulgating an Ordinance under Article 93 is justiciable.[25]

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[23] Mahmudul Islam, *Constitutional Law of Bangladesh* (3rd edn, Mullick Brothers 2012) 422.
[24] ibid 421.
[25] See, *supra* texts accompanying notes 14-24.

In *Teh Cheng Poh v Public Prosecutor* [26] the court dealt with the power of a Ruler under the Malaysian Constitution to make certain proclamations. Regarding the question of validity of such a proclamation, Lord Diplock observed that the emergency being a condition precedent to the exercise of the power, the validity of the proclamation of emergency can be challenged on the ground that there was no satisfaction at all or that it was wholly *mala fide* or based on totally irrelevant or extraneous grounds. Dealing with the question whether the court is powerless when the Ruler fails to revoke the proclamation, Lord Diplock further observed that if failure to exercise his power of revocation would be an abuse of his discretion, *mandamus* could be issued against the members of the cabinet requiring them to advise (the Ruler) to revoke the proclamation.[27]

Under traditional approach, there would be no reason why the abovementioned observations of *Teh Cheng Poh* should not be applicable in our constitutional dispensation. However, it should be kept in mind that since Constitution has committed the matter to the power of the executive and parliament has been given authority to approve or disapprove it, the Court should not lightly deal with the decision of the executive in this regard and should be very cautious in upsetting the decision of the executive in respect of both issue and revocation of the proclamation of emergency.[28] But Court's jurisdiction to issue appropriate writs cannot be questioned where it is plainly clear that there was no emergency at all or that the emergency has ceased to exist.[29]

Thus, according to traditional approach, the power of the President in relation to emergency and promulgation of Ordinances are not discretionary powers in the sense of deciding one instead of another but powers with predicate conditions. Satisfaction of the President regarding the existence of the prescribed conditions or circumstances is understood to be *objective* and hence *justiciable* in a court of law. In view of this approach, the doctrine of political question, therefore, cannot have any relevance in relation to these provisions of our Constitution. However, a political question approach to the issues may simply provide the contrary scenario as shown below.

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[26] [1980] AC 458.
[27] ibid 473.
[28] Mahmudul Islam (n 23) 433, 434.
[29] ibid 434.

6.1.2.1.2. Political Question Approach

Article 93 speaks of promulgating Ordinances when "circumstances exit which render immediate action necessary" and Article 141A of issuing proclamation of emergency when "grave emergency exists" in which the security or economic life of Bangladesh, or any part thereof, is threatened by war or external aggression or internal disturbances. Both Articles involve determination of facts upon whose existence the power may be exercised. The Constitution vests the task of determining such facts upon Executive – a political organ of the government.

Determination of facts of the abovementioned kind is different from facts which anyone including courts may take notice of. Article 93 itself mentions such kind of a fact as condition precedent for exercise of power under the Article: it authorizes the President to promulgate Ordinances only when "Parliament stands dissolved or is not in session". Whether parliament stands dissolved or not or whether it is in session or not, these are facts very much visible and known to all including courts. Any Ordinances promulgated in contravention of this express provision may be declared null and void by the Supreme Court.

On the contrary, the determination of circumstances that require immediate action necessary or the determination of whether national security or economic life of the people is threatened requiring proclamation of an emergency are no doubt facts, but they are not as simple facts as merely like the one of taking a judicial notice of whether parliament is dissolved or not or whether it is in session or not. Facts like "grave emergency" or "circumstances requiring immediate action" may in fact depend on the existence or non-existence of other facts. The decision-makers may be required to take into account a wide variety of information, which may be either reliable or instead may be of questionable reliability, accuracy, or relevance. A wide spectrum of political and practical considerations should be taken into account; they may be needed to go into the roots of the context and situation to reach the ultimate decision. The Constitution has entrusted these critical areas of responsibility with the political branches of government.

Now, in what sense the executive's decision in promulgating Ordinances or proclaiming emergencies may be challenged in a court of law? The petitioner may argue that the government has failed *to* consider all relevant factors or *to not* consider irrelevant factors in

reaching the decision. Alternatively, he may argue that there was no satisfaction at all or that the decision was wholly *mala fide* or based on totally extraneous grounds. All these grounds of challenge may rest under one umbrella ground that the decision of the government has not been reasonable. This is challenging governmental action on the ground of reasonableness or seeking judicial involvement on the basis of "reasonableness" as an independent ground for judicial review.

This Study does not dispute the justiciability of "reasonableness" as a norm but contends that "reasonableness" as ground of judicial review should be distinguished from "reasonableness" as part of substantive law in the first place. The terms 'reasonable man', 'reasonable manner', 'reasonable amount of time', and the like, appear in penal law, law of contracts, tort law, family law, property law, law of adjudication and evidence and so on.[30] Indeed, reasonability stands at the very heart of the law of tort and penal law when they deal particularly tortious negligence or criminal negligence.[31] In these instances, the norm "reasonableness" form part of the respective substantive laws themselves and it cannot be said that tortious negligence or criminal negligence are not normatively justiciable because they incorporate a reasonableness requirement.[32] Furthermore, in these cases "the prohibitions on conduct are not generally applicable only to "extremely" unreasonable behaviour or "arbitrary and capricious" conduct; rather, the legal prohibition relates to every deviation from the substantive standard of reasonability."[33]

The norm "reasonableness' forms part not only of the substantive law of ordinary statutes but also of constitutional law. In the Bangladesh Constitution, "reasonableness", for example, appears very prominently in the context of some fundamental rights: doctrine of reasonable classification in right to equality (Articles 27, 28 and 29); reasonable and non-arbitrary law in right to protection of law (Article 31); imposition of reasonable restrictions on certain fundament rights (Articles 36, 37, 38, 39 and 43) etc. In these Articles, the term 'reasonable' form part of the substantive law of those relevant fundamental rights.

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30 Ariel L. Bendor, 'Are There Any Limits To Justiciability? The Jurisprudential And Constitutional Controversy In Light Of The Israeli And American Experience' (1997) 7 (2) *Ind. Int'l &Comp. L. Rev.* 330.
31 ibid 368.
32 ibid.
33 ibid 371 (internal citation omitted).

This Study distinguishes reasonableness as part of the requirement of substantive law (of ordinary statutes or of constitutional law) from reasonableness as an independent ground for judicial review. Political question relates not to reasonableness as part of the requirement of substantive law but to reasonableness review of governmental decisions. If accurately perceived, the challenges pertaining to determination of facts under Articles 93 and 141A basically involve a reasonableness review of executive branch's decision as opposed to deciding upon reasonableness as part of the substantive law of Ordinances or emergencies since no such requirement has really been included under the said Articles in the way we see reasonableness sometimes form part of the ordinary law or of the constitutional law as has just been seen above.

So, the question is not whether courts are capable of deciding on "reasonableness" but on maintaining distinction between reasonableness as an independent ground of judicial review and reasonableness as part of substantive law in the first place.[34] True, this analysis is helpful for conceptual clarity, but it does not actually explain why reasonableness review of political branches' decision should be impermissible when the constitutional issue is a political question. The question would be more begging when one knows that reasonableness review of statutory bodies' decisions is now a common phenomenon in administrative law. Indeed, courts routinely perform the task to control administrative discretion or check arbitrariness in administration.

Discretion generally would mean choosing from among the various available alternatives without reference to any pre-determined rules/criteria no matter how fanciful that choice may be. However, since administrative discretion is subject to the judicial review power of courts, statutory discretion means (or, should mean) choosing from among the various available alternatives but with reference to the rules of reasons and justice and not according to personal whims.[35] Where the statutory body is endowed with legislative power in the form of delegated legislation, there could be certain judicial and parliamentary control.[36] Where it is

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[34] See, *supra*, Chapter 1 (texts accompanying note 100) (p. 35) of the Study.

[35] See, *Sharp v Wakefield* 1891 AC 173 (Such exercise is not to be arbitrary, vague and fanciful, but legal and regular); Lord Denning in *Master of Rolls in Breen v Amalgamated Engineering Union* (1971) 2 QB 175, 190 ("The discretion of a statutory body is never unfettered. It is a discretion which is to be exercised according to law. That means at least this: the statutory body must be guided by relevant considerations and not by irrelevant. If its decision is influenced by extraneous considerations which it ought not to have taken into account, then the decision cannot stand").

[36] For example, one paramount principle of judicial control over delegated legislation is that the delegating statute cannot effect an impermissible delegation involving delegation of legislative function without laying

endowed with judicial or quasi-judicial powers, there could be some control under Article 102 of the Constitution. But the main difficulty is to regulate the discretion of administration when the power is neither legislative nor judicial. Courts have held administrative discretion to be administrative arbitrariness and hence *ultra vires* or illegal, *inter alia*, on these grounds: taking irrelevant consideration into account;[37] acting for improper purpose;[38] acting *mala fide*;[39] acting unreasonably;[40] acting according to personal whims;[41] acting in a vague manner;[42] and, non-application of mind.[43]

It transpires from the above that "reasonableness" may function as an independent ground (as opposed to part of substantive law) of judicial review of statutory bodies' actions. But the crux of the question is whether the same standard of administrative law should be applicable in constitutional law also or should we distinguish between constitutional discretion of highest dignitaries of the state (i.e., the Executive and the Legislative) and statutory discretion of other public officials of the state? In Indian context, Seervai observes that the jurisdiction of courts may be excluded by the Constitution or by a valid law.[44] A Conclusive presumption may also prevent courts from investigating the real state of things once facts are proved from which the conclusive presumption must be drawn.[45] "Except for such exclusion", Seervai holds, "there is no "prohibited field" for the judiciary in India."[46] Having these observations, Seervai unambiguously favours for applying administrative law principles in constitutional sphere also:

> All constitutional questions turn on whether power has been exceeded or abused. That is a determination which the Court makes. The doctrine of the political question precludes the court from inquiring whether the governmental body has exceeded or abused its powers . . . The fact that the exercise of discretionary power like that conferred by Art. 356 involves questions of policy does not defeat the judicial process, because it leaves open for judicial determination the question whether the policy considerations taken into account are irrelevant or are extraneous or whether the exercise of power is

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down a clear policy or standard. See, *Dr. Nurul Islam v Bangladesh* (1981) BLD (AD) 140; *Ghulam Zaman v AB Khandoker* (1964) 16 DLR 486; *Dacca Picture Palace Ltd. v Pakistan* (1966) 18 DLR 442.

37 *State of UP v Raja Ram Jaiswal* AIR 1985 SC 1108.

38 *Nalini Mohan v District Magistrate* AIR 1951 Cal 346.

39 *Pratap Singh v State of Punjab* AIR 1964 SC 72.

40 *Shafiqul Islam Shimul v Bangladesh* 24 BLD (HCD) 171.

41 *Sharp v Wakefield* 1891 AC 173.

42 *Upid Nareya v Assistant Commissioner of Tax* AIR 1965 SC 212.

43 *Emperor v Shibnath Banerji* AIR 1945 PC 156.

44 SM Seervai, *Constitutional Law of India* (New Delhi 1996) 2641.

45 ibid.

46 ibid 2641-42.

> *mala fide*. To review the exercise of discretionary power is not to substitute the court's opinion or satisfaction for that of the designated authority. For, once it is established that considerations relevant to the exercise of the power have been taken into account; that those considerations are such that a reasonable person would take them into account, and that the action is taken in good faith, then the court will not substitute its own judgment for that of the designated authority.[47]

As opposed to the above view of Seervai, this Study holds that administrative law standards of reasonableness review should not equally be applied upon constitutional dignitaries of the state: briefly stated, there should be distinction between statutory and constitutional discretion of officials of the state. Administrative powers are exercised largely on the basis of ordinary legislation, by the field level executives, and hence do not concern the 'separation of powers' principle of the Constitution. On the contrary, constitutional discretion is exercised by the political branches (the Executive and the Legislative), and hence judicial intrusion into these areas involve the concerns of 'separation of powers' among the three co-equal and co-ordinate branches of government. At this stage, one may argue that 'rule of law' would be at stake if 'discretion' is allowed to be unchecked. The Study holds that if administrative powers are allowed to be unchecked, then, 'rule of law' is at stake and courts must uphold 'rule of law'. On the contrary, if constitutional discretion of elected branches is allowed to be unchecked, then, it is not simply a concern of 'rule of law principle', rather it is a question of balancing between the competing/counteractive principles of 'rule of law' at the one hand and 'separation of powers' at the other hand.[48]

On a proper balance between the above stated principles, it is possible to hold that even reasonableness review of elected branches' decision is impermissible when the constitutional

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[47] ibid 2642. Bendor seems to hold a similar view, see, Bendor (n 30) 343-44. These sayings of Bendor are also interesting, "If the intent is that the governmental authorities are not subject to a legal requirement of reasonableness in the exercise of their political activities, then the court's avoidance of examining the reasonableness of these actions does not occur because of the ostensible non-justiciability of the unreasonableness claim, but rather because unreasonable political acts are legal . . . On the other hand, if the meaning here is that the *legal* obligation of the reasonableness applies to political acts, but that the court is not the proper body to observe the compliance with that obligation, then we are indeed speaking of a contention of non-justiciability , if only in its institutional aspect." Bendor, ibid 329. See also Bendor, ibid 322, 353 (Bendor views discretion as part of substantive law itself and not something relating to the issue of justiciability). See also Louis Henkin, 'Is There a "Political Question" Doctrine?' (1976) 85 *Yale Law Journal* 597 (the substantive law generally provides that in the administration of foreign affairs and national security, the empowered authorities are granted a particularly wide scope of discretion). These observations of Bendor and Henkin either argues against political question doctrine of any kind or that political question has no bearing with the issue of justiciability or that political question needs no separate jurisprudence of its own. This Study holds the contrary view and writes as to why political question should have a jurisprudence of its own, see, *supra*, Chapter 2 (Section 2.3.3.6.) (p. 84) of the Study.

[48] See, *supra*, Chapter 1 (texts accompanying note 85) (p. 30) of the Study.

issue is found to be a political question.[49] In the United States, the principle of a "zone of reasonableness" has been accepted.[50] Under federal law, the Administrative Procedure Act provides, *inter alia*, that: the reviewing court shall . . . (2) hold unlawful and set aside agency action, findings, and conclusions found to be (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. [51] Bendor aptly depicts how the principle of "zone of reasonableness" applies in US system:

> Indeed, in the United States, for a decision to be considered as beyond the zone of reasonableness, constituting thereby an illegitimate exercise of discretion, the decision must generally be found to have been arbitrary and capricious. This is quite a narrow standard and, generally, the court will not substitute its judgment for that of the agency if its decision was based on the relevant factors (and on them only), and if the agency's action does not involve violation of constitutional rights, or of rights established under the legislation through which the agency purports to act.[52]

But interestingly in *Franklin v Massachusetts* it has unambiguously been held that the Administrative Procedure Act and the bases established therein for judicial review do not apply to the President of the United States, unless the matter is set forth in the specific statute upon whose power he operates.[53]

In view of the above critical analysis, the Study holds that there may (or indeed should) be distinction between constitutional discretion of elected branches of government and statutory discretion of other public officials of the state. Discretionary concerns are associated in determining facts under Articles 93 and 141A of the Constitution. Hence, any action challenging exercise of power under these Articles in fact involves a "reasonableness" review of the executive branch's decision. And since discretion is one of a constitutional discretion exercised by one of the elected branches of government, administrative law standards of

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[49] For a more detail of the reasoning for this holding, see, *supra*, Chapter 2 (Section 2.3.3.6.) (particularly texts accompanying notes 193-197) (pp. 85-88) of the Study.

[50] Bendor (n 30) 358.

[51] Administrative Procedure Act, 5 USC, Section 706 (2) (A) (1996). Quoted in Bendor, ibid.

[52] Bendor, ibid 358-59 (internal citation omitted). Bendor beautifully sums up how "reasonableness" acts as an independent ground of judicial review as opposed to being a forming part of substantive law: "That the rule of reasonableness constitutes a law-creating power and jurisdiction for the court to which the agencies and the public are subject, and *not* a substantive law establishing rights and duties, can be gathered from the fact that, to invalidate the decision of a administrative agency, it is insufficient that it be "simply" unreasonable. Rather, what is required, even in Israel, is "extreme" unreasonability, while in the United States, the requirement is for unreasonability expressed through an exercise of discretion that is nothing less than "*arbitrary and capricious*"." (emphasis original). Bendor, ibid 371 (internal citation omitted).

[53] 505 US 788 (1992). Quoted in Bendor, ibid 359 (in footnote 135).

"reasonableness" may (or should) not be acted upon by the Supreme Court to rule on the validity of the executive's action. In other words, the constitutional questions involved in Articles 93 and 141A are susceptible of being political questions provided the discretion is held to be an unbounded one.[54]

Whole things perceived in this way, it may be said that the power of the President to promulgate Ordinances or to proclaim an emergency attracts a political question analysis and depends on the *subjective* (as opposed to *objective* which traditional approach suggests/holds) satisfaction of the President.[55]

6.1.2.2. Legislative Authority of Making Law

Article 65 of the Bangladesh Constitution vests the legislative power of the Republic in the parliament.[56] However, the proviso of the Article authorizes the parliament to delegate the law making power to any person or authority by an Act of Parliament.[57] Article 93 empowers the President to promulgate Ordinances and he may also frame rules, *inter alia*, under Articles 115 and 133 of the Constitution.[58] Thus, under the Constitution, the parliament, the President and subordinate authorities can make law for the people of Bangladesh. In this Study's context, the relevant question is: are these legislative authorities free to legislate as they please? Or, in other words, does the subject matter of legislation rest with discretion of these authorities to warrant a case for political question?

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54 For when may a discretion be held to be an unbounded one, see, *infra*, Chapter 6 (Section 6.2.1.) (p. 190) of the Study.

55 For traditional approach, see, *supra*, Chapter 6 (Section 6.1.2.1.1.) (p. 175) of the Study.

56 It states "There shall be a Parliament for Bangladesh (to be known as the House of the Nation) in which, subject to the provisions of this Constitution, shall be vested the legislative power of the Republic."

57 The proviso states "Provided that nothing in this Clause shall prevent Parliament from delegating to any person or authority, by Act of Parliament, power to make orders, rules, regulations, bye-laws or other instruments having legislative effect."

58 Article 93 not only empowers the President to promulgate Ordinances but also equates the status of Ordinances with an Act of Parliament: "At any time when Parliament stands dissolved or is not in session, if the President is satisfied that circumstances exist which render immediate action necessary, he may make and promulgate such Ordinances as the circumstances appear to him to require, and any Ordinance so made shall as from its promulgation *have the like force of law as an Act of Parliament*." (emphasis added). Article 115 states that "Appointments of persons to offices in the judicial service or as magistrates exercising judicial functions shall be made by the President *in accordance with rules made by him* in that behalf." (emphasis added). Proviso of Article 133 states, "Provided that *it shall be competent for the President to make rules* regulating the appointment and the conditions of service of such persons until provision in that behalf is made by or under any law, and rules so made shall have effect subject to the provisions of any such law." (emphasis added).

In parliamentary supremacy as prevalent in England, the parliament may legislate as it pleases in the sense that there is no *legal* limitation on the power of parliament.[59] But in Bangladesh, constitutional supremacy prevails as governmental system of the country. The framers of the Constitution thought it necessary and proper not only to declare the supremacy of the Constitution in the preamble [60] but also to make a substantive provision to this effect.[61] As such, Article 7 of the Constitution expressly provides: "(1) All powers in the Republic belong to the people, and their exercise on behalf of the people shall be effected only under, and by the authority of, this Constitution. (2) This Constitution is, as the solemn expression of the will of the people, *the supreme law of the Republic*, and if any other law is inconsistent with this Constitution that other law shall, to the extent of the inconsistency, be void." [62]

Article 7 alone fully encompasses the law of the Constitution as regards paramountcy [63] and comprehends the entire jurisprudence of constitutional law and constitutionalism. [64] It explicitly speaks of (a) sovereignty of the people and the republican character of the state and government, (b) supremacy of the Constitution as the solemn expression of the will of the people and (c) voidability of other laws inconsistent with the supreme law, 'this Constitution' and implicit in the Article are the concepts of (d) limited government with three organs performing functions by and under the authority of the Constitution, (e) separation of powers between the three co-ordinate organs of the state as a corollary of designated functions and (f) enforceability of the supremacy of the Constitution by the Supreme Court.[65]

Where there is a written Constitution, all laws must generally be in conformity with the provisions of the Constitution.[66] And in the face of clear provision contained in Article 7 of Bangladesh Constitution, there can be no doubt that the power of all legislative authorities including parliament are circumscribed by the Constitution. Mahmudul Islam succinctly

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[59] However, after the passing of the Human Rights Act of 1998, the British Courts may issue 'declaration of incompatibility' if a law is found to be inconsistent with any provision of the Human Rights Act. Parliament then amends the law so as to bring it in conformity with the Human Rights Act. Thus, the Courts themselves cannot strike down the law. In this way, parliamentary sovereignty is still technically retained in England. For a more detail, see, *supra*, Chapter 2 (Section 2.1.4.) (p. 47) of the Study.

[60] See, 4th para of the preamble.

[61] *Khondker Delwar Hossain v Italian Marble Works Ltd.* (2010) 62 DLR (AD) 298 (hereafter *Khondker Delwar Hossain*).

[62] Emphasis added.

[63] *Md. Shoaib v Bangladesh* (1975) 27 DLR 318.

[64] *Khondker Delwar Hossain* (n 61) 298.

[65] See the summary of submissions in *Anwar Hossain Chowdhury v Bangladesh* 1989 BLD (Spl) 1, 28 (hereafter *Anwar Hossain Chowdhury*).

[66] Mahmudul Islam (n 23) 95.

depicts the genesis of constitutional supremacy: "Supremacy of the Constitution means that its mandates shall prevail under all circumstances. As it is the source of legitimacy of all actions, legislative, executive or judicial, no action shall be valid unless it is in conformity with the Constitution both in letter and spirit." [67]

If a law may be declared void on the ground of its repugnancy with the provisions of the Constitution, a question naturally arises: does it not then contradict popular sovereignty contemplated by the very Article 7 of the Constitution? In defending the institution of judicial review for US system, Hamilton argued that judicial review was perfectly consistent with popular sovereignty, for it:

> [does not] suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both; and that where the will of the legislature declared in statutes, stands in opposition to that of the people declared in the constitution, the judges ought to be governed by the latter, rather than the former.[68]

Hamilton based judicial review on the general theory of a limited constitution. This is evident also from this another contention of Hamilton:

> No legislative act therefore contrary to the constitution can be valid. To deny this would be to affirm that . . . the representatives of the people are superior to the people themselves; that men acting by virtue of powers may do not only what their powers do not authorize, but what they forbid . . . [T]he Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.[69]

The Study submits that there is no reason why Hamilton's justification of the institution of judicial review in the context of US constitutional system should not hold good for our jurisdiction. And the Bangladesh Supreme Court exercised its power of judicial review of

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[67] ibid 96. Describing 'constitutional supremacy', the author elsewhere writes, "But if there are entrenched provisions in the Constitution limiting the power of the legislature in enacting laws and amendment of the provisions of the Constitution requires stricter procedure, there is no supremacy of the legislature; it is the Constitution which is supreme and to it all actions of the legislature and executive must conform whether or not it is stated in the Constitution." ibid 95. If any action is actually inconsistent with the provisions of the Constitution, such action shall be void and cannot under any circumstances be ratified by passing a declaratory law in parliament. ibid 96-97. For status of 'constitutional supremacy' in martial law regime, see, Mahmudul Islam, ibid 98-124; Mustafa Kamal, *Bangladesh Constitution: Trends and Issues* (2nd edn, University of Dhaka 1994) 54-94.

[68] The Federalist No. 78, at 525 (Hamilton). Quoted in Robert J. Pushaw Jr., 'Justiciability and Separation of Powers: A Neo-Federalist Approach' (1996) 81 (2) *Cornell Law Review* 424.

[69] The Federalist No. 78, at 524-25 (Hamilton). Quoted in Pushaw, ibid 424-25 (in footnote 149).

laws and declared any law void if found inconsistent with the provisions of the Constitution. Section 9 (2) of Act XII of 1974 provided that the government may, at any time, retire from service a public servant who has completed twenty-five years of service without assigning any reason. In *Dr. Nurul Islam v Bangladesh*, Section 9 (2) of the said law was declared *ultra vires* being violative of Articles 27 and 29 of the Constitution by the Appellate Division of the Supreme Court.[70]

Article 26 contains a separate provision for Fundamental Rights (FRs). It enjoins the state not to make any law inconsistent with FRs and any law so made shall, to the extent of such inconsistency, be void. However, the parliament may by law impose *reasonable* restrictions upon FRs guaranteed under Articles 36 (freedom of movement); 37 (freedom of assembly); 38 (freedom of association); 39 (freedom of thought and conscience, and of speech); and 43 (protection of home and correspondence). The parliament may impose *any* restriction upon FRs guaranteed under Articles 40 (freedom of profession or occupation); and, 42 (rights to property).

From the above analysis, it may now be concluded that legislative authorities of Bangladesh including parliament must exercise their powers being within the bounds or four corners of the Constitution. It is only in imposing *reasonable* restrictions upon FRs guaranteed under Articles 36, 37, 38, 39, and 43 of the Constitution that the parliament may be said to possess some *weak* form of discretion.[71] And since Articles 40 and 42 empowers to impose *any* restriction, the parliament is possessed with a wider scope of discretion as to them. Thus, the Study submits, it is only with respect to imposition of *any* restriction upon FRs guaranteed under Articles 40 and 42 that a *discretionary* element (in the strict sense of the term) may come into scene. Accordingly, issues arising under these Articles only may be susceptible of a political question analysis.

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[70] (1981) 33 DLR (AD) 201 (hereafter *Dr. Nurul Islam*). See also *Mofizur Rahman Khan v Bangladesh* (1982) 34 DLR (AD) 321 (hereafter *Mofizur Rahman Khan*) (The Court pointed out the limitations on the uncontrolled exercise of legislative power. The Court observed that there is limitation on the power of parliament to pass "legislative judgments": the Court elaborated, parliament has the power to validate a law declared by a Court illegal by removing the cause of illegality or infirmity; in other words, the legislature cannot reverse or set aside the Court's judgment, order, or decree but it can render the judgment, order or decree ineffective by removing their basis. See also *Kudrat-E-Elahi Panir v Bangladesh* (1992) 44 DLR (AD) 319 (hereafter *Kudrat-E-Elahi Panir (AD)*) (the Court held that Articles 59 and 60 restrict the plenary legislative power of parliament to enact laws on local government to the extent that parliament cannot transgress, overlook and ignore the constitutional provisions prescribing the manner and method of establishing local government, its composition, powers and functions including the power of local taxation. Some words in the repealing Ordinance were found to *be ultra vires* the Constitution).

[71] See, Bhuian (n 7) 89.

However, the political question doctrine to be applicable in a case there must not only be discretion but the discretion of the authority should be *absolute* or *unfettered* as opposed to *bounded* or *limited*. How should one differentiate *bounded* from *unbounded* discretion? It is, therefore, this aspect of the doctrine that the Study will now deal with in light of, *inter alia*, some relevant provisions of the Bangladesh Constitution.

6.2. Differentiating *Unbounded* from *Bounded* Discretion

6.2.1. The Criteria of *Unbounded* Discretion

Since unbounded discretion has been formulated as the basis for the doctrine of political question in this Study,[72] it is essential to learn how one may exactly draw a distinction between bounded and unbounded discretion.[73] This is indeed a difficult task presenting overwhelming challenges. Amanda Tyler observes: "As yet, no one has come forward with a principled framework for isolating those matters that are conferred to the *unchecked discretion* of the political branches."[74] Tyler rightly observes because constitutional clauses or provisions that confer discretionary powers upon an authority do not come up with footnotes attached specifying some discretion as unbounded and the others as bounded ones.[75]

However, in view of this Study, Professor Jesse Choper's analysis of the political question doctrine may be of some guidance in the matter of differentiating unbounded from bounded discretion.[76] Choper proposes something similar to a hierarchy of rights. He posits that disputes between the legislative and executive branches (separation of powers dispute), as well as those matters involving questions of national versus state power (federalism disputes), should effectively be non-justiciable.[77] Choper reasons for this view that the "put upon" branch or state can use political means to protect its interests; it does not need the help of the

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[72] See, *supra*, Chapter 2 (Section 2.3.1.) (p. 71) of the Study.
[73] The Study presents an improved and updated version of what the author earlier wrote on this point, see, Waheduzzaman (n 9) 30-32.
[74] Amanda L. Tyler, 'Is Suspension a Political Question?' (2006) 59 *Stanford Law Review* 379 (emphasis added).
[75] Steven G. Calabresi, 'The Political Question of Presidential Succession' (1995) 48 *Stanford Law Review* 157.
[76] JH Choper, *Judicial Review and the National Political Process: a Functional Reconsideration of the Role of the Supreme Court* (1980) chs. 2-3, 2-3.
[77] ibid 169, 295-96.

courts.[78] Conversely, Choper submits, cases involving the protection of individual rights should be lying at the other end of the spectrum warranting judicial review.[79] Choper builds his theory on the primary justification for the inclusion of judicial review in American constitutional structure, namely, the institution is necessary to check majoritarian abuses of minority and individual rights.[80]

Tyler considers Choper's spectrum as "intuitively attractive"[81] but indicates also some weaknesses of Choper's analysis. In his view, a *structural claim* of one person (of political branches or of the federal and state governments) may often be another person's *individual rights* claim.[82] Tyler establishes his argument by referring to some cases of American jurisdiction decided by its Apex Court.[83] To quote Tyler:

> Consider the Court's decision in Bush V. Gore, thought by some commentators to involve a *non-justiciable political question*. In that case, one could advance a forceful argument that the claims at issue were *structural* in nature. Such an argument would sound something like this: Overseeing Presidential elections is the proper province of the legislature, and arguably this role is assigned by the text of the Constitution to that branch. This is, moreover, a question that implicates the balance of powers between the political branches, as well as between the states and the federal government. Accordingly, it is precisely the kind of matter in which the judiciary should stay its hand. Alternatively, one could argue – as the attorneys did on behalf of George W. Bush – that the case implicated the *equal protection* and *due process* rights of individual voters whose votes were being counted improperly

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78 ibid. Choper in fact is arguing that, as says Barkow, "the fundamental purpose of judicial review is to protect individual rights and asserting that the Court should abstain from federalism and separation of powers questions because the political branches of state and federal governments can take care of themselves." Rachel E Barkow, 'More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy' (2002) 102 (2) *Columbia Law Review* 326 (in footnote 545).

79 Choper (n 76) 64.

80 See Po Liang Chen & Jordan T. Wada, 'Can the Japanese Supreme Court Overcome the Political Question Hurdle?' (2017) 26 (2) *Washington International Law Journal* 349 (contemplating three views on the role of judicial review in the US Supreme Court: (i) the classical theory and the rule of the clear mistake; (ii) the counter-majoritarian difficulty; and, (iii) robust judicial review). On judicial review generally, see, Luc B. Tremblay, 'General Legitimacy of Judicial Review and the Fundamental Basis of Constitutional Law' (2003) 23(4) *Oxford Journal of Legal Studies* 525; Jeremy Waldron, 'The Core of the Case Against Judicial Review' (2006) 115 *Yale Law Journal* 1346; Richard Fallon, 'The Core of an Uneasy Case for Judicial Review (2008) 121 *Harvard Law Review* 1693; Allan C. Hutchinson, 'A 'Hard Core' Case Against Judicial Review' (2008) 121 *Harvard Law Review Forum* 57; Alon Harel and Tsvi Kahana, 'The Real Case for Judicial Review: A Plea for Non-Instrumentalist Justification in Constitutional Theory' *Georgetown Law* (Center for Transnational Legal Studies Colloquium: Research Paper No. 1, March 2009); Alexander Kaufman and Michael B. Runnels, ' The Core of an Unqualified Case for Judicial Review: A Reply to Jeremy Waldron and Contemporary Critics' (2016) 82 (1) *Brooklyn Law Review* 163.

81 Tyler (n 74) 372.

82 ibid 373.

83 This Study has also considered those cases dealing with the origin and development of the doctrine of political question in US Supreme Court; see, *supra*, Chapter 3 (Section 3.1.1.) (p. 90) of the Study.

> and/or arbitrarily due to, among other things, the various recounts ordered by state officials.
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> The same tension lies in a number of areas of constitutional jurisprudence. Consider the matter of the impeachment power. *Nixon* could be viewed as a case going to the heart of the *separation of powers* (as the majority opinion suggested) or, alternatively, as one involving Judge Nixon's *individual procedural* rights. This tension exists in many federalism cases, and may also account for the Court's inconsistent approach in the apportionment cases.[84]

The Study fully endorses the view of Tyler expressed in the above quoted passage. This view clearly suggests that the *structural* claim of federal and state governments or of the political branches of such governments may overlap with the *individual rights* claim of other persons. But the Study suggests that the questions whether *structural* and *individual rights* claim of persons may overlap in a given case and to what extent such overlapping, if there be any, may be an obstacle in differentiating unbounded from bounded discretion are different. It is submitted that although such overlapping may cause hardships but would not render it totally impossible for a court to indicate the nature and kind of discretion conferred upon an authority in a given case. We all know that the democratic norms and values of modern times recognize and approve majority rule subject only to the protection of *minority* and *individual* rights. Choper also views "the overriding virtue of and justification for vesting the Court with this awesome power of judicial review is to guard against governmental infringement of individual liberties secured by the Constitution."[85] Therefore, despite some weaknesses of Choper's theory as indicated by Tyler, his model rightly preserves the expenditure of judicial capital for a category of core matters – protection of *minority* and *individual* rights – to which the "political process is by design insensitive."[86]

The Study should now recall that Chief Justice Marshall in *Marbury v Madison* also sought to exempt the application of the doctrine of political question precisely on the ground of protecting the rights of individuals. [87] Rightly assumes Barkow: "Chief Justice Marshall in *Marbury* gave one structural characteristics for courts to use in deciding whether a constitutional question presents a political question: Does it involve an *individual right*, or

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84 Tyler (n 74) 373-74 (internal citations omitted) (emphasis added).
85 Choper (n 76) 127-28, 169-70.
86 Tyler (n 74) 372.
87 *Marbury v Madison* 5 (1803) US (1 Cranch) 137, 166 (hereafter *Marbury*). For detail on *Marbury*, see, *supra*, Chapter 3 (Section 3.1.1.1.) (p. 91) of the Study.

does it involve a more general question of political judgment and discretion." [88] Professor Scharpf also remarks that the politica question doctrine will not be applied "where important individual rights are at stake." [89] To the same effect, Chemerinsky observes that the political question doctrine has generally been reserved for those areas that pertain to the structure of government and not those directly impacting individual rights.[90]

The Study, therefore, holds that a court in a given case may decide to differentiate between the discretionary powers of an authority on the basis of whether it involves the protection of *minority rights* or the *individual rights* claim of a person. If so involves, the court may hold that the matter has not been committed to the unbounded discretion of the other branches of government. The Study further submits that even when *structural* and *individual rights* claim overlap, the court may consider the discretion as a *bounded* one and hence should not stay its hands off if a strong case for the protection of *minority* or *individual rights* may also be established in the case.[91] It is on the basis of these principles that the Study will now take into account some provisions of Bangladesh Constitution so as to determine the nature and kind of discretion conferred upon the political branches of government.

6.2.2. Prerogative of Mercy in Light of *Unbounded* Discretion

First provision the Study seeks to deal with is the power of pardon of the President under Article 49 of the Constitution.[92] Article 49 of Bangladesh Constitution provides that the President shall have the power to grant pardons, reprieves and respites, and to remit, suspend or commute any sentence passed by any court, tribunal or other authority. The question is

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88 Barkow (n 78) 254 (emphasis added).

89 Fritz W. Scharpf, 'Judicial Review and the Political Question: A Functional Analysis' (1966) 75 (4) *Yale law Journal* 584.

90 Erwin Chemerinsky, 'Cases Under the Guarantee Clause Should be Justiciable' (1994) 65 *University of Colorado Law Review* 866-67. Chemerinsky indeed draws distinctions among constitutional cases and argues that "application of the political question doctrine is least appropriate in cases where individual rights are at stake." ibid 864-65 Chemerinsky also further argues that a distinction between structure of government and individual liberties is drawn in questions involving justiciability, including the standing doctrine of generalized grievances. ibid 866.

91 Pushaw, therefore, rightly notes that the Court has "properly continued to find the *process* of making foreign and military policy to be nonjusticiable, although it has recognized that the *results* of such decisions may sometimes be scrutinized if they invade individual rights, especially fundamental liberties" (internal citations omitted) (emphasis original). Pushaw (n 68) 508. See also Rebecca L. Brown, 'When Political Questions Affect Individual Rights: The Other Nixon v. United States' (1993) *Supreme Court Review* 137-38 (arguing that the Court must decide questions where individual rights are at stake and that even questions of separation of powers implicate individual rights). See also Bendor (n 30) 345.

92 The Study presents a revised version of what the author earlier wrote on this, see, Waheduzzaman (n 9) 33-35.

whether at all and how far the exercise of Presidential power under Article 49 is justiciable. The Appellate Division of the Supreme Court of Bangladesh in *Bangladesh v Kazi Shaziruddin Ahmed* [93] held that the power conferred under Article 49 of the Constitution gives the widest power to the President and no word of limitation can be indicated in the said Article and the order so passed by the President is not justiciable in the court of law.[94] Before commenting on the judgment of the Court, the Study would like to take a brief account of judicial pronouncements of some other jurisdictions on the point.

The question of justiciability of the power of Presidential clemency came under judicial consideration on several occasions before the Supreme Court of India. In *Maru Ram v India*,[95] the Supreme Court recommended framing of rules for guidance in the exercise of the power of pardon by the President and observed that the consideration for exercise of power under Article 72/161 may be myriad but no consideration nor occasion can be wholly irrelevant, irrational, discriminatory or *mala fide*. Only in these rare cases will the Court examine the exercise. [96] *Kehar Singh v India* [97] reaffirmed *Maru Ram* by holding that the exercise of the power under Article 72 cannot be subjected to judicial review on its merits except within the strict limitations defined in *Maru Ram*.

The Supreme Court continued invoking jurisdiction in the matter of Presidential clemency: If such power was exercised arbitrarily, *mala fide* or in absolute disregard of the finer canons of constitutionalism, the by-product order cannot get the approval of law and in such case, the judicial hand must be stretched to it.[98]

Subsequently, in the more recent case of *Epuru Sudhakar v A.P.*,[99] the Court held that the exercise of clemency is a matter of discretion of the executive, and yet subject to certain standards. This discretion, Court emphasized, has to be exercised on public considerations alone. On this basis the Court summarised the following grounds on which the exercise of the power of pardon may be impugned: (a) that the order has been passed without application of mind; (b) that the order is *mala fide*; (c) that the order has been passed on extraneous or

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93 (2007) 15 BLT (AD) 95 (hereafter *Kazi Shaziruddin Ahmed*)
94 For detail on *Kazi Shaziruddin Ahmed*, see, *supra*, Chapter 4 (Section 4.1.4.) (p. 137) of the Study.
95 AIR 1980 SC 2147.
96 ibid 2175.
97 AIR 1989 SC 653.
98 *Swaran Singh v U.P.*, AIR 1998 SC 2026, 2028.
99 AIR 2006 SC 3385.

wholly irrelevant considerations; (d) that relevant materials have been kept out of consideration; (e) that the order suffers from arbitrariness.

Prerogative of mercy is one of the most important prerogative powers of the UK Crown. Hence, judicial pronouncements from UK courts deserve specific mentioning in this regard. In *Council of Civil Service Union v Minister for the Civil Service*,[100] Lord Roskill listed, *inter alia*, the prerogative of mercy as a non-justiciable matter. But in *R v Secretary of State for the Home Department ex P. Bentley*,[101] the Court rejected the assertion of the Secretary of State that the prerogative of mercy is not subject to the power of judicial review of a Court. The Court also quoted with approval this observation by the New Zealand Court of Appeal: "The *rule of law* requires that challenge shall be permitted in so far as issues arise of a kind with which the courts are competent to deal."[102]

It is submitted that the decisions and observations of courts of foreign jurisdictions represent the correct statement of law as regards the question of justiciability of prerogative of mercy under the respective Constitutions. The decision of Bangladesh Supreme Court in this respect in *Kazi Shaziruddin Ahmed* [103] is thus erroneous. The Study, therefore, holds that the power of Bangladesh President under Article 49 should be justiciable like that of the powers under Articles 93 and 141A of the Constitution under traditional approach.[104] However, the reasons behind the justiciability of the exercise of Presidential power under all three Articles may not be the same. Under Articles 93 and 141A of the Constitution, the exercise of the power of President is justiciable because in a constitutional democracy professing rule of law executive's satisfaction as to the existence of conditions and/or circumstances is ordinarily held to be *objective* and hence justiciable.[105] On the contrary, the power of the President under Article 49 should be justiciable not because it is subject to some conditions precedent but a *discretionary* one but such discretion may not be said to be an *unbounded* discretion conferred by the Constitution.

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[100] [1984] 3 All ER 935.
[101] [1993] 4 All ER 442.
[102] *Burt v Governor General* [1992] 3 NZLR 672, 678 (emphasis added). For more on prerogative of mercy and justiciability in English jurisdiction, see, BV Harris, 'Judicial Review, Justiciability and the Prerogative of Mercy' (2003) 62 (3) *Cambridge Law Journal* 631.
[103] See, *supra* notes 93 and 94.
[104] For justiciability of issues involved under Articles 93 and 141A of the Constitution according to traditional approach, see, *supra*, Chapter 6 (Section 6.1.2.1.1.) (p. 175) of the Study. A political question approach, however, may hold otherwise, see, *supra*, Chapter 6 (Section 6.1.2.1.2.) (p. 180) of the Study.
[105] ibid.

President (or, properly speaking, the Prime Minister on whose advice the President is constitutionally bound to act) may or may not exercise his power under Article 49 of the Constitution. On this basis, it should be regarded as an instance of *discretionary* power as opposed to powers subject to conditions precedent for their exercise.[106] But why should one regard such discretion as *bounded* as opposed to *unbounded* or *absolute*? The reasons may be stated as below.

Bangladesh President obtains a unique position by the terms of the Constitution. He belongs by constitutional design to the executive organ of the government but performs, broadly speaking, all three functions of the Republic – the legislative, the executive and the judicial. Exercise of the power of pardon under Article 49 is by nature a judicial one. Judges may not exercise the discretionary powers conferred upon them by statutes arbitrarily or unreasonably since such powers have been given in good faith for the causes of justice in the process of settlement of disputes between individuals. Questions of rights, liability, disability, status etc. of individuals are directly involved in both the administration of civil and criminal justice in a court of law. Similarly, the Constitution confers upon the highest dignitary of the state the power of pardon for broader concerns of peace, good governance as well as for the causes of justice. Legitimate expectations and interests of both the victim and convicted are involved in the matter. Since *individual rights* aspect and broader issues of *constitutionalism* and *justice* are directly involved, the power though a *discretionary* one cannot be said to be an *unbounded* or *absolute* one.[107] Therefore, the Study could not but hold that the exercise of Presidential power under Article 49 should be justiciable and the political question doctrine cannot have any relevance in deciding the justiciability of the matter.

Thus, the three grand exercise of the power of President under Bangladesh Constitution have been proved to be justiciable.[108] While ordinance and emergency powers being subject to conditions precedent for their exercise are justiciable,[109] the discretionary power of pardon not being an *unbounded* one is also justiciable. The Study may now take into account some other provisions of Bangladesh Constitution where discretionary powers conferred upon an authority may be said to be an *unbounded* one.

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[106] On discretionary powers of political branches of government, see generally, *supra*, Chapter 6 (Section 6.1.) (p. 172) of the Study.

[107] For the differentiating criteria of unbounded discretion, see, *supra*, Chapter 6 (Section 6.2.1.) (p. 190) of the Study.

[108] See, *supra*, notes 104 and 105 and accompanying texts.

[109] ibid.

6.2.3. Instances of *Unbounded* Discretion

The Study appreciates five main areas of power where the Constitution may be said to have conferred *unbounded* discretion upon the political branches of government: (1) appointment powers of the executive; (2) political branches' power in relation to war; (3) foreign relations power of the executive; (4) directing the legislature to enact law; and (5) parliament's authority to amend the Constitution. The Study elaborates below these instances of political power of Bangladesh Constitution.

6.2.3.1. Appointment Powers of the Executive

For convenience of discussion as well as the nature of questions involved in them, the Study divides appointment powers of the executive into two classes: (i) appointment powers generally; and, (ii) the power of appointment of Judges of the Supreme Court.

6.2.3.1.1. Appointment Powers Generally

The Study has already mentioned that one sound principle on which one can differentiate *unbounded* from *bounded* discretion of an authority is whether the questions of the protection of *minority rights* or the aspects of *individual rights* claim are involved in the matter.[110] If not so involved, the discretion of the authority may be regarded as an *unbounded* or *absolute* one. In this view of the matter, the first instance of *unbounded* discretion that might come up for consideration is the President's power of appointment in some highest constitutional posts and/or offices of the State.[111]

For example, the President of Bangladesh may appoint Ministers, Attorney-General, members of Election Commission, Comptroller and Auditor-General, and members of Public Service Commission under Articles 56, 64, 118, 127 and 138 respectively of the Constitution. However, in the exercise of the power the President is bound under Article 48(3) of the Constitution to act in accordance with the advice of the Prime Minister. Therefore, the real executive power in relation to the appointment of these highest constitutional offices of the state belongs to the Prime Minister. In short, it is the President who shall exercise the power

[110] See, *supra*, Chapter 6 (Section 6.2.1.) (p. 190) of the Study.
[111] The Study presents an improved version of what he earlier wrote on this, see, Waheduzzaman (n 9) 35-36.

of appointment according to the advice of the Prime Minister. But what is relevant for our present purpose is that the matter has been committed to the *discretion* of the executive. And the question is: why should one regard such discretion as an *unbounded* one?

To give the answer, let us just take only one or two as example/s among the various powers of appointment just mentioned above. President may appoint Ministers under Article 56(2) of the Constitution. Suppose, the President appoints in total forty-five Ministers, Ministers of State and Deputy Ministers for Bangladesh and all of them are male members. It may be that many would agree that no one could bring an *equal protection* claim challenging the President's decision to name a slate of all male Cabinet members. To take another example, Article 64 of the Constitution provides that "the President shall appoint a person who is qualified to be appointed as a Judge of the Supreme Court to be Attorney-General for Bangladesh." Surely, the appointment may be challenged in the court if the person so appointed is not qualified to be appointed as a judge of the Supreme Court. But there are indeed (or may be) many persons having the qualification for being appointed as a Judge of the Supreme Court and hence also qualified to be appointed as the Attorney-General for Bangladesh. Can any such qualified person being aggrieved for not being appointed as the Attorney-General raise the *equal protection* claim challenging the appointment?

The Study supposes, he cannot. Because the Study holds that whom the President shall appoint as the Attorney-General, among those many qualified, falls within the *complete discretion* of the President. Again, it may be that most would likely agree to this submission of the Study. Because executive might feel, for one reason or the other, more ease and comfort with one person instead of another in running the affairs of the Republic. And examination of those reasons should be beyond the reach or power of interference made by the court. Thus, the power of appointment of the President under the Constitution should be regarded as an instance of *unbounded* discretion in the true sense of the term.

In this respect, it may not be out of place to mention that Chief Justice Marshall in *Marbury* gave two examples of political questions in the US context: President's power of appointment and power of conducting foreign relations.[112] Pushaw vividly depicts the discretionary nature of US President's power of appointment: "Another class of political questions consists of

[112] *Marbury* (n 87) 166-67. See, Barkow (n 78) 249.

those constitutional provisions . . . For example, the President nominates executive officers and judges, but their appointment requires Senate advice and consent. This process involves the exercise of political discretion before any legal rights have crystallized; hence, no one can sue over an appointment." [113] Chemerinsky identifies the US President's powers of appointments and vetoes as the only true discretionary political questions in US constitutional system.[114]

It is, therefore, important to take note that in US system also the power of appointment is viewed as an instance of discretionary power to be regarded as political question and hence placed beyond the reach of judicial control. Thus, the exercise of the power of appointment by the executive may rightly be viewed as an instance of *unbounded* discretion within the framework of Bangladesh Constitution. With these understandings in hand, the Study now proceeds to deal specifically the issue involved in the power of appointment of the Judges of the Supreme Court.[115]

6.2.3.1.2. Appointment of Judges of the Supreme Court

The Constitution empowers the President to appoint also the Chief Justice and other Judges of the Supreme Court (i.e., the Judges of the Higher Judiciary).[116] However, the President is bound to appoint other Judges 'after consultation' with the Chief Justice.[117] Can this power of appointment of Judges of the Higher Judiciary be said to rest on the *unbounded* discretion of the executive? The answer depends on the true import of the expression 'after consultation'

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[113] Pushaw (n 68) 507 (internal citations omitted).

[114] Erwin Chemerinsky, *Interpreting the Constitution* (1987) 102.

[115] See, *supra*, Chapter 1 (paragraph accompanying note 84) (p.30) of the Study.

[116] See, Article 95 (1) of the Constitution ("The Chief Justice shall be appointed by the President, and the other Judges shall be appointed by the President after consultation with the Chief Justice").

[117] ibid. The provision for 'consultation' was there in the 1972 original Constitution of Bangladesh. However, it was done away with later on but now has again formed part of the Constitution. Article 95 (1) of the original Constitution of 1972 provided that "the Chief Justice shall be appointed by the President and other Judges shall be appointed by the President after consultation with the Chief Justice." Likewise, the President was also required to consult the Chief Justice to appoint Additional Judges under Article 98 of the Constitution. By the Constitution (Fourth Amendment) Act, 1975 (Act II of 1975) the phrase 'after consultation with the Chief Justice' was omitted both from Articles 95 and 98 of the Constitution. The said phrase was restored to Article 95 (1) by the Second Proclamation (Seventh Amendment) Order, 1976 [Second Proclamation Order No. VI of 1976] but was soon omitted by the Second Proclamation (Tenth Amendment) Order, 1977 [Proclamation Order No. I of 1977] and finally by the Constitution (Fifth Amendment) Act, 1979 [Act I of 1979]. Constitution (Fifteenth Amendment) Act, 2011 has again revived the original provision in Article 95 (1) of the Constitution. [Act XIV of 2011, section 31]. See, Moha. Waheduzzaman, 'Measuring Constitutional "Laws" and "Conventions" in Same Parlance: Critiquing the *Idrisur Rahman*' (2020) 8 *Jahangirnagar University Journal of Law* 48 (in footnote 2).

incorporated in the said Article 95 (1) of the Constitution.[118] The crux of the question is: should the opinion of the Chief Justice have primacy over the opinion of the executive in the matter of appointment of Judges of the Supreme Court?

In the Indian jurisdiction, the question came up for consideration in *SP Gupta v Union of India* [119] and *Supreme Court Advocates-on-Record Association and another v Union of India*.[120] In *SP Gupta*, the majority held against the primacy though they were of the view that the consultation contemplated by the Constitution must be full and effective and by *convention* the views of the concerned Chief Justice and Chief Justice of India should always prevail unless there are exceptional circumstances which may impel the President to disagree with the advice given by the above constitutional authorities.[121] However, the majority Court in *Supreme Court Advocates-on-Record* held that the Chief Justice of India's opinion has primacy in the matter of appointment of the High Court and Supreme Court Judges.[122]

The same question came for consideration in Pakistan also. In *Al-Jehad Trust v Federation of Pakistan,* [123] the Pakistan Supreme Court after considering the relevant provisions of the Constitutions of Pakistan and India and the background of the legal system of both the countries and the leading decisions on the point, concurred with the majority view of the famous Indian decision of *Supreme Court Advocates-on-Record*. [124] Ajmal Miah J observed that "the power of appointment of Judges in the superior courts had direct nexus with the independence of judiciary."[125] His lordship emphasized that the words 'after consultation' "involve participatory consultative process between the consultees and the Executive. It should be effective, meaningful, purposive, consensus-oriented, leaving no room for complaint or arbitrariness or unfair play."[126]

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[118] See, *supra* note 116.
[119] AIR 1982 SC 149 (hereafter *SP Gupta*).
[120] AIR 1994 SC 268 (*Supreme Court Advocates-on-Record*).
[121] See, *State v Chief Editor, Manabjamin* (2005) 57 DLR (HCD) 442 (hereafter *Manabjamin*).
[122] ibid 443.
[123] 1996 PLD SC 324 (hereafter *Al-Jehad Trust*).
[124] *Supreme Court Advocates-on-Record* (n 120) and texts accompanying note 122. See, *Manabjamin* (n 121) 446-47.
[125] See, *Manabjamin* (n 121) 447.
[126] ibid. Indeed, the Judges of the Superior Courts of both Pakistan and India noted that the Chief Justice is well equipped to assess the knowledge and suitability of a candidate for judgeship in the superior courts, whereas the executive is better equipped to find out about the antecedents of a candidate and to acquire other information as to his character and conduct. Hence, in view of the Judges of these jurisdictions, the Chief Justice's opinion should have primacy as to the candidate's knowledge and intellectual ability for judgeship, whereas the executive's opinion should have primacy as to the candidate's antecedents, and character and conduct. See, *Manabjamin*, ibid.

Following the footsteps of Indian and Pakistani verdict, the High Court Division in an *obiter dictum* observed that the opinion of the Chief Justice of Bangladesh should have primacy over that of the executive in the matter of appointment of Judges of the Supreme Court.[127] Regarding the primacy of CJ's opinion and its proximity with independence of judiciary, the Court boldly asserted the following:

> Therefore, we are of the firm conviction that in the matter of appointment of judges of the High Court Division of this Court a prior consultation with the Full Court is a must and their opinion must have a primacy and be binding on the Executive. Otherwise not only the independence of the judiciary which is one of the basic features of the Constitution will be destroyed but spineless, pliant and submissive persons would be appointed by the Executive on extraneous grounds which would not be conducive to justice.[128]

The Court also thought it to be the only way to secure judicial independence: "The concept of independence of judiciary cannot be ensured unless the exclusion of the final say of the Executive in the matter of appointment of judges is done away and that is the only way to maintain the independence of the judiciary."[129]

In *Idrisur Rahman v Bangladesh* involving specifically the issue of appointment of Judges, the High Court Division again was of the view that the opinion of the Chief Justice is entitled to have primacy over that of the executive in appointing Judges of the Supreme Court. [130] The Appellate Division affirmed the holding of the High Court Division subject to the modification that the opinion of the executive is entitled to have primacy in the matter of antecedent of the candidate. [131] Writing for the Court, MA Matin J observed that the appointment of Judges of the Higher Judiciary with primacy of opinion of the Chief Justice is a condition for 'rule of law' and independence of judiciary:

> This is why appointment of Judges is the key to the independence of judiciary and the convention of consultation with the chief Justice with primacy of his opinion is essentially ingrained in the very concept of independence of judiciary, rule of law and supremacy of the constitution. These are the reasons of the convention of consultation.[132]

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[127] *Manabjamin* (n 121).
[128] ibid 456 (per Syed Amirul Islam J).
[129] ibid.
[130] (2009) 61 DLR (HCD) 523 (hereafter *Idrisur Rahman (HCD)*).
[131] *Bangladesh v Idrisur Rahman* (2010) 15 BLC (AD) 49, 107 (hereafter *Idrisur Rahman (AD)*).
[132] ibid 95.

This Study does not substantially differ with Court's observation that judicial independence is an aspect of 'rule of law' and 'rule of law' forms part of the doctrine of basic structure in Bangladesh.[133] But the Study could not agree with Court's main claim that appointment of Higher Judiciary Judges with primacy of opinion of the Chief Justice is a condition for independence of the judiciary.[134] Given that the issue cannot be examined exhaustively within a limited space, the Study seeks to reflect on the essential pre-requisites of judicial independence only in brief.

The Study holds three features as the essential or vital components of judicial independence: (a) security of tenure; (b) adequate remuneration and privileges; (c) prohibition of procuring post retirement benefit. The Bangladesh Constitution secures first two of the enumerated conditions of judicial independence whereas contains provisions as to the third that hinders judicial independence. Under Article 96, a Judge of the Supreme Court shall hold office until he attains the age of sixty-seven years. Before the stipulated period, a Judge of the Supreme Court can be removed from office by the President only when Supreme Judicial Council (SJC) reports to the President that they are of the opinion that the concerned Judge has ceased to be capable of properly performing the functions of his office by reason of physical or mental incapacity, or has been guilty of misconduct. Noticeably, the SJC shall consist of the Chief Justice of Bangladesh, and the two next senor Judges; no member is thus from

[133] See, *Anwar Hossain Chowdhury* (n 65).

[134] In holding so, the Study, however, does not dispute the value of independence of judiciary or necessity of having independent courts of justice. Indeed, independent courts are "the bulwarks of a limited constitution against legislative encroachments." The Federalist No. 78, at 526. See, Pushaw (n 68) 423 (in footnote 144). See also the Constitution 16th Amendment Case: *Bangladesh v Adv. Asaduzzaman & Others* 2017 CLR (Spl) 215 (hereafter *Constitution 16th Amendment* case) ("the complete independence of the Courts of justice is peculiarly essential in a limited constitution"). In founding the US Constitution, Hamilton based his arguments of judicial review on the "general theory of a limited constitution." The Federalist No. 81, at 543. See, Pushaw, ibid. By a limited constitution, Hamilton understood one which contains certain specified exceptions to the legislative authority; such, for instance, that it shall pass no bills of attainder, no *ex post facto* laws, and the like. Hamilton argued that "limitations of this kind can be preserved in practice no other way than through the medium of the courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the constitution void." The Federalist No. 78, at 524. See, Pushaw, ibid (in footnote 145). Otherwise, those limitations "would amount to nothing." ibid. Courts, therefore, were designed "to be an intermediate body between the people and the legislature . . . to keep the latter within the limits assigned to their authority." The Federalist No. 78, at 525. See, Pushaw, ibid (in footnote 144). In other words, impartial judges assigned with the function of expounding the law (which included also the written Constitution) were essential for invalidating politica branch actions that exceeded the restrictions the People had placed on those departments. Pushaw, ibid 423. See also Martin H Redish, *The Federal Courts in the Political Order* (1991) 79-84(arguing that judicial review by an independent judiciary is not compelled by the US Constitution's text or history, but rather is a logical and practical necessity to maintain *limited* democracy under a written constitution). Quoted in Pushaw, ibid 423 (in footnote 144). This Study, therefore, does not deny the value of having independent courts, but only questions the proposition that appointment of Higher Judiciary Judges in Bangladesh with primacy of Chief Justice's opinion is a condition for judicial independence.

executive or legislative wing of the government.[135] This ensures security of tenure of Judges at its highest possible form though in a way that violates the system of checks and balances.[136]

Adequate remuneration and privileges include three things: (i) salaries and other allowances of a Judge should be such that he can easily maintain a reasonable standard of living; (ii) conditions of salaries and privileges should not be varied to the disadvantages during tenure of his office; (iii) he should receive pension so that during his tenure he needs not to indulge in corrupt practices and can lead a respectful life after retirement. The Constitution ensures these if Article 88 is read with Article 147 and Rule 119 of the Rules of Procedure. While Article 88 provides that the salary of a Judge shall be charged on the consolidated fund of the Republic, Rule 119 provides that such charges shall not be voted in the parliament nor shall any cut motion be brought in respect of the demands made in this regard. Article 147 (2) provides that remuneration and privileges of a Judge shall not be varied to the disadvantage during his term of office.

The third element of judicial independence i.e., the prohibition of procuring post retirement benefit is intended to immune Judges from all sorts of allurement for possible future gains. To attain the objective, Article 99 disqualifies Judges from holding any 'office of profit' in the service of the Republic after retirement or removal therefrom. However, they may hold any judicial or quasi-judicial office after retirement. These exceptions frustrate the very objective of why Article 99 was embodied in the Constitution. Already we have got many instances of Judges holding judicial (e.g., Labour Appellate Tribunal, Administrative Tribunal etc.); quasi-judicial (e.g., Chairman of the Law Commission); or even non-judicial offices (e.g., the Chief Election Commissioner (CEC), Chairman of the Anti Corruption Commission) after their retirement.[137] Like Article 99, Article 98 is also a threat to judicial independence that authorizes the President to appoint 'Additional Judges' for a period not

[135] The 1972 original Constitution vested in parliament the power of removal of Supreme Court Judges. It was amended by a Proclamation to transfer the power from parliament to President via the Supreme Judicial Council. [See, the Second Proclamation (Tenth Amendment) Order, 1977 (Second Proclamation Order No. 1 of 1977)]. This change was upheld by the Appellate Division in the *Constitution 5th Amendment Case*, see, *supra* note 61. The Constitution 16th Amendment (Act XIII of 2014) again restored the power in the parliament. The Appellate Division, however, has declared the amendment unconstitutional and void in the *Constitution 16th Amendment Case*, see, *supra* note 134.

[136] For 'checks and balances', see, *supra*, Chapter 5 (Section 5.1.3.) (p. 158) of the Study.

[137] See, M Jasim Ali Chowdhury, 'Judiciary and the Dilemma of Office of Profit: A Pandora's Box' (2006) 11 *Chittagong University Journal of Law* 58.

exceeding two years. A Judge appointed under Article 98 may be tempted to pass favourable judgments to the government with a view to being appointed permanently under Article 95 of the Constitution.[138]

But in no cases the Supreme Court has pointed out Articles 98 and 99 of the Constitution as provisions that violate judicial independence or are hindrances to pronounce impartial judgments. On the contrary, the Court has focused more on the mode of appointment of Judges by the executive itself. But as has already been pointed out, the mode of appointment threatens judicial independence only when judges are appointed temporarily as 'Additional Judges' under Article 98 of the Constitution. The appointment of Judges by the executive is not in itself a condition that fetter judicial independence provided the other post appointment conditions for securing judicial independence are ensured. Joynul Abedin J in his dissenting judgment in *Idrisur Rahman* holds the same view: "There should not be any apprehension that merely because the power of appointment is with the President meaning the executive, the independence of judiciary would become impaired. The true principle is that after such appointment the executive should have no scope for interference with the work of the Judge or for that matter judiciary."[139]

But, as has been seen, the Constitution amply safeguards the post appointment conditions of security of tenure, and adequate remuneration and privileges. Here again, if there is anything that hampers judicial independence is the provision of procuring post retirement benefit under Article 99 of the Constitution. Appointment to highest constitutional offices is inherently an executive function. And if executive appointment of Judges does not in itself violate judicial independence, their appointment with primacy of opinion of the chief Justice cannot be said to be the meaning of the words 'after consultation' under Article 95 of the Constitution, ostensibly linking it with judicial independence. Thus, the appointment of Judges, like the appointment of other constitutional offices of the state, rest with *unbounded* discretion of the executive.[140] However, the opinion of the Chief Justice though should not be binding on the

[138] See, M Harunur Rashid, 'Appointment of Additional Judges: A Threat to the Independence of Judiciary' 9 *MLR Journal* 36; Justice Amirul Kabir Chowdhury, 'The Independence of Judiciary' *11 MLR Journal* 33; HK Abdul Hye, 'Appointment and Removal of Judges' *49 DLR Journal* 11.

[139] *Idrisur Rahman (AD)* (n 131) 70. Regarding the conditions of the independence of lower judiciary, see, *Masdar Hossain* (n 13) 126, 133-35.

[140] See, *supra* note 115. For appointment of lower judiciary judges and magistrates exercising judicial functions, and as regards the question of primacy of opinion of the Supreme Court regarding their control (posting, promotion, and grant of leave) and discipline, see, *Masdar Hossain* (n 13) 131-32.

President, is nevertheless entitled to due weight and respect and normally to be followed. But in case of any arbitrary disregard of Chief Justice's opinion, the remedy lies not in courts but in political means only.[141]

6.2.3.2. Political Branches' Power in Relation to War

Another instance of *unbounded* discretion under the Constitution may be that of executive's authority to declare or participate in a war. Article 63 of the Constitution provides that "War shall not be declared and the Republic shall not participate in any war except with the assent of Parliament." Constitution thus commits the matter to the sole discretion of the parliament. Under Article 7 of the Constitution all powers of the Republic shall belong to the people. Parliament being the representative body of the people will decide in its wisdom and foresightedness whether to declare and participate in a war with other states. Courts may not, therefore, second guess the decision of the parliament in its exercise of the power of judicial review. The matter, the Study submits, rests with *complete discretion* of the executive subject to the assent of parliament.[142]

6.2.3.3. Foreign Relations Powers of the Executive

Another instance of *unbounded* discretion that may be contemplated under any Constitution would be in relation to questions touching on the foreign relations.[143] This possibly makes up the largest class of questions to which the political question doctrine may be applied. Chief Justice Marshall in *Marbury* aptly included, *inter alia*, the acts of an executive officer in foreign affairs that are performed at the direction of the President as political questions.[144] There are indeed ample authorities in the US jurisdiction that treats actions of the political branches pertaining to foreign affairs as political questions. For example, the determination of when hostilities begin,[145] when a state of war concludes,[146] and the recognition of foreign

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[141] Regarding the justifiability of political accountability of political questions, see, *infra*, Chapter 6 (Section 6.4.) (p. 229) of the Study.

[142] For the same view, see, Waheduzzaman (n 9) 37.

[143] The Study presents an updated version of what this author earlier wrote on this, see, Waheduzzaman (n 9) 37-38.

[144] *Marbury* (n 87) 166-67. See, Barkow (n 78) 249. See also *supra* texts accompanying note 112.

[145] *Martin v Mott* 25 US (12 Wheat.) 19, 30 (1827). The case involved determining the validity of a statute that authorized the President alone to determine whether exigencies warranted calling forth the militia to repel and invasion. The Court upheld the statute reasoning that the President's judgment was subject only to

governments[147] are questions held by the US Supreme Court to have been vested in the political branches.[148]

In *Oetjen*, the US Supreme Court held that the executive's official recognition of the Mexican regime touched on foreign relations and consequently was a matter committed to the political branches and beyond judicial review. [149] The Court envisioned the things as thus: "Who is the Sovereign, de jure or de facto, of a territory is not a *judicial*, but is a *political question*, the determination of which by the legislative and executive departments of any government conclusively binds the judges, as well as all other officers, citizens and subjects of that government."[150] Similarly, the Court in *Americans United for Separation of Church and State v Reagan* found the challenge to diplomatic relations with the Vatican to raise a political question. [151]

In *Gilligan v Morgan*, [152] several students of Kent State University were died when the National Guard was called to the campus to quell civil disorder.[153] The plaintiffs sought for the district court to "establish standards for the training, kind of weapons and scope and kind of orders to control the actions of the National Guard," as well as continuing judicial supervision to ensure compliance with court's order with a view to restraining the officers of the National Guard from future violation of their constitutional rights.[154] The US Supreme Court noted that Article I of the Constitution vests Congress with authority over the militia

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political scrutiny because judicial engagement would interfere with his Article II powers as commander-in-chief and might jeopardize national security interests. See, Pushaw (n 68) 450.

146 *Commercial Trust Co. v Miller* 262 US 51 (1923): *Ludecke v Watkins* 335 US 160, 168-69 (1948) ("'The state of war' may be terminated by treaty or legislation or Presidential proclamation. Whatever the modes, its termination is a political act.").

147 *Oetjen v Central Leather Co.* 246 US 297, 302 (1918) (hereafter *Oetjen*).

148 Jared P Cole, 'The Political Question Doctrine: Justiciability and the Separation of Powers' *Congressional Research Service (CRS) Report* (prepared for Members and Committees of Congress) (2014) 9.

149 *Oetjen* (n 147).

150 ibid [quoting *Jones v United States* 137 US 202, 212 (1890)]. (quotations omitted) (emphasis added).

151 786 F. 2d 194, 202 (3d Cir. 1986). See also *Chicago & S. Air Lines v Waterman SS Corp.* 333 US 103, 111 (1948) ("The very nature of executive decisions as to foreign policy is political, not judicial. Such decisions.....are delicate, complex, and involve large elements of prophecy . . . They are decisions of a kind for which the judiciary has neither aptitude, facilities nor responsibility . . . "); *Schlesinger v Reservists Committee to Stop the War* 418 US 208, 222 (1974) ("To permit a complainant who has no concrete injury to require a court to rule on important constitutional issues would create the potential for abuse of the judicial process, distort the role of the Judiciary in its relationship to the Executive and the Legislature, and open the Judiciary to an arguable charge of providing "government by injunction"" (internal citation omitted)). See, Pushaw (n 68) 508 (in footnote 564) and 474 respectively.

152 413 US 1 (1973) (hereafter *Gilligan*).

153 See, Cole (n 148) 11.

154 *Gilligan* (n 152) 3-4. See, Cole, ibid.

and thus found the matter to be a non-justiciable political question.[155] In Court's view, the remedies sought by the plaintiffs (judicial review of the National Guard's training procedures and exercising judicial supervision thereafter) would "embrace critical areas of responsibility vested by the Constitution in the Legislative and Executive Branches of Government."[156] The Court repeatedly asserted that they were matters of "substantive political judgments entrusted expressly to the coordinate branches of government"[157] and hence judicial intrusion into them would be inappropriate.[158] The Court elaborated:

> It would be difficult to think of a clearer example of the type of governmental action that was intended by the Constitution to be left to the political branches directly responsible - as the Judicial Branch is not - to the electoral process. Moreover, it is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject always to civilian control of the Legislative and Executive Branches. The ultimate responsibility for these decisions is appropriately vested in branches of the government which are periodically subject to electoral accountability. It is this power of oversight and control of military force by elected representatives and officials which underlies our entire constitutional system.[159]

Goldwater v Carter [160] involved a challenge by some Senators that the President alone cannot terminate a treaty without Senate consent. A four Justices plurality held that the issue presented a non-justiciable political question.[161] The plurality found that the Constitution contains provision regarding the Senate's role in ratifying treaties, but it is silent as to a treaty's 'abrogation'. This absence of any express constitutional provision governing the termination of a treaty was interpreted by the plurality to indicate that the question was not for the courts to decide.[162] In so deciding, the plurality of the Justices also noted that the dispute was "between coequal branches of our government, each of which has resources

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[155] Cole, ibid.
[156] *Gilligan* (n 152) 7.
[157] ibid 11.
[158] Cole (n 148) 11.
[159] *Gilligan* (n 152) 10. See, Cole, ibid.
[160] 444 US 996 (1979) (hereafter *Goldwater*).
[161] ibid 1004.
[162] ibid. In his concurring opinion, Justice Powell, however, found the issue to be justiciable but deemed it to be unripe because Congress had not directly 'confronted the President' and Senate though considered the issue, did not pass any resolution declaring the necessity of Senate approval for the termination of a treaty. He, therefore, urged the Court not to intervene until the legislature and executive had reached an impasse. ibid 997-1002 (Powell J concurring). See, Cole (n 148) 10; Pushaw (n 68) 509.

available to protect and assert its interests, resources not available to private litigants outside the judicial forum."[163]

However, the US Supreme Court has cautioned that a case does not present a political question simply because it touches upon foreign affairs. In *Japan Whaling Association v American Cetacean Society*,[164] the Court ruled that the case did not raise a political question, explaining that the interpretation of treaties, executive agreements, and legislation was a proper judicial function.[165] The Court noted the "premier role which both Congress and the Executive play" in foreign affairs, but concluded that "under the Constitution, one of the Judiciary's characteristic roles is to interpret statues and we cannot shirk this responsibility merely because our decision may have significant *political overtones*."[166]

The US Supreme Court's treating the foreign relations questions as political questions may be interpreted to rest with *unbounded* discretion of the political branches of US government. The Study submits that the decisions and observations of US jurisdiction regarding having an *unbounded* discretion of the political branches in relation to questions touching upon foreign relations should in all fairness (or, subject to necessary adjustments only) be applicable in our constitutional jurisdiction.

6.2.3.4. Directing the Legislature to Enact Law

In a system of constitutional supremacy as is ours, the judiciary can review laws in light of relevant constitutional provisions. But can judiciary give direction to the parliament to make laws or the President to frame rules? Or, whether the matter rest with *unbounded* discretion of the concerned legislative authorities for that matter? Mahmudul Islam holds that "Just as judiciary cannot legislate, the judiciary cannot give direction to the parliament to make laws or to the President to make rule . . . " [167]

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[163] ibid 1004. For how the Court analogized *Goldwater* with *Coleman* and distinguished *Goldwater* from *Steel Seizure*, see, Cole, ibid 9-10.
[164] 478 US 221, 223 (1986).
[165] ibid 230. See, Cole (n 148) 12.
[166] ibid (emphasis added). See, Cole, ibid. See also Pushaw (n 68) 508-09 ("although the negotiation, ratification, and termination of treaties are political questions, persons granted rights under treaties can vindicate them judicially") (internal citations omitted).
[167] Mahmudul Islam (n 23) 93.

The Study approves the above-quoted view of Mahmudul Islam. In a few cases only the question was considered by the Bangladesh Supreme Court. In *Sheikh Abdus Sattar v Returning Officer*, [168] the petitioner sought declaration of a law to be *ultra vires*. The relevant law disqualified the bank loan defaulters to contest in the *Union Parishads* election.[169] At that time, there was no such law providing a similar disqualification for the candidates of parliamentary election. On this ground, the petitioner claimed the *Union Parishads* election law to be discriminatory. Appearing on behalf of the government, advocate TH Khan argued that instead of undoing the good work done by the parliament in providing the disqualification in the local government election, the Court may recommend similar provision for parliamentary election also.[170] This is in effect seeking from the Court a direction upon parliament to enact law in the respective field. In overturning the plea of the learned counsel, ATM Afzal J observed:

> I do not think that this Court has any duty under the Constitution to offer unsolicited advice as to what the Parliament should or should not do. As long as the law is within the bound of the Constitution it will be upheld by this Court but if the law is otherwise open to criticism, it is for the Parliament itself to respond in the manner it thinks best. While prescribing the new disqualification, the Parliament has not attached it to persons seeking election to it (The House of the Nation) which means that a defaulter in repaying public money cannot sit in the House of the Nation with glory but he cannot sit in the Union Parishad or a local body. The Members of Parliament owe an answer to this, not the Court.[171]

However, the question of directing the parliament to enact law becomes more pertinent in relation to Part II of the Constitution that embodies Fundamental Principles of State Policy (FPSP).[172] To implement them, promulgation of law and a wide range of other policies and programmes are necessary to be undertaken by the executive government of the state. But Article 8(2) declares that the principles set out in Part II shall not be judicially enforceable. In such view of the matter, can the legislative authorities (the parliament or the President) be directed to initiate necessary legislative measures to implement any such principle? In *Masdar Hossain*, the Supreme Court issued 12 points direction upon the government to

[168] (1989) 41 DLR AD 30 (hereafter *Sheikh Abdus Sattar*).
[169] *Union Parishads* are one of the tiers of local government in Bangladesh.
[170] *Sheikh Abdus Sattar* (n 168) para 77.
[171] ibid para 84.
[172] See, from Articles 8 to 25 of the Constitution.

ensure separation of judiciary from the executive, one of the FPSP contained under Article 22 of the Constitution.[173]

The learned Attorney General rightly raised the question of whether the judiciary can direct the parliament to adopt legislative measures or direct the President to frame rules to ensure separation of lower judiciary from executive.[174] To fully apprehend the Court's judgment on the point, it is necessary to consider the facts of the case in brief. The Bangladesh Civil Service (Re-organization) Order, 1980 purported to incorporate "Judicial Service" within the Bangladesh Civil Service as one of the cadre Services vide paragraph 2(x) thereof.[175] The parent legislation that supported the Order is the Services (Re-organization and Conditions) Act, 1975 (Act No. XXXII of 1975) conferring on the Government the power to create new services or amalgamate or unify existing services.[176] The question for the Court to decide was whether the inclusion of the members of the judicial service within Bangladesh Civil Service (Reorganization) Order, 1980 is *ultra vires* the Constitution.

The Court held that such inclusion of the judicial service under Bangladesh Civil Service (Reorganization) Order, 1980 dated 1.9.80. as Bangladesh Civil Service (Judicial) is *ultra vires* the Constitution.[177] In so deciding, the Court conceded that the judicial service is of course included in the definition of service of the Republic but argued that they have been separately treated within the scheme of the Constitution as reflected in Articles 115, 116, 116A and 152(1) of the Constitution.[178]

Subordinate judiciary has been dealt with from Articles 114 to 116A of Chapter II of Part VI of the Constitution. Article 116A provides that all persons employed in the judicial service shall be independent in the exercise of their judicial functions. As to the urgency of implementation of Chapter II of Part VI, the framers inserted in sub-paragraph (6) of paragraph 6 of the Fourth Schedule to the Constitution (transitional and temporary provisions) the following provision:

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[173] See, *Masdar Hossain* (n 13) 140-41.
[174] ibid 139.
[175] ibid 110.
[176] ibid 111.
[177] ibid 140, 144.
[178] ibid.

> (6) The provisions of Chapter II of Part VI which relate to subordinate courts *shall be implemented as soon as practicable* and until such implementation the matters provided for in that Chapter shall (subject to any other provision made by law) be regulated in the manner in which they were regulated immediately before the commencement of this Constitution.[179]

Mustafa Kamal CJ rightly took note of Article 116A that speaks of the independence of subordinate courts, and thereby reflected on the essential conditions of the independence of the judiciary.[180] His lordship observed that until subordinate courts are separated from the executive their true independence cannot be secured: "The judiciary must be free from actual or apparent interference or dependence upon especially the executive arm of Government."[181] His lordship then noticed that instead of implementing Chapter II of Part VI as mandated by sub-paragraph (6) of paragraph 6 of Fourth Schedule to the Constitution, the government has adopted legislative measures [182] contrary to the constitutional scheme and arrangements for the subordinate judiciary. It is only in this backdrop that the learned Chief Justice issued direction upon the government to frame rules to implement Chapter II of Part VI[183] and justified its course in the following words:

> Although we shall depart in some ways from the direction given by the High Court Division, we think that in the present case constitutional deviation and constitutional arrangements have been interfered with and affected both by the Parliament by enacting the Act and by the Government by issuing various orders in respect of the judicial service. For long 28 years after liberation sub-paragraph (6) of paragraph 6 of the Fourth Schedule to the Constitution remains unimplemented. When Parliament and the executive instead of

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[179] Emphasis added.

[180] Referring to *Walter Valente v Her Majesty the Queen* (1985) 2 RCS 673 decided by the Supreme Court of Canada, his lordship listed three essential conditions of judicial independence: (i) security of tenure; (ii) security of salary or other remuneration and, where appropriate, security of pension; (iii) institutional independence of the subordinate judiciary especially from the Parliament and the Executive. *Masdar Hossain* (n 13) 133-34. In addition to these, his lordship identified two other essential conditions of judicial independence in the special context of Bangladesh. The first of which relates to judicial appointment which his lordship said should normally be permanent: "Recruitment to the judicial service shall be made by a separate judicial services commission...Recommendations for appointment on merit should come from the commission." ibid 134-35. The other essential condition of judicial independence in the special context of Bangladesh, his lordship said, is administrative and financial independence. ibid 135.

[181] *Masdar Hossain* (n 13) 134.

[182] The Bangladesh Civil Service (Re-organization) Order, 1980 and The Services (Re-organization and Conditions) Act, 1975 (Act No. XXXII of 1975). See, *supra* texts accompanying notes 175 and 176.

[183] See especially directions 1to 5 of the 12 points direction. *Masdar Hossain* (n 13) 140-41. The Study quotes direction no. 4, the most pertinent one in the present context: "The appellant and the other respondents to the writ petition are directed that necessary steps be taken forthwith for the President to make Rules under Article 115 to implement its provisions which is a constitutional mandate and not a mere enabling power . . . They are further directed that either by legislation or by framing Rules under Article 115 or by executive Order having the force of Rules a Judicial Services Commission be established forthwith . . . in the recruitment." ibid.

> implementing the provision of Chapter II of Part VI follow a different course not sanctioned by the Constitution, the higher judiciary is within its jurisdiction to bring back the Parliament and the executive from constitutional derailment and give necessary directions to follow the constitutional course. This exercise was made by this Court in the case of Kudrat-E-Elahi Panir Vs. Bangladesh 44 DLR (AD) 319. We do not see why the High Court Division or this Court cannot repeat that exercise when a constitutional deviation is detected and when there is a constitutional mandate to implement certain provisions of the Constitution.[184]

Thus, the Court issued directions to bring back parliament and executive from constitutional derailment. If it has enforced Article 22 fundamental principle of 'separation of judiciary from the executive', it has done so not on its own but on the imperative need of securing independence of lower judiciary guaranteed in Article 116A of Chapter II of Part VI read with the mandate imposed by sub-paragraph (6) of paragraph 6 of the Forth Schedule to the Constitution. Therefore, the Court cannot in ordinary courses direct the legislature to initiate legislative measures even when that relates to implementing one of the FPSP under Part II of the Constitution.[185]

In this respect, it may be mentioned that Article 112 enjoins all authorities, executive and judicial (but not legislative) to act in aid of the Supreme Court. Mahmudul Islam notes this and submits that "when there is a constitutional deviation in legislative measures, the court can declare such legislative measures to be *ultra vires*, but cannot give a direction to repeal or modify it."[186] If judiciary can only declare the purported legislative measures to be *ultra vires* but cannot direct the legislature to repeal or modify them then it is more true to say that the judiciary cannot direct the legislature to enact legislation on a subject. Subject to the

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[184] ibid 139. In so justifying its course, the Court relied on *Government of Sindh v Sharaf Faridi* PLD 1994 (SC) 105. The Supreme Court of Pakistan too consistent with the mandate contained in Article 175 of the present Constitution of Pakistan to secure the separation of the judiciary from the executive issued directions in the nature of adoption of legislative and executive measures. ibid.

[185] See, *supra*, Chapter 1 (paragraph accompanying note 84) (p.30) of the Study. At this stage, one may observe or rather argue that the Bangladesh Supreme Court has indirectly enforced ESC rights incorporated in Part II of the Constitution as judicially non-enforceable Fundamental Principles of State Policy (FPSP). Waheduzzaman has shown that in those cases the Court has not enforced the ESC rights indirectly as part of the enforcement of the fundamental right of 'right to life and personal liberty' guaranteed under Article 32, rather the Court has enforced the fundamental right of 'right to protection of law' of the citizens guaranteed under Article 31 of the Constitution. See, Moha. Waheduzzaman, 'Economic, Social and Cultural Rights under the Constitution: Critical Evaluation of Judicial Jurisprudence in Bangladesh' (2014) 14 (1&2) *Bangladesh Journal of Law* 1. See also Moha. Waheduzzaman, 'Judicial Enforcement of Socio-Economic Rights in Bangladesh: Theoretical Aspects from Comparative Perspective' in Dr. M Rahman (ed) (2011) *Human Rights and Environment* 57; Moha. Waheduzzaman, 'Inclusion and Enforcement of ESC Rights under State Constitutions: An Appraisal' (2015) 3 *Jahangirnagar University Journal of Law* 55.

[186] Mahmudul Islam (n 23) 93 (internal citation omitted). See also *Shah Abdul Hannan v Bangladesh* (2011) 16 BLC 386.

observations made particularly in light of *Masdar Hossain's* judgment,[187] the question of whether to enact legislation on a subject, therefore, rest with *sole* or *unbounded* discretion of the legislative authorities of the government.

6.2.3.5. Parliament's Authority to Amend the Constitution

Should there be any limitation on parliament's authority to amend the Constitution or should the matter rest with complete discretion of the parliament? Before delving into detail of this normative question, it may be observed first that two kinds of limitations are usually seen to operate in contemporary constitutional jurisprudence: (i) explicit or express limitations (ii) implicit or implied limitations. The first type of limitations is usually imposed by the framers when the Constitution is originally adopted, and the second type of limitations is founded on the core values or basic features of the constitution and is an innovation of judiciary through the creative interpretive exercise.

A glaring example of explicit limitation on parliament's amending power of Constitution is the one of German Basic Law of 1949. Article 79(3) of the German Basic Law contains an *eternity* clause which makes the federal structure, participation of states in the making of law, and basic principles enshrined in Articles 1, and 20 unamendable.[188] Like the German Basic Law, the 1972 original Constitution of Bangladesh did not insert any *eternity* clause to render certain provisions of the Constitution unamendable. Keeping in view of the needs of future generations, the framers simply authorized the parliament to amend the Constitution "by way of addition, alteration, substitution or repeal by Act of Parliament."[189] This apparently seen unchecked power has now been subject to Article 7B inserted by the 15th Amendment to the Constitution.[190] Article 7B includes the preamble, all Articles of Part I, all Articles of Part II, all Articles of Part III (subject to emergency provisions of Part IXA), and the provisions of Articles relating to the basic structures of the Constitution including Article 150 of Part XI as 'basic provisions' of the Constitution and makes them unamendable.

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[187] See, *supra* texts accompanying notes 172 to 185.
[188] See, H Gorelich, 'Concept of Special Protection for Certain Elements and Principles of the Constitution Against Amendments and Article 79(3), Basic Law of Germany' (2008) 1 *NUJS Law Review* 398.
[189] See, Article 142 of the Constitution.
[190] Article 7B was inserted by the Constitution (Fifteenth Amendment) Act, 2011 (Act XIV of 2011), section 7.

The Study marks some observations in connection with Article 7B's *eternity* provision. *First*, since it is an express substantive provision, the whole of Article 7B may be seen as *explicit* limitation on the amending authority of parliament. *Second*, alternatively and preferably, only the first part of the Article should be seen as *explicit* (since unamendable provisions are expressly named) whereas the second part as *implicit* (since unamendable provisions are unnamed) limitation on the amending power of parliament. *Third*, leaving the question of the nature of unamendability aside, it may be said that since no parliament can bind its successor parliaments, any parliament constituted later on may validly 'repeal'[191] Article 7B itself so as to remove the unamendability imposed by the said Article. *Fourth*, the second part of the Article expands the ambit of unamendability beyond what is expressly named in the first part when says "and the provisions of Articles relating to the basic structures of the Constitution" shall be unamendable. This 'unnamed' part not only refers to the doctrine of basic structure already developed by the judiciary but also leaves the task upon judiciary to determine in appropriate cases what may be the other unamendable Articles of the Constitution based on the said doctrine.

The Supreme Court accepted the doctrine of basic structure in our jurisdiction in the *Constitution 8th Amendment* case.[192] Article 100 of the original Constitution provided that "The permanent seat of the Supreme Court shall be in the capital, but sessions of the High Court Division may be held at such other place or places as the Chief Justice may, with the approval of the President, from time to time appoint." The Constitution 8th Amendment of 1988 provided for establishing six permanent benches of the High Court Division outside the permanent seat of the Supreme Court at Dhaka and the Chief Justice was given the power to transfer Judges to such permanent benches.[193] Since Article 1 speaks of *unitary* character of the Republic, the Court had to determine whether the Constitution 8th Amendment violated the *oneness* of the Supreme Court with plenary jurisdiction over the entire territory whittling down one of the basic structures of the Constitution and whether parliament may amend the basic structures of the Constitution.

[191] See, *supra* text accompanying note 189.
[192] See, *Anwar Hossain Chowdhury* (n 65).
[193] See, clauses 1, 2, 3 and 4 of the Constitution 8th Amendment Act. The jurisdictional area of each permanent bench was to be decided the President in consultation with the Chief Justice (clause 5) and the Chief Justice was given the power to make rules in relation to the permanent benches (clause 6).

The vires of the amendment came for consideration of the Appellate Division after being summarily rejected by the High Court Division.[194] The Appellate Division being inspired by the Indian *Kesavananda Bharati* [195] held that the parliament in the name of amendment cannot alter or damage the basic structures of the Constitution. Since in its view the High Court Division with plenary judicial power over the entire Republic is a basic structure of the Constitution, the amendment setting up six permanent benches and thereby dismantling the *oneness* of the Supreme Court (or rather the *unitary* character of the Republic) was declared void and unconstitutional. In so deciding, the Court conceded that the amending power is a form of *constituent* power as opposed to mere ordinary legislative power. But the Court emphasized that it is nevertheless merely a power granted to parliament by the Constitution and hence should be limited. Badrul Haider Chowdhury J wrote:

> Call it by any a name – 'basic feature' or whatever, but that is the fabric of the Constitution which cannot be dismantled by an authority created by the Constitution itself – namely, the Parliament . . . Because the amending power is but a power given by the Constitution to Parliament, it is a higher power than any other given by the Constitution to Parliament, but nevertheless it is a power within and not outside the Constitution.[196]

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[194] Writ Petition Nos. 1176 and 1252 of 1988.

[195] *Kesavananda Bharati v State of Kerala* AIR 1973 SC 1461 (hereafter *Kesavananda Bharati*) (a 7:6 majority held 24th amendment to the Indian Constitution unconstitutional). In this respect, it should be mentioned that the Indian judiciary initially rejected the notion of *implicit* limitation on the amendment power of the Indian parliament. See, *Shankari Prasad Singh Deo v Union of India* AIR 1951 SC 458 (facing a challenge to the 1st amendment that abridged the right to property, the Court held that under Article 368 the parliament might amend any Part of the Constitution including fundamental rights); *Sajjan Singh v State of Rajasthan* AIR 1965 SC 845 (hereafter *Sajjan Singh*) (facing a challenge to the 17th amendment, a 3:2 majority Court again upheld the unlimited amending power of parliament; the Court rejected the argument that amendments cannot violate fundamental rights). In *Golaknath v State of Punjab* AIR 1967 SC 1643 (hereafter *Golaknath*), a 6:5 majority Court prospectively overruled *Sajjan Singh* holding that the fundamental rights are inviolable; however, the Court, adopted a narrow view of the Indian parliament's power of amendment. *Kesavananda Bharati* overruled *Golaknath* so far it construed narrowly the parliament's power of amendment, and held that the parliament has in fact wide power to amend the constitution, albeit without violating the basic structure of the Constitution. See also *Indira Gandhi v Raj Narain* AIR 1975 SC 2299 (the Court validated Gandhi's election in 1971 and upheld the 39th amendment excluding the curtailment of judicial review in relation to election dispute invoking democracy, free and fair election, and judicial review as the basic structures of the Constitution); *Minerva Mills v Union of India* AIR 1980 SC 1789 (hereafter *Minerva Mills*) (the 42nd amendment removed all limitations on the parliament's power of amendment; it clearly stated that the parliament has the right to amend any part of the Constitution and no such amendment can be subjected to judicial review; the Court unanimously annulled the amendment). Since *Minerva Mills*, the basic structure doctrine has been accepted and applied in various other cases. See, *Waman Rao v Union of India* AIR 1981 SC 271; *SP Gupta v Union of India* AIR 1982 SC 149; *SP Sampath Kumar v Union of India* AIR 1987 SC 386; *Sambamurthy v State of Andhra Pradesh* AIR 1987 SC 663; *Chandra Kumar v Union of India* AIR 1997 SC 1125.

[196] *Anwar Hossain Chowdhury* (n 65) 96 (para 195).

Shahabuddin Ahmed J observed that the *original* constituent power - the power to make a Constitution - belongs to the people alone. The power of amendment that is vested in the parliament is only a *derivative* one and is thus limited. He found the *implied* limitation of the power of amendment in the word 'amendment' itself:

> As to *implied* limitation on the amending power, it is inherent in the word "amendment" in Art. 142 and is also deducible from the entire scheme of the Constitution. Amendment of the Constitution means change or alternation for improvement or to make it effective or meaningful and not its elimination or abrogation. Amendment is subject to the retention of the basic structures. The Court therefore has power to undo an amendment if it transgresses its limit and alters a basic structure of the Constitution.[197]

This line of reasoning was reaffirmed in subsequent cases [198] and the Court has also declared the Constitution 5th, 7th, 13th, and 16th Amendments *ultra vires* based on the *implied* limitation *ratio* of the *Constitution 8th Amendment* judgment.

The Constitution 5th and 7th amendments were enacted to serve the purpose of imparting validity to extra-constitutional regimes. Following the assassination of President Sheikh Mujibur Rahman, first Martial Law was declared in 1975 which continued till 1979 under Khandoker Moshtaque Ahmed, Chief Justice ASM Sayem and Major General Ziaur Rahman respectively. For the entire period, the Constitution and the ordinary laws of the country were made subservient to Marital Law Proclamations, Regulations, and Orders.[199] The successive extra-constitutional regimes brought several changes in the Constitution by Martial Law provisions.[200] The Constitution (Fifth Amendment) Act, 1979 [201] was brought to ratify and confirm all the Martial Law provisions and actions by adding paragraph 18 to the Fourth Schedule to the Constitution.[202]

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[197] ibid 157 (para 378) (emphasis added).

[198] See, *Alam Ara Huq v Government of Bangladesh* (1990) 42 DLR 98; *Fazle Rabbi v Election Commission* (1992) 44 DLR 14; *Dr. Ahmed Hossain v Bangladesh* (1992) 44 DLR (AD) 109; *Mashihur Rahman v Bangladesh* 1997 BLD 55.

[199] To learn about the dubious stand of the Supreme Court in preserving constitutional supremacy in Martial Law periods, see, Mustafa Kamal (n 67) 54-94; Rokeya Chowdhury, 'The Doctrine of Basic Structure in Bangladesh: From 'Calfpath' to 'Matryoshka' Dolls' (2014) 14 (1&2) *Bangladesh Journal of Law* 56-58.

[200] They brought changes notably in the preamble, in some fundamental principles of Part II, inserted Article 142A in Part X, and took the power of removal of Judges of the Supreme Court from parliament to President by introducing the provisions of Supreme Judicial Council in Article 96 of the Constitution.

[201] Act No. I of 1979.

[202] For how a political party was formed, election held, and a parliament constituted that brought about the Constitution 5th amendment, see, Chowdhury (n 199) 54.

In *Bangladesh Italian Marble Works Limited v Government of Bangladesh*,[203] the High Court Division per ABM Khairul Haque J declared the Constitution 5th amendment illegal and void *ab initio* subject to condonations of the provisions and actions taken thereon as mentioned in the judgment. The Court noted that the "pith and substance" of the amendment in question was to ratify and validate the Martial Law Proclamations etc.,[204] but the widest possible construction of the word "amendment" does not include ratification, confirmation, or validity.[205] The Court, therefore, held the seizure of power and changes made in the Constitution by Proclamations etc. by the extra-constitutional regimes to be without lawful authority.[206] To state otherwise, the amendment was annulled for want of authority and fraud practiced on the Constitution.[207]

The Court affirmed the plenary power of the parliament to amend the Constitution following the procedure prescribed in Article 142 of the Constitution. The Court construed parliament's amendment power widely but held that it is 'not that wide to abrogate the Constitution or to transform its democratic republican character into one of dictatorship or monarchy'. In short, Article 142 though confers enabling power of amendment; it cannot be used to swallow the constitutional fabrics or to offend the basic structure of the Constitution.[208] Resuming appeal in *Khondker Delwar Hossain and others v Bangladesh Italian Marble Works Ltd*,[209] the Appellate Division subject to some modifications only [210] approved the judgment of the High Court division.

After President Ziaur Rahman's assassination in 1981, there was civilian presidential rule in the country for a short period of time. Justice Abdus Sattar was an elected President but he was deposed in a military coup by Hussain Muhammad Ershad on 24th March 1982. In the same year, Ershad imposed the second Martial Law suspending the Constitution, dissolving

[203] (2006) 14 BLT (Spl) (HCD) 1 (hereafter *Bangladesh Italian Marble Works Limited*).
[204] ibid 101.
[205] ibid 198.
[206] ibid 54, 75, 180, 240.
[207] ibid 240-41.
[208] ibid 124.
[209] (2010) BLD (Spl) (AD) 1 (hereafter *Khondker Delwar Hossain*).
[210] ibid 139. The Appellate Division, *inter alia*, condoned the transfer of power from parliament to President of removal of the Judges of the Supreme Court by introducing the system of Supreme Judicial Council in Article 96. See, ibid, 140. Analyzing condonations made in the instant case, Chowdhury identifies three principles upon which an amended provision otherwise invalid can be condoned: (i) if it has the effect of restoring provisions of the original Constitution; (ii) if the amended provision is better than the original provision; and, (iii) on grounds of public interest and necessity. Chowdhury (n 199) 73.

the parliament, and prohibiting all politica parties.[211] Following Zia's footprints, Ershad formed his own political party and his parliament ratified all Martial Law Proclamations by the Constitution (Seventh Amendment) Act, 1986 [212] inserting paragraph 19 to the Fourth Schedule to the Constitution.[213] The vires of the amendment was challenged in *Siddique Ahmed v Bangladesh*.[214] Following the *ratio* of the *Constitution (Fifth Amendment)* case,[215] the Appellate Division declared paragraph 19 to the Fourth Schedule to the Constitution void and *non est*.[216]

Abdul Mannan Khan v Bangladesh [217] involved a challenge to the Constitution (Thirteenth Amendment) Act, 1996 [218] that mandated the elected governments, on expiry of their term, to transfer power to an unelected non-party Care Taker Government (CTG) to oversee the next parliamentary election. The Appellate Division held the amendment prospectively void for violating two basis structures of the Constitution: republican democracy and independence of judiciary.[219]

The *Constitution 16th amendment* case [220] concerned the procedure of removal of Judges of the Supreme Court. The 1972 original Constitution retained for parliament the power of removal of Judges of the Supreme Court. The Second Proclamation (Tenth Amendment) Order, 1977 (Second Proclamation Order No. 1 of 1977) transferred the power from parliament to President by inserting Clauses (2), (3), (4), (5), (6) and (7) in Article 96 and thereby introducing Supreme Judicial Council instead of parliamentary impeachment. The Constitution 5th Amendment ratified all Martial Law actions including the said Proclamation that brought about this change in the procedure of removal of Judges. The *Constitution (5th*

[211] Chowdhury, ibid 54.
[212] Act No. I of 1986.
[213] To know how Ershad's political party was formed, election held, and a parliament constituted that brought about the Constitution 7th amendment, see, Chowdhury (n 199) 54.
[214] 2013 Counsel (Spl) 1 (hereafter *Siddique Ahmed*).
[215] See, *supra* texts accompanying notes 203 to 210.
[216] *Siddique Ahmed* (n 214) 102.
[217] (2012) 20 BLT (Special Issue) (AD) 1 (hereafter *Abdul Mannan Khan*).
[218] Act No. 1 of 1996.
[219] *Abdul Mannan Khan* (n 217) 208-09. The Court noted that the CTG taken as a whole snatched away the People's sovereignty for 90 days as spelt out in the Preamble and Articles 1 and 7 of the Constitution; it created an oligarchy for 90 days which is contrary to the basic feature of republican democracy and hence not consistent with the original Constitution. In this context, it may be mentioned that the Appellate Division took note of the High Court Division judgment in *M Saleem Ullah v Bangladesh* (2005) 57 DLR (HCD) 171. Interestingly, all three Judges of the High Court Division concurred on the validity of the CTG by separate judgments. Joynul Abedin J held democracy and independence of judiciary as basic features, but concluded that the CTG had not impaired them. Mirza Hussain Haider J argued that the amendment has indeed strengthened the basic feature of democracy by ensuring free and fair election.
[220] See, the *Constitution 16th Amendment* case (n 134).

Amendment) case [221] though invalidated the Constitution 5th amendment condoned the provisions relating to Supreme Judicial Council for its prospect of safeguarding independence of judiciary.[222] The Constitution (Sixteenth Amendment) Act, 2014 [223] revived the original provision by vesting the power again in parliament. But the Appellate Division has declared the amendment *ultra vires* for violating independence of judiciary, one of the basic structures of the Constitution.[224]

The above case law development reveals that in our jurisdiction there was already *implicit* limitation on parliament's amending power before the Constitution 15th Amendment imposed *explicit* limitation by inserting Article 7B in the Constitution. [225] In light of both the entrenched provisions and judicially crafted *implied* limitations, the Study may now consider the normative question of whether there should be any limitation on the amending power of parliament. To answer this, one should contemplate both forms of limitation, procedural and substantive.

To state accurately, procedural limitations are more in the nature of procedural requirements for making an amendment to the Constitution. Constitutions of states invariably specify some procedure before an amendment may come into existence. Firstly, the Constitution vests the power upon a designated person, forum or authority. The designated authority should then follow the procedure laid down in the Constitution. For example, Article 142 of Bangladesh Constitution vests the power of amendment upon parliament. The same Article provides for two further procedural rules to be followed by the parliament: (i) no amendment Bill shall be allowed to proceed unless the long title thereof expressly states that it will amend a provision of the Constitution (ii) no such Bill shall be presented to the President for assent unless it is passed by the votes of not less than two-thirds of the total number of members of the parliament.[226]

Now, if the Bangladesh Constitution is amended by any authority other than the lawfully constituted parliament or even when parliament amends it disregarding the abovementioned procedural rules, the Court may validly declare such amendment *ultra vires* for flouting the

[221] See, *supra* notes 203 and 209.
[222] See, *supra* note 210.
[223] Act No. XIII of 2014.
[224] The *Constitution 16th Amendment* case (n 134).
[225] See, *supra* text accompanying note 190.
[226] See, Clauses (a) (i) and (ii) of Article 142 of the Constitution.

procedural requirements of amending the Constitution. Constitution 5th and 7th amendments besides *substantive* limitations also violated these *procedural* limitations of the Constitution. Constitution was first amended by Martial Law Proclamations etc. and then ratified by these amendments. The Court rightly invalidated the amendments for want of authority and fraud practiced on the constitution.[227] In the *Constitution 5th Amendment* case, ABM Khairul Haque J held, *inter alia*, that the "lack of long title which is a mandatory condition for amendment, made the amendment void." [228]

In *Coleman v Miller*, Justice Black, joined by a plurality, wrote a concurring opinion which held that the entire amendment process was immune from judicial review: "Congress has sole and complete control over the amending process, subject to no judicial review, the views of any court upon this process cannot be binding upon Congress." [229] It seems that this type of sweeping remark would not allow for any restriction on parliament's power of amendment, whether procedural or substantive. Contrary to the observation of Justice Black, this Study holds that procedural rules may be imposed by the Constitution and judiciary would be within its jurisdiction to strike down any amendment for non-observance of the procedural rules of amending the Constitution.

The study, however, objects holding that there may be *substantive* limitation on parliament's amending power either by the entrenched *eternity* clause or by the judicial doctrine of 'basic structure'. By this, the Study does not contend that there may be no basic structures of the Constitution. True, there may be no immutable principles that would be accepted by all and for all time. But definitely there would be some core values each generation would cherish at a given point of time. Likewise, the Constitutions are also founded on the fundamental values of its time subject to the context specificity of a given state. Democracy, rule of law, human rights, independence of judiciary are values and basic features of most Constitutions of the present time. On the contrary, federalism may be one of the foundational principles of the Constitution of US but not of the Constitutions of UK and Bangladesh. Similarly, supremacy of the Constitution may be a salient feature of the Constitutions of India, Bangladesh and US but not of the Constitution of UK.

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[227] See, *supra* text accompanying note 207.
[228] *Bangladesh Italian Marble Works Limited v Government of Bangladesh* (2010) BLD (Spl) (HCD) 253.
[229] 307 US 433, 459 (1939) (Black J concurring) (hereafter *Coleman*). See, Cole (n 148) 10 (in footnote 89). For detail of *Coleman*, see, *supra*, Chapter 3 (Section 3.1.1.3.) (p. 95) of the Study.

There are thus basic structures or basic constitutional fabrics though what those fabrics are may differ from country to country or for a given Constitution from person to person. The Study, therefore, without disputing the fact of existence of basic structures, only maintains that there should be distinction between *substantive* limits (either *explicitly* as in the *eternity* clause in the Constitution or *implicitly* as in the basic structure) on the amending power and judicial enforcement of those limits. In *Pakistan Lawyers Forum v Federation of Pakistan*, the Supreme Court of Pakistan maintained this distinction:

> There is a significant difference between taking the position that Parliament may not amend salient features of the Constitution and between the position that if Parliament does amend these salient features, it will then be the duty of the superior judiciary to strike down such amendments. The superior courts of this country have consistently acknowledged that while there may be a basic structure to the Constitution, and while there may be also limitations on the power of Parliament to make amendments to such basic structure, such limitations are to be exercised and enforced not by the judiciary . . . but by the body politic, i.e., the people of Pakistan.[230]

The Court concluded that judicial review of constitutional amendments can be made only on procedural grounds and that it had no jurisdiction to invalidate amendment on substantive grounds. The Court held the issue of constitutional amendment to be a political question and hence the remedy should lie not in judicial forum but in political means:

> No constitutional amendment could be struck down by the superior judiciary as being violative of those features. The remedy lay in the *political and not the judicial process.* The appeal in such cases was to be made *to the people not the courts.* A constitutional amendment posed a *political question,* which could be resolved only through the normal mechanisms of parliamentary democracy and free elections.[231]

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[230] PLD 2005 SC 719 para 56 (hereafter *Pakistan Lawyers Forum*) (the Court faced a challenge to the 17th Amendment to the Constitution which, *inter alia,* allowed the President to hold both the offices of President of Pakistan and the Chief of Army Staff for General Pervez Musharraf). There are indeed many cases in Pakistan where the Court recognized 'salient features of the Constitution' but never invalidated any constitutional amendment on the ground that it violated any such feature of the Constitution. See, for example, *Darvesh M Arbey v Federation of Pakistan* PLD 1980 Lah. 846; *Fouji Foundation v Shamimur Rehman* PLD 1983 SC 457; *Pir Sabir Shah v Federation of Pakistan* PLD 1994 SC 738; *Al-Jehad Trust v Federation of Pakistan* PLD 1996 SC 367; *MK Achakzai v Federation of Pakistan* PLD 1997 SC 426; *Wukala Mahaz Barai Tahafaz Dastoor v Federation of Pakistan* PLD 1998 SC 1263; *Syed Masroor Ahsan and others v Ardeshir Cowasjee and others* PLD 1998 SC 823; *Zafar Ali Shah v Pervez Musharraf* PLD 2000 SC 869.

[231] ibid para 57 (emphasis added). See also *Nadeem Ahmed v Federation of Pakistan* PLD 2010 SC 1165 (the Court observed that the Constitution 18th Amendment goes against the salient feature of 'independence of judiciary', but instead of invalidating the amendment for violating the salient feature referred the matter to parliament for reconsideration).

Going back to Article 7B of Bangladesh Constitution that imposes *substantive* limitation on parliament's amending power. It is submitted that so long Article 7B remains or is otherwise not repealed by any successive parliament or not declared unconstitutional by the Court itself, the Court is bound to enforce Article 7B and thereby upholding 'basic structure' and thus *substantive* limitation on parliament's power of amendment. But this type of *eternity* clause has been subjected to criticism. Criticizing Article 7B, Chowdhury, for example, writes: "Simply translated this provision means that the People's Republic of Bangladesh can never revert back to a secular constitution or it can never make any of the fundamental principles judicially enforceable in the strict sense of the term or it can never recognize the indigenous communities or their linguistic rights or it cannot include the emerging human rights norms."[232] Chowdhury summarizes the criticism of the basic structure doctrine of a Pakistani author which is also worth-quoting:

> These questions have been raised earlier by critiques: *First*, the features that today's Courts consider basic might obstruct aspirations of a welfare state in future. *Second*, the doctrine places the founding assembly on a higher footing than the parliaments of present and future, which given Pakistan's constitutional history was at best a remnant of the elected representatives. *Third*, if Parliament goes berserk so as to dissolve the judiciary or to take such other drastic steps, within such fragile balance of power a judicial doctrine will not be able to save the constitutional fabric.[233]

In this respect, it may also be observed that Article 79 (3) of the German Basic Law of 1949 contains *eternity* clause [234] comparable to Article 7B of Bangladesh Constitution. But despite having a separate Constitutional Court in Germany, till date no constitutional amendment has been annulled for its repugnancy with Article 79 (3).[235]

In light of the overall analysis thus far made, the Study in line with the view of the Pakistan Supreme Court [236] holds that there should be distinction between the questions of *substantive*

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[232] Chowdhury (n 199) 86-87. See also Salimullah Khan, 'Leviathan and the Supreme Court' *The Daily New Age* September 18, 2009 (criticizing the 'basic structure' doctrine in Bangladesh). For criticism of the doctrine in the Indian context, see, R Ramachandran, 'The Supreme Court and the Basic Structure Doctrine' in BN Kirpal et. al. (eds.), *Supreme but Not Infallible: Essays in Honour of the Supreme Court of India* (Oxford University Press, 2000) 107-33.

[233] Chowdhury, ibid 51-52 (internal citations omitted). See also Chowdhury, ibid 70 (Since the 'basic structure' doctrine relates to Constitution, Chowdhury cynically observes, "The question that was left unanswered was 'the Constitution of which time?'").

[234] See, *supra* text accompanying note 188.

[235] Chowdhury (n 199) 46.

[236] See, *supra* notes 230 & 231 and the accompanying texts.

limitation and their enforcement in a judicial forum. And to answer the normative question posed at the beginning, there should not be any *substantive* limitation on parliament's power of amendment.[237] In *discretionary* terms, this may simply be restated that the amendment questions so far that relates to *substantive* limitation should rest with *unbounded* discretion of the elected branch of government, namely, the parliament.

This Sub-Section has sought to identify some of the instances of *unbounded* discretion within the framework of Bangladesh Constitution. Even then the object was not, by any means, to enumerate exhaustively the instances of *unbounded* discretion of the political branches under the Constitution. But, in all events, the instances of *unbounded* discretion identified above may be sufficient evidence to show that the dignitaries of a state may be given *unbounded* discretionary powers within the framework of its Constitution. Does conferment of such *unbounded* discretion comport with *rule of law* – an objective sought to be achieved in the preamble of the Constitution? A satisfactory answer to the question can only make the doctrinaire approach to the issue of political question a logically coherent and rounded one. It is, therefore, this aspect or question in relation to the doctrine of political question that the Study will now deal with.[238]

6.3. The Compliance of *Unbounded Discretion* with *Rule of Law*

6.3.1. The Meaning of Rule of Law

Under Article 7 of Bangladesh Constitution, all powers in the Republic belong to the people. The said Article mandates that their exercise on behalf of the people shall be effected only under, and by the authority of the Constitution. If Constitution may be said to have conferred *unbounded* discretionary powers upon dignitaries of the State, the exercise of such power by the dignitary would be *by and under* and *not beyond* the authority of the Constitution since the Constitution itself conferred upon the authority such kind of discretionary power. But the

[237] By contrast, see, in the US context, Pushaw (n 68) 509 (arguing that the framers designing the judiciary to vindicate law against transient majoritarian sentiments, Congress should not have absolute control over amendments); Chemerinsky (n 114) 1-24, 86-97 (noting that judiciary's independence and principled decision-making process make it the institution best able to protect fundamental constitutional values from majoritarian pressures). In the Indian context, see, *IR Coelho (Dead) by LRs v State of Tamil Nadu & others* 2007 AIR (SC) 861 (the Supreme Court holding that the existence of power to confer absolute immunity is not compatible with the *implied* limitation upon the power of amendment in Article 368 of the Constitution).

[238] The Study would present a revised and an improved version of what this author earlier wrote on this, see, Waheduzzaman (n 9) 38-43.

question may be raised that can a Constitution professing *rule of law* be construed as having conferred an *unbounded* discretion on any functionary irrespective of the nature of the power exercised? Mahmudul Islam, a leading exponent on Bangladesh constitutional law, observes that "where *rule of law* is a constitutional mandate, no exercise of power can be arbitrary or discriminatory."[239] However, the Study submits that the answer to the question depends on the meaning of *rule of law* as enshrined in the preamble read with other relevant Articles of the Constitution and the proportionate relevance and applicability of such meaning in relation to *Constitution* and the *ordinary law* that may be made by the legislative authorities under such Constitution.

The preamble of the Constitution of Bangladesh embodies *rule of law* as one of the objectives to be achieved and in the *Constitution (8th Amendment)* case,[240] the Supreme Court regarded *rule of law* as one of the basic structures of our Constitution. But the expression *rule of law* has various shades of meaning and of all constitutional concepts, it is the most subjective and value-laden.[241] The Study would not take interest in enumerating all such meanings [242] but would mention only two aspects of the meaning of *rule of law* that would suffice the Study's purpose.

6.3.1.1. The First Aspect of the Meaning of Rule of Law

There are two definite strands of thought as regards the first aspect of the meaning of *rule of law*. According to the *first view*, the power of the State should not be exercised against individuals except in accordance with law. This view is not concerned with the quality and content of the rules but only insists that whatever be the rules in existence, these must be

[239] Mahmudul Islam (n 23) 440 (emphasis added).
[240] *Anwar Hossain Chowdhury* (n 65) 171 (para 443).
[241] Mahmudul Islam (n 23) 79.
[242] One may, however, nevertheless consult some meanings of 'rule of law'. In *Bangladesh v Idrisur Rahman* (2010) 15 BLC (AD) 49, MA Matin J attributed these meanings to 'rule of law': "The expression of rule of law has a number of different meanings and corollaries, its primary meaning is that everything must be done in accordance with law, in other words, it speaks of rule of law and not of men and everybody is under the law and nobody is above the law. The other meaning of the rule of law is that government should be conducted within a framework of recognized rules and principles which restrict discretionary power and our constitution is the embodiment of the supreme will of the people setting forth the rules and principles. But the most important meaning of rule of law is that the disputes as to the legality of the acts of the government are to be decided by Judges who are independent of the executive." Waldron argues that the value of 'separation of powers' lies in securing 'articulated governance'. He, therefore, ascribes meaning to 'rule of law' so that "the various aspects of law-making and legally authorized action are not just run together into a single gestalt." Jeremy Waldron, 'Separation of Powers in Thought and Practice' (2013) 54 *Boston College Law Review* 457.

certain and known and followed until changed.[243] This view holds that the quality of the rules is a matter of substantive justice and not a matter to be considered as a connotation of the *rule of law*.[244] The *other view*, on the contrary, puts stress on the quality and content of the rules that may be prescribed. Accordingly, it is not merely sufficient that the rules should be stated and known and followed by both individuals and the State. In this view, "Law in the context of *'rule of Law'* does not mean any law enacted by the legislative authorities, howsoever arbitrary or despotic it may be . . . What is a necessary element of the *rule of law* is that the law must not be arbitrary or irrational and it must satisfy the *test of reason* and the democratic form of the polity seeks to ensure this element by making the framer of the law accountable to the people."[245]

It is submitted that the expression *rule of law* in Bangladesh Constitution has been used in the second of the abovementioned senses. The contention may be established with reference to an analysis, albeit brief, of some of the fundamental rights embodied in Part III of the Constitution. Article 31 of the Constitution guarantees the *right to protection of law* – to enjoy the protection of law and to be treated in accordance with law is the inalienable right of every citizen. And Article 32 provides protection of the *right to life and personal liberty*: "no person shall be deprived of life or personal liberty save in accordance with law." If the expression 'law' used in the said Articles means any law, howsoever arbitrary or unreasonable, that may be made by legislative authorities, the guarantees and protections or safeguards under the Articles become totally meaningless.

The Indian Supreme Court while interpreting Article 21 of its Constitution which is similar to Article 31 of Bangladesh Constitution held in the case of *Maneka Gandhi v India* [246] that the expression 'procedure established by law' must mean reasonable and non-arbitrary procedure and not any procedure that may be prescribed by parliament. It is submitted that in order to preserve the integrity of Articles 31 and 32 as fundamental rights same should obtain under our constitutional dispensation and the expression 'in accordance with law' under the Articles must mean a law which is reasonable and non-arbitrary.

[243] Mahmudul Islam (n 23) 80.
[244] ibid.
[245] *Bachan Singh v Punjab* AIR 1982 SC 1325, 1337 (emphasis added).
[246] (1978) AIR (SC) 597.

It may, therefore, be concluded that the expression *rule of law* as envisaged in the preamble of the Constitution is intended to imply that the life of the people should be governed not on the basis of some arbitrary whim and caprice of a ruler but on the authority of law and furthermore such a law should conform to certain minimum standards of justice, both substantive and procedural. For example, while one of the requirements of the substantive justice may be that the law must not be arbitrary and unreasonable, procedural aspect of justice may require that a person ought not to be deprived of his liberty, status or any other substantial interest unless he is given the opportunity of a fair hearing before an impartial tribunal.

6.3.1.2. The Second Aspect of the Meaning of Rule of Law

The other aspect of the meaning of *rule of law* is that in a system governed by *rule of law*, discretion, when conferred on the executive, must be confined within clearly defined limits. Decisions should be made by the application of known principles and rules and in general, such decisions should be predictable and the citizen should know where he stands. A decision without any principle or rule is unpredictable and is the antithesis of a decision in accordance with the *rule of law*.[247] In short, in a system governed by *rule of law*, where the law confers wide discretionary powers there should be adequate safeguards against their abuse.

However, it should be mentioned in this context that the second aspect of the meaning of *rule of law* may, in broader terms, be viewed as a component of the first aspect. According to the first aspect of the meaning of *rule of law*, the authorities shall exercise power or govern the life of people only on the basis of law and such a law must conform to some minimum standards of justice, both substantive and procedural. And one of the aspects of the requirement of substantive justice is that the law should not be *arbitrary*. But when statutes confer wide discretionary powers without specifying guidelines for their exercise or having safeguards against their abuse, the law may be said to be an *arbitrary* one. This is how the concerns in relation to conferring discretionary powers upon an authority may be viewed as one of the components of the first meaning of the concept of *rule of law*. But the Study has deliberately mentioned this component as the second aspect of the meaning of *rule of law*

[247] *Jaisinghani v India* AIR 1967 SC 1427 (para 14) (quoted with approval in *Shrilekha Vidyarthi v U.P.*, AIR 1991 SC 537, 554).

mainly because of convenience since it is this aspect of the meaning of *rule of law* that we are here particularly concerned with.

6.3.2. Unbounded Discretion vis-a-vis Rule of Law

However, whatever meaning one may attach to the expression *rule of law*, he attaches the meaning in relation to the nature, form and quality of the term *law* included in the expression. As to the meaning of the concept *rule of law* we say, *firstly*, that authorities should exercise power in accordance with law that incorporates both substantive and procedural aspects of justice and *secondly*, when such a law confers *discretion*, that must be given within clearly defined limits or that there are adequate safeguards against abuse of such discretion.

Here one may mean by the term *law* both *ordinary laws* and the *Constitution* on whose authority such ordinary laws may be made by legislative authorities of a state. But it is necessary to maintain the distinction between discretionary powers conferred by Constitution upon political branches of the government or of the highest dignitaries of the state and discretionary powers conferred by statutes upon other statutory authorities of the state. Constitution as a founding document of a nation differs significantly from other ordinary laws of a country. Constitution is a living and dynamic document and framed not only for a temporary period but for the evolving times to come. Compared to other ordinary laws, the language of a Constitution is open-ended and stated in broad and general terms so that it can fit itself into the felt necessities of time or encompass in itself the growing demands, needs of people and change of time.

In view of the abovementioned aspects in relation to the nature of Constitution as a founding document of a nation as well as the kind of authorities upon whom the Constitution confers discretion, the Study thinks no one is likely to disagree that compared to other ordinary laws of a state constitutional conferment of discretionary powers would be wider without specifying well defined limits for the exercise of the power or adequate safeguards against abuse of such discretion. It should be noted in this respect that it is not that the constitutional requirement of *rule of law* does not at all permit the conferment of discretionary powers but only that the *discretion* is confined within clearly defined limits. Therefore, the proposition may be stated as thus: *ordinary laws* may confer discretion upon statutory authorities but in no case can the discretion be *unguided*, but discretionary powers of the political branches or

the highest dignitaries of the state under the *Constitution* are always likely to be wider, open-ended, stated in more general and broad terms and may even be *completely unrestricted* in cases or on occasions. And it will be the duty and function of the court to determine in which cases or on what occasions the *discretion* of an authority under the Constitution may be said to be an *unrestricted* one through a creative interpretative exercise of the relevant provisions of the Constitution.

If a court tries to identify the nature and kind of constitutional discretion of an authority on the basis of some sound principles, the process of identification itself, the Study submits, is a *rational* as opposed to an *arbitrary* one. And this is exactly what the Study has done to differentiate *unbounded* from *bounded* discretion on the basis of the principle of whether the case directly and/or significantly involves the protection of *minority* and *individual* rights.[248] The Study, therefore, submits that a view that suggests 'since *rule of law* is the constitutional mandate, no power under the Constitution can be construed to have been unrestricted' [249] is a *mechanical* one when that does not at all take into account the nature of the power to be exercised, the kind of authorities upon whom the power has been conferred as well as the circumstances in which the power needs to be exercised.

Recall, for example, Article 63 of Bangladesh Constitution that confers upon executives the power to declare and participate in war subject to the assent of Parliament.[250] Should not we consider this kind of extra-ordinary provision as one where the discretion of the political branches of the government may be said to be an *unchecked* one? Don't even our intuition both indicates and dictates that these kinds of extra-ordinary powers the Constitution vests within the *complete discretion* of the political branches subject to no interference made by the court? At least this author's intuition responses in the affirmative.

Whole things perceived in this way, the Study could not but hold that the conferment of *wide* and *unfettered* discretionary powers upon the highest dignitaries of the state in some limited number of critical and/or extra-ordinary areas of responsibility and furthermore on the basis of some sound and rational principles does not contradict *rule of law* as envisioned by the

[248] See, *supra*, Chapter 6 (Section 6.2.1.) (p. 190) of the Study.
[249] Mahmudul Islam, for example, holds such a view. See, Mahmudul Islam (n 23) 423, 440.
[250] See, *supra*, Chapter 6 (Section 6.2.3.2.) (p. 205) of the Study.

framers in the preamble of the Constitution.[251] Supreme Court's role in the interpretative exercise while settling disputes between the parties cannot merely be that of passively finding the law especially when that interprets a living and dynamic document like Constitution. The Study, therefore, is also of the view that a court by differentiating *unbounded* from *bounded* discretion on the basis of some *sound* principles may be regarded in its approach as more *creative*, *rational* and *reasoned* as opposed to being merely a *mechanical* one.

If *unbounded discretion* may be not contradictory to *rule of law* as explained above, then, the accountability of the elected branches for political questions remains only political and not legal. The next Section of the Study, therefore, seeks to justify political accountability only of political questions.

6.4. The Justifiability of Political Accountability for Political Questions

The discretion of government even if construed to be *unbounded* in constitutional issues termed as 'political questions', it does not mean that it would be exercised unreasonably and capriciously. In these cases, the question of accountability whether legal or political does not arise at all However, if the discretion is alleged to have been exercised arbitrarily, the Study holds that the remedy should lie in political means only and not in judicial process. This is the central thrust of argument of the Study as to elected branches responsibility so far that relates to political questions. Acknowledgement of this proposition exists in judicial utterances of our jurisdiction itself though not exactly in a political question case or a case susceptible of political question analysis.

The Constitution embodies in Part II the Fundamental Principles of State Policy (FPSP). But unlike the Fundamental Rights (FRs) of Part III, the FPSP have been expressly declared judicially non-enforceable by Article 8 (2). However, the former part of the same Article 8 (2) states that FPSP shall be fundamental to the governance of Bangladesh, shall be applied by the state in the making of laws, shall be a guide to the interpretation of the Constitution and of other laws of Bangladesh, and shall form the basis of the work of the state and of its citizens. In the case of *Kudrat-E-Elahi Panir (HCD)*, Naimuddin Ahmed J perceived positive and negative enforcement of FPSP and held that only positive enforcement of FPSP is barred

[251] See, *supra* note 1.

by Article 8 (2).[252] His lordship also entered into academic discussion and asked whether the High Court Division can declare a law passed by parliament void which flagrantly violates any FPSP. The Appellate Division in *Kudrat-E-Elahi Panir (AD)* [253] condemned Naimuddin Ahmed J for speculating on hypothetical question. However, in the context of the present Study, the question raised by Naimuddin Ahmed J in relation to FPSP and its answer remains pertinent. What if really the government instead of adopting legislative and other measures to implement FPSP enacts law that manifestly violates FPSP? Due to the express bar of Article 8 (2) if the Court cannot declare the law void, how would the accountability of government be ensured in this regard? Interestingly and significantly, the Court spoke of or justified only political accountability in these words:

> A hypothetical question has been posed. Parliament passes a law which glaringly violates and flouts a fundamental principle of state policy, and if its vires is challenged solely on the ground of inconsistency with that principle and on no other ground whatsoever, will the High Court Division declare or not declare the law void? It is a madness scenario. The learned Counsel could not show any such legislation in this sub-continent, but suppose, Parliament is struck with such madness, is the High Court Division in its writ jurisdiction the only light at the end of the tunnel? *What does public opinion, political party and election do if Parliament goes berserk?* [254]

The Court thus urged the public opinion, political party and election to play its role so that the elected branches by adopting legislative and other measures might not whittle down the FPSP instead of implementing them. Besides legal process, these are effective means of protest and disapproval of governmental actions and should always remain alive in a democratic polity to check abuses of power, arbitrary and capricious exercise of discretion, and thereby ensuring accountability by extra-legal means. The constitutional system of UK is a glaring example of how the democratic and constitutional values are protected and sustained by extra-legal means besides judicial process.

Due to the operation of 'parliamentary sovereignty', the British courts cannot even declare a law passed by British Parliament void for its incongruence with Constitution. If any law passed by the British Parliament is inconsistent with Constitution, the Constitution is presumed to be *pro tanto* amended by the said law. The extent of power of the British

[252] *Kudrat-E-Elahi Panir v Bangladesh* (1992) 44 DLR (HCD) 179.
[253] *Kudrat-E-Elahi Panir (AD)* (n 70).
[254] ibid 347 (emphasis added) (per Mustafa Kamal J).

Parliament is sometimes expressed by saying that the British Parliament can make and unmake any law or can do and undo anything except making a man woman or *vice versa*. There are thus no *legal* limitations on the power of British Parliament. [255] Does this mean that the British Parliament can enact (or, in fact enacts) law as it pleases? The British Parliament neither enacts nor would enact arbitrary law not because there are no *legal* limitations on its power but because of the fear of public censure and disapproval.

Whereas the UK constitutional system effectively functions without even judicial review of laws, in jurisdictions like us we seek to ensure everything through courts or by means of judicial process. And we seek so even in those areas of elected branches' responsibility where the Constitution imposes no limitation on their power. The study has shown that in such cases *unbounded* discretion if questions of individual or minority rights protection are not involved does not contradict 'rule of law'.[256] If Constitution itself places no limitation, the judicially crafted *implied* limitation (since, in their view, 'rule of law' being constitutional mandate, no power can be said to be beyond the purview of judicial review) simply invades 'separation of powers' maintained in the Constitution.

Recall, the Study considers by way of illustration the appointment powers of the executive including the power of appointment of Judges, the question of determination of facts (emergency and ordinances), elected branches' power in relation to war, foreign relations powers of the executive, directing the legislate to enact law, and parliament's authority to amend the Constitution as instances of *unbounded* discretion of the elected branches and as such probable political questions under the Constitution.[257] Recall again, the Study considers an otherwise instance of *unbounded* discretion to be a *bounded* one if individual and minority rights claim may be involved in the dispute.[258] One may now argue that if discretion may be construed to be *bounded* if the matter involves individual or minority rights claim, then it should be more true for the issues the Study suggests being instances of *unbounded* discretion. Because, to take few of them as examples, in cases of proclamation of emergency

[255] However, the British Parliament cannot now enact law inconsistent with the provisions of Human Rights Act, 1998. If a law is inconsistent with the Human Rights Act, the British courts even then cannot declare the law void; it can only issue a 'declaration of incompatibility'. It then becomes the responsibility of the Parliament to amend the law so as to remove the inconsistency. This is how the 'parliamentary sovereignty' is still technically retained in England.

[256] See generally, *supra*, Chapter 6 (Sections 6.2. and 6.3.) (pp. 190, 223) of the Study.

[257] See generally, *supra*, Chapter 6 (Section 6.2.3.) (p. 197) of the Study.

[258] See, *supra*, Chapter 6 (Section 6.2.1. and 6.2.2.) (pp. 190, 193) of the Study.

or amendment of the Constitution, the whole or considerable portion of Fundamental Rights (FRs) may be suspended or repealed from the Constitution. If individual rights of one or minority rights of a group may render an otherwise *unbounded* discretionary power into a *bounded* one, why the exercise of power in emergency or amendment of Constitution should not be so because by this the FRs of all (as opposed to one or a group) citizens may be taken away or suspended for a considerable period of time.[259]

This is an apparently seeming strong argument. But it stands on a nebulous footing and if one goes deeper, he will find that it reinforces the Study's argument on political accountability for political questions. Article 49 of the Constitution speaks of the prerogative of mercy and it imposes no limitation for the President to exercise the power. This discretionary power of the President could be interpreted to be either *bounded* or *unbounded* one. Recall, this Study held it to be a *bounded* discretion since individual rights aspect or concerns of justice from the perspectives of both victim and offender are involved.[260] Since interest or claim of only one or some individuals are involved, it is unlikely that these matters would draw attention of media and public at large. Unless vindicated by judiciary, these causes would go unredressed or justice for the individuals from the perspectives of both sides would not be ensured. On the contrary, such issues as emergency, amendment of Constitution, question of implementing FPSP by adopting necessary measures concerns all and hence any arbitrary exercise of power in relation to them may be effectively checked by *those* all exercising the extra-legal means of media trial, censure and popular disapproval. In other words, an arbitrary power may not pay heed to an individual or group of individuals and because of this inherent *vulnerability*, he or they are essentially in need of judicial protection. But such power would definitely fear the collective strength of individuals expressed through the various extra-legal means and would thus refrain from exercising the constitutionally conferred discretionary powers unreasonably and arbitrarily.

In view of the above, the Study holds that issues identified as instances of *unbounded* discretion and hence political questions should be placed beyond judicial reach and the elected branches' accountability as to them should be ensured by political or extra-legal means only. If somebody is still not convinced, the Study would remind that even almighty

[259] See, for example, Part IXA on "Emergency Provisions" of Bangladesh Constitution. While emergency is in operation, certain FRs will automatically be suspended, or enforcement of such FRs as may be specified by the President in the order may be suspended. See, Articles 141B and 141C respectively of the Constitution.

[260] See, *supra*, Chapter 6 (Section 6.2.2.) (p. 193) of the Study.

has created his creations in pair: men and women; good or bad; right or wrong; and so on.[261] 'Reason and belief', 'unitary or federal', 'parliamentary or presidential', 'law and fact', 'legal or extra-legal' are pairs of the same kind. It is not that these pairs are always antithesis to each other, but they may be also complementary to each other. Legal and political accountability of government are not antithesis but complementary to each other. The whole of governmental accountability cannot be claimed to be ensured legally and the *vice versa*. The Study admits this and based on sound and rational principles places a limited number of critical areas of elected branches' responsibility beyond judicial sphere and reposes them on the judgment of people alone.

While the above should be enough to argue for political accountability only of political questions, any practical example would surely add some more impetus to the argument. Does any such example exist in our jurisdiction? The Study notes that as the judicial utterances of extra-legal means of accountability exist [262] so also exists the real example of checking arbitrary exercise of constitutional discretion and thereby ensuring accountability by such means. And it exists in relation to an issue which this Study also identifies as an instance of *unbounded* discretion, i.e., the appointment powers of the executive including the power of appointment of Judges of the Supreme Court.[263]

The 1972 original Constitution provided that "the Chief Justice shall be appointed by the President and other Judges shall be appointed by the President after consultation with the Chief Justice." [264] Likewise, the President was also required to consult the Chief Justice to appoint Additional Judges under Article 98 of the Constitution. By the Constitution (4th Amendment) Act, 1975 [265] the phrase 'after consultation with the Chief Justice' was omitted both from Articles 95 and 98 of the Constitution.[266] However, even after the 4th Amendment, "the Judges were appointed in consultation with the Chief Justice of Bangladesh even during the Martial Law regime though the matter of consultation was not reflected in the notification." [267]

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[261] Holy Quran, Surah An-Naba, Verse 8.
[262] See, *supra* texts accompanying note 254.
[263] See, *supra*, Chapter 6 (Section 6.2.3.1.2.) (p. 199) of the Study.
[264] Article 95 (1) of the original Constitution of 1972.
[265] Act II of 1975.
[266] However, the original provision has again been revived by the Constitution (15th Amendment) Act, 2011. For detail, see, *supra* note 117.
[267] *Manabjamin* (n 121) 448.

The state of consultation by convention continued until February 1994. On 2nd February 1994 nine Judges were appointed in the High Court Division giving a go by to the convention of consultation.[268] On 3rd February, the then Chief Justice Shahabuddin Ahmed brought it to the notice of the Bar that nine Judges were appointed by the President (the Executive) without any prior consultation with him and the Chief Justice is "Mr. Nobody" in the matter of appointment of Judges of this Court.[269] After this disclosure by the Chief Justice, the matter was taken up by the Bar and they launched a movement for cancellation of the appointment of the said nine Judges. The government withdrew the earlier notification and a fresh notification was issued on 9th February 1994 and in that notification for the first time after the 4th amendment it was mentioned that the appointment of Judges was made by the President in consultation with the chief Justice.[270]

Thus, not only judicial utterances of ensuring governmental accountability by extra-legal means but also practical example of such ensuring exist in our jurisdiction itself. Hence, besides the elected branches, the judiciary should also remain within bounds in exercise of its power under the Constitution. In *Abdul Mannan Bhuiyan v State*, [271] MA Matin J, therefore, rightly observed:

> It is true that there is no such thing as absolute or unqualified separation of power in the sense conceived by Montesquieu but there is however, a well marked and clear-cut functional division in the business of the Government and *our judiciary is to oversee and protect the overstepping not only of other organs of the Government but also of itself.* [272]

And the Study holds that the judiciary would overstep its limit when makes inroad into the domain of the elected branches having *unbounded* discretion in exercise of power in constitutional issues termed as 'political questions'. MA Aziz J in *Khondaker Modarresh Elahi v Bangladesh* [273] cautioned the danger of violating 'separation of powers' observed in the Constitution in the following words:

> It must not be forgotten that the 3 (three) organs of the State i.e. the Executive, the Legislature and the Judiciary in part IV, V and VI respectively of our

[268] ibid.
[269] ibid.
[270] ibid 449.
[271] (2008) 60 DLR (AD) 49.
[272] ibid 54 (emphasis added).
[273] (2001) 21 BLD (HCD) 352.

> Constitution have been kept in water tight compartments with specific powers and functions assigned to them. Any encroachment by any of those 3 (organs) into the exclusive domain of the other is bound *to lead to indiscipline, chaos, anarchy and lawlessness*. [274]

While MA Aziz J fears only chaos, indiscipline and lawlessness, Pushaw observes that the violation of 'separation of powers' by judiciary may ultimately lead to judicial tyranny. To quote him:

> Therefore, under Federalist theory, separation of powers would be violated if federal courts refused to exercise the authority constitutionally conferred on them. But it would be equally subverted if judges arrogated power not granted, for doing so would flout the rule of law, disrupt governmental efficiency, and *lead to judicial tyranny*.[275]

It may, therefore, be observed that in 'political question' cases where discretion of the elected branches is construed to be *unbounded*, the discretion is entirely theirs which cannot be doubted or questioned. The question of expediency, motive, or bonafides of taking any action regarding constitutional issues termed as 'political questions' cannot be inquired into by the Court.[276] Someone may become worried, what would then happen to fundamental values enshrined in the Constitution? The Study, to reiterate again, reposes the responsibility in people as did ATM Afzal CJ as to democratic functioning: "It is not for the Court to save the high principles of democratic functioning and very little can be done by it unless they vibrate in the society itself." The study holds that What Hand J said about fundamental principles of equity and fair play is true for Justice Afzal's principles of democratic functioning just

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[274] ibid 371 (emphasis added). MA Aziz J, however, observed it in relation to making of law by Court violating 'separation of powers': "For all intents and purposes the declaration that the calling of hartal and holding of it is illegal is tantamount to enacting a law prohibiting hartal. Can the Court legislate and enact law?....To legislate and enact law is the exclusive and absolute prerogative of the legislature. Any attempt by any Court however exalted and powerful, to make law would be an awfully awkward and naked usurpation of the power of the legislature." ibid 372. Mahmudul Islam observes same: "Thus in the name of interpretation of the Constitution and the laws, the judiciary cannot create a new law or amend an existing law, which will be offensive as a judicial legislation." Mahmudul Islam (n 23) 92.

[275] Pushaw (n 68) 398 (internal citation omitted) (emphasis added). See also Pushaw, ibid 398, 427, 428, 438, 449, 450, 469, 474, 485, 486, 489 and 491.

[276] In this respect, it may be noted that the Supreme Court held this kind of a view in relation to President's power of making Reference to the Appellate Division under Article 106 of the Constitution. ATM Afzal CJ observed: "The discretion is entirely his which cannot be doubted or questioned. The expediency, or the motive, political or otherwise, or bonafides of making the Reference cannot be gone into by Court. The President's satisfaction that a question of law has arisen, or is likely to arise, and that it is of public importance and that it is expedient to obtain the opinion of the Supreme court justifies a Reference at all times under the Article." *Special Reference No. 1 of 1995* (1995) 47 DLR (AD) 118. Mustafa Kamal J also held the same view. See, ibid 132.

mentioned as well as to the concern of protecting fundamental values of the Constitution. To quote Hand J:

> You may ask what then will become of the fundamental principles of equity and fair play which our constitutions enshrine; and whether I seriously believe that unsupported they will serve merely as counsels of moderation. I do not think that anyone can say what will be left of those principles; I do not know whether they will serve only as counsels; but this much I think I do know – that a society so riven that the spirit of moderation is gone, no court can save; that a society where that spirit flourishes, no court need save; that in a society which evades its responsibility by thrusting upon the courts the nurture of that spirit, that spirit in the end will perish.[277]

In view of the overall analysis made above, the Study firmly holds not only that for political questions the political departments should remain only politically accountable [278] but also that the superior courts' power of judicial review is not absolute and may be illegitimate when makes inroad into the domain of the other co-ordinate branches of the government.[279] Therefore, the judicial intrusion into the areas of *substantive political judgments* of the kinds mentioned in this Study [280] is inappropriate. The ultimate responsibility for these decisions is appropriately vested in the political branches of the government which are periodically subject to electoral accountability. The Constitution may be interpreted to intend that in these critical and/or extra-ordinary areas of responsibility, the actions of the political branches will only be politically examinable. Every instance of inappropriate exercise or abuse of power by the political branches may evoke serious criticism and the fear of such criticism and popular disapproval will work as a check behind the abuse of such discretionary powers in these critical areas of responsibility.[281]

[277] Quoted in *Anwar Hossain Chowdhury* (n 65) 205.
[278] See, *supra* note 2.
[279] See, *supra* note 3.
[280] See generally, *supra*, Chapter 6 (Section 6.2.3.) (p. 197) of the Study.
[281] For the same view, see also Waheduzzaman (n 9) 42-43.

Summary and Assessment

Discretionary Powers of Government. This Chapter presents the theoretical framework of the doctrine of political question with reference to Bangladesh Constitution. Since it is held that a wider discretionary power entrusted to the elected branches leaves a room for a political question to arise, the Study, first of all, reflects on the meaning and nature of discretionary power in general and constitutional discretion of the elected branches in particular. The Study finds in general the essential characteristics of discretion in 'choice' i.e., the authority conferred with discretion has a choice to decide one instead of another. Then, to understand constitutional discretion, it considers in particular the powers of the executive as to promulgation of Ordinances and proclamation of emergency. The traditional approach holds that these are instances of power conferred upon the executive with some pre-conditions for their exercise. So the issue here is not whether the authority has the discretion to decide one thing or the other, instead, the issue is whether the satisfaction of the authority regarding the fulfillment of the pre-conditions is *subjective* or *objective*. Besides delineating this traditional view, the Study argues that these instances of executive power involve matters of *substantive political judgment* and hence may be analyzed in *discretionary* terms and susceptible of being political questions under the Bangladesh Constitution.

As to legislative authority of making law, the question of discretion generally does not come into the scene since all legislative authorities including parliament must exercise their powers being within the bounds of the Constitution and if any law passed by the designated authority violate any provision of the Constitution, it is liable to be declared void under Article 7 of the Constitution. However, the Constitution authorizes the legislature to impose *reasonable* restrictions upon Fundamental Rights (FRs) guaranteed under Articles 36, 37, 38, 39, and 43 and *any* restriction upon FRs guaranteed under Articles 40 and 42. In view of these express provisions, the Study holds that the legislature may be said to possess some *weak* form of discretion in the former categories of FRs and a wider scope of discretion in the latter categories of FRs. However, the Study submits that it is only with respect to imposition of *any* restriction upon FRs guaranteed under Articles 40 and 42 that a *discretionary* element (in the strict sense of the term) may come into scene and, accordingly, issues arising under these Articles only may be susceptible of a political question analysis.

Bounded and Unbounded Discretion. In Study's analysis, mere discretionary power is not enough for regarding a constitutional issue a 'political question'. The discretion furthermore should be an *unbounded* one. Question, therefore, arises: how should one differentiate *unbounded* from *bounded* discretion? The Study holds that when Constitution confers power upon the elected branches without imposing limitation, the matter may be said to rest with *discretion* of those branches. And in such cases, the discretion may be said to be *unbounded* only if individual or minority rights aspect is not directly involved in it. To clarify, Article 49 of the Constitution has been taken as a paradigm example. Article 49 confers the power of prerogative of mercy upon President. The Study holds the power truly a *discretionary* one since the Article does not circumscribe the power with limitation and the President in his discretion may or may not pardon. But the Study does not hold it to be an instance of *unbounded* discretion since individual rights aspect of both victim and offender is directly involved in it.

Based on the above criteria, the Study holds executive's power of appointment including the power of appointment of Judges of the Supreme Court, political branches' power in relation to war, foreign relations powers of the executive, directing the legislature to enact law, and parliament's authority to amend the Constitution [282] as instances of *unbounded* discretion and hence 'political questions' under the Bangladesh Constitution.

Rule of Law and Unbounded Discretion. Since 'rule of law' is enshrined in the Preamble as a constitutional objective and since 'rule of law' is generally construed to be antithesis to *unbounded* discretion, the Study of necessity inquired whether the study's political question argument based on *unbounded* discretion contradicts 'rule of law'. The Study emphasizes on two aspects of the meaning of 'rule of law' and notes that it is not that the constitutional requirement of *rule of law* does not at all permit the conferment of discretionary powers but only that the *discretion* is confined within clearly defined limits. But the Study distinguishes between administrative discretion of statutory authorities and constitutional discretion of elected branches: ordinary laws may confer discretion upon statutory authorities but in no case can the discretion be *unguided*, but constitutional discretion of the elected branches are

[282] As to parliament's amending power, the Study has been both *descriptive* and *normative*. As a descriptive phenomenon, the Study observes that so long the *eternity* clause of Article 7B exists i.e., not repealed by any successive parliament or declared unconstitutional by the Court itself, the Court is bound to enforce article 7B. As a normative phenomenon, the Study asks whether there should be any limitation on the amending power of parliament. The Study holds that there may be *procedural* limitations on parliament's amending power but not any *substantive* limitation.

always likely to be wider, open-ended, stated in more general and broad terms and may even be *completely unrestricted* in cases or on occasions.

In other words, if administrative powers are allowed to be unchecked, then, 'rule of law' is at stake and courts must uphold the 'rule of law'. On the contrary, if constitutional discretion of the elected branches is allowed to be unchecked, then, it is a question of balancing between the principles of 'rule of law' at the one hand and 'separation of powers' at the other hand. And the Study is of the view that when courts seek to review elected branches' decision in 'political questions' cases by adopting a mechanical construction of 'rule of law', they make inroad into the domain of the other co-ordinate branches of government and thereby invade 'separation of powers' as maintained in the Constitution. A theory of political question founded on *unbounded* discretion, therefore, does not contradict 'rule of law'.

Political Accountability of Political Questions. Finally, comes the question of ensuring the elected branches' accountability in 'political question' cases. The Study finds that both judicial utterances of ensuring accountability by extra-legal means (though in *dicta*) and the practical example of ensuring it by such means exist in our jurisdiction itself. The Study firmly advocates political accountability only of political questions as opposed to seeking judicial redress.

Adopting these four-faceted inquiries, the Study not only presents [283] but also makes the theoretical framework of the doctrine of political question a logically coherent and rounded one. However, in a political question doctrine discourse of the kind just presented, it is also necessary to identify the *apparently seeming* issues that may not, in the true sense of the term, be dubbed as 'political questions'. The following Chapter attempts to identify those issues in the context of Bangladesh Constitution.

[283] See, *supra*, Chapter 1 (notes 96 and 94 and accompanying texts) (p. 32) of the Study.

CHAPTER 7
DISTINGUISHING THE APPARENTLY SEEMING ISSUES: WHAT – IS NOT – A POLITICAL QUESTION

Introduction

This Chapter identifies and distinguishes *apparently seeming* issues from a true 'political question' as defined [1] and presented in the Study. [2] It comprises of seven Sections. Section 7.1. addresses 'exceptions to judicial review', one of the express limits of Court's power of judicial review. Section 7.2. deals 'absence of jurisdiction', another express constitutional limit of judicial review. Section 7.3. reflects on privilege and immunity which includes both parliamentary privileges and immunities and immunity of the President from Court proceedings. Sections 7.4., 7.5. and 7.6. respectively consider three distinct forms of judicial behaviour, such as, 'judicial self-restraint', 'judicial discretion', and 'judicial deference' and distinguishes them from 'political question'. Section 7.7. distinguishes 'political question' from 'cases involving political ramifications'.

7.1. Exceptions to Judicial Review

There is probably no rule that admits no exceptions. If judicial review is rule under the Constitution, the same is subject to exceptions also. And it should be emphasized that those exceptions are created by the Constitution itself. Hence, the Study regards them as *express* constitutional limits [3] on the judicial review power of the Court. The Study discerns such limitations under four Articles of the Constitution. *First*, Fundamental Rights guaranteed under Part II are not available to any provision of a disciplinary law relating to members of a disciplined force (Article 45). *Second*, laws intended to give effect to Fundamental Principles of State Policy set out in Part II, laws specified in the First Schedule, and laws providing for detention, prosecution etc. of any person for such crimes as genocide, crimes against humanity, war crimes, and other crimes against international law are exempted from judicial review (Article 47). *Third*, judicial review is barred under Articles 31, 35 and 44 for a person to whom clause (3) of Article 47 applies (Article 47A). *Fourth*, a court or tribunal established

1 See, *supra*, Chapter 2 (Section 2.3.1.) (p. 71) of the Study.
2 See generally, *supra*, Chapter 6 (p. 172) of the Study.
3 See, *supra*, Chapter 2 (Section 2.1.5.) (p. 51) of the Study.

under a law relating to the defence services of Bangladesh or any disciplined force or a tribunal to which Article 117 applies is not amenable to the power of judicial review of the Supreme Court (Article 102 (5)).

In view of the objective of the Study, it is not essential to explain the above stated exceptions or rather the *express* limits on Court's power of judicial review.[4] To accomplish the task of the Study, it would suffice to state that as opposed to these *express* limitations, 'political question' is a form of *interpretive* limit based on striking a proper balance between the competing principles of 'rule of law' at the one hand and 'separation of powers' at the other hand. Identifying 'political question', therefore, involves delicate exercise of constitutional interpretation and also concerns the judiciary's relationship vis-a-vis the other co-ordinate branches of government. Exceptions to judicial review, by contrast, involve no such exercise; the Court may simply deny its power of judicial review referring to those Articles that create such exceptions.

7.2. Absence of Jurisdiction

As the Constitution creates exception to judicial review, so also it ousts jurisdiction of courts in certain matters.[5] The Study finds such ouster under four Articles of the Constitution. *First*, President of Bangladesh is constitutionally bound to act in accordance with the advice of the Prime Minister. But Article 48 (3) excludes the jurisdiction of courts including the Supreme Court to inquire whether any, and if so what, advice has been tendered by the Prime Minister to the President. *Second*, under Article 78 (1), validity of the proceedings in Parliament shall not be questioned in any court. Under sub-article 2 of the same Article, the members and officers of parliament shall not in the exercise of their powers relating to regulation of procedure, conduct of the business or the maintenance of order in parliament be subject to the jurisdiction of any court. *Third*, every Money Bill shall bear a certificate under the hand of the Speaker that it is a Money Bill. Article 81 (3) provides that such certificate shall be *conclusive proof* for all the purposes and shall not be questioned in any court. *Fourth*, under Article 125, the validity of election law and elections shall not be called in question in any

[4] Anyone interested in a detailed explanation of these exceptions to judicial review may see, Mustafa Kamal, *Bangladesh Constitution: Trends and Issues* (2nd edn, University of Dhaka 1994) 146-56.

[5] The Study presents a revised version of what this author earlier wrote on this, see, Moha. Waheduzzaman, 'The Domain of the Doctrine of Political Question in Constitutional Litigation: Bangladesh Constitution in Context' (2017) 17 (1 & 2) *Bangladesh Journal of Law* 43-45.

court. Like 'exceptions to judicial review',[6] *ouster clauses* provisions are also *express* limit on Court's power of judicial review.

Framers of the Constitution for one reason or the other exclude the jurisdiction of courts in certain matters of the kinds just mentioned above. A detailed discussion of the reasons and wisdom of the framers for such exclusion surely falls outside the limited scope of the Study. But whatever may be the reasons for such exclusion, it may be stated with some certainty that in *ouster clauses*, provisions of the abovementioned kinds, the excluded matters shall generally be beyond the reach of courts or, negatively, shall not be subject to interference made by courts.[7] In the political question cases of the kinds mentioned earlier in this Study, courts should also stay their hands off in the exercise of discretion by the political branches regarding certain matters. [8] One may, therefore, argue that why the *ouster clauses* provisions of a Constitution should not then be regarded as political questions since these matters have also been kept outside the reach of judicial scrutiny? The question may in simple terms be restated as thus: how do the *ouster clauses* provisions of a Constitution differ from issues dubbed as 'political questions'?

The Study formulates *unbounded* discretion as the basis for the doctrine of political question.[9] And on that basis, the Study constructs a logically coherent and rounded theory of political question with reference to answers to some interrelated themes and inquiries.[10] This indicates that the Study adopts a *doctrinaire* approach to the issues that may be dubbed as 'political questions' since identification of a political question engages one with a full-fledged and robust understanding of those interrelated themes and inquires. On the contrary, one needs no special doctrine to explain why a court should abstain itself as regards the questions or matters involved in *ouster clauses* provisions of a Constitution. One may explain the nature of the review role of courts in this respect by simply stating that courts should not

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6 See, *supra*, Chapter 7 (Section 7.1.) (p. 240) of the Study.

7 This rule, however, admits exceptions. It has been held on occasions that the Supreme Court, even where any *ouster clause* provision excludes jurisdiction of courts, has the power to declare an action to be without lawful authority if it is totally without jurisdiction (*coram non judice*) or is vitiated by *mala fide*. See, for example, *Jamil Huq v Bangladesh* (1982) 34 DLR (AD) 125; *Khandker Mostaque Ahmed v Bangladesh* (1982) 34 DLR (AD) 222; *Saheda Khatun v Administrative App. Tribunal* (1998) 3 BLC (AD) 155; *Mohammadullah v Secretary, Home Affairs* 1996 BLD 18; *Syed Abdul Alim v DC, Dhaka* (2006) 58 DLR 74.

8 See generally, *supra*, Chapter 6 (Section 6.2.3.) (p. 197) of the Study.

9 See generally, *supra*, Chapter 6 (p. 172) of the Study.

10 ibid.

stretch their hands to reach these matters because their jurisdiction has been expressly barred by the terms of the Constitution.

In such view of the matter, the Study holds that a theory of political question may exist independently of the *ouster clauses* provisions of a Constitution and, conversely, *ouster clauses* questions may not come under the umbrella of the *doctrinaire* approach to issues dubbed as 'political questions'. [11] And a theory of political question, to be emphasized, may exist in this sense only when the courts adopt a *creative* and *rational* interpretative exercise of its provisions instead of *mechanically* holding that since powers of the courts have not been expressly excluded by the terms of the Constitution, all other provisions may be intended to be subject to the power of judicial review since *rule of law* is the constitutional mandate under the Constitution.[12]

7.3. Privilege and Immunity

The Study groups into two categories the privileges and immunities contemplated under the Constitution: (i) parliamentary privileges and immunities; (ii) immunity of the President from Court proceedings.

7.3.1. Parliamentary Privileges and Immunities

Article 78 of the Constitution speaks of the privileges and immunities of parliament and its members. Before stating how those privileges and immunities differ from 'political question', the Study should take notice of the scheme of Article 78. As to its scheme, Mahmudul Islam writes:

> The scheme of art. 78 has to be noticed. Sub-arts. (1) to (4) specify the privileges of Parliament and its committees and members. Thereafter, sub-art. (5) provides that subject to this article the privileges of Parliament, its committees and members may be determined by Act of Parliament. It clearly means that in addition to the privileges specified, further privileges may be granted by an Act of Parliament . . . under art. 65. [13]

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[11] For more clarity as to conceptual concerns between 'jurisdiction' and 'political question', see, *supra*, Chapter 2 (Section 2.3.3.2.) (p. 75) of the Study.

[12] For the Study's view that 'political question' as envisaged does not contradict 'rule of law', see. *supra*, Chapter 6 (Section 6.3.) (p. 223) of the Study.

[13] Mahmudul Islam, *Constitutional Law of Bangladesh* (3rd edn, Mullick Brothers 2012) 562.

Without inquiring into the further privileges that may be granted by Act of Parliament, to accomplish the Study's purpose, it may be enough to focus on privileges and immunities that have been granted by the Constitution itself in sub-arts. (1) to (4) of Article 78. Sub-art. (1) provides that the validity of the proceedings of parliament shall not be questioned in any court. Sub-art. (2) provides that the members and officers of parliament shall not in the exercise of their powers relating to regulation of procedure, conduct of the business, or the maintenance of order in parliament be subject to the jurisdiction of any court. Sub-art. (3) protects the members of parliament against any liability in respect of anything said or vote given by them in parliament or in a committee of parliament. Sub-art. (4) ensures no person shall incur any liability in respect of any publication by or under the authority of parliament of any report, paper, vote or proceeding.[14]

Sub-arts. (1) and (2) relate to proceedings of parliament and privileges of parliament, its members and officers in relation to such proceedings. Sub-arts. (3) and (4), on the other hand, speaks about immunities of members of parliament in respect of anything said in parliament or anything published under the authority of parliament. Article 78 collectively terms them as 'privileges and immunities' of parliament and its members. In a sense, Article 78 is an *ouster clause* provision of the Constitution as explained in the immediately preceding Section of the Study.[15] Given that courts' ouster of jurisdiction may be on various subject matters, Article 78 ousts such jurisdiction on the subject matter of 'privileges and immunities' of parliament and its members.

A detail enumeration of the meaning of 'proceedings of parliament' or the meaning and extent of 'privileges and immunities' of parliament and its members guaranteed under the Article are beyond the limited space of the Study. [16] In political question cases, the Court, as the Study advocates, should refrain from exercising its power of judicial review. Likewise,

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14 Mahmudul Islam, ibid 558.

15 See, *supra*, Chapter 7 (Section 7.2.) (p. 241) of the Study.

16 However, for the meaning of 'internal proceedings of parliament' or generally for the meaning and extent of parliamentary privileges and immunities under Article 78, one may see, *Fazlul Kader Chowdhury v Shah Nawaz* 18 DLR (SC) 62; *Badrul Huq Khan v Election Tribunal* (1963) 15 DLR (SC) 389; *Suranjit Sengupta v Election Tribunal* 1981 BLD 132; *Cyril Sikdar v Nazmul Huda* (1994) 46 DLR 555; *Special Reference No. 1 of 1995* (1995) 47 DLR (AD) 111 (hereafter *Special Reference No. 1 of 1995*); *Rafique (Md.) Hossain v Speaker* (1995) 47 DLR 361; *Anwar Hossain Khan v Speaker, Jatya Sangsad* (1995) 47 DLR 42; *Khondaker Delwar Hossain v The Speaker* (1999) 51 DLR 1; *Secretary, Parliament v Khondaker Delwar Hossain* 1999 BLD (AD) 276; *Dr. Ahmed Hossain v Bangladesh* (1999) 51 DLR (AD) 75; *Ataur Rahman v Md. Nasim* (2000) 52 DLR 16; *Afzalul Abedin v Bangladesh* (2002) 10 BLT 490; *BLAST v Bangladesh* (2008) 60 DLR 176; *Moudud Ahmed v Anwar Hossain Khan* (2008) 60 DLR (AD) 108;

the Court would also not exercise the judicial power if the matter qualifies as one of the parliamentary privileges or immunities. The Study, therefore, to fulfill its task, would concentrate only on how Court's refusal to exercise its power of judicial review on 'political question' ground should be distinguished from its refusal on the ground of parliamentary 'privileges and immunities'.

Privilege generally connotes a special facility or advantage granted to any person or group or any authority. Suppose, the English law of inheritance has granted special advantage to the eldest son of the family. One may then say that the English inheritance law has privileged the eldest son. Laws including Constitution sometimes give preferential treatment to women or any disadvantaged section of the society. In the strict sense of the term, these preferential rights may also be viewed as privileges for that concerned section of the society. Immunity literally means exemption from something. In legal parlance, it conveys exemption from an obligation or penalty or any proceeding. [17] Both privileges and immunities are accorded by law to attain certain objective. Privileges and immunities are also given to parliament and its members with certain objectives and rationales in view. Mahmudul Islam observes the rationale in these words:

> For the discharge of the high functions and responsibilities effectively free of any interference or obstruction from any quarter certain privileges and immunities are accorded to the legislature and its members. These privileges are conferred to the legislature collectively so that it may vindicate its authority, prestige and power and protect its members from obstruction in the performance of their parliamentary functions and the members of the legislature are given wider personal liberty and freedom of speech than enjoyed by the ordinary citizens.[18]

Privileges and immunities to parliament and its members are thus accorded so that they may effectively exercise their powers. The parliament is vested with legislative powers. Privileges and immunities are not related to those legislative powers themselves, rather they are related to some special advantage so that the parliament may exercise or discharge the legislative powers or functions effectively. Privileges and immunities, therefore, do not concern 'separation of powers' which the Constitution assigns to the three co-ordinate branches of

[17] For better jurisprudential appreciation, one can consult also Hohfeld's analysis of rights in this regard. He perceives 'right' with reference to four distinct legal concepts, namely, a claim (right *stricto senso* or right in the strict sense of the term); a privilege; a power; and, an immunity.

[18] Mahmudul Islam (n 13) 557-58.

government. Political question, by contrast, directly concerns 'separation of powers' i.e., courts would invade 'separation of powers' if inquires into constitutional issues dubbed as 'political questions'. To conclude, like the 'exceptions to judicial review' [19] or 'absence of jurisdiction', [20] the Court may simply withhold judicial review if the matter involves parliamentary privileges and immunities referring directly to Article 78 of the Constitution. On the contrary, 'political question' can be ascertained only by reference to the inquiries of interrelated themes or taking recourse to constitutional interpretation as suggested earlier in this Study.[21]

7.3.2. Immunity of the President from Court Proceedings

Article 51 speaks of the President's immunity from proceedings of court. Sub-article 1 provides that the President shall not be answerable in any court for anything done or omitted to be done in the exercise or purported exercise of the functions of his office. Sub-article 2 provides that during the term of his office no criminal proceedings shall be instituted or continued against the President, and no process for his arrest or imprisonment shall be issued from any court. President's immunity thus applies to both civil and criminal proceedings. However, the immunity is available to the President while he is in office and not after expiry of his term of office.[22]

Evidently, the immunity has been given to the President so that he may effectively discharge his functions as well as in view of the sanctity and dignity of his office. The Study submits that President's immunity under Article 51 should be distinguished from Court's refusal to exercise the power of judicial review on 'political question' ground on the same reasoning as provided for parliamentary privileges and immunities in the preceding sub-section of the Study.[23]

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19 See, *supra*, Chapter 7 (Section 7.1.) (p. 240) of the Study.
20 See, *supra*, Chapter 7 (Section 7.2.) (p. 241) of the Study.
21 See generally, *supra*, Chapter 6 (p. 172) of the Study.
22 See, *Khandker Moshtaque Ahmed v Bangladesh* (1982) 34 DLR (AD) 222 (hereafter *Khandker Moshtaque Ahmed*); *HM Ershad v State* (1991) 43 DLR (AD) 50.
23 See, *supra*, Chapter 7 (Section 7.3.1.) (p. 243) of the Study.

7.4. Judicial Self-Restraint

A Court cannot arrogate power which it is not granted to it. It has already been seen that 'exceptions to judicial review' and 'absence of jurisdiction' are the two *express* constitutional limits on Court's power of judicial review.[24] In these cases, the Court's abstention role cannot be viewed simply as *judicial self-restraint* since the Court has no other option but to refrain due to such *express* limit. Likewise, political question also imposes limit on Court's power of judicial review the only distinction being that in the former case the limitation is *express* whereas in political question cases it is *interpretive*. As the Court is bound to refrain in the case of *express* limit, it should likewise be bound to refrain in the case of *interpretive* limit manifested through political questions. Thus, the Court's abstention role in political question cases cannot also be viewed merely as an exercise of *judicial self-restraint*. Like the *express* limit, the Court is bound to abstain its review role once a constitutional issue is found to be a 'political question'.[25]

If, in view of the above reasoning, *judicial self-restraint* is not the appropriate term to depict the abstention role of Court in political question cases, then, what really is the purport of *judicial self-restraint* when used in constitutional law? The Study finds its true import in the principles of constitutional interpretation. In constitutional supremacy as in ours, the Court can not only review laws but also declare the law void if repugnant to any provision of the Constitution. In so reviewing of laws, the Court has developed over the years some principles of interpretation. In view of this Study, a minimalistic attitude of Court expressed through some of such principles of constitutional interpretation has collectively been termed as *judicial self-restraint*.

To clarify, the Study cites some of such principles relating to judicial review of laws. The maxim *utres magis valeat quam pareat* (it is better for a thing to have effect than to be made void) is one such principle. On the basis of this principle, the Court presumes a statute to be valid when its constitutionality comes into question.[26] Similarly, where constitutionality of a

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[24] See, *supra*, Chapter 7 (Sections 7.1. and 7.2. respectively) (pp. 240, 241) of the Study.

[25] For how the Court would determine whether a constitutional issue is a 'political question' or not, see generally, *supra*, Chapter 6 (p. 172) of the Study.

[26] See, for example, *Mujibur Rahman v Bangladesh* (1992) 44 DLR (AD) 111, para 66 (hereafter *Mujibur Rahman*). See also *Dr. Nurul Islam v Bangladesh* 1981 BLD (AD) 140 (hereafter *Dr. Nurul Islam*) ("one of the cardinal principles of interpretation is that...the Court will lean in favour of upholding the constitutionality of a law" - per Shahabuddin Ahmed J, para 129).

statute is challenged and there are two possible interpretations, by one of which it would be unconstitutional and the other valid, the Court adopts that interpretation which upholds the constitutionality of the statute.[27] Again, the Court also avoids decision of a constitutional nature if the issue can be decided otherwise. This means when a case may be decided on either one of the two grounds and one of those grounds does not involve the constitutionality of the law, the court will decide on the latter ground.[28] To follow some other principles of a similar nature, the Court does not impute improper motive to legislature,[29] formulate a rule of constitutional law broader than is required by the precise facts of the case,[30] and determine constitutionality of a statute as a hypothetical question. [31]

The term *judicial self-restraint*, therefore, reflects a minimalistic attitude of Court manifested through principles of interpretation particularly when the Court makes judicial review of laws passed by the legislature. [32] It thus should not have any bearing with limitation imposed upon Court's power of judicial review itself either in *express* terms by the Constitution or through the *interpretive* exercise of Court striking a right balance between the two paramount but competing principles of Constitution, namely, 'separation of powers' and 'rule of law'. The Court is bound to expound law which includes also the Constitution and in the name of *judicial self-restraint* cannot efface its constitutional obligation. At the same time, it cannot

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27 See, *Dr. Nurul Islam*, ibid ("one of the cardinal principles of interpretation is that a law should be interpreted in such a way that it should be rather saved than destroyed" - per Shahabuddin Ahmed J, para 129).

28 See, *Dr. Nurul Islam*, ibid. In this case K Hossain CJ and Shahabuddin Ahmed J adhered to this principle of interpretation. In view of these Judges, the order under challenge is vitiated by malice in law is sufficient to dispose of the appeal. But the majority of the Judges declared the law in question to be unconstitutional even though they also found the impugned action of the government to be *mala fide* and a decision on constitutionality could have been avoided. See also *BADC v Md. Shamsul Haque Mazumder & others* 14 MLR (AD) 197 (the High Court Division thought it prudent to dispose of the case otherwise than by striking down the Regulation. The approach of the High Court Division was appreciated by the Appellate Division because when a case can be decided without striking down the law but giving the relief to the petitioners, that course is always better than striking down the law).

29 See, for example, *Khandakar Moshtaque Ahmed* (n 22).

30 The Court, however, departed from this principle in *Kazi Mukhlesur Rahman v Bangladesh* (1974) 26 DLR (AD) 44. Even after holding the writ petition premature, the Appellate Division went into the question of the extent of executive power under Articles 55 (2) and 143 (2) of the Constitution. In American jurisdiction, this principle of constitutional interpretation is expressed as the principle of "judicial minimalism". For more on judicial minimalism, see, Cass R. Sunstein, One Case at a Time: Judicial Minimalism on the Supreme Court 3 (1999); Andrew Nolan, The Doctrine of Constitutional Avoidance: A Legal Overview, Congressional Research Service (CRS) Report for Members and Committees of Congress (2014).

31 See, *Kudrat-E-Elahi Panir v Bangladesh* (1992) 44 DLR (AD) 319. The Appellate Division criticized Naimuddin Ahmed J for embarking on hypothetical or academic questions in *Kudrat- E-Elahi Panir v Bangladesh* (1992) 44 DLR (HCD) 179. See also *Moudud Ahmed v Md. Anwar Hossain Khan* 2008 BLD (AD) 81; *Bangladesh v Idrisur Rahman* 2009 BLD (AD) 79, 103.

32 In this context, See also SM Seervai, *Constitutional Law of India* (New Delhi 1996) 2639-40 (noting a judge's not invalidating laws or executive action which run counter to his own political, social and economic views and predilections as a form of *judicial self-restraint* and observes that judicial restraint in this sense was the basis of Justice Holmes's famous dissent in *Lockner v New York* (1904) 198 US 45).

assume for itself power which it is not granted to it, say, for example, in the instant case, deciding on the political questions. And, to emphasize again, Court's refusal to exercise judicial review on 'political question' ground cannot simply be styled as an exercise of *judicial self-restraint*.

7.5. Judicial Discretion

The Court's identifying a constitutional issue as a political question is also not just a matter of its discretion. True, 'political question' as opposed to *express* constitutional limit is a form of *interpretive* limit on Court's power of judicial review. In that view, it involves a delicate and creative exercise of constitutional interpretation. But 'separation of powers' being one of the basic features of Constitution and 'political question' founded on it, the Court must identify a constitutional issue as a 'political question' if judicial interference with the issue infringes such 'separation of powers'. Political question thus differ from typical instances of a court's exercising discretion. The Study may profitably cite here some of such typical exercises of judicial discretion.

The criminal law of any state confers discretionary power upon courts to choose from among the alternative punishments. The law may authorize courts to inflict punishment in the form of either imprisonment or fine or both. Again, the law may allow such discretionary powers as inflicting either simple or rigorous imprisonment. These discretionary powers in criminal law are mostly or at the first instance exercised by the lower court judges. The Higher Judiciary Judges also exercise discretion in terms expressed by the Constitution. Article 103 of Bangladesh Constitution provides an example. Sub-article 2 of Article 103 states that an appeal to the Appellate Division from a judgment, decree, order or sentence of the High Court Division shall lie *as of right* where the High Court Division: (a) certifies that the case involves a substantial question of law as to the interpretation of the Constitution; or (b) has confirmed a sentence of death or sentenced a person to death or to imprisonment for life; or (c) has imposed punishment on a person for contempt of that division and in such other cases as may be provided by Act of Parliament. Under sub-article 3, in a case to which the three clauses of sub-article 2 does not apply, an appeal from the judgment, decree, order or sentence of the High Court Division to the Appellate division shall lie only if the Appellate Division grants *leave to appeal*. Sub-article 3 of Article 103 thus confers discretion upon the Appellate Division in respect of granting appeal in its Division. It may be observed that in

these instances of discretion conferred by the ordinary criminal law or of constitutional law, the Court is not strictly bound to take one particular decision, but rather may choose from among a number of alternatives stipulated in law or decide one instead of another in exercise of its discretion.

However, the Higher Judiciary's exercise of discretion that has attracted more academic attention and also debate is the one which it exercises in *hard cases*. In *hard cases*, the Judges are not governed by any predetermined rules. How do then they decide the dispute? Hart [33] and Dworkin [34] have expressed contrary views regarding this or as to the role of Judges in *hard cases*. According to Hart, a Judge has no discretion when a clear and established rule is available. It otherwise means that a Judge exercises discretion when 'rules run out' or 'in a vacuum' and hence his discretion is legally uncontrolled. Dworkin, on the other hand, argues that a Judge's discretion is never uncontrolled; rather his discretion even in *hard cases* is confined by pre-existing principles and standards. The Study finds Dworkin's argument more persuasive and proceeds to examine a Judge's discretion in *hard cases* with reference to an illustration from our jurisdiction.[35]

Article 102 of the Constitution has declared the writ jurisdiction of the High Court Division. Under this Article, although any person can approach the Court in case of writs of *habeas corpus* and *quo warranto*, only an 'aggrieved person' can file a writ of *mandamus*, *Certiorari* and *prohibition*. The general principle of law is that the 'aggrieved person' himself must sue. It rests on the dictum that 'he who suffers knows best his own case'. But a strict adherence to this traditional view may, at the one hand, help going many public wrongs unredressed and, at the other hand, may cause hardship to the poor vulnerable masses and helpless victims to reach justice. Taking into account these considerations, the Appellate Division by its historic judgment in *Dr. Mohiuddin Farooque v Bangladesh* [36] relaxed this procedural rule of standing. It held that the expression 'person aggrieved' means not only any person who is personally aggrieved but also one whose heart bleeds for his less fortunate fellow beings for a wrong done by the government or a local authority in not fulfilling its constitutional or

[33] HLA Hart, *The Concept of Law* (Clarendon Press, 1994).
[34] Ronald Dworkin, *Taking Rights Seriously* (Duckworth, 1977).
[35] The Study presents a revised version of what this author earlier wrote on this illustration of our jurisdiction, see, Moha. Waheduzzaman, 'Judicial Enforcement of Socio-Economic Rights in Bangladesh: Theoretical Aspects from Comparative Perspective' in Dr. M. Rahman (ed.) (2011) 12 *Human Rights and Environment* 76, 77.
[36] (1997) 49 DLR (AD) 1 (hereafter *Dr. Mohiuddin Farooque*).

statutory obligation.[37] This decision subsequently paved the way for Public Interest Litigation (PIL) in Bangladesh.

Now, how will one evaluate the interpretive role of the Court in *Dr. Mohiuddin Farooque*? Before making any comments, it should first be observed that a Constitution as a founding document of a nation differs significantly from other ordinary laws of the land. It is framed not for a temporary period but for the evolving times to come. Therefore, the language of a Constitution is general in terms or open-ended or content of the words are often indeterminate as opposed to rigid and fixed. The expression 'person aggrieved' of Article 102 is also of an expression of a vague and indeterminate nature. A close scrutiny would reveal that the Court in *Dr. Mohiuddin Farooque* merely interpreted that vague, indeterminate and open-ended provision of the Constitution.

The expression 'person aggrieved' of Article 102 could be interpreted in either ways. It could be interpreted to mean: *first*, a person who is 'directly and personally' aggrieved or *second*, a person though not directly and personally aggrieved has 'sufficient interest' in the matter so as to claim *locus standi* before the Court. This kind of open-ended and indeterminate nature of constitutional provisions gives Judges' discretionary power to make their choices from among the alternative interpretations.

The discretion of a Judge, however, is not as wide and strong as that of a legislator. Furthermore, a Judge's discretion cannot also be arbitrary or unreasonable or based on personal preferences but must be guided objectively to best fit the decision with the underlying values of the legal system. For instance, the discretion of the Court in adopting the second interpretation of the expression 'person aggrieved' in *Dr. Mohiuddin Farooque* was guided by some prime considerations*: first*, they had to take a purposive view of the Constitution; *second*, they had to interpret the expression not in isolation of but in conjunction with other provisions of the Constitution specially Part II which embodies, *inter alia*, socio-economic rights as Fundamental Principles of State Policy (FPSP); *third*, they had to fit the decision with the currently accepted and expanding jurisprudence of Public Interest Litigation (PIL).

[37] ibid 24 (per BB Roy Chowdhury J).

Dr. Mohiuddin Farooque thus shows that even in *hard cases* the discretion of a Judge is not unguided. In the absence of a concrete rule, the Court's decision is always informed by pre-existing principles and standards. And so far *hard cases* relate to constitutional law, it may be said that from amongst the alternative interpretations or choices, the Court adopts (or rather should adopt) the one which is in consonance with the currently accepted values and thoughts of the society or which accords with the realities of the situation or which best fits with the entire scheme of the Constitution or which is in best harmony with the vision and mission enshrined in the preamble. Dworkin's view, therefore, should get preference over that of the view of Hart.[38]

The foregoing discussion on judicial discretion adequately explains the meaning and nature of a Judge's discretion in ordinary course and in *hard cases*. As opposed to this discretion of a Judge, political question concerns discretion of the elected branches, namely, the legislature and the executive. And when courts identify a constitutional issue as a 'political question', they perform the act of acknowledging the discretion of the elected branches. Judicial discretion thus simply conveys that Judges may also have discretion like the other co-ordinate branches of government. But one must not confuse this discretion of the Judges with wider discretion of the elected branches that leave room for a political question to arise when it is construed to be *unbounded*. [39]

7.6. Judicial Deference

Judicial deference to the view of any authority (say, for example, the decision of a statutory authority) in general or the view of the elected branches in particular is different from declining substantive merit review of elected branches' decision on political question grounds. If a constitutional issue is held to be a 'political question', the issue is plainly beyond the reach of judicial review; not merely that it is subject to a deferential standard of review. The term 'judicial deference', therefore, can have no meaning when judicial review is itself barred as, in the instant case, in political question cases. It has meaning only when the issue itself is held to be justiciable.

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[38] See, *supra* notes 33 and 34.

[39] For how/when may discretion of elected branches be construed to be *unbounded*, see generally, *supra*, Chapter 6 (p. 172) of the Study.

The Study illustrates this with reference to some provisions of our Constitution. Recall, the Study depicted earlier that according to the *traditional* view, the question of determination of facts involved in promulgation of Ordinances and proclamation of emergency is justiciable.[40] The Court, therefore, in these cases, without declining to adjudicate the issue at all, may grant deference to the view of the executive branch of government. Suppose, an Ordinance promulgated under Article 93 has been challenged. The court may start with a presumption of the existence of an emergency and the person who challenges the Ordinance will have a great burden of showing the absence of such emergency. As held in *AK Roy v India*, every casual and passing challenge to the existence of the necessary circumstances cannot be entertained.[41] Similarly, the executive being vested under Article 141A of the Constitution with the power to proclaim emergency and the parliament being given the power to approve or disapprove it, the Court should not lightly deal with the decision of the executive in this regard and should be very cautious in upsetting the decision of the executive in respect of both the issue and revocation of the proclamation of emergency.[42] Thus, executive's assertion of the existence of necessary circumstances or of the emergency under both the Articles is to be given due and proper weight. This indicates a kind of *judicial deference* to the views held by the other branches of government.

Besides depicting the above stated *traditional* view, the Study also suggested that the questions of determining facts involved in the promulgation of Ordinances and proclamation of emergency may be also susceptible of *political question analysis*.[43] And on that analysis if the issues are held to be political questions, judicial review would outright be impermissible and accordingly the question of deference would be rendered totally impertinent. On the contrary, when a constitutional issue is held to be justiciable, the saying that the Court should nevertheless accord deference to the view of elected branches remains meaningful. One might say, for example, that certain constitutional clauses, although justiciable, should be interpreted with extraordinary deference to the political branches.[44] Recall, for example, the Study held the President's exercise of prerogative of mercy justiciable.[45] In this respect, it remains meaningful to say that the Court should nevertheless give due and proper weight to

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40 See, *supra*, Chapter 6 (Section 6.1.2.1.1.) (p. 175) of the Study.
41 AIR 1982 SC 725.
42 Mahmudul Islam (n 13) 433, 434.
43 See, *supra*, Chapter 6 (Section 6.1.2.1.2.) (p. 180) of the Study.
44 Robert J. Pushaw Jr., 'Justiciability and Separation of Powers: A Neo-Federalist Approach' (1996) 81 *Cornell Law Review* 509.
45 See, *supra*, Chapter 6 (Section 6.2.2.) (p. 193) of the Study.

the factors taken into consideration by the President in reaching the decision.[46] Again, in our jurisdiction, Judges may review laws and may also declare any such law void if contravenes any provision of the Constitution. Nevertheless, it may be said that the Judges should (Judges in fact do) start with a presumption of validity of the laws passed by the legislature.[47]

All the above cited instances whether in relation to executive or legislature are nothing but showing some degree of respect and deference to the view of elected branches having regard to their high constitutional status but without relinquishing the paramount function of judicial review itself. Thus, the *judicial deference* of these kinds, unlike a true *political question doctrine*, does not preclude courts from deciding a question at all. The Court's mention of *deference* to the political branches does not necessarily imply that a political question is present.[48] And conversely, in a true political question case, reference to judicial deference bears no significance since judicial review itself is precluded when a constitutional issue is found to be a political question.[49]

7.7. Cases Involving Political Ramifications

Before drawing distinction between 'political question' and 'cases involving political ramifications', the Study should first reflect, albeit in brief, on the distinction between a *political question* and enforcing *political rights* of individuals. Constitutions of states now invariably contain a Chapter on the rights of individuals under such title as Basic Rights, Fundamental rights or Bill or Rights. Subject to some exceptions and variations of state Constitutions, this mainly embodies civil and political rights of individuals. The effect of these entrenched rights is that no law in derogation of them may be passed by the legislature, and no executive action may also be taken in violation of them.

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[46] One can see this observation of US court having reflection of *judicial deference* to the view of executive branch: "We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer." *Chevron, USA, Inc. v Natural Res. Def. Council, Inc.*, 467 US 837, 844 (1984). Quoted in Jared P Cole, 'The Political Question Doctrine: Justiciability and the Separation of Powers' *Congressional Research Service (CRS) Report* (prepared for Members and Committees of Congress) (2014) 11 (in footnote 102).

[47] Just to perceive *judicial deference* rather extensively, one can see also *judicial deference* to administrative decisions. See, for example, *Mustafa Kamal v Commissioner of Customs* (1999) 51 DLR (AD) 1 (In judicial review of administrative actions, the court has to start with the presumption of regularity of the official act and the burden of proof is on the person who alleges the contrary). See, Mahmudul Islam (n 13) 601.

[48] Cole (n 46) 11.

[49] It may be mentioned that this author in his earlier work also identified *judicial deference* as an apparently seeming issue that is not truly a 'political question'. The Study has presented a vastly improved version of what he wrote earlier on this. See author's earlier writing in Waheduzzaman (n 5) 46-47.

The Bangladesh Constitution embodies them in Part III under the title Fundamental Rights. Freedom of movement (Article 36), freedom of assembly (Article 37), freedom of association (Article 38) are some examples of *political* rights guaranteed under Part III of the Constitution. The right to move the High Court Division to enforce Fundamental Rights conferred by Part III is also a fundamental right under Article 44 of the Constitution. In such view of the matter, the question of 'political question' can have no bearing or can never arise when Court enforces *political* rights of the individuals. In US jurisdiction, Justice Brennan rightly noted that the "mere fact that the suit seeks protection of a *political right* does not mean it presents a political question." [50]

With this brief understanding as to the distinction between political question and political rights, the Study now proceeds to distinguish between political question and cases involving political ramifications.[51] As constitutional issues are often politically sensitive, the courts adjudicate controversies with *political ramifications* on a regular basis. To understand a case with *political ramifications*, the Study considers the landmark case of *Special Reference No. 1 of 1995*. [52] This case in its *advisory opinion* contains also the only full-fledged decision in Bangladesh as regards the question of the applicability of the *doctrine of political question* within its constitutional framework.

There the President of Bangladesh sought an *advisory opinion* from the Supreme Court on some legal questions arising out of the continued absence of some members of the parliament consequent upon their walking out of the House first and then resorting to boycott of the parliament. The question was whether such boycott was to be construed as absence and as such rendered their seats vacant.[53]

From among the counsels, Dr. Kamal Hossain and Syed Ishtiaq Ahmed raised the question as to the *maintainability* of the Reference on the ground that it raised *political question* rather than *legal*. The matter, in their view, was essentially one between the parliament and its members and hence within the domain of the parliament. They, therefore, particularly

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[50] *Baker v Carr* 369 US 186, 209 (1962) (emphasis added).
[51] The Study presents an improved version of what this author earlier wrote on the distinction between 'political question' and 'cases involving political ramifications'. See, Waheduzzaman (n 5) 45-46.
[52] *Special Reference No. 1 of 1995* (n 16).
[53] For detail, see, *supra*, Chapter 4 (Section 4.1.5.) (p. 138) of the Study.

contended that by deciding the matter, the Court is required to encroach on the field of a co-ordinate branch of the government, i.e., the parliament.[54]

The Appellate Division was anxious to keep itself *aloof from political controversies* but not at the cost of its responsibility to resolve *legal* issues. After reviewing relevant cases from divergent jurisdictions and notable comments of some authors, the Court while deciding in favour of the *maintainability* of the Reference rejected the argument of *political question* in the context of Bangladeshi jurisdiction.[55] However, regarding a Court's authority to decide controversies with *political ramifications*, ATM Afzal CJ expressed his views in no ambiguous terms:

> It has never been the practice in any jurisdiction that a Court has refused to answer a Reference merely because the question of law has arisen out of facts which have *political overtones*.[56]

Although this Study adopts a contrasting view regarding the existence of a political question doctrine within the framework of Bangladesh Constitution,[57] the Study fully endorses the abovementioned observation of ATM Afzal CJ regarding a Court's assertion of jurisdiction in controversies with *political ramifications*. In this context, it may be pertinent to mention that in US jurisdiction also where the doctrine of political question has been originated,[58] a distinction is drawn between political question and cases involving political ramifications. In *Zivotofsky v Clinton*,[59] Justice Roberts citing *INS v Chadha*[60] held that courts cannot avoid their responsibility merely because the issue has *political implications*. Justice Sotomayor in her concurring opinion was also of the same view when said that a court may not refuse to adjudicate a dispute merely because a decision may have significant *political overtones*.[61] A true *political question* should thus not be confused with cases merely involving *political ramifications*.

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54 ibid.

55 ibid. The Court observed that "there is no magic in the phrase 'political question'." *Special Reference No. 1 of 1995* (n 16) 120 (per ATM Afzal CJ). The Court further observed: "While maintaining judicial restraint the Court is the ultimate arbiter in deciding whether it is appropriate in a particular case to take upon himself the task of undertaking a pronouncement on an issue which may be dubbed as a political question." ibid. For this Study's critical comment on Court's holding on 'political question', see, *supra*, Chapter 4 (Section 4.2.) (notes 115 to 119 and accompanying texts) (p. 147) of the Study.

56 *Special Reference No. 1 of 1995* (n 16) 121-22 (emphasis added).

57 See generally, *supra*, Chapter 6 (p. 172) of the Study.

58 See, *supra*, Chapter 3 (Section 3.1.) (p. 90) of the Study.

59 *Zivotofsky ex rel. Zivotofsky v Clinton*, 132 S. Ct. (2012) (hereafter *Zivotofsky*).

60 462 US 919, 943 (1983).

61 *Zivotofsky* (n 59).

Summary and Assessment

This Chapter both identifies and distinguishes apparently seeming issues from a true 'political question' to avoid confusion and uncertainty.[62] Exceptions to judicial review and absence of jurisdiction (Sections 7.1. and 7.2. respectively) are the two *express* limits on Court's power of judicial review whereas political question is a form of *interpretive* limit to be understood striking a right balance between 'rule of law' and 'separation of powers'. Privileges and immunities of parliament and President as identified in Section 7.3 do not concern 'separation of powers' itself, rather they are merely special advantage given having regard to their high constitutional status and sanctity so that they may effectively exercise their powers. Political question, by contrast, concerns *powers* themselves among the three co-ordinate branches of government.

Sections 7.4. (judicial self-restraint), 7.5. (judicial discretion), and 7.6. (judicial deference) identify three forms of judicial behaviour. The common feature in all of them is that they are taken recourse to by the Court without relinquishing its power of judicial review itself. For example, the Court in exercise of *judicial self-restraint* may adopt a minimalistic attitude in determining the validity of laws without abandoning its power of judicial review of laws itself. Similarly, the Court in exercise of *judicial discretion* chooses from among alternative interpretations in *hard cases*. The Court does so retaining its substantive authority to decide the case itself. Again, the Court may show *deference* to the view held by any authority including the elected branches without relinquishing its authority to decide on the authority's decision itself. As opposed to these, political question is a distinct form of judicial behaviour since in a 'political question' case, the Court is wholly precluded from exercising a substantive merit review of elected branches' decision if the constitutional issue is held to be a political question.

Section 7.7. first draws on the distinction between *political question* and enforcing *political rights* of the individuals and then distinguishes 'cases involving political ramifications' from a true 'political question'. Constitutional disputes involve political overtones and undertones and as such often politically sensitive. This political sensitiveness is not the characteristic

[62] See, *supra*, Chapter 1 (notes 93, 97 and 94 and accompanying texts) (pp. 31, 32) of the Study.

mark of a political question.[63] Political question arises from Constitution's conferring power on the elected branches without specifying how those powers would be exercised or without imposing any limitation for exercise of the power. And, in view of this Study, issues arising under those provisions would be 'political questions' if the discretion of the elected branches may be construed to be *unbounded*.[64]

[63] See, *supra*, Chapter 1 (note 10 and accompanying text) (p. 16) of the Study.

[64] For when may the discretion of the elected branches be construed to be *unbounded*, see generally, *supra*, Chapter 6 (p. 172) of the Study.

CHAPTER 8
CONCLUSION

Introduction

This Chapter comprises of three Sections. Section 8.1. presents a summary of the Study's arguments and incidents of political question as a form of *interpretive* limit on the Supreme Court's power of judicial review. Section 8.2. highlights the prospect for future research on the subject. Section 8.3. ends by expressing the concluding words of the Study.

8.1. Political Question: *Interpretive* Limit

The Study aims at constructing a theoretical framework regarding the application of the doctrine of political question in constitutional litigation with particular reference to Bangladesh Constitution. The doctrine concerns with Supreme Court's limits of adjudication of constitutional questions. The Study submits that certain constitutional matters vested with elected branches' responsibility fall beyond Court's adjudicative sphere. It terms those issues as 'political questions' and argues that the elected branches would remain only politically accountable to the people for those questions. As opposed to as well as in addition to *express* limit, political question is *interpretive* limit on Court's power of judicial review that functions to preserve 'separation of powers' among the branches of government as maintained in the Constitution.

In US jurisdiction, Chief Justice Marshall assumed for the Court the power of judicial review asserting that "It is emphatically the province and duty of the judicial department to say what the law is." [1] But how far the Court may go in that vein? In a written Constitution, the judiciary, like the other co-ordinate branches, also functions in terms of the Constitution. In such view of the matter, when may it be said that the judiciary has exceeded its limit set by the Constitution? In *Marbury* itself, Chief Justice Marshall observed that in certain areas of elected branches responsibility in the performance of which they have a discretion cannot be gone into by the Court.[2] And Marshall identified, by way of example, the power of the executive to appoint Judges and other high officials of state and executive's power in relation

1 *Marbury v Madison* 5 US (1 Cranch) 137, 169-70, 177 (1803) (hereafter *Marbury*).
2 See, *supra*, Chapter 3 (Section 3.1.1.1.) (p. 91) of the Study.

to foreign affairs as issues as to which the judiciary should have no competence under the US Constitution.[3] These issues came to be known gradually as 'political questions' and *Marbury* to represent both for *judicial review* and *political question* in US jurisdiction. In *Cohens v Virginia*,[4] the Court laid down the following principle of Court's assuming jurisdiction and ground of its abstention:

> It is must true that this Court will not take jurisdiction if it should not: but it is equally true, that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be both before us. *We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution*.[5]

However, even after the judicial utterances of the abovementioned kinds, there has not been any full-fledged academic attempt in US jurisdiction to theorize political questions. True, certain approaches exist but this Study has already shown that those approaches are either inaccurate or inadequate.[6] So far the Bangladesh judiciary is concerned, the Court has employed the term 'political question' in deciding cases of its jurisdiction but has completely failed to grasp the inner sense of political question as obtained in US jurisdiction.[7] In some cases, the Court appears to decline judicial review confusing 'political question' with 'cases involving political ramifications'.[8] In others, Court's failure to appreciate the real meaning of political question has resulted into exercising judicial review into areas of elected branches responsibility which are truly susceptible of a political question analysis.[9] But no Bangladeshi scholar has undertaken any robust research study to justify political accountability of political questions and present political question in a coherent form.[10] In the backdrop of this vacuum from both the national and global perspectives, the Study constructs this *interpretive* theory of political question.

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3 ibid.
4 19 US (6 Wheat.) 264 (1821).
5 ibid 404 (emphasis added).
6 See generally, *supra*, Chapter 1 (Sections 1.1. and 1.2.) (pp. 18, 25) of the Study.
7 See, *supra*, Chapter 4 (p. 129) of the Study. For the meaning of political question in US jurisdiction, see generally, *supra*, Chapter 1 (Section 1.1.) (p. 18) and Chapter 3 (Section 3.1.) (p. 90) of the Study.
8 See, *supra*, Chapter 4 (p. 129) of the Study.
9 For issues susceptible of political question analysis of Bangladesh Constitution, see, *supra*, Chapter 2 (Section 2.3.2.) (p. 72) and Chapter 6 (Section 6. 2.3.) (p. 197) of the Study.
10 The Study found only two articles on political question from the perspective of Bangladesh Constitution. For a critical review (or limitation) of those works, see, *supra*, Chapter 1 (Section 1.2.) (p. 25) of the Study.

Political questions provide for Court a *substantive* ground to decline judicial review. The Court avoids reaching merit of an issue on other grounds also, such as, on grounds of *locus standi*, ripeness and mootness. These are more in the nature of *procedural* techniques or reasons of avoidance. Before making any attempt to formulate a theory of political question, the Study, therefore, as part of conceptual clarity, distinguishes 'political question' from these *procedural* grounds of avoidance as well as identifies the distinguishing features of political question.[11]

To construct the theoretical framework, the Study finds its constitutional basis in the principle of 'separation of powers'. The Study thus explores the genesis of the principle of 'separation of powers', distinguishes it from the two adjacent principles of 'division of powers' and 'checks and balances', and finally establishes that the Bangladesh Constitution maintains 'separation of powers' among the co-ordinate organs of government to sustain a claim for political question.[12]

However, though political question may be rooted in the principle of 'separation of powers', the Study needed a workable basis to construct the theoretical framework of the doctrine. The Study finds that basis in *unbounded* discretion of the elected branches of government. Question then arises: how are political question, 'separation of powers' and *unbounded* discretion related to each other? A political question arises out of the elected branches' exercise of power under the Constitution. Question may be raised again: is judicial review of elected branches' decision permissible when the power has been conferred without imposing any limitation? If the answer is no, it may then be said that elected branches' action in relation to those powers rest with their *unbounded* discretion. This is how political question based on the principle of 'separation of powers' is ultimately related to *unbounded* discretion. Based on this understanding, the Study defines political question as "constitutional issues committed to the *unbounded* discretion of the elected branches of government",[13] constructs the theoretical framework of the doctrine on that basis,[14] and thereby answers the research

[11] See generally, *supra*, Chapter 2 (Sections 2.2. and 2.3.) (pp. 52, 71) of the Study.
[12] See generally, *supra*, Chapter 5 (p. 151) read with Chapter 1 (note 89 and accompanying text) (p. 31) of the Study.
[13] See, *supra*, Chapter 2 (Section 2.3.1.) (p. 71) of the Study.
[14] See generally, *supra*, Chapter 6 (p. 172) of the Study.

question, "When may a constitutional issue be termed as a *political* as distinguished from a *legal* question?"[15]

In so answering the research question and constructing the theoretical framework of the doctrine, the Study reflects on discretionary powers generally and constitutional discretion in particular of the elected branches. It then distinguishes *unbounded* from *bounded* discretion based on some sound principle. The Study establishes that the idea of *unbounded* discretion does not contradict the constitutionally proclaimed objective of 'rule of law'. With respect to matters of *substantive political judgment* or critical areas of elected branches' responsibility, the Study's view thus runs counter to the view of the New Zealand Court of Appeal that "The *rule of law* requires that challenge shall be permitted in so far as issues arise of a kind with which the courts are competent to deal."[16] The study finally justifies political accountability of political questions.[17]

While the thesis could have been concluded with such presenting the theoretical framework of the doctrine in Chapter 6, Chapter 7 identifies some apparently seeming issues that are not truly political questions. Political question is *interpretive* limit on Court's power of judicial review whereas 'exceptions to judicial review' and 'absence of jurisdiction' are *express* limits on such power.[18] While political question concerns 'separation of powers' itself, privileges and immunities of parliament and the President concern how those powers may be effectively exercised.[19] While political question precludes the power of judicial review itself, judicial self-restraint, judicial discretion, and judicial deference without relinquishing such power operate at substantive merit review stage of the proceeding.[20] And finally political question implicating 'separation of powers' simply is not the same thing as an issue having political overtones and undertones.[21] Chapter 7 thus helps avoiding confusion and uncertainty in ascertaining political question as well as further reinforces that 'political question' as defined and framed in Chapter 6 is the political question in true sense of the term.

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15 See, *supra*, Chapter 1 (note 94 and accompanying text) (p. 32) of the Study.
16 *Burt v Governor General* [1992] 3 NZLR 672, 678 (emphasis added).
17 For these four-faceted inquiries in presenting the theoretical framework of the doctrine, see generally, *supra*, Chapter 6 (p. 172) of the Study.
18 See, *supra*, Chapter 7 (Sections 7.1. and 7.2.) (pp. 240, 241) of the Study.
19 See, *supra*, Chapter 7 (Section 7.3.) (p. 243) of the Study.
20 See, *supra*, Chapter 7 (Sections 7.4., 7.5. and 7.6) (pp. 247, 249, 252) of the Study.
21 See, *supra*, Chapter 7 (Section 7.7.) (p. 254) of the Study.

Political question having been originated in US jurisdiction is sometimes considered by some as the characteristics of US Constitution only.[22] They attribute it to the US Constitution's essential features of federalism and *rigid* 'separation of powers'. But this Study maintains that since political question is essentially a function of 'separation of powers' and since every Constitution maintains a minimum of 'separation of powers', political question may be the characteristic of any Constitution irrespective of the nature of government or whether the Constitution is based on a *rigid* 'separation of powers' or not.[23] The theory of political question this Study constructs with particular reference to Bangladesh Constitution should, therefore, hold good for other jurisdictions as well.[24]

8.2. Potentials for Further Study

The Study clarifies the concept of political question and guides courts as to its application in constitutional litigation. At the same time, it exposes some questions for further study.[25] They may briefly be mentioned as under.

8.2.1. Political Branches' Assault on Judiciary

Any Court that denies the existence of political questions in a way holds that the entire Constitution is judicially enforceable. Such a Court would not hesitate to intrude even into matters of *substantive political judgment* of the elected branches. This is too broad an interference into the workings of other co-ordinate branches and may cause those branches to circumscribe the jurisdiction of the Court in order to limit the power of judicial oversight.[26] And the legislative restriction upon the Court's jurisdiction may be so sweeping to extend even to cases that are currently understood to be justiciable.[27] One can remember in this context the US President Franklin D Roosevelt's court packing plan of 1937.[28]

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[22] See, for example, SM Seervai, *Constitutional Law of India* (New Delhi 1996) 2637-38; Mahmudul Islam, *Constitutional Law of Bangladesh* (3rd edn, Mullick Brothers 2012) 605. See also *MK Achakzai v Pakistan* PLD 1997 SC 426, 518.

[23] See, *supra*, Chapter 1 (notes 3 and 4 and accompanying paragraph) (pp. 13-14) of the Study.

[24] See, *supra*, Chapter 1 (Sections 1.5. and 1.6.) (pp. 32, 34) of the Study.

[25] See, *supra*, Chapter 1 (Section 1.5.) (p. 32) of the Study.

[26] Ariel L. Bendor, 'Are There Any Limits To Justiciability? The Jurisprudential And Constitutional Controversy In Light Of The Israeli And American Experience' (1997) 7 (2) *Ind. Int'l &Comp. L. Rev.* 349.

[27] ibid.

[28] President Roosevelt initiated New Deal legislation the most important of which was the National Industrial Recovery Act, 1933. The US Supreme Court invalidated the law on the ground of impermissible delegation giving the President unlimited discretion to make basic law and policy decisions. President Roosevelt reacted

In our jurisdiction, one cannot think of court packing or even curtailing court's jurisdiction because political branches themselves are not conscious of the fact that the Supreme Court is bound to function within the limits set by the Constitution and the Court transgresses its limit when decides a political question. In addition to this, the legal researches of the country mostly cite decisions of the Supreme Court as expository of laws but are not critical of the decisions themselves when required.[29] The Supreme Court may be supreme but not infallible and in view of this Study the Court falls into an error when decides a political question. Further research initiatives may, therefore, be undertaken reflecting on the consequences of deciding political questions implicating the role and scope of power between judiciary vis-a-vis the co-ordinate branches.

8.2.2. Context Specificity of the Application of Political Question

The level of Court's involvement into the spheres of elected branches' responsibility sometimes depends on the prevailing political and judicial culture of the country. The success of any doctrine, therefore, depends on the constitutional climate in which it operates. The Study does not engage itself with this concern. One may argue that allowing *unbounded* discretion in issues termed as 'political questions' may make the political branches more autocratic in exercise of their power. In short, the operation of political question doctrine might make our nascent democracy and rule of law more vulnerable.

Recall, the Study holds that the legal and political means of ensuring the accountability of government is not antithesis but complimentary to each other.[30] One of the central thrusts of argument, therefore, is that the whole of governmental accountability cannot be ensured by legal means and *vice versa*.[31] If one rejects political question fearing a harmful impact on

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by pronouncing his court packing plan. The Court thereupon proceeded to uphold the New Deal legislation. For detail, see, Robert J. Pushaw Jr., 'Justiciability and Separation of Powers: A Neo-Federalist Approach' (1996) 81 (2) *Cornell Law Review* 456-57.

29 Waheduzzaman, however, writes in the field of constitutional law and his writings often identify the loopholes of the Supreme Court's decisions. See, for example, Moha. Waheduzzaman, 'Judicial Enforcement of Socio-Economic Rights in Bangladesh: Theoretical Aspects from Comparative Perspective' in Dr. M Rahman (ed) (2011) *Human Rights and Environment* 57; Moha. Waheduzzaman, 'Economic, Social and Cultural Rights under the Constitution: Critical Evaluation of Judicial Jurisprudence in Bangladesh' (2014) 14 (1&2) *Bangladesh Journal of Law* 1; Moha. Waheduzzaman, 'The Domain of the Doctrine of Political Question in Constitutional Litigation: Bangladesh Constitution in Context' (2017) 17 (1 & 2) *Bangladesh Journal of Law* 1; Moha. Waheduzzaman, 'Measuring Constitutional "Laws" and "Conventions" in Same Parlance: Critiquing the *Idrisur Rahman*' (2020) 8 *Jahangirnagar University Journal of Law* 47.

30 See, *supra*, Chapter 6 (Section 6.4.) (p. 229) of the Study.

31 ibid.

democracy and rule of law, he thereby assumes that all fundamental values of a society or of a Constitution may be protected by judiciary. But that does not happen in practice. None would probably disagree that our judiciary is more active and intruding into the affairs of elected branches than the judiciary of UK and US. Did this ensure for us a better democracy and rule of law than the citizens of UK and US?

Certainly not. When people think of ensuring everything by means of judicial enforcement, it sometimes work to their disadvantage in the sense that they would then sit idly hoping the court is enough and would gain for them everything. But not all values may be protected by the court unless they vibrate in the society itself. On the contrary, if people know beforehand that certain constitutional values are for them to uphold, they would always remain conscious to guard those values against political branches' arbitrariness or majoritarian abuses. And this is better for a long term and sustainable democracy and rule of law. Therefore, the Study suggests, instead of vesting everything on judiciary, it is better to leave something for people, for their democratic consciousness, for mass media, for public censure, and for popular disapproval.

However, even after the above forceful assertion of the Study, a separate research may fairly be pursued focusing on the impact of the application of political question doctrine in our jurisdiction and how the doctrine's application may vary from country to country depending on their particular contexts.

8.2.3. The Forms of Political Accountability

The Study argues that the political branches should remain only politically accountable for political questions.[32] By this the Study means that the accountability of the elected branches for actions pertaining to political questions cannot be ensured by courts. In the UK, conventions of the Constitution are traditionally enforced not by courts but by fear of public criticism. The forms of political accountability for political questions may rightly include those means as are prevalent in the UK for enforcement of constitutional conventions. Apart from that, can there be any alternative legal institutions (not being courts) that will be authorized to monitor the reasonableness of the elected branches' decision on political

[32] ibid.

questions? If yes, what will be the status of those bodies' view or decision on political questions? Can parliamentary standing committees be given any role to play as an alternative legal institution in this regard?[33] These questions in particular as well as the question of efficacy of political means in ensuring governmental accountability are left by the Study for further research.

8.3. The Epilogue

The precise contours of the doctrine of political question have been said to be *murky* and *unsettled*, without there being a clear consensus among the members of the judges or academia.[34] In *Baker v Carr*, the US Supreme Court noted that the political question doctrine has caused much confusion and determining if it applies to a given case requires "a delicate exercise in constitutional interpretation."[35] The existence of the doctrine has been challenged in the country of its origin – the United States by many scholars of recognized merit.[36] Authors of other States including Bangladesh and India are, therefore, more prone to negate the existence of the doctrine within their respective jurisdictions.[37] In this backdrop, it was indeed a challenging task to argue in favour of a political question doctrine of any kind. Furthermore, recall, the Study advocates not only for the existence of a political question doctrine but also that such a doctrine may exist irrespective of the nature of the government the Constitution has chosen for itself as well as whether the constitutional system is based on a rigid separation of powers or not.[38]

The Study could accomplish this feat because it could discern well the difficulties involved in the issue termed as 'political question'. One aspect of difficulty lies in distinguishing political question from other grounds of refusal, such as, *locus standi*, ripeness, and mootness; relating political question with 'justiciability'; and, identifying the other distinguishing features of political question. The Study does this as part of conceptual clarity in Chapter 2. The other

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33 See, Article 76 of the Constitution for standing committees of parliament.

34 *Tel-Oren v Libyan Arab Republic* 726 F.2d 774, 803 n.8 (DC Cir. 1984) (Bork J., concurring). Quoted in Jared P Cole, 'The Political Question Doctrine: Justiciability and the Separation of Powers' *Congressional Research Service (CRS) Report* (prepared for Members and Committees of Congress) (2014) 2.

35 369 US 186, 211 (1962).

36 See, *supra*, Chapter 3 (Section 3.1.3.) (p. 114) of the Study.

37 See, *supra* note 22.

38 See, *supra* texts accompanying notes 22 to 24. This paragraph is a revised version of what this author earlier wrote on this, see, Moha. Waheduzzaman, 'The Domain of the Doctrine of Political Question in Constitutional Litigation: Bangladesh Constitution in Context' (2017) 17 (1 & 2) *Bangladesh Journal of Law* 47.

aspect of difficulty has been addressed in Chapter 7 as apparently seeming issues that are not truly political questions. Even after this, the main challenge of formulating the theoretical framework of the doctrine remains. The Study does this by striking a proper balance between 'rule of law' and 'separation of powers' and justifying political accountability for political questions (Chapter 6).

By this the Study, however, never claims that it has been able to remove the confusion and uncertainty surrounding political question once and for all. But it may surely hold with some credibility that the thesis as presented above advances one's understanding of political question one step forward. The Courts of any jurisdiction including the Bangladesh Supreme Court may now decide with more confidence that some issues of the Constitution are indeed political questions and the Constitution has left their performance to depend on the fidelity of the elected branches' action and ultimately on the vigilance of the people in exercise of their democratic rights.

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