JOURNAL OF THE INDIAN LAW INSTITUTE

VOLUME 54 APRIL-JUNE 2012 NUMBER 2

CONSTITUTIONAL ETHOS*

S.H. Kapadia **

Abstract

The political question/justiciability doctrine which was evolved with reference to the US Constitution is a matter of debate in India. The paper discusses how the anxieties attached to it can be resolved by textual and principled analysis of the relevant constitutional provisions rather than a formalist decision that the question is a political one, or not justiciable. The Indian Constitution provides the normative principles to guide the task of interpretation. And these principles help in narrowing the ambit of reasonable judicial disagreement.

Institutional justiciability – importance of the text of the Constitution

JUSTICIABILITY IS possibly the most open-ended and sensitive judge-made public law doctrine. A dispute is institutionally justiciable if it can be determined by law before a court. The question is not whether it is possible to decide the dispute by law in court but whether it is desirable to decide the dispute according to legal standards in court. Justiciability is a term dedicated to political question doctrine in UK and other common law systems including Israel. It is one of the judicial techniques used as a threshold barrier for review. In India, in the case of *State of Rajasthan* v. *Union of India*,[1] the expression used is "the prohibited field" which suggests adoption of the "doctrine of political question". Thus, political question doctrine is considered a threshold preliminary barrier designed to exempt courts from delving into the difficult issues involved which has to be applied before the merit review stage. Thus, when an issue is found to be non-justiciable, applicants cannot succeed; the strength of their arguments is immaterial *except* in the case of blatant illegality or manifestly unauthorized exercise of power or in case of rights based claims. However, in each of the above exceptions there must be infringement of

* Address at the Eleventh Indo-British Legal Forum Meet at London in June, 2012.

** Chief Justice of India.

1. 1977 (3) SCC 592.

protected human rights which does not enjoy the above type of immunity from review.

The political question/justiciability doctrine (hereinafter doctrine) is the most criticized rule in public law. It requires a hands-off judicial stance in certain fields of action, for example, in the appointment of judges in US and making of treaties. It is based on prudential criteria. In *Paul POE et al.* v. *Abraham ULLMAN,*[2] Frankfurter J observed that justiciability is "not a legal concept with a fixed content or susceptible of scientific verification."

This doctrine is a blend of constitutional requirement and policy considerations. However, the source is in policy, rather than in purely constitutional considerations. Under the American creed, the judiciary of US draws its legitimacy and powers from the Constitution; its limits likewise derive from the Constitution. The power of the judges is constitutional, and thus not only legitimate but also limited.

The doctrine was evolved with reference to the US Constitution and is the function of the separation of powers. Is such a doctrine an alibi for refusing to decide a legal controversy? Is it a device for transferring responsibility for a question or decision to another branch of the government or is in fact required by realities? If all constitutional questions turn on whether a governmental body has exceeded its powers, would the doctrine not prevent the court from enquiring into the above constitutional question? According to Holmes J a question becomes political by the judge's refusal to decide. However, the above doctrine got evolved because it was felt that judicial treatment of all issues brought before the court could lead to "a concentration of power" which will, in practice, nullify the other authorities' ability to function and thereby weaken "the separation of powers" doctrine. The doctrine is a matter of debate in India.

According to H.M. Seervai,[3] this doctrine is not applicable to India for following reasons : (a) US Constitution is based on a rigid separation of powers. (b) The doctrine is a function of "the separation of powers". (c) Judicial power is not vested in the judiciary in India. Supreme Court of India has advisory jurisdiction under article 143. It has legislative powers under sections 122 and 129 of the Civil Procedure Code (d) Radical difference in powers and position of US and Indian Presidents. In India, the real executive power is wielded by council of ministers.

This doctrine in US is a doctrine of jurisprudential avoidance, rather than of decision-making. The US Supreme Court developed this doctrine in terms

2. 367 US 497.

3. H.M. Seervai, *Constitutional Law of India* (4th edn. 1996).

of which the court could exercise a "Broad Discretion" not to decide certain matters. The doctrine does not flow from an interpretation of the Constitution, but out of prudence and not on construction or principle. There is a range of considerations that inform the said doctrine including lack of capacity of the court, a "suspicion" on the part of the court that the resolution of the dispute may be based on expedient considerations rather principled ones and, the court's sense of the "inner vulnerability of an institution which is electorally irresponsible".

The doctrine on political questions turns on the concept of separation of powers. However, there is no one concept of separation of powers. It has different nuances. Every constitutional democracy has its own conception of separation of powers and therefore the contours of separation of powers would depend upon text of the Constitution of each country. In Israel, there is *doctrine of institutional justiciability* under which access to courts is open on all issues, rather than relying on non-justiciability. However, the outcome would depend on court's discretion, *i.e.*, option of self-restraint.

In US, one of the sources of separation of powers in US Constitution comes from the power of the court to overturn a law made by Congress which was asserted in *Marbury* v. *Madison*.[4] However, the source of separation of power under the South African Constitution flows from power of the court to enforce the provisions of the Constitution. Thus, under the South African Constitution as under the Indian Constitution the court has to start with a clear mandate given by the Constitution and determine the constitutionality of any law or conduct that is challenged before it. Thus, there is no place for a portmanteau principle of non-justiciability on prudential concerns.

In the author's opinion most of the anxieties that animate the doctrine can be resolved by textual and principled analysis of the relevant constitutional provisions rather than a formalist decision that the question is a political one, or not justiciable. These are different approaches to judicial restraint. Courts should intervene only if it is shown that Parliament has not acted to fulfill its mandate. The court has to find a balance between avoidance of improper intrusions into the domain of the Parliament and fulfillment of the mandate of the Constitution.

Judicial restraint is important for the preservation of a democracy and constitutionalism. The focus should be on the interpretation of the text in the light of constitutional function and principle and not on the underlying political controversy in a case. *Thus, the doctrine is not consistent with the South African or the Indian constitutional framework*. The task of Supreme Court of India is to protect

4. 5 US 137.

the Constitution. Legislative or executive action that is inconsistent with the Constitution must be declared invalid. Protecting the Constitution will require deep engagement with contentious issues, but the focus, at least in relation to constitutional issues should remain on the text of the Constitution itself and not external political controversy. Judicial self-restraint, insofar as it requires a judge not to invalidate laws or executive action which run counter to his own political, social and economic views is the right judicial attitude. The political doctrine precludes the court from inquiring whether the governmental body has exceeded or abused its powers. All constitutional questions turn on whether power has been exceeded or abused. Hence, Indian courts have not adopted the doctrine. The *Rajasthan* case[5] was in context of article 356(5) which has been since deleted.

The idea that the court should develop principles with the overt or covert aim of preventing "domination" of the political system is quite a different project, and one that has no roots in the text of the Constitution.

Jurisprudence of rights

The hardest part of constitutional judging is giving contours and content to the open-ended guarantees in the Constitution. While interpreting the fundamental rights, the court must give interpretation which promotes the values of open and democratic society. Often the temptation is to gloss over the contours of the right and simply assert that there has been a breach. Rights are best given specific content in the light of the history and experience of the particular society in which they are enforced. But then experience of others is also relevant. Comparative jurisprudence helps us to understand how judges in other open and democratic society have developed the context of rights; however, keeping in mind the differences between the text of those Constitutions and one's own Constitution. Further, foreign jurisprudence warns the judge of pitfalls in interpreting a particular right.

Text demands careful analysis of the context of rights. For example, article 21 rights in the Indian Constitution are formulated in general terms. However, many of the rights [*e.g.* article 19(1)(a) or article 19(1)(g)] in the Constitution are subject to qualifications. These define the context of the rights, hence should not be treated as a saving provision or an exception. In other words, the ambit of the right is drawn from the qualifiers. These qualifiers limit the rights. In cases concerning the positive obligations borne by the state in respect of social and economic rights, the question is whether the state, in the light of its available resources, has introduced a legislative measure which is reasonable

5. *Supra* note 1.

and which is capable of achieving the progressive realization of the right. Thus, article 21A of the Indian Constitution has got to be interpreted in the light of articles 41, 45 and 46 of the Constitution.

Once it is determined that a right has been limited, the next question is of justifying the limitation – whether the limitation is "reasonable and justifiable" in an open and democratic society based on freedom and equality. According to the judgments of the South African Supreme Court the exercise depends on assessment "based on proportionality" on case to case basis.[6] Thus, the approach to limitation is, therefore, to determine the proportionality between the extent of the limitation of the right, considering the nature and importance of the infringed right, on the one hand, and the purpose, importance and effect of the infringing provision, taking into account the availability of less restrictive means available to achieve that purpose, on the other. The Canadian approach is different which requires three separate criteria: *firstly* that the legislative objective is sufficient to limit the fundamental rights; *secondly* that the measures adopted to meet the legislative objective be rationally connected to that objective and *thirdly* that the impairment of the right must be no more than is necessary to accomplish the legislative objective.[7] The Canadian test is similar to the "classification test" in article 14 of the Indian Constitution. Under the South African jurisprudence, if the limitation is not an invasive one, and the purpose is important, the fact that there may be less restrictive means to achieve that purpose will not result in the limitation being unjustifiable. According to the Supreme Court of India in matters of enforcement of socio-economic laws, statutory and programmatic obstacles concerning *weaker section*, defined on the basis of income, have to fall within the framework of the Constitution *subject to judicial review on the basis of reasonableness*, anti-discrimination and the extent of disadvantage.[8] Implicit in the Indian constitutional structure is an acceptance that rights are not absolute and that they may be limited as long as that limitation is justifiable and reasonable. A directive principle that limits a right constitutes a justifiable limitation of the right. Under the Indian Constitution, just like under Human Rights Act in UK, the first question in considering any constitutional challenge to a statutory provision is: whether the language of the provision is reasonably capable of bearing a meaning that would be consistent with the Constitution. Institutional comity warrants the desirability of avoiding a declaration of invalidity which at one level is an affront to the legislature that enacted the legislation. However, institutional

6. For example, see, *S* v. *Makwanyane* (CCT3/94) [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391; [1996] 2 CHRLD 164; 1995 (2) SACR 1 (6 June 1995).

7. For example, see *Egan* v. *Canada* [1995] 2 S.C.R. 513.

8. For example, see *M. Nagaraj* v. *Union of India* (2010) 12 SCC 526 [Emphasis added].

comity cannot be at the cost of "rule of law principle" that legislation should be clear and intelligible. Attaching a meaning to the words in a legislative provision that is different from the ordinary import of the words may impair the rule of law principle. One question, which, therefore, arises is – how far a court should go to find a meaning consistent with the Constitution in the face of the express language of the provision itself?

The question of remedies

Once a court concludes that a statutory provision is inconsistent with the Constitution, it has no choice but to declare the provision inconsistent. But the court has a range of choices as to the precise terms of the declaration of constitutional invalidity and any ancillary reliefs. The two obvious questions for a court relate to the scope of the order of invalidity and the effective date of the order of invalidity. For example, it is possible to narrow the scope of the order of invalidity by using the *jurisprudential technique of severance*. The second technique is of reading in. The unconstitutionality of a statute is remedied by reading additional words into a statutory provision. The third technique is *prospective overruling* if it is just and equitable to do so (for example, to minimize the disruption to the administration of justice by an order of constitutional invalidity). The fourth jurisprudential technique is to "read down" the impugned provision in order to save the enactment from getting struck down on the ground of its incompatibility with a specific provision in part III of the Indian Constitution.

Conclusion

The text of the Indian Constitution is very important in structuring the jurisprudence that emerges from the constitutional court. But that does not mean that the text of the Constitution determines the outcome of every dispute. But it simply means that the text of the Constitution is the most important starting point for judicial decision-making. Moreover, because the text itself provides the normative principles to guide the task of interpretation, judicial reasoning must display substantive engagement with those principles. By providing normative principles the text narrows the ambit of reasonable judicial disagreement.

Many of the disputes that come before the constitutional court(s) are the litigious manifestations of deep political and social contests. Yet the Indian Constitution does not permit the constitutional court(s) to abdicate its duty to determine disputes simply because of a sense of *institutional anxiety*. The Constitution requires the court to adopt a principled and consistent approach

to adjudication of constitutional disputes. In performing this task, the court(s) has to demonstrate that there is a difference between the judicial method for dispute resolution and political resolution of disputes. This has to be done by judgments of constitutional courts.

The challenges that face India in building the society envisaged in the Constitution's preamble are many and complex. Until the deep social inequality is eradicated, these challenges will persist. In seeking to meet them, India is fortunate indeed to have a constitutional text that continues to illuminate the way forward.