# THE DOMAIN OF THE DOCTRINE OF POLITICAL QUESTION IN CONSTITUTIONAL LITIGATION: BANGLADESH CONSTITUTION IN CONTEXT

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## ABSTRACT

*My idea in this article is that a Constitution retains a political question irrespective of the nature of the government it suggests. My submission is that a wider discretionary power entrusted to the governmental organs leaves a room for a political question to arise. The focus then largely revolves surrounding the discretionary powers. A political question, thus founded, depends on the satisfactory appreciation and resolution of some interrelated themes and inquiries. First, how can one exactly draw a distinction between a discretionary power and other instances of power that may not strictly or appropriately be termed as discretionary powers? Second, what should be the basis for determining the nature of a discretionary power? Third, to what extent the conferment of an unfettered discretionary power conforms to the concept of rule of law mandated by the Constitution? Keeping these questions in mind, this article makes an attempt to define the province of political question.*

## I. INTRODUCTION

The *doctrine of political question* was created by the United States (US) courts as a part of the broader concept of *justiciability* in which a court has to say whether an issue is capable for judicial examination. An issue may be denied for judicial review under the *political question doctrine* which the court feels is best resolved by one of the other coordinate branches of the government. With its origin in the context of American jurisdiction, the doctrine, later on, was applied in other jurisdictions including Bangladesh. For example, in the case of *Dulichand Omraolal vs. Bangladesh*,[1] the Appellate Division of the Supreme Court, regarding the question of constitutional legitimacy of a regime, held as follows:

> "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."[2]

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1 33 (1981) DLR (AD) 30 (hereinafter referred as *Dulichand*).

2 *ibid*, para 12 at p. 37 (emphasis added). However, *Dulichand* does not represent the law in the respective field of determination of constitutional legitimacy of any regime.

Similarly, dealing with 'hartal'[3] issues, the Appellate Division, in the case of *Abdul Mannan Bhuiyan vs. State*,[4] condemning the High Court Division for acting beyond its authority and declaring the pro-hartal and anti-hartal activities as cognisable offence, concluded its views in these words:

> "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."[5]

In some other cases, the Court declined to exercise its jurisdiction to an issue without referring expressly to the *doctrine of political question*. The issues include, amongst others, the question of presidential clemency and the president's power to promulgate Ordinances under Articles 49 and 93 respectively of Bangladesh Constitution. In *The Government of Bangladesh vs. Mr. Kazi Shaziruddin Ahmed*,[6] the Appellate Division, without referring to the *political question doctrine*, held in unequivocal terms 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."[7] The Court further held that, "the power of the President under Article 49 of the Constitution may be conditional and unconditional, and not subject to any constitutional and judicial restraints except that it cannot be used to enhance the sentence."[8]

Regarding the promulgation of Ordinance under Article 93, the question is whether the satisfaction of the President regarding the existence of the

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Before *Dulichand* was decided, the Pakistan Supreme Court had already found Yahya Khan to be a usurper in the case of *Asma Jilani vs. Punjab* PLD 1972 SC 139. See also *Madzimbamuto vs. Lardner-Burke* [1968] 3 All E.R. 561 (the Privy Council found the government of Ian Smith unconstitutional). See also the Bangladesh cases of *Bangladesh Italian Marble Works Ltd. vs. Government of Bangladesh* (2006) BLT (HCD) 1 (Constitution 5th Amendment that sought to ratify the changes made in the Constitution by unconstitutional means was held to be void); and *Siddique Ahmed vs. Bangladesh* 63 (2011) DLR (HCD) 565 (declaring Constitution 7th Amendment that sought to ratify the changes made in the Constitution by unconstitutional means void).

3 'Hartal' is a Bangla word for the analogous English term 'Strike'.

4 60 (2008) DLR (AD) 49 (hereinafter referred as *Abdul Mannan Bhuiyan*).

5 *ibid*, para 44 at p. 54 (emphasis added). See also *Khondaker Modarresh Elahi vs. Bangladesh* 21 (2001) BLD (HCD) 352, para 51 at p. 375.

6 15 (2007) BLT (AD) 95 (hereinafter referred as *Kazi Shaziruddin Ahmed*).

7 *ibid*, para 6 at p. 97.

8 *ibid*, paras 7 and 8 at pp. 97-8.

emergent situation is *justiciable*. High Court Division of the Supreme Court emphatically answered the question in negative.[9] In view of the Court:

> "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."[10]

Justice Brennan in *Baker vs. Carr*[11] summarised the law of political question in the context of American jurisdiction and observed that the *doctrine of political question* is 'essentially a function of the separation of powers'.[12] 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, a leading exponent on Indian constitutional law, has concluded that the doctrine has no place to ground in the context of Indian constitutional system[13]. In the same vein, Pakistan Supreme Court has also observed that "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 the power of judicial review, the fact that it involves *political question*, cannot compel the Court to refuse its determination".[14] Mahmudul Islam, a commentator on Bangladesh constitutional law, also finds no justification for the application of the *doctrine of political question* within the framework of Bangladesh Constitution.[15] Taking into consideration the American cases and the comments of some author, the Appellate Division of the Supreme Court of Bangladesh, in an *advisory opinion*,[16] observed that "there is no magic in the phrase *'political question'* ".[17] In view of the Court:

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9 *Ahsanullah vs. Bangladesh* 44 (1992) DLR (HCD) 179 (hereinafter referred as *Ahsanullah*).

10 *ibid*, para 48 at p. 188.

11 (1962) 369 US 186 (hereinafter referred as *Baker*).

12 *Ibid*, at p. 217.

13 Seervai, S.M., *Constitutional Law of India,* New Delhi., 1996, at pp. 2636-42.

14 *M.K. Achakzai vs. Pakistan* PLD 1997 SC 426, 518 (emphasis added); See also *Farooq A.K. Leghari vs. Pakistan* PLD 1999 SC 57.

15 Islam, M., *Constitutional Law of Bangladesh,* Mullick Brothers: Dhaka, 2012, at p. 605.

16 Special Reference no. 1 of 1995, 47 (1995) DLR (AD) 111.

17 *ibid*, para 31 at p. 120, per ATM Afzal CJ (emphasis added).