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Judicial Review and Referendum Legality: Constitutional Control of the 2026 Popular Vote

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This study critically examines the legality and democratic legitimacy of the proposed 2026 referendum in Bangladesh, with a particular focus on the constitutional role of interim governments and the scope of judicial review. Despite the growing global use of referendums as tools of direct democracy, the Bangladeshi Constitution provides no comprehensive procedural framework for initiating such votes, and transitional authorities possess limited competence to undertake binding constitutional actions. Using a doctrinal qualitative methodology, the research analyses constitutional texts, judicial precedents, comparative South Asian jurisprudence, and scholarly literature to evaluate whether the referendum aligns with principles of constitutional supremacy, institutional competence, and procedural democratic integrity. The findings reveal that the referendum faces multiple legal vulnerabilities: lack of explicit constitutional authorisation, overreach by non-elected authorities, oversimplified binary questions undermining informed voter choice, and underutilization of judicial review mechanisms. The study demonstrates that democratic legitimacy cannot substitute for constitutional legality, emphasising that courts must serve as guardians of constitutional order to prevent plebiscitary erosion of constitutionalism. Comparative evidence from India and Sri Lanka further underscores the need for pre-emptive judicial scrutiny and clear procedural safeguards in referendum processes. The research contributes to constitutional theory by highlighting the interplay between legality, legitimacy, and transitional governance, offering insights for policymakers, the judiciary, and scholars on ensuring that referendums in Bangladesh adhere to both legal and democratic standards.

Keywords: Referendum legality, Judicial review, Bangladesh Constitution, Interim government, Democratic legitimacy, Constitutional supremacy, Transitional governance

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1. Introduction

Referendums are commonly understood as instruments of direct democracy through which citizens are invited to participate directly in important political or constitutional decisions. In theory, such mechanisms enhance democratic legitimacy by allowing the electorate to bypass representative institutions and express collective will on matters of national importance. However, modern constitutional theory emphasises that democratic legitimacy is not derived solely from popular participation but also from the legality of governing structures, procedural integrity, and conformity with constitutional norms (Beetham, 2013; Tierney, 2012). Consequently, the constitutional validity of a referendum depends not only on voter turnout or majority approval but also on whether the process is initiated, conducted, and implemented by authorities possessing lawful constitutional competence.

The proposed 2026 referendum in Bangladesh arises within an exceptional constitutional context. At present, the country is governed by an interim administrative arrangement that lacks explicit recognition within the existing constitutional framework. Unlike earlier periods when a constitutionally recognised caretaker government system existed, the current arrangement does not derive directly from any clearly defined constitutional provision. The absence of an express constitutional foundation for such an interim authority raises fundamental questions about the legality of decisions taken by that authority, including the initiation and administration of a nationwide referendum. Under the doctrine of constitutional supremacy, all exercises of public power must trace their legitimacy to the constitution itself (Dicey, 1915; Tushnet, 2009). Where such linkage is absent or ambiguous, the legality of state action becomes constitutionally suspect.

Further complexity arises from the President's role in seeking advisory opinions from the Supreme Court regarding the legality of governmental actions related to the referendum. While constitutional advisory jurisdiction may exist in certain legal systems, the binding character and normative authority of such opinions often remain contested, particularly when they are not delivered through adversarial judicial proceedings. Scholars of constitutional law have repeatedly cautioned that advisory opinions, although politically influential, may lack the same democratic legitimacy and procedural safeguards as ordinary constitutional adjudication (Ginsburg, 2003). In politically polarised contexts, reliance on such opinions may further complicate questions of institutional legitimacy and separation of powers.

Another distinctive feature of the proposed referendum is the structure of the ballot itself. The referendum reportedly involves multiple written constitutional or political questions to be answered through binary “yes” or “no” choices. Comparative studies of referendum design suggest that complex constitutional or institutional reforms are ill-suited to simplified binary voting formats, as such structures may fail to capture nuanced public preferences and can undermine informed consent (International IDEA, 2018; Tierney, 2012). From the perspective of deliberative democratic theory, democratic legitimacy requires not merely the act of voting but the availability of meaningful public reasoning, adequate information, and the opportunity for reflective judgment (Habermas, 1996). When voters are presented with multiple complex propositions in simplified formats, the deliberative quality of democratic participation is significantly weakened.

In constitutional democracies, courts play a central role in safeguarding the legality of electoral and referendum processes. Judicial review functions as the primary institutional

mechanism through which constitutional supremacy is enforced and fundamental rights are protected (Stone Sweet, 2012). Courts may review referendum initiatives at multiple stages, including pre-referendum review of ballot questions, procedural supervision during voting, and post-referendum review of implementing legislation. Such oversight is particularly critical when referendums concern constitutional amendments or institutional restructuring, as these matters directly implicate the constitutional order's basic structure and identity (Roznai, 2017).

In South Asian constitutional practice, judicial control over constitutional change has been firmly established through doctrines such as the basic structure doctrine, which limits the amendatory power of political authorities even when acting with legislative supermajorities (*Kesavananda Bharati v. State of Kerala*, 1973). This jurisprudence reflects a broader constitutional commitment to preserving democratic governance, separation of powers, and judicial independence against majoritarian excess. Although referendums are not frequently used in Bangladesh or neighbouring jurisdictions, the underlying constitutional principles governing limits on political power remain fully applicable to any form of direct democratic decision-making.

The present study is motivated by the absence of a systematic legal analysis of referendum legality within Bangladesh's constitutional scholarship. Existing literature has largely focused on parliamentary sovereignty, election administration, and judicial activism, while the constitutional implications of direct democracy mechanisms have received limited attention. This gap is significant because referendums, when conducted under uncertain constitutional authority, may generate outcomes that are politically persuasive yet legally vulnerable. In such circumstances, post-referendum litigation

and political contestation may undermine both institutional stability and public trust in democratic governance.

Against this background, this article seeks to examine whether a referendum conducted under an interim governance structure without explicit constitutional recognition can satisfy the requirements of constitutional legality and democratic legitimacy. It further investigates whether judicial review mechanisms are adequate to address procedural and substantive constitutional concerns arising from such a process. The central research questions guiding this study are: To what extent does the absence of constitutional authorisation for an interim governing authority affect the legality of referendum initiatives? What constitutional doctrines govern judicial intervention in referendum processes within South Asian constitutional traditions? And how should courts balance respect for popular participation with enforcement of constitutional limits?

By adopting a doctrinal and theoretical approach, this article aims to contribute to constitutional discourse on direct democracy in transitional political contexts. The findings are expected to be relevant not only for Bangladesh but also for other jurisdictions facing similar tensions between political expediency and constitutional legality. Ultimately, the study argues that referendums conducted outside clearly defined constitutional frameworks risk transforming popular participation into a tool of political legitimisation rather than a genuine expression of constitutional democracy.

2. Theoretical Framework

This study is grounded in three interrelated theoretical traditions: constitutional supremacy and rule of law, democratic legitimacy theory, and judicial guardianship of constitutional order. Together, these frameworks provide an analytical

lens for evaluating the legality and legitimacy of referendum processes conducted under uncertain governmental authority.

2.1 Constitutional Supremacy and Rule of Law

The principle of constitutional supremacy holds that the constitution is the highest legal authority in the state and that all public power must be exercised in accordance with constitutional provisions (Dicey, 1915; Tushnet, 2009). Under this framework, neither political necessity nor popular support can justify actions taken without constitutional authorisation. Governmental authority must be traceable to legally recognised institutional mandates, and any deviation from constitutional procedures constitutes an ultra vires exercise of power.

Rule of law theory complements constitutional supremacy by emphasising predictability, legality, and institutional accountability in governance. According to this view, lawful authority depends not only on substantive objectives but also on adherence to established legal procedures (Beetham, 2013). In electoral contexts, the rule of law requires that voting processes, administrative control, and dispute resolution mechanisms be governed by clear legal standards subject to judicial enforcement. Where interim or exceptional political arrangements operate outside normal constitutional structures, the risk of discretionary governance and erosion of legal accountability becomes pronounced.

Applied to referendums, these principles imply that the power to initiate, organise, and certify popular votes must be constitutionally allocated. Without such allocation, referendum outcomes may carry political weight but lack legal validity. From a doctrinal perspective, constitutional supremacy therefore requires courts to scrutinise not only the conduct of referendums but also the constitutional competence of authorities responsible for administering them.

2.2 Democratic Legitimacy and Procedural Justice

Democratic legitimacy has traditionally been associated with the principle of popular sovereignty, according to which political authority derives from the consent of the governed. However, contemporary democratic theory recognises that consent must be produced through fair and inclusive procedures to be normatively meaningful (Habermas, 1996). Procedural justice, equality of participation, and access to information are therefore integral components of democratic legitimacy.

Deliberative democratic theory further argues that democratic decisions should be the product of public reasoning rather than the mere aggregation of preferences. For a referendum to be democratically legitimate, voters must have adequate opportunity to understand the issues, evaluate alternatives, and participate without coercion or manipulation (Tierney, 2012). When complex constitutional questions are reduced to binary choices, the deliberative dimension of democracy may be compromised, particularly if institutional safeguards for balanced campaigning and media neutrality are weak.

Importantly, democratic legitimacy is not solely retrospective—based on voter approval—but also prospective, grounded in the fairness of the process that produced the decision (Beetham, 2013). This distinction is critical in assessing referendums conducted under irregular political authority. Even overwhelming popular support cannot cure procedural illegality or institutional incompetence, as legitimacy cannot be retroactively constructed through outcomes alone.

2.3 Judicial Review and Constitutional Guardianship

Judicial review constitutes the institutional mechanism through which constitutional

supremacy and procedural democracy are enforced. Courts are entrusted with interpreting constitutional boundaries and ensuring that political processes comply with fundamental legal norms (Stone Sweet, 2012). In the context of referendums, judicial review serves multiple functions: protecting political rights, enforcing procedural standards, and preserving constitutional identity.

Comparative constitutional scholarship demonstrates that courts often intervene in referendum processes when popular initiatives threaten fundamental rights or structural principles of constitutional governance (Roznai, 2017). Such intervention is justified by the theory of militant or defensive democracy, which permits constitutional institutions to prevent democratic processes from undermining democracy itself. Under this approach, courts are not acting against popular sovereignty but rather preserving the conditions that make democratic participation meaningful and sustainable.

In South Asian constitutional traditions, judicial guardianship has been institutionalised through doctrines limiting constitutional amendment powers. The basic structure doctrine, developed in India and adopted in modified forms in neighbouring jurisdictions, asserts that certain constitutional principles—such as separation of powers, judicial independence, and democratic governance—are immune from political alteration, even when supported by legislative supermajorities (*Kesavananda Bharati v. State of Kerala*, 1973). This doctrine reflects deep scepticism toward unconstrained majoritarianism and underscores the normative priority of constitutional continuity.

Applied to referendum governance, judicial guardianship theory suggests that courts must evaluate not only the legality of procedures but also the constitutional permissibility of referendum objectives. Where referendums are

used to restructure political institutions or alter constitutional identity, judicial oversight becomes essential to prevent erosion of democratic safeguards.

2.4 Integrative Analytical Model

This study integrates these theoretical strands into a unified analytical framework. Constitutional supremacy defines the legal limits of political authority; democratic legitimacy theory assesses the normative quality of participatory processes; and judicial guardianship theory explains the institutional role of courts in enforcing constitutional boundaries. Together, they enable evaluation of whether a referendum conducted under interim authority can simultaneously satisfy legality, legitimacy, and institutional accountability.

This integrated framework rejects the false dichotomy between democracy and constitutionalism. Instead, it conceptualises constitutional democracy as a system in which popular participation operates within legally defined structures protected by independent judicial institutions. In this sense, judicial review is not antithetical to democracy but constitutive of its constitutional form.

3. Literature Review

This section reviews the existing body of scholarly literature on referendums, judicial review, constitutional supremacy, and transitional governance, with particular attention to South Asian constitutional experiences. The purpose of the literature review is to identify dominant theoretical positions, doctrinal interpretations, and empirical findings that inform debates on the legality and legitimacy of popular votes. By synthesising constitutional theory, comparative jurisprudence, and studies on democratic participation, this section establishes the analytical foundations of the study and highlights gaps in existing research, particularly regarding

referendums initiated under interim or extra-constitutional political arrangements.

3.1 Judicial Review and Popular Sovereignty

The tension between judicial review and popular sovereignty has long occupied constitutional theory. While referendums are commonly justified as direct expressions of the people's will, constitutionalism requires that even popular decisions remain subject to legal limits (Dicey, 1915; Tushnet, 1999). Judicial review serves as a mechanism to ensure that democratic processes comply with constitutional norms, particularly where political majorities may threaten minority rights or constitutional structure (Ely, 1980).

In South Asia, courts have historically assumed a strong role in safeguarding constitutional supremacy, even when political processes invoke popular legitimacy (Hirschl, 2004). The Indian Supreme Court's development of the basic structure doctrine established that constitutional amendments approved by Parliament — and potentially even by popular mandate — may be invalidated if they violate fundamental constitutional principles (*Kesavananda Bharati v. State of Kerala*, 1973). Scholars argue that this doctrine reflects a judicial commitment to substantive constitutionalism over procedural majoritarianism (Austin, 2011).

Bangladesh adopted a similar approach through judicial affirmation of constitutional supremacy and the inviolability of core constitutional features. In *Anwar Hossain Chowdhury v. Bangladesh* (1989), the Appellate Division recognised that constitutional amendments could be reviewed if they undermined the basic structure. Although Bangladesh has rarely used referendums, this jurisprudence implies that even direct popular endorsement cannot legitimise unconstitutional political arrangements (Halim, 2018).

3.2 Referendum Legality and Constitutional Authorisation

Comparative scholarship emphasises that referendums are not inherently democratic; rather, their legitimacy depends on constitutional authorisation, procedural safeguards, and meaningful choice (Tierney, 2012). In many constitutions, referendums are explicitly regulated, specifying subject matter, voting thresholds, and legal effects. Where constitutions remain silent or ambiguous, courts often become the primary interpreters of referendum legality (Qvortrup, 2014).

In Bangladesh, the Constitution historically provided for referendums under Article 142(1)(i), allowing the President to refer certain constitutional amendment bills to popular vote. However, this provision has rarely been operationalised, and no comprehensive statutory framework governs referendum procedures (Halim, 2018). Scholars argue that constitutional silence regarding referendum design creates serious risks of executive manipulation and democratic distortion (Ahmed, 2020).

South Asian experience shows similar patterns. In Sri Lanka, referendums have been used to bypass parliamentary constraints, most notably in 1982 when the government extended parliamentary tenure through popular vote, an act widely criticised as undermining constitutional democracy (de Silva, 1997). Courts later adopted a more restrictive approach toward referendum-based constitutional change (Shanmuganathan, 2019).

Thus, literature consistently suggests that referendums without clear constitutional authorisation risk functioning as tools of political consolidation rather than expressions of democratic consent.

3.3 Interim Governments and Constitutional Continuity

A critical dimension of the Bangladeshi context concerns the constitutional status of interim or caretaker governments. Bangladesh previously institutionalised caretaker governments through the Thirteenth Amendment, which was later declared unconstitutional by the Supreme Court in *Abdul Mannan Khan v. Bangladesh* (2011). The Court acknowledged that caretaker governments were unconstitutional but temporarily allowed their continuation for electoral stability — a decision that scholars describe as pragmatic but jurisprudentially inconsistent (Hossain, 2013).

Current debates over interim arrangements revive unresolved constitutional questions: whether non-elected governments can legitimately initiate constitutional or quasi-constitutional political processes such as referendums. Comparative constitutional theory suggests that transitional authorities possess only limited constitutional competence and must avoid irreversible structural decisions (Teitel, 2000).

In Pakistan, courts have repeatedly validated interim regimes under the “doctrine of necessity,” later facing criticism for legitimising unconstitutional power transfers (Newberg, 1995). Bangladesh’s judiciary has increasingly distanced itself from such doctrines, emphasising constitutional continuity rather than expedient legitimacy (Halim, 2018).

The literature, therefore, raises serious doubts about whether interim governments may lawfully initiate referendum processes affecting constitutional order, particularly when constitutional authorisation is absent or ambiguous.

3.4 Judicial Review of Political Questions in South Asia

Another strand of scholarship addresses whether courts should intervene in politically sensitive matters such as referendum legality. Traditional political question doctrine suggests judicial restraint in matters committed to political branches (Bickel, 1962). However, South Asian courts have progressively rejected strict non-justiciability where constitutional compliance is at stake (Sathe, 2002).

In India, judicial review of electoral processes and constitutional amendments has expanded substantially, with courts framing such intervention as necessary to protect the democratic structure (Chandra, 2017). Bangladeshi courts similarly assert authority to review executive actions affecting constitutional governance, even when framed as political decisions (Halim, 2018).

Scholars argue that in weak institutional contexts, judicial intervention becomes essential to prevent constitutional erosion through populist or executive-driven mechanisms (Hirschl, 2004). This perspective is particularly relevant where referendums are framed through binary questions that oversimplify complex constitutional arrangements, reducing democratic choice to procedural symbolism.

3.5 Gaps in Existing Scholarship

Despite extensive discussion on judicial review and constitutional amendments, limited research directly addresses referendum legality in Bangladesh, especially under interim governance conditions. Existing works focus primarily on parliamentary amendment processes, electoral administration, and caretaker governments, leaving referendum mechanisms largely unexplored (Ahmed, 2020; Halim, 2018).

Moreover, most South Asian studies analyse referendums within formal constitutional

frameworks, whereas contemporary political practices increasingly operate through extra-constitutional mechanisms. This gap necessitates doctrinal inquiry into whether constitutional courts possess both authority and obligation to invalidate referendums conducted without an explicit constitutional mandate.

Thus, the present study contributes by integrating constitutional theory, judicial precedent, and democratic legitimacy analysis into a unified doctrinal assessment of referendum legality in transitional governance contexts.

4. Conceptual Framework

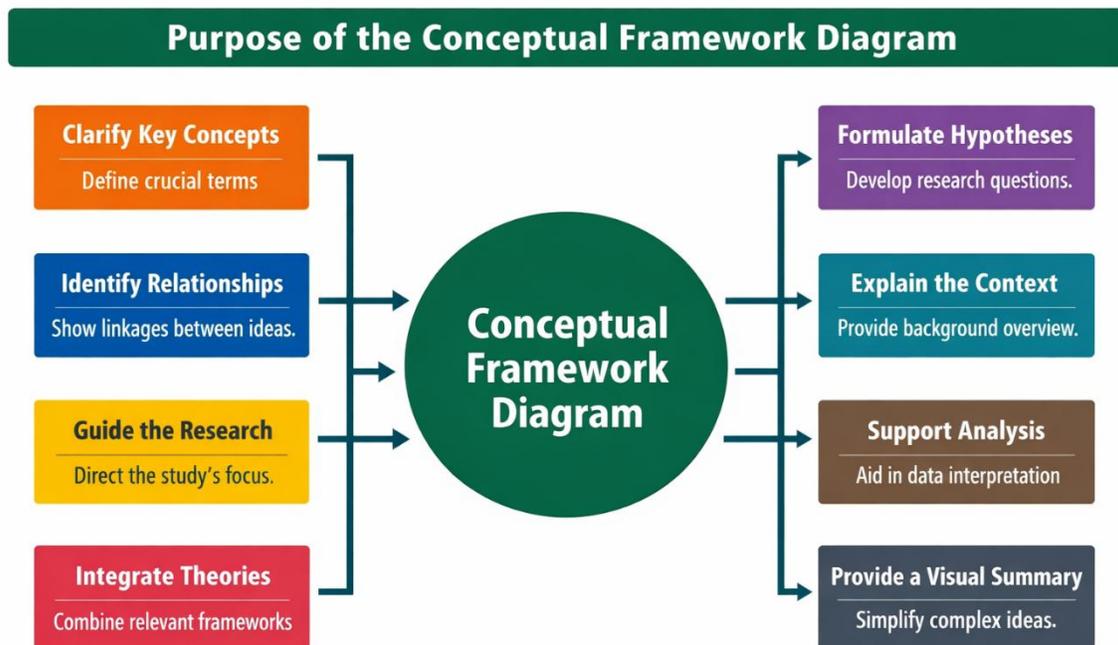
The conceptual framework provides a structured analytical model for examining how constitutional legality and democratic legitimacy interact in the context of a referendum. It identifies key variables—such as institutional competence, constitutional authorisation, procedural integrity, and judicial oversight—and

maps their relationships in determining the constitutional validity of referendum outcomes. This framework guides the doctrinal analysis by clarifying causal pathways and evaluative criteria, enabling systematic assessment of whether popular participation is occurring within constitutionally permissible limits.

4.1 Purpose of the Conceptual Framework

This study conceptualises referendum legality as the outcome of interaction among constitutional authority, institutional competence, procedural safeguards, and judicial oversight. Rather than treating referendums as inherently democratic acts, the framework positions them within a constitutional ecosystem where legality and legitimacy must coexist.

The framework is grounded in constitutional supremacy theory, which holds that all political actions derive validity from constitutional authorisation (Dicey, 1915; Halim, 2018).



4.2 Key Variables

4.2.1 Constitutional Authorisation

This variable examines whether the constitution explicitly permits referendums and specifies their scope, subject matter, and legal effect. Absence of clear authorisation raises a presumption of illegality under strict constitutional interpretation.

Indicators:

- Express constitutional provisions
- Amendment procedures
- Delegated legislative competence

4.2.2 Institutional Competence of the Initiating Authority

This variable assesses whether the authority initiating the referendum possesses constitutional legitimacy to undertake irreversible political

decisions. Interim or transitional governments are generally considered limited-purpose institutions (Teitel, 2000).

Indicators:

- Nature of government (elected vs interim)
- Constitutional mandate
- Judicial recognition of authority

4.2.3 Procedural Democratic Integrity

Procedural legitimacy involves fairness, transparency, and meaningful participation. Binary “yes/no” questions on complex

constitutional matters may undermine informed consent (Tierney, 2012).

Indicators:

- Voter information access
- Campaign for equality
- Neutral administration

4.2.4 Judicial Review Mechanism

Judicial review operates as a corrective safeguard ensuring that referendum processes conform to constitutional norms. Courts may invalidate referendums either before or after execution (Hirschl, 2004).

Indicators:

- Availability of constitutional litigation
- Scope of judicial jurisdiction
- Precedent on political questions

4.2.5 Democratic Legitimacy Outcome

Legitimacy is treated as dependent, not automatic. It emerges only when constitutional authority and procedural integrity converge.

Indicators:

- Public trust
- Institutional acceptance
- Stability of outcomes

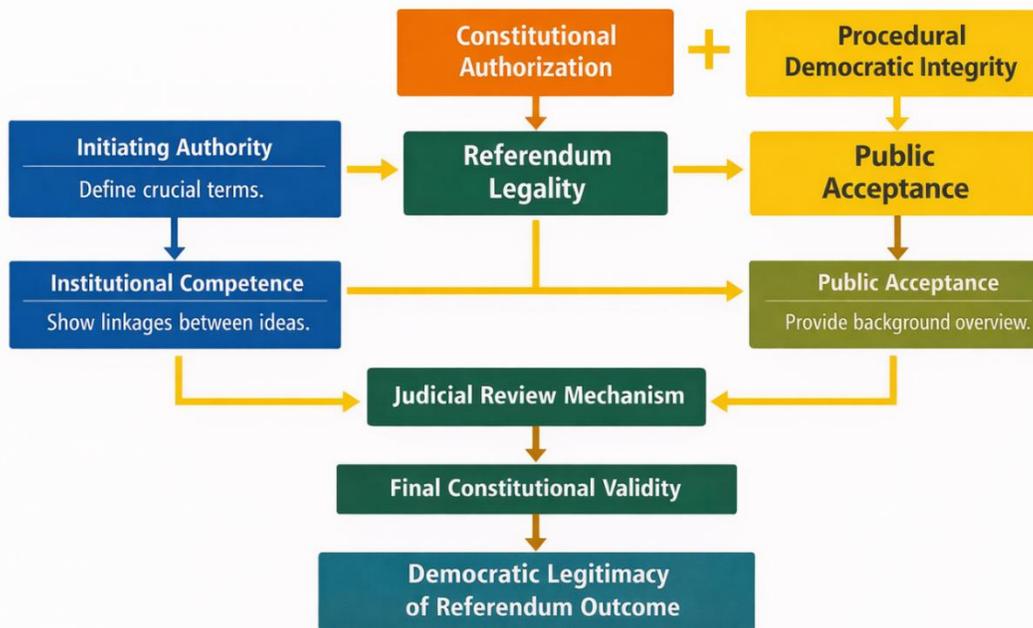


Figure 4.1 Diagrammatic Representation of the Conceptual Framework

The conceptual framework illustrates how the democratic legitimacy of a referendum outcome is constitutionally conditioned by a sequence of legal and institutional factors, with judicial review operating as the central validating mechanism. The framework is grounded in constitutional supremacy and the rule of law, emphasising that popular sovereignty must be exercised through constitutionally authorised procedures rather than through ad hoc political arrangements (Dicey, 1915; Barber, 2018). In this model, legitimacy is not derived solely from public participation but from the lawful structuring of that participation within constitutional limits.

The process begins with the Initiating Authority, which refers to the body or arrangement that calls for the referendum. In constitutional systems, the competence to initiate a referendum is usually allocated to specific institutions—such as parliament, the president acting under

constitutional advice, or an electoral commission—through explicit constitutional or statutory provisions (Ginsburg, Elkins, & Blount, 2009). When a referendum is initiated by an authority not clearly recognised by the constitution, serious doubts arise regarding its legal foundation. Thus, initiating authority is not a neutral procedural step but a threshold constitutional requirement that shapes the legality of the entire process.

Closely linked to the initiating authority is Institutional Competence, which evaluates whether the initiating body possesses lawful jurisdiction to frame questions, determine procedures, and bind state institutions to the outcome. Institutional competence reflects the separation of powers principle and guards against the concentration of sovereign decision-making in bodies lacking democratic or constitutional mandate (Barber, 2018). In transitional or interim political arrangements, competence is especially

contested, as constitutional continuity may be disrupted while formal amendment procedures remain unchanged. The framework, therefore, treats competence as an independent variable influencing both referendum legality and judicial scrutiny.

At the centre of the framework lies Referendum Legality, which is shaped jointly by Constitutional Authorisation and Procedural Democratic Integrity. Constitutional authorisation refers to whether the constitution expressly or implicitly permits referendums on the subject matter in question and whether amendment procedures are being bypassed through popular voting (Roznai, 2017). Many constitutions limit the scope of referendums, particularly regarding entrenched clauses or the basic structure of the constitution. Procedural democratic integrity, by contrast, concerns fairness, clarity of questions, equal campaign opportunities, and freedom from coercion or administrative manipulation (Venice Commission, 2007). Even when a referendum is constitutionally permitted, procedural defects can undermine its legal validity and moral authority.

The framework further recognises Public Acceptance as a sociopolitical outcome influenced by both procedural integrity and perceived legality. While public support cannot cure constitutional defects, widespread rejection can weaken the normative force of legal outcomes and provoke post-referendum instability (Tierney, 2012). Public acceptance is therefore positioned as an intermediary factor that interacts with judicial processes rather than replacing them. In constitutional democracies, courts do not measure popularity but are increasingly aware that legitimacy crises may follow procedurally lawful yet socially contested referendums.

The most critical component of the framework is the Judicial Review Mechanism, which operates

as a constitutional filter through which all prior factors are assessed. Judicial review examines the initiating authority, institutional competence, constitutional authorisation, and procedural integrity to determine whether the referendum conforms to constitutional standards (Stone Sweet, 2000). Courts may intervene before a referendum (preventive review) or after the vote (curative or invalidating review), depending on jurisdiction. This mechanism ensures that popular will is expressed within constitutional boundaries rather than above them, reinforcing the principle that sovereignty is constitutionally mediated.

Finally, the outcome of judicial scrutiny produces Final Constitutional Validity, which directly determines the Democratic Legitimacy of the Referendum Outcome. Legitimacy here is understood in a constitutional sense, not merely as electoral endorsement but as lawful transformation of political will into binding legal authority (Habermas, 1996). Where judicial validation is absent or contested, referendum outcomes may lack enforceability or provoke constitutional crises. Thus, the framework demonstrates that democratic legitimacy is not a linear product of voting but a cumulative result of lawful initiation, competent institutions, constitutional authorisation, fair procedures, and effective judicial control.

In sum, the diagram conceptualises referendum legitimacy as a constitutionally structured process rather than a purely majoritarian event. It highlights that judicial review is not antagonistic to democracy but constitutive of constitutional democracy, ensuring that popular participation operates within the normative architecture of the constitution (Barber, 2018; Roznai, 2017). This framework is particularly relevant for contexts involving interim or extra-constitutional authorities, where procedural shortcuts risk transforming democratic instruments into tools of constitutional displacement.

4.4 Analytical Logic of the Framework

The framework assumes that legality precedes legitimacy. Even high voter turnout cannot validate processes lacking a constitutional foundation. Judicial review functions as the gatekeeping institution that reconciles popular participation with constitutional discipline.

In Bangladesh, where constitutional governance has historically been vulnerable to executive dominance, courts become essential arbiters of procedural legality (Halim, 2018). This framework, therefore, prioritises doctrinal analysis of court judgments and constitutional provisions over political outcomes.

4.5 Application to the 2026 Referendum Context

Applying this framework to a referendum initiated by an interim government raises immediate red flags across all variables:

- **Authorisation:** Absence of statutory referendum law
- **Institutional Competence:** Non-elected authority initiating political restructuring
- **Procedural Integrity:** Binary voting on multiple constitutional questions
- **Judicial Review:** Contested advisory opinions and limited pre-emptive scrutiny

Consequently, democratic legitimacy remains constitutionally fragile, even if political participation appears high. This analytical structure supports the study's normative claim that constitutional compliance, not numerical consent, determines democratic legality.

5. Methodology

This study adopts a qualitative doctrinal legal research methodology to evaluate the

constitutional validity of the proposed referendum. Doctrinal analysis focuses on the interpretation of constitutional texts, statutes, judicial decisions, and authoritative legal principles to determine the applicable legal standards governing referendums and judicial review. By examining legal norms and their application within constitutional jurisprudence, this method is particularly suited to assessing questions of institutional competence, procedural legality, and the scope of judicial authority in constitutional democracies.

5.1 Research Design

This study adopts a qualitative doctrinal legal research methodology, which is traditionally used to analyse legal principles, constitutional provisions, judicial precedents, and normative doctrines governing state authority. Doctrinal research seeks to identify, interpret, and systematise legal rules as developed by courts and constitutional texts (Hutchinson & Duncan, 2012). Given that the legality of a referendum depends primarily on constitutional authorisation and judicial interpretation, doctrinal analysis is the most appropriate method for assessing the constitutional validity of the proposed 2026 referendum.

Unlike empirical socio-legal research, which focuses on behavioural or institutional outcomes, doctrinal research evaluates legality through internal legal coherence, precedent consistency, and constitutional hierarchy (McConville & Chui, 2017). The present study, therefore, does not examine voter behaviour or political party strategies, but rather evaluates whether the referendum process conforms to constitutional requirements and judicially recognised principles of democratic governance.

5.2 Sources of Legal Data

The study relies on four principal categories of legal materials:

Constitutional Texts

- Constitution of the People’s Republic of Bangladesh (as amended)
- Comparative constitutional provisions from India and Sri Lanka relating to referendums and constitutional amendments

Judicial Decisions, Key Bangladeshi Supreme Court judgments, including:

- *Anwar Hossain Chowdhury v. Bangladesh* (1989)
- *Abdul Mannan Khan v. Bangladesh* (2011)
- Advisory opinions related to executive authority and constitutional interpretation

Comparative cases such as:

- *Kesavananda Bharati v. State of Kerala* (1973, India)
- Sri Lankan Supreme Court determinations on constitutional referendums

Statutory Instruments and Electoral Regulations, existing election laws and the absence of a referendum-specific statutory framework are examined to assess procedural legality.

Scholarly Literature, Academic books and journal articles on constitutionalism, judicial review, and referendum theory are used to contextualise legal interpretation within broader constitutional doctrine (Tierney, 2012; Halim, 2018).

5.3 Analytical Strategy

The doctrinal analysis follows a three-stage interpretive framework:

5.3.1 Constitutional Authorisation Test

First, the study examines whether the constitution explicitly authorises the initiation of referendums, and if so, under what procedural and institutional conditions. Constitutional silence is treated as legally significant, particularly where referendum outcomes may alter political structure or constitutional identity (Dicey, 1915; Halim, 2018).

5.3.2 Institutional Competence Test

Second, the analysis evaluates whether the initiating authority—particularly an interim or transitional government—possesses constitutional capacity to undertake binding political processes. Transitional constitutional theory suggests that interim authorities are legally constrained from undertaking irreversible constitutional transformation (Teitel, 2000).

5.3.3 Judicial Oversight Test

Third, the study assesses the availability and scope of judicial review over referendum legality, including whether courts may intervene pre-emptively or only after political execution. This stage evaluates judicial doctrines relating to political questions and constitutional supremacy.

5.4 Normative Constitutional Interpretation

Beyond formal textual analysis, the study applies normative constitutional principles, including:

- Supremacy of the Constitution
- Separation of powers
- Rule of law
- Protection of the democratic structure

These principles guide interpretation where constitutional text remains ambiguous or silent. South Asian constitutional jurisprudence consistently recognises that constitutional identity cannot be altered through procedural

shortcuts or executive improvisation (Austin, 2011; Sathe, 2002).

5.5 Limitations of the Methodology

Doctrinal research does not capture public perception, political mobilisation, or electoral psychology. However, since the research question concerns constitutional legality rather than political popularity, doctrinal analysis remains both sufficient and appropriate. The study also acknowledges that courts themselves operate within political environments, but treats judicial reasoning as an authoritative source of constitutional meaning.

6. Findings

This section presents the principal legal and constitutional findings derived from the doctrinal analysis of constitutional provisions, judicial precedents, and comparative jurisprudence. The findings identify structural inconsistencies between referendum practices and constitutional requirements, particularly concerning initiating authority, procedural safeguards, and the limits of interim governance. Rather than evaluating political desirability, the focus remains on constitutional permissibility and institutional accountability, revealing significant legal vulnerabilities in the proposed referendum framework.

6.1 Absence of Clear Constitutional Authorisation for Referendum Processes

The first major finding of this study is that Bangladesh's constitutional framework does not provide a comprehensive or operational legal basis for conducting national referendums on political or constitutional questions. Although Article 142 historically allowed for a referendum in limited circumstances related to constitutional amendment bills, no detailed procedural framework exists to regulate question

formulation, campaign conduct, voter education, or legal consequences of outcomes (Halim, 2018).

Furthermore, the absence of enabling legislation means that executive authorities lack delegated competence to design referendum procedures. Under the constitutional supremacy doctrine, any political mechanism that potentially alters governance structures must derive its authority directly from constitutional or statutory authorisation (Dicey, 1915). In the absence of such authorisation, referendum initiatives remain constitutionally vulnerable regardless of political justification.

Comparative jurisprudence reinforces this conclusion. In India, constitutional amendments require parliamentary supermajorities and, in some cases, state ratification, but referendums play no formal constitutional role. The Supreme Court has consistently emphasised that constitutional change must follow strictly prescribed procedures (*Kesavananda Bharati v. State of Kerala*, 1973). Sri Lanka's constitution explicitly regulates referendum processes, and courts actively scrutinise whether constitutional conditions are satisfied before permitting popular votes (Shanmuganathan, 2019). Bangladesh's lack of such regulatory clarity represents a structural constitutional deficiency.

6.2 Institutional Incompetence of Interim Authorities to Initiate Referendum Processes

The second key finding concerns the constitutional status of interim governments. Judicial precedents in Bangladesh suggest that non-elected or transitional authorities possess limited constitutional competence and are expected to perform routine administrative functions rather than structural political reform (*Abdul Mannan Khan v. Bangladesh*, 2011).

Transitional constitutional theory further supports this limitation, arguing that interim regimes should avoid irreversible political commitments that bind future elected governments (Teitel, 2000). Initiating a referendum—particularly on matters affecting constitutional legitimacy or political structure—constitutes a fundamental act of constitutional agency that exceeds caretaker authority.

Comparative experience from Pakistan illustrates the dangers of judicial validation of transitional authorities through doctrines of necessity, which later contributed to democratic instability (Newberg, 1995). Bangladeshi jurisprudence has gradually rejected necessity-based validation and emphasised restoration of constitutional continuity (Halim, 2018). Therefore, referendum initiation by interim authorities would contradict both domestic jurisprudence and regional constitutional trends.

6.3 Binary Referendum Questions Undermine Meaningful Democratic Choice

A third significant finding is that referendum designs relying on simplistic “yes/no” questions on complex constitutional matters undermine democratic deliberation. Constitutional scholarship emphasises that informed consent requires an adequate understanding of legal consequences, institutional implications, and alternative models (Tierney, 2012).

Binary referendums are particularly problematic when multiple constitutional issues are collapsed into a single vote, depriving voters of nuanced choices. This violates the principle of procedural democratic integrity, which requires that political participation be meaningful rather than merely symbolic (Ely, 1980).

In the Bangladeshi context, where civic education on constitutional law remains limited, referendum mechanisms risk transforming public

participation into a legitimising ritual rather than a genuine constitutional choice. Courts in South Asia have acknowledged that electoral processes must satisfy both procedural fairness and substantive clarity (Sathe, 2002).

6.4 Judicial Authority to Review Referendum Legality Exists but Remains Underutilised

The fourth finding is that constitutional courts in Bangladesh possess sufficient jurisdiction to review referendum legality, even in politically sensitive contexts. Judicial precedents confirm that constitutional compliance is not shielded by political labelling (Halim, 2018).

However, judicial reluctance to intervene pre-emptively allows politically irreversible processes to proceed before legal assessment occurs. Comparative jurisprudence in Sri Lanka demonstrates stronger pre-enactment judicial scrutiny of referendum proposals, preventing unconstitutional votes before public mobilisation occurs (Shanmuganathan, 2019).

The study finds that while doctrinal authority exists, institutional caution limits effective judicial control, creating constitutional vulnerability during transitional political moments.

6.5 Democratic Legitimacy Cannot Substitute for Constitutional Validity

Finally, the study finds that democratic participation alone cannot legitimise constitutionally defective processes. South Asian constitutional courts consistently affirm that constitutional structure, not popular enthusiasm, determines legality (*Kesavananda Bharati*, 1973; *Anwar Hossain Chowdhury v. Bangladesh*, 1989).

Popular endorsement of unconstitutional actions risks normalising executive bypass of constitutional safeguards. Hirschl (2004)

describes this phenomenon as “plebiscitary erosion of constitutionalism,” where democratic symbolism masks institutional degradation.

Therefore, even a high-turnout referendum cannot cure foundational legal defects arising from a lack of authorisation, institutional incompetence, or procedural unfairness.

7. Discussion: Linking Findings with Theory and Literature

The discussion section interprets the doctrinal findings in light of established constitutional theory and prior scholarly literature. It examines how the observed legal deficiencies reflect broader tensions between popular sovereignty and constitutional supremacy, especially in transitional political contexts. By situating the findings within debates on judicial review, democratic legitimacy, and constitutional continuity, this section assesses the normative implications of the study and explains how the results contribute to both theoretical discourse and regional constitutional practice.

The findings of this study underscore the constitutional fragility of referendums conducted under interim governmental arrangements in Bangladesh. By integrating doctrinal analysis, institutional assessment, and procedural evaluation, this study demonstrates that the legality and democratic legitimacy of the proposed 2026 referendum are simultaneously challenged. The discussion below synthesises these findings with the theoretical frameworks and existing literature outlined earlier, highlighting how constitutional supremacy, democratic legitimacy, and judicial review theories converge to evaluate referendum processes.

7.1 Constitutional Authorisation and Supremacy

One of the central findings is the absence of clear constitutional authorisation for the 2026 referendum. Constitutional supremacy theory emphasises that all exercises of public authority derive validity only from explicit or implicit constitutional mandates (Dicey, 1915; Tushnet, 1999). In Bangladesh, while Article 142 historically permitted referendums in the context of certain constitutional amendments, there is no procedural or institutional framework governing referendums, leaving critical legal gaps (Halim, 2018). This aligns with Tierney’s (2012) observation that constitutional silence on referendum procedures can transform ostensibly democratic instruments into tools for political expediency.

This finding resonates with comparative literature. For example, in Sri Lanka, courts closely scrutinised the constitutionality of referendum processes, especially when used to consolidate political power without adequate legislative or procedural safeguards (Shanmuganathan, 2019). Similarly, Indian jurisprudence emphasises that constitutional amendments and structural changes must strictly adhere to prescribed procedures; bypassing such procedures compromises both legality and democratic legitimacy (*Kesavananda Bharati v. State of Kerala*, 1973). Thus, from both a doctrinal and comparative perspective, the lack of explicit authorisation renders the referendum constitutionally vulnerable.

Furthermore, the absence of a constitutional basis reflects a broader problem in transitional governance, where political imperatives often outpace constitutional regulation. Teitel (2000) argues that interim or transitional authorities should avoid undertaking irreversible structural decisions. In Bangladesh, as in other South Asian contexts, the absence of statutory mechanisms

governing referendums magnifies the risk that interim governments might exceed their constitutional competence, thereby undermining the principle of constitutional supremacy.

7.2 Institutional Competence of Interim Authorities

The study's second major finding concerns the limited competence of interim governments to initiate referendum processes. Doctrinal analysis shows that transitional authorities in Bangladesh are constitutionally constrained, tasked primarily with administrative continuity rather than transformative decision-making (*Abdul Mannan Khan v. Bangladesh*, 2011; Halim, 2018). Comparative literature echoes this limitation: in Pakistan, courts' application of the "doctrine of necessity" to legitimise interim authority has often led to institutional instability and post-hoc legitimacy crises (Newberg, 1995).

Applying constitutional supremacy theory, an interim government that initiates a referendum on constitutional or political questions arguably exercises authority beyond its legal competence. This reflects the principle that legality cannot be retroactively conferred through political expedience or popular approval (Dicey, 1915; Hirschl, 2004). In this sense, Bangladesh's current constitutional vacuum regarding interim governance intensifies the risk that a referendum could be invalidated judicially, irrespective of voter participation or political legitimacy.

Normative interpretations of constitutional theory further support this conclusion. Austin (2011) notes that the legitimacy of governmental action depends on both procedural authorisation and institutional identity. Without a constitutionally recognised authority to initiate referendums, interim governments lack the requisite institutional identity to bind future elected administrations, making the referendum outcome legally precarious.

7.3 Procedural Integrity and Democratic Legitimacy

A key contribution of this study is the identification of binary "yes/no" questions on multiple constitutional issues as undermining procedural democratic integrity. Democratic legitimacy theory emphasises that participation alone does not confer normative authority; voters must be adequately informed and able to make meaningful choices (Habermas, 1996; Beetham, 2013). Tierney (2012) also argues that referendums oversimplifying complex constitutional matters risk reducing deliberative democracy to symbolic voting.

The findings show that the proposed 2026 referendum, by collapsing multiple structural and legal questions into binary choices, compromises the quality of voter consent. Citizens may endorse measures without fully understanding institutional implications, thereby diminishing democratic legitimacy even if procedural participation appears high. This aligns with Ely's (1980) assertion that democratic procedures are only meaningful when substantive comprehension and deliberation are possible.

Comparative literature provides additional support. In Sri Lanka, referendums with oversimplified questions have been criticised for generating outcomes that reflect political manipulation rather than considered public consent (Shanmuganathan, 2019). In India, courts have stressed that procedural fairness in referendum-like processes—including clear question formulation and balanced information—is essential to maintain democratic legitimacy (*Kesavananda Bharati*, 1973). The Bangladesh scenario, therefore, mirrors broader regional concerns regarding procedural simplification and the limits of direct democracy.

7.4 Judicial Review and Constitutional Safeguards

Another critical finding concerns the role and underutilization of judicial review mechanisms. Constitutional courts in Bangladesh possess the authority to examine the legality of executive actions, including referendum initiatives, under both Article 102 and other interpretive doctrines of constitutional supremacy (Halim, 2018). Yet, advisory opinions by the President or pre-emptive judicial review remain underutilised, creating a temporal gap in constitutional oversight.

This reflects the theoretical tension between judicial activism and political restraint. Bickel (1962) and Sathe (2002) emphasise that courts must balance intervention with respect for political decision-making. However, South Asian courts increasingly reject strict non-justiciability in matters affecting constitutional identity (Chandra, 2017; Hirschl, 2004). The study finds that judicial oversight could serve as the principal corrective mechanism to ensure constitutional compliance, particularly in transitional or extraordinary political contexts.

Comparatively, Indian and Sri Lankan courts have demonstrated the capacity to invalidate unconstitutional referendums or legislative acts before implementation (Shanmuganathan, 2019; Chandra, 2017). Bangladesh could adopt a similar approach, affirming the role of constitutional courts as guardians of legality and institutional continuity.

7.5 Interaction Between Legality and Democratic Legitimacy

A significant theoretical insight from this study is the interaction between legality and democratic legitimacy. The findings illustrate that even high voter turnout and political support cannot compensate for deficiencies in constitutional authorisation or procedural integrity. Beetham (2013) emphasises that legitimacy emerges not

solely from consent but from adherence to legal and institutional norms. Hirschl (2004) similarly cautions that plebiscitary mechanisms can erode constitutionalism when divorced from legal constraints.

In practical terms, this implies that a referendum under an interim government without explicit constitutional authorisation, conducted through simplified binary questions, may be politically persuasive but legally invalid. The study aligns with Tierney (2012), Ely (1980), and Halim (2018), arguing that constitutional legitimacy is a precondition for sustainable democratic legitimacy. Courts, therefore, must reconcile popular participation with the enforcement of constitutional limits.

7.6 Implications for Transitional Governance

The discussion also highlights broader implications for transitional governance. In contexts where governments are temporary or extraconstitutional, mechanisms such as referendums must be carefully regulated to prevent institutional overreach. Teitel (2000) underscores that transitional authorities should avoid binding future governments through structural decisions. The findings indicate that failure to observe these constraints can exacerbate institutional fragility and invite judicial invalidation, undermining both political stability and democratic trust.

7.7 Regional Comparative Insights

Regional comparative evidence strengthens the analysis. Indian and Sri Lankan experiences show that constitutional courts play a decisive role in maintaining procedural and substantive limits on referendums. While India relies on procedural strictures for amendments and limits popular initiatives to avoid structural disruption (*Kesavananda Bharati*, 1973), Sri Lanka emphasises pre-implementation judicial scrutiny

(Shanmuganathan, 2019). Bangladesh, in contrast, currently lacks robust legal safeguards for referendum design, execution, and judicial oversight. This situates the 2026 referendum within a highly vulnerable constitutional framework.

7.8 Synthesis and Theoretical Integration

By integrating doctrinal findings with theoretical frameworks, several conclusions emerge:

- **Constitutional Supremacy:** The referendum lacks explicit constitutional authorisation, violating core principles of legality (Dicey, 1915; Halim, 2018).
- **Institutional Competence:** Interim authorities are limited in scope and cannot lawfully initiate binding constitutional changes (Teitel, 2000).
- **Democratic Legitimacy:** Procedural simplifications, such as binary questions, undermine informed consent and deliberative legitimacy (Habermas, 1996; Tierney, 2012).
- **Judicial Review:** Courts have the doctrinal authority to intervene but must overcome political caution to prevent constitutional erosion (Hirschl, 2004; Chandra, 2017).
- **Legality Precedes Popular Approval:** Popular participation alone cannot confer constitutional legitimacy (Beetham, 2013; Ely, 1980).

Together, these insights suggest that a legally and democratically legitimate referendum requires clear constitutional authorisation, competent initiating authorities, meaningful procedural design, and proactive judicial oversight.

The discussion demonstrates that the 2026 referendum in Bangladesh presents a complex intersection of constitutional ambiguity, transitional governance, procedural

simplification, and judicial underutilization. By situating these findings within South Asian comparative experience, doctrinal theory, and democratic legitimacy frameworks, it becomes evident that conducting the referendum without robust constitutional safeguards may undermine both legality and democratic trust. In this sense, the study confirms the theoretical expectation that constitutional legality is not optional but foundational for any credible democratic process.

8. Conclusion

The analysis demonstrates that the proposed 2026 referendum in Bangladesh presents a complex intersection of constitutional ambiguity, interim governance, and procedural challenges. Doctrinal findings indicate that the referendum lacks explicit constitutional authorisation, undermining the principle of constitutional supremacy. Interim governments, by definition, possess limited institutional competence, making the initiation of binding constitutional processes legally precarious. Additionally, the use of simplified binary questions on complex constitutional matters compromises procedural democratic integrity, limiting informed public participation and threatening genuine democratic legitimacy.

Judicial review emerges as the primary corrective mechanism to reconcile popular participation with constitutional norms. While Bangladeshi courts have doctrinal authority to review such processes, historical caution and the absence of pre-emptive mechanisms create a legal vulnerability that could allow unconstitutional referendums to proceed. Comparative experience from India and Sri Lanka underscores that robust pre-implementation judicial scrutiny and clear procedural safeguards are essential to uphold both legality and legitimacy.

Policy Implications: Policymakers must ensure that any referendum aligns with constitutional text, is backed by enabling legislation, and

includes transparent procedural rules. Particular attention should be given to the design of referendum questions, voter education, and neutral administration to maintain both procedural fairness and democratic integrity.

Judicial Implications: Courts should proactively assert jurisdiction over referendum processes, reviewing both procedural and substantive compliance with constitutional norms. Judicial interventions, whether through advisory opinions or pre-emptive orders, are critical to preserving constitutional continuity and preventing plebiscitary overreach.

In conclusion, while referendums can enhance participatory democracy, their legitimacy in Bangladesh hinges on adherence to constitutional law, institutional competence, and judicial oversight. The 2026 referendum, as currently conceptualised under interim authority, faces significant legal and democratic challenges. Ensuring constitutional and procedural compliance is imperative to safeguard both legality and the broader democratic structure.

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