Downfall of Political Question Doctrine and Rise of Judicial Self-Restraint in the Judicial Arena: A Case-based Approach

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Abstract

This article aims at examining the justifiability of the political question doctrine while adjudicating political litigations in the light of constitutional dictation as well as exploring the rise of the principle of judicial self-restraint as an alternative to the doctrine for determining what cases are to be taken into cognizance albeit political in nature and what cases the court should refrain from investigation and trial and leave to the domain of the other branches of the government. The study method applied is the analysis of secondary materials like books, journal articles and research reports and papers of major reputable institutions working on political questions. The study points out that in earlier times the political question doctrine applied frequently by the courts so as to exclude from its jurisdiction political cases altogether. But nowadays, the judiciary has given up this rigid practice of non-interference with the policy decisions. At the same time, it also finds out that currently the courts are inflicting the principle of judicial self-restraint to repeal or wipe out any statutes on the ground of its being impractical or unconstitutional. Although in such circumstances fresh laws or policies are to be made by the executive or legislative organs of the government. Finally, it concludes by saying that for the smooth adjudication of political cases there is no need to make the political question doctrine justifiable instead the principle of judicial self-restraint could serve the best purpose.

Keywords: Political question doctrine, judicial review, judicial self-restraint, judicial activism.

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Introduction

In many of the cases where the constitution does not ascribe any constraints upon the political branches, the political question doctrine is simply confusing and inessential mode of exposing the clear point that the courts should not also impose such a confinement (*Henkin*, 1976). In fact, the doctrine might be discarded for its little impact on matters relating to political question. Under this doctrine, matters which can best be solved by one or the other department of the government, the court can deny judicial review (*New Jersey v. United States*, 1996). As the issues are political in nature, the court deems that they can best be resolved by political accountability, rather than by the mandate from the courts. But one has to observe the salient features to ascertain whether any other mechanism instead of the court system is required. Indeed, there are many countries which in spite of their lack of knowledge on this could run the judiciary smoothly and speedily. In the USA constitutional law, this doctrine is closely connected with the concept of justifiability due to the reason that the court has the authority to hear and adjudicate only legal questions being justifiable, not political one as they are non-justifiable (Huhn, 2016). Unlike the other requisites of justifiability, political question doctrine being one of them, delimits the issues that can be taken into consideration by the courts irrespective of the circumstances. And by doing this, the doctrine frees political branches as regards certain issues from judicial review altogether. It represents that as to certain matters the government will perform best if the political branches can function out of the control and interference of judiciary. One might agree or disagree with this view but simply freeing the political branches from judicial review and its intervention just for ensuring smooth functioning of the government might cause more harm than good.

On the other hand, the principle of judicial self-restraint requires the judges to deal with legal issues only rather than spending time over policy decisions. Previously, under the political question doctrine, the courts did not pay heed to the constitutionality of a statute or policy. Presently, unlike the doctrine, the judicial self-restraint acknowledges if any statute or policy violates constitutional provisions though it declines to adjudicate the same and thereby attributes its supports towards resolution of policy disputes by other governmental organs. And by doing this a judicially self-restrained judge decides a case in such a way as to make it consistent with the statutory provisions. In fact, nowadays the frequent practice of judicial self-restraint by the courts establishes it as the most suitable way of dealing with external affairs rather than confronting to the conservative political question doctrine.

This article seeks to examine the justifiability of the political question doctrine in the courts while resolving political issues by mentioning constitutional provisions. Apart from analyzing the doctrine, the study also aims to explore the emergence and primeness of the principle of judicial self-restraint while deciding political cases, alongside making a brief but critical analysis of the political question doctrine in the context of Bangladesh, taking practical insights from the jurisprudence of the United States of America, the States wherefrom this doctrine originated and also from the empiric jurisprudential stands of India, Pakistan and Malaysia in this regard.

Political Question Doctrine: Concept, Origin and Development

(i) Political Question Doctrine: Concept

The term "political question doctrine" is a vague term. There is no international or regional legal instrument providing for a plain and precise definition of the concept of political question. However, a few scholars have described the notion of this doctrine from their viewpoint rather than giving an exhaustive definition. Basically, the political question doctrine is a rule created by the Supreme Court of the USA. It was originated from the separation of power theory, as evidently and precisely laid down in the constitution of the United States. The doctrine prevents federal courts from deciding politically sensational cases, since this kind of cases belong to the decision-making authority of elected officials or other organs of the government namely, legislature or executive, whereas the judicial organ decides matters relating to question of law (*Luther v. Borden*, 1849).

As per the definition mentioned in the Black's Law Dictionary, political questions are questions of which the court will refuse to take cognizance, or to decide, on account of their purely political character or just because their determination would involve an encroachment upon the executive or legislative powers (Garner, 2009). Though the definition provided here holds an admirable beginning, there is a debate as regards whether political questions must deal with questions that are purely political in nature or not. To describe the term 'purely political' Rohde and Spaeth opined that a matter will be considered as a purely political question if the court believes it to be a matter more appropriate for resolution by either of the two branches of government, or one that the judges consider themselves incompetent to resolve because the character of the dispute is not amenable to resolution through judicial process (Rohde, and Spaeth, 1975).

Nwosu in order to clarify the meaning of the concept political question by referring specially to the "Justifiability theory" stated that political question is a non-justifiable issue. A legal matter is justifiable if it is such that can be entertained by a court, not having breached the rule as to mootness, standing and ripeness (Nwosu, 2005). However, Nwosu's definition of political question with reference to the justifiability theory was not accepted universally and has been criticized extremely by many scholars. The strongest one of which is made by Ben Nwabueze who countered that addressing political question as non-justifiable issue invites a re-definition of justifiability concept or introduction of an entirely new class of what is or is not justifiable (Nwabueze, 2005). He also opined that justiciability is a veritable concept, at once pre-eminently meaningful and intelligible, and rests upon objective rules and principles, which delimit or seek to delimit the province of the judicial function. It is what confers jurisdiction on the court and matters which are justiciable are simply matters which the court can rule upon (Ibid.). The definition of Nwosu is one which could hardly be defended, and recognizing this, political questions could rightfully and comprehensively be defined as composing mainly of those matters or issues which is clearly and unambiguously considered by the superior court of record to have been constitutionally and statutorily allocated to the legislative or executive organ of the government for conclusive resolution, and in addition, it further includes matters or issues, which would, in the opinion of the court for just reasons, be improper for it to resolve through judicial process and which it deem itself to be functionally unauthorized to resolve and enforce (Ibid.). Although the definition covers all the fundamental components of the political question doctrine yet these elements generally vary while their authors are influenced by the circumstances of each particular case. Thus, there will be as many definitions of political question doctrine as there are researchers working on this particular legal area. Therefore, in a nutshell, it can be concluded from the above discussion that the political question doctrine is a vague term which cannot be defined conclusively.

(ii) Political Question Doctrine: Origin and Development

(a) The Classical Form of the Doctrine

The political question doctrine derived its birth from the USA jurisdiction where, due to the rigid practice of separation of power theory, the Supreme Court could not encroach upon the matters which in its view were left at the disposal by the other organs of the government under the constitution (*Elrod v. Burns*, 1976). The political question doctrine was, for the first time, spoken of in the historic *Marbury v. Madison* case, where Marshall CJ stated that

questions, which are, political in nature, or constitutionally and by laws, submitted to the jurisdiction of the executive can never be made in this court. Again, emphatically it is the province and obligation of the court to enunciate what the law is (*Marbury v. Madison*, 1803). However, by saying this Marshall CJ retained the political question doctrine within a narrow confinement. Theoretically, the judiciary by refraining itself from solving the political matters, keeps the judges away from politics and indulges them in adjudicating legal disputes (Seidman, 2004). Additionally, the Federalist Papers of Alexander Hamilton obsessed the classical form of the political question doctrine. He upholds the separation of power theory and recapitulated the momentous role of the judiciary while interpreting the law (Hamilton, 1788). Moreover, Hamilton marked the primeness of the judiciary in so far it operates as a check on the other organs of the government (*Marbury v. Madison*, 1803). It can therefore be concluded that, although the court has the authority to redress individual grievances, yet it cannot intrude upon the public liberty by enforcing its judgment on purely political question.

(b) The Prudential Form of the Doctrine

In contrast with the classical form of the doctrine, another version, well explained by Alexander Bickel and further developed by the federal courts is the prudential form of the doctrine (Bickel, 1961). Under this concept the court can refuse, for prudential causes, to hear and adjudicate any dispute that might transgress into the territory of the executive branches (*Barkow, 2002).* Unlike classical form, prudential one is not confined to the recitation of the constitution. Rather, it incorporates the view that the court should refrain from resolving issues which could be solved in a better way by the other organs of the government (Tushnet, 2002). Professor Bickel expressed that the prudential force of the doctrine is required for supplying the judiciary with instruments so that it can abstain from exercising its adjudication authority (Scharpf, 1966).

(c) Baker Formulation and the Application of the Doctrine Post-Baker

Formerly, in *Luther v. Borden*, the court after analyzing the arguments, of either parties to the dispute and the Guarantee Clause itself, came to a decision that the challenge was nothing but a political question. In this case the court according to the General Clause concluded that the USA promised for each of its State a Republican form of government and its decision is obligatory upon all the government branches and is

not subject to be questioned before court. Furthermore, in this case, the court remarked some prudential reasoning weighing against the judgment to avoid chaos that could have arisen if court declared the State government invalid (*Luther v. Borden*, 1849). However, *Baker* case revealed the modern political question doctrine in response to the decision of the court that an ascertainment of whether state allocation contravened the plaintiff's equal protection rights was not at all a political question. In *Baker v. Carr*, Brennan J. settled down six formulations, the existence of which might cause a case to be discarded under the doctrine. These are:

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 the 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 (*Baker v. Carr*, 1962).

As the formulations were wide in themselves, Justice Brennan, being inspired by former case laws, narrowed down the scope of the doctrine (May, 2008). According to him, it is to be applied fully with reference to ascertained political questions attached to the elected branches of the government only, and not to the ordinary political litigations *(Breedon*, 2008). Since the settlement of *Baker* case in 1962, simply two verdicts of the Supreme Court uphold the view that a dispute should be dismissed in appliance of the doctrine. Firstly, in *Gilligan v. Morgan* the court held that courts should not indulge in scrutinizing the training of the Ohio National Guard (*Gilligan v. Morgan*, 1973). Later on, in *Nixon v. United States*, the Supreme Court decided that the issue of impeaching a judge was a political question. Although these two claims were regarded as political questions founded partly on

textual undertaking of the matters by the courts as per the Powers of Congress Clause and the Impeachment Trial Clause (*Nixon v. United States*, 1993). But the critics differ by saying that the Supreme Court lacks endeavor to redefine the political question doctrine, and to describe the prudential form of it which ultimately makes the doctrine an ill-destined one as per the result of the Baker test and its Post Baker appliance in Supreme Court judgment *(Breedon,* 2008). And that is why nowadays, the courts of USA quits their former conservative views concerning the doctrine instead the courts take a flexible approach in solving lawful dispute impartial of its relevancy with the political question doctrine. Recently, in *Zivotofsky v. Clinton,* the court refused to apply the political question doctrine for satisfying the legal demand of a plaintiff and thereby affixed an interpretive approach to narrow down the doctrine's area of operation. In this case, the Supreme Court adjudged that Zivotofsky had invoked a statutory claim, and the court's liability to ascertain whether statutes are valid extends to political question also (*Zivotofsky v. Clinton*, 2012). Under the Indian legal lexicon the political question doctrine is applied to a limited extent. Here, it was sought to be used in domestic constitutional question (*Rajasthan v. India*, 1977). The Supreme Court of India denied resorting to this doctrine in respect of justifiability question for satisfaction of the President as regards the existence of emergency (*A.K. Roy v. India*, 1982). In Pakistan, the Supreme Court observed that there are many cases which possess political timbres but that cannot take a case away from the judicial scrutiny by the court. As the constitutional legitimacy of Yahya Khan was not a political question, the Supreme Court of Pakistan adjudged him to be a usurper (*Asma Jilani v. Punjab*, 1972). Again, in *Abdul Baqui Baluch v. Pakistan,* the Supreme Court of Pakistan decided that the question whether emergency has ceased to subsist is a political question which is outside the jurisdiction of the courts to adjudicate (*Abdul Baqui Baluch v. Pakistan,* 1968). Likewise, the Privy Council held the Ian Smith's government unconstitutional (*Madzimbamuto v. Lardner-Burke*, 1968). Recently, in Malaysia, the Privy Council held that the executive government may be instructed to prescribe the President for withdrawing the emergency (*The Cheng Poh v. Public Prosecutor*, 1980).

Political Question Doctrine: Justifiability

The term "justifiability" pertains to the perimeter of law and judgment and is connected with the question of what matters are qualified enough to be the subject matter of juridical regulations and court's decision (Bendor,

1997). Being closely connected with the theory of separation of power the doctrine postulates that in order to maintain independence and autonomy of the three organs of the government, neither of the organs should interfere in the workings of the other and each of the organs is supreme in its domain (*Kilbourn v. Thompson*, 1880). As such the doctrine asserts that the political branches must ascertain policy and resolve political disputes and the judiciary, being not a political organ, must not take into consideration these non-justifiable issues (*Fong Yue Ting v. U.S.*, 1893). Moreover, justifiability also related to the arena under which the law and judiciary can smoothly operate. As regards political questions, the justifiability refers to limits that the judicial authority cannot supersede especially on matters the adjudication of which are left at the jurisdiction of the executive or legislative organs of the government. For instance, matters like emergency, foreign affairs and state security. The doctrine seldom deals with the question of justifiability as to periphery of statute rather it focuses more on the province of the court to resolve cases particularly political cases. Jesse H. Choper suggested four standards for ascertaining whether to banish questions of interpretation to the political branches as per constitution. First, the Court should refrain from deciding questions where there is a textual commitment to a coordinate political department that is, when the constitution itself is interpreted as clearly referring the resolution of a question to an elected branch. Second, pursuant to a functional rather than a textual approach, when judicial review is thought to be unnecessary for the effective preservation of our constitutional scheme, the court should decline to exercise its interpretive authority. Third, the court should not decide issues for which it cannot formulate principled coherent tests as a result of a lack of judicially discoverable and manageable standards. Finally, it would be tentatively suggested that constitutional injuries that are general and widely shared are also candidates for being treated as political questions. These four criteria have a common thread and they identify questions either that the judiciary is ill-equipped to decide or where committing the issue to some political branch promises a reliable, perhaps even a superior, resolution (Choper, 2004). The political question doctrine since its birth ensured its justifiability in a court of law by making constitutional issues to be settled particularly by government's political organs and not by the judicial authority. It further causes the political issues non-justifiable on the basis of Baker formula (*Baker v. Carr*, 1962). In a number of cases Lower Federal courts dismissed cases on the basis of this doctrine (*Spectrum Stores, Inc. v. Citgo Petrol. Corp.*, 2011). Likewise, certain disputes were dismissed under this doctrine by alleging that the adjudication might prejudice the foreign policy interests of the United States (*Al-Shimari v. CACI Premier Technology, Inc.*, 2014).

Again, lower court also held in other cases that discretionary military determinations are committed textually to the political authorities and the courts have deficiency regarding manageable standards for reviewing them. For instance, a District Court in the D.C. Circuit dismissed a case which challenged the tasks of the government "kill lists" referring it as a political question (*Al-Aulaqi v. Obama*, 2010). The court deciding it cannot resolve the claim due to the absence of judicially manageable standards. Moreover, in *El-Shifa v. United States*, the D. C. Court of Appeals decided that a case wanting review of the President's decision to launch an attack on a foreign target rendered a non-justifiable political question. The court resolved by saying that the political question doctrine debarred courts from assessing the merits of the President's decision to launch an attack on a foreign target. And this green doctrine sanctioned the judiciary to refuse to adjudicate political issues regardless of the question of whether it was actually under duty to solve the dispute (*El-Shifa Pharmaceutical Industries Co. v. United States*, 2010). Finally, it can be said that a political question is non- justifiable when the subject matter is of such a nature that the ordinary provision of judicial review is not applicable provided the other obstacles to justifiability exits (Rutledge, 1947). Furthermore, the subsistence of a political controversy does not *ipso facto* debar a court from taking cognizance of such a matter. Only a few issues contained in that case are left outside its jurisdiction (Prize Cases, 1862). Obviously, where issues of constitutional right are concerned the doctrine disappears and the court holds the ultimate authority to expound of the constitution, which is supreme in theory (*Marbury v. Madison*, 1803).

Political Question Doctrine and Judicial Self-Restraint: The Experiences of the Supreme Court of Bangladesh

(i) Application of Political Question Doctrine in Bangladesh: Judicial Approach

Before considering the judicial approach towards the political question doctrine, it would to some extent be advantageous to consider the status and role of judiciary in a democratic society. Among the other branches of the state, the judiciary is the least perilous organ possessing neither wish, nor strength and no pursue but only judgment (Bickel, 1986). Although the critics argue that judges are not powerful in every matter due to their lack of constitutional legitimacy and institutional capability yet in practice they have a definite political role and can efficiently manage political issues and make effective social reforms. Moreover, the concept of non-interference in political cases is of no place in modern jurisprudence. In

reality every legal dispute is politicized (Allison, 1994) and judiciary being the guarantor of constitutional supremacy, it has to realize constitutional goals through active performance (Mason, 1996). Even in Bangladesh, the fragile judiciary also tries to expose itself as a mastodon for ensuring constitutionalism. As Judges are duty bound by law and precedent to guide the nation in shaping its destination within the legal and constitutional framework they have to look into the matters which could have been solved otherwise then by the courts (*SAS Bangladesh Ltd v. Engineer* Mahmud-ul *Islam*, 2004). In another case Kamal, J says, whenever the executive or legislature attempts to deviate from the constitution, the higher judiciary is under obligation to push them back to the constitutional circle by providing essential guidelines (*Secretary, Ministry* of *Finance v. Masdar Hossain*, 1999).

In truth, the justifiability concept faced substantial challenge after the inception of the political question doctrine in the legal domain of Bangladesh. A close scrutiny of the cases incorporating the doctrine discloses that the judiciary frequently applies either of the following two approaches:

A) Restrictive Approach

The acceptance of this approach by the judicial authority in Bangladesh indicates that if a political body is permitted to exercise powers, either by the constitution or by the legislation and legitimately exercised the power as per the terms, substance and objectives attached to it, thereafter the judiciary lacks competency to trespass into the matter. In *Dulichand Omraolal v. Bangladesh,* the court viewed with regard to the constitutional legitimacy debate of Yahya Khan that if the justness or legitimacy of a law could otherwise be determined then the court should refrain itself from responding to such a political question (*Dulichand Omraolal v. Bangladesh*, 1981). In fact, under this approach due to the lack of any constitutional or legislative force the court put on the clothes of judicial self-restraint and often tries to escape its role towards the adjudication of political issues leaving it open to the mercy of the politicians. Similarly, in the case of *Khondaker Modarresh Elahi v. Bangladesh*, the court thought that this political issue should in all fairness be decided by the politicians (*Khondaker Modarresh Elahi v. Bangladesh*, 2001). Further, in *Abdul Mannan Bhuiyan* and another *v. State,* the court in exercise of its judicial self-restraint declined to enter into the political question of virtues and vices of hartal and strike in the absence of any constitutional imperative or compulsion (*Abdul Mannan Bhuiyan* and another *v. State*, 2008).

B) Permissive Approach

The most comprehensive opinion on permissive approach is that once the court is entrusted with justifiability under the constitution or statute, it cannot exercise its discretionary power of denial of jurisdiction on the ground that the matter as to which the jurisdiction has been conferred is a political question. In *Idrisur Rahman v. Bangladesh*, it was held that the constitutional system does not justify the applicability of the political question doctrine (*Idrisur Rahman v. Bangladesh*, 2008). Likewise, in *Rafique Hossain v. Speaker, Bangladesh Parliament*, the court held that the legality of a non-MP minister's speaking on a matter unrelated to his portfolio and the speaker's ruling on a constitutional issue was held justifiable (*Rafique Hossain v. Speaker, Bangladesh Parliament*, 2002). Again, in matters like proclamation of emergency, the court gives priority to the decision of the executive authority, which does in no way mean that the court lacks competency to adjudicate due to the political question doctrine. In fine, it is absolutely clear that though in the earlier constitutional history of various countries of the world the courts were entrusted with judicial pronouncements in favor of the doctrine, later on they gave up their former approach towards this doctrine and adopted a generous and permissive approach. Currently, the judges around the world do not consent to the fact that they have no authority to decide an issue involving political question, rather they indisputably accepted that they should settle a legal issue impartial of its relevancy with political question. In the light of the above discussion, it can be said that unlike earlier times nowadays the judiciary plays a very active and unprecedented role towards adjudication of cases. Previously, the jurists and the judges gave emphasis on law and legal theory and not on moral concern for answering the question of justifiability of political issues while settlement. But at present the political question doctrine is of no existence in the real practice because of the advancement of affirmative behavior of the courts as regards the disputes whatever might be its nature whether political concern or execution concern, and imposing check on the whimsical attitude of the mighty executive and legislature and thereby eradicating all forms of injustices. Therefore, from the jurisprudential perspective it is obvious that the political question doctrine is submissive to judicial scrutiny. Moreover, it is wise and crucial to grant power upon the judiciary so as to try the accuracy of any activities of whatever nature by the judicial procedure and solve them under the mandates of the constitution.

(ii) Rise of Judicial Self-Restraint in Bangladesh: An Alternative to Political Question Doctrine

Judicial self-restraint is a principle of judicial interpretation whereby the judges are stimulated to keep down their authority to exercise individual power of striking down laws unless they are obviously unconstitutional. It requires the judges to hesitate while confronting with the question of whether or not to knock out any law although the term "obviously unconstitutional" is in itself open to debate. Being motivated by the principle of *stare decisis,* the principle of judicial self-restraint requires the court to pronounce its judgment on the basis of this principle. The principle frequently applies in the Supreme Court which has the authority to repeal or wipe out any laws on the ground of inefficacious, unfair or unconstitutional. It seeks to delimit the powers of a court to make fresh laws and policies and requires that it should be left to the other governmental institution to enact laws and decide policy matters so long they are performing their activities as authorized by the constitution. Often, a judge being judicially self-restrained has to resolve matters in a way that will affirm statutes enacted by legislatures. Such a judge by his qualified constructionism reveals solemn reverence to the separation of governmental disputes. The fact that court recognizes the contravention of constitutional provisions though it refuses to adjudicate the same can be designated as judicial self-restraint. While exercising the power of judicial review the judicial self-restraint follows two different approaches namely procedural or substantive. Procedural approach restrains a court from resolving legal and constitutional matters unless justice otherwise requires. Whereas the substantive approach requires a court to consider constitutional mandate, and to sanction and pronounce judgment invalidating political actions when it is satisfied that the elected organs have clearly violated the constitutional provisions. In a landmark case, where the constitutionality of some Pennsylvania state statutory provisions relating to abortion was challenged, the Supreme Court of the United States upheld the right to an abortion as a continuance of the decision of the Warren Court (*Planned Parenthood v. Casey*, 1992). Again, in *State of Rajasthan v. Union of India,* the court rejected the prayer alleging that it involved a political question and as such the court would not go into the matter (*State of Rajasthan v. Union of India,* 1977). Here, the court applied the principle of judicial self-restraint. Furthermore, in *S.R. Bommai v. Union of India,* the judges held that there are certain circumstances under which the political element dominates and judicial review is not possible (*S.R. Bommai v. Union of India,* 1994). Schwartz speaking about the application of political question doctrine and judicial self-restraint commented that the political question doctrine is itself an anomaly in a system in which government acts may ordinarily be weighed in the judicial

balance and if necessary, found constitutionally wanting. A good case can be made for restraining the doctrine to the field of foreign affairs. It is one thing to hold that there must be judicial self-limitation in cases bearing directly on the transaction of external relations. It is quite another to use the political question doctrine as a formula to avoid decision in cases involving only internal affairs. If there is one principle that is fundamental in the constitutional system, it is that of having the judiciary as the ultimate arbiter on all domestic constitutional questions. That indeed, is what Americans normally mean by the rule of law (Schwartz, 1979).

If we look into the scenario of Bangladesh, the government of Bangladesh is parliamentary in nature having a flexible separation of power so as to avoid controversies regarding difference with other branches of the government. The inquiry on whether a certain government is basically constitutional one is a question to be determined with reference to the constitution itself. Like other similar constitutional questions, this should be left outside the jurisdiction of the court unless the dispute between the parties demands such a solution. In cases of proclamation of emergency, election procedure, administrative action, the court has to affix great attention to the opinion of the executive branches which should not mean that it is incompetent to hear and adjudicate due to the political question doctrine. One of the prominent scholars Mahmudul Islam opined that there is no necessity to adopt and apply the political question doctrine rather the judicial body should be guided by the principle of judicial self-restraint in cases directly related to the external matters (Islam, 2012). In this connection, Afzal. C. J. opined that there is no allurement in the phrase "political question". Whereas the court's maintenance of judicial self-restraint is the absolute referee to determine whether in a particular case it is proper to take in hand the task of announcing decision on matters that may be designated as political (*Special Reference No 1*, 1995). In *Re MPs' Resignation (Advisory Opinion)*, the Appellate Division of the Supreme Court of Bangladesh was anxious to keep itself aloof from political controversies but not at the cost of its responsibility to resolve legal issues. The court was asked by the President to advise whether continuous boycotting of Parliament by opposition MPs for consecutive 90 days would render their seats vacant for being absent from Parliament for such a period, as continuously mandated in article 67(1) (b). Faced with knotty political crises, the whole nation was expecting the apex court to play its due role as the guardian of the constitution. The court picked-up the public expectation well and answered the reference affirmatively. Afzal, C.J. viewed that we are plainly at a loss to appreciate why the absence of the members of the opposition should not be construed as absence. Does it enhance the cause of constitutionalism by construing their absence as presence? That will be onerous for holding by-election if such a large

number of seats fall vacant at a time is no ground for giving a twisted meaning to the word 'absent' (*Constitutional Reference No 1*, 1995).

The principle of judicial self-restraint has been introduced to depolarize the courts and judges established by the Constitution of the People's Republic of Bangladesh. As for instance, article 94(4) of this Constitution announces that subject to the provision of this constitution the Chief Justice and the other judges shall be independent in the exercise of their judicial functions. Again, Article 116A stipulates that subject to the constitution, all persons employed in the judicial service and all magistrates shall be independent in the exercise of their judicial functions. Moreover, there are universally accepted legal norms that judges should refrain from participating in the activities of political groups and other organizations so that at the time of administering justice they could maintain liberty. Additionally, while trying cases they should be guided by statute only. In the same line, governmental institutions, parliament members, other officers of the government, political parties, political and public organizations and citizens should refrain from interfering with the workings of a judge or judicial body. Furthermore, the judiciary and executive branches of the government shall undergo liability as provided for by statute. This gives rise to the question about the instruments that judicial self-restraint should be maintained while resolving political questions which may arise in a court of law. The first and foremost instrument is the statute whereby the courts are established and their formation, efficiency and jurisdictions are described. Again, the rules under the statutes are also necessary to give a reply to the question about whether the concept of political question is the effective tool in determining the justifiability or non-justifiability of a case or ascertaining the decisions that should be reduced to the level of judicial review. The second instrument is the behavior and the case laws referring to the freedom and neutrality of the courts while disposing the cases within the organs of the political authority and assuring the constitutionality of the political system. In conclusion, a few observations on political question doctrine are-whether the legitimation of political questions is possible? Whether the political question can naturally be transformed into purely legal questions? May every legal question in its turn be transformed into political question? That would certainly open the unlimited possibilities to charge and criticize the courts as purportedly politicized and pass political decisions. Therefore addressing the political question doctrine as the most important thing is not to deny the possibility to investigate and to settle the political questions in a judicial way at all, but to consider what terms, conditions and procedures are required in order to allow political questions to be settled in the court, and in what cases solving of certain political questions has to be excluded from the competence of courts and when the

courts would be obliged to refuse to investigate such applications in order to clearly demarcate certain fields of politics and law. Moreover, when the rights of a citizen are infringed, the constitution has mandated adjudication of the right by the court. As there is no express mandate on the political question in our constitution or any law in operation, it is a sort of escaping duty on the part of the judicial authority by invoking the doctrine. If we interpret the constitutional provisions regarding allocation of powers among the state organs we will find that the doctrine has no place, rather article 106 authorizes the President to take opinion on matters of public importance not dividing whether political or not from the apex court. The preamble and articles 7, 26, 94(4), 102 which ensure the supremacy of the constitution are the deathblow on the political question doctrine. Therefore, it can be said that the principle of judicial self-restraint stands as a guide to the court and plot the vanishing points of the political question doctrine towards solving the political issues.

Conclusion

The political question doctrine since its inception in the United States legal arena through the *Marbury case* tried to establish the rigid theory of separation of power which required the judiciary to keep its hands off from the adjudication of political issues and other governmental policy decisions and left it to be decided by the executive and legislative branches of the state. The doctrine asserts that each of the three organs of the government is supreme in their field and therefore, must not be intervened by the other while performing their assigned functions. As such the political issues must be ascertained by the political branches of the government and the court should not spend its time over these issues. However, the six formulations uttered in the Baker case limits the scope of the doctrine and concludes that the doctrine must be applied with reference to the definite political issues of the elected representative organs and should not cover the ordinary political cases.

This article reveals that previously the Supreme Court of the USA in a number of disputes made the political question doctrine applicable to ascertain the justifiableness of cases and dismissed those accordingly. But afterwards they dispatch their earlier rigid practice and started to solve litigation irrespective of its relevancy with the doctrine. And that is why currently, the existence of political issues like emergency, foreign policy or state security do not make a case non-justifiable as a whole rather the higher courts of various countries of the world rarely invoke the doctrine to settle political disputes. Indeed, they rely more on the principle of judicial self-restraint to halt the courts authority to adjudicate policy

decisions unless they are obviously unconstitutional. In fact, the existence of political controversy does not altogether deprive a court from taking cognizance rather in such a situation the court keeps out some of the claims from its decision. However, a close scrutiny of the political cases of the United States of America, India, Pakistan and Malaysia makes it evident that in modern times the doctrine is applied in a very confined way to solve political disputes. And just because a case contains political fibers does not altogether take it away from the jurisdiction of the court.

The study further finds out that in the context of Bangladesh, where the concept of checks and balance among the three organs of the government is prevailing instead of the rigid separation of power, the political question doctrine has a limited scope. Rather the principle of judicial self-restraint is followed to resolve political cases. Moreover, the Constitution of the People's Republic of Bangladesh specifically authorizes the judges to be independent and impartial while performing their judicial functions. And the provisions under which the courts are formed and functioning in our country also discloses that there is no need of the political question doctrine instead the judicial self-restraint plays the vital role of an umpire to see whether any particular political issue is to be adjudicated by the court or not. Therefore, the prime object of incorporating the principle of judicial self-restraint in Bangladesh is not to debar the judicial investigation, trial and judgment of political issues, but to fix the criterion under which the court can deny such petitions for determining the arena of law and politics. Finally, it can be concluded by saying that there is no justification for the application of the political question doctrine in our constitutional system instead the principle of judicial self-restraint is to be observed by the court to decide what matters they should designate as political and stay away from adjudicating and what matters they should resolve irrespective of the question of their being political in nature.

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