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Doctrine of Political Question, Separation of Political and Legal Questions and Superior Judiciary of Pakistan

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ABSTRACT

This paper aims at ascertaining nature of political question, its origin, two different aspects of the doctrine of political question and cases involving political questions taken up by the Superior Judiciary of Pakistan. The concept of doctrine of political question emanated from the Constitution of the United States of America and later on went under interpretation and elaboration by the Judgments of the Supreme Court of the U.S.A. There are two views about this doctrine one contends that the Court should not interfere with political questions and the other is of the opinion that Courts being guardian of the Human Rights have jurisdiction to review any kind of questions whether political or legal within the statutory mandate. Pakistan since its inception, in addition to the Government of India Act, 1935, framed three constitutions in 1956, 1962 and 1973 (now in force) and all these documents bestowed the Superior Judiciary of the Country with powers of judicial review. However, the Courts of the country expressed different views about curtailing jurisdiction of the courts regarding political questions during different times. To meet up this task, a combination of descriptive and analytical methodologies coupled with qualitative dominantly and quantitative minutely approaches shall be adopted. However, both primary and secondary sources of Data Collection shall be consulted.

Keywords: *Doctrine, Judicial Review, Pakistan, Political Question, Views, Superior Judiciary.*

I. INTRODUCTION

A modern democratic State consists of three organs Legislature, Judicature and Administration. The Legislature is the Law-Making body while the Judiciary has dual function: one is interpretation of those Laws and the other protection of human rights of the Subjects of the State. The third organ i.e. Administration has to execute Laws made by the Legislature and implement along with compliance of Judicial Decisions. All these pillars have their own powers and functions from the Constitution of the State irrespective of written or unwritten.

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The doctrine of separation of powers proclaimed by Montesquieu in his book “The Spirit of Laws” in 1748 divides state powers and functions into these organs and stipulates that no institution should interfere with the functions of the others. Constitution of is considered to be the Supreme Law of the Land in most of the Constitutional democracies. Under the constitution, the Courts of Country are empowered to check the constitutionality of the statutes framed by the legislature within the spirit of the Constitution instead of going into political nature of a matter and should not go beyond the limitations imposed by the transcript. Obviously, Courts enjoy the powers of judicial review to check constitutionality but this exercise should not violate the doctrine of separation of powers. In the words of T.R.S. Allan “While a court must respect the sphere of decision-making autonomy properly enjoyed by a public authority, a general doctrine of deference is unlikely to furnish a useful means of defining the limits of the court's jurisdiction. The appropriate degree of judicial deference is dependent on all the circumstances: the correct balance between constitutional rights and the general public interest is a feature of the context in which a specific legal issue arises. Legislation should not be held invalid, or defective, when capable of a suitably benign construction, consistent with constitutional standards. What is required is a construction that reconciles legitimate public purposes and established basic rights, according to context; and courts are only rarely justified in abdicating that responsibility” (Allan, 2010). The courts, in order to avoid adventurism, must act with caution and restraint and the judiciary should ensure active participation of executive in its functions regulated by the law.

II. WHAT IS A POLITICAL QUESTION DOCTRINE?

A political question is linked to the concept of justiciability as it comes down to a question of whether or not Court System is in appropriate form in which to hear the case. This reason behind this fact is that a Court System is only empowered to decide a legal question instead of a political question. Legal Questions are deemed to justice-able while political questions are non justice-able. The political question doctrine holds that some questions in their nature are fundamentally political, and not legal, and if a question is fundamentally political, then the court will refuse to hear that case on the ground of lack of jurisdiction. And it will leave that question to some other aspect of the political process to settle out (Finn, 2006).

A ruling of non-justiciability will ultimately prohibit the issue that is bringing the case before the court from being able to be heard in a court of law. Where there is non justiciability finding on account of Doctrine of Political Question, the matter is so certain that the Constitution grants powers to coordinate political branch or otherwise in case of vagueness of issue, the United

States Constitution does not even consider it. A court can only decide legal issues not political. The Constitution imposes different legal responsibilities on respective branches of government. The absence of Constitution as a guide lacks legal criteria to use. In absence of any specific constitutional duties, there is a democratic process to settle the dispute. The court will not indulge in disputes involving politics.

A constitutional dispute that requires knowledge of a non-legal character or the use of techniques not suitable for a court or explicitly assigned by the Constitution the judges customarily refuse to address non legal character of the U.S. Congress, or the President of the United States being a political question.

III. ORIGIN OF THE DOCTRINE OF POLITICAL QUESTION

A constitution of a State provides basics for the functioning of the state along with mechanism for such functions. This is the Constitutional Document which sets boundaries of power for different Organs and Institutions of the State. The Constitution of the United States of America written in 1787, ratified in 1788 and came into in 1789 (Senate) is termed as landmark in constitutional history of the modern world because it catered a plenty of constitutional principles which were, later on, followed by many other States while drafting their own constitutions. The Concept of Political Question was envisaged by the Constitution of the U.S.A under Article III of the Constitution confining the jurisdiction of Federal Courts to the extent of deciding actual cases and controversies. The political question doctrine has long puzzled scholars of federal courts and constitutional law. Unlike other aspects of Article III jurisdiction (like standing, ripeness, and mootness), which define the circumstances under which the federal courts may decide legal issues, the political question doctrine instructs that the courts may not decide certain issues—most prominently, federal constitutional claims—at all (*Zivotofsky ex rel. Zivotofsky v. Clinton*, 2012).

This fact was further elaborated and given interpretation by the Supreme Court of the U.S.A. The first ever landmark judgment delivered by Chief Justice Johan Martial in 1803 appears to include the matters constitutionally entrusted to the President with unrestricted discretion excluding the matters affecting the individual rights. However, modern application of the term emanates from another esteemed judgment of the Supreme Court of U.S.A titled “*Baker vs. Carr*” which laid down certain factors for presenting a political question.

IV. SEPARATION BETWEEN POLITICAL AND LEGAL QUESTIONS

In the Constitution of the United States of America the political question doctrine is closely

linked to the concept of justiciability whether or not a Court System is appropriate forum to hear the case. The judiciary has is just authoritative to hear and decide legal questions instead of political ones because the former are deemed to be justiciable while later are non-justiciable. Only legal issues can be decided by a Court. The Constitution grants different responsibilities to each respective branch of government. If there is an issue where the court does not have the Constitution as a guide, there is no legal criteria to be used. Where there is no involvement of certain constitutional duty, there is a democratic process to resolve the matter. The doctrine traces its history from the case of *Marbury v. Madison* (1803). In that case, Chief Justice John Marshal drawing a distinction between functions of the U.S. Secretary of State declared that when the Secretary of State performing a purely discretionary matter was not held to any legally identifiable standards and some of his acts are not liable to review by a court of law. The doctrine is based on desire of federal judiciary avoiding involvement in conflicts between branches of the federal government and some questions can be best resolved through voting system by voting for or against a particular issue.

A Supreme Court case in the area of political question doctrine is another judgment, the Court outlined six characteristics of a political question including a constitutional commitment coordinating political department, lack of judicially discoverable and manageable standards for its resolve, impossibility of court's independent resolution without expressing a lack of respect for a coordinate branch, impossibility of deciding the issue without an initial policy decision, above the court's discretion, un-certain need for unquestioning allegiance to a political decision already made and the potentiality of embarrassment from multifarious pronouncements by various departments on one question(*Baker v. Carr*, 1962).

The U.S Supreme Court in 2012 restricted scope of the political question doctrine emphasizing the Courts to take up statutory questions. (*ZIVOTOFSKY v. CLINTON*, 2012).

At least two major theories about the proper role of courts vis-a-vis the other branches of government can be discerned in the doctrine (Redish, 1985). According to one classical version of the doctrine, political questions emanate from the Constitution itself. Courts have a duty to adjudicate cases properly presented before them, which includes interpreting the Constitution when appropriate, and may not sidestep this role for prudential reasons (Scharpf, 1966).

In contrast, another theory by Alexander understands the political question doctrine to permit courts to decline to adjudicate a case for prudential reasons as well. Writing in the aftermath of “*Brown v. Board of Education*” and the significant pushback engendered by decision in the South, Bickel sought to preserve the legitimacy of an unelected judicial branch (Bickel,

1961). The Supreme Court has sometimes invoked both constitutional and prudential factors in finding a case to be a political question, without clearly stating which factors are dispositive (Nixon v. U.S, 1993).

V. THE COURTS IN PAKISTAN AND POLITICAL QUESTIONS

Article 175 of the Constitution of the Islamic Republic of Pakistan, 1973 provides a judicial set up with the Supreme Court as the Apex Court of the Republic. Article 184 of the Constitution describing original jurisdiction of the Supreme Court empowers it to have judicial review which also existed in the constitutions of 1956 and 1962 respectively. Since inception of the country, the Superior Judiciary of the State delivered prominent judgments on political questions under the umbrella of constitution even during imposition of Martial Laws which sometimes enjoyed appreciation and sometimes faced criticism. Regarding role of Pakistan judiciary towards political questions Muhammad Azeem observes “the judiciary has always been there to put its stamp on this dissolution of assembly as ‘constitutional deviation (Azeem, 2017)”. In Pakistan, the Judiciary in the last decade has retained status of driving seat. The Judiciary opts for cases of public litigation from cases of Kite Flying to the privatization of National Institutions and to the constitutional cases (Khalid, 2018).

The Apex Court of the Country categorically held that the Supreme Court is empowered under constitution of the Country to revisit any Action of Legislature notwithstanding it may be pertaining to a political or legal. It was further established that the Apex Court has also authority to see the constitutionality and legality of any amendment to the Constitution passed by the Legislation (Mahmood Khan Achakzai and others vs. Federation of Pakistan and Others, 1997).

The first step towards decision of political questions by the judiciary of the country came to light when the Chief Court of Sindh decided a case of dissolution of the 1st Constituent Assembly of Pakistan in 1955 by restoring the Assembly. However, this judgment was later on reversed by the Federal Court of Pakistan (Federation of Pakistan vs. Maulvi Tamizuddin Khan, 1955).

In 1955, the Federal Court of Pakistan in a world famous Usif Patel Case declared an Ordinance promulgated by the Governor null and void holding that the Governor General cannot issue an ordinance on a constitutional matter under the Government of India Act, 1935 then prevalent in the Country (Usif Patel and 2 others vs. The Crown, 1955).

In 1972, Miss. Asma Jilani challenged the detention of her father Malik Ghulam Jilani through a Constitutional Petition. The Supreme Court of Pakistan while deciding the petition held that

“the Military rule sought to be imposed upon country by General Agha Muhammad Yahya Khan by Proclamation of Martial Law, 1969 illegal and Presidential Order 3 of 1969, being a sub constitutional legislation, could not curtail jurisdiction conferred by Constitution of Pakistan (1962) upon Supreme Court and High Courts” (Miss. Asma Jilani vs. the Government of the Punjab and another, 1972).

Thereafter in 1991, the Supreme Court took up a writ petition challenging dissolution of the National Assembly of Pakistan on 6th August, 1990 by the then President of the State. The Supreme Court of Pakistan declared the act of the President to be valid through its judgment in Ahmed Tariq Rahim case (Khawaja Ahmed Tariq Rahim vs. Federation of Pakistan, 1990).

In 1993, the National Assembly of Pakistan again went under dissolution and the then Prime Minister namely Mian Muhammad Nawaz Sharif took this act of the President to the Supreme Court under Article 184 (03) of the Constitution of the Islamic Republic of Pakistan, 1973. The Supreme Court of Pakistan in the judgment declared the said order of the President without lawful authority and of no legal effect restoring the Prime Minister with his Cabinet (Mian Muhammad Nawaz Sharif vs. President of Pakistan and others, 1993).

Afterwards, once again in 1997, the then Prime Minister Benazir Bhutto was deposed by the President by dissolving the National Assembly of the Country and the Supreme Court of Pakistan in its renowned case declared act of the President unsustainable and restored the Prime Minister along with Cabinet (Mohtarma Benazir Bhutto and another vs. President of Pakistan and others, 1997).

In 2000, the Supreme Court of the Country, in a celebrated judgment Syed Zafar Ali Shah declared proclamation of emergency by the Chief Executive of Pakistan and extra constitutional steps of taking over the affairs of the State by the Armed Forces holding that the Provisional Constitutional Order (PCO 1999) does not impose any restriction on the Court to restrict the power of judicial review (Syed Zafar Ali Shah and others vs. General Pervez Musharraf, Chief Executive of Pakistan and others, 2000).

In 2007, the Supreme Court of Pakistan in Chief Justice of Pakistan case set aside reference filed by the President of Pakistan against the then Chief Justice of Pakistan entitling him to hold the office (Chief Justice of Pakistan Mr. Iftikhar Muhammad Chaudhary vs. The President of Pakistan through Secretary and others, 2007).

Recently in 2017, the Supreme Court of Pakistan delivered another renowned judgment in Panama Papers Scandal case and disqualified the then Prime Minister Mian Muhammad Nawaz Sharif holding that “But it does not mean that this Court should exercise a jurisdiction not

conferred on it and act in derogation of the provisions of the Constitution and the law regulating trichotomy of power and conferment of jurisdiction on the courts of law”(Imran Ahmed Khan vs. Mian Muhammad Nawaz Sharif, Prime Minister of Pakistan , 2017).

VI. CONCLUSION

The crux of the discussion is that the doctrine of political question is based on the phenomenon that the Courts should take up legal questions instead of indulging in matters purely relating to other branches of the Government. The doctrine of Political Question enunciated by the Constitution of the United States of America was subsequently interpreted by the Supreme Court of the Country in various judgments. This doctrine acquired different meanings, scope and value in different times. Sometimes, Courts, Scholars and Legal Experts asserted that the Courts should not intervene in the regime of other Organs of the State. However, some of the Legal Fraternity called for Courts to take up questions of political nature on the ground that those questions arise from Constitutionality too. The Supreme Court of Pakistan, at many occasions, interfered with the questions of political nature, notwithstanding, on the pretext of legality and constitutionality of the verdicts of the other branches of the State.

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