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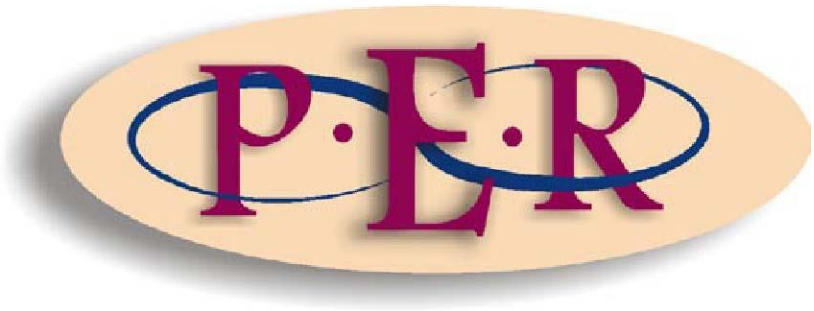

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SEPARATION OF POWERS IN GHANA: THE EVOLUTION OF THE POLITICAL QUESTION DOCTRINE

MO Mhango*

1 Introduction

In most constitutional democracies, political disputes or contestations will likely end up in the courts. When this happens, the principles of judicial independence and separation of powers are threatened. As one South African judge recently warned in *Mazibuko v Sisulu*[1] there is a threat to judicial independence when the judiciary is drawn in to resolve political questions that are beyond its competence or jurisdiction.[2] He further said:

> An overreach of the powers of judges, their intrusion into issues which are beyond their competence or intended jurisdiction or which have been deliberately and carefully constructed legally so as to ensure that the other arms of the state deal with these matters, can only result in jeopardy for our constitutional democracy. In this dispute I am not prepared to create a juristocracy and thus do more than that which I am mandated to do in terms of our constitutional model.[3]

The difficulty that confronts democracies is how to jurisprudentially resolve political questions that end up in the courts while at the same time preserving the separation of powers. In some democracies, notably Nigeria, Uganda, Ghana, United States and Israel, judiciaries have developed what is commonly referred to as the political question doctrine to jurisprudentially resolve political questions and define their relationship with other branches of government. The political question doctrine is a function of the principle of the separation of powers, and it provides that there are certain questions of constitutional law that are constitutionally committed to the

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1 *Mazibuko, Leader of the Opposition in the National Assembly v Sisulu MP Speaker of the National Assembly* 2012 ZAWCHC 189 (22 November 2012) (hereafter *Mazibuko v Sisulu*).

2 See *Mazibuko v Sisulu* 256E-J.

3 See *Mazibuko v Sisulu* 256H-J. Also see *Mazibuko, Leader of the Opposition in the National Assembly v Sisulu MP Speaker of the National Assembly* 2013 ZACC 28 (27 August 2013) para 83 (Jafta J minority opinion) (noting that "political issues must be resolved at a political level; that our court should not be drawn into political disputes, the resolution of which falls appropriately within the domain of other fora established in terms of the Constitution").

elected branches of government for resolution.[4] As a result, such questions are non-justiciable and require the judiciary to abstain from deciding them if doing so would intrude upon the functions of the elected branches of government.[5] The underlying theme is that such questions must find resolution in the political process.[6]

This article examines the development and current status of the theme of the political question doctrine in Ghanaian jurisprudence, which was developed from American jurisprudence. It begins by briefly discussing the history of the political question doctrine and its modern application in the United States of America. It then discusses the application of the political question doctrine in Ghana. It argues that while there are differences of opinion around the application of the political question doctrine, the doctrine is firmly part of Ghanaian constitutional law. It observes that the differences of opinion among judges in Ghana is over the proper application of the doctrine rather than whether or not it forms part of Ghanaian constitutional law. The article also discusses another related issue, which is the constitutional status of Directive Principles of State Policy in chapter 6 of the *Constitution* of Ghana and whether or not these principles are justiciable.

2 Brief history of the political question doctrine

The political question doctrine was first enunciated in *Marbury* by the United States Supreme Court when it held that the principle of the separation of powers makes certain questions non-justiciable because adjudicating those questions would intrude

4 See Redish 1984 *NWU L Rev* 1031; Breedon 2008 *Ohio NU L Rev* 523 (explaining that the purpose of the political question doctrine is twofold. The first purpose, which is rooted in the *Constitution*'s separation of powers, is to ensure proper judicial restraint against exercising jurisdiction when doing so would require courts to assume responsibilities which are assigned to the political branches. The second purpose is to ensure the legitimacy of the judiciary by protecting against the issuing of orders which courts cannot enforce); Wechsler *Principles* 11-14; Yoshino 2009 *Willamette Law Review* 559 (arguing that the political question doctrine is a doctrine of justiciability, noting that other such doctrines include standing, ripeness, mootness, and the bar on advisory opinions; that the justiciability doctrines underscore the idea that there can be rights without judicially enforceable remedies); and LaTourette 2008 *Rutgers LJ* 219 (arguing that the political question doctrine is a function of the separation of powers).

5 Redish 1984 *NWU L Rev* 1031; Breedon 2008 *Ohio NU L Rev* 523; Wechsler *Principles* 11-14; Yoshino 2009 *Willamette Law Review* 559; LaTourette 2008 *Rutgers LJ* 219.

6 Redish 1984 *NWU L Rev* 1031; Breedon 2008 *Ohio NU L Rev* 523; Wechsler *Principles* 11-14; Yoshino 2009 *Willamette Law Review* 559; LaTourette 2008 *Rutgers LJ* 219.

on the powers of the political branches of government.[7] In addition, *Marbury* is prominently known for holding that "… it is, emphatically, the province and duty of the judicial department to say what the law is".[8] With this holding *Marbury* laid the foundation for the exercise of judicial review in modern democracies across the globe. While the holding in *Marbury* is famously known to have claimed the power of judicial review, it also recognized limitations on that power and said:

> The province of the court is, solely, to decide on the rights of individuals, not to inquire how the executive, or executive officers, perform duties in which they have discretion. Questions in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.[9]

With this pronouncement the court in *Marbury* instructed the judiciary to dismiss cases if the constitution's text, structure, or theory signified that an issue should be decided by an elected branch of government.[10] Based on this articulation, *Marbury* recognized a clear distinction between legal questions that the judiciary must decide and political questions they must allow the political branches to remedy.[11] As Fallon has commented, *Marbury* not only represents the fountainhead of judicial review, but also "... furnishes the canonical statement of the necessary and appropriate role of the judiciary in the constitutional system founded on the principle of separation of powers".[12] It is for this reason that some commentators have defended the political question doctrine on the grounds of the separation of powers, arguing that a *Constitution* should be viewed as assigning responsibility for interpreting or enforcing certain constitutional provisions to the elected branches of government.[13]

Since *Marbury*, the Supreme Court has applied the political question doctrine in a number of cases.[14] The case of *Baker v Carr*[15] is perhaps the clearest articulation of

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7 *Marbury v Madison* 5 US (1 Cranch) 137 (1803) 170 (hereafter *Marbury*). For a discussion of the evolution of the political question doctrine, see *Atlee v Laird* 347 F Supp 689 (DCPa 1972) 692.

8 *Marbury* 177.

9 *Marbury* 170.

10 Pushaw 2002 *NCL Rev* 1192-1193.

11 See Shrewsbury 2002 *Mil L Rev* 166; Stephens 2004 *Tenn L Rev* 241, 245; and Price 2006 *NYU J Int'l L & Pol* 323, 331.

12 See Fallon 2003 *CLR* 5.

13 Chemerinsky *Constitutional Law* 77; Imam *et al* 2011 *Afr J L & Crim* 50; *Koohi v United States* 976 F 2d 1328 (9th Cir 1992); *EEOC v Peabody W Coal Co* 400 F 3d 774 (9th Cir 2005) 785.

14 See *Luther v Borden* 48 US 1 (1849); *Colegrave v Green* 328 US 549 (1946); *Gray v Sanders* 372 US 368 (1963); *Reynolds v Sims* 377 US 533 (1964); *Wesberry v Sanders* 376 US 1 (1964); *Avery v Midland Country* 390 US 474 (1968); and *Wells v Rockefeller* 394 US 542 (1969).

the criteria for determining what constitutes a political question. Briefly, the case involved the question of whether an equal protection challenge to malapportionment of state legislatures is a non-justiciable political question. The court in *Baker v Carr* set out what could be described as the modern articulation of the political question doctrine and ruled that a determination of whether state malapportionment of state legislatures violated the plaintiffs' equal protection rights under the United States *Constitution* was not a political question.[16] Justice Brennan, who wrote for the majority in *Baker v Carr*, announced six criteria for assessing when a case may be dismissed under the political question doctrine.[17] These criteria are:

> [1] textually demonstrable constitutional commitment of the issue to a coordinate political department; [2] or a lack of judicially discoverable and manageable standard for resolving it; [3]or the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion; [4] or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; [5] or an unusual need for unquestioning adherence to a political decision already made; [6] or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[18]

According to Justice Brennan, the existence of one criterion is sufficient to invoke the political question doctrine. However, Justice Brennan emphasised the limited reach of the political question doctrine so that "... it is used sparingly in the context of a demonstrable political question devoted to the elected branches and not simply to cases that involve political issues".[19] Further, Justice Brennan explains that the

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15 *Baker v Carr* 369 US 186 (1962) (hereafter *Baker*).

16 *Baker* 197-198.

17 *Baker* 217.

18 *Baker* 217. Also see Tribe *American Constitutional Law* 96 (discussing the different strands of the political question doctrine announced in *Baker*).

19 *Baker* 217; Free 2003 *Pac Rim L & Pol'y J* 467, 489 (arguing that the political question doctrine does not allow courts to dismiss suits merely because they address controversial political issues); LaTourette 2008 *Rutgers LJ* 282 (arguing that given the complexities associated with anthropogenic global warming, and the highly politicized nature of the issue, there is an obvious concern that courts will continue to use the political question doctrine to ward off otherwise justiciable controversies that relate to climate change); Barkow 2002 *Colum L Rev* 253, 262-263 (discussing the prudential strand of the political question doctrine and its problems arguing that it allows courts to avoid rampant activism by staying out of certain matters); Fickes 2009 *Temp L Rev* 525, 531 (noting that the judiciary can hear politically charged cases without invoking the political question doctrine, and discussing the case of *Bush v Gore* 531 US 98 (2000), which was heard even though it involved political questions); Willig 2010 *Cardozo L Rev* 723, 732 (arguing that it is a mistake to assume that every case which touches on foreign policy is nonjusticiable); Chase 2001 *Cath U L Rev* 1045, 1055 (observing that although recognising that the political question doctrine serves to protect the separation of powers doctrine, the adjudication of certain

benefit and purpose of the political question doctrine is to preserve the separation of powers and minimise claims that have the potential to undermine this principle.[20] Some members of the United States federal bench have gone so far as to suggest that the political question doctrine serves to prevent the federal courts from intruding unduly on certain policy choices and judgments that are constitutionally committed to the United States Congress or the executive branch.[21] According to this view, a nonjusticiable political question exists when, to resolve a dispute, a court must make a policy judgment of a legislative or executive nature, rather than resolve the dispute through the application of the law.[22]

A further benefit of the political question doctrine is that it minimises judicial intrusion into the operations of the other branches of government and allocates decisions to the branches of government that have superior expertise in particular areas. Scharpf has been an advocate of this view and has argued, for example, that the Supreme Court has rightly treated many constitutional issues concerning foreign policy to be political questions because of the greater information and expertise of the other branches of government.[23] Nearly four decades ago Bickel and Scharpf offered one of the most influential academic defences of the political question doctrine. In their commentaries, Bickel and Scharpf treat the political question doctrine as one of the devices that the judiciary utilise to define the relationship with other branches and acknowledge that courts share responsibility for interpreting a *Constitution* with the other branches of government.[24] According to Bickel and Scharpf, entangling the courts with the other institutions of the political system in ways that would not benefit the nation is imprudent.[25] For Bickel and Scharpf, the

claims remains possible because the political question doctrine does not prevent a court from hearing a case simply because it involves a political issue).

20 *Baker* 217; Tribe *American Constitutional Law;* Free 2003 *Pac Rim L & Pol'y J* 467, 489; LaTourette 2008 *Rutgers LJ* 282; Barkow 2002 *Colum L Rev* 253, 262-263; Fickes 2009 *Temp L Rev* 525, 531; Willig 2010 *Cardozo L Rev* 723, 732. Also see *Lane v Halliburton* 529 F 3d 548 (2008).

21 *Koohi v United States* 976 F 2d 1328 (9th Cir 1992).

22 *EEOC v Peabody W Coal Co* 400 F 3d 774 (9th Cir 2005).

23 Scharpf 1996 *Yale LJ* 517, 567, 583-584.

24 Bickel *Least Dangerous Branch* 183-197 (advocating for the prudential political question doctrine); Scharpf 1996 *Yale LJ* 517, 538.

25 Bickel *Least Dangerous Branch* 183-197; Scharpf 1996 *Yale LJ* 517, 538.

political question doctrine provides the Supreme Court with techniques for refraining from deciding cases on the merits when doing so would be unwise.[26]

Since *Baker v Carr* was decided, the Supreme Court has dismissed cases on the basis of the political question doctrine. The first notable case was *Gillian v Morgan*,[27] where the Supreme Court ruled that courts should not examine the training of the Ohio National Guard because doing so would invade critical areas of responsibility vested by the Constitution in the legislative and executive branches of government.[28] In a second case, *Nixon v United States*,[29] the Supreme Court ruled that the impeachment of a judge was a political question and therefore not justiciable.[30] Despite the fact that the Supreme Court has not invoked the political question doctrine in recent years, federal cases reveal that lower courts frequently apply the doctrine in the adjudication of constitutional cases.[31] Based on the analysis of these federal cases, it could be argued that the discourse around the political question doctrine among judges and academics has centered on ensuring a consistent

26 Tushnet 2002 *NC L Rev* 1203-1204.

27 *Gilligan v Morgan* 413 US 1 (1973) (hereafter *Gilligan*).

28 *Gilligan* 6.

29 *Nixon v United States* 506 US 224 (1993) (hereafter *Nixon*). See Levinson and Young 2001 *Fla St U L Rev* 925 (discussing *Nixon*).

30 *Nixon 236*.

31 See Mulhern 1988 *U Pa L Rev* 97, 106 (defending the political question doctrine and noting that the doctrine is more prominent in the opinions of the lower federal courts). For some of the cases that demonstrate this frequent application of the political question doctrine, see *Gonzales-Vera v Kissinger* 449 F 3d 1260 (2006) (where the victims and survivors of human rights abuses carried out by the Chilean government brought action against the United States alleging torture). The Court of Appeals affirmed that the claims were non-justiciable under the political question doctrine. It reasoned that to evaluate the legal validity of the drastic measures taken by the United States to implement its policy with respect to Chile would require it to delve into questions of foreign policy textually committed to a coordinate branch of government); *Schneider v Kissinger* 412 F 3d 190 (2005) (where the Court of Appeals affirmed the lower court's decision to dismiss on the grounds that the claims involved non-justiciable political questions. In addressing concern about the effects of leaving political questions to the political process, the court reasoned that the lack of judicial authority to oversee the conduct of the executive branch in political matters did not leave executive power unchecked because political branches effectively exercise checks and balances on each other in the area of political questions); *Arakaki v Lingle* 423 F 3d 954 (9th Cir 2005); *Corriee v Caterpillar* 503 F 3d 974 (9th Cir 2007) 980, 982-984 (where the Israeli Defence Forces (IDF) ordered bulldozers directly from Caterpillar but the United States paid for them. The family members of individuals, who were killed when the IDF used bulldozers to demolish houses in Palestinian territories brought action against Caterpillar alleging that it provided the IDF equipment used in violation of international law. The court affirmed that the political question doctrine barred it from hearing the matter. It reasoned that allowing this action to proceed would necessarily require it to question the political decision to grant military aid to Israel); and *Schroeder v Bush* 263 F 3d 1169 (2001).

application of the doctrine.[32] While inconsistent application of any legal principle is not desirable, it can be expected in the development and application of a complex concept like the political question doctrine.[33] Courts always disagree and at times become unclear in the development and application of a significant number of legal principles but this does not mean the principles at issue are discredited or should be abandoned.[34] Due to its prominence, the political question doctrine has been adopted and applied in Ghana.

3 The application of the political question doctrine in Ghana

Like in the United States, the political question doctrine has been considered by courts in Ghana since the early 1980s.[35] However, not only have courts and legal commentators disagreed about its wisdom and validity, they have also varied considerably over the doctrine's scope and rationale.[36] In fact, they have even diverged over whether or not the doctrine is applicable under Ghanaian constitutional law, given the contested case authority that adopted it.[37] However,

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32 See Finkelstein 1924 *Harv L Rev* 338, 344-345 (noting that there are certain cases which are completely without the sphere of judicial interference. They are called political questions); and Redish 1984 *NWU L Rev* 1031-1032 (arguing that academic debate on the political question doctrine has centred on the principled use of the doctrine, and that the doctrine is very much alive in Supreme Court decisions).

33 See Jaffe 2011 *Ecology LQ* 1033, 1043-1063 (discussing recent cases applying the political question doctrine).

34 See Rautenbach 2012 *TSAR* 20, 28 (suggesting that the political question doctrine should not be adopted in South Africa because it is highly controversial in its land of origin).

35 It was first considered in *Tuffour v Attorney-General* 1980 GLR 637, 651-652 (hereafter *Tuffour*) (holding that "courts cannot enquire into the legality or illegality of what happened in Parliament. In so far as Parliament has acted by virtue of the powers conferred upon it by the Constitution, its actions within Parliament are a closed book").

36 See Asare 2006 http://www.ghanaweb.com/GhanaHomePage/NewsArchive/artikel.php?ID=113967 (arguing against the application of the political question doctrine in Ghana); *JH Mensah v Attorney-General* 1996-97 SCGLR 320 (hereafter *Mensah*) (holding that the political question doctrine as applied in the United States is not applicable in Ghana); *Amidu v President Kufuor* 2001-2002 SCGLR 138, 152 (hereafter *Amidu*) (Kpegah dissenting opinion) (arguing that the political question doctrine is applicable to Ghana); *Ghana Bar Association v Attorney-General* 2003-2004 SCGLR 250 (hereafter *Ghana Bar Association*) (holding that the political question doctrine barred the Supreme Court from scrutinising the decision of the President to appoint the Chief Justice); *New Patriotic Party v Attorney-General* (*31st December Case*) 1993-94 2 GLR 35 SC (hereafter *31 December Case*); *Asare v Attorney-General (AP)* unreported case number 21/2006 (15 September 2006).

37 See Bimpong-Buta *Role of the Supreme Court* 129-130 (suggesting that there is no proper legal authority for the application of the political question doctrine in Ghana); Redish 1984 *NWU L Rev* 1031 (making similar observations about the disagreements of the application of the political question doctrine in the United States context); *Asare v Attorney-General (AP)* unreported case number 21/2006 (15 September 2006) (where the political question doctrine was most recently

there is agreement that the political question doctrine is a function of the separation of powers principle enshrined in the Ghanaian *Constitution*, and that its jurisprudential basis was influenced by case law from the United States Supreme Court.[38] Justice Kpegah, who was one of the strongest advocates of the doctrine in the Ghanaian Supreme Court, has offered the most comprehensive and convincing articulation of the basis of the political question doctrine under the Ghanaian *Constitution*.

In his dissenting opinion in *Amidu v President Kufuor*,[39] Justice Kpegah explains that the *Constitution* of Ghana is written and underpinned by the principle of the separation of powers. In his view, being a written *Constitution*, it has certain attributes. Among them is that the form of government envisages three important arms of government, namely the executive, legislature and judiciary.[40] Another attribute, maintains Justice Kpegah, is that these various arms of government have their respective power laid down with limits not to be infringed by any other arm of government.[41] Justice Kpegah reminds us that these limits expressed in the *Constitution* would be meaningless and serve no purpose if freely ignored or infringed by any arm of government.[42] Constitutional commentators agree with Justice Kpegah's pronouncement, arguing that:

> … by simultaneously dividing power among the three arms of government and institutionalising methods that allow each branch to check the other, a Constitution reduces the likelihood that one faction will be able to implement its political agenda in conflict with the wishes of the people.[43]

applied). See Wishik 1985 *Wash L Rev* 697 (discussing that scholars disagree on whether the political question doctrine exists at all, and if it does exist, on whether it is constitutionally defined or is a flexible, prudential tool to protect the court's authority).

38 See *Ghana Bar Association* (Hayfron-Benjamin concurring opinion) (explaining that although in *Tuffour*, the Supreme Court did not use the term non-justiciable political question, they reached conclusions which accord with justice Brennan's dictum in *Baker*).

39 *Amidu v President Kufuor* 2001-2002 SCGLR 138.

40 *Amidu* 153.

41 *Amidu* 153.

42 *Amidu* 153-54.

43 See Magill 2000 *Va L Rev* 1127; Calabresi and Larsen 1994 *Cornell L Rev* 1045, 1052 (arguing that a separation of personnel, as well as of institutions, is absolutely vital to the fostering of competition and to the de-concentration of power); Redish and Cisar 1991 *Duke LJ* 449, 451; Redish *Constitution As Political Structure*; Calabresi and Rhodes 1992 *Harv L Rev* 1153; Liberman 1989 *Am U L Rev* 313; Bruff 1979 *Yale LJ* 451; Strauss 1978 *Cornell L Rev* 488; Farina 1989 *Colum L Rev* 452.

Justice Kpegah goes on to explain that while the *Constitution* of Ghana is expressed as the supreme law of Ghana, there is an inherent indication in the text that the policy which informs or should inform any legislation and the desire to enact such legislation are matters for the political branches of government to determine.[44] On the other hand, Kpegah concedes that the interpretation and enforcement of the law passed by the legislature fall within the functions of the judiciary. In his view, the question of whether an Act of parliament is constitutionally valid or not is not a political question and the judiciary is not barred from deciding it.[45] He teaches us that when the judiciary examines whether parliament has breached the constitutional limits on its legislative powers it is not engaging in determining political questions, because judiciaries have the power to make these determinations. For Kpegah, this distinction is important and must be maintained.[46] One of Kpegah's colleagues on the bench, Chief Justice Archer, agreed with the importance of maintaining this distinction when he said:

> The Constitution gives the judiciary power to interpret and enforce the Constitution and I do not think that this independence enables the judiciary to do what it likes by undertaking incursions into territory reserved for Parliament and the executive. This court should not behave like an octopus stretching its eight tentacles here and there to grab jurisdiction not constitutionally meant for it. I hold that this court has no constitutional power to prevent the executive from proclaiming 31 December as a public holiday.[47]

Clearly, Justice Kpegah and other justices of the Supreme Court of Ghana are of the view that the political question doctrine did not evolve in American jurisprudence due to the fact that the courts were not expressly endowed with the power of judicial review in the United States *Constitution*.[48] Instead, they view the doctrine as

44 *Amidu* 154.
45 *Amidu* 154.
46 Justice Ngcobo agrees with the need to maintain this distinction and explains that "when a court decides whether parliament has complied with its express constitutional obligation, such as a provision that requires statutes to be passed by a specified majority, it does not infringe upon the principle of separation of powers or determine a political question". Ngcobo maintains that "what the court is simply doing in such a case is to decide the formal question of whether there was the required majority". See *Doctors for Life International v Speaker of the National Assembly* 2006 12 BCLR 1399 (CC) para 25 (hereafter *Doctors for Life International*).
47 *Amidu* 154 citing *31 December Case* 49.
48 *Amidu* 154.

a necessary function of the universal principle of separation of powers.[49] There are at least three Supreme Court decisions and one high court decision that either openly applied or considered the political question doctrine in post-1992 Ghana.

3.1 Upholding a legislative decision to declare a public holiday as a political question

The first case that considered the political question doctrine was *New Patriotic Party v Attorney-General* (*31 December Case*).[50] The plaintiff in this case was the New Patriotic Party (the New Party), the main opposition political party at the time. It brought a law suit seeking a declaration pursuant to section 2(1) of the *Constitution* 1992 that the planned public holiday and celebration of the coup d'état in Ghana on 31 December 1981 was in conflict with the *Constitution*. In its defence the government invoked the political question doctrine as articulated in *Baker v Carr* to bar the Supreme Court from adjudicating the matter. The government argued that the question of whether or not 31 December should be declared a public holiday was a non-justiciable political question.

In a five to four decision, the majority of the Supreme Court led by Justice Adade rejected the government's argument. It reasoned that since the "... Constitution is essentially a political document almost every matter of interpretation or enforcement which may arise from it is bound to be political, or at least to have a political dimension",[51] which fact cannot be a basis to deprive the Supreme Court of its judicial powers. Further, it explained that the Supreme Court has jurisdiction to determine political questions in exercising its constitutional duty of enforcing or interpreting the *Constitution* under articles 2(1)[52] and 130.[53] According to the

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49 *Amidu* 155. Also see Birkey 1999 *CLR* 1271 (arguing that the political question doctrine is a function of the separation of powers doctrine); Reich 1977 *Colum L Rev* 466 (arguing that the judiciary's reluctance to decide political questions stems from its respect for the separation of powers between the judiciary and the elected branches of government); and Harvey 1988 *J Marshall L Rev* 341, 356 (arguing that the political question doctrine is based on the separation of powers).

50 *31 December Case.*

51 *31 December Case* 65.

52 Section 2 of the *Constitution of the Republic of Ghana*, 1992 provides as follows: "(1) A person who alleges that - (a) an enactment or anything contained in or done under the authority of that or any other enactment; or (b) any act or omission of any person; is inconsistent with, or is in

Supreme Court, the question of whether the celebration of the 31 December seizure of power from the then Government of Ghana was in conflict with the *Constitution* required an interpretation of the *Constitution*, which the Supreme Court had jurisdiction to determine. It held that the political question doctrine was not applicable in Ghana because the Supreme Court as the ultimate interpreter of the *Constitution* pursuant to articles 2(1) and 130 may lawfully decide controversies of a political nature. There is general agreement among commentators upon the views of the Supreme Court in *31 December Case* that nothing prevents courts from deciding political controversies; however, that cases that are too political fall within the political question doctrine.[54]

Throwing his weight behind the majority decision, Justice Amua-Sekyi made the following observation about the reach of the Supreme Court's powers under the *Constitution*:

> It was said that the issue is a political one that the plaintiff ought to have made its complaint to Parliament. However, there is nothing to stop it from making a legal issue of it and coming to this court for redress. As the fundamental law, the Constitution controls all legislation and determines their validity. It is for the courts to ensure that all agencies of the state keep within their lawful bounds.[55]

Evidently, Justice Amua-Sekyi views Supreme Court powers as broad enough to encompass political questions. On the other hand, the minority view was that the issue before the Supreme Court was a political question and more appropriate for the executive and legislature to determine. In her powerful dissenting view, Justice

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contravention of a provision of this Constitution, may bring an action in the Supreme Court for a declaration to that effect."

53 Section 130 of the *Constitution* provides in pertinent as follows: "The Supreme Court shall have exclusive original jurisdiction in - (a) all matters relating to the enforcement or interpretation of this Constitution; and (b) all matters arising as to whether an enactment was made in excess of the powers conferred on Parliament or any other authority or person by law or under this Constitution."

54 See Free 2003 *Pac Rim L & Pol'y J* 489; LaTourette 2008 *Rutgers LJ* 282 (arguing that the political question doctrine can be used to avoid deciding cases that are too complicated or politically charged); Fickes 2009 *Temp L Rev* 531 (arguing that the Supreme Court's willingness to determine the most politically contentious issues in recent years demonstrates that the courts will not shy away from resolving legal disputes merely because they touch upon politically controversial issues); Willig 2010 *Cardozo L Rev* 732; Chase 2001 *Cath U L Rev* 1055; May 2008 *Denv U L Rev* 919, 953 (arguing that a political issue and a political question are two different things. The former allows judicial oversight; the latter suggests that overriding separation of powers concerns warrant judicial restraint); Ekpu 1996 *Ariz J Int'l & Comp L* 1.

55 *31 December Case* 130.

Bamford-Addo reasoned that "... the fixing of 31 December as a public holiday was not offensive to the Constitution but a policy choice".[56] According to Justice Bamford-Addo, any government has the freedom to adopt a policy choice, through legislation, to scrap or insert 31 December from the list of public holidays in the legislation.[57] Thus, since the fixing of 31 December was a policy choice, the minority view was that the political question doctrine barred the Supreme Court from deciding the matter as a means of demonstrating respect to the other arms of government. In his support of the minority views, Justice Archer defended the theme of the political question doctrine and reasoned that:

> I think if the order is granted, it would amount to judicial officiousness - poking our noses into the affairs of Parliament and intermeddling with the prerogative of the executive by directing the government not to spend moneys approved by Parliament. Such a move clearly amounts to a violation of the doctrine of separation of powers which is the core of our Constitution.[58]

It is important to point out that while siding with the majority on the question of 31 December celebrations, Justice Hayfron-Benjamin differed from the majority on the broad question of whether the political question doctrine was applicable in Ghana. Justice Hayfron-Benjamin confidently stated that:

> The whole principle of a non-justiciable political question is an American formulation. While it may be relevant to our situation because it is a development from a written democratic Constitution, I think there are so few parallels between the two Constitutions on this principle that its application to our Constitution, 1992 must necessarily be limited. It seems to me therefore that by the nature of our Constitution the principle of a non-justiciable political question can only arise where the Constitution expressly commits a particular responsibility to some arm of government. A clear example may be the power of the President to appoint ambassadors under article 74(1) of the Constitution.[59]

Despite the ruling in *31 December Case*, the Supreme Court in *Ghana Bar Association v Attorney-General*[60] categorically held that the political question doctrine was applicable in Ghana.

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56 *31 December Case* 153.
57 *31 December Case* 153.
58 *31 December Case* 52.
59 *31 December Case* 179.
60 *Ghana Bar Association.*

3.2 Upholding the appointment of a Chief Justice as a political question

In *Ghana Bar Association*, the President acting under articles 91(1)[61] and 144(1)[62] of the *Constitution* nominated Justice Abban as the Chief Justice for approval by Parliament. In turn, Parliament approved the nomination and Justice Abban was duly appointed by the President on 22 February 1995. The Ghana Bar Association (GBA) objected to this appointment. It brought a lawsuit before the Supreme Court in which it sought a declaration that Justice Abban was not a person of high moral character and proven integrity and thus not appointable as Chief Justice. The GBA also sought a declaration that the appointment of Justice Abban by the President as Chief Justice, as well as the advice of the Council of State and the approval by Parliament of his nomination, was unconstitutional.

The government defended the case by challenging the jurisdiction of the Supreme Court to hear the matter. Anyone who is familiar with Barkow's work on the political question doctrine would understand that the reason the threshold question raised by the government was directed at the courts' jurisdiction was that the "… political question doctrine requires courts at the outset of every case to determine whether the Constitution gives some interpretive authority to the political branches on the question being raised and to specify the boundaries of what has been allocated elsewhere".[63] Barkow argues that "… just as legislation may commit a question entirely to agency discretion, so too does the Constitution recognize that some constitutional questions rest entirely within the absolute discretion of the political branches".[64]

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61 Section 91(1) of the *Constitution of the Republic of Ghana*, 1992 reads as follows: "The Council of State shall consider and advise the President or any other authority in respect of any appointment which is required by this Constitution or any other law to be made in accordance with the advice of, or in consultation with, the Council of State."

62 Section 144(1) of the *Constitution of the Republic of Ghana*, 1992 reads as follows: "The Chief Justice shall be appointed by the President acting in consultation with the Council of State and with the approval of Parliament."

63 Barkow 2002 *Colum L Rev* 239.

64 Barkow 2002 *Colum L Rev* 239

In line with Barkow's thinking, the government's main argument in *Ghana Bar Association* was that by virtue of the principle of separation of powers enshrined in the *Constitution*, the appointment of Justice Abban as Chief Justice was a non-justiciable political question specifically committed to the President, Council of State and Parliament. On the contrary, the GBA argued that the Supreme Court, pursuant to articles 295 and 125(3) of the *Constitution*, has the final judicial power to determine whether any person or authority has properly performed his, her or its functions under the Constitution or any other law. As a result, the political question doctrine was not applicable to Ghana.[65]

Justice Kpegah, who wrote for the majority, held that the political question doctrine was applicable to Ghana. He reasoned that the doctrine was implicit in the concept of the separation of powers, where certain functions are committed to a specific branch of government. In such a constitutional design, he reasoned, a political question cannot evolve into a judicial question.[66] In support of Justice Kpegah, Weinberg has argued that in "a system where government is composed of three co-equal branches, the interpretation and enforcement of the constitutional law cannot be entrusted entirely to the judiciary or the elected branches" but must be understood as a shared responsibility.[67] To a great extent, this view is shared by Barkow. In her view, the political question doctrine "… reflects a constitutional design that does not require the judiciary to supply the substantive content of all constitutional provisions".[68] Consistent with these views, Justice Kpegah held that article 144 of the *Constitution* committed the appointment of the Chief Justice to the executive branch and legislative branch, and that any attempt by the Supreme Court to claim a power to be able to declare null and void the appointment of the Chief Justice would justly be described as a usurpation of the constitutional functions of both the executive and legislative branches.[69] Kpegah was convinced that by

65 Defenders of the political question doctrine oppose arguments like this one raised by the GBA, which presuppose that the judiciary has the final say on the interpretation of the *Constitution*. They argue that the judiciary shares interpretive authority with the other branches of government. See Mulhern 1988 *U Pa L Rev* 101; Bickel *Least Dangerous Branch* 183-197.

66 *Ghana Bar Association* 294.

67 See Weinberg 1994 *U Colo L Rev* 887.

68 Barkow 2002 *Colum L Rev* 239.

69 *Ghana Bar Association* 301.

assuming the jurisdiction to adjudicate the matter, the Supreme Court would be entering upon policy determinations for which judicially manageable standards were not available.[70] In other words, by assuming jurisdiction the Supreme Court would be supplying substantive content to the constitutional provisions concerning the appointment of a Chief Justice, which, in his view, it cannot do.[71]

In addressing the general question of the applicability of the political question doctrine in Ghana, Justice Kpegah reasoned that there were enough local authorities to support its application,[72] and since the political question doctrine was a concept that emanated from the notion of the separation of powers, the Supreme Court ought to endeavour to apply it. Justice Kpegah laid down three common characteristics by which to determine whether a case raises a political question, namely: (1) does the issue involve the resolution of questions committed by the text of the Constitution to a co-ordinate branch of government; (2) would a resolution of the question demand that a court move beyond areas of judicial expertise; and (3) do prudential considerations counsel against judicial intervention.[73]

He criticized and dismissed the proposition by Justice Adade in the *31 December Case* that the political question doctrine does not apply to the United States Supreme Court, which reasoning Justice Adade employed to deny the application of that doctrine in that case. In his view, Justice Adade's majority opinion in the *31 December Case* was a very simplistic way to consider a serious legal concept such as the political question doctrine.[74] In support of Justice Kpegah, Justice Hayfron-Benjamin commented that the political question doctrine "… is certainly one of the

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70 In Nigeria appellate courts have taken a view similar to that of Ghanaian courts. See *Onuoha v Okafor* 1983 NSCC 494 (holding that the lack of satisfactory criteria for a judicial determination of a political question is one of the dominant considerations in determining whether a question falls within the category of political questions); and *Balarabe Musa v Auta Hamzat* 1983 3 NCLR 229, 247 (holding that the impeachment of a State governor was a political question not appropriate for judicial review. Justice Ademola reasoned that "impeachment proceedings are political and for the court to enter into the political thicket as the invitation made to it clearly implies in my view asking its gates and its walls to be painted with mud; and the throne of justice from where its judgments are delivered polished with mire"). Also see Mhango 2013 *AJLS* 249 (discussing the development and application of the political question doctrine in Uganda).

71 Barkow 2002 *Colum L Rev* 239.

72 *Tuffour* (Justice Sowah opinion); *31 December Case* (Archer opinion; and Jutice Hayfron-Benjamin opinion).

73 *Ghana Bar Association* 300.

74 *Ghana Bar Association* 294.

grounds upon which the jurisdiction of this court may be ousted".[75] He went on to say that *Tuffour*, which is cited as authority for the political question doctrine in Ghana, "… reached conclusions which accord with Justice Brennan's dictum in *Baker v Carr*".[76] While Justice Kpegah in *Ghana Bar Association* recognised the application of the political question doctrine in Ghana, he accepted the limits of its application and held that the mere fact that a lawsuit seeks the protection of a political right does not mean that it presents a non-justiciable political question.[77] The decision in *Ghana Bar Association* was considered in *Mensah v Attorney-General,* in which the Supreme Court reached a different conclusion about the application of the political question doctrine in that case.

3.3 Dismissing the appointment of cabinet ministers as a political question

In *Mensah v Attorney- General* the term of office of President Rawlings had ended on 6 January 1997. The next day, President Rawlings, who had been re-elected as President in the previous month, was sworn in as President for a second term of four years. Soon after the swearing in, it was announced that the President had decided to retain in office some of his previous ministers and deputy ministers. It was also announced that since the appointment of those retained ministers had been approved by the previous Parliament, there was no need for them to be reapproved by the new Parliament. That decision was opposed by the opposition party in Parliament. Subsequent to this announcement it was also announced that one of the retained Ministers, the Minister of Finance, would appear before Parliament to present the 1997 Budget Statement. Before the Minister could do so the leader of the opposition party Hon. Mensah filed a lawsuit in the Supreme Court. The Plaintiff asked the Supreme Court to declare, among other things, that the Constitution prevented anyone from acting as a Minister without the prior approval of the newly elected second Parliament. The government defended the lawsuit by arguing, *inter alia,* that the process by which Parliament exercised its powers such as the approval

75 *Amidu v President Kufuor* 148, citing *Ghana Bar Association.*
76 *Amidu v President Kufuor* 148, citing *Ghana Bar Association.*
77 *Ghana Bar Association* 295.

of ministerial nominations could not be questioned by the judiciary under the political question doctrine.

The Supreme Court, as per Justice Acquah, held that every presidential nominee for ministerial appointment, whether retained or new, required the prior approval of Parliament. Justice Acquah reasoned that unlike the United States Supreme Court which derives its power of judicial review through jurisprudential authority, the Supreme Court of Ghana derives its power of judicial review from articles 2 and 130 of the *Constitution*. Any limitation on that power, he argued, would have to find support in the language of those articles. On this point, Barkow has remarked that although judicial review is the norm, as Justice Acquah suggests, there are exceptions which are expressed in particular provisions in a *Constitution*.[78] In the American context, Barkow asserts that the *Constitution* carves out certain categories of issues that may be resolved as a matter of legislative or executive discretion.[79] Under this view of the political question doctrine, judicial abstinence is seen as constitutionally required and not discretionary.[80]

However, in his analysis Justice Acquah expressed some reservations about the political question doctrine. Specifically, he saw one potential interpretation of the doctrine which could be perceived as granting political immunity for breaches of the *Constitution* by the elected branches of government. In turn he offered his preferred understanding of the doctrine which, in his view, complied with Ghana's constitutional design. I call his preferred understanding the "compromised political question doctrine". He says:

78 Barkow 2002 *Colum L Rev* 247-248.

79 Barkow 2002 *Colum L Rev* 247-248

80 Barkow 2002 *Colum L Rev* 247-248; Wechsler 1959 *Harv L Rev* 9 (arguing that the only judgment that may lead to an abstention from decision is that the *Constitution* has committed the determination of the issue to another agency of government than the courts); Gouin 1994 *Conn L Rev* 759, 780, 796-797 (discussing the classical version of the political question doctrine and noting that the *Constitution* committed some constitutional issues to the political branches); Cutaiar 2009 *Loy LA L Rev* 393, 398 (arguing that the political question doctrine is a product of constitutional interpretation rather than judicial discretion).

> If by the political question doctrine, it is meant that where the Constitution allocates power or function to an authority, and that authority exercises that power within the parameters of that provision and the Constitution as a whole, a court has no jurisdiction to interfere with the exercise of that function, then I entirely agree that the doctrine applies in our constitutional jurisprudence. For this is what is implied in the concept of separation of powers. But if by the doctrine, it is meant that even when the authority exercises that power in violation of the constitutional provision, a court has no jurisdiction to interfere because it is the Constitution which allocated that power to that authority, then I emphatically disagree.[81]

I believe Justice Acquah's statement above is a perfect expression of what Cowper and Sossin identified as the difficulty with the political question doctrine, which lies in the failure by some jurists to distinguish between "… questions which the judiciary must resolve, no matter how politically sensitive, and those that raise separation of powers concerns and should therefore be dismissed by the judiciary".[82] It is possible that I have given Justice Acquah an unfair reading, but I cannot help but believe that there is a failure to appreciate the significance of the above distinction in Justice Acquah's reasoning.

In explaining the distinction that must be made in cases involving political questions, Redish offered a useful suggestion which (while made in the American context during the 1980s) addresses Justice Acquah's assertion above. Redish postulates that in those cases that raise separation of powers concerns and should be dismissed, the "… judiciary does not abdicate its power to interpret and enforce the Constitution"; rather it simply holds "… that nothing in the Constitution directs the political branch as to how to exercise its constitutionally granted power".[83] Redish further maintains that "… when the Constitution's framers intended that one of the political branches has discretion to act, the text says so, by vesting decision making power in those branches without simultaneously indicating the parameters of that

81 *Mensah* 368

82 Cowper and Sossin 2002 *Sup Ct L Rev* 343. Also see Price 2006 *NYU J Int'l L & Pol* 323; and May 2008 *Denv U L Rev* 919, 953 (arguing that a political issue and a political question are two different things. The former allows judicial oversight and the latter suggests that overriding separation of powers concerns warrant judicial restraint).

83 Redish 1984 *NWU L Rev* 1039. Also see *31 December Case* (Justice Adade) (arguing that "to refuse to hear a constitutional case on the ground that it is political is to abdicate our responsibilities under the Constitution and breach its provisions").

discretion".[84] In the South African case of *Doctors for Life International,* Justice Ngcobo accepts the distinction advocated by Redish. Ngcobo explains it this way:

> It seems to me therefore that a distinction should be drawn between constitutional provisions that impose obligations that are readily ascertainable and are unlikely to give rise to disputes, on the one hand, and those provisions which impose the primary obligation on Parliament to determine what is required of it, on the other. In the case of the former, a determination whether those obligations have been fulfilled does not call upon a court to pronounce upon a sensitive aspect of the separation of powers. It simply decides the formal question whether there was, for example, the two-thirds majority required to pass the legislation. By contrast, where the obligation requires Parliament to determine in the first place what is necessary to fulfil its obligation, a review by a court whether that obligation has been fulfilled, trenches on the autonomy of Parliament to regulate its own affairs and thus the principle of separation of powers.[85]

If the political question doctrine can be understood in this way, it becomes easier to see the flaw in Justice Acquah's stance.

In his pronouncement above, Justice Acquah addresses and accepts the application of the political question doctrine in circumstances where he claims the *Constitution* allocates power to the political branches and indicates the parameters for the exercise of such power. However, Justice Acquah fails to address the instances where the Constitution allocates power or discretion to the political branches without at the same time indicating the parameters of that discretion or power. By this failure Justice Acquah creates the impression that in those other instances the judiciary will have a final say concerning those constitutional questions. Barkow disagrees with this suggestion and correctly argues that the "constitution's structure and the limited powers of the judiciary require political branches to decide constitutional questions in many instances, and in such instances they have the same authority to make decisions as the judiciary itself has in other instances.[86]

Perhaps Justice Acquah would find consolation in the fact that "… the judiciary has the authority, through constitutional interpretation, to determine whether an issue presented a political question committed to the political branches to remedy or a

84 Redish 1984 *NWU L Rev* 1047.
85 *Doctors for Life International* 1414-1415.
86 Barkow 2002 *Colum L Rev* 320.

judicial question, which the judiciary must answer".[87] Redish was correct in noting that it is:

> … vital to distinguish between what he calls substantive deference, where the judiciary while retaining power to render final decisions on the meaning of the constitutional limits, nevertheless takes into account the need for expertise, and procedural deference, where the judiciary decides that resort to the courts constitutes the wrong procedure because the decision is exclusively that of the political branches.[88]

At least to some extent Redish's arguments and comments were directed towards the views of Justice Acquah and other like-minded jurists.

Notwithstanding Justice Acquah's failure to distinguish between justiciable and non-justiciable questions, there is something to celebrate about his perspective. He endorses the political question doctrine in Ghana and accepts, like some commentators, that certain constitutional provisions require deference to the other branches, but has reservations about accepting that in cases involving political questions absolute deference is required.[89] I describe Justice Acquah's position as a compromise political question doctrine because he accepts what Savitzky explains as the need to balance the judiciary's role in checking unconstitutional government action with its duty not to usurp the political power exercised by the people through the executive and legislative branches.[90] The problem, as I have tried to show, is that Justice Acquah, at the time of his writing, had not yet fully thought out the

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87 See Scharpf 1966 *Yale LJ* 538 (explaining that the basic idea of the political question doctrine is that it is an outcome of constitutional interpretation); Kelly 2010 *Miss C L Rev* 219, 224 (discussing the idea that the purpose of the political question doctrine is to bar claims that threaten the separation-of-powers design of the federal government, and thus a determination as to the justiciability of a claim is a delicate exercise in constitutional interpretation, not merely plugging facts into factors.); Barkow 2002 *Colum L Rev* 249; *Marbury* 167, 170-171.

88 Redish 1984 *NWU L Rev* 1048-1049.

89 Barkow 2002 *Colum L Rev* 244, 319 (arguing that the political question doctrine is part of a spectrum of deference to the political branches' interpretation of the *Constitution*. Barkow claims that the political question doctrine requires the judiciary to determine as a threshold matter in all cases whether the question before it has been assigned by the *Constitution* to another branch of government. This initial determination of how much deference is appropriate serves a valuable function because it reminds the judiciary that not all constitutional questions require independent judicial interpretation); and Mulhern 1988 *U Pa L Rev* 124-127 (discussing dissenting voices against the judicial monopoly and emphasising equal authority among the three branches on constitutional matters. Mulhern argues that there is no obvious reason why a court's assertion of judicial power should be any more authoritative than a President's assertion of executive power. Both are part of our constitutional tradition, and there is no apparent way to establish any priority between them).

90 Savitzky 2011 *NY L Rev* 2043.

practicalities of this balance, or may not have been convinced that the facts in *Mensah v Attorney-General* presented an opportunity to develop that balance.

Justice Aikins agreed with Justice Acquah's opinion in *Mensah v Attorney-General* and wrote his own concurring opinion. He dismissed the government's contention and held that the Supreme Court was entitled to decide questions of a political nature "… since in Ghana it is the Constitution and not Parliament which is supreme".[91] Further, Aikins held that any act of Parliament which is in conflict with the *Constitution* can be declared null and void even though the Act dealt with a political question.[92] While the political question doctrine was dismissed as not applicable in *Mensah v Attorney General*, in his concurring opinion Justice Aikins conceded that the doctrine was increasingly creeping into Ghanaian legal jurisprudence.[93] To further enhance this concession and solidify the political question doctrine in Ghana, Aikins distinguished *Tuffuor*, the first case that considered the political question doctrine in Ghana, from *Mensah v Attorney-General*.[94] This is an important development because as Bimpong-Buta has observed *Tuffuor,* together with the dicta from the opinions of Justices Archer and Hayfron-Benjamin in *31 December Case,* has been cited as authority in support for the application of the political question doctrine in Ghana.[95] In other words, by distinguishing *Mensah v Attorney-General* from *Tuffuor*, Justice Aikins' pronouncement can be read as bringing clarity in the law that the political question doctrine is applicable in Ghana.

3.4 Upholding a legislative decision to retain a Member of Parliament as a political question

The above jurisprudence reflects the Supreme Court's efforts to formulate a consistent political question doctrine for Ghana.[96] This jurisprudence has had

91 *Mensah* 344.
92 *Mensah* 344.
93 *Mensah* 341.
94 *Mensah* 348.
95 See Bimpong-Buta *Role of the Supreme Court* 129.
96 At least Justice Kpegah conceded that the Supreme Court has not been consistent in its application of the political question doctrine and other justiciability principles derived from the United States. He observes that the doctrine was applied in *Tuffour* without the court specifically saying so, but rejected in the *13 December Case* and subsequently applied in *Ghana Bar Association*, where the *13 December Case* was criticised. See *Amidu* 145-147.

influence in the lower court's application of the doctrine. One of the most recent lower court cases applying the political question doctrine is *Asare v Attorney-General.*[97] In this case, a member of Parliament Mr Eric Amoateng was arrested and detained in the United States for unlawfully importing narcotics into that country. Under the rules of Parliament, Mr Amoeteng sought leave of absence from Parliament, which was granted from 17 to 24 November 2005. Further, Parliament's Committee on Privileges considered the reasonableness of Mr Amoaeteng's absence from Parliament. On the strength of the criminal law principle that everyone is presumed innocent until proven guilty by a court of law, and the need to extend compassion to Amoaeteng due to the slow pace of his criminal trial in the United States, the Committee on Privileges recommended that Parliament allow Amoaeteng the required time to defend his criminal charges.

After some debate, Parliament approved this recommendation and decided to grant Amoaeteng a dispensation to be absent from Parliament indefinitely. This decision by Parliament was challenged by the plaintiff, Stephen Asare. The plaintiff's claim was that since the Speaker permitted Amoaeteng to be absent from 17 to 24 November only, Amoaeteng's seat became vacant by operation of law and neither the Speaker nor Parliament could grant any other dispensation. Therefore the High Court, in this case, was seized to determine whether Parliament had the authority to grant a member of Parliament a dispensation to be absent from Parliament indefinitely.[98]

Essentially the High Court had to determine at least two important related questions: firstly, whether the parliamentary seat of Amoaeteng became vacant by operation of law, and secondly, whether Parliament's decision to grant Amoaeteng a dispensation to be absent indefinitely from Parliament could be called into question on legal grounds as being unreasonable and unlawful. Justice Ayebi held that the political question doctrine applied in this case. In endorsing Justice Acquah's opinion in *Mensah v Attorney-General*, Justice Ayebi reasoned that "… it is parliament as the legislative arm of government which is mandated by the Constitution to determine

97 *Asare v Attorney-General (AP)* unreported case number 21/2006 (15 September 2006).

98 As Barkow puts it, the threshold question for every court, and in my view the High Court in *Asare,* should be to determine if the questions before it have been assigned by the *Constitution* to another branch of government. Barkow 2002 *Colum L Rev* 244.

the reasonableness or otherwise of Amoaeteng's explanation of his absence through the Committee on Privileges". Justice Ayebi found that this is what Parliament had done in this case. In his view "… the decision of Parliament will stand the test of time, and … it is a political question *intra vires* the Constitution and therefore not subject to judicial scrutiny".

To best illustrate the suitability of applying the political question doctrine in this case, Justice Ayebi employed the following hypothetical scenario and said:

> … suppose the member of Parliament in this case was involved in a fatal accident on this trip and he was only able to inform Mr. Speaker long after fifteen sittings of Parliament. Doctors attending to him determined that it will take some time for him to recover. Should the court declare an indefinite dispensation granted to such Member of Parliament in such circumstances by parliament as unreasonable? Consequent upon that, should the court declare the seat of the Member of Parliament vacant? I think not, he observed.[99]

Justice Ayebi's reasoning was that since Parliament found Amoaeteng's reasons for absence reasonable and granted indefinite dispensation in the particular circumstances of this case, that decision should not be subjected to judicial scrutiny.

While *Asare v Attorney-General* has been criticised, this criticism has centered on the failure of Justice Ayebi to properly justify why the political question doctrine should have determined the case.[100] In other words, Asare, who has expressed the most critical views against the decision in *Asare v Attorney-General*, agrees that the political question doctrine is applicable in Ghana, but that a court should offer convincing reasons for its application in any given case.[101] What seems to ignite Asare's critical views on *Asare v Attorney General* is that Justice Ayebi's opinion, in his view, does not justify or explain the rationale for allowing the political question doctrine to swallow the court's explicit powers in article 99(1)(a) of the *Constitution*.[102] Further, Asare criticises Justice Ayebi's failure to apply the three-prong test announced in *Ghana Bar Association* to the facts in the case. Presumably, had this been done Justice Ayebi would have been forced to justify the application of

99 *Asare v Attorney-General (AP)* unreported case number 21/2006 (15 September 2006).
100 *Asare v Attorney-General (AP)* unreported case number 21/2006 (15 September 2006).
101 *Asare v Attorney-General (AP)* unreported case number 21/2006 (15 September 2006).
102 *Asare v Attorney-General (AP)* unreported case number 21/2006 (15 September 2006).

the political question doctrine in the case.[103] Asare's criticism is reflective of the prevailing discourse around the doctrine in Ghana, namely that it forms part of Ghanaian law and *Ghana Bar Association* articulates how it ought to be applied. Therefore it seems clear from this discourse that the critical views against the recent application of the political question doctrine are not dismissive of the doctrine but are rather directed at what should be its proper application.

3.5 The justiciability of directive policies and certain provisions of the Constitution

What is clear from the above analysis is that the application of the political question doctrine requires an acceptance that there are certain constitutional questions or provisions that are not justiciable. This is why the doctrine is controversial. However, the issue of the justiciability or not of certain provisions of the *Constitution* of Ghana has been contested since the advent of constitutionalism in Ghana.[104] As commentators have observed, one of the areas where this issue has come to the fore is chapter 6 of the *Constitution*.[105] In particular, commentators note that Article 34(1), the opening of chapter 6, creates some ambiguity.[106] The article provides that:

> 34 (1) The Directive Principles of State Policy contained in this Chapter shall guide all citizens, Parliament, the President, the Judiciary, the Council of State, the Cabinet, political parties and other bodies and persons in applying or interpreting this Constitution or any other law and in taking and implementing any policy decisions, for the establishment of a just and free society.

The observation from scholars is that the ambiguity arose from the Consultative Assembly's reliance on the Report of the Committee of Experts on the Proposal for a Draft Constitution Ghana (Committee of Experts) to conclude that the Directive Principles in chapter 6 should not be justiciable.[107] The rationale for the inclusion of

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103 *Asare v Attorney-General (AP)* unreported case number 21/2006 (15 September 2006).

104 Quashigah date unknown http://www.icla.up.ac.za/images/country_reports/ghana_country_report.pdf 14.

105 Quashigah date unknown http://www.icla.up.ac.za/images/country_reports/ghana_country_report.pdf 14; and Atupare 2014 *Harv Hum Rts J* 71.

106 Quashigah date unknown http://www.icla.up.ac.za/images/country_reports/ghana_country_report.pdf; and Atupare 2014 *Harv Hum Rts J* 71.

107 Committee of Experts *Report* 97-97; *31 December Case* 149.

these Directives Principles in chapter 6 was explained by the Committee of Experts as follows:

> 94. The NCD report speaks of the need to include in the new Constitution 'core principles around which national political, social and economic life will revolve.' This is precisely what the Directive Principles of State Policy seeks to do. Against the background of the achievements and failings of our post-independence experience, and our aspirations for the future as a people, the principles attempt to set the stage for the enunciation of political, civil, economic and social rights of our people. They may thus be regarded as spelling out in broad strokes the spirit or conscience of the constitution. The Committee used Chapter Four of the 1979 Constitution as a basis for its deliberations on this subject.
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> 95. By tradition Directive Principles are not justiciable; even so, there are at least two good reasons for including them in a constitution. First, Directive Principles enumerate a set of fundamental objectives which a people expect all bodies and persons that make or execute public policy to strive to achieve. In the present proposals, one novelty is the explicit inclusion of political parties among the bodies expected to observe the principles. The reason for this is that political parties significantly influence government policy. A second justification for including Directive Principles in a constitution is that, taken together, they constitute, in the long run, a sort of barometer by which the people could measure the performance of their government. In effect they provide goals for legislative programmes and a guide for judicial interpretation.
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> 96. On the basis of the foregoing considerations, the Committee proposes as follows: The Directive Principles of State Policy are for the guidance of Parliament, the President, the Council of Minister, Political Parties and other bodies and persons in making and applying public policy for the establishment of a just and free society. The Principles should not of and by themselves be legally enforceable by any Court. The Court should, however, have regard to the said Principles in interpreting any laws based on them.[108]

According to some scholars, the problem is that the final text of the *Constitution* omitted to expressly declare that the Directive Principles are non-justiciable, which left open the question of whether or not that omission points to the conclusion of non-justiciablity.[109] Indeed, that omission has attracted distinct judicial pronouncements about the constitutional status of the Directive Principles. I discuss these pronouncements and how they relate to the application of the political question doctrine in Ghana.

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108 *31 December Case* 149.

109 Quashigah date unknown http://www.icla.up.ac.za/images/country_reports/ghana_country_report.pdf 14; and Atupare 2014 *Harv Hum Rts J* 95.

One of the earliest judicial pronouncements on the constitutional status of the Directive Principles was made in the *31 December Case*. As Atupare has observed, the judgment in the *31 December Case* on the justiciability of the Directive Principles was less dynamic.[110] On the part of the majority, only Justice Adade openly tackled the issue and said:

> I do not subscribe to the view that chapter 6 of the Constitution is not justiciable: it is. First, the Constitution as a whole is a justiciable document. If any part is to be non-justiciable, the Constitution itself must say so. I have not seen anything in chapter 6 or in the Constitution generally, which tells me that chapter 6 is not justiciable. The evidence to establish the non-justiciability must be internal to the Constitution not otherwise … we cannot add words to the Constitution in order to change its meaning. The very tenor of chapter 6 of the Constitution supports the view that the chapter is justiciable. As far as the judiciary is concerned, I ask myself the question: How do the principles guide the judiciary in applying or interpreting the Constitution if not in the process of enforcing them?[111]

What is more, Justice Adade took issue with the conclusion by the Committee of Experts that Directive Principles are traditionally non-justiciable. In his view, under chapter 4 of the *Constitution* 1979, Directive Principles were justiciable.[112] Adade noted that while the debates in the Consultative Assembly may demonstrate some intention to make the Directive Principles non-justiciable, he concluded that "... the intention was not carried into the Constitution, and the debates themselves are inadmissible to contradict the language of the Constitution."[113]

On the other hand, two justices wrote minority opinions on the justiciability of the Directive Principles in the *31 December Case*. Justice Abban found that the Directive Principles were not relevant to the subject matter before the court, and that reference to them was totally misconceived.[114] In her opinion, Justice Bamford-Addo unambiguously pronounced and reasoned that the Directive Principles:

> ... are not justiciable and the plaintiff has no cause of action based on these articles. Those principles were included in the Constitution, for the guidance of all citizens, Parliament, the President, judiciary, the Council of State, the cabinet, political parties or other bodies and persons in applying or

110 Atupare 2014 *Harv Hum Rts J* 95.
111 *31 December Case* 66-67.
112 *31 December Case* 69.
113 *31 December Case* 69.
114 *31 December Case* 102.

> interpreting the Constitution or any other law and in taking and implementing any policy decisions, for the establishment of a just and free society. The judiciary is to be guided, while interpreting the Constitution by only the specific provisions under chapter 6.[115]

Based on the above pronouncements, Atupare correctly commented that "... an important tension has emerged between the need to observe Directive Principles as legal duties of all government agencies and public officials as the inability of courts to directly enforce these Directive Principles."[116]Atupare is critical of the fact that no clear majority or minority view on the justiciability of Directive Principles emerged in the *31 December Case* because several justices addressed or failed to address the issue. He correctly points out that "it is unclear whether the majority of the Supreme Court subscribed to the pronouncements of Justice Adade that Directive Principles are justiciable or if Justice Bamford-Addo's rebuttal of that claim was endorsed by the justices."[117] Beneath Atupare's criticism is the notion that the issue of the justiciability of Directive Principles remained uncertain after the *31 December Case*. This is clear from his submission that "... with Justice Adade and Justice Bamford-Addo acting alone in advancing their respective views, the case did not reach a determination of whether the Directive Principles are justiciable."[118]

While I understand Atupare's concerns, these concerns were short-lived because later, in *New Patriotic Party v Attorney General* (*CIBA*),[119] the Supreme Court revisited the issue of the justiciability of Directive Principles and clarified the law. In *CIBA* the Supreme Court ruled that Directive Principles are not justiciable. Justices Ampiah and Akuffor, who wrote concurring opinions, openly found that Directive Principles are not justiciable, while Justice Atuguba described them as mere rules of construction.[120] Justice Bamford-Addo, who wrote for the majority, had a slightly nuanced view to the proposition that Directive Principles are not justiciable. She reasoned that:

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115 *31 December Case* 149.
116 Atupare 2014 *Harv Hum Rts J* 96.
117 Atupare 2014 *Harv Hum Rts J* 96.
118 Atupare 2014 *Harv Hum Rts J* 96.
119 *New Patriotic Party v Attorney General (CIBA)* 1997 SCGLR 729 (hereafter *CIBA*).
120 *CIBA* 752-761, 787, 791-803; Atupare 2014 *Harv Hum Rts J* 97.

> ... there are particular instances where some provisions of the Directive Principles form an integral part of some of the enforceable rights because either they qualify them or can be held to be rights in themselves. In those instances, they are of themselves justiciable also. Where those principles are read in conjunction with other enforceable provisions of the Constitution, by reason of the fact that the courts are mandated to apply them, they are justiciable. Further where any provision under chapter Six dealing with the Directive Principles can be interpreted to mean the creation of a legal right, ie a guaranteed fundamental human right as was done in article 37(2)(a) regarding the freedom to form associations, they become justiciable and protected by the Constitution.[121]

While the judgment in *CIBA* has been welcomed by some commentators,[122] Atupare has criticised the decision arguing that the majority opinions were indecisive about the justiciability of the Directive Principles.[123]

Unlike Atupare, I find that the judgment in *CIBA*, read together with the wisdom of the minority views in the *31 December Case*, clarified the constitutional status of Directive Principles. In my view the judgment in *CIBA* brought clarity to the law by holding that Directive Principles are in general not justiciable except when read with other justiciable provisions of the Constitution. As Justice Bamford-Addo puts it, the effect of this judgment is that "... having regard to the test of justiciability of any particular provision under chapter 6 of the Constitution, it is my view that each case would depend on its peculiar facts."[124] This is because the general rule is that Directive Principles are not justiciable and the court will have to determine, in every case, whether the exception as pronounced in *CIBA* applies. In fact, despite his criticism of the judgment in *CIBA*, Atupare concedes that the judgment in *CIBA* was clearer than that in the *31 December Case* on the question of the constitutional status of Directive Principles.[125]

If the judgment in *CIBA* is not sufficiently clear on the issue of the justiciability of Directive Principles, as suggested by Atupare, the Supreme Court decision in *Ghana Lotto Operators Association & Others v National Lottery Authority*[126] provides further clarity. In *Ghana Lotto Operators Association* the Supreme Court considered the

121 *CIBA* 745-747.
122 Nwauche 2010 *AHRLJ* 514 (suggesting that courts in Nigeria adopt the approach in *CIBA*).
123 Atupare 2014 *Harv Hum Rts J* 97.
124 *CIBA.*
125 Atupare 2014 *Harv Hum Rts J* 97.
126 *Ghana Lotto Operators Association v National Lottery Authority* 2007-2008 SCGLR 1088.

question of whether chapter 6 was justiciable or not. Justice Date-Bah, who wrote for the majority, reasoned that the "... starting point of analysis should be that all provisions in the Constitution are justiciable, unless there are strong indications to the contrary in the text or context of the Constitution."[127] However, Justice Date-Bah further explains that:

> ... there may be particular provisions in chapter 6 which do not lend themselves to enforcement by a court. The very nature of such a particular provision would rebut the presumption of justiciability in relation to it. In the absence of a demonstration that a particular provision does not lend itself to enforcement by courts, however, the enforcement by this court of the obligations imposed in chapter 6 should be insisted upon and would be a way of deepening our democracy and the liberty under law that it entails...This court will need to be flexible and imaginative in determining how the provisions of the chapter 6 are to be enforceable.[128]

While the ambiguity concerning the justiciability of the provisions of chapter 6 has been definitively addressed, Justice Date-Bah posits that there are certain provisions that do not lend themselves to enforcement by courts.[129]

Justices Date-Bah and Bamford-Addo's pronouncements in *Ghana Lotto Operators Association* and *CIBA* respectively are important ways by which Ghana's *Constitution* can be understood to recognize the application of the political question doctrine. My submission is that both Justice Date-Bah and Justice Bamford-Addo had in mind the applicability of the political question doctrine to Ghana's constitutional circumstances when they made their pronouncements above. In other words, the philosophical consideration which informed their pronouncement is the potential application of the political question doctrine.

There is another point that needs to be highlighted about the pronouncements by Justices Date-Bah and Bamford-Addo, which further demonstrates why Atupare's criticism is no longer germane. These pronouncements have brought clarity in the law as to whether Directive Principles are justiciable or not. The difference between their pronouncements is that Justice Date-Bah holds that there is a presumption of

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127 *Ghana Lotto Operators Association v National Lottery Authority* 2007-2008 SCGLR 1088 1099.

128 *Ghana Lotto Operators Association v National Lottery Authority* 2007-2008 SCGLR 1088 1106-1107.

129 Quashigah date unknown http://www.icla.up.ac.za/images/country_reports/ghana_country_report.pdf 14.

justiciability of the Directive Principles, which can be rebutted, while Justice Bamford-Add holds that the Directive Principles are presumed not justiciable unless read with other justiciable provisions of the *Constitution*. In essence, the two legal positions are not in conflict with each other because both of them recognize the potential that certain provisions of the *Constitution* may not be justiciable. To address the potential criticism from those who might argue that these pronouncements are in conflict with each other or indecisive about the constitutional status of Directive Principles, Justice Date-Bah explains that:

> The two positions are convergent in that, if a particular provision of chapter 6 does not lend itself for enforcement by action in court, then in our preferred approach, the presumption of justiciability would be rebutted; while, similarly, the case by case approach of Bamford-Addo would result in the court finding that the provision in question does not create an enforceable right. The advantage of the presumption of justiciability is that it provides a clear starting rule that is supportive of the enforcement of fundamental human rights.

Therefore, it is clear that the question of the constitutional status of Directive Principles is no longer uncertain, and that certain categories of constitutional issues may be resolved as a matter of legislative or executive discretion. This is why the political question remains relevant and part of Ghanaian law.

4 Conclusion

From the foregoing analysis, it is clear that the holding by the Supreme Court in *Ghana Bar Association* that the political question doctrine is applicable to the *Constitution* of Ghana has never been overruled.[130] *Ghana Bar Association* and the wisdom in *Mensah v Attorney General* and the *31 December Case* demonstrate that the political question doctrine forms part of Ghanaian constitutional law and, as in other countries where it is applied, it does not apply to every case involving a political question.[131] The Supreme Court has discretion (though interpretative) to determine which matters are committed to the political branches and can discard

[130] For a contrary view see Bimpong-Buta *Role of the Supreme Court* 134-135 (arguing that the criticism in *Ghana Bar Association* on the issue of the application of the political question doctrine could be read as having overruled the decision in the *31 December Case*).

[131] Free 2003 *Pac Rim L & Pol'y J* 489; LaTourette 2008 *Rutgers LJ* 282; Fickes 2009 *Temp L Rev* 531; Willig 2010 *Cardozo L Rev* 732; Chase *Cath U L Rev* 1055; Barkow 2002 *Colum L Rev* 253, 262-263.

them on that basis. I submit that *Ghana Bar Association* is such a case where the Supreme Court found that the questions in that case were properly committed to the political branches and decided to exercise restraint by applying the political question doctrine.

However, it is clear from the case law that courts acknowledge the importance of the political question doctrine in Ghana's constitutional democracy, which is underpinned by the principle of the separation of powers. It is also clear in these cases and academic commentaries that judges disagree about which questions are most appropriate for its application. In other words, the debate among judges in Ghana is not whether or not the political question doctrine forms part of Ghanaian constitutional law; rather, it is whether or when the doctrine should apply in a particular case. It is pointless, in my view, to question as others have done[132] *Tuffour* and other local authorities that have been used to justify the political question doctrine in Ghana.

132 *Asare v Attorney-General (AP)* unreported case number 21/2006 (15 September 2006) (arguing that both justice Abeyi and Kpegah improperly rely on *Tuffour* as the authority for the political question doctrine; that this doctrine was not an issue in *Tuffour*, nor was the holding in *Tuffour* an endorsement of or even a clarification of the doctrine); and the *31 December Case* (where Justice Adade found that the political question doctrine cannot have any application in Ghana). Also see Bimpong-But *Role of the Supreme Court* 128-135 (suggesting that the political question doctrine should not apply to Ghana).

BIBLIOGRAPHY

Literature

Atupare 2014 *Harv Hum Rts J*

Atupare A "Reconciling Socioeconomic Rights and Directive Principles with a Fundamental Law of Reason in Ghana and Nigeria" 2014 *Harv Hum Rts J* 71-106

Barkow 2002 *Colum L Rev*

Barkow R "More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy" 2002 *Colum L Rev* 237-336

Bickel *Least Dangerous Branch*

Bickel AM *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Yale University Press New Haven 1962)

Bimpong-Buta *Role of the Supreme Court*

Bimpong-Buta S *The Role of the Supreme Court in the Development of Constitutional Law in Ghana* (LLD-thesis University of South Africa 2005)

Birkey 1999 *CLR*

Birkey S "Gordon v Texas and the Prudential Approach to Political Questions" 1999 *CLR* 1265-1281

Breedon 2008 *Ohio NU L Rev*

Breedon K "Remedial Problems at the Intersection of the Political Question Doctrine, The Standing Doctrine and the Doctrine of Equitable Discretion" 2008 *Ohio NU L Rev* 523-566

Bruff 1979 *Yale LJ*

Bruff H "Presidential Powers and Administrative Rulemaking" 1979 *Yale LJ* 451-453

Calabresi and Larsen 1994 *Cornell L Rev*

Calabresi SG and Larsen JL "One Person, One Office: Separation of Powers or Separation of Personnel?" 1994 *Cornell L Rev* 1045-1157

Calabresi and Rhodes 1992 *Harv L Rev*

Calabresi SG and Rhodes KH "The Structural Constitution: Unitary Executive, Plural Judiciary" 1992 *Harv L Rev* 1153-1216

Chase 2001 *Cath U L Rev*

Chase C "The Political Question Doctrine: Preventing the Challenge of US Foreign Policy in *767 Third Avenue Associates v Consulate General of Socialist Federal Republic of Yugoslavia*" 2001 *Cath U L Rev* 1045-1079

Chemerinsky *Constitutional Law*

Chemerinsky E *Constitutional Law* (Aspen New York 2001)

Committee of Experts *Report*

Committee of Experts *Report of the Committee of Experts on Proposals for A Draft Constitution of Ghana* (Unknown publisher Accra 1991)

Cowper and Sossin 2002 *Sup Ct L Rev*

Cowper G and Sossin L "Does Canada Need A Political Questions Doctrine?" 2002 *Sup Ct L Rev* 343-370

Cutaiar 2009 *Loy LA L Rev*

Cutaiar T "*Lane Ex Rel Lane v Halliburton*: The Fifth Circuit's Recent Treatment of the Political Question Doctrine and What It Could Mean for *Commer v Murphy Oil*" 2009 *Loy LA L Rev* 393-398

Ekpu 1996 *Ariz J Int'l & Comp L*

Ekpu A "Judicial Response to Coup De'tat: A Reply to Tayyab Mahmud (From a Nigerian Perspective)" 1996 *Ariz J Int'l & Comp L* 1-2

Fallon 2003 *CLR*

Fallon R "Marbury and the Constitutional Mind: A Bicentennial Essay on the Wages of Doctrinal Tension" 2003 *CLR* 1-55

Farina 1989 *Colum L Rev*

Farina C "Statutory Interpretation and the Balance of Power in the Administrative State" 1989 *Colum L Rev* 452-528

Fickes 2009 *Temp L Rev*

Fickes A "Private and Political Questions: A Critical Analysis of the Political Question Doctrine's Application to Suits Against Private Military Contractors" 2009 *Temp L Rev* 525-560

Finkelstein 1924 *Harv L Rev*

Finkelstein M "Judicial Self-Limitation" 1924 *Harv L Rev* 338-364

Free 2003 *Pac Rim L & Pol'y J*

Free B "*Waiting Does v Exxon Mobole Corp*: Advocating the Cautious Use of Executive Opinions in Alien Tort Claims Act Litigation" 2003 *Pac Rim L & Pol'y J* 467-498

Gouin 1994 *Conn L Rev*

Gouin MD "*United States v Alvarez-Machain*: Waltzing with the Political Question Doctrine" 1994 *Conn L Rev* 759-781

Harvey 1988 *J Marshall L Rev*

Harvey D "The Alien Tort Statute: International Human Rights Watchdog or Simply Historical Trivia" 1988 *J Marshall L Rev* 341-356.

Imam *et al* 2011 *Afr J L & Crim*

Imam I *et al* "Judicial Activism and Intervention in the Doctrine of Political Questions in Nigeria: An Analytical Exposition" 2011 *Afr J L & Crim* 50-69

Jaffe 2011 *Ecology LQ*

Jaffe J "The Political Question Doctrine: An Update in Response to Recent Case Law" 2011 *Ecology LQ* 1033-1065

Kelly 2010 *Miss C L Rev*

Kelly MR "Revisiting and Revising the Political Question: *Lane v Halliburton* and the Need to Adopt a Case-Specific Political Question Analysis for Private Military Contractor Cases" 2010 *Miss C L Rev* 219-256

LaTourette 2008 *Rutgers LJ*

LaTourette S "Global Climate: A Political Question?" 2008 *Rutgers LJ* 219-284

Levinson and Young 2001 *Fla St U L Rev*

Levinson S and Young EA "Who's Afraid of the Twelfth Amendment?" 2001 *Fla St U L Rev* 925-973

Liberman 1989 *Am U L Rev*

Liberman L "*Morrison v Olson*: A Formalistic Perspective on Why the Court Was Wrong" 1989 *Am U L Rev* 313-358

Magill 2000 *Va L Rev*

Magill E "The Real Separation in Separation of Powers Law" 2000 *Va L Rev* 1127-1198

May 2008 *Denv U L Rev*

May JR "Climate Change, Constitutional Consignment and the Political Question Doctrine" 2008 *Denv U L Rev* 919-953

Mhango 2013 *AJLS*

Mhango M "Separation of Powers and the Application of the Political Question Doctrine in Uganda" 2013 *AJLS* 249-264

Mulhern 1988 *U Pa L Rev*

Mulhern P "In Defense of the Political Question Doctrine" 1988 *U Pa L Rev* 97-176

Nwauche 2010 *AHRLJ*

Nwauche E "The Nigerian Fundamental Rights (Enforcement) Procedure Rules 2009: A Fitting Response to Problems in the Enforcement of Human Rights in Nigeria?" 2010 *AHRLJ* 502-514

Price 2006 *NYU J Int'l L & Pol*

Price LR "Banishing the Specter of Judicial Foreign Policymaking: A Competence-Based Approach to the Political Question Doctrine" 2006 *NYU J Int'l L & Pol* 323-354

Pushaw 2002 *NCL Rev*

Pushaw RJ "Judicial Review and the Political Question Doctrine: Reviving the Federalist 'Rebuttable Presumption' Analysis" 2002 *NCL Rev* 1165-1202

Rautenbach 2012 *TSAR*

Rautenbach IM "Policy and Judicial Review - Political Questions, Margins of Appreciation and the South African Constitution" 2012 *TSAR* 20-34

Redish 1984 *NWU L Rev*

Redish MH "Judicial Review and the 'Political Question'" 1984 *NWU L Rev* 1031-1047

Redish *Constitution as Political Structure*

Redish MH *The Constitution as Political Structure* (Oxford University Press New York 1995)

Redish and Cisar 1991 *Duke LJ*

Redish MH and Cisar EJ "'If Angels Were to Govern': The Need for Pragmatic Formalism in Separation of Powers Theory" 1991 *Duke LJ* 449-506

Reich 1977 *Colum L Rev*

Reich YZ "*United States v AT&T*: Judicially Supervised Negotiated and Political Questions" 1977 *Colum L Rev* 466-494

Savitzky 2011 *NY L Rev*

Savitzky A "The Law of Democracy and the Two *Luther v Bordens*: A Counter History" 2011 *NY L Rev* 2028-2043

Scharpf 1966 *Yale LJ*

Scharpf F "Judicial Review and the Political Question: A Functional Analysis" 1966 *Yale LJ* 517-597

Shrewsbury 2002 *Mil L Rev*

Shrewsbury S "*Marbury v Madison*: The Origins and Legacy of Judicial Review" 2002 *Mil L Rev* 160-166

Stephens 2004 *Tenn L Rev*

Stephens O "John Marshall and the Confluence of Law and Politics" 2004 *Tenn L Rev* 241-250

Strauss 1978 *Cornell L Rev*

Strauss PL "Formal and Functional Approaches to Separation-of-Powers Questions: A Foolish Inconsistency?" 1978 *Cornell L Rev* 488-526

Tribe *American Constitutional Law*

Tribe L *American Constitutional Law* (Foundation Press New York 1988)

Tushnet 2002 *NC L Rev*

Tushnet M "Law and Prudence in the Law of Justiciability: The Transformation and Disappearance of the Political Question Doctrine" 2002 *NC L Rev* 1203-1235

Wechsler 1959 *Harv L Rev*

Wechsler H "Toward Neutral Principles of Constitutional Law" 1959 *Harv L Rev* 1-35

Wechsler *Principles*

Wechsler H *Principles, Politics and Fundamental Law: Selected Essays* (Harvard University Press Cambridge Mass 1961)

Weinberg 1994 *U Colo L Rev*

Weinberg L "Political Questions and the Guarantee Clause" 1994 *U Colo L Rev* 887-888

Willig 2010 *Cardozo L Rev*

Willig S "Politics as Usual? The Political Question Doctrine in Holocaust Litigation" 2010 *Cardozo L Rev* 723-753

Wishik 1985 *Wash L Rev*

Wishik L "Separation of Powers and Adjudication of Human Rights Claims Under Alien Tort Claims Act - *Hanoch-Tel-Oren v Libyan Arab Republic* 726 F 2d 774 (DC Cir 1984), Cert Denied, 105 SCT 1354 (1985)" 1985 *Wash L Rev* 697-698

Yoshino 2009 *Willamette Law Review*

Yoshino K "Restrained Ambition in Constitutional Interpretation" 2009 *Willamette L Rev* 559-563

Case law

Amidu v President Kufuor 2001-2002 SCGLR 138

Asare v Attorney-General (AP) unreported case number 21/2006 (15 September 2006)

Arakaki v Lingle 423 F 3d 954 (9th Cir 2005)

Atlee v Laird 347 F Supp 689 (DCPa 1972)

Avery v Midland Country 390 US 474 (1968)

Baker v Carr 369 US 186 (1962)

Balarabe Musa v Auta Hamzat 1983 3 NCLR 229

Bush v Gore 531 US 98 (2000)

Colegrave v Green 328 US 549 (1946)

Corriee v Caterpillar 503 F 3d 974 (9th Cir 2007)

Doctors for Life International v Speaker of the National Assembly 2006 12 BCLR 1399 (CC)

EEOC v Peabody W Coal Co 400 F 3d 774 (9th Cir 2005)

Ghana Bar Association v Attorney-General 2003-2004 SCGLR 250

Ghana Lotto Operators Association v National Lottery Authority 2007-2008 SCGLR 1088

Gilligan v Morgan 413 US 1 (1973)

Gonzales-Vera v Kissinger 449 F 3d 1260 (2006)

Gray v Sanders 372 US 368 (1963)

JH Mensah v Attorney-General 1996-97 SCGLR 320

Koohi v United States 976 F 2d 1328 (9th Cir 1992)

Lane v Halliburton 529 F 3d 548 (2008)

Luther v Borden 48 US 1 (1849)

Marbury v Madison 5 US (1 Cranch) 137 (1803)

Mazibuko, Leader of the Opposition in the National Assembly v Sisulu MP Speaker of the National Assembly 2012 ZAWCHC 189 (22 November 2012)

Mazibuko, Leader of the Opposition in the National Assembly v Sisulu MP Speaker of the National Assembly 2013 ZACC 28 (27 August 2013)

New Patriotic Party v Attorney-General (*31st December Case*) 1993-94 2 GLR 35 SC

New Patriotic Party v Attorney General (*CIBA*) 1997 SCGLR 729

Nixon v United States 506 US 224 (1993)

Onuoha v Okafor 1983 NSCC 494

Reynolds v Sims 377 US 533 (1964)

Schneider v Kissinger 412 F 3d 190 (2005)

Schroeder v Bush 263 F 3d 1169 (2001)

Tuffour v Attorney-General 1980 GLR 637

Wells v Rockefeller 394 US 542 (1969)

Wesberry v Sanders 376 US 1 (1964)

Legislation

Constitution of the Republic of Ghana, 1992

Internet sources

Asare 2006 http://www.ghanaweb.com/GhanaHomePage/NewsArchive/artikel.php?ID=113967

Asare SK 2006 *Can the Political Doctrine Question Save MP Amoeteng* http://www.ghanaweb.com/GhanaHomePage/NewsArchive/artikel.php?ID=113967 accessed 18 January 2015

Quashigah date unknown http://www.icla.up.ac.za/images/country_reports/ghana_country_report.pdf

Quashigah K date unknown *The 1992 Constitution of Ghana* http://www.icla.up.ac.za/images/country_reports/ghana_country_report.pdf accessed 18 January 2015

LIST OF ABBREVIATIONS

Afr J L & Crim	African Journal of Law and Criminology
AHRLJ	African Human Rights Law Journal
AJLS	African Journal of Legal Studies
Am U L Rev	American University Law Review
Ariz J Int'l & Comp L	Arizona Journal of International Law and Comparative Law
Cardozo L Rev	Cardozo Law Review
Cath U L Rev	Catholic University Law Review
CLR	California Law Review
Colum L Rev	Columbia Law Review
Conn L Rev	Connecticut Law Review
Cornell L Rev	Cornell Law Review
Denv U L Rev	Denver University Law Review
Duke LJ	Duke Law Journal
Ecology LQ	Ecology Law Quarterly
Fla St U L Rev	Florida State University Law Review
GBA	Ghana Bar Association
Harv Hum Rts J	Harvard Human Rights Journal
Harv L Rev	Harvard Law Review
IDF	Israeli Defence Forces
J Marshall L Rev	John Marshall Law Review
Loy LA L Rev	Loyola of Los Angeles Law Review
Mil L Rev	Military Law Review
Miss C L Rev	Mississippi College Law Review
NC L Rev	North Carolina Law Review
NWU L Rev	Northwestern University Law Review

NY L Rev	New York Law Review
NYU J Int'l L & Pol	New York University Journal of International Law and Politics
Ohio NU L Rev	Ohio Northern University Law Review
Pac Rim L & Pol'y J	Pacific Rim Law and Policy Journal
Rutgers LJ	Rutgers Law Journal
Sup Ct L Rev	Supreme Court Law Review
Temp L Rev	Temple Law Review
Tenn L Rev	Tennessee Law Review
TSAR	Tydskrif vir die Suid-Afrikaanse Reg
U Colo L Rev	University of Colorado Law Review
U Pa L Rev	University of Pennsylvania Law Review
Va L Rev	Virginia Law Review
Wash L Rev	Washington Law Review
Yale LJ	Yale Law Journal