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Does Bangladesh need the Political Question Doctrine?

Md. Zahirul Islam[*]

Abstract

In the era of judicial activism, the judiciary has become more active and functional as opposed to its traditional "self-restraint" position. Application of the political question doctrine somehow narrows the expanding scope of judicial review, and therefore remains a crucial issue to be dealt with by the courts. This article focuses on the various judicial approaches to the justiciability of issues with political ramifications. This work adopts a broader study of the origin, the evolution, the current legal position and the future of the political question doctrine in constitutional law discourse by analyzing works of scholars and courts across jurisdictions. Relying on an extensive study of the judicial works of Bangladeshi courts, this paper makes an honest endeavor to see whether Bangladesh needs the political question doctrine, while its judiciary has progressed towards achieving constitutionalism by widening the scope of its review.

Introduction

The "political question doctrine"; the combination of these three words seems innocuous on the face of it. Nevertheless, in constitutional law discourse, this doctrine is often misused, sometimes wrongly applied and shown to be problematic. At the same time, this doctrine has managed to gather support and

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recognition from a few quarters. The "political question doctrine", an American invention, states that some issues are inherently non-justiciable due to their political nature. Philosophically, judicial restraint over political issues seems to be a sound principle. But in reality, this principle is most often misused. A large number of "issues" have been kept outside judicial review for being "political". The political question doctrine is closely linked to the concept of justiciablity, i.e., the question of whether the judiciary is the appropriate forum to judge a particular issue. While legal questions are deemed to be justiciable, political questions are not. This is despite constitutional law being a grey area, where legal issues often have political overtones.[1]

In Bangladesh, the existing socio-political realities require the judiciary to adopt and evolve an active and operational jurisprudence of its own to help gaining the promised constitutional democracy.[2] The judiciary has generally pursued a broader approach to the justiciability of issues with political ramifications. Sometimes, it has refused to go beyond the political question doctrine so as to adjudicate "politics-inspired issues of constitutional importance",[3] sometimes avoided[4] and sometimes accepted[5] this doctrine. But a clear stance has yet to be adopted by the judiciary. Therefore, the

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1 MAHMUDUL ISLAM, CONSTITUTIONAL LAW OF BANGLADESH 444 (2003).

2 Ridwanul Hoque, *On* Coup D' Etat, *Constitutionalism, and the Need to Break the Subtle Bondage with Alien Legal Thought*, THE DAILY STAR (Dhaka), October 29, 2005.

3 M A. Mannan v. Bangladesh (High Court Division's judgment in 2008) (Unreported). This case was about the legality of delimitation of constituencies by the Election Commission.

4 Constitutional Reference No 1 of 1995 (MPs' Resignation) III BLT (Spl.) (1995) 159.

5 M/S Dulichand Omraolal v. Bangladesh, 1 BLD (1981) (AD) 1. Khondaker Modarresh Elahi v. Bangladesh, 21 BLD (2001) (HCD) 352.

present study is the search for a clear stance that the Bangladesh judiciary can consider appropriate for itself, where the judiciary has begun playing an active role to promote constitutionalism. This paper revolves around the question of whether Bangladesh needs the political question doctrine. This paper analyses the political question doctrine and its relationship with judicial activism. It is not my argument that the judiciary should intervene in every political dispute. Rather, it is that there is no reason to disempower the judiciary in the name of the "political question doctrine".

Part I. Understanding the "Political Question Doctrine"

The "political question doctrine" is an American invention, and has its roots in the historic U.S. Supreme Court case *Marbury v. Madison.*[6] In this case, Justice Marshal appears to have created two major doctrines in constitutional law.[7] The *first* is the statement that it is "emphatically the province and the duty of the judicial department to say what the law is", which paved the way for modern judicial review. The *second* is the assertion that recognized the existence of certain questions that are wholly outside the purview of the courts by use of the term "question in their nature political". The statements, when read together, may reveal Marshall's fundamental conception of the separation of powers, and highlight both the limits of judicial authority and the interpretive role played by the political branches.[8] When these cases involving such political questions are presented, it is the province and the duty of the legislature or the executive and not the courts to clarify the legal position. These questions have

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6 5 U.S. (1 Cranch) 137 (1803).

7 A. A. Shamrahayu & A. O. Sambo, *Internal Affairs of Political Questions and Judicial review: An Expository Study of the Experience in Nigeria and Malaysia*, 7(13) J. OF APPLIED SCIENCE RESEARCH 2257-2265 (2011).

8 *Id.*

come to form the substance of the so-called "political question doctrine."[9]

Louis Henkin and Aharon Barak are some of the leading scholars who have argued against this doctrine. Henkin points out that, in many cases, the "political question doctrine" merely restates in a confusing manner the obvious principle that "the courts are bound to accept decisions by the political branches within their constitutional authority." [10] For Barak, "any act is liable to be "caught" by the legal norm, and there is no act for which there is no applicable legal norm. The law spans all actions."[11] Barak's view is that the political nature of the act is irrelevant as every act necessarily has legal implications. Barak also wrote: "the American doctrine concerning political questions is particularly problematic. Its legal foundations are shaky and it is largely based on irrational reasons".[12]

In *Vieth v. Jubelirer*, [13] the US Supreme Court observed, "sometimes—the law is that the judicial department has no business entertaining a claim of unlawfulness—because the question is entrusted to one of the political branches or involves no judicially enforceable rights. Such questions are said to be 'non-justiciable,' or 'political questions'."[14] The political question doctrine "excludes from judicial review those controversies which revolve around policy

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9 R. E. Barkow, *More Supreme than Court? The Fall of Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUMBIA L. REV. 237 (2002).

10 Louis Henkin, *Is There a 'Political Question' Doctrine?,* 85 YALE L. J. 597-599 (1976).

11 Ressler v. Minister of Defense, 42 P.D. (2) 441 (1988) *per* Barak J.

12 AHARON BARAK, THE JUDGE IN A DEMOCRACY (2006).

13 541 U.S. 277 (2004). The Pennsylvania General Assembly (D) drew a map delineating the districts for the congressional elections. The map was challenged by Vieth (P) and others in court, on the basis that the creation of the districts was for the improper purpose of obtaining political advantage, or gerrymandering.

14 *Id.*

choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch." [15] Furthermore, "because political questions are non-justiciable under Article III of the Constitution, [16] courts lack jurisdiction to decide such cases." Correspondingly, in the American context, the political question doctrine performs an important function in ensuring separation of powers. Similarly, in Nigeria, the Courts have created a dichotomy between matters that the Constitution prescribed and other matters that concerned the affairs of the legislature or the executive. For instance, in *Balarabe Musa v Auta Hamzat*, [17] the Nigerian Court of Appeal observed that a question of impeachment of a state's governor was a political question, and outside its jurisdiction.[18]

In Canadian case of *United States v. Burns*, [19] the challenge concerned an extradition request by the United States for two accused individuals in Canada. Despite public outcry, Canada's Minister of Justice refused to impose a condition that the United States would not seek death penalty upon conviction. This was a matter of foreign policy, clearly falling within the usual ambit of the political question doctrine. Nevertheless, the Supreme Court of Canada regarded the matter as justiciable, and mandated the "no death penalty" condition. The Court observed death penalty to be a matter concerning justice, and not outside its realm.

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15 Lessin v. Kellogg Brown & Root, U.S. Dist. LEXIS 39403 (2006).

16 Article III of the United States Constitution establishes the judicial branch of the federal government. The judicial branch comprises the Supreme Court of the United States and lower courts as created by Congress.

17 3 NCLR 229 (1982)

18 See *Ume Ezeoke v Makarfi* 3 NCLR 663 (1982); *Okwu v Wayas* 2 NCLR 522 (1981)

19 1 S.C.R. 283 (2001)

An analysis of these cases from different jurisdictions reveals that the political question doctrine has no universally accepted definition. Its recognition and application varies across jurisdictions. Nonetheless, it is submitted that the doctrine constitutes a form of judicial avoidance where courts defer matters without reviewing the positions taken by the political branches of the government, and refuse to comment on the lawfulness of the positions.[20]

A. Development of the Political Question Doctrine

Although the doctrine's current analytical framework originates from a handful of landmark U.S. Supreme Court opinions,[21] the political question doctrine arrived in America as a component of common law.[22] Some scholars argue Alexander Hamilton contemplated the basic principle behind the doctrine in *The Federalist Papers*.[23] However, Justice John Marshall deserves much of the credit for bringing the doctrine to the forefront of American jurisprudence. Three years before Marshall discussed political questions as a limit on judicial review in *Marbury v. Madison*,[24] he warned of the potential danger of a court without jurisdictional limits.[25] Marshall cautioned, "if the judicial power extended to every question under the constitution, it would involve almost every subject

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20 F. W. Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75(4) YALE L. J. 517-535 (1966).

21 *See, e.g.*, Baker v. Carr, 369 U.S. 186 (1963); Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

22 Edwin B. Firmage, *The War Powers and the Political Question Doctrine*, 49 UNIVERSITY OF COLORADO L. REV. 65, 68–69 (1977).

23 Rachel E. Barkow, *The Rise and Fall of the Political Question Doctrine* in THE POLITICAL QUESTION DOCTRINE AND THE SUPREME COURT OF THE UNITED STATES 24 (Nada Mourtada-Sabbah & Bruce E. Cain eds., 2007); *See* The Federalist No. 78 (Alexander Hamilton).

24 5 U.S. (1 Cranch) 137 (1803).

25 Barkow, *supra* note 9.

proper for legislative discussion and decision." [26] This would undermine the separation of powers and "the other departments would be swallowed up by the judiciary."[27] Marshall carried these notions of judicial restraint with him to the Supreme Court. *Marbury v. Madison* is the case in which judicial review was "firmly established as a keystone of American constitutional jurisprudence."[28] Therefore, *Marbury* was quite significant in the development of the political question doctrine.

The most important U.S. Supreme Court case regarding the political question doctrine is a voting rights reapportionment case from 1963, *Baker v. Carr.* [29] In *Baker*, the Court held that the determination of whether a matter has been committed to another branch of the Federal Government "is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as

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[26] Barkow, *supra* note 9, (quoting Representative John Marshall, Speech on the Floor of the House of Representatives Mar. 7, 1800, *in* 18 U.S. (5 Wheat.) app. note I, 16–17, (1820).

[27] Barkow, *supra* note 9.

[28] Henkin, *supra* note 10

[29] 369 U.S. 186 (1963); *see* Rogers v. Lodge, 458 U.S. 634 (1982) (contending *Baker* "represents one of the great landmarks in the history of [the U.S. Supreme Court's] jurisprudence"); *Developments in the Law: Access to Courts*, 122 HARVARD L. REV. 1195 (2009) (describing *Baker* as the case which "announced [the political question] doctrine's modern contours"). Charles Baker (P) was a resident of Shelby County, Tennessee. Baker filed suit against Joe Carr, the Secretary of State of Tennessee. Baker's complaint alleged that the Tennessee legislature had not redrawn its legislative districts since 1901, in violation of the Tennessee State Constitution that required redistricting according to the federal census every 10 years. Baker, who lived in an urban part of the state, asserted that the demographics of the state had changed shifting a greater proportion of the population to the cities, thereby diluting his vote in violation of the Equal Protection Clause of the Fourteenth Amendment. Baker sought an injunction prohibiting further elections, and sought the remedy of reapportionment or at-large elections. The district court denied relief on the grounds that the issue of redistricting posed a political question and would therefore not be heard by the court.

ultimate interpreter of the Constitution."[30] The *Baker* case delineated six criteria[31] to be used in determining the existence of a political question: "[1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question."[32] These six *Baker* criteria serve as standards with which political question cases are to be measured.[33] Unless one of the six presents itself in a particular case, there should be no dismissal on political question grounds.[34]

Subsequent cases further clarified and refined the *Baker* criteria. For example, in 2004, the Court held that the *Baker* criteria

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30 *Id,* at 211.

31 *See also,* The *Baker* criteria are also described as formulations, tests, and indicia. *See id.* 217 (describing the criteria as formulations); Vieth v. Jubelirer, 541 U.S. 267, 277 (2004) (describing the criteria as tests); McMahon v. Presidential Airways, Inc., 502 F.3d 1357 (11th Cir. 2007) (describing the criteria as indicia). However, the *Baker* criteria are not factors to be weighed against one another.

32 *Supra* note *29*, 217.

33 Ibrahim v. Titan Corp., 391 F. Supp. 2d 10, 15 (D.D.C. 2005) ("The political question doctrine may lack clarity, but it is not without standards.") (Citing Comm. of U.S. Citizens Living in Nicar. v. Reagan, 859 F.2d 929, 933 D.C. Cir. 1988).

34 369 U.S. 217 ("Unless one of these formulations is inextricable from the case at bar, there should be no dismissal for non-justiciability on the ground of a political question's presence."); *See* Occidental of Umm al Qaywayn, Inc. v. A Certain Cargo of Petroleum, 577 F.2d 1196, 1203 (5th Cir. 1978) ("The inextricable presence of one or more of these factors will render the case non-justiciable under the Article III 'case or controversy' requirement.").

"are probably listed in descending order of both importance and certainty."[35] Other cases suggested the six criteria could be viewed together or combined into more succinct inquiries.[36] Despite these suggestions, modern U.S. cases as well as courts in other countries [37] still prominently use the *Baker* criteria to identify political questions.[38]

B. Theoretical approaches to the Political Question Doctrine

Political Question doctrine is compounded with the various theories, primarily with the classical and prudential theory. The prudential theory further includes the opportunistic theory, cognitive theory and normative theory. The classical theory conceives of political question as a question of constitutional interpretation rather than judicial discretion.[39] Wechsler appears to be the main proponent of this classical school. He opined that the courts are called upon to

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35 *Vieth*, 541 U.S. 278.

36 *See,* Goldwater v. Carter, 444 U.S. 996 (1979). In a concurring opinion, Justice Powell contended a court's analysis of political question doctrine issues "incorporates three inquiries: (i) Does the issue involve resolution of questions committed by the text of the Constitution to a coordinate branch of government? (ii) Would resolution of the question demand that a court move beyond areas of judicial expertise? (iii) Do prudential considerations counsel against judicial intervention?" *See id.* 998; *see also,* Nixon v. United States, 506 U.S. 224 (1993).

37 In Nigeria, the Court relied on *Baker v Carr* to decide in *Onuoha v Okafor*, NSCC 494 (1983). The Supreme Court defined the political question doctrine in Nigeria as consisting of two principles. One is that '[t]he lack of a satisfactory criteria for judicial determination of a political question is one of the dominant considerations in determining whether a question falls within the category of political questions'. The other is '[t]he [appropriateness] of attributing finality to the action of the political department and political parties under the Nigerian Constitution and system of government'.[37] The Supreme Court cited *Baker v Carr* in support of these two principles.

38 Lane v. Halliburton, 529 F.3d 548, 558 (5th Cir. 2008); McMahon v. Presidential Airways, Inc., 502 F.3d 1331, 1358 (11th Cir. 2007).

39 *See,* Moyer v. Peabody, 212, U.S. 78 (1908). The court was of the view where the constitution assigns a particular function wholly and indivisibly to another department, the federal judiciary does not intervene.

consider whether the constitution has committed to another agency of government the autonomous determination of the issues raised, a finding which itself requires an interpretation rather than discretion to abstain or intervene.[40] The prudential theory evolved as a result of the criticism levied on the classical theory. It is not based on constitutional interpretation, rather on prudence. Finkelstein described the prudential theory through certain cases that were completely outside the sphere of judicial interference.[41] Prudential theory is further divided into opportunistic, cognitive and normative theories. Finkelstein explained opportunistic theory in terms of court's instinct for political survival that would persuade the court to avoid the court from deciding "prickly issues" and "contentious questions" which touch the hypersensitive nerve of "public opinion."[42] Courts cannot shy away from deciding a case properly brought before it all on the ground that it is controversial and thus could be hidden under the doctrine of political questions. Field explains cognitive theory political question in terms of "a lack of legal principles to apply to the questions presented".[43] If the danger of clash with the political institution or political controversy about an issue will not account for the court to use the doctrine, we may need to analyze the legal nature of questions that the court has avoided.[44] Where there are no standards or rules, the court should create legal principles that would be applicable in the circumstances of the case. Although in the case of *Baker v. Carr*,[45] Justice Frankfurter showed

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40 Herbert Wechsler, *Towards Neutral Principles of Constitutional Law*, 73 HARVARD L. REV. 1-12 (1959).

41 Maurice Finkelstein, *Judicial self Limitation*, 37(3) HARVARD L. REV. 338-64 (1924).

42 Scharpf, *supra* note *20*.

43 Oliver P. Field, *"The Doctrine of Political Questions in the Federal Courts"*, 8 Minnesota L. REV, 512 (1924).

44 Finkelstein, *supra* note *41*.

45 Baker, *supra* note *3*.

"lack of judicially discoverable and manageable standards" as one of the elements of political questions, it is difficult to justify on cognitive grounds.[46] That is the reason why the 'minimum rationality test' has been suggested.[47]

Jaffe in light of normative theory of political question doctrine sees some other matters flowing from the powers of the political class apart from constitutional assignments as political questions because there are no guiding rules for its operation or its better done without rules. One is tempted to submit that the rationale of the phrase 'that the job is better done without rules'[48] is less convincing.

Thus, above definitions and theories offered by various authors do not perfectly define and delimit the scope of the term political questions. All the definitions and theories have one flaw or another. They are products of individual idiosyncrasies. The definitions and theories do not entirely capture the intention of Marshall in *Marbury*'s case. This is perhaps the reason why an attempt has been made to list the factors or consideration.[49] An attempt to propose a definition that will incorporate the various definitions offered does not solve this problem. This is because the

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46 *E.g.,* Field and Frankfurter's views are related in the sense that both are saying where there are no standards or rules to decide a particular situation, the court will not interfere by regarding it as a political question. For instance, since there are no guidelines, rules or standards to measure when emergency proclamation is needed; it should be regarded as a political question.

47 Scharpf, *supra* note *20.*

48 This phrase means that actions of political class do not have rules to be followed in doing it or even if there are rules, they may not be complied with as political processes often influence it. Thus, courts should not enforce the rules of the House where it is not complied.

49 B.O. NWABUEZE, NIGERIA'S PRESIDENTIAL CONSTITUTION 1979-1983: THE SECOND EXPERIMENT IN+CONSTITUTIONAL DEMOCRACY (1985).

incorporation will be suffering from all the defects of the proposed definitions. It is a constitutional law doctrine that was developed to stop the court from deciding on the merit certain questions, which may affect the powers or functions of other arms of government, or questions relating to the affairs of the political parties. But this doctrine has earned huge criticism as well through the all way of the development. In recent times, some scholars see this doctrine as almost dead one.[50]

Part II. Judicial Review and the Political Questions Doctrine

The origin of the concept of judicial review is also linked with *Marbury case,* which is the origin of the concept political question too. However, the practices of the English courts in the sixteenth and seventeenth century are equally important. Montesquieu, the father of the modern "separation of powers" doctrine, considered separation of judiciary as the most vital part of the constitutional scheme because it guards the government against its own lawlessness and ensures rule of law by securing the liberties of the citizenry *vis-a-vis* executive and legislative branches.[51] Despite the absence of a uniform practice, in function, there has emerged the theory of checks and balances, which in fact is a manifestation of the separation doctrine itself.[52] In this context, the judiciary exercises the power of judicial review to enforce legal limits on the other branches.

The term judicial activism, despites its popularity amongst legal experts, judges, scholars and politicians, has not until recently been given an appropriate definition of what the term should mean

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50 Barkow, *supra* note *9.*

51 RIDWANUL HOQUE, JUDICIAL ACTIVISM IN BANGLADESH: A GOLDEN MEAN APPROACH 33 (2011).

52 HOQUE, *id. 33.*

so that it will not be subject to abuse.[53] The effect of this has been a misconception about what the term is all about.[54] This therefore creates a series of definitions about the concept. Paul Mahoney in offering his own definition of the concept submits that judicial activism exists where the judges modified the law from what was previously stated to be the existing law that often leads to substituting their own decisions from that of the elected representatives of the people.[55] This definition would consider invalid actions or decisions of the judges given for the purpose of seeking the justice in a particular case or to interpret the law in the previous jurisprudence of law.[56] A contrary view has also been offered that judicial activism becomes a valuable instrument when the legislative machinery comes to a halt in a case.[57] It must be stated that other approaches to the meaning of judicial activism has been largely focused on three main issues.[58] One of the other approaches focuses on the willingness of the judges to depart from the previous decisions thereby doing away with the doctrine of *stare decisis*. Another approach sees judicial activism as a departure from the original or ordinary meaning of the

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53 Chad M. Oldfather, *Defining Judicial Inactivism: Models of Adjudication and the Duty to Decide*, 94 *Geo. L.J.* 121 (2005); RICHARD A. POSNER, THE SUPREME COURT (2004); Term—Foreword, *A Political Court*, 119 HARV. L. REV. 54 (2005); Stephen F. Smith, *Activism as Restraint: Lessons from Criminal Procedure,* 80 TEX. L. REV. 1077 (2002); Ernest A. Young, *Judicial Activism and Conservative Politics,* 73 U. COLO. L. REV. 1141 (2002).

54 Keenan D. Kmiec, *The Origin and Current Meanings of "Judicial Activism"*, 92 CALIFORNIA L. REV. 1442 (2004); *see also*, Bradley C. Canon, *A Framework for the Analysis of Judicial Activism* in SUPREME COURT ACTIVISM AND RESTRAINT 386 (Stephen C. Halpem & Charles M. Lamb eds.1982).

55 Paul Mahoney, *Judicial Activism and Judicial Self-Restraint in the European Court of Human Rights: Two Sides of the Same Coin*, 11 HUMAN RIGHTS L. J. 58 (1990).

56 Dragoljub Popovic, *Prevailing Judicial Activism over Self Restraint in the Jurisprudence of the European Court of Human Rights*, 42 CREIGHTON L. REV. 363 (2009).

57 Thijmen Koopmans, *The Roots of Judicial Activism in Protecting Human Rights: The European Dimension* in STUDIES IN HONOR OF GÉRARD J. WIARDA 326 (F Matscher & H. Petzold Eds., 1988).

58 Mark Tushnet, *The United States of America* in JUDICIAL ACTIVISM IN COMMON LAW SUPREME COURTS 416-17 (Brice Dickson Ed., 2007).

constitutional text.[59] The last approach measures judicial activism in the light of the numbers of judicial decisions that strike down legislations.[60] To quote Hoque:

> *"If we recognize that judicial activism is the creative and assertive exercise of the aiming at activating the court in overseeing legislative and executive inactivity, its exercise seems inevitable not only in case of excessive or illegal exercise of state powers but also in cases of failure of the power-holders in performing constitutional/public duties."*[61]

A. Relationships between Judicial Review and Political Questions

In many cases, the courts while exercising the power of judicial review or of interpreting the constitution, may involve in examining political power or policy activities.[62] Then, what is the dividing line between political and legal questions? Western scholarship has yet to answer this question.[63] In practice, often a political issue has legal/constitutional dimensions.[64] A clear distinction between "law" and "politics" in the framework of the Parliament is impractical. Notably, in the constitutional states of Europe, political activity is constitutionally regulated. As such it has a "normative" character and is for the most part justiciable.[65]

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59 Tushnet, *id.*

60 *Id.*

61 HOQUE, *supra* note *51*, at 35.

62 HOQUE, *supra* note *51*, at 36.

63 Tushnet, *supra* note *58*.

64 Hoque, *supra* note *51*.

65 Suzie Navot, *Political questions in the Court: Is "Judicial self-restraint" a better alternative than a "non justiciable" approach?*, July 14, 2007, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1367596/ (Last visited on August 12, 2015)

Those who oppose judicial review of political questions criticize that the Supreme Court of Nigeria frequently dwells into matters specifically delineated to elected representatives; and thereby infringes on the prerogatives of the political institutions.[66] Here, I agree with the comment of Hoque: "If the court's job is to dispense justice to the claimants, then every issue involving interpretation of the constitutional provisions or determination of a serious legal issue giving rise to public duties upon which depends the realization of justice for all, however political or policy-oriented that question might be, is verily within the judicial competence, although institutional comity demands a cautious approach."[67]

Aharon Barak argues, "the mere fact that an issue is 'political'— that is, holding political ramifications and predominant political elements—does not mean that it cannot be resolved by a court. Everything can be resolved by a court, in the sense that law can take a view as to its legality." [68] He comes up with a jurisprudential argument: "although not everything is law, there is law in everything."[69] Lon Fuller's concept of polycentricity and the limits of adjudication [70] also become relevant here. Fuller argued that polycentric issues are non-justiciable.[71] Where conventional political

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66 Nwosu, *supra* note *18*.

67 HOQUE, *supra* note *51*.

68 AHARON BARAK, THE JUDGE IN A DEMOCRACY (2006).

69 *Id.*

70 Lon Fuller, *The Forms and Limits of Adjudication*, 92 HARVARD L. REV. 353 (1978-1979).

71 *See*, Jeff A King, *The Pervasiveness of Polycentricity*, PUBLIC LAW 101-124 (2008). To Fuller, a polycentric problem is one that comprises a large and complicated web of interdependent relationships, such that a change to one factor produces an incalculable series of changes to other factors. The perfect example of a polycentric task is how to set an appropriate price or wage. Setting the price of a commodity or the wage of an employee can affect supply or demand for the commodity or employment, which in turn affects a multitude of other costs and relationships. And each of the separate consequential effects of the price

activism may take years or may not happen at all, necessitating the need to "effect socio-economic and political transformation from outside the conventional political arena",[72] or where constitutional mandates are unjustifiably twisted, judicial engagement with policy issues may be a constitutional imperative.[73]

B. Political Question Doctrine in Bangladesh

On constitutional issues of wider importance, the Court has generally pursued a broader approach to the justiciablity issues of political ramifications.[74] It seems that apart from some unsustainable failure of the past, the court has, on balance, avoided being eluded by the so-called American doctrine of political question,[75] remaining at times essentially passive on complex political issues such as the legality of *hartal* (political strike).[76] The following are some cases

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determination (e.g., lay off, decreased demand for the commodity), in turn affects networks of relationships associated with that factor (e.g., production, transport, insurance, advertising), and so on.

72 *See,* Ahmed (1999: 75), considering PIL in South Asia as such an alternative device to realize social transformation (Cited in HOQUE, *supra* note *51*).

73 Minister of Health v. Treatment Action Campaign, (5) SA 721 (CC); (2002) 5 LRC 216, ¶99. In this case the South African Court emphatically rejected an argument that an injunction to enforce the government to fulfill the socio-economic rights of AIDS patients would breach separation of powers as it would eventually require the government to pursue a particular policy (Cited in HOQUE, *supra* note *51*).

74 *See*, Najmul Huda, MP v. Secretary, Cabinet Division, 2 BLC (1997) (HCD) 414; Rafique Hossain v. Speaker, Bangladesh Parliament, 54 DLR (2002) (HCD) 42.

75 HOQUE, *supra* note *51*.

76 *E.g.,* In Khondaker Modarresh Elahi v. Bangladesh, 21 BLD (2001) (HCD) 375, the Court decided, "this political issue should in all fairness be decided by the politicians". It earlier rejected another hartal-challenging case, Abu Bakar Siddique v. Sheikh Hasina, WP No 2057 of 1995 (Unreported). In Abdul Mannan Bhuiyan v. State, 60 DLR (2008) (HCD) 49, the Appellate Division held that *hartal* or strike, unaccompanied by force or violence, is a democratic right of the citizens.

where the Bangladesh judiciary has invoked the "political question doctrine".

1. M/S Dulichand Omraolal vs. Bangladesh[77] (1981)

M/S Dulichand Omraolal v. Bangladesh was the first famous case in Bangladesh, in which the court applied the political question doctrine. The writ was an unsuccessful challenge of declaring the applicant firm's property as "enemy property". One of the applicant's contentions was that "President Ayub Khan in violation of his own Constitution" and "Yahya Khan without any legal or constitution authority abrogated the constitution of the then Pakistan."[78] The Apex Court held that the determining the constitutional legitimacy of Yahya Khan's military rule was a political question from which courts ought to refrain.[79] The highest court of Bangladesh showed no interest in engaging with this important issue despite an earlier decision of the Pakistani Supreme Court having held General Yahya Khan's military rule to be unconstitutional.[80] The Supreme Court avoided the issue of legitimacy of Yahya Khan's regime terming it a "political question".

2. Constitutional Reference No. 1[81] (1995)

In *Constitutional Reference No 1*, the court discussed a detail about the political question doctrine. This case is also known as *MPs' Resignation case.* ATM Afzal, C.J. held: "there is no magic in the phrase "political question". While maintaining judicial restraint the Court is

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77 1 BLD (1981) (AD) 1.

78 *Id.*

79 *Supra* note *77.*

80 Asma Jilani v. Punjb, PLD (1972) SC 139.

81 Constitutional Reference No 1 of 1995 (MPs' Resignation) III BLT (Spl.) (1995) 159.

the ultimate arbiter in deciding whether it is appropriate in a particular case to take upon itself the task of undertaking a pronouncement on an issue which may be dubbed as a political question." [82] The President asked the Supreme Court to advise whether a continuous boycott of Parliament by Opposition Party MPs for a period of 90 days would render their seats vacant for being "absent" for the constitutionally mandated period under Article 67(1)(b).[83] The Court advised the President that boycotting of the Parliament by opposition members for a consecutive period of ninety days rendered their seats vacant.

3. Nazmul Huda vs. Secretary, Cabinet Division[84] (1997)

A non-member of the Parliament, who was in charge of Ministry of Planning as a State Minister, answered questions relating to the Cabinet Division, the Prime Minister's Secretariat and President's Secretariat during a session of the parliament. The opposition party claimed that such a Minister could not answer questions unrelated to his portfolio. But the Speaker issued a memo ruling in favour of the Minister. Consequently, the opposition party challenged the constitutionality of this ruling. Although the court recognized its lack of jurisdiction to scrutinize internal proceedings of parliament, it held that the Speaker's rulings on a constitutional matter and the issue of the legality of a technocrat minister's speech unrelated to his portfolio were justiciable. The court engaged into the matter, analyzed the fact, and finally held that "the contention that a non-member of the Parliament being in charge of Ministry of

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82 *Id*, ¶ 31.

83 Article 67(1)(b) of the Constitution of Bangladesh provides that if any member of parliament remains 'absent' from parliament for such a period his or her seat would become vacant.

84 2 BLC (1997) 414.

Planning as a State Minister will not be entrusted to speak or to give answer unrelated to his portfolio in violation of the provisions of Article 73A[85] of the Constitution is negatived."[86]

4. Khondaker Modarresh Elahi vs. Government of the People's Republic of Bangladesh[87] (2002)

In this case, the legality of a *hartal* (political strike) was challenged. The Court remained passive in such a complex political issue. Mainur Reza Chowdhury J, Syed JR Mudassir Hussain J and M.A. Aziz J delivered the judgment. The judgment stated: "Call for hartal *per se* is not illegal but where any call for hartal is accompanied by threat it would amount to intimidation and the caller of hartal or strike would be liable under the ordinary law of the land'.[88] Syed JR Mudassir Hussain J. observed: "hartal cannot be declared illegal. It is, democratic right to call hartal but is should be observed peacefully without resorting to any illegal activities by the pro-hartal activists but at the same time hartal should also be allowed to be observed peacefully without any provocation, instigation, intervention and aggression of any kind by anti-hartal activists.[89]

M.A. Aziz J. termed a hartal to be a "political issue" and found "burden" to adjudicate by the court. He observed, "The determination whether hartal is good or bad depends on the position held by the political parties. As such, this political issue should in all fairness be decided by the politicians themselves without

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85 Article 73A of Bangladesh Constitution states, Every Minister shall have the right to speak in, and otherwise to take part in the proceedings of, Parliament, but shall not be entitled to vote or to speak on any matter not related to his Ministry unless he is a member of Parliament also.

86 *Id.*

87 54 DLR (HCD) (2002) 47.

88 *Id. per* Mainur Reza Chowdhury J. ¶ 16.

89 *Supra* note *87*, ¶ 30.

unnecessarily burdening this Court to adjudicate something it is not empowered to."[90] He also ruled that only the Government would be capable of dealing with the issues arising out of a hartal.[91]

5. Bangladesh Italian Marble Works Ltd. v. Bangladesh[92] (2005)

Popularly known as the *5th Amendment case*, the High Court Division held unconstitutional the 5th Amendment that validated the first martial law regime (15 August 1975 -9 April 1979). The case in appeal, the Appellate Division in 2010 stood in defense of the supremacy of the constitution. [93] In the case *Siddique Ahmed v. Bangladesh,*[94] High Court Division in its verdict held 7th Amendment to the constitution unconstitutional that validated the second martial law regime (24 March 1982 to 10 November 1986). The Appellate Division of the Supreme Court on May 14, 2011 upheld the High Court Division's verdict.

6. Mohammad Badiuzzaman v. Bangladesh[95] (2010)

In this case, the constitutionality of some provisions of the Rangamati, Khagrachari and Bandarban Hill District Local Government Council (Amendment) Acts 1998[96] and the Chittagong Hill Tracts Regional Council Act, 1998[97] was challenged. The specific challenge was that the relevant peace accords were entered into in violation of the Bangladeshi Constitution. The division bench of the

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90 *Supra* note *87*, ¶ 51.
91 *Supra* note 87, ¶ 52.
92 BLT (Special) (2006) (HCD) 1.
93 62 DLR (2010) (AD) 298.
94 39 CLC (2010) (HCD).
95 7 Law Guardian (2010) (HCD) 208.
96 Acts Nos. IX, X and XI of (1998).
97 Act No. XII of (1998).

High Court Division comprising with Justice Syed Refaat Ahmed and Justice Moyeenul Islam Chowdhury took the petition as justiciable. The court found certain provisions the Regional Council Act *ultra vires* the constitution. The Court was disinclined to interfere with the Peace Accord.[98] The Court also stated: "It is inevitable that the sustainability of the peace process will depend on innovation and progressive development of ideas and measures that shall, however, always need measuring against the Constitution. Should, in this regard, any kind of exigency demand action not strictly envisaged in the Constitution, lawmakers shall prudently henceforth allow for the Constitutional entrenchment of the same."[99]

Part III. Does Bangladesh need a political question doctrine?

The Bangladeshi judiciary, especially in recent decades, has started playing an active role to establish constitutionalism. The winds of judicial activism[100] to establish constitutionalism and public interest started since the Supreme Court's historic ruling in *Anwar Hossain Chowdhury v. Bangladesh*, [101] which invalidated the 8th Amendment to the Constitution. The court was seemingly motivated to uphold the greater public interest,[102] and this case arguably created a conceptual framework for public interest litigation (PIL)[103] that later emerged. Bangladesh has a transformative constitution, aimed at a just social order based on certain core values such as justice (social,

98 *Supra* note *95,* guideline (a).
99 *Supra* note *95,* guideline (f).
100 HOQUE, *supra* note *51*, at 112.
101 BLD (spl) (1989) 1.
102 HOQUE, *supra* note *51*, at 113.
103 Naim Ahmed, *Litigation in the name of people: Stress and Strain of the development of public interest litigation in Bangladesh,* (February 1998) (Ph.D. Thesis, Department of Law, SOAS, University of London); *See also*, N. Ahmed, *Public Interest Litigation: Constitutional Issued and Remedies* (BLAST, Dhaka 1999) (cited in Hoque)

economic and political), human dignity, and rights-and-duty-based democracy, and hence judicial review here has its own unique indigenous instrumentality.[104] Hoque writes that after the restoration of democratic government in 1991, the Supreme Court of Bangladesh began to engage hearing increasing number of people with diverse causes.[105] In the meantime, Public Interest Litigation-based judicial activism also started.[106] Though at the early states, the Court was reluctant[107] to constant engagement in policy issues, but with time, the scope of judicial review has been expanding.[108] In the meantime, *suo moto* judicial intervention has become a common feature of the judicial engagements on different issues.[109] Public

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104 Hoque, *supra* note *3*.

105 HOQUE, *supra* note *51*, at 118.

106 Dr. Mohiuddin Farooque v. Bangladesh 17 BLD (1997) (AD) 1 is the country's first true PIL case that relaxed the conventional *locus standi*.

107 HOQUE, *supra* note *51*, at 126.

108 *E.g.,* in Abdul Gafur v. Ministry of Foreign Affairs 17 BLD (1997) (HCD) 453, the court, in pursuance of the right to life and legal protection of a girl-victim of human trafficking interned in Kolkata, directed a diplomatic assistance for her rescue. It is also directed actions to bring back other women victims of human trafficking. (Cited in HOQUE, *Id*, at 127)

109 *See,* State v. Secretary, Ministry of Law, Justice & Parliamentary Affairs and Others, Suo Motu Rule No. 5621 of 2009, High Court Division, Bangladesh (judgment on 3 Sept. 2009) (A 7 year-old girl was allegedly raped by her neighbour and distant relative. The police recorded the girl's case and sent her to the Magistrate Court. The Magistrate ordered the girl to be kept in a safe home managed by the Department of Social Welfare. The girl's parents were denied access to the safe home. The Court found that the Magistrate had acted illegally in ordering the girl to be kept in state custody. The Court also made a number of recommendations, calling for, among other things, the establishment of child-specific courts in every district, specialized training for police and other members of the criminal justice system who deal with children (including training for lawyers and judges on the CRC and other international instruments) and new laws implementing Bangladesh's obligations under international treaties and covenants (such as the CRC)); *See also*, Labu Mia v. State 53 DLR (2001) (HCD) 218, Daily Star v. State 53 DLR (2001) (HCD) 155 (Cited in HOQUE, *Id.*).

interest constitutional litigations have also been contributing to achieve constitutionalism.[110]

Academic debate over any judgment in Bangladesh is rare. In 2005, the judgment in the *5th Amendment case* led to serious academic debates. Imtiaz Omar and Zakir Hossain criticized the judgment. They opined that the Bangladesh Supreme Court should adopt an approach along the lines of the 'political questions doctrine' invoked by the Supreme Court of the USA on questions such as the invalidation of the 5th Amendment, or the legality of an Amendment to the Constitution.[111] They claimed that the Court could not define the limits of the exercise of power that relates to these 'political questions'. [112] In his reply Hoque identified "political question doctrine" as a trap for the Court and advocated that the Court should avoid that trap. He also made a reference to Parliament Boycott case (advisory opinion, 1995), where the "trap" had been beautifully avoided."[113] Omar and Hossain replied to Hoque via another article and hold that political questions should be debated and resolved in political or representative forums.[114]

Bangladesh judiciary has started its activism to achieve constitutionalism and already entered into an era of judicial activism. This judiciary has been passing a "threshold" to achieve its goal. Therefore, at this juncture, the application of the political question

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[110] *See*, BLAST v. Bangladesh, 55 DLR (2003) (HCD) 363, Ekushe Television Limited v. Chowdhury Mahmud Hasan, 54 DLR (2002) (AD) 130, BNWLA v. Bangladesh, 14 BLC (2009) (HCD) 694.

[111] Imtiaz Omar and Zakir Hossain, *Coup D' Etat, Constitution and Legal Continuity*, THE DAILY STAR (Dhaka) September 24, 2005.

[112] *Id.*

[113] Hoque, *supra* note *3*.

[114] Imtiaz Omar and Md. Zakir Hossain, *Constitutionalism, parliamentary supremacy, and judicial review: A short rejoinder to Hoque*, THE DAILY STAR (Dhaka) November 26, 2005.

doctrine can be harmful to the emerging judicial role. Bangladesh has witnessed a bad use of this doctrine in 1981 by *M/S Dulichand Omraolal v. Bangladesh*[115], where court showed no interest to declare Yahya Khan's martial law regime unconstitutional, perhaps which led Bangladesh judiciary to take another 24 years to declare a martial law unconstitutional in 2005 by the *5th Amendment case*. To achieve promised constitutionalism, it is time to take a clear stand on the application of this doctrine.

Some scholars have already opposed the application of political question doctrine in Bangladesh. Mahmudul Islam writes, "in our constitutional system there is no justification for the application of the doctrine of political question." [116] Hoque argues, "it is jurisprudentially dangerous to induce it [the Court] to permanently adopt such a doctrine (political question), as it would then become permanently disempowered to deal with peculiarly Bangladeshi (constitutional) issues such as, e.g., legality of martial law regimes/regulations."[117]

Bangladesh Judiciary has yet to rule on important constitutional issues with political ramifications such as emergency powers,[118] the President's unchallenged prerogative powers,[119] etc. In

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115 1 BLD (1981) (AD) 1.

116 ISLAM, *supra* note *2*, at 446.

117 Hoque, *supra* note *3*.

118 *See*, M. Saleem Ullah and Others v. Bangladesh, W.P. No. 5033 of 2008 (Pending) and M Asafuddowla and Others v. Bangladesh, W.P. No. of 24 November 2008. (Pending) (It now remains to be seen how the Court responds to this fundamental constitutional issue brought before it 35 years after the provisions for Emergency have been declared constitutional.)

119 Sarwar Kamal v. State, 64 DLR 2012 (HCD) 331 (A Division Bench of the High Court Division expressed that the powers of the president and the government to pardon, suspend or remit sentences of any convict should be exercised fairly and on unbiased relevant principles. If a fugitive from law is given pardon knowing his status then the exercise of power under Article 49 of

this regards, the Bangladeshi judiciary may take Barak's view that the judiciary assesses the "legal aspect of politics" and not its wisdom. Thus, when a judge has to examine the legality of a political determination, he will only determine the question according to legal standards, which is an essential judicial function.[120] Power oriented politics have led political parties to a focus on acquiring state power, where the interests of the people and the future of the nation bear no consequence at all.[121] Though, it seems sound that judiciary is not going to interfere in pure political issues, but in reality, it vests unfettered powers followed large scale of immunities to politicians. Until the political institutions of this state are fully democratized, no other branches of the state but the judiciary is the most reliable.[122] The public still regards the judiciary as the "last resort" for protection against any injustice or excesses.[123]

On the other hand, if Bangladesh judiciary applies this doctrine, it would certainly hamper its progress towards establishing constitutionalism. Such an action would not inspire the Bangladeshi people's confidence in their judiciary. Meanwhile, judiciary needs its development continued in transparency and accountability to constitution and people. In the prevalent socio-political context in Bangladesh, the need for judicial vigilance for the protection of

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the Constitution or section 401 (1) of the Code certainly be arbitrary, malafide, unreasonable, irrational and improper and such exercise of power is against the principle of the rule of law and an abuse of power*)*

120 BARAK, *supra* note *12.*

121 Sayed Javed Ahmad, *Good Governance in Bangladesh: A Quest for a Non-Political Party Approach,* 2 J. of Politics and Law, 144 (December 2009).

122 In Bangladesh, the most trusted institution is the Judiciary. *See,* GOVERNANCE IN SOUTH, SOUTHEAST, AND EAST ASIA: TRENDS, ISSUES AND CHALLENGES, (Ishtiaq Jamil, Salahuddin M. Aminuzzaman, SK. Tawfique M. Haque eds.), (Springer International Publishing 2015).

123 Ridwanul Hoque, *Courts and the Adjudication System in Bangladesh: In Quest of Viable Reforms',* in ASIAN COURTS IN CONTEXT, 447-486, (J. Yeh and Wen-Chen Chang eds. Cambridge: Cambridge University Press, 2014).

justice and good governance is an ever-present one. Moreover, judiciary needs its own initiatives to achieve and maintain public trust and confidence. Therefore, the Bangladeshi judiciary should take a clear stance to not use the "political question doctrine".

Part IV. Political Question Doctrine: Experience from India and Pakistan

In India, the doctrine stands on somewhat flimsy grounds. The question has been discussed only in a string of President's Rule cases, in the context of limits on the power of the Governor under Article 356. *First* discussed in cases such as *State of Rajasthan v. Union of India*[124] and *State of Karnataka v. Union of India*,[125] the doctrine has since been eroded by what Baxi aptly terms "expansion of the frontiers of judicial power". However, after the authoritative exposition of the law in *S.R. Bommai v. Union of India*[126], the position seems to be settled on the "sufficiency of materials" test alone. The judicial position has at all times been cognizant of the fact that what is followed as a "strict separation of powers" in the United States does not apply in India, where checks and balances are preferred to watertight compartmentalization[127]. However, Justices Bhagwati and Chandrachud have spoken of the "political thicket" that judges should "scrupulously" keep away from.

In Pakistan, the Supreme Court has been very clear in dealing the issues of political questions. In *Pakistan Lawyers Forum v. Federation of Pakistan and Others*, the Supreme Court ruled against adopting the "political question doctrine" as a means of keeping away from

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124 AIR (1977) 1361.
125 AIR (1978) 68.
126 AIR (1994) SC 1918.
127 *See Ram Jawaya Kapur v. State of Punjab* AIR (1955) SC 549

difficult legal questions with political undertones. The Court observed that applying the doctrine would amount to abdication of judicial power.[128] In *Watan Party and others v. Federation of Pakistan and others*, the Pakistani Supreme Court observed that the existence of a political question did not suffice to oust the court of its jurisdiction. Whether there existed a non-justiciable political question was to be determined on a case-by-case basis.[129]

Conclusion

Tracing its origin to American constitutional law, the "political question doctrine" was a measure to keep the judiciary away from matters that were within the scope of other sovereign bodies. Nevertheless, today, the political question doctrine seems to have disappeared from American case law.[130] This paper does not advocate that the judiciary should resolve every political dispute. Instead, I argue against disempowering the judiciary to in the name of the "political question doctrine". For this purpose, I argue so by relying on Bangladeshi constitutional jurisprudence, and case laws and scholarly opinions from the United States, Israel, India and Pakistan, amongst others.

Constitutional law involves difficult questions of government power and politics. However, that does not mean that the judiciary can completely avoid such questions. It is submitted that the

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128 P L D (2003) LAHORE 371

129 Watan Party and others v. Federation of Pakistan and others PLD (2012) SC 292 [Constitution Petition under Article 184(3) of the Constitution regarding alleged Memorandum to Admiral Mike Mullen by Mr. Husain Haqqani, former Ambassador of Pakistan to the United States of America]

130 Symposium, *Baker V. Carr: A Commemorative Symposium: Panel I: Justiciability and the Political Thicket: Law and Prudence in the Law of Justiciability: The Transformation and Disappearance of the Political Question Doctrine*, 80 NORTH CAROLINA L. REV. 1203 (2002).

judiciary should determine its own criteria for judicial intervention on a case-by-case basis. The judiciary should not abdicate its role of adjudication by applying the "political question doctrine". In the context of Bangladesh, there are no distinct advantages to be gained by applying this doctrine, as the judiciary marches towards strengthening the Bangladeshi democracy and constitutionalism.