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Judging Remedies for Violation of Constitutional Conventions

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Abstract: *This paper reflects on the remedial aspects of constitutional conventions. It discerns three varying approaches from the jurisprudence of courts of different jurisdictions, mainly of Bangladesh, India, the UK, and Canada: judicial enforcement; judicial declaration; and extra-judicial relief. In Idrisur Rahman, the Supreme Court of Bangladesh enforced the President's conventional consultation with the Chief Justice in the matter of appointment of Judges of the Supreme Court. This paper argues that the Court should have judged the two other forms of remedies still followed notably in the English jurisdiction, the mother country of constitutional conventions. The Court did not justify why it preferred to judicially enforce conventions when in the UK and Canada, violation of conventions is still left to the political verdict, or, if Courts involve themselves at all, they limit themselves to only declaring the existence of the convention but not enforcing it. Idrisur Rahamn is clearly deficient since it omitted an analysis of the comparative merits and demerits of different approaches to the violation of conventions. But this is an essential aspect of analysis if a Court decides to enforce conventions. These omissions, to this author's view, have rendered Idrisur Rahman a weak authority on the subject. This paper is to provide for the said omissions of Idrisur Rahman. The attempt may guide the Supreme Court in any future litigation dealing with conventions in general or the issue of an appropriate remedy for the violation of conventions.*

Keywords: *Convention of the Constitution, enforcement of conventions, remedy for violation of conventions, judicial relief, extra-judicial relief.*

1. Introduction

A Constitution is usually understood to contain two sets of rules: (a) the law of the Constitution and (b) the convention of the Constitution.[1] It is

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1 To know generally the meaning, nature and growth of conventions in the context of the Constitution of Bangladesh, see, Moha Waheduzzaman, 'Judicial Recognition of Constitutional Conventions: The Elements Revisited' (2020) 31 Dhaka University Law Journal 121–31; To know some examples of the conventions of the Constitution of Bangladesh, see, Moha Waheduzzaman, 'Measuring Constitutional "Laws" and "Conventions" in Same Parlance: Critiquing the *Idrisur Rahman*' (2020) 8 Jahangirnagar University Journal of Law 47–48; To know more on conventions, see generally, Geoffrey Marshall, *Constitutional Conventions: The Rules and Forms of Political Accountability* (1st edn, OUP 1984) 3–18; William Maley, 'Laws and Conventions Revisited' (1985) 48(2) The Modern Law Review 121–38; TRS Allan, 'Law, Convention, Prerogative: Reflections Prompted by the Canadian Constitutional Case' (1986) 45(2) The Cambridge Law Journal 305–20; Andrew D Heard, 'Recognizing the Variety among Constitutional Conventions' (1989) 22(1) Canadian Journal of Political Science 63–81; Joseph Jaconelli, 'Do Constitutional Conventions Bind?' (2005) 64(1) The Cambridge Law Journal 149–76; Joseph Jaconelli, 'The Proper Roles for Constitutional Conventions' (2015) 38(2) Dublin University Law Journal

necessary to comprehend both sets of rules well to perceive how the Constitution of a country works in practice. Regarding conventions, it is important to mention a few issues: first, the issue of the *certainty* of existence and the meaning of this body of rules of the Constitution; second, their *significance* as rules of the governmental system; third, the reasons for their *obedience*; and fourth, the *consequences* of their violation.[2] This paper aims to focus on the last of these issues, termed more formally as a *remedy* for the violation of conventions.

The paper is written in the backdrop of the Bangladesh Supreme Court's *Idrisur Rahman* verdict, which deals with, *inter alia*, the enforcement of a constitutional convention.[3] For the most part, during the period between 1975 and 2011, the executive *conventionally* consulted with the Chief Justice in the matter of the appointment of Judges to the Supreme Court.[4] Before *Idrisur Rahman*, this *conventional* consultation was breached only once in 1994.[5] However, to be accurate, in *Idrisur Rahman*, it is not that in appointing the judges, the President did not consult with the Chief Justice. Some people were appointed as Additional Judges of the High Court Division under Article 98 of the Constitution after due consultation with the Chief Justice. However, the Executive did not confirm all of them as permanent Judges of the High Court Division under Article 95 of the Constitution, even though there was a positive recommendation of the Chief Justice to that effect.

The Additional Judges who were not confirmed challenged the decision of the Executive. The Supreme Court enforced the convention of *consultation* against the Executive. The paper would show that conventions are still *not* enforceable in a court of law in England, the mother country of conventions. They leave it for a political verdict. The paper terms it as 'extra-judicial' relief for the violation of conventions. Even when the judiciary involves itself in the matter, it only declares that such a convention exists in its system but abstains from judicially enforcing it. The paper terms it as 'judicial declaratory' relief. The paper thus envisages three

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363–85; Adam Perry and Adam Tucker, 'Top-Down Constitutional Conventions' (2018) 81(5) The Modern Law Review 765–89.

2 In this context, see, Waheduzzaman, 'Measuring Laws and Conventions' (n 1) (identifying six grounds of contrast between law and convention of the Constitution).

3 *Idrisur Rahman v Bangladesh* (2009) 61 DLR 523 (HCD) (hereafter *Idrisur Rahman (HCD)*); *Bangladesh v Idrisur Rahman* (2010) 15 BLC 49 (AD) (hereafter *Idrisur Rahman (AD)*).

4 For history on the law of consultation in Bangladesh, see Moha Waheduzzaman, 'Appointment of Supreme Court Judges in Bangladesh: An Alternative Interpretation of "Consultation"' (2023) 34(1) Dhaka University Law Journal 79–80.

5 For details on this breach, see *State v Chief Editor, Manabjamin* (2005) 57 DLR (HCD) 448–50 (hereafter *Manabjamin*).

distinct forms of relief for violation of conventions: (i) judicial enforcement; (ii) judicial declaration; and (iii) extra-judicial relief.

To this author's view, since the Supreme Court enforced a convention in its jurisdiction, it should have judged all these forms of relief for violation of constitutional conventions. However, the *Idrisur Rahman* Court did nothing. It applied the three-fold Jennings test to establish that the convention of *consultation* exists in its jurisdiction.[6] And, finding it an established convention, it simply enforced it against the Executive. The issue principally was not whether such a convention exists; rather, the issue was whether judicial enforcement should be employed as a form of remedy for the violation of the convention of *consultation,* which admittedly exists.

In the UK and Canada, 'judicial declaration' and 'extra-judicial' relief are still in vogue as remedies for the violation of conventions. They still maintain a distinction between *laws* and *conventions* on the grounds of 'court enforceability'. There is no analysis or justification in the Supreme Court's *Idrisur Rahman* verdict as to why it departed from these forms of relief. When essential aspects of analysis are omitted, the judgment itself becomes a weak authority on the subject.

This paper attempts to fill the gaps left by the vital omissions of *Idrisur Rahman*. Suppose the objective of the paper is accomplished. In that case, it may serve as a guide for the Supreme Court in any future litigation involving constitutional conventions in general or remedies for the violation of conventions.

The paper consists of four sections. The Introduction states, in brief, the background and justifies the necessity of the paper. Section 2 analyses the different forms of remedies for the violation of conventions. It discerns mainly three forms of relief. The first one, being distinguished as 'judicial enforcement', shall be analysed mainly in the context of the leading decisions of the Bangladesh and Indian jurisdictions. The second one, being identified as 'judicial declaration', shall be discussed principally with respect to the UK and Canadian jurisdictions. The third one, being referred to as 'extra-judicial' relief, is to be perceived predominantly with reference to the English jurisdiction. After knowing these forms in section 2, the author expresses his own views on the remedies for violations of conventions in section 3. The author, it would be seen, advocates for *extra-judicial* and softer *declaratory* relief for conventions. Section 4 summarises the arguments of the paper and concludes.

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[6] Jennings considers that there are three elements of a constitutional convention: precedent, normativity, and reason. For a detailed discussion of these elements, see, Waheduzzaman, 'Judicial Recognition of Conventions' (n 1) 131–40.

2. Forms of Remedies for Violation of Conventions

2.1 Judicial Enforcement of Conventions

Judicial enforcement as a remedy for violation of conventions was adopted by the Supreme Court of Bangladesh in *Idrisur Rahman*.[7] The case concerned the appointment of Judges of the Supreme Court. A person may be appointed directly as a permanent Judge of the High Court Division under Article 95 of the Constitution. Conventionally, he was first appointed as an Additional Judge of the High Court Division for two years under Article 98 of the Constitution. This happened in *Idrisur Rahman*. Some people were appointed as Additional Judges of the High Court Division for two years after consultation with the Chief Justice. After the expiry of two years, the Chief Justice recommended that all of them be appointed permanently under Article 95 of the Constitution. But the Executive did not appoint them all.

The Additional Judges who were not so confirmed filed a writ petition in the High Court Division challenging the decision of the Executive. One issue the Supreme Court had to decide on was the true import of 'consultation'. In other words, whose opinion shall prevail in case any conflict arises between the Chief Justice and the Executive regarding the appointment of Judges of the Supreme Court? *Idrisur Rahman (HCD)* laid down some guidelines for the Executive to follow in the matter of the appointment of Judges of the Supreme Court.[8] Specifically, as to the issue of *primacy*, the High Court Division held that the opinion of the Chief Justice is entitled to have primacy over the opinion of the Executive in this regard.[9]

On appeal, in *Idrisur Rahman (AD)*, the Appellate Division modified the judgment of the High Court Division to the effect that the opinion of the Chief Justice shall be dominant in deciding the legal acumen and professional suitability of the candidate, whereas the opinion of the Executive shall be dominant in matters of antecedents of the candidate.[10] The Appellate Division also observed that the appointment of Judges of the

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7 Judicial enforcement as a remedy for violation of conventions was also preferred by the Indian Supreme Court in *SC Advocates-on-Record Association v India* [1994] AIR 268 (SC) (popularly known as the *2nd Judges* case)*;* For how the Appellate Division of the Supreme Court of Bangladesh was inspired by the view of Kuldip Singh J in the Indian *2nd Judges* case, see (n 13) and (n 14) and accompanying texts. This paper is critical of both the Indian and Bangladeshi views and shows that those views are problematic. See for details (n 13)– (n 22).

8 *Idrisur Rahman (HCD)* (n 3) 551-52.

9 ibid 551.

10 *Idrisur Rahman (AD)* (n 3) 107.

Supreme Court with primacy of opinion of the Chief Justice is a condition for 'rule of law' and 'independence of judiciary'.[11]

The above *primacy* issue and necessary corollaries involved in *Idrisur Rahman* have already been adequately addressed in our jurisdiction and hence fall beyond the scope of the present paper.[12]

As already manifested, this paper concerns another aspect of *Idrisur Rahman*: issues relating to conventions, particularly with the issue of *remedy* for their violation. However, to reflect on the issue, we should first know the Supreme Court's view of conventions in the context of the enforcement of the convention of *consultation*. It would be enough to state the Court's observations in *Idrisur Rahman (AD)* since that is the Apex judicial forum in our jurisdiction. As to conventions, *Idrisur Rahman (AD)* held that "Convention when recognized and acted upon is as good as constitutional law and the provisions of the constitution and is binding like any other principles of law."[13] To equate conventions with laws of the Constitution, the Appellate Division was inspired by the following view of Kuldip Singh J of the Indian Supreme Court:

> We are of the view that there is no distinction between the "constitutional law" and an established "constitutional convention", and both are binding in the field of their operation. Once it is established to the satisfaction of the court that a particular convention exists and is operating, then the convention becomes a part of the "constitutional law" of the land and can be enforced in the like manner.[14]

In the Court's view, therefore, there was no distinction between *laws of the Constitution* and *established conventions*. Hence, the only inquiry with which the Court was concerned was whether *consultation* was a convention in its jurisdiction. To establish, it relied on the three-fold Jennings test as elements of a constitutional convention: precedent, normativity, and reason.[15]

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11 ibid 95.

12 See generally, Waheduzzaman (n 4).

13 *Idrisur Rahman (AD)* (n 3) 106.

14 *S.C. Advocates-on-Record Association v India* (1994) AIR (SC) 268, 404 (popularly known as the *2nd Judges* case). See *Idrisur Rahman (AD)* (n 3) 90. In passing, it may be noted that this view of Kuldip Singh J in the *2nd Judges* case has been quoted with approval by the HCD in *Idrisur Rahman (HCD)* (n 3) 542 and 579; *Manabjamin* (n 5) 453 and 455.

15 Ivor Jennings, *The Law and the Constitution* (5th edn, University of London Press Ltd 1972) 136; For a detailed discussion of the three-fold Jennings test, see Waheduzzaman, 'Judicial Recognition of Conventions' (n 1) 131–40.

The above-stated approach of the Court gives rise to some pertinent questions. *First*, should there be any distinction between mere *recognition* of a convention and the question of its judicial *enforcement*? Waheduzzaman argues that such a distinction is still maintained in the English jurisdiction and should also be maintained in the Bangladeshi jurisdiction.[16] Waheduzzaman's views suggest that the inquiry into the question of *recognition* of conventions and the inquiry into the question of *enforcement* of conventions are different or not necessarily the same.[17]

Second, the Court equates conventions with laws of the Constitution when it says that there is no distinction between constitutional law and established constitutional convention. So, the question is: should *laws* and *conventions* be measured in the same parlance? Waheduzzaman argues that *laws* and *conventions* should not be measured in the same parlance. He identifies six grounds of contrast between them.[18]

Third, it is just stated that the Court equates conventions with laws of the Constitution. So, the question is: are conventions *per se* law (law in itself) or a mere source of law in Bangladesh? The Court's approach in equating conventions with laws indicates a *historical* approach to conventions. So, the question is: whether the Constitution of Bangladesh adopts a *historical* or *positivist* approach to conventions? In contrast to the holding of the Court, Waheduzzaman argues that conventions are not *per se* law, rather a material and non-binding source of law under the Constitution of Bangladesh.[19] He furthermore shows that the Constitution of Bangladesh adopts a *positivist* as opposed to a *historical* approach to conventions.[20]

This paper acknowledges the above-identified issues concerning constitutional conventions in the context of the Supreme Court's *Idrisur Rahman* decision. Given that these issues have already been addressed, the present paper considers another aspect of *Idrisur Rahman*, that is, the question of remedy for violation of conventions. And, as has been known already, in *Idrisur Rahman (AD)*, the Court, as a remedy for violation of conventions, opted for judicial enforcement of the convention of

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16 See generally, Waheduzzaman, 'Judicial Recognition of Conventions' (n 1).

17 ibid.

18 See generally, Waheduzzaman, *Measuring Laws and Conventions* (n 1). According to him, the six grounds on which laws and conventions may be contrasted are: *certainty* of existence and meaning; *flexibility* in operation; *significance* as rules of a governmental system; *consequence* of violation; reasons for *obedience*; and *recognition* and *enforcement* in a court of law (emphases added). See ibid. 55–74.

19 Moha Waheduzzaman, 'Judicial Enforcement of Constitutional Conventions: Examining the Misleading *Idrisur Rahman*' (2025) 36(1) Dhaka University Law Journal 39– 63.

20 ibid.

consultation. In the end, therefore, the Court held that the cases of non-confirmed Additional Judges should be considered in terms of the guidelines provided by the Court.[21]

To summarize the features of 'judicial enforcement' as a form of remedy for violation of conventions so far as the Bangladeshi (*Idrisur Rahman*) and Indian (*2nd Judges*) cases are concerned: (i) there is no distinction between *recognition* and *enforcement* of conventions; (ii) there is no distinction between *laws of the Constitution* and *established conventions*; (iii) conventions are *per se* law as opposed to material and non-binding source of law; (iv) a *historical* as opposed to *positivist* approach may be taken as to the question, 'when does a convention become law'? It has just been shown that all these views of the Court have been scholarly addressed and found to be problematic.[22]

This paper is necessitated since the Court did not take into consideration the other forms of remedies of other jurisdictions. The principal aim of the paper is to assess which of the remedies should be considered the most appropriate one for the violation of conventions. The assessment is possible only after we have gained knowledge of the other two forms: 'judicial declaration' and 'extra-judicial' relief. The paper analyses them in the following sub-sections.

2.2 Judicial Declaratory Relief

By judicial declaratory relief, it is meant that the Court only declares the existence of the convention in a particular constitutional system but abstains from enforcing it. It will be seen that the Courts of England and Canada adopted this approach in some cases dealing with constitutional conventions. From a broader perspective, this is nothing but maintaining the distinction between *laws* and *conventions* of the Constitution on the ground of 'court enforceability'.

It would not be out of place to mention that in England, Dicey for the first time maintained a distinction between *laws* and *conventions* on the ground of 'court enforceability', that is, laws of the Constitution are enforceable in a court of law, whereas conventions of the Constitution are not.[23] As stated earlier, *Idrisur Rahman (AD)* relied heavily on Jennings's three-fold test to determine whether the convention of *consultation* existed in its constitutional system. Since the Court approved Jennings's idea of

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21 *Idrisur Rahman (AD)* (n 3) 108.

22 See, texts accompanying (n 16)– (n 20).

23 AV Dicey, *Introduction to the Study of the Law of the Constitution* (10th edn, London: Macmillan and Co 1962) 417; See also, Ivor Jennings, *Cabinet Government* (3rd edn, CUP 1959) 3.

conventions, it was anxious to know what Jennings's view regarding the question of the enforcement of conventions was. The Court wrongly assumed that Jennings, unlike Dicey, did not draw any distinction between *laws* and *conventions* on the ground of 'court enforceability'. To state the Court's misconceived understanding:

> Thus, it appears that the distinction made by Dicey has been rejected by Sir W. Ivor Jennings, who argued that *enforceability* by the Courts was not a valid basis for a distinction between laws and conventions and that both rested essentially on the *acquiescence* of those to whom they applied.[24]

This paper submits that Jennings also distinguished between laws and conventions of the Constitution, and that too, as did Dicey, on the ground of 'court enforceability. That Jennings also maintained the distinction is clear from these unambiguous words of Jennings himself: "We may note in passing that these rules of law, which are conventions in Great Britain, *are not 'enforced' in courts*." [25]

While Dicey and Jennings assert and confirm the distinction between *laws* and *conventions* of the Constitution on the ground of 'court enforceability', Munro justifies the usefulness of such a distinction:

> The validity of conventions cannot be the subject of proceedings in a court of law. Reparation for breach of such rules will not be affected by any legal sanction. There are no cases that contradict these propositions. In fact, the idea of a court enforcing a mere convention is so strange that the question hardly arises.
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> If, in fact, laws and conventions are different in kind, as is my argument, then an accurate and meaningful picture of the constitution may only be obtained if this distinction is made. *If the distinction is blurred, analysis of the constitution is less complete*; this is not only dangerous for the lawyer but less than helpful to the political scientist.[26]

Leaving aside the scholarly views and coming to the question of courts' approach again, the paper cites here four significant cases from the English and Canadian jurisdictions that set the tone of the courts of the respective jurisdictions regarding the question of enforcement or remedy for violation of conventions of the Constitution. The cases are: *Madzimbamuto v*

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[24] *Idrisur Rahman (AD)* (n 3) 89–90 (emphasis added).

[25] Jennings (n 15) 121 (emphasis added).

[26] CR Munro, 'Laws and conventions distinguished' (1975) 91 LQR 228 (emphasis added).

Lardner-Burke;[27] *Attorney-General v Jonathan Cape Ltd;*[28] *Reference re Amendment of the Constitution of Canada*; [29] and *R. (Miller) v Secretary of State for Exiting the European Union*.[30]

To begin with, *Madzimbamuto*, the case of *Madzimbamuto* is often cited to assert that the courts do not enforce conventions. There was a convention in the British constitutional system that Britain would not legislate for a dominion unless so requested by the dominion. But, in breach of the convention, the British Parliament enacted the South Rhodesia Act, 1965, when Rhodesia declared unilateral independence and formed a revolutionary government and passed laws. The said Act declared that Rhodesia was still a dominion of the UK and invalidated all laws passed by the revolutionary government. A person detained under the Rhodesian detention law contended that the South Rhodesia Act, 1965, would not be applicable since it was enacted in breach of the convention. The Privy Council rejected the contention. It is viewed that the Privy Council in effect refused to enforce a convention of the British Constitution.[31]

Jonathan Cape Ltd. was involved in the violation of the convention of 'confidentiality'. In the British system, cabinet meetings are, by convention, confidential and cannot be revealed except under the conditions specified by law or on the authority of the cabinet secretary. In this case, an ex-Cabinet minister decided to proceed with the publication of the diaries, which included records of cabinet discussions. The government sought an injunction to restrain him. The court held that generally an *eight to ten-year* embargo was enough unless national security was involved. In the instant case, the court refused to suppress 'secrets' over *ten* years old. Though the court refused an injunction to restrain the ex-cabinet minister, it recognised that 'confidentiality' and 'collective ministerial responsibility' were conventions of the British constitution.[32]

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27 *Madzimbamuto v Lardner-Burke* [1967] 1 AC 645 (hereafter *Madzimbamuto*).

28 *Attorney-General v Jonathan Cape Ltd* [1976] QB 752 (hereafter *Jonathan Cape Ltd*).

29 *Reference re Amendment of the Constitution of Canada* [1981] 1 SCR 753 (hereafter *Patriation Reference*), as quoted in Mahmudul Islam, *Constitutional Law of Bangladesh* (3rd edn, Mullick Brothers 2012) 5–7.

30 *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5 (hereafter *Miller*).

31 For more on *Madzimbamuto*, see Marshall (n 1) 16; Maley (n 1) 135–36; Jaconelli, 'Do Constitutional Conventions Bind?' (n 1) 175; See also *Manuel v Attorney-General* [1983] Ch 77 (hereafter *Manuel*). *Manuel* involved issues similar to that of *Madzimbamuto* and the Court of Appeal refused to enforce the convention involved in it.

32 For more on *Jonathan Cape Ltd*, see Marshall (n 1) 14–15; Jaconelli, 'Do Constitutional Conventions Bind?' (n 1) 159.

Patriation Reference is of Canadian jurisdiction. The question involved in it was whether the Constitution of Canada could be amended without first obtaining the consent of the provinces. The Supreme Court of Canada held that the consent of the provinces was required not by law but by convention only. The Court recognised the existence of the convention but abstained from enforcing it. Regarding judicial enforcement of conventions, the Court held its views as under:

> The conventional rules of the constitution present one striking peculiarity. In contradistinction to the laws of the constitution, they are not enforced by the courts. One reason for this situation is that, unlike common law rules, conventions are not judge-made rules. They are not based on judicial precedents but on precedents established by the institutions of government themselves. Nor are they in the nature of statutory commands which it is the function and duty of the courts to obey and enforce. Furthermore, to *enforce* them would mean to administer some *formal sanction* when they are *breached*. *But, the legal system from which they are distinct does not contemplate formal sanctions for their breach*.[33]

Thus, the Supreme Court of Canada not only abstained from enforcing the convention in the instant case but also reminded that the English jurisdiction where the convention has for the most part originated does not contemplate formal sanction for breach of the convention when it said, "*the legal system from which they are distinct does not contemplate formal sanctions for their breach*."[34]

Miller is of English jurisdiction in the context of Britain's exit from the European Union. It involved, *inter alia*, the issue of enforcement of the Sewel convention. According to this convention, the UK government could not legislate on the devolved matters in Scotland or Northern Ireland without the consent of the Scottish Parliament or Northern Ireland Assembly. The UK Supreme Court "declined not just to enforce the Sewel Convention, but also to interpret it or rule on its scope."[35]

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[33] See *Patriation Reference* (n 29), as quoted in Hilaire Barnett, *Constitutional and Administrative Law* (4th edn, Cavendish Publishing Ltd 2002) 39 (emphasis added).

[34] ibid; For more on *Patriation Reference* (n 29), see Marshall (n 1) 16–17; Maley (n 1) 136–37; Leonid Sirota, 'Towards a Jurisprudence of Constitutional Conventions' (2011) 11(1) Oxford University Commonwealth Law Journal 44–45; Farrah Ahmed, Richard Albert and Adam Perry, 'Judging Constitutional Conventions' (2019) 17(3) International Journal of Constitutional Law 798–99; Farrah Ahmed, Richard Albert and Adam Perry, 'Enforcing Constitutional Conventions' (2019) 17(4) International Journal of Constitutional Law 1152–53.

[35] Perry and Tucker (n 1) 786; For more on *Miller* (n 30), see Ahmed, Albert and Perry, 'Judging Constitutional Conventions' (n 34) 788; Ahmed, Albert and Perry, 'Enforcing Constitutional Conventions' (n 34) 1151; In this context, see also *R (Miller) v The Prime*

Not to go beyond *recognition* by the English court in *Jonathan Cape Ltd.* and by the Supreme Court of Canada in *Patriation Reference* has been rightly appreciated by Barnett in these words: "the lack of a legal remedy is explained by the strict distinction between law and convention and by the courts' refusal to go beyond recognition of the convention to enforcement thereof."[36]

Referring to *Manuel* and *Jonathan Cape Ltd.*, Barnett, on another occasion, also observes the same: "Being non-legal rules, there is no question of a breach of convention being enforced by the courts: the courts do not have the jurisdiction to enforce conventional rules, although they may give recognition to them."[37]

The above cases of the English and Canadian jurisdictions adequately show that the courts may recognize conventions even after holding that they are not 'court-enforceable'.[38] This approach of the courts finds support from academic opinions also. Carroll, for example, observes:

Minister and *Cherry v Advocate General for Scotland* [2019] UKSC 41 (hereinafter *Miller 2*); Like *Miller* (n 30), *Miller 2* also involved the contexts and issues of Britain's exit from the European Union. In *Miller 2*, the UK Supreme Court invalidated an attempted prorogation of Parliament by the Executive. Can this be viewed as the UK Supreme Court enforcing a convention that limits the prerogative power to prorogue Parliament? Perry observes that most writers say no, but he says yes. According to him, the UK Supreme Court in *Miller 2* enforced (conventional) principles of the UK Constitution. But even after holding this, Perry emphasizes that by this he does not mean that all conventions of the UK Constitution should be enforceable. See Adam Perry, 'Enforcing Principles, Enforcing Conventions' (*UK Constitutional Law Association Blog*, 3 December 2019) <https://ukconstitutionallaw.org/2019/12/03/adam-perry-enforcing-principles-enforcing-conventions/> accessed 10 November 2025; Indeed, it is difficult to cite *Miller 2* authoritatively as the UK Supreme Court's usual position on the question of enforcement of conventions because the Supreme Court itself cautioned that *Miller 2* was the result of 'circumstances which have never arisen before and are unlikely ever to arise again'. See Leonid Sirota, 'The Case of the Prorogations and the Political Constitution' (2021) 3 Journal of Commonwealth Law 105; The UK Supreme Court, therefore, itself described *Miller 2* as a 'one off' case. See ibid; Sirota, therefore, observes that *Miller 2* "might in turn be disregarded in the future." See ibid; Thus, even after *Miller 2*, the view that conventions are 'non-enforceable' or that the UK Courts do not enforce conventions remains pertinent.

36 Barnett (n 33) 40.

37 ibid 33.

38 For more on recognition and enforcement of conventions, see, NW Barber, *The Constitutional State* (1st edn, OUP 2010) 89–95; Adrian Vermeule, 'Conventions in Court' (2015) 38(2) Dublin University Law Journal 283–310; In this respect, see also, Allan (n 1) (arguing against the traditional dichotomy between law and convention of the Constitution).

> It would be misleading, however, to represent judicial refusal to enforce conventions as symptomatic of a reluctance to recognize the existence and significance of non-legal rules in the workings of the constitution.[39]

Carroll's observation very precisely highlights some important characteristics of conventions: *first*, they are non-legal rules; *second*, not judicially enforceable; *third*, they are significant though; *fourth*, the courts should not be reluctant to *recognise* their existence even when they are not enforcing it.

Bradley and Ewing's comment is also noteworthy. Dealing with the same question, they observe:

> In view of the political nature of most conventional rules, the stress on *political or parliamentary remedies* is appropriate. Moreover, many conventional rules, for example, those relating to Cabinet system, do not affect a citizen's rights closely enough for a judicial remedy to be justified . . . It may, however, be necessary for a court to take into account the *existence* of a conventional rule in making its decision on a point of law.[40]

The above views show that judicial engagement with conventions may mean only declaring that a particular convention exists in a constitutional system without formally enforcing it judicially. This is softer 'judicial declaratory' relief. The main feature of this approach is that it maintains a distinction between recognition and actual judicial enforcement of conventions. One might wonder, can mere declaration of the convention be of any utility? To this author's view, it may bear significance although it does not actually enforce since the court's declaration may act as a soft pressure upon the constitutional or political actors to comply with the convention.

After knowing both 'judicial enforcement' and 'judicial declaration', the paper now turns to reflect on 'extra-judicial' relief.

2.3 Extra-Judicial Relief

The remedy for violation of conventions remains extra-judicial when the issue is not brought to the court and hence the court gets no opportunity, neither to judicially enforce it nor to declare at least that such a convention exists in the constitutional system concerned. In such a case, the

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[39] Alex Carroll, *Constitutional and Administrative Law* (4th edn, Pearson Longman 2007) 61.

[40] Bradley and Ewing, *Constitutional and Administrative Law* (14th edn, Longman 2006) 29 (emphasis added).

consequence of violation of conventions remains wholly political. Question may, therefore, necessarily arise, if violation of conventions entails no legal consequences, why are then conventions in many respects seen to be obeyed in fact? Barnett explains the reason in these words: "conventions are obeyed because of the potential *political difficulties* which would arise if a firmly established convention were departed from without constitutional justification".[41] Islam observes the same reason couched in a different language: "Though there is no consequence stipulated for non-compliance, disobedience to it creates *political difficulties* and it is unthinkable that the constitutional conventions can be wholly discarded."[42]

Besides the potential *political difficulties* that Barnett and Islam identify, conventions are also obeyed due to the fear of *public criticism*. As already observed, according to Jennings, there are three elements of a convention: precedent, normativity and reason. The element of *normativity* carries in it the idea of 'rule' having 'obligatory force'. Because of this aspect, violation of convention, even if it entails no legal consequences, always gives rise to a legitimate ground for criticism. Because of this fear of criticism, the constitutional and political actors are, in fact, seen to obey conventions.

Barnett compares habits, practices, conventions, and laws of the Constitution. So far as the consequence of their violation is concerned, Barnett observes that the violation of habits requires no justification. Violation of practices may call for justification. Breach of a convention may give rise to a legitimate ground for criticism and be charged with as

41 Barnett (n 33) 34 (emphasis added).

42 Islam (n 29) 4 and 5 (emphasis added).

an "unconstitutional" conduct.[43] Violation of the law of the Constitution is both unconstitutional and unlawful.[44]

Thus, the consequence of violation of a convention is, for the most part, *political* rather than *legal*. Since the remedy is mostly *political*, it is in large measure unpredictable and uncertain as to what consequence/s will result from the breach of a particular convention. All conventions are not of equal *certainty* regarding their existence and meaning. Similarly, all of them are not of equal *significance* as rules of the governmental system. And it is in part for these reasons that the consequences of their violation may vary.[45] Again, as observed by Barnett, the consequence may also vary depending on the 'extent' [46] of the breach and the 'political mood' [47] of the country at the time of the breach.[48]

Perhaps, the difference between laws and conventions of the Constitution on the grounds of violation and the consequential effects has been best explained by Jennings. To quote him:

> To break the law is to do something clearly and obviously unconstitutional. Unless there are special circumstances, such as a political or financial emergency, it is the subject of blame; it is possible to rouse public opinion to indignation; the breach would be proclaimed from every platform and blazoned forth in every headline.

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[43] In this context, it should be noted that violation of convention may be charged with as an unconstitutional conduct does not mean that they regard conventions in same parlance with laws of the Constitution. They regard the action unconstitutional since conventions are also one set of rules of the British Constitution. They thus maintain a distinction between unconstitutional and unlawful conduct so far as its Constitution is concerned. Simply speaking, violation of law of the Constitution is both unconstitutional and unlawful whereas violation of convention of the Constitution is only unconstitutional but not unlawful. In *Patriation Reference* (n 29), the Supreme Court of Canada comprehended this distinction of the English jurisdiction: "they [conventions] form an integral part of the constitution and of the constitutional system and that is why it is perfectly appropriate to say that to violate a convention is to do something which is unconstitutional although it entails *no direct legal consequence*," as quoted in Islam (n 29) 6 (emphasis added); Jennings also appreciates the distinction: "an opposition feels that it has a more effective remedy if it can point out that the Government has acted *illegally* than it would have if it could say only that it had acted *unconstitutionally*." See Jennings (n 15) 133 (emphasis added). The scenario is different in other jurisdictions, such as in Bangladesh. In Bangladesh, for example, the expressions unconstitutional and unlawful are commonly used interchangeably in the realm of constitutional law.

[44] Barnett (n 33) 30.

[45] ibid 35.

[46] ibid 34.

[47] ibid.

[48] Regarding the varying nature of conventions, see also Heard (n 1) 63, 68–77, 81 (classifying conventions into different types: infra-conventions, semi-conventions, meso-conventions and fundamental conventions).

> Breaches of constitutional conventions are less obvious and can be more easily clouded by a fog of misunderstanding. A judicial decision that a law has been broken leaves no room for argument, save as to its political justification; an accusation that a convention has been broken may be met by an accusation of factious and deliberate misrepresentation. The angel who has been formally condemned is no longer an angel; in the absence of formal condemnation, he may protest his injured innocence.[49]

To summarize extra-judicial relief, the breach of law normally leads to the enforcement of the rules by courts, whereas the consequence of the breach of convention is *political* rather than *legal*. The consequence of breach of laws, *even by the government,* is mostly contained in the provision of law itself and may usually be contemplated in advance. On the contrary, the consequence of violation of the convention being political is, in large measure, uncertain, indefinite, and unpredictable.

3. Assessment of the Different Forms of Relief

As expressed in the Introduction, the paper advocates extra-judicial and declaratory relief and not judicial enforcement itself as a remedy for the violation of constitutional conventions. The following sub-sections explain the justification for favoring extra-judicial and declaratory reliefs.

3.1 Justification for Extra-Judicial Relief

To justify extra-judicial relief, the sub-section first acquaints a reader with the jurisprudence of extra-judicial relief in the context of the Constitution of Bangladesh. It then provides a practical example of extra-judicial relief in the Bangladeshi jurisdiction and finally shows the merit of extra-judicial relief as a form of remedy for violation of the conventions of the Constitution.

3.1.1 The Jurisprudence of Extra-Judicial Relief

Regarding extra-judicial relief for violation of conventions, the proposition is very simple: since conventions are 'non-legal'[50] rules of the Constitution,

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[49] Jennings (n 23) 4.

[50] O Hood Phillips, *Constitutional and Administrative Law* (4th edn, Sweet & Maxwell 1967) 77; Besides 'non-legal' rules, Phillips also terms conventions as the 'rules of political practice'. See ibid; Heard considers conventions as the 'informal' rules of the Constitution. See Heard (n 1) 63; Heard argues that as 'informal' rules, conventions cannot be treated as a homogenous group as did Jennings, rather they should be divided into several distinguishable classes of rules, such as, infra-conventions, semi-conventions, meso-conventions and fundamental conventions. See ibid 63, 64, 76–77, 81.

the remedy for their violation should be 'non-legal' or 'extra-judicial'. This proposition may be easily established if we can show that even in the realm of the law of the Constitution, extra-judicial relief or political accountability may or should be a form of remedy to ensure the accountability of the government.

To show this, the paper cites a pertinent provision of the Constitution. Article 63 (1) states that "war shall not be declared, and the Republic shall not participate in any war except with the assent of Parliament." The necessary implication of the provision is that the Constitution confers the power to declare war upon the Executive, and the Executive can declare it only with the assent of Parliament. So, the war powers have been collectively vested in the political departments of state, the Executive, and the Parliament. And to be noticed, the powers have been conferred without prescribing any manner or imposing any limitation for their exercise.

Now, suppose, in a wartime situation, a person challenged the Executive's decision to declare or conclude war with a foreign state. Can the Supreme Court entertain the petition and exercise its power of judicial review upon the Executive's exercise of war powers under Article 63 (1)? Certainly, many of our intuitions would respond that the Supreme Court cannot. Perhaps, we would also say that the judicial interference in this case (or of cases like this) would amount to encroaching on the affairs of the political departments and thus would violate the principle of 'separation of powers' maintained in the Constitution. In a system of constitutional supremacy, judicial interference is very common in the exercise of powers and functions of the political departments of the state. Say, for example, the Supreme Court can declare a law passed by the Parliament void if found to be inconsistent with any provision of the Constitution. Do we raise the concern of 'separation of powers' when the Supreme Court declares so? We do not. Then, why can't the Supreme Court exercise its power of judicial review when it comes to the question of war powers or of similar powers under the Constitution?

Before answering, a relevant question should be addressed: in case the Executive exercises war powers, what is the subject of judicial review? This question is pertinent since, as we have already seen, the Constitution neither prescribes the manner nor imposes limitations on the exercise of power. So, the Supreme Court has nothing to review, either to decide whether the prescribed manner has been complied with or the limitation has been infringed upon or not. So, judicial review of war powers may mean only that the Supreme Court examines the reasonableness of the decision of the Executive. And, if the Supreme Court finds it reasonable, the decision of the Executive would be sustained, and if it is found to be unreasonable, it would be quashed.

But can inquiry into the reasonableness of action form the subject matter of judicial review? Yes, it can, and this is seen mostly in the field of administrative law. Statutes invariably confer powers on statutory and administrative authorities. Such powers must be exercised in accordance with the manner prescribed or subject to the limitations imposed by the statute. Violation of statutory guidelines by the administrative authorities would render the action *ultra vires*. If statutes provide no guidelines for the exercise of power, the statute may itself be declared unconstitutional for impermissible delegation of power. Furthermore, the exercise of powers by administrative authorities may always be the subject of the Supreme Court's power of judicial review to ensure that the power is exercised reasonably and not arbitrarily. So, in addition to or in the absence of other available grounds, determining the *reasonableness* of an action may always form the subject of the Supreme Court's judicial review in the sphere of administrative law.

After knowing the relevant considerations, the paper now attempts to decide whether the war powers of the Executive may similarly be subjected to the Supreme Court's power of judicial review on the grounds of *reasonableness* of the Executive action. Simply speaking, challenging the Executive's action because the power has not been exercised *reasonably,* or, to say negatively, it has been exercised *arbitrarily*. This author is of the view that it cannot be so challenged. As already stated, the intuition is in favour of judicial abstinence. But to say that only intuition would not be enough in legal parlance. One needs to justify the Supreme Court's abstention role, advancing sound arguments from constitutional law perspectives with a view to providing for a jurisprudence of extra-judicial relief.

To know whether there can be any possibility of extra-judicial relief even in the realm of the law of the Constitution, it is necessary to know the differing nature of powers conferred by the Constitution upon the political departments of the government or upon the highest dignitaries of the state. Sometimes powers are conferred upon them subject to conditions and limitations or it is said that to exercise the power, they are bound to follow the prescribed manner of the Constitution. For example, the Constitution has conferred the plenary law-making power of the Republic upon the Parliament, subject to the limitation that the law made by the Parliament shall not be inconsistent with any provision of the Constitution.[51] Or, to cite another example, the Constitution has conferred the power of amendment of the Constitution upon the Parliament, subject to the procedural limitations that the long title of the Bill should specifically mention that it

[51] See the Constitution of Bangladesh, 1972, Preamble, arts 65, 7 and 26.

is an amending Bill of the Constitution and that it must be passed by at least two-thirds of the total number of members of the Parliament.[52]

In the above cases (or of similar cases), the Supreme Court certainly should have (in fact has) the power of judicial review to ensure that the constitutional mandates are observed by the political branches while exercising powers under the Constitution. Since, in these cases, accountability is ensured judicially, no question of ensuring accountability by political or extra-judicial means arises. And, in this case, the Supreme Court's exercise of the power of judicial review cannot be viewed as encroaching on the affairs of the other coordinate branches of the government and thus violating the principle of 'separation of powers' maintained in the Constitution.

However, it is possible to contemplate a different scenario. As opposed to the kind of powers mentioned above, Constitutions sometimes simply confer powers upon the highest dignitaries of the state without imposing any limitation or prescribing any manner for the exercise of such power. These powers are, as often said, confided to the discretion of the elected branches of the government. One example of this kind of power has already been mentioned, that is, the war powers of the Executive. The questions of whether circumstances exist to declare war with any foreign state or when to conclude peace are left to the discretion of the political branches of the government. These are matters of critical areas of elected branches' responsibility. In other words, they are matters of the highest forms of political judgment. If judicial review is allowed in these cases to examine the *reasonableness* of action, political judgment would then be replaced by judicial judgment in these critical areas of elected branches' responsibility.

Similar discretionary powers are to be found in the domain of the foreign relations of states. Suppose a question arises as to whether the government of Bangladesh should recognise a political entity as an independent state, recognise its government, and establish diplomatic relations with it. Suppose the government decided on its foreign relations policy. Now, suppose a conscious citizen challenged the decision, arguing that the decision of government has been unreasonable. Can the Supreme Court entertain the challenge? To this author's view, *no*, because these issues of governance have been left to the discretion of the political branches of government. And, as one may say, interference with these matters by the Supreme Court would amount to the violation of the principle of 'separation of powers' maintained in the Constitution.

To cite yet another example, the Constitution has conferred upon the Executive the power of appointment. In fact, an appointment is by nature

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[52] ibid article 142.

an executive function. Hence, besides the power to appoint Judges of the Supreme Court, the Executive (the President on the advice of the Prime Minister) has been conferred the power to appoint persons in the highest constitutional offices of the state, such as, the power to appoint Ministers (Article 56), Attorney-General (Article 64), Chief Election Commissioner and Election Commissioners (Article 118), Comptroller and Auditor-General (Article 127) and Chairman and Members of the Public Service Commission (Article 138).

To simplify, the paper just considers one of the above-mentioned examples. Suppose the Executive has appointed 'A' as the Attorney-General for Bangladesh. A conscious citizen or lawyer thought that many people are more qualified than 'A' to be appointed as Attorney-General. They filed a writ petition challenging the decision (appointment) of the Executive. They particularly argued that the Executive has appointed a less qualified person and thus has deprived many others having more qualifications, and hence the action/decision (appointment) of the Executive has been arbitrary and unreasonable and is, therefore, liable to be quashed.

Can the Supreme Court entertain the petition in exercise of its power of judicial review? To this author's view, the Supreme Court cannot. If a government (presumably elected) is restrained from appointing people of its choice, then the government cannot function as a government. In the cabinet system of government, as is ours, the Prime Minister is the real executive head of the government. She herself, though, is the Prime Minister, cannot occupy all institutional positions of the state. However, when she can appoint people of her choice, *inter alia*, in the highest constitutional offices of the state, then the government can be said to be her government.

Besides the above, if she is not given the authority to appoint persons of her choice, she can always evade responsibility relating to the conduct of other officials of the state (such as, Ministers, Attorney-General, Election Commissioners etc.) simply by saying that they were not persons of her choice (in running the affairs of the government) and she had no ultimate authority regarding their appointment. But when the real executive head of the government is (presumably) elected and upon her is vested all crucial powers of appointment, she can always be held accountable to the people in running the affairs of the state. So, judicial interference in the Executive's power of appointment of the kinds stated above should be untenable, for doing so would infringe the principle of 'separation of powers' maintained in the Constitution.

The above examples (war powers, foreign relations powers, and appointment powers) are only illustrative and not exhaustive of which constitutional issues are left to the discretion of the elected branches of the

government, and, as such, the Supreme Court's power of judicial review may/should be excluded.[53]

Now, if the Supreme Court's power of judicial review is excluded, then the accountability of the elected branches cannot be ensured by legal means. Then, a question may be asked: how should the accountability of the government be ensured as to these issues of the Constitution? In other words, if the government acts *unreasonably* with respect to these constitutional issues, where should the remedy lie – in courts or in political means only? According to this author's analysis above, the accountability of the government would be ensured politically only. To state specifically, the fear of public opinion or of public criticism, the positive role of political parties and mass media, etc. (collectively 'political means') should play their respective roles to ensure that the government acts reasonably and not arbitrarily.[54]

The above analysis shows that extra-judicial relief may be envisaged even for *legal* norms of the Constitution. Since conventions are 'non-legal'[55] or 'informal'[56] rules of the Constitution, the jurisprudence of extra-judicial relief constructed in view mainly of the legal provisions of the Constitution should be truer or more appropriate for the conventions of the Constitution. The paper states the merit of extra-judicial relief in a later sub-section. Before that, it may be useful to state a practical example of extra-judicial relief from the Bangladeshi jurisdiction.

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[53] For example, in the Constitution of Bangladesh, the Executive's power of pardon (art 49), power to promulgate Ordinance (art 93), power of proclamation of emergency (arts 141A, 141B and 141C), directing the legislature to enact law, and Parliament's authority to amend the Constitution (art 142) may be subjected to a similar analysis. It is to be noted, however, that the paper does not conclusively hold that these constitutional issues of the Constitution of Bangladesh should fall beyond the purview of the Supreme Court's power of judicial review. It only observes that these issues are at least *prima facie* prone to a similar analysis made in this paper with respect to the war powers, foreign relations powers and appointment powers of the political departments of the government.

[54] In the Bangladeshi jurisdiction, the issues of the Constitution as to which the Supreme Court's power of judicial review should be excluded have been termed as 'political questions.' 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 1–50 (defining political question as 'constitutional issues committed to the unbounded discretion of the other coordinate branches of the government': ibid 4); For more details on the author's view in this regard, see generally Moha Waheduzzaman, 'Doctrine of Political Question in Constitutional Litigation of Bangladesh: A Quest for Theoretical Framework' (Unpublished PhD Thesis, University of Dhaka 2022).

[55] Phillips (n 50).

[56] (n 50).

3.1.2 Practical Instances of Extra-Judicial Relief

This sub-section is to inquire whether any practical example of extra-judicial relief exists in our jurisdiction to substantiate, in practical terms, the jurisprudence erected in the preceding sub-section. However, before searching for any example, the paper first seeks to draw on whether any judicial utterances exist that speak of extra-judicial relief, whether for legal or non-legal norms of the Constitution. It is to be seen that such utterances exist about written provisions of the Constitution.

The Constitution of Bangladesh has provided for Human Rights (HRs) in two different Parts. Fundamental Principles of State Policy (FPSP) of Part II embodies, *inter alia*, the Economic, Social, and Cultural (ESC) Rights. Fundamental Rights (FRs) of Part II embody principally the Civil and Political (CP) rights. FRs of Part III are judicially enforceable, whereas the FPSPs of Part II are expressly declared by Article 8 (2) to be judicially non-enforceable. In *Kudrat-E-Elahi Panir v Bangladesh*, Naimuddin Ahmed J speculated on a hypothetical question: can the Supreme Court declare a law void which violates the FPSP of Part II?[57] On appeal, the Appellate Division per Mustafa Kamal J condemned Naimuddin Ahmed J for entering an academic discussion. However, the question of Naimuddin Ahmed J in the High Court Division and its answer in the Appellate Division remains pertinent. As to Naimuddin Ahmed J's posed question, Mustafa Kamal J replied:

> 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?* [58]

Mustafa Kamal J, therefore, without any hesitation, urges upon the *public opinion, political party, and elections* to play their respective roles to ensure that the Parliament does not go berserk. Simply speaking, as per the learned Judge, the government's constitutional responsibility with respect to FPSP is to be ensured politically only by extra-judicial means. And, to emphasize, the learned Judge observed this not with respect to any 'non-

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[57] *Kudrat-E-Elahi Panir v Bangladesh* (1992) 44 DLR (HCD) 179.

[58] *Kudrat-E-Elahi Panir v Bangladesh* (1992) 44 DLR (AD) 347 (emphasis added).

legal' norm, such as, convention of the Constitution, but with respect to written provisions of the Constitution.

After knowing judicial utterances that support extra-judicial relief, the paper now looks for a practical example. Interestingly, a practical example also exists, and that too in a judge's appointment context, and furthermore with respect to the convention of *consultation* itself. To state briefly, the requirement of *consultation* was there in the original Constitution of 1972. Subsequently, it was done away with by the 4th amendment in 1975. It was again revived in the Constitution by the 15th Amendment in 2011. So, for the most part, during the period between 1975-2011, the requirement of *consultation* was a mere convention of the Constitution.

The Executive followed the above-stated conventional *consultation* in appointing the Judges of the Supreme Court, except for one breach. In 1994, the then government appointed Judges of the High Court Division without consulting the Chief Justice. The then Chief Justice Shahabuddin Ahmed, in an address to the Bar, disclosed that Judges have been appointed to the High Court Division, and he is 'Mr. Nobody'. By this, the learned Chief Justice meant that they had been so appointed without any prior consultation with him. Knowing this, the Bar became united and launched a movement against the government to cancel the appointment. The movement was so intense that the government was compelled to rescind the earlier notification and issue a fresh notification, and in the fresh notification, it was clearly stated that the Judges of the High Court Division had been appointed after due consultation with the Chief Justice.[59]

The above is a glaring example in our jurisdiction to ensure accountability of the government by political/extra-judicial means; to ensure that the government acts (or exercises its powers) reasonably and not arbitrarily. After knowing both the jurisprudence of extra-judicial relief, judicial utterances, and practical examples of such relief, the paper now turns to draw on the merits of extra-judicial relief.

3.1.3 Merit of Extra-Judicial Relief

It is clear from the preceding analysis that the accountability of the government can be ensured both legally and politically/extra-judicially. The argument for the merit of extra-judicial relief is premised primarily on the assumption that the whole of the accountability of the government cannot be ensured legally, and *vice versa*. Legal and political accountability are complementary to each other. In England, most of the democratic and constitutional values are sustained by political or extra-judicial means. In the USA, some constitutional issues are termed as 'political questions' and

[59] For this historical aspect, see *Manabjamin* (n 5).

the US Supreme Court refrains from exercising its power of judicial review as to those issues of the US Constitution. So, in the USA also, the form of accountability for 'political questions' or remedy for their violation is political or extra-judicial.[60]

But, in Bangladesh, we ordinarily think that all constitutional issues should be determined by the judiciary. We want to ensure everything by judicial means, not to leave anything for extra-judicial means or political verdict. But not all constitutional values can be protected by the judiciary if people themselves are not vigilant for the causes of their rights and justice. When people think that all values of society or the Constitution can be protected by the judicial process, they will not remain vigilant, thinking that there is an all-powerful judiciary that will do everything for them. But that is not seen to happen in practice. In a democracy, both legal and political means should function effectively to ensure a responsible government. If it is true that political or extra-judicial forms of relief cannot be wholly trusted to ensure a responsible government, then the same should be true for legal or judicial forms of relief as well. That is, the judicial process similarly cannot be wholly relied upon to ensure a responsible government.

That the judicial process may in fact prove inadequate can be shown from a recent decision of the Supreme Court itself, and that again in a Judges' appointment context. We have already seen that both the *Manabjamin dicta*[61] and *Idrisur Rahman's* decision[62] imparted primacy of opinion of the Chief Justice over that of the Executive in the appointment of Judges of the Supreme Court. The judgments necessarily imply that in case of conflict of opinion, the opinion of the Chief Justice shall prevail. What was the purpose of these judicial *dicta* and decisions? The purpose was to ensure that the Executive does not act arbitrarily in appointing Judges of the Supreme Court. That is, the Supreme Court took upon itself the responsibility of ensuring governmental accountability so far as the appointment of Judges of the Supreme Court was concerned.

But the Supreme Court was ultimately proved to be incapable of accomplishing the feat. It had to depart from its *Manabjamin* dicta and *Idrisur Rahman* decision in *ABM Altaf Hossain and Ors v Bangladesh and Ors*.[63] *ABM Altaf Hossain* had similar facts to those of *Idrisur Rahman*. Some people were appointed as Additional Judges under Article 98 of the Constitution. They were not confirmed by the Executive as permanent

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60 For 'political question' in the US jurisdiction, see Waheduzzaman, 'Doctrine of Political Question in Constitutional Litigation of Bangladesh' (n 54) ch 3.

61 *Manabjamin* (n 5).

62 *Idrisur Rahman (HCD)* and *Idrisur Rahman (AD)* (n 3).

63 *ABM Altaf Hossain and others v Bangladesh and others* (2024) 19 SCOB 21 (AD) (hereafter *ABM Altaf Hossain*).

Judges under Article 95 of the Constitution, even after the Chief Justice's positive recommendation to that effect. The Appellate Division concurred with *Idrisur Rahman* that the Chief Justice's opinion is to be considered in determining the legal acumen and professional suitability of the candidate, and the Executive's opinion is to be considered as regards antecedents of the candidate.[64] However, departing from *Manabjamin* and *Idrisur Rahman*, the Appellate Division held that the opinion of no functionary will get primacy in case of conflict of opinion; if divergence of opinion occurs, the President is not empowered to appoint that person as Judge.[65] In the end, the Appellate Division employed soft language that 'the Executive *may* consider the case of appellant ABM Altaf Hossain',[66] whereas in *Idrisur Rahman*, the Appellate Division boldly pronounced that the cases of non-confirmed Judges be considered in light of the guidelines provided by the Court.[67]

ABM Altaf Hossain thus shows the inadequacies of legal/judicial means in ensuring the accountability of the government or that the government acts reasonably (and not arbitrarily), disregarding wholly the relevance and significance of political/extra-judicial means in this regard.

The paper now contemplates a different scenario. Suppose the Supreme Court of Bangladesh acknowledges that there are indeed constitutional issues as to which the Supreme Court should refrain from exercising its power of judicial review, since doing so would mean encroaching on the affairs of the elected branches of the government and thus infringing on the 'separation of powers' observed in the Constitution.[68] If this really happens, then all would know beforehand that certain issues of the Constitution are not to be resolved in judicial forums. A consciousness would gradually grow among the relevant stakeholders, like lawyers, political parties, mass media, and above all, among the general people. They would know that the remedy for violation of those constitutional issues is left to the political judgment or extra-judicial means. Knowing this, they can always remain vigilant to protect those constitutional values and to ensure that the government acts reasonably in dealing with those questions.[69]

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64 ibid 95.

65 ibid.

66 ibid.

67 *Idrisur Rahman (AD)* (n 3) 108.

68 This paper provides a hint as to constitutional issues that should fall beyond the Supreme Court's power of judicial review: see section 3.1.1 of the paper. For more details on which constitutional issues the Supreme Court should play an abstention or non-interference role, see Waheduzzaman 'Doctrine of Political Question in Constitutional Litigation of Bangladesh (n 54).

69 One example of such vigilance is to be found in the 1994 incident. See, texts accompanying (n 59).

The above analysis shows how extra-judicial means may contribute to observing the norms (whether legal or non-legal) of the Constitution. Thus, the merit of extra-judicial relief lies in the fact that extra-judicial relief, together with judicial relief, may make a government more accountable and responsible. This merit of extra-judicial relief is premised on the assumption that the whole of governmental accountability cannot be claimed to be ensured legally and *vice versa*.[70]

3.2 Justification for Judicial Declaratory Relief

In declaratory relief, the courts do not enforce but only declare the existence of the convention for a given constitutional system. So, even in the case of judicial declaratory relief, ultimately, the remedy for violation of the convention remains in the extra-judicial realm. Observing this, one may not at first sight find any difference between extra-judicial relief and judicial declaratory relief. To this author's view, these two forms should be perceived differently. When the case of violation is not brought to the court, the remedy lies solely and exclusively within the extra-judicial sphere. When the remedy is sought before the court, there is the possibility of either judicial enforcement or judicial declaration only or total silence on the issue, showing no interest even as to the inquiry of whether such a convention exists in the constitutional system.

Viewed this way, judicial declaratory relief as a form of remedy for violation of conventions seems to stand between judicial enforcement and extra-judicial relief. And, to this author's view, judicial declaratory relief has two features distinguished from both judicial enforcement and extra-judicial relief.

First, when a court declares the existence of a convention for a constitutional system, it may attain the status of *soft* constitutional law for that system. The idea of 'soft law' is not novel in the realm of law. In international law, General Assembly Resolutions are considered *soft* international law. Similarly, when the courts declare a norm as an *established convention*, it should be treated as a *soft* constitutional law.[71] This declaration, apart from the idea of being *soft* law, has another merit. The conventions are not created deliberately like the law of the Constitution. So, there may always be some degree of uncertainty as to the existence of a particular convention. But the confusion as to its existence is removed when the court declares its existence.

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[70] However, this assumption of the paper has been substantiated with reference to the practical example of *ABM Altaf Hossain's* case: see texts accompanying (n 63)– (n 67).

[71] McHarg also supports the idea of conventions being treated as soft constitutional law. See, Aileen McHarg, 'Reforming the Unted Kingdom Constitution: Law, Convention, Soft Law' (2008) 71(6) The Modern Law Review 861–63.

Second, one of the essential elements of a convention, as Jennings identifies, is *normativity*. *Normativity* of conventions is like Hart's idea of *rule*, custom's ingredient of *obligatory force,* and customary international law's *opinio juris*. The constitutional and political actors feel themselves to be bound by a convention because of this element. There may be a difference on this point between a declared convention and a non-declared convention. A judicially declared convention would very naturally possess more binding force than a non-declared convention.

The phenomenon of a judicially declared convention may also be compared with the 'declaration of incompatibility' of the English jurisdiction. England historically follows parliamentary sovereignty as its constitutional system. So, the English judges cannot declare a law passed by the Parliament void on the grounds of its inconsistency with the English constitution. This parliamentary sovereignty is still technically retained after the enactment of the Human Rights Act, 1998. If any law passed by the British Parliament is inconsistent with the Human Rights Act, the Court nevertheless cannot declare the law void but can issue a 'declaration of incompatibility' signifying that the law has been inconsistent with any provision of the Human Rights Act.

It then becomes a non-legal or moral responsibility of the British Parliament to amend the law to remove the inconsistency. Likewise, in the case of conventions, when courts declare the existence of a particular convention, it becomes the moral responsibility of the constitutional functionaries and political actors to comply with the convention both in the instant case and future cases to come.

The above analysis shows how judicial declaration differs in nature both from a wholly extra-judicial relief and total silence of the court on the issue. Perceiving the above-stated features, this paper considers judicial declaratory relief as a separate class of remedy for the violation of conventions.

This author, as has already been seen, considers that both judicial and extra-judicial reliefs are necessary to hold a government accountable and responsible.[72] That's why the author's preference is for extra-judicial relief when contrasted with complete judicial enforcement. Similarly, when the judiciary has already engaged itself in the matter, the author supports a judicial declaration only and not judicial enforcement. By adopting the midway of declaration, the matter can still be left with political and extra-judicial means while gaining the advantages of declaration as identified above (soft law and carrying of a more binding force and moral obligation).

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[72] See generally, section 3.1 of this paper.

4. Conclusion

The paper aimed to assess the different forms of remedies for violation of conventions of the Constitution in the backdrop of the Supreme Court's *Idrisur Rahman* verdict[73] enforcing the convention of *consultation* in appointing the Judges of the Supreme Court. Any such attempt first requires knowing the available forms of remedies that may be distilled from the courts' jurisprudence, particularly of the English jurisdiction, since it is the mother country of conventions.

With this aim in view, section 2 examines the jurisdictions mainly of Bangladesh, India, England, and Canada, and identifies three forms of relief for violation of conventions: judicial enforcement, judicial declaration, and extra-judicial relief. It observes that the distinction between *recognition* and *enforcement* of conventions is still maintained in the English jurisdiction. Furthermore, the English courts still distinguish between *laws* and *conventions* on the ground of 'court enforceability' as did Dicey and confirmed by Jennings.[74] To mention some cases specifically, the English *Madzimbamuto*[75] and *Manuel*[76] simply denied judicial enforcement of conventions respectively. The English *Jonathan Cape Ltd.*[77] and the Canadian *Patriation Reference*[78] acknowledged the existence of the conventions in their respective jurisdictions but abstained from enforcing them judicially. Even the most recent *Miller*[79] of English jurisdiction maintains a distinction between mere *recognition* and actual judicial *enforcement* of conventions.

The paper is written since *Idrisur Rahman* is clearly deficient. The Supreme Court enforces a convention in its jurisdiction, but does not consider at all the other forms of remedies for violations of conventions. It also does not explain why it departs from the established English position in this regard. Section 3 provides for these omissions of the Supreme Court. The author prefers extra-judicial and judicial declaratory relief to direct judicial enforcement. Hence, it formulates the jurisprudence of extra-judicial relief, provides practical examples of extra-judicial relief, and argues for the merit and justification of both extra-judicial and judicial declaratory reliefs. It also takes note of the fact that in England, most of the constitutional values are sustained by political means. In the USA, the court has developed the

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73 *Idrisur Rahman (HCD)* and *Idrisur Rahman (AD)* (n 3).

74 See, texts accompanying (n 23)– (n 25).

75 *Madzimbamuto* (n 27).

76 *Manuel* (n 31).

77 *Jonathan Cape Ltd* (n 28).

78 *Patriation Reference* (n 29).

79 *Miller* (n 30).

concept of 'political questions' to refrain from judicial review as to certain constitutional questions.

The jurisprudence of extra-judicial relief shows that extra-judicial relief may be a better or appropriate form of relief even for *legal* norms of the Constitution. Since the argument advanced in the jurisprudence of extra-judicial relief is relevant even for *legal* norms, it is, therefore, quite natural that the arguments would fit more for conventions, the *non-legal* rules of the Constitution. The argument assumes that the whole accountability of the government cannot be claimed to be ensured legally, and *vice versa*. The paper substantiates this assumption with reference to the Supreme Court's recent decision of *ABM Altaf Hossain*.[80]

Acknowledgement of the above proposition by all, including the Supreme Court, means that certain constitutional questions fall beyond the Supreme Court's power of judicial review. For them, extra-judicial means are a better and appropriate form of remedy. When this is known to all, they can be vigilant to protect those constitutional values by employing political and extra-judicial means. Democracy is successful only when the people are enlightened, who remain always vigilant as to the questions of their rights and justice. In this way, the judicial and extra-judicial means can ensure that the government acts reasonably and not whimsically and arbitrarily. Due to the fear of public criticism and disapproval, the government would act reasonably. This is how the legal and political means together can ensure a truly responsible government.

Overall, the paper reflects on the remedial aspects of conventions in the backdrop of the Supreme Court's *Idrisur Rahman* decision. But it may bear significance even for *laws* of the Constitution since the jurisprudence of extra-judicial relief is formulated keeping in view the *legal* norms of the Constitution also. But, to be more specific, the paper is mainly to be of guidance for the Supreme Court in any future litigation concerning the issue of remedy for violation of the conventions of the Constitution.

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[80] *ABM Altaf Hossain* (n 63).