

The American “Case” or “Controversy” Requirement and the Bangladeshi “Aggrieved Person” Rule: A Comparative Study

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Abstract: Article 102 (2) of the Bangladesh Constitution speaks of an “aggrieved person” invoking writ jurisdiction of the Supreme Court. The expression “aggrieved person” is commonly understood to involve only the issue of *locus standi*. This article argues that besides *locus standi*, ripeness and mootness may also be the forming parts of the expression “aggrieved person”. In this extended meaning, the expression “aggrieved person” of Bangladeshi jurisdiction is somewhat similar to the Article III “case” or “controversy” requirement of American jurisdiction. The article thus both interprets and compares “aggrieved person” with the American “case” or “controversy” requirement. Ripeness and mootness when form parts of “aggrieved person”, become law of the Constitution under Article 102 (2) and not mere *rules of practice* the Supreme Court usually follow in writ jurisdiction. The article thus develops knowledge of constitutional law in the context of interpreting “aggrieved person”. The knowledge it develops may be utilized by the Bangladesh Supreme Court in interpreting “aggrieved person” in a properly constituted case before it. In this way, the article may have practical interest and utility besides its academic value. Besides the Court, any person interested in constitutional law may also be benefited from properly knowing the scope or extent of the expression “aggrieved person” of Article 102 (2) of the Bangladesh Constitution.

Keywords: Aggrieved person, constitution, *locus standi*, ripeness, and mootness.

1. Introduction

The judicial branch of the Government is mainly understood to mean a system of courts of law for the administration of justice and the judges presiding over these courts. The purpose of the Bangladeshi judicial system is also the administration of justice according to law. To achieve the purpose, Article 104 of the Constitution manifestly empowers its Apex Court to issue any order it deems fit for ensuring ‘complete justice’ in a case.¹ And the Judiciary, both the Apex and the Subordinate

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¹ The Article reads: “The Appellate Division shall have power to issue such directions, orders, decrees or writs as may be necessary for doing *complete justice* in any case or matter pending before it,

Courts, performs this function of administering justice through exercising the “judicial power” of the Republic.

However, in the exercise of the “judicial power” of the Republic, the courts follow certain rules founded on statutes and the Constitution. The courts are usually meant to determine actual controversies arising between diverse litigants. So far as constitutional law is concerned, this phenomenon has gained recognition through the expression “aggrieved person” in Bangladesh² and through the “case” or “controversy” requirement in the United States.³ In the US jurisdiction, several justiciability doctrines, such as, standing, ripeness and mootness have emanated out of the “case” or “controversy” requirement. On the contrary, the expression “aggrieved person” in the Bangladeshi jurisdiction is generally understood to mean only the standing or *locus standi* requirement. The US “case” or “controversy” requirement counsels against issuing advisory opinions by the US Supreme Court. On the contrary, the Appellate Division of the Bangladesh Supreme Court can issue such opinions in the exercise of its Advisory Jurisdiction under Article 106 of the Constitution.⁴

This article shows that the expression “aggrieved person” in Bangladeshi jurisdiction may subsume in it the rules of ripeness and mootness besides the traditional understanding of the *locus standi* (standing) rule as in the US jurisdiction under “case” or “controversy” requirement. It further shows that in Bangladesh also the Court assumes jurisdiction only when there is an actual case or controversy between the parties and so far, Article 106 allows issuing advisory opinions that form only an exception to the general rule. The cases of *Kazi Mukhlesur Rahman v Bangladesh*⁵ and *Kudrat-E-Elahi Panir v Bangladesh*⁶ have been taken as the two paradigm examples to show that the expression “aggrieved person” of Bangladeshi jurisdiction may include within its ambit the rules of ripeness⁷ and mootness⁸ also besides the rule of standing or *locus standi*.⁹

The main aim of the article is to develop knowledge of constitutional law in the context of interpreting the expression “aggrieved person” of Article 102 (2) of the

including orders for the purpose of securing the attendance of any person or the discovery or production of any document.” (Emphasis added).

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

³ See, Article III, Section 2, Clause 1 of the United States (US) Constitution.

⁴ Article 106 reads: “If at any time it appears to the President that a question of law has arisen, or is likely to arise, which is of such a nature and of such public importance that it is expedient to obtain the opinion of the Supreme Court upon it, he may refer the question to the Appellate Division for consideration and the division may, after such hearing as it thinks fit, report its opinion thereon to the President.”

⁵ *Kazi Mukhlesur Rahman v Bangladesh* (1974) 26 DLR (AD) 44 (hereafter *Kazi Mukhlesur Rahman*).

⁶ *Kudrat-E-Elahi Panir v Bangladesh* (1992) 44 DLR (AD) 319 (hereafter *Kudrat-E-Elahi Panir*).

⁷ See, *infra*, Section 3.2. of the article.

⁸ See, *infra*, Section 3.3. of the article.

⁹ See, *infra*, Section 3.1. of the article.

Bangladesh Constitution. Furthermore, it has been done through a comparative method: comparing the Bangladeshi “aggrieved person” requirement with the US requirement of “case” or “controversy”. The knowledge the article seeks to develop may be utilized by the Bangladesh Supreme Court in interpreting the expression “aggrieved person” in a properly constituted case before it. Thus, the article may have practical interest and utility besides its academic value. Besides the Court, any person interested in constitutional law may also be benefited in properly knowing the scope or extent of the expression “aggrieved person” of the Bangladesh Constitution.

To accomplish the task, I have divided the article into 5 Sections. Following this introductory Section, Section 2 ascertains the meaning and scope of the American “case” or “controversy” requirement. Section 3 interprets the expression “aggrieved person” of Bangladesh Constitution and argues that three distinct sub-rules (standing, ripeness, and mootness) may subsume under the expression “aggrieved person”. Section 4 briefly compares the Bangladeshi “aggrieved person” rule with the US “case” or “controversy” requirement. Section 5 summarizes the arguments of the article and concludes.

2. The American “Case” or “Controversy” Requirement¹⁰

Under Article III (Section 2, Clause 1) of the US Constitution, the judicial power shall extend to “cases” or “controversies”. Doctrines of standing, ripeness, mootness, and political question are all said to have emanated from the “case” or “controversy” requirement of Article III of the US Constitution.¹¹ And, federal courts, they say, lack jurisdiction if either of the doctrines involved in a case. For example, in relation to the mootness doctrine, it was held “due to lack of jurisdiction, federal courts have no power to consider the merits of a constitutionally moot case.”¹²

However, there is no consensus of opinion in the legal literature of US jurisdiction as to the basis of the political question. The opinions wander between the Article III “case” or “controversy” requirement and the principle of ‘separation of powers’. Park argues that the earlier federal cases referred to Article III’s “case” or “controversy” requirement as the basis for the doctrines of standing, ripeness, and mootness only; and held the origin of political question doctrine in the principle of ‘separation of powers’.¹³ It is only the cases of modern times that refer to Article

¹⁰ Moha. Waheduzzaman, *Doctrine of Political Question in Constitutional Litigation of Bangladesh: A Quest for Theoretical Framework*, Unpublished PhD Thesis (Dhaka: University of Dhaka, Department of Law, 2022) 75.

¹¹ Ron Park, ‘Is the Political Question Doctrine Jurisdictional or Prudential?’ (2016) 6 *UC Irvine LR* 257.

¹² *Powell v McCormack* 395 US 486, 496 (1969). Quoted in Mootness: An Explanation of the Justiciability Doctrine, Congressional Research Service (CRS) Report (prepared for Members and Committees of Congress) (2007) 2.

¹³ See, Park (n 11).

III's "case" or "controversy" requirement as the basis for the doctrine of political question.¹⁴ Park holds the view of earlier federal cases as a correct statement of law.¹⁵ I am in agreement with the view of Park.¹⁶ In a relatively recent article, Harrison also argues that if originally understood the US Supreme Court's political question cases have nothing to do with the subject matter jurisdiction of the Court.¹⁷

Since I do not hold the political question doctrine as emanating from Article III "case" or "controversy" requirement, there is no necessity here of explaining the import of the doctrine in the US jurisdiction.¹⁸ For a different reason though I do not also want to explain the American doctrines of standing, ripeness and mootness here since I am supposed to explain the same as the three distinct sub-rules under the expression "aggrieved person" appearing in Article 102 (2) of the Bangladesh Constitution. I, therefore, now turn to analyze the "aggrieved person" rule in the Bangladeshi jurisdiction under the said Article.

3. The Bangladeshi "Aggrieved Person" Rule (or, the Grievance Rule)¹⁹

The High Court Division of the Supreme Court exercises writ jurisdiction under Article 102 of the Constitution. Though not in name, Article 102 (2) speaks in substance of five kinds of writs: writ of prohibition, writ of *mandamus*, writ of *certiorari*, writ of *quo-warranto*, and writ of *habeas corpus*. Except for the writs of *quo-warranto* and *habeas corpus*, the applicant must be an "aggrieved person" to invoke the jurisdiction of the High Court Division.²⁰ As already stated, three distinct sub-rules may subsume under the "aggrieved person" rule: standing or *locus standi*, ripeness, and mootness. I explain the three sub-rules under the following three sub-sections of this Section.

3.1. *Locus Standi*

The *locus standi* sub-rule of the rule of "aggrieved person" may profitably be explained and examined under the two headings: restrictive view and liberalized view.

3.1.1. Restrictive View

The expression "aggrieved person" appearing in Article 102 (2) has not been defined by the Constitution itself. In the absence of any constitutional definition,

¹⁴ *ibid.*

¹⁵ *ibid.*

¹⁶ For detail, see, Waheduzzaman, (n 10) 75-76.

¹⁷ John Harrison, 'The Political Question Doctrines' (2017) 67 *American University Law Review* 457.

¹⁸ See, Waheduzzaman, (n 10) 90-121.

¹⁹ *ibid.*, 56-70.

²⁰ See, Article 102 (2) (a) (i) (ii) of the Constitution.

one needs to look at how courts of different jurisdictions have interpreted the term. The leading English case on *locus standi* is *Ex parte Sidebotham*, in which the Court held that a person aggrieved is a man “who has suffered a legal grievance, a man against whom a decision has been pronounced which has wrongly deprived him of something, or wrongfully refused him something, or wrongfully affected his title to something.”²¹

Subsequently, this restrictive view of standing was adopted by courts of other jurisdictions including Bangladesh. The Pakistan Supreme Court adopted the restrictive approach in *Tariq Transport v Sargodha-Bhera Bus service*: “. . . a person seeking judicial review . . . must show that he has a *direct personal interest* in the act which he challenges before his prayer for review is entertained.”²² In an earlier decision, the Bangladesh Supreme Court also echoed somewhat a similar view:

We also are of the opinion that any person who is affected by any order can maintain a petition under article 102. In order to show that they have been affected, it is necessary to establish that they have some right in the subject matter of the dispute and that they are affected by the impugned orders.²³

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

Restrictive rules about standing are in general inimical to a healthy system of administrative law. If a plaintiff with a good case is turned away, merely because he is not sufficiently affected personally, that means that some government agency is left free to violate the law, and that is contrary to public interest.²⁴

3.1.2. Liberalized View

The Bangladesh Supreme Court took a liberal view of standing even before Public Interest Litigation (PIL) gained a foothold in India.²⁵ Shortly after the commencement of the Constitution in 1972, a case of grave constitutional

²¹ [1880] 14 Ch. D. 458.

²² (1959) 11 DLR (SC) 140, 150 (emphasis added) (the Court held this view in exercise of the power of judicial review under Article 170 of the Pakistan Constitution of 1956).

²³ *Eastern Hosiery MSBS Samity v Bangladesh* (1977) 29 DLR 694, 679.

²⁴ Schwartz and Wade, *Legal Control of Government* (1972) 291.

²⁵ For liberalized view of standing rule and Public Interest Litigation (PIL) in India, see, *Mumbai Kamgar Sabha v Abdulbhai* AIR 1976 SC 1455; *ABSK Sangh (Rly) v Union of India* AIR 1981 SC 298; *SP Gupta v President of India* AIR 1982 SC 149. For liberalized view of standing rule in Pakistan, see, *Benazir Bhutto v Pakistan* PLD 1988 SC 416. For the liberalized rule of standing in England, see, the four Blackburn cases. For Blackburn cases, see, Mustafa Kamal, *Bangladesh Constitution: Trends and Issues* (2nd edn, University of Dhaka 1994) 162. For further detail on the liberalized view of standing rule in England, India and Pakistan, see, (n 10) 57-60.

importance, namely, *Kazi Mukhlesur Rahman*²⁶ came for consideration before the Supreme Court of Bangladesh. The case involved a challenge by an advocate the legality of the Delhi Treaty of 1974 regarding demarcation of the land boundary between Bangladesh and India. In justifying the *locus standi* of the appellant, the Appellate Division stated:

The fact that the appellant is not a resident of South Berubari Union No. 12 or of the adjacent enclaves involved in the Delhi Treaty need not stand in the way of his claim to be heard in this case. We heard him in view of the constitutional issue of grave importance raised in the instant case involving an international treaty affecting the territory of Bangladesh and his complaint as to an impending threat to his certain fundamental rights guaranteed by the Constitution, namely, to move freely throughout the territory of Bangladesh, to reside and settle in any place therein as well as his right of franchise. Evidently, these rights attached to citizen are not local. They pervade and extend to every inch of the territory of Bangladesh stretching up to the continental shelf.²⁷

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

It appears to us that the question of *locus standi* does not involve the Court's jurisdiction to hear a person but of the competency of the person to claim a hearing, so that the question is one of discretion which the Court exercises upon due consideration of the facts and circumstances of each case.²⁸

Some definitive conclusions on the issue of *locus standi* may be drawn from Supreme Court's observations in *Kazi Mukhlesur Rahman*.²⁹ *First*, standing involves the right of an applicant to claim a hearing and not Court's jurisdiction over the subject matter in question. *Second*, the Court will hear a person (grant *locus standi*) if he agitates a constitutional question of grave importance. *Third*, when FRs are involved, the impugned matter need not affect a purely personal right of the applicant touching him alone – it is enough if he shares the right in common with others. *Fourth*, it is a matter of discretion on the part of the Court to grant *locus standi* to an applicant which the Court shall exercise judiciously taking due consideration of the facts and circumstances of each case.³⁰

²⁶ See, *Kazi Mukhlesur Rahman* (n 5).

²⁷ *ibid* 53.

²⁸ *ibid* 52.

²⁹ *Kazi Mukhlesur Rahman* (n 5).

³⁰ I agree with the view that standing relates to applicant's right to claim a hearing and does not involve Court's jurisdiction but finds the view of the Court that *locus standi* is a matter of discretion confusing. *Locus standi* embodied in Article 102 is now a constitutional precondition that requires being satisfied for vindicating grievances in writ jurisdiction. In a preliminary review of the matter, if *locus standi* of the party is found to be lacking, the Court will not reach the substantive merit of the issue. For the distinction between preliminary and substantive merit review of an issue, see, (n 10) 78 and 81.

Although *Kazi Mukhlesur Rahman*³¹ decided in the instant case the issue of standing of the appellant, the landmark judgment in Bangladesh involving the issue of *locus standi* is *Dr. Mohiuddin Farooque v Bangladesh*³² popularly known as the BELA's case.³³ In this case, the Appellate Division accepted the grievance of Dr. Farooque against the Flood Action Plan (FAP) of the Government. To ascertain the meaning of the expression 'person aggrieved', the Court observed that Article 102 of the Constitution should not be viewed as "an isolated island above or beyond the sea level of the other provisions of the Constitution."³⁴ Taking into account the relevant provisions including the pronounced scheme and objectives of the Constitution, the Court could not but hold that "There is no question of enlarging *locus standi* or legislation by Court. The enlargement is written large on the face of the Constitution."³⁵

Quite in an artistic way, the Court expressed that 'person aggrieved' means "not only any person who is personally aggrieved but also one whose heart bleeds for his less fortunate fellow beings for a wrong done by the government or a local authority in not fulfilling its constitutional or statutory obligations."³⁶ In light of these high holdings, the Appellate Division declared the law of *locus standi* of Article 102 (2) of the Bangladesh Constitution in these words:

The traditional view remains true, valid and effective till today insofar as individual rights and individual infractions thereof are concerned. But when a public injury or public wrong or infraction of a fundamental right affecting an indeterminate number of people is involved, it is not necessary, in the scheme of our Constitution, that the multitude of individuals who have been collectively wronged or injured or whose collective fundamental rights have been invaded are to invoke the jurisdiction under Article 102 in a multitude of individual writ petitions, each representing his own portion of concern. Insofar as it concerns public wrong or public injury or invasion of fundamental rights of an indeterminate number of people, any member of the public . . . espousing that particular cause is a person aggrieved and has right to invoke the jurisdiction under Article 102.³⁷

A careful reading of the judgment would reveal that a person without being personally affected may be a 'person aggrieved' under Article 102 only when a public wrong is involved in the dispute and insofar individual rights and infractions are concerned, as the judgment holds, "the traditional view remains true, valid and effective till today"³⁸ meaning the person to be regarded aggrieved

³¹ *Kazi Mukhlesur Rahman* (n 5).

³² *Dr. Mohiuddin Farooque v Bangladesh* (1997) 49 DLR (AD) 1 (hereafter *Dr. Mohiuddin Farooque*).

³³ BELA stands for Bangladesh Environmental Lawyers' Association.

³⁴ *Dr. Mohiuddin Farooque* (n 32) 13.

³⁵ *ibid* 15.

³⁶ *ibid* 24.

³⁷ *ibid* 15.

³⁸ *ibid*.

should suffer direct personal harm or injury. These two facets of the ruling of *Dr. Mohiuddin Farooque*³⁹ are vital for understanding the Court's approach in subsequent cases of *locus standi*.

For example, in *Bangladesh Sangbadpatra Parishad v Bangladesh*,⁴⁰ the High Court Division denied standing to the association of newspaper-owners who challenged an award given by the Wage Board. Since the case did not involve any public wrong and since there was no difficulty on the part of the newspaper owners themselves to challenge the award, the Appellate Division rightly confirmed the decision of the High Court Division in denying standing to the association of newspaper-owners. On the contrary, in *Bangladesh Retired Government Employees' Welfare Association v Bangladesh*,⁴¹ the High Court Division rightly accepted the standing of the said association holding, "Since the association has an interest in ventilating the common grievance of all its members who are retired Government employees, in our view, this association is a 'person aggrieved'" under Article 102 of the Constitution.

The Bangladesh Supreme Court now widely allows Public Interest Litigation (PIL) to further the causes of justice. In this respect, it should be mentioned that although *Dr. Mohiuddin Farooque*⁴² may be viewed as the first case to initiate prospect for PIL in Bangladesh, the two other subsequent cases, namely, *Ekushey Television LTD v Dr. Chowdhury Mahmood Hasan*⁴³ and *Engineer Mahmudul Islam v Bangladesh*⁴⁴ should be regarded as imparting PIL a firm footing in our jurisdiction. In these cases, the Supreme Court not only sought to elucidate the nature of PIL but also to expound the jurisprudential basis for PIL in Bangladesh jurisdiction. In the *ETV* case, for example, the Appellate Division explained the nature of PIL vis-a-vis private disputes as under:

The nature of public interest litigation is completely different from traditional case which is adversarial in nature whereas PIL is intended to vindicate rights of the people. In such a case benefit will be derived by a large number of people in contrast to a few. PIL considers the interest of others and therefore, the court in a public interest litigation acts as the guardian of all the people whereas in a private case the court does not have such power. Therefore, in public interest litigation the court will lean to protect the interest of the general public and the rule of law vis-a-vis the private interests. Where the rule of law comes in conflict with third party interests the rule of law will, of course, prevail.⁴⁵

³⁹ *Dr. Mohiuddin Farooque* (n 32).

⁴⁰ *Bangladesh Sangbadpatra Parishad v Bangladesh* (1991) 43 DLR (AD) 126.

⁴¹ *Bangladesh Retired Government Employees' Welfare Association v Bangladesh* (1994) 46 DLR 426.

⁴² *Dr. Mohiuddin Farooque* (n 32).

⁴³ *Ekushey Television LTD v Dr. Chowdhury Mahmood Hasan* (2002) 54 DLR (AD) 130 (popularly known as *ETV* case) (hereafter *ETV* case).

⁴⁴ *Engineer Mahmudul Islam v Bangladesh* (2003) 55 DLR 171 (hereafter *Engineer Mahmudul Islam*).

⁴⁵ *ETV* case (n 43). As to the gradual shift of the meaning of *locus standi*, the Court remarkably observed, "From the above, it appears that the Courts of this jurisdiction have shifted their position to a great

The case of *Engineer Mahmudul Islam*⁴⁶ involved a challenge of approval of the project of container terminal by the Board of Investment. Having found the allegation of non-application of mind, negligence and arbitrariness against members of the Board of Investment its basis, the Court accorded standing to the petitioner. The following passage of the judgment is reflective of Court's jurisprudence of PIL:

Justice delivery system in this part of the world is based on the principle of liberty and justice for all. Public interest litigation means the legal action initiated in a court of law for the enforcement of rights and interests of the citizens in general or a section thereof. The judiciary is to play a vital and important role not only in preventing and remedying abuse and misuse of power but also to eliminate injustice. It must not be forgotten that the cause of justice cannot be allowed to be thwarted by any procedural technicalities. An action may be maintained for judicial redress brought before it by a citizen provided from such action the State will be benefited.⁴⁷

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

It would be pleasing to appreciate that the Court in its leading *Dr. Mohiuddin Farooque*⁴⁸ verdict involving the issue of *locus standi* not only addressed both these issues of concern but also provided guidelines to be followed by the High Court Division in subsequent cases. As to the first issue of concern, ATM Afzal CJ held: "The Court in considering the question of standing in a particular case, if the affected party is not before it, will enquire as to why the affected party is not coming before it and if it finds no satisfactory reason for non-appearance of the affected party, it may refuse to entertain the application."⁴⁹ As regards the second

extent from the traditional rule of standing which confines access to the judicial process only to those to whom legal injuries are caused or legal wrong is done. The narrow confines within which the rule of standing was imprisoned for long years have been broken and a new dimension is being given to the doctrine of *locus standi*."

⁴⁶ *Engineer Mahmudul Islam* (n 44).

⁴⁷ *ibid*.

⁴⁸ *Dr. Mohiuddin Farooque* (n 32).

⁴⁹ *ibid* 5.

issue of concern, Mustafa Kamal J (the author Judge of the case) laid down the following rule of caution:

The High Court Division will exercise some rules of caution in each case. It will see that the application is, in fact, espousing a public cause, that his interest in the subject matter is real and not in the interest of generating some publicity for himself or to create mere public sensation, that he is acting *bona fide*, that he is not a busybody or an interloper, that it is in the public interest to grant him standing and that he is not acting for a collateral purpose to achieve a dubious goal, including serving a foreign interest.⁵⁰

The Supreme Court's denial of *locus standi* in some cases may be fully appreciated only when that is judged in light of the above-quoted observations of *Dr. Mohiuddin Farooque*.⁵¹ For example, in *BRAC v Professor Mozaffar Ahmed*⁵², the Appellate Division rightly denied standing to the applicant since there was nothing in the writ petition to show that the applicant moved the High Court Division for and on behalf of himself as also of other less fortunate persons of the society who have no source or means to invoke the writ jurisdiction though the applicant was seeking remedy against an alleged public wrong or injury.

Similarly, in *Moudud Ahmed v Anwar Hossain Khan*⁵³, the Appellate Division rightly observed that a person cannot have *locus standi* even in a public interest litigation when he initiated the proceeding not to vindicate the cause of the people in general or that of a group in the society who are for some seasons not in a position to vindicate their cause before the court but to serve the cause of somebody other than the cause of public nature or a cause of a vulnerable group in the society.⁵⁴

On the contrary, in the *Constitution (Sixteenth) Amendment* case,⁵⁵ although the petitioners were not directly affected by the Sixteenth Amendment of the Constitution, yet as Advocates, they were rightly held to have sufficient interest in the matter:

From the facts and circumstances of the present case, it transpires that the petitioners as Advocates of the Supreme Court of Bangladesh are very much

⁵⁰ *ibid* 15. In this respect, the observation of Mahmudul Islam is also noteworthy. The author writes: "In a quo-warranto proceeding there is no requirement of an application by a 'person aggrieved'. Even then the court inquires whether an applicant has an interest in the matter and whether he is approaching the court *bona fide* or with an oblique motive. When an application for *mandamus*, *certiorari* or prohibition is required to be filed by a 'person aggrieved', the court will have all the more reason to ask why the affected party is not coming forward and what is the motive of the applicant" (internal citation omitted). Mahmudul Islam, *Constitutional Law of Bangladesh* (3rd edn, Mullick Brothers 2012) 851.

⁵¹ *Dr. Mohiuddin Farooque* (n 32).

⁵² *BRAC v Professor Mozaffar Ahmed* (2002) 54 DLR (AD) 36.

⁵³ *Moudud Ahmed v Anwar Hossain Khan* (2008) 60 DLR (AD) 108.

⁵⁴ See also *Chairman, Civil Aviation Authority v KA Rouf* (1994) 46 DLR (AD) 145; *Alauddin Sikder v Bangladesh* (2004) 56 DLR (AD) 130; *Salauddin Shoaib Chowdhury v Bangladesh* (2009) 17 BLT (AD) 89.

⁵⁵ 24 BLT (Special Issue) (HCD) 1.

concerned with the independence of the Judiciary, separation of powers and establishment of rule of law. In a word, like Judges, they are also stakeholders in the administration of justice without let or hindrance from any quarter. It goes without saying that they are not busybodies or interlopers. Given this situation, I cannot deny their *standing* in filing the writ petition before the High Court Division under article 102 of the Constitution.⁵⁶

The foregoing discussion, within the limited scope of the article, adequately reveals the jurisprudence of *locus standi* in Bangladeshi jurisdiction. But, as stated earlier, the “aggrieved person” rule of Article 102 (2), besides *locus standi*, also includes within its scope the sub-rules of ripeness and mootness. I, therefore, now turn to elucidate in brief the nature of these sub-rules under the said Article.

3.2. Ripeness

The rule of ripeness considers whether a petitioner has brought a case too early for adjudication. If the rule of *locus standi* ensures that the plaintiff is the proper party to assert a claim, the rule of ripeness ensures that the court is adjudicating such claim at a proper point of time. The case of *Kazi Mukhlesur Rahman*⁵⁷ may be considered again to understand ripeness as one of the forming parts of the “aggrieved person” rule of Article 102 (2) of the Constitution.

The facts which gave rise to the case of *Kazi Mukhlesur Rahman*⁵⁸ may shortly be stated thus. The executive heads of the Governments of Bangladesh and India entered into a Treaty concerning the demarcation of the land boundary between them.⁵⁹ In pursuance of the Treaty, India will retain the southern half of south Berubari Union No. 12 and the adjacent enclaves, and in exchange, Bangladesh will retain the Dahagram and Angarpota enclaves. The appellant in his petition before the High Court Division prayed for a declaration that the Treaty involving cession of the territory of Bangladesh was without lawful authority and of no legal effect. The appellant particularly contended that he was under an impending threat of deprivation of his fundamental rights of movement and franchise under respective provisions of the Constitution. The High Court Division summarily dismissed the petition but granted leave to appeal under Article 103 (2) (a) of the Constitution.

On appeal, the Appellate Division had to consider, *inter alia*, whether the appellant had standing to raise the objection as well as whether the issue raised was *ripe* for adjudication. In view of the grave constitutional questions involved in the case, such as, the ambit of executive power under Article 55 (2) of the Constitution and

⁵⁶ *ibid* (emphasis added). But see *SN Goswamy v Bangladesh* (2003) 55 DLR 332 (the High Court Division negated the *locus standi* of an Advocate who challenged the appointment of some Judges as Judges of the Appellate Division of the Supreme Court).

⁵⁷ *Kazi Mukhlesur Rahman* (n 5).

⁵⁸ *ibid*.

⁵⁹ The Delhi Treaty signed on 16th day of May 1974.

the threat to the appellant's some of precious fundamental rights, the Appellate Division accepted the appellant's *locus standi*⁶⁰ but dismissed the appeal on the ground that the issue brought to the notice of the Court was *not yet ripe* for judicial interference. In reaching this conclusion, the Appellate Division particularly took note of Article 5 of the Treaty wherein it was clearly stated that the agreement shall be subject to ratification by the Governments of Bangladesh and India and that the agreement shall be effective only after the exchange of the Instruments of Ratification has taken place.⁶¹

As to the executive's authority to enter into Treaty, the Appellate Division held that treaty-making falls within the ambit of executive power under Article 55 (2) of the Constitution but a Treaty involving determination of boundary, and more so involving cession of territory, can only be concluded with the concurrence of Parliament by necessary enactment.⁶² In the face of express stipulation contained in Article 5 of the Treaty,⁶³ the Court held that the Delhi Treaty of 1974 though dispositive in nature cannot be held to be an executed treaty; something is yet to be done before it can be so. In this view of the matter, the Court held that the appellant's prayer is *premature* because there can be no question of a document being declared to be without lawful authority and of no legal effect when the document itself stipulates that it will be effective only on the happening of a certain event in future, namely, the exchange of Instruments of Ratification.⁶⁴

Thus, *Kazi Mukhlesur Rahman*⁶⁵ bears significance not only from the *locus standi* standpoint but also from the perspective of ripeness in exercise of the High Court Division's writ jurisdiction under Article 102 of the Constitution. And ripeness, simply to relate it with the expression 'grievance' of Article 102, may be interpreted to mean that the Court will not entertain a writ petition on *premature grievances*.⁶⁶ I may now proceed to analyze another component of the "grievance" or "aggrieved person" rule, that is, mootness.

3.3. Mootness

If standing ensures a proper party for litigating an issue and ripeness the proper point of time for adjudicating the issue, mootness ensures that the court invokes jurisdiction to resolve only "live" issues. The rule of mootness requires that an

⁶⁰ See, above notes 27 and 28 and the accompanying texts.

⁶¹ *Kazi Mukhlesur Rahman* (n 5) 48-49.

⁶² *ibid* 58. Subsequently, in light of the decision of *Kazi Mukhlesur Rahman*, the Constitution (Third Amendment) Act, 1974 was enacted on 28 November 1974 to give effect to the said exchange of territory under the Delhi Treaty, 1974.

⁶³ See, *supra* texts accompanying note 61.

⁶⁴ *Kazi Mukhlesur Rahman* (n 5) 54.

⁶⁵ *ibid*.

⁶⁶ On ripeness or premature grievances, see also, *Usmania Glass Sheet v STO* (1970) 22 DLR (SC) 437; *Kamaluddin v Secretary, Ministry of Land* (2004) 56 DLR (AD) 212; *Sadek Hossain Khoka v Election Commission* (2009) 17 BLT 221; *Abdus Sattar Khan v DG, Bureau of Anti-Corruption* (2010) 15 BLC 73.

actual case or controversy (that is, a ‘live’ issue) should exist not only when the lawsuit is filed or when the review is granted by the appellate court, but throughout all stages of the proceeding. An issue may become moot when a controversy initially existing at the time the lawsuit was filed is no longer “live” due to a change in the law or in the status of the parties involved, or due to an act of one of the parties that dissolves the dispute.⁶⁷

The case of *Kudrat-E-Elahi Panir*⁶⁸ may be regarded as a standard familiar example in Bangladeshi jurisdiction to understand the issue of mootness in constitutional litigation. The short facts of the case are as thus. Ordinance No. LIX of 1982 was promulgated by the then Government to constitute Upazila Parishads, the third tier of the Local Government. To run and manage certain Local Government functions, the Ordinance transferred some powers and functions of the Government in the Upazila Parishads. However, the new Government formed after the general election of February 1991 promulgated Ordinance No. XXXVII (later on made Act No. II of 1992) abolishing the Upazila Parishads altogether and vesting in the Government all rights, powers, authorities and privileges of the dissolved Upazila Parishads.

The Repealing Ordinance and the Act were challenged by some Chairmen of the dissolved Upazila Parishads on specific grounds involving substantial questions of law as to the interpretation of the Constitution. *First*, they contended that the Ordinance being inconsistent with Articles 9 and 11 runs against the spirit of the Constitution and become void by operation of Article 7 (2) of the Constitution. *Second*, they also argued that the Ordinance is violative of Article 59 of the Constitution which provides that Local Government in every administrative unit shall be entrusted to bodies composed of elected representatives of the people. *Third*, existence of circumstances that renders immediate action necessary is a precondition for the promulgation of the Ordinance under Article 93 of the Constitution. They contended that the Government presented no fact to show that circumstances existed which rendered immediate legislation necessary.

As to the first ground of challenge, the Court held that Articles 9 and 11 being Fundamental Principles of State Policy (FPSP) are not judicially enforceable in view of Article 8 (2) of the Constitution.⁶⁹ As regards the second ground of challenge, the Court agreed that all Local Government units must conform to Article 59 of the Constitution. But since Upazila Parishads were never designated

⁶⁷ See, Mootness: CRS Report (n 12) (for the quoted reference, see, Summary of the Report).

⁶⁸ *Kudrat-E-Elahi Panir* (n 6).

⁶⁹ Part II of Bangladesh Constitution contains Fundamental Principles of State Policy (FPSP) (from Articles 8-25). Article 8 (2) enumerates some important uses of FPSP but at the same time expressly declares them to be judicially non-enforceable. For a critical appraisal of the judgment of *Kudrat-E-Elahi Panir* in relation to its interpretation of Article 8 (2) and the FPSP, see, Moha. Waheduzzaman, ‘Judicial Enforcement of Socio-Economic Rights in Bangladesh: Theoretical Aspects from Comparative Perspective’ in Dr. M. Rahman (ed.) (2011) 12 *Human Rights and Environment* 64-68.

by law to be an administrative unit for the purposes of Article 59, the Court held that the abolition of Upazila Parishads did not attract the mischief of Article 59 of the Constitution.

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

It has been seen that an issue may become moot due to an act done by one of the parties involved in the dispute.⁷⁰ This exactly happened in *Kudrat-E-Elahi Panir*.⁷¹ The third ground of challenge involved in the case became "moot" due to Parliament's turning the impugned Ordinance into an Act of Parliament within the constitutionally prescribed period of time. In terms of "grievance" or "aggrieved person" rule of Article 102 (2), it may be said that the appellant's *grievance* in relation to the third ground of challenge was no longer "live" or, in other words, his *grievance* in relation to that issue ceased to exist due to a change of circumstance in the case.⁷²

Thus, the expression "aggrieved person" not only involves the issue of *locus standi* but also the issues of ripeness and mootness. In other words, it both addresses questions of who (*locus standi*) and when (ripeness and mootness) of the issue of grievance of Article 102 (2) of the Constitution. After knowing well the American "case" or "controversy" requirement (Section 2) and the Bangladeshi "aggrieved person" or "grievance" rule (Section 3), I now move for a brief comparison between them.

⁷⁰ See, *supra* note 67 and the accompanying texts.

⁷¹ *Kudrat-E-Elahi Panir* (n 6).

⁷² On mootness, see also, *Raquibuddin v Syndicate, Dhaka University* (2005) 57 DLR 63. For mootness in Indian jurisdiction one can see *Guruswamy v Mysore* AIR 1954 SC 592; *Kartar Singh v Piara Ram* AIR 1976 SC 957; *AK Roy v India* AIR 1982 SC 710.

4. Comparing the Bangladeshi “Aggrieved Person” Rule with the American “Case” or “Controversy” Requirement⁷³

I identify here both the similarity and dissimilarity between the Bangladeshi and American jurisdiction so far as the American “case” or “controversy” and the Bangladeshi “aggrieved person” requirements are concerned. The doctrines of standing, ripeness and mootness may properly be said to have emanated from the “case” or “controversy” requirement of Article III of the US Constitution.⁷⁴ In Bangladeshi jurisdiction, the same should be said to have originated as three distinct sub-rules of the “aggrieved person” or “grievance” rule of Article 102 (2) of the Constitution.⁷⁵

In *Muskrat v United States*, the US Supreme Court defined “judicial power” as the “right to determine *actual controversies* arising between diverse litigants, duly instituted in courts of proper jurisdiction”.⁷⁶ The determination of the controversy or settling the dispute necessarily involves the hearing of parties, admission of proofs and evidence, interpretation and application of the law on the ascertained facts, and finally pronouncing a ‘binding judgment’ on the parties before it. However, the questions of ‘actual controversy’ and ‘binding judgment’ *Muskrat* ⁷⁷ identifies as incidents of “judicial power” in the US system may not equally hold good for Bangladeshi jurisdiction.

In the US jurisdiction, the grievance doctrines (standing, ripeness and mootness) ensure that the US Supreme Court does not issue advisory opinions. Because deciding an issue when proper plaintiff is not before the Court or when the issue is unripe for judicial consideration or when the case is moot results only in an advisory opinion that has no tangible effect. By contrast, Article 106 of the Bangladesh Constitution expressly confers the Advisory Jurisdiction upon the Appellate Division of the Supreme Court.⁷⁸ The Appellate Division, in its discretion, may always exercise this Advisory Jurisdiction in the absence of any concrete “case” or “controversy”. And any opinion rendered by the Supreme Court on a point of law sought by the President is also *not* binding on the President. Howsoever persuasive force the opinion may carry in fact; in the eyes of law, it carries no authoritatively binding force.⁷⁹ Thus, the US requirements of *actual* ‘case’ or ‘controversy’ and ‘binding judgment’ may not always form the incidents of the exercise of “judicial power” in Bangladeshi jurisdiction.

⁷³ This Section is a revised version of what I wrote in my PhD research. See, Moha. Waheduzzaman, (n 10) 43, 44 and 76.

⁷⁴ See, *supra* note 3 and Section 2 of the article generally.

⁷⁵ See generally, *supra*, Sections 3.1., 3.2. and 3.3. of the article.

⁷⁶ *Muskrat v United States* 219 US 346, 361 (1911) (emphasis added) (hereafter *Muskrat*).

⁷⁷ *ibid.*

⁷⁸ See, *supra* note 4.

⁷⁹ For Appellate Division’s exercise of the Advisory Jurisdiction under Article 106 of the Constitution, see, *Special Reference no. 1 of 1995* (1995) 47 DLR (AD) 111.

However, the provision of Advisory Jurisdiction as contained in Article 106 of the Bangladesh Constitution should be regarded only as an exception to the rule that courts exercise “judicial power” to decide only *actual* ‘case’ or ‘controversy’. In fact, Bangladesh Constitution also recognizes this general rule when it embodies the expression “aggrieved person” in Article 102 (2) of the Constitution. And I have shown that three distinct sub-rules (standing, ripeness and mootness) may subsume under the said expression of the Article.⁸⁰ The sub-rules in effect inhibit the Supreme Court from exercising “judicial power” in the absence of any *concrete* ‘case’ or ‘controversy’.

5. Conclusion

Some conditions need to be satisfied before one may claim constitutional relief in the exercise of writ jurisdiction of the Court. Those conditions may broadly be divided into two categories. *First*, rules of practice or the self-imposed rules of Court.⁸¹ *Second*, rules that are founded on the law of the Constitution itself. I find two rules that are founded by the law of the Constitution itself: *first*, there is no other equally efficacious remedy provided by law and *second*, the petitioner seeking relief, except for the writs of *habeas corpus* and *quo-warranto*, is an “aggrieved person”.⁸²

In this article, I focus on one of the rules founded on the Constitution i.e., the “aggrieved person” or “grievance” rule. I both interpret⁸³ and compare⁸⁴ the expression “aggrieved person” with the American “case” or “controversy” requirement. Regarding their co-relationship I elsewhere argued:

Grievance necessarily implies or involves adversariness that lead to a ‘case’ or ‘controversy’. Therefore, pronouncing ‘binding judgment’ in a concrete ‘case’ or ‘controversy’ is also the rule in our jurisdiction and advisory opinion that may be rendered by the Appellate Division under Article 106 of the Constitution forms only an exception to the rule.

When perceived in the above sense, the ‘grievance rule’ of Bangladesh Constitution is similar to Article III ‘case’ or ‘controversy’ requirement of the US Constitution. The US Supreme Court has emanated several justiciability

⁸⁰ See generally, *supra*, Sections 3.1., 3.2. and 3.3. of the article.

⁸¹ “Except for the writ of *habeas corpus* and enforcement of FRs, the other writs are generally discretionary. The Court exercises discretion in accordance with judicial consideration and well established principles. These principles of the Court are simply termed as *rules of practice* based on sound and proper exercise of discretion.” Waheduzzaman, (n 10) 53 (internal citation omitted) (emphasis original). For examples of such *rules of practice* in our jurisdiction, see *ibid*.

⁸² Waheduzzaman terms the former as ‘rule of exhaustion’ and the latter as ‘rule of grievance’. See, (n 10) 54. On ‘rule of exhaustion’ (meaning, objective, and Bangladeshi cases), see, *ibid* 54-55.

⁸³ For interpretation of the expression “aggrieved person” in Bangladeshi jurisdiction, see generally, *supra*, Section 3 of the article.

⁸⁴ For comparison between the Bangladeshi “aggrieved person” rule and the American “case” or “controversy” requirement, see generally, *supra*, Section 4 of the article.

doctrines out of Article III's 'case' or 'controversy' requirement. It is submitted that three distinct sub-rules may also subsume under the "grievance rule" of Article 102 of the Bangladesh Constitution: *locus standi* (standing), ripeness and mootness.⁸⁵

In Bangladesh jurisdiction, one is accustomed to thinking of "aggrieved person" as involving the issue of *locus standi* only. It is not that the Bangladesh Supreme Court did not refuse to reach the merit of an issue on the grounds of ripeness and mootness in any case. In *Kazi Mukhlesur Rahman*, the Court refused to invoke jurisdiction because the issue brought to the notice of the Court was *not yet ripe* for judicial consideration.⁸⁶ Again, in *Kudrat-E-Elahi Panir*, the Court did not reach the merit of the third ground of challenging the impugned Ordinance because due to the change of circumstances the issue was *no longer live* or became *moot*.⁸⁷

What is simply lacking is that the Court when dismisses a claim on the grounds of either ripeness or mootness, does not say or consider ripeness or mootness (as the case may) as forming parts of the "aggrieved person" or "grievance" rule under Article 102 (2) of the Constitution. This article shows that besides *locus standi*, ripeness and mootness are also components of the expression "aggrieved person".⁸⁸ If this is true, then ripeness and mootness are also rules (indeed, sub-rules under the rule of "grievance") founded on the Constitution and hence cannot merely be treated as *rules of practice* in a case.⁸⁹ If these interpretive aspects of "aggrieved person" are appreciated by all including the Supreme Court of Bangladesh that may offer synchronization of the "grievance" or "aggrieved person" rule and simplify the grounds of entertaining writ petition in our jurisdiction.

⁸⁵ See, (n 10) 55-56 (internal citations omitted) (emphasis original).

⁸⁶ See, *Kazi Mukhlesur Rahman* (n 5) and see generally, *supra*, Section 3.2. of the article.

⁸⁷ See, *Kudrat-E-Elahi Panir* (n 6) and see generally, *supra*, Section 3.3. of the article.

⁸⁸ See generally, *supra*, Sections 3.1., 3.2. and 3.3. of the article.

⁸⁹ For *rules of practice*, see *supra* note 81.

