

Unravelling the Judiciary: Analysing the Supreme Court’s Decision as an Interpretive Exercise Rather Than a Constitutional Rewrite

Supreme Court Bar Association of Pakistan v. Federation of Pakistan
PLD 2023 SC 42

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Introduction

In April 2022, a resolution for a no-confidence vote was passed against Prime Minister Imran Khan, creating political turmoil in the country. Owing to the instability of the law-and-order situation, the President invoked the Supreme Court of Pakistan’s (‘Court’) advisory jurisdiction under Article 186 of the Constitution¹ by filing Reference No. 1 of 2022 (the ‘Reference’).² In *Supreme Court Bar Association of Pakistan v. Federation of Pakistan*³ (the ‘SCBA case’), a five-member bench of the Court, through its order dated 17 May 2022, gave its findings on questions relating to the interpretation of Article 63-A of the Constitution,⁴ particularly dealing with questions relating to defection, vote counting, and disqualification of defecting members.

The ethos of this Reference was on understanding the scope and meaning of specific provisions of Article 63-A of the Constitution. The main contention pertained to the appropriate interpretive approach for Article 63-A. One view favoured a strict textual approach, interpreting the provision in isolation from the broader constitutional framework. The other approach supported an expansive reading to interpret Article 63-A, grounded in the Constitution as a whole. The latter approach would curb defections, purify the electoral process, and promote

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¹ The Constitution of the Islamic Republic of Pakistan 1973, art 186.

² The Presidential Reference No. 1 of 2022.

³ *Supreme Court Bar Association v. Federation of Pakistan* PLD 2022 SC 488.

⁴ Constitution (n 1) art 63-A.

democratic accountability. Thus, the Court, by three to two, ruled in favour of the expansive approach for interpreting Article 63-A.

This decision was met with notable criticism from the Court's judges, notably Justice Mazhar Alam Khan and Justice Jamal Khan.⁵ Their objections were centred on the belief that the judiciary had exceeded its constitutional authority by engaging in an interpretive process that effectively led to the rewriting of the Constitution.⁶ They argued that such judicial activism blurred the separation of powers as the Court ventured beyond its judicial mandate into areas reserved for legislative action. Their critique highlights the concerns regarding the judiciary's role in altering constitutional frameworks through its rulings rather than adhering strictly to its interpretive duties. However, this paper challenges the validity of the critiquing arguments.

Although the express terms of Article 63-A appear to be clear and compelling, opting for the purposive approach does not amount to the judiciary rewriting the Constitution because the interpretive role of the judiciary relates to 'understanding(s)' of the Constitution. This essentially highlights the need to understand Article 63-A in conjunction with fundamental rights, such as Article 17 of the Constitution.⁷ This shows how such an interpretation is necessitated to preserve the parliamentary form of government, which constitutes a salient feature of the Constitution.

Facts

In 2020, the opposition parties (PML-N, PPP, MMA, and ANP) started the Pakistan Democratic Movement ('PDM') against the Pakistan Tehreek-e-Insaf ('PTI') government based on allegations of poor governance, mismanaged foreign policy, political victimisation of opponent parties, and bad economic management.⁸ In 2022, 142 members of the National Assembly from within the opposition party filed a notice to move a resolution for a no-confidence vote against Prime Minister

⁵ *Supreme Court Bar Association* (n 3) 496.

⁶ *Ibid.*

⁷ Constitution (n 1) art 17.

⁸ Asad Rahim Khan, 'No Confidence: How Did Prime Minister Imran Khan End up Here?' *Dawn* (Islamabad, 17 March 2022) <<https://www.dawn.com/news/1680285>> accessed 29 September 2024.

Imran Khan. Along with this notice, the then-Speaker of the National Assembly called for an Assembly session. As a result of this motion, political turmoil increased, with the PTI and the PDM gathering their supporters to organise rallies in Islamabad.

Furthermore, coalition and ally-party members of the PTI quit the alliance and joined the opposition, while several members, including two Ministers, resigned from the cabinet. In addition, the political situation worsened when PTI protesters barged into the Sindh House in Islamabad to throw those ex-ministers and Members of the National Assembly ('MNAs') who had either resigned from the Cabinet or left the PTI alliance to join the opposition.⁹ Amid the political chaos, Prime Minister Imran Khan's assertion that the no-confidence motion against his government was a part of a broader foreign-funded conspiracy to destabilise his administration gained significant attention.¹⁰

Owing to the situation, the Supreme Court Bar Association ('SCBA') intervened by filing a petition in the Court under Article 184(3) of the Constitution.¹¹ On 21 March 2022, the President moved the Reference¹² by seeking the advice of the Court in respect of the correct interpretive approach for Article 63-A. This included seeking advice regarding the treatment of a defecting political party member in terms of being disqualified for life and the right of a defecting political party member to have their vote counted or excluded from the vote count. Moreover, the President also sought advice for other measures within the constitutional framework which can be used to prevent defection, vote buying, and floor crossing. While the proceedings for this petition started, they were adjourned till 4 April 2022, before another constitutional crisis erupted.

On the day on which the no-confidence motion was to be voted on, 3 April 2022, the Deputy Speaker, without hearing any member, stated that the motion of

⁹ Shakeel Qarar and Imtiaz Ali, 'PTI supporters forcibly enter Sindh House in Islamabad after hours-long protest' *Dawn* (Islamabad, 18 March 2022) <<http://dawn.com/news/1680612>> accessed 29 September 2024.

¹⁰ 'PM Imran Says "foreign-Funded Conspiracy" out to Topple His Govt, Claims to Have Evidence in Writing' *Dawn* (Islamabad, 27 March 2022) <<https://www.dawn.com/news/1682104>> accessed 29 September 2024.

¹¹ Constitution (n 1) art 184(3).

¹² Presidential Reference (n 2).

no-confidence must be in accordance with the rules of the Constitution and ruled out the no-confidence motion, declaring it to be unconstitutional. He premised dismissing the motion based on the narrative that foreign conspirators have no right to dismiss an elected government.¹³ On the Prime Minister's advice, the President dissolved the Assembly and called for general elections. On the same day, the Chief Justice invoked the *suo motu* jurisdiction of the Court under Article 184(3),¹⁴ and a Bench was convened to decide on the constitutionality of the Deputy Speaker's action and the subsequent dissolution of the Assemblies by the President. The hearing lasted for five days. On 7 April 2022, the Court set aside the ruling of the Deputy Speaker and subsequent events, with the result that the dissolution of the Assembly was unconstitutional. Thus, on 9 April 2022, the Assembly took the no-confidence motion against the Prime Minister.

For the first time in the history of Pakistan, the National Assembly endorsed a no-confidence motion against the Prime Minister. Through 174 members passing the no-confidence motion, Prime Minister Imran Khan was ousted from power. After the change of government, the Court continued with the proceedings for the Reference,¹⁵ the SCBA case,¹⁶ and the PTI's Constitution Petition No. 9 of 2022 under Article 184(3). PTI pleaded the Court to declare that any defection as set out in Article 63-A amounts to a lifetime ban from contesting elections in the interest of justice.

It is also essential to note that Article 63-A was initially inserted in the Constitution through the Constitution (Fourteenth Amendment) Act, 1997 ('14th Constitutional Amendment'),¹⁷ after which it underwent several changes. Article 63-A was instituted by the Legal Framework Order, 2002,¹⁸ which was ratified by the Constitution (Seventeenth Amendment) Act, 2003 ('17th Constitutional Amendment') in 2003.¹⁹ Later, the 18th Constitutional Amendment of 2010

¹³ Fahad Chaudhry, 'NA speaker dismisses no-trust move against PM Imran, terms it contradictory to Article 5' *Dawn* (Islamabad, 3 April 2022) <<https://www.dawn.com/news/1683067>> accessed 29 September 2022.

¹⁴ *Ibid.*

¹⁵ Presidential Reference (n 2).

¹⁶ *Supreme Court Bar Association* (n 3).

¹⁷ Constitution (Fourteenth Amendment) Act 1997.

¹⁸ Legal Framework Order 2002.

¹⁹ Constitution (Seventeenth Amendment) Act 2003.

replaced the Article.²⁰ As it stands today, specific parts of Article 63-A are reproduced below:

If a member of a Parliamentary Party composed of a single political party in a House—

- (a) resigns from membership of his political party or joins another Parliamentary Party; or
- (b) votes or abstains from voting in the House contrary to any direction issued by the Parliamentary Party to which he belongs in relation to—
 - (i) election of the Prime Minister or the Chief Minister; or
 - (ii) a vote of confidence or a vote of no-confidence; or
 - (iii) a Money Bill or a Constitution (Amendment) Bill; he may be declared in writing by the Party Head to have defected from the political party, and the Party Head may forward a copy of the declaration to the Presiding Officer and the Chief Election Commissioner and shall similarly forward a copy thereof to the member concerned: Provided that before making the declaration, the Party Head shall provide such member with an opportunity to show cause as to why such declaration may not be made against him.

Legal Analysis

I. The Interpretive role of the Judiciary relates to ‘Understanding(s)’ of the Constitution

It can be argued that the interpretation of the Constitution, as a primary role of the judiciary, follows the purposive approach, which does not amount to rewriting the Constitution. This means that constitutional courts should interpret the text of the Constitution in a manner that is ‘expansive and expanding’. Firstly, it is important to understand that the judiciary, while interpreting the Constitution, engages in a plural exercise of the ‘understanding(s)’ of the Constitution. Here, ‘understandings’ explains the process of Constitutional interpretation, which suggests that the judiciary not only provides a binding and authoritative meaning of a Constitutional provision but also does so while understanding the underlying principles and rules

²⁰ Constitution (Eighteenth Amendment) Act 2010.

that formulate it. Borrowing from the *Puttaswamy* case²¹ of the Indian Supreme Court, the Court relied on the statement that 'as society evolves, so must constitutional doctrine [understanding].' Thus, the goal of the interpreting exercise conducted by the majority in the SCBA case²² was to understand the Constitution holistically.

The purposive interpretation of the Constitution in terms of its 'understandings' reflects the contemporaneous approach adopted by the judiciary. Such an approach propels the judiciary to adopt a different interpretive approach for a statute and the Constitution. While the former requires the Court to ascertain the legislative intent of a statute, the latter is about understanding the meaning and underlying principles that impact the Constitutional text. The reason for a contextual and expansive approach to the interpretation revolves around the belief that the Constitution is a 'living document' intended to survive and evolve for years to continue to serve as the cornerstone for future laws. As highlighted in the case of *McCulloch v. Maryland*,²³ the United States Supreme Court ('US Supreme Court') held that 'a constitution [is] intended to endure for ages to come, and consequently to be adapted to the various crises of human affairs.'²⁴ Furthermore, the United States Supreme Court's judgement mentions Justice Cardozo's approach to interpreting a constitution to accentuate that the constitution enlists principles for the 'expanding future' and not rules for the 'passing hour'. Therefore, the Court interpreted Article 63-A purposively to ensure its intent is accounted for while understanding the text.

Furthermore, the majority in reference argued that Article 63-A could not be read and interpreted in isolation because it pertains to the fundamental right of collectivity, i.e., the political parties as a whole, which needs to be understood in light of other Constitutional provisions having a similar subject-matter (political parties). Such an interpretive approach does not amount to rewriting the Constitution; rather, it adopts an all-rounded approach to interpret Article 63-A following the spirit of the Constitution.

²¹ *Justice K. S. Puttaswamy (Retd.) and another v. Union of India and others* AIR 2017 SC 4161.

²² *Supreme Court Bar Association* (n 3).

²³ *McCulloch v. Maryland* 17 US 316 [1819].

²⁴ *Ibid.*

Moreover, courts in Pakistan have affirmed the 'living tree' metaphor laid down in *Edwards v. Canada*²⁵ within the reasoning of various judgements. The Court applied the living tree metaphor to interpret the Constitution in a progressive and adaptive solution-defining manner rather than adopting a narrow or pedantic interpretation method. This represented a holistic approach to interpreting the Constitution to ensure that the Constitution could be allowed to develop over time while staying within its natural limits. The Court has affirmed the metaphor in the cases of *Al-Jehad Trust*²⁶ and the *Civil Aviation Authority*.²⁷ Similarly, the minority opinion by Justice Miankhel emphasises that interpretation of the Constitution is tied to its 'avowed purpose and spirit' to avoid an 'illogical outcome' to avoid 'fundamental changes', which ensures that there is 'sufficient elasticity' underlying the interpretive exercise.²⁸ This is in line with the interpretation of Article 63-A by the majority to protect the basic tenets of the Constitution, as was the case in *Al-Jehad Trust*.²⁹

Since the emphasis on the 'living tree' metaphor warrants that the interpretive process is always linked to the spirit of the Constitution, it is not left to the whims of the individual judges. This creates space for growth according to contextual needs while keeping in mind the basic structure of the Constitution and circumventing any illogical outcome. Therefore, the Court has particularly emphasized that Constitutional interpretation must not be a restrictive exercise tied to the past; instead, the interpretation must focus on growth in line with the present needs. The majority has interpreted Article 63-A using the same approach by expanding its outlook to address the issue of defection while keeping itself restricted to the tenets of the Constitution to prevent an imbalance within the scheme of parliamentary democracy.

II. Understanding Article 63-A in Conjunction with Fundamental Rights

The true interpretation of Article 63-A would only be revealed when looked at in conjunction with other Articles of the Constitution because it is not a 'complete

²⁵ *Edwards v. Canada* [1930] AC 124, 1929 UKPC 86.

²⁶ *Al-Jehad Trust v. Fed of Pakistan* PLD 1996 SC 324.

²⁷ *Civil Aviation Authority and others v. Supreme Appellate Court Gilgit Baltistan and others* PLD 2019 SC 357.

²⁸ *Supreme Court Bar Association* (n 3).

²⁹ *Al-Jehad Trust* (n 26).

code' in itself, as suggested by the minority opinion. The intention of the Parliament could only be inferred when it is looked at holistically. The proper constitutional interpretation of the anti-defection clause brings the relevance of Article 17, i.e., freedom to form and be part of an association, to the forefront.³⁰ The intent behind the imposition of Article 63-A in relation to the protection of the political parties from unconstitutional assaults would only bear fruition when interpreted in a broad manner consistent with the fundamental rights conferred on the political parties under Article 17(2). Therefore, these provisions must be examined together to understand the implications for a defecting member violating these rights. From the discussion that follows, it will be highlighted that the majority decision did not amount to rewriting the Constitution; instead, they adopted a purposive interpretation of Article 63-A in consonance with the spirit of the Constitution.

Appreciating Article 17(2) becomes necessary to understand Article 63-A because the former vests fundamental rights in political parties in compatibility with the latter. The Court in *Benazir Bhutto*³¹ held that Article 17(2) pertains explicitly to rights attached to political parties, which could not be restricted to their formation; instead, it includes the right to 'continue its activities and propagate its political opinions.' It was further held in *Benazir Bhutto*³² that the elected political parties continue to be in the association as they are meant to implement their mandate.³³ Action that contravenes this function of the political parties would impact its 'healthy operation' in relation to both its internal and external aspects, resulting in the infringement of the fundamental rights in Article 17(2) conferred on the political party as a unit as opposed to its individual members.

The purpose of vesting the political party with the fundamental right is to promote its 'healthy operation'. This forms an essential connection with Article 63-A to understand the scope of its interpretation taken by the majority in the Reference. This connection elucidates that the majority did not rewrite the Constitution; instead, a holistic approach was taken to uphold the fundamental right envisioned in Article 17(2). The minority opinion's emphasis on the notion that a 'restriction cannot be read into the liberties which are not already mentioned in the

³⁰ Constitution (n 1) art 17.

³¹ *Benazir Bhutto v. Federation of Pakistan and another* PLD 1988 SC 416.

³² *Benazir Bhutto and another v. Federation of Pakistan and another* PLD 1989 SC 66.

³³ *Mian Muhammad Nawaz Sharif v. President of Pakistan* PLD 1993 SC 473.

Constitution' omits to realise that the entire Constitution has to be read as an integrated whole to preserve its harmony, as no provision must be interpreted in a manner which destroys the other. This demonstrates that Articles 63-A and 17(2) must be read together to safeguard the harmony of the Constitution, given their interconnected nature, which does not amount to a rewriting of the Constitution. Essentially, Article 63-A provides the yardstick to analyse the internal and external aspects of the 'healthy operation' of the political parties inherent in Article 17(2). Internal factors relate to matters within the political parties, while external aspects cover the competitive inter-party relationships. Therefore, the imposition of Article 63-A serves as a corrective for defection, which is antithetical to both these aspects.

Protecting the fundamental right in Article 17(2) requires Article 63-A to be interpreted purposively to hold that the defecting member be de-seated from his office and parliamentary party once the parliamentary party gives directions under Article 63-A(b). This would restore the internal operation of the political party by fulfilling one part of its objective. However, the external aspect implicit in Article 17(2) must be addressed to reinstate the fundamental right of the political party. The vote cast by the defector disturbs the external balance amongst political parties, which could only be rectified through Article 63-A. It could be remedied by discarding the votes of the defecting members regardless of whether the party takes any resolution or direction. Therefore, the proper redressal offered by Article 63-A will only come to light when read in conjunction with Article 17(2) because the fundamental rights inherent within political parties through the latter must be protected through the former. Such an interpretation is in line with the intent of the Constitution and does not amount to rewriting by the majority.

The minority opinion is premised on the assumption that such a construction is not in accordance with other Constitutional provisions, including Article 19 relating to the Freedom of Speech³⁴ and Article 66 referring to Privileges of Members of the Constitution.³⁵ It was propounded in *Wukala Mahaz Barai Tahafaz Dastoor*³⁶ that the freedom of speech in a parliamentary form of government must be evaluated subject to the reasonable restrictions imposed on the conduct of the parliamentary members. This emphasizes the interconnected nature of the

³⁴ Constitution (n 1) art 19.

³⁵ Constitution (n 1) art 66.

³⁶ *Wukala Mahaz Barai Tahafaz Dastoor and another v. Federation of Pakistan* PLD 1998 SC 1263.

Constitution to reveal that individual members of the political party are allowed to exercise their freedom under Articles 19 and 66 if they are not infringing the restrictions set down in Article 63-A. Although Article 66 protects MNAs' speaking and voting privileges, these are also subject to the Constitution. Therefore, the full extent of the restriction laid down in Article 63-A could only be operational when read with Article 17(2) concerning the political parties' internal and external operations.

Article 63-A protects the continued coherence of political parties because the system of parliamentary democracy is contingent on their healthy operation. Their presence paves the way for the maintenance of other rights guaranteed by the Constitution.³⁷ In *Benazir Bhutto*,³⁸ the system of parliamentary democracy was recognised as one of the salient features of the Constitution, with political parties as its leading players. The significance of parliamentary democracy as part of the salient features of the Constitution was further solidified in *District Bar Association*.³⁹

Destabilization of the political parties would adversely affect democracy because they are a connecting link between the cabinet, Parliament, and voters. Defection causes detrimental effects on the operation of the political parties with delegitimizing implications on the political system. The purpose of Article 63-A must be robustly interpreted, considering these repercussions. Although these consequences are not expressly laid down, the touchstone of salient features in the Constitution emphasizes that Article 63-A must be interpreted through such a lens to respect the essence of the Constitution. The de-seating of the defecting member, alongside discarding his vote, offers to protect the parliamentary form of government inherent in the Constitution. This does not amount to changing the Constitution by the majority; alternatively, the interpretation harmonizes it to uphold its salient features.

One of the roles of the political parties in effecting the cause of parliamentary democracy lies in competition and rivalry amongst them, as

³⁷ *Abdul A'la Maudoodi v. Government of West Pakistan* PLD 1964 SC 673.

³⁸ *Benazir Bhutto* (n 31).

³⁹ *District Bar Association, Rawalpindi v. Federation of Pakistan* PLD 2015 SC 401.

envisioned in Article 17(2).⁴⁰ A defecting member disturbs this function as they go against their electoral mandate by colluding with the opposing parties using unlawful practices. This leads to negative implications for the healthy operation of political parties, which is necessary for the proper functioning of the salient features of the Constitution. The conduct of the defecting member becomes a 'mockery of the democratic Constitutional process,' signifying that they must be dealt with in a manner where they are not 'unjustly enriched'.⁴¹ Hence, Article 63-A, when read with Article 17(2), must be interpreted in a deterring way to preserve the 'normative moorings of the Constitution'. The notion of terming individual members as 'conscientious observers' becomes irrelevant, as it does not consider the untenable implications such acts could have on the salient features of the Constitution.

It has been collectively advanced by the two minority judges' opinion that such an interpretation would make Article 55, regarding voting in the Assembly and quorum,⁴² and Article 95, pertaining to vote of no-confidence against a Prime Minister,⁴³ redundant, leading to 'elective dictatorship'. However, they have based their argument on an assumption that ignores the difference between casting and counting the vote. While the latter is allowed individually, the former cannot be prejudicial to their party manifesto if it relates to the conditions present in Article 63-A. Therefore, Article 55 does not become redundant as their votes are subject to the restrictions stipulated in Article 63-A. An action to the contrary would lead to discarding their votes alongside a vacation of their seat on the touchstone of the salient features of the Constitution that comes at the forefront when Article 63-A is read in conjunction with Article 17(2).

Hence, Article 63-A must be read with Article 17(2) to holistically understand the implications for a defecting member violating these rights. Such an interpretation upholds the scheme laid out in other Articles relevant to the parliamentary form of democracy, which is essential for the protection of the basic structure of the Constitution.

⁴⁰ *Nawaz Sharif* (n 33).

⁴¹ *Kh. Ahmad Tariq Rahim v. Federation of Pakistan and others* PLD 1992 SC 646.

⁴² Constitution (n 1) art 55.

⁴³ Constitution (n 1) art 95.

III. Preserving the Parliamentary Form of Government, A Salient Feature of the Constitution

Individual members get elected on the mandate of their political party, which they must follow for the smooth running of the executive and legislative arenas. The minority opinion fails to take into account that the mandate of the political party coincides with the interests of the constituents of the individual members, which they must work to achieve during their tenure. The assumption that individual members forward their independent mandate, instead of the party's mandate, is untenable. Floor crossing disturbs the balance that the individual member must strike with the party's mandate, on which they were elected.⁴⁴ A government based on a party basis would never be able to work if it had to constantly monitor its parliamentarians, especially given the upheavals parliamentary democracy has historically faced within Pakistan.

A cursory glance at Pakistan's constitutional history reflects the challenge of maintaining a party-based government. In particular, during the 2008 elections, the Pakistan People's Party ('PPP') struggled to unify its coalition amid internal tensions, which led to significant political instability.⁴⁵ However, this does not mean that the interpretation by the majority in reference would infringe on Article 95 of the Constitution by giving 'unbridled power to the prime minister' as proposed by the minority opinion. The majority of the parliamentary party may still bring a vote of no confidence against their Prime Minister. Through this mechanism, they can vote freely to set him aside if they refuse to issue the direction under Article 63-A. Simultaneously, individual members on their own cannot vote against their party in matters relating to Article 63-A, as that would hinder competition and create an imbalance in the functioning of parliamentary democracy, which is a salient feature of the Constitution. Such defecting members

⁴⁴ InpaperMagazine F, 'The Law and Politics of Floor Crossing' *Dawn* (Islamabad, 13 March 2011) <<https://www.dawn.com/news/612849/the-law-and-politics-of-floor-crossing>> accessed 29 September 2024.

⁴⁵ Mehdi T, 'An Overview of 2008 General Elections' *Dawn* (Islamabad, 16 April 2013) <<https://www.dawn.com/news/802815/an-overview-of-2008-general-elections>> accessed 29 September 2024.

could voice their dissent during internal meetings or resign and get re-elected with a fresh mandate instead of defecting against the present one.

Thus, individual members must respect the mandate of the political party on which they are elected to lead to a sophisticated running of the tripartite organs of the State. Several other modes are available for the individual members to showcase their dissent, which does not render parliamentary democracy redundant.

The Political Impact of the Judgement

This Reference has turned out to be a landmark case that has had a broad impact, especially within the political realm. It has attempted to strengthen the democratic process by eliminating defection and floor crossing. Defection has caused immense instability for decades amongst political parties, which runs counter to the notion of a parliamentary form of government enshrined in the Constitution. Switching political loyalties for *mala fide* considerations defies their role of being carriers of the 'amanat' of their constituents. It binds the elected officials on party tickets with the political party, leading to increased discipline and accountability in connection with the party manifesto, based on which they were elected. Political shaming, expulsion from the party, and de-seating were not sufficient disincentives against frequent floor-crossing because these members would first benefit from defecting, leading to the destabilisation of Parliament, and would later become part of the political party for whom they defected by gaining their party ticket to form part of the government again. The interests of the constituents were ignored in favour of individual gains. The judgement fortifies public confidence and legitimises the democratic process revered in the Constitution instead of restricting it to the whims of the defecting members.

The Court has successfully balanced its judicial role within the tripartite scheme by limiting itself to the Constitution and not disqualifying the defectors for life; rather, it has acknowledged that the legislators must develop an appropriate law to enact such penal consequences. Such exercise of judicial restraint authoritatively addressed political defections using the constitutional framework, reducing national anxiety regarding floor crossing. The Constitution becomes a mere set of rules unless it is purposively interpreted and upheld. The majority precisely endorses this by mitigating the abuse of law arising from defections and

floor crossing. The Constitution protects the political parties since they, as the nucleus of parliamentary democracy, represent the aspirations of the masses. The judgement consolidates this and stabilizes democracy from the threatening vice of horse trading that materializes through defection.

The impact of this watershed judgement could be evidenced by the events surrounding the election of the Chief Minister of Punjab in 2022. Although the defecting members did not vote against Mr. Imran Khan, 25 members of the Provincial Assembly defected during the election of the Chief Minister of Punjab held on 16 April 2022, leading to the election of Hamza Shahbaz. The Reference,⁴⁶ pronounced on 17 May 2022, provided a substantial rationale for the petitioners to challenge the election of Hamza Shahbaz as Chief Minister of Punjab at the Lahore High Court. The Lahore High Court upheld the Speaker's orders and Hamza Shahbaz's subsequent election.⁴⁷ Furthermore, the Lahore High Court held that the votes of the election of the Chief Minister held on 16 April 2022 were to be recounted by excluding the votes of the defectors from the counting process, leading to a possible re-election. As a result, Pervaiz Elahi gained the majority vote.

Subsequently, another petition was filed in the Court by Pervaiz Elahi that related to whether the understanding and implementation of the short judgement of the Court dated 17 May 2022, passed in the Reference,⁴⁸ read with Article 63-A(1)(b) of the Constitution, was correct.⁴⁹ The Court held that the import of the order given by the Deputy Speaker, Provincial Assembly of Punjab, Lahore, was incorrect and void since it ran counter to the established constitutional understanding of Article 63-A. Moreover, Pervaiz Elahi was declared the duly elected Chief Minister of Punjab.

The purposive interpretation of Article 63-A enshrined in the Constitution, which was brought to the forefront in the Reference, aided in resolving this significant crisis that affected the democratic process in one of the primary provinces of Pakistan. The trichotomy of power between the state organs and

⁴⁶ Presidential Reference (n 2).

⁴⁷ *Chaudhary Parvez Elahi v. Governor Punjab and others* PLD 2023 Lahore 154.

⁴⁸ Presidential Reference (n 2).

⁴⁹ *Chaudhry Parvez Elahi v. Deputy Speaker, Provincial Assembly of Punjab, Lahore and others* PLD 2022 SC 678 [11].

parliamentary democracy, as the salient features of the Constitution, was upheld since the destabilizing effects of the votes of the defectors were effectively set aside. Therefore, the purposive approach encompassed in the judiciary's role instils them with the authority to avert such setbacks to the democratic scheme.

Conclusion

In light of the arguments discussed above, it can be proposed that the majority decision in the Reference⁵⁰ does not amount to rewriting the Constitution. The Court took a purposive approach to understand the meaning of Article 63-A holistically. It followed the progressive elements inherent in the judiciary's role while interpreting Article 63-A. This approach highlighted that the true import of Article 63-A could only be encompassed when read with Article 17(2) of the Constitution. Lastly, it has been shown that this interpretation protects the salient features of the Constitution as opposed to the alleged rewriting. Thus, the majority decision in the Reference⁵¹ stands as a principled exercise in constitutional interpretation, ensuring the stability of Pakistan's parliamentary democracy by deterring defections, reinforcing party discipline, and preserving the integrity of the Constitution without overstepping judicial boundaries.

⁵⁰ Presidential Reference (n 2).

⁵¹ Presidential Reference (n 2).