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The Political Question Doctrine in the Supreme court of Bangladesh : Towards a constitution enforcing role for the court

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Abstract

In Constitutional discourse the doctrine of political question is a controversial theory. It is often narrated as a limit on judicial review power of the Court. Under this theory the court seeks to insulate itself from political pressures by avoiding the determination of questions which appear political in nature. It does not mean that the dispute has something to do with politics or anything like that. It is a kind of dispute that the Constitution provides to adjudicate by other branches of the government not by the judiciary. The paper, therefore, focuses a critical exposition of the doctrine of political questions and echoes that the Court should avoid the trap of the political questions which does not mean that there should not be anything like political questions. Because our Constitution aimed at a just social order based on certain core values e.g., justice (social, economic and political), human dignity, and rights and duty based democracy, and hence judicial review has its unique indigenous instrumentally. It's the Courts discretion- what would be decided and what ought not to be decided. The Court cannot take it (political question) as a law and at the same time on the touchstone of this doctrine, cannot decline itself to rule upon the dispute involving public interest which arises before it. Thus this paper begins by examining the history of the doctrine and the extent and nature of the Political Question Doctrine in Constitutional adjudication in the Supreme Court of Bangladesh and elsewhere the doctrine has developed. By this paper, the concept of justiciability, the proper scope of judicial review, the role of judiciary, the separation of power and the Supremacy of the Constitution explaining core principles of constitutionalism and how the court will adjudicate different disputes on the basis of those principles would be explained a little. A few important case decisions have been analyzed to give the argument a context. The paper will conclude that the Constitution is a living document needing interpretation in the light of the demand of society and also explores that the political question doctrine is troubling because the doctrine forces the Court to confront the institutional strengths ofthe political branches and the Court's weaknesses in resolving some Constitutional questions on the demand of the society.

Keywords : *Political Question, Justiciability, Judicial Review, Separation of Powers and Constitutionalism.*

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1.0 Introduction

Political question doctrine holds that certain issues even a Constitutional one, which the court feels is best resolved by one of the other branches of Government. This issues are generally political in nature, and the court feels that the political system of accountability is the best mechanism to resolve the issues, as opposed to a mandate from the courts, often these issues are either given wholly to another branch of Government in the Constitution or there is a lack of judicially manageable standard for resolving it, or for a number of other reasons. For example question relating to foreign relations, existence of state of war or belligerency, employment of armed forces, organization and procedure of the legislative department etc are treated as political questions (Islam, 2002). So political questions fall within such issues which belong to the domain of Parliament and judicially incapable to decide the concerned matter. The paper is, therefore, along with other relevant issues focusing on where a competent court refuses to decide a case on the merit, not because it does not have jurisdiction on procedural ground but because the controversy presented is non-justiciable being political in nature or encroaching on the powers of the political class.

2.0 Origin and definition of the doctrine

Justice Marshall, in an attempt to insulate the court from political pressure, in the case of Marbury v. Madison (1803) it appears to have created two major controversial doctrines in constitutional law especially when some of his sentences are read in isolation. The first is the statement issued that it is "emphatically the province and duty of the judicial department to say what the law is." The statement, when read in isolation, establishes seemingly limitless constitutional authority in the Supreme Court. The constitution is the law and within the Supreme Court's power - its duty - to say what the law is. Therefore, it is the Supreme Court's province and duty to answer all constitutional questions with finality (Ibrahim, Sambo, Egbewole, Abdulkadir, 2011). This is the path of judicial review. The second is the assertion that recognized the existence of certain questions that are wholly outside the purview of the courts by the use of the term 'questions in their nature political.' This has not been subject to definite definition. The statements when read together may reveal Marshall's fundamental conception of the separation of powers and highlights of both the limits of judicial authority and the interpretive role played by the political branches (Ibrahim, Sambo, Egbewole, Abdulkadir, 2011). When these political questions are presented, it is the province and duty of legislature or the executive, not the courts, to say what the law is. These questions have formed the gist of the so-called 'political question doctrine' (Barkow, 2002, p. 237). Marshall's J. considered both the institutional strengths and weaknesses of each

branch are taken into consideration in resolving particular issues (Barkow, 2002). Unfortunately, the term political question has created more confusion than creating room for constitutional structure (Henkin, 1976). In other words, the doctrine of political questions has not been subject to a universally acceptable definition. It is defined as a substantive ruling by the justices that a constitutional issue regarding the scope of a particular provision (or some aspects of it) should be authoritatively resolved not by the Supreme Court but rather by one (or both) of the national political branches (Choper, 2005). It has been described as "Who gets to decide what the right answer to a substantive constitutional question is?" and "Does the Constitution give a political branch the final power to interpret the Constitution (Tushnet, 2002)?" It is also seen as questions which the court foregoes their unique and paramount function of judicial review of constitutionality (Henkin, 1976). It has also been seen as the result of any development of devices for withholding the ultimate constitutional judgment of the Supreme Court and in a sense their sum (Bickel, 1962). It is also defined as questions which the courts will refuse to take cognizance, or to decide, on account of their purely political character or because their determination would involve an encroachment upon the executive or legislative powers. The simplest is that it is a non justiciable matter (Nwosu,2005). It is seen also as issues of constitutional law that are more effectively resolved by the political branches of government and not appropriate for judicial resolution (Redish, 1985). It also defined as when the court believes it to be a matter more appropriate for resolution by either of the other branches of government or where the court considers itself as incompetent as the matter is not amenable to resolution by judicial processes (Rodhe&spaeth, 1976). It appears that there is, therefore, no universally acceptable definition of the doctrine (Ibrahim, Sambo, Egbewole &Abdulkadir, 2011). When the doctrine of political question is applied in a court, it is a way of avoidance because the court defers without reviewing the position taken by the political departments and refuses to comment on the lawfulness of the position (Scharpf, 1966). However, one must note the difference between avoidance in political question and avoidance on jurisdictional or procedural ground. Where it is based on procedural ground, such as ripeness, or standing, it only affects that particular party, not the constitutional issue. Political question attaches itself to the issue. The court assumes jurisdiction but will not determine the issue in controversy (Abdulfatai, Sambo&Shamrahayu, 2012). The two, however, have the same effect because the court will not eventually decide the matter on the merit and will refuse judicial review where a matter has to do with political question.

Except the above discourse, it should further be combined with some theories to point out the nature, scope and rationale for non justiciability of questions which are political in nature.

3.0 Theories on the Meaning and Scope of Political Questions

There are two types of theory - classical and prudential theory.

3 (i). The Classical Theory of Political Questions

This theory posits that political question is a question of constitutional interpretation rather than judicial discretion and it should be understood as a function of separation of power (Mayor vs.Peabody, 1909). Wechsler (1959) is the main proponent of this classical school. He submitted that the courts are called upon to consider whether the constitution has committed to another agency of government the autonomous determination of the issues raised, a finding which itself requires an interpretation rather than discretion to abstain or intervene. He argues while citing constitutional provisions on the impeachment by the Senate and the House as his point of departure, that each House of the congress shall be the judge of the elections, returns, and qualification of its own members, punish its member for disorderly behavior and expel its members where necessary. He, therefore, considers all these as political questions which the courts should not interfere. This position is subject to criticism on the ground that it does not support what Wechsler claims. This is because, the example falls under the justiciable controversy which is within the power of the court to decide in some jurisdiction including United States. It involves dispute which are adjudicative in nature and, therefore, within the province of the judiciary (Scharpf, 1966). Supporting Scharpf's view, he said whether this disposition is based upon an interpretation of the constitution cannot, of course, be determined merely by searching for references to a constitutional grant of power in the opinion. In order to answer this question, it becomes necessary to take a broader look at the court's practice in one particular field and to determine whether over all patterns of political question cases decided on the merit could be explained in terms of any reasonable interpretation of the constitution.

3 (ii). The Prudential Theory of Political Questions

From the criticism of classical theory, the prudential theory emerged. The theory opines that political question is "something greatly more flexible, something of prudence, not construction and not principle" (Bickel, 1962). Finkelstein (1924) narrated the prudential theory as follows: There are certain cases which are completely without the sphere of judicial interference. They are called, for historical reason, "political questions." The term applies to all those matters of which the court, at a given time, will be of the opinion that it will be impolitic or inexpedient to take jurisdiction. Prudential theory is further divided into opportunistic, cognitive and normative theories (Finkelstein,1924) which are discussed below:

3 (ii) (a). An Opportunistic Theory of Political Questions

Finkelstein (1924) explained this theory in terms of court's instinct for political survival which would persuade the court to avoid from deciding "prickly issues" and "contentious questions" which touch the hypersensitive nerve of "public opinion." This theory is based is not convincing because it would make the court apprehensive on the particular position it has taken in a particular case (Scharpf, 1966). The court cannot run away from deciding a case properly brought before it all on the ground that it is controversial and thus could be hidden under the doctrine of political questions. Also, this could be criticized on the ground which would not likely focus on the parties disobedience, but upon the willingness of the public and political institutions to accept the court's determination of controversial issue as final and authoritative. However, where the court avoids political question because of its controversial nature, this cannot be correctly argued that there are no other constitutional issues that are more controversial than political question. The court may determine these issues rightly or wrongly but will touch upon the "hypertensive nerves of public opinions" (Scharpf, 1966). It is, therefore, submitted that the court has all it takes not to seek protection under political question doctrine because of the fear or apprehension that it might be unpopular. What is important is that the court should not abandon its primary duty of formulating and vindicating principles to limit or manage potential clashes with political institutions and opinions of the public without having to resort to complete abdication. This cannot be explained by the political question doctrine satisfactorily.

3 (ii) (b). Cognitive Theory of Political Question

Field (1924) opined that whatever may be the difficulties in definitively describing the differences between the judicial and the legislative department, it seems settled and clear that the court must have some rule to follow before it can operate. Where no rules exist the court is powerless to act. From this, it follows that the courts cannot enter into questions of state craft and policy.It is the authors' view that even though the courts need to follow rules to operate; to argue that court is powerless to act where there are no rules is difficult to justify. This is because there is no (sic) how constitutional law could have grown and flourished anywhere in the world especially in America if the court had not been creative or not doing creative functions as advocated by the cognitive theory. Where there are no standards or rules, the court should create legal principles that would be applicable in the circumstances of the case (Field,1924). Although the court in the case of Bakerv.Carr (1962), Justice Frankfurter showed 'lack of judicially discoverable and manageable standards' as one of the elements of political questions, it is difficult to justify on cognitive grounds. Field and Frankfurter's views are related in the sense that both are saying where there are

no standards or rules to decide a particular situation, the Court will not interfere by regarding it as a political question. For instance, since there are no guidelines, rules or standards to measure when emergency proclamation is needed; it should be regarded as a political question.

3 (ii) (c). A Normative Theory of the Political Question

The question of standards has been restated in normative rather than cognitive terms by Jaffe (1961) and sees that some other matters flow from the powers of the political class apart from constitutional assignments as political questions because there are no guiding rules for its operation or its better done without rules. One is tempted to submit that the rationale of the phrase 'that the job is better done without rules' is less convincing .The reason is that the President and the legislature get to power through legal means such as laws, rules and legal principles. Why should their activities not be regulated by laws and rules? Assuming without conceding that the job is better done without legal rules, why should the court not make it clear that their activities are lawful and valid as no rule is required thereby deciding the matter on the merit (Bickel, 1962)? He further posited that 'that even though there are applicable rules, these rules should be among the numerous relevant considerations.' This appears to be a call for an extra legal measure all in the name of political question. Why should the court regard legal principles as applicable to particular circumstance but refuses to apply or enforce such principles? This view was clearly supported and articulated by Scharfp (1966) where he opined: "My objection can be stated more broadly: where the Court was persuaded that the political departments ought to be able to act with a view to non-legal factors-economic, political, military, international-and expediency, it has usually been to allow this freedom of action through its substantive interpretation of the scope of constitutional power and discretion...if even the need to accommodate non-legal factors could be met by the decisions of the merits, then Mr. Jaffe's second formulae does not seem to establish a compelling necessity for the Court's reliance on political question doctrine." It is, therefore, submitted that such practice would damage the usefulness of the court as a court of law. Where would the court derive its authority to authorize an extra legal approach to solving questions? The court cannot distort the constitution to accommodate an extra legal factor. This would make it difficult for the court to protect constitutional provisions and defend the rights of the common man through the enforcement of legal provisions (Abdulfatai, Sambo & Shamrahayu, 2012). What then should be the meaning and scope of political questions? It is, therefore, crystal clear from the above that the definitions and theories offered by different scholars do not properly define and delimit the scope of the term political questions. Every definition and theory has one flaws or another. They are products of individual idiosyncrasies. The definitions and theories do not entirely capture the intention of Marshall in

Marbury's case (1803). For this reason an attempt has been made to list the factors or consideration (Nwabueze, 1985). An attempt to propose a definition does not solve this problem (Nwosu, 2005).This is not to say however that the definitions offered are not helpful in describing the doctrine of political questions. Political question is thus seen as matters which the constitution or the law has given its determination to the political class (Constitution of the Federal Republic of Nigeria, 1999. sec. 60 ; Malaysian Federal Constitution, 1957, art. 62), or a non justiciable matter or questions which would not violate the norms and principles of the Constitution and thereby, the courts will refuse or be reluctant to take cognizance of, or to decide, or review their constitutionality because of their purely political character or because their determination would involve an encroachment upon an executive or legislative powers (Black's law Dictionary, 1979). It is a constitutional law doctrine that was developed to stop the court from deciding on the merit of certain questions which may affect the powers or functions of other arms of government, or questions relating to the affairs of the political parties (Marbury v. Madison, 1803).

4.0 Henkin's Theory of Political Question

Henkin's theory is known as pure theory of political question. According to him: A meaningful political question doctrine implies something more and different: that some issues which prima facie and by usual criteria would seem to be for the courts, will not be decided by them but extra ordinarily left for political decision. In particular, under "pure theory" a political question is one in which the courts forego their unique and paramount function of judicial review of constitutionality. ...does not, therefore, arise at the local court. However, where the matter is brought in a local court, the court must decline jurisdiction because it is of international affairs and states sovereignty will come into place. Issue of political question may, therefore, arise as to where treaties are being negotiated by a government of a country, or issue whether to go to war. It most humbly submitted that this is regulated by law. Thus, where the law is violated in this act, it is a ground for judicial review and the issue of political question should not arise (Henkin, 1976).

It is clear thatthe doctrine of political question was born in the American jurisdiction for the rigid practice of separation of powers. The American Supreme Court evolved it to stay its hands off in matters which according to the Supreme Court, were committed to the judgment of the other branches of the government by the Constitution (Luther v. Borden,1849). Further this doctrine has been criticized in America because the court refused to treat the legislative membership (Powell v. McCormack, 1969) and legislative apportionment (Luther v. Borden, 1849) as political question.

5.0 The said doctrine practiced in India

The Indian judiciary is hamstrung by the vague outlines of what constitutes a political and hence, non-justiciable question. In Golaknath v. Union of India (1967), the court said it was hard to answer what constituted a political question (Shylashri, 2008).The court said that judicial review "may be avoided on questions of a purely political nature, though pure legal questions camouflaged by the political questions are always justiciable." But it is unclear how a judge distinguishes between the real thing and the camouflaged one. One yardstick the judges adopted was to see if the case could be resolved through judicially discoverable and manageable standards. But in practice, it is hard to discern the line between what constitutes political questions to be resolved by the state's political wings and justiciable questions to be resolved in court (Golaknath v. Union of India, 1967). In practice in India the doctrine was sought to be applied to a domestic constitutional question (Rajasthan v. India, 1977). The Indian Supreme Court refused to apply the doctrine in justifying the satisfaction of the President regarding the existence of emergency (A.K. Roy v. India, 1982). In the case of Madhav Rao Scindia v. India (1971); Shah J. rightly opined that 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.

6.0 The Doctrine in Pakistan

In M/S Dulichand Omraolal v. Bangladesh (1981); the Appellate Division posited that regarding the question of the Constitutional legitimacy of Yahya Khan it need be said that, this is a political question. In Abdul Baqui Baluch v. Pakistan (1968), the Pakistan Supreme Court held that the question whether an emergency has ceased to exist is a political question which is outside the competence of the Courts to decide (Islam, 2002). But inAsma Jilani v. Government of Punjab (1972), the Pakistan Supreme Court found him to be a usurper and held that the constitutional legitimacy of Yahya Khan was not a political question. While dealing with the provisions of the Constitution of 1973 introducing Parliamentary forms of Government, the Pakistan Supreme Court observed, "This 'Political Question Doctrine' is based on the respect for the Constitutional provisions of separation of power among the organs of the state. Where in a case the Court has the jurisdiction of the power of judicial review, a real political question cannot compel the Court to refuse its determination (M.K. Achakzai v. Pakistan, 1997)."

7.0 The Doctrine in Bangladesh

I mentioned in my paper above that ours is a duty and right based democracy

and parliamentary forms of Government and at the same time the fundamental aim of the state is to realize through the democratic process a socialist society, free from exploitation-a society in which the rule of law, fundamental human rights and freedom, equality and justice, (political, economic and social) will be secured for all citizens (The Constitution of the people's Republic of Bangladesh, 1972). The principle of judicial review and the supremacy of the Constitutional law get a strong position and we do not have any rigid separation of powers so that the question of deference to the other branches of the government cannot get the primacy. The question whether a particular government is legitimate is essentially a Constitutional question to be decided with reference to the Constitution and such a question like other constitutional questions should not be decided unless the controversy between the parties requires resolution of the question (Islam, 2002, p. 445). For example the then military governments established under the said 5th and 7th amendment act to the Constitution of Bangladesh have been declared unlawful and ultra vires by the apex Court of Bangladesh. To know the practice of political questions in Bangladesh, certain core principles like justiciability, judicial review, and supremacy of the Constitution, separation of powers and role of the Supreme Court require a discussion to some extent. These are as follows:

8.0 Justiciability from the socio-economic perspective in Bangladesh

An essential tool that judges use till their role in a democracy is determining justiciability. Judges identify those issues about which they ought not to make a decision, leaving that decision to other branches of the state (Barak, 2006). Barak (2006) stated that justiciability is of two types-normative and institutional. Normative justiciabilityaims to answer the question whether there are legal criteria for determining a given case. On the other hand, Institutional justiciability deals with the question whether the law and the Court are proper frameworks for deciding the dispute. Many scholars argue that there should be no political question doctrine at all on the basis that there is an unconscionable 'moral lost' in allowing a potential legal violation to go inevitably unpunished (Redish, 1985). Besides these, justiciability has two components-firstly, the jurisdiction of a Court to hear a case which is preliminary known as the political question doctrine and secondly, Courts invoke so-called political question doctrine ostensibly to avoid considering the merits of a particular case which has come before them (Daly, n.d.). Regarding this, Professor Harris (2003) has distinguished primary from secondary justiciability. He posited that primary justiciability refers to the category of decision and secondary justiciability refers to the grounds of review sought and whether a court has the necessary tools at its disposal to resolve the case; on the other hand, the extent to which review is available. Secondary justiciability states that no category of decision is automatically beyond the scope of review, though various considerations may

decrease the standard of review (Chris, 2002). InCouncil of Civil Service v. Minister for the civil service (1985) simply known as GCHQ (Government Communication Headquarters) case. In this case, a prerogative Order in Council had been used by the Prime Minister (who is the Minister for the civil service) to ban trade union activities working at GCHQ. This Order was issued without consultation. The House of Lords had to decide whether this was reviewable by judicial review. It was held that executive action is not immune from judicial review simply because it uses powers derived from common law rather than statute (thus the prerogative is reviewable).InBrazilian vs. Govt. of Israel (1986),the Court was required to review the validity of a pretrial pardon granted by the president of the state to the head of the Israeli General Security Services and to a number of its agents for illegal acts that they committed. The Court also decided that the President may grant so, but rejected the argument on the ground of non-justiciability. In Bangladesh, inSarwar Kamal vs. State (2012), for the first time the court interfered with the mercy power given by the then President Abdur Rahman Biswas under art. 49 of the Constitution of Bangladesh to Sarwar Kamal who was accused for a murder case. The High Court Division of the Supreme Court observed, the Court can fold its hand in despair and declare judicial hands off. So long as the question arises whether an authority under the Constitution has acted with the limit of its power or exceeded it or the power has been exercised without application of mind and mechanically or the order in question is a malafide one or the order has been passed on some extraneous consideration or how far the order is fair and reasonable, it can certainly be examined and decided by the court. The Court cannot be debarred to examine the decision making process and the correctness of the decision itself. The action of the President or the Government, as the case may be, must be based on some rational, reasonable, fair and relevant principle which is non discriminatory and it must not be guided by any extraneous or irrelevant considerations. It is well settled that all public power including constitutional power shall never be exercisable arbitrarily or malafide and ordinarily, guideline for fair and equal execution are guarantors of the valid play of power and when the mode of power of exercising a valid power is improper or unreasonable, there is an abuse of power.The then President's pardon under art.49 to an accused, fugitive is a misuse of power and an arbitrary decision from the point of rule of law. It is completely clear that if any President grants mercy to any accused arbitrarily, that clemency should not be exempted from judicial review i.e. could be challenged. So every legal problem has criteria for its resolution. There is no legal vacuum. Law tills the whole world. There is no sphere containing no law and no legal criteria. Every human act is encompassed in the world of law. Every act can be 'imprisoned' within the framework of the law. Even action of a clearly political nature, such as waging war, can be examined with legal criteria. An issue is 'political' that is holding political ramifications and predominant, political elements does not mean that it cannot

be resolved by a court. Everything can be resolved by a court, in the sense that law can take a view as to its legality (Islam, 2002) such as, Nazmul Huda, MP vs. Secretary, Cabinet division (1997), legality of a non-MP minister's speaking on a matter unrelated to his portfolio and the Speaker's ruling on a Constitutional issue were held justiciable.

9.0 Supremacy of the Constitution of Bangladesh

Our Constitution, an 'autochthonous' one, is representing the sovereign will of the people, is the supreme entity, which alone posses sovereignty and, all the organs of the State are, but its offspring's, and as such, subservient to it. Our Parliament like those in other countries with written Constitution, cannot posses the sort of unbridled power as it's British counterpart does, simply because, unlike the British one, our Parliament is indeed a progeny of the Constitution, which instrument has, additionally made the following explicit commandments: "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 inconsistency, be void (Art.7 of the Constitution of people's Republic of Bangladesh, 1972)." "All existing law inconsistent with the provisions of this part shall, to the extent of such inconsistency, become void on the commencement of this Constitution" and "The State shall not make any law inconsistent with any provisions of this part, and any law so made shall, to the existent of such inconsistency, be void (The Constitution of the People's republic of Bangladesh, 1972, art. 26)."Art.65 of the Constitution of Bangladesh provides that the legislative powers shall be vested with the Parliament subject to the provisions of the Constitution which indirectly indicates the supremacy of the Constitution. Obviously, the creature Parliament cannot rise above its creator and hence, it's freedom in respect to legislation is seriously impaired by the express provisions of the Constitution to the effect that it cannot pass any law which would be inconsistent with any of the express provisions of the Constitution (7th amendment case, 2010, p.78). The legislative jurisdiction of our Parliament is not, hence, unbridled, which follows that the Diecyan doctrine of legislative sovereignty of Parliament has no place in our system. Marbury's case (1803) suggests that the position would not have been any different even if article 7 or 26 were not there. Also the basic structure doctrine which was established in the 8th Amendment case (1989)and held that the basic structure cannot be amended, altered or substituted by the Parliament. In the light of above writing we can say that Constitutional supremacy is also called judicial supremacy in the sense that the judiciary is the highest Court of the land and acts as a guardian of the Constitution. Art.7 of Our Constitution which contains that all powers in the republic belong to the people is a statue of liberty, supremacy of law and rule of law. This article is a happy conjunction of the will of the people and the supremacy of the Constitution (Zahir, 2004).

Finally, the judiciary though, non-elected, through the constitution indirectly represents the will of the people. So, every issue should be under the Constitution and the judiciary will deal with this issue, whether it is enforceable or not. In that sense political question doctrine will come within the purview of the judiciary.

10.0 Judicial Review in Bangladesh

It is clear enough from art. 102 (1) as well as art.102 (2) (ii), read with Article 7 that an act including a legislative act, can be declared void by this Division, if done or taken without lawful authority. If an Act of Parliament depicts repugnancy with any provision figured in Part (iii) of the Constitution, this Division can invalidate such an enactment engaging Article 102 (1), while same consequence would ensue if such an enactment, including an enactment designed to amend the Constitution, be confronted with any express provision of the Constitution, even beyond Part (iii).So the judicial power vests in the Judiciary. InMujibur Rahman vs. Bangladesh (1992), Mustafa Kamal J. held that 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. In Marbury v. Madison (1803), the U.S. Supreme Court held that the judicial function vested in the court necessarily carried with it the task of deciding whether an Act of Congress was or was not in conformity with the Constitution." The supremacy of the Bangladesh Constitution and its Superior Court's indomitable power to judicially review acts of Parliament had been crystal cleared through a myriad of decisions.

In Fazlul Quader Chowdhury-v-Abdul Huq (1963), the Supreme Court was robust enough to apply the doctrine of judicial review of legislation, as was first fully induct into the judicial vicinity by the Supreme Court of the United States. In that case the validity of a law (President's Order No.34 of 1962) allowing ministers in Ayub Khan's cabinet to answer questions in Parliament, was successfully challenged. It was held that the President's power to remove 'difficulties' in launching the Constitution altering one of its basic structures-namely, no person shall be a Minister and a member of Parliament at the same time and ultimately the President's Order was struck down as ultra vires of the Constitution.

Anwar Hossain Chowdhury vs. Bangladesh (8th Amendment Case,1989).

In this case the Court declared the amendment of art.100 of the Constitution regarding six permanent Benches of the High Court division of the Supreme Court to be void. It argued that the High Court Division of the Supreme Court with plenary judicial power over the Republic is the basic pillar of the

Constitution which cannot be altered or damaged. Here judicial review powers prevail over the acts of parliament, i.e. the question which are entirely belongs to the parliament will also come under the purview of the judicial review. Finally M.H. Rahman J. argued that basic structure is not new in the sense of totally innovative idea, rather it has been emerged as a new extended interpretation of the principle of judicial review.

Bangladesh Italian Marble Works Limited. v. Government of Bangladesh and others (1979), popularly known as 5th amendment case. In that case the legitimacy of Martial Law proclaimed by Khandker Mushtaq Ahmed and all the activities of martial regime validated by 5th Amendment Act, 1979 has been successfully challenged and the Court declared the martial regime unlawful and ultra vires.

Siddique Ahmed.Vs.Bangladesh (2010) , known as 7th Amendment case. In this case the very validity of all the martial law instruments and the proclamation of martial law itself, by General Hussain Mohammed Ershad were challenged. Like 5th amendment act, the Court declared the 7th amendment act made to the Constitution as ultra vires.

In Golak Nathv.State of Punjab (1967) the Indian Apex Court held that the power conferred upon the Parliament to amend could not be extended to the power to amend a fundamental right because of the express restrictions on their amendments, and the superior court would strike off such an amendment.

In Keshvananda Bharati v. State of Kerala (1973) that the Indian Supreme Court declared supremacy of the Constitution as one of the basic structure of the constitution and that by Art. 13, Indian Constitution imposed restrictions on Parliament's power to enact law in contravention of the guaranteed fundamental rights.

In Indira Nehru Gandhi v. Raj Narain (1975), the Indian Supreme Court was specific enough to proclaim that amendment to any of the basic structures of the Constitution is void.

It is, therefore, crystal clear that Parliament under a written Constitution regime does not, to put it more precisely, cannot, enjoy the sort of unbuckled power, like the British Parliament. As G. Marshal (1971) explains, where autochthony exists, the authority for the Constitution arises from the people. The phrases, 'We the people' has powerful psychological and legal force, and the resultant document, the Constitution, will be supreme. Sir Ivor Jennings (1959) had this to say; "A written Constitution is thus the fundamental law of a country, the express embodiment of the rule of law in one of its senses. All public authorities –legislative, administrative and judicial—take their powers directly or

indirectly from it." Wheare (1966) has insisted that to give omnipotence to a Parliament in a written constitution regime would be tantamount to giving the deputy greater importance than his principle, to put the servant above his master, and to place the representatives of the people in a position above that of the people themselves.

Thus, the supremacy of the Constitution, the doctrine of judicial review and the principle of constitutionalism, eventually found a permanent fortress, never to be evicted there from.

11.0 Separation of Powers

The doctrine of separation of powers was adopted by the convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary powers (Vile, 1967). It is true that there is no such thing as absolute or unqualified separation of powers 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 to oversee and protect the overstepping not only to other organs of the government but also itself. Though separation of powers is western culture its ramification should be country specific. Ours is a right and duty based Constitution and there is no rigid separation of powers, though the matters involving political issues would be within the domain of other branches of the Government, i.e., the judiciary has the power to initiative with the issue if this matters undermine the Constitution. In a Constitutional state there must be a set of rules which effectively restrains the exercise of arbitrary powers of the Government. In our Constitutional jurisprudence, the concept of separation of powers has got its clear expression throughout the whole scheme of the Constitution of Bangladesh, obviously with its inherent limitations. Executive power of the Republic lies with the Executive under the Prime minister and his Cabinet. It is exercised by or on the authority of the Prime Minister (The Constitution of the People's Republic of Bangladesh, Art. 55). Legislative power is vested in the Parliament (The Constitution of the People's Republic of Bangladesh, Art. 65).Though there is no clear provision regarding vesting of the Judicial power in the Judiciary, the Appellate Division inMujibur Rahman's case (1992), held that it so lies with the Supreme Court and subordinate courts to it. But the exercise of powers in our Constitution dispersed among the various institutions like legislative, executive and judicial in such a way so as to avoid the misuse of powers.

It is clear that in our Constitution, separation of powers exists in the name of checks and balances. It is further clear that in our Constitutional system there is no justification for the application of the doctrine of political questions along the line of the 'political questions doctrine' invoked by the Supreme Court of America. The doctrine has been dis-applied even in the USA (Bakar v. Carr,

1962)-disapproving a legislative attempt to segregate racial minority voters into different voting districts.Secretary Ministry of finance vs. Mr. Masder Hossain and others (2000), through the judgment of the said case, the independence of judiciary has been ensured on 1st November, 2007.The Court interfered with the policy issues of the Parliament because that issue involved great public interest and compelled the parliament to frame policy for the independence of judiciary. So the application of doctrine of political questions could not be accepted by the Court in a strict sense because of the principles of Constitutionalism practiced in Bangladesh. In that case Mustafa Kamal, CJ., observed that "...the independence of the judiciary, as affirmed and declared by articles 94 (4) and 116A, is one of the basic pillars of the Constitution and cannot be demolished, whittled down, curtailed or diminished in any manner whatsoever, except under the existing provisions of the Constitution. It is true that this independence is subject to the provisions of the Constitution, but we find no provision inthe Constitution which curtails, diminishes or otherwise abridges this independence..."His lordship further held that when Parliament and the executive, instead of implementing the provisions 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 courses. So the Constitution clearly assigned to the legislature, executive and the judiciary demarcated roles, each controlled by Constitutional provisions so as to avoid autocratic rule. However, no watertight separation of powers is possible or desirable. Even in the United States of America, strict separation of powers is not followed. The prevalent "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. Budget and impeachment, judicial review and pardon are the examples of this sort of check (Friedrich, 1968)."So it is clear that in the name of checks and balances, no organ can exercise its powers over others arbitrarily. For example: Judicial duties are to adjudicate but it can impeach the President on the ground of misconduct. This is a kind of judicial activity. No single organ becomes omnipotent. If any law is inconsistent with the Constitution, it will get ultra vires by the judiciary. Truly, the pure system of checks and balances mean that one organ depends on another. It is not the violation of the principle of separation of powers. The question arises, whether judicial review violates the spirit of separation of powers. The answer is no rather judicial review enforces the objectives and norms of the separation of powers.

12.0 Role of the Supreme Court and Constitutionalism in Bangladesh

Bangladesh has got a written Constitution. This Constitution may be termed as controlled or rigid but in contradiction to a Federal form of Government, as in

the United States, it has a Parliamentary form of government within limits set by the constitution. Like the United States, its three grand Departments, 'the Legislature makes, the Executive executes and the judiciary construes the law' (Chief Justice Marshall), constituting a tracheotomy of power in the Republic under the Constitution. Parliament in Bangladesh lacks the omnipotence of the British Parliament while the President is not the executive head like the U.S. President but the Prime Minister is, like British Prime Minister. However, all the functionaries of the Republic owe their existence, powers and functions to the constitution. 'We the people of Bangladesh', gave themselves this Constitution which is conceived of as a fundamental or an organic or a Supreme Law rising loftily high above all other laws in the country and article 7 (2) expressly spelt out that any law which is inconsistent with this Constitution, to that extent of the inconsistency, is void. As such, the provisions of the Constitution is the basis on which the vires of all other existing laws and those passed by the Legislature as well as the actions of the Executive, are to be judged by the Supreme Court, under its power of judicial review. This power of judicial review of the Supreme Court of Bangladesh is, similar to those in the United States and in India (BIWM v. Bangladesh & others, 2006). This is how the Legislature, the Executive and the Judiciary functions under the Constitutional scheme in Bangladesh. The Constitution is the undoubted source of all powers and functions of all three grand Departments of the Republic, just like the United States and India. The Supreme Court of Bangladesh has got the power of review of both legislative and executive actions but such power of review would not place the Supreme Court with any higher position to those of the other two Branches of the Republic. The Supreme Court is the creation of the Constitution just like the Legislature and the Executive. But the Constitution endowed the Supreme Court with such power of judicial review and since the judges of the Supreme Court have taken oath to preserve, protect and defend the Constitution, they are obliged and duty bound to declare and strike down any provision of law which is inconsistent with the Constitution without any fear or favor to anybody. This includes the power to declare any provision seeking to oust the jurisdiction of the Court, as ultra vires to the Constitution (BIWM v. Bangladesh & others, 2006, p.196). Followings are the examples where some Parliamentary amendment has come under the purview of judicial review. The Eighth Amendment was challenged in Anwar Hossain's case (1989) where it was held that basic structures of the Constitution cannot be dismantled by an authority created by the Constitution itself, namely, the Parliament (Para 192). The Tenth Amendment was challenged in Dr. Ahmed Hossain vs. Bangladesh (1992), held that indirect election cannot be called undemocratic while the Constitution itself provides for that. Specially, Clause (4) of Article 28 provides for special laws in favor of the women. The Thirteenth Amendment was challenged inMashihur Rahman vs. Bangladesh (1997), where the Court declared the said Thirteenth Amendment Act to the Constitution of Bangladesh as ultra vires and unlawful.

The Fifth Amendment was challenged in the Moon Cinema Case, and became ultra vires all changes brought by then President Ziaur Rahman during the tenure of martial law. At the same time and on the same merit the 7th Amendment was declared ultra vires and unlawful by the Court in Siddique Ahmed'scase (2010). All the challenges were decided on merit and no question regarding the propriety of judicial review was raised. In Moyezuddin Sikder vs. State (2007), the High Court Division effectively held that its inherent power and wider judicial authority to grant bail to the accused cannot be foreclosed by law even during the state of national emergency. In AKM Reazul Islam vs. State (2008), the High Court Division held that the Court "should not put its hands off" when no remedy in law is available to the accused, but rather intervene so as to serve "the cause of justice". This decision indicates that a justice-conscious and willing Court may discover appropriate legal technology to secure citizens' liberty even in the face of restrictive legal provisions (Haque, 2009).So it appears that the obligation of the Court is to see that the Constitution is not infringed and to preserve it inviolate. The Court (Judges) will always try to ensure the demands of the society and to uphold core principles of Constitutionalism.

13.0 A Few Important Cases Regarding Political Question

Kudrat-E-Elahi Panir vs. Bangladesh (1992), in this case the petitioners challenged the Constitutional validity of the Bangladesh Local Government (Upazila Parisad and Upazila Administration Re-organization) (Repeal) Ordinance, 1991-Ordinance no. 37 of 1991, on the ground that this Ordinance is inconsistent with articles 9, 11, 59 and 60 of the Constitution of Bangladesh and as such it is void in terms of article 7 (2) of the constitution. Latifur Rahman J. observed that since the Ordinance has already been made an Act of Parliament, the question of its validity has become academic and we need not express any opinion in this case.ATM Afzal J. observed that the Court does not answer merely academic question but confines itself only to the point/points which are strictly necessary to be decided for the disposal of the matter before it. This should be more so when Constitutional questions are involved. Abstract theoretical question are not to be decided by any Court as those are of only academic importance.In this case we find that the Court refrains itself from deciding purely political question.

Special Reference no. 1 of 1995, this is a Reference under art. 106 of the Constitution of the People's Republic of Bangladesh by which the President has sought to obtain the opinion of the Supreme Court on some legal questions arising out of the continuous absence of some members of the Parliament consequent upon their walking out of the House first and then restoring to boycott of the Parliament. Here the Court returned the said Reference without answering the questions and held that the opinion may not be honored has

never deterred any Court from answering a Reference. Further held that there is no magic in the phrase "political question". While maintaining judicial restraint the Court is the ultimate arbiter in deciding whether it is appropriate in a particular case to take upon itself the task of undertaking a pronouncement on an issue which may be dubbed as a political question. Schwartz (1956) said that "the political question doctrine is itself an anomaly in a system in which governmental acts may ordinarily be weighed in the judicial balance and, if necessary, found constitutionally wanting. A good cause can be made for restricting the doctrine to the field of foreign affairs. It is one thing to hold that there must be judicial self limitation in cases bearing directly on the transaction of external relations. It is quite another to use the political question doctrine as a formula to avoid decision in cases involving only internal affairs. If there is one that is fundamental in the Constitutional system it is that of having the judiciary as the ultimate arbiter on all domestic constitutional questions. That, indeed, is what Americans normally mean by the rule of law." I, completely agree with the statement of B Schwartz. Because in our country there is Constitutional sovereignty not parliamentary sovereignty and all functionaries of the republic would be done in the line of the provisions of the Constitution and weighed in the judicial balance. The trap of political question should not be accepted as a law and it should be assign to the discretionary power of the Court.

Dr. Ahmed Hussain vs. Bangladesh (1999),in pursuance of the provisions of art.68 of the Constitution, the members of Parliament (Remuneration and allowances) Order, 1973 was promulgated to determine the salaries and allowances of the members of parliament. In 1991 this Order was amended to increase the benefits of the members of Parliament. Art. 3C was added to the Order to allow the Members of Parliamenta privilege to import facility. The petitioner, a senior Advocate of the Supreme Court, challenged the inclusion of art.3C in the 1973 order. Being denied any remedy in the High Court Division, he brought this leave to appeal petition before the Appellate Division. His argument was that although a privilege in appearance, the so called privilege is nothing but a bounty to the Members of Parliament and is not a privilege at all. A Member of Parliament being already entitled to rail, air, steamer or launce journey at the highest class and to receive traveling allowances, importing duty free car import facility was not a privilege but a bounty conferred on the Members of Parliament which was beyond the scope of art. 68 of the Constitution. The High court Division while rejecting his petition justified art.3C on the ground that Member of Parliament has to visit his constituency and for this purpose a duty free car or jeep will be of immense help to him in discharging his duties as a member of parliament. The Appellate Division refrained from judging the necessity of the facility, but impliedly indicated that this facility might seem odd to the people at large: Members of Parliament is entitled to such privileges as the Parliament may determine and the

determination is an act of discretion, propriety and sense of decency on the part of the Parliament. Here the issue is purely political in nature and the Court refrains itself from judging the issue.

Ataur Rahman Khan vs. Md. Nasim and another (2000), Mr. Ataur Rahman, a practicing advocate of the Supreme Court brought a contempt proceeding against Mr. Md. Nasim MP and the Home Minister of the 1996 AL Government for making some objectionable and derogatory comments in the House about the judges of the Supreme Court. Referring to the bail granted by the High Court Division to two noted criminals earlier, the Home Minister commented: 'Sitting on high pedestal to ensure justice in the society they (judges) are patronizing terrorism.' The then attorney General argued firstly that, the alleged statement made during question answer session of the Parliament was very much an internal proceedings of Parliament; secondly, the Court's power to initiate contempt proceedings under art. 108 is not absolute rather it is subject to law .The Rules of Procedure of Parliament (rules 14 to 19) empowers only the Speaker to deal with its violation and no court, including the Supreme Court, is authorized in this regard; thirdly, art.78 (3) is absolute, unqualified and unlimited as it covers 'anything said' in the Parliament. The Court accepted the argument holding that: The Article confers immunity, inter alia, in respect of 'anything said in Parliament.' The word 'anything' is of widest import and equivalent to 'everything'. Here the Court did not interfere with this matter because it particularly belongs to the domain of parliament.

Nazmul Huda vs. Secretary, Cabinet Division, Government of the People's Republic of Bangladesh and others (1997),the Court held that without the allocation of portfolio by the Prime Minister a non-member Minister is totally debarred from speaking in Parliament in any matter not connected with his portfolio. Here, though the matter is relating to the proceedings of parliament, the Court interfered with it and observed that these issues belong to the Speaker who will decide whether the Rules of Procedure were followed or not. Here the legality of a non-MP minister's speaking on a matter unrelated to his portfolio and the Speaker's ruling on a Constitutional issue was held justiciable.

AKM Shafiuddin vs. Secretary, Ministry of Law, Jatiya Sangshad and the Speaker (2012),in this case AKM Safiuddin challenged the legality of Speaker Abdul Hamid's ruling on June 18, 2012 regarding the comments made by Justice AHM Shamsuddin Chowdhury Manik. On July 24, 2012 the High Court Division gave a verdict on the petition and held that the speaker's observations on the High court judge had no legal effect and was baseless in the eye of law. The High Court Division further held that the scope of judicial review in the matters concerning parliamentary proceedings is limited and restricted. The area of powers, privileges and immunities of the legislature is exceptional and

extra-ordinary and its acts particularly relating to exercise thereof, ought not to be tested on the traditional parameters of judicial review in the same manner as an ordinary administrative action would be tested, and the Court would confine itself to the acknowledge parameters of judicial review and within the judicially discoverable and manageable standards.

Justice Latifur Rahman observed in Special Reference No.1 of 1995 that the internal and proper business of the proceedings of the Parliament is beyond the purview of the Constitutional Court, but while acting in the name of internal proceedings, if any violation of the Constitutional provision takes place then this Court is certainly competent to interfere. In the light of above mentioned decisions, it is, therefore, quietly clear that in dealing with internal matters, if any violation takes place to the principles of the Constitution that should be subject to judicial review. The question of validity of an Ordinance made by the President is subject to judicial review though it is an academic one (Shahariar Rashid Khan v. Bangladesh, 1997).

14.0 Conclusion

It is relevant here to quote the passage from the case of Farooq Ahmed Khan Leghari vs Federation of Pakistan (PLD 1999 SC 57) which is "Constitution is an organic document designed and intended to cater the needs for all times to come. It is like a living tree; it grows and blossoms with the passage of time in order to keep pace with the growth of the country and its people..." Supporting this quotation I would like to say, Our Constitution is an autochthony one which needs interpretation in the light of socio-political realities and requires the judiciary to take an active and operational jurisprudence of its own to help 'we the people' to whom the actual sovereignty lays with. The examination over the spirit of the concept of justiciability, supremacy of Constitutional law, judicial review and the separation of powers embodied in our Constitution exposes that the application of Political Question Doctrine in our Constitutional jurisprudence in a strict sense like America is neither possible nor desirable. Every issue should come under the purview of Constitution and Judiciary will deal with this issue, whether it is enforceable or not. For upholding the principles of Constitutionalism and maintaining judicial activism, the Court should avoid the trap of political question. I never arguing that there should not be anything like political questions but posits that the Supreme Court being the apex court have been given the power of judicial review to see that the Parliament dealing with political questions does not over step the limits set up by the Constitution. The Court would not maintain this issue (political in nature) as a formula like US Supreme Court. I am not proposing that the Supreme Court is the highest organ rather the guardian of the Constitution. And every organ of the state is the supplementary and complementary to each other.

But the functions of our Parliament shall be subject to the provisions of the Constitution (art.65). If that is true the political question involving Constitutional issue would not be exempted from judicial review. It means that the court will exercise its jurisdiction over the issue which is political in nature concerning to a substantial question of law as to the interpretation of this Constitution.

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