

ZOOM IN

The question:

The multi-faceted character of the ‘political question’ doctrine in recent practice: A one-size-fits-all tool?

Introduced by Micaela Frulli

The non-justiciability of ‘political acts’ or ‘acts of government’ is accepted in most legal systems, although with notable differences in denomination and meaning. The doctrine was first propounded in France (*actes de gouvernement*) and later spread to the United Kingdom, under the ‘royal prerogative’ label, and to the United States, where it is commonly referred to as the ‘political question’ doctrine (PQD).¹ Through this mechanism of judicial restraint, courts occasionally refuse to adjudicate claims that concern actions taken by their Government. This deference to the executive is deemed appropriate in circumstances where the exercise of governmental discretion is essential to protect constitutional or political interests; the doctrine in fact emerged as a complement to the principle of separation of powers. However, deciding when a matter becomes too ‘political’ for judicial oversight is an inherently arbitrary exercise and there is no predetermined nor easy-to-draw standard applicable to different situations and in different legal systems. Therefore, it is not surprising that also in recent times courts struggle with the scope of the PQD and eventually come to very dissimilar if not opposite findings.

The present Zoom-in chooses to focus on the conundrum of the PQD from a dual perspective. On one hand, Diego Mauri analyses the connection between drone strikes and the PQD in two judicial decisions regarding the same set of facts on complaints brought by the same applicant (*bin Ali Jaber*): the first by the US Court of Appeals for the District of Columbia Circuit, the second by the German North Rhine-Westphalia

¹ For a recent appraisal see D Amoroso, ‘Judicial Abdication in Foreign Affairs and the Effectiveness of International Law’ (2015) 14 Chinese J Intl L 99 and J Odermatt, ‘Patterns of Avoidance: Political Questions before International Courts’ (2018) 14 Intl J L in Context 221.

Higher Administrative Court. The US and German courts come indeed to antithetical conclusions: the US court has interpreted the PQD in a very broad manner and squeezed judicial scrutiny in the corner whereas the German judges left little room for the PQD and privileged the possibility for the victims to access justice and obtain redress. In light of the reflections triggered by these cases, the author proposes an approach to the PQD based on a pondered balancing of all relevant interests, where the intensity of judicial review is bound to increase in areas covered by human rights standards.

On the other hand, Martina Buscemi reflects upon a set of arguments – analogous to those underlying the PQD – relied upon by several courts to dismiss claims that call into dispute acts attributable to the United Nations (UN). Obviously, a variety of legal grounds have been relied upon by domestic and international courts to dismiss claims against the UN (such as immunity of IOs from jurisdiction for instance); however Buscemi convincingly maintains that some jurisprudential arguments echo traditional contentions belonging to the PQD strain. A telling example is the concern put forward by the European Court of Human Rights that judicial interference in matters regarding international peace and security might hamper the ‘imperative mandate’ of the UN Security Council. The author also finds that the ‘political argument’ has been more recently raised to dismiss claims of compensation filed, before UN internal dispute settlement bodies, by individuals whose rights have been affected in the course of peacekeeping operations and/or territorial administration. The assessment unilaterally conducted by the UN Secretariat – that considered such claims ‘not receivable’ due their ‘political nature’ (echoing once again the PQD line of reasoning) and eventually lead to their ‘non-justiciability’ – raises a number of issues that Buscemi critically addresses in her article, with a view to uncover the hidden reasons underlying this attitude and to call attention to their far-reaching repercussions.

Placing the two contributions side by side is an attempt at offering a grasp of the wide-ranging extent and the timeless potential of the PQD that keeps rising from its ashes like the legendary Phoenix.

