

# Comment on the Supreme Court’s Judgment on *Zulfiqar Ahmed Bhutta v Federation of Pakistan*

PLD 2018 SC 370

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## Introduction

This case note discusses the judgment rendered by a three-member bench of the Supreme Court of Pakistan (‘Supreme Court’) on the consolidated petitions challenging the *vires* of the Elections Act 2017 (‘Act’).<sup>1</sup> It sheds light on the effect of the judgment on the scope and interpretation of Article 17(2) of the Constitution of the Islamic Republic of Pakistan 1973 (‘Constitution’) that pertains to the right to form and join political parties. It is argued that the judgment inhibits the democratic freedoms envisaged by Article 17(2) by reading in restrictions not stipulated within the said Article.

The first part of this case note provides the background and history of the case and the second part dilates upon the judgment. This will be followed by an analysis of the judgment and a conclusion.

## Background

The genesis of this case lies in the International Consortium of Investigative Journalists (ICIJ) releasing certain documents from the database of the law firm; Mossack Fonseca & Company, based in Panama. Colloquially referred to as ‘Panama Papers’, these documents carried, *inter alia*, details of offshore companies held by the family of then Prime Minister of Pakistan, Mian Muhammad Nawaz Sharif. The Supreme Court delivered its judgment on 20<sup>th</sup> April 2017 by a majority of 3:2.<sup>2</sup> The Court constituted a Joint Investigation Team (‘JIT’) to conduct a probe into the allegations against the Prime Minister and his family. The remaining two judges, however, held that the Prime Minister in his response had not been honest and truthful. Consequently, they held that the Prime Minister fell short of the requirements enshrined under Article 62(1)(f) of the Constitution and was thus liable to be disqualified from membership of the Parliament.<sup>3</sup> The JIT submitted its report upon an expiry of 60 days. Upon a perusal of the report, the remaining three judges of the Court also disqualified the then Prime Minister as a Member of National Assembly in terms of Article 62(1)(f) of the Constitution and thereby rendered him ineligible to hold the Office of Prime Minister.<sup>4</sup>

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<sup>1</sup> *Zulfiqar Ahmed Bhutta v Federation of Pakistan* PLD 2018 SC 370.

<sup>2</sup> *Imran Khan Niazi v Mian Muhammad Nawaz Sharif Prime Minister of Pakistan* PLD 2017 SC 265.

<sup>3</sup> The Constitution of the Islamic Republic of Pakistan, art. 62(1)(f). “A person shall not be qualified to be elected or chosen as a member of the Majlis-e-Shoora (Parliament) unless - he is sagacious, righteous, non-profligate, honest and ameen, there being no declaration to the contrary by a court of law.”

<sup>4</sup> *Imran Ahmed Khan Niazi v Mian Muhammad Nawaz Sharif, Prime Minister of Pakistan* PLD 2017 SC 692.

As a corollary to the aforesaid judgment and in view of section 5 of the Political Parties Order 2002 ('2002 Order'), Mian Muhammad Nawaz Sharif was also disqualified from serving as the President of his party; the Pakistan Muslim League-N (PML-N). The said provision provides:

Membership of political parties. - (1) Every citizen, not being in the service of Pakistan, shall have the right to form or be a member of a political party or be otherwise associated with a political party or take part in political activities or be elected as an office-bearer of a political party:

Provided that a person shall not be appointed or serve as an office-bearer of a political party if he is not qualified to be, or is disqualified from being, elected or chosen as a member of the Majlis-e-Shoora (Parliament) under Article 63 of the Constitution of the Islamic Republic of Pakistan or under any other law for the time being in force. (emphasis added)

Subsequently, an Act to 'amend, consolidate and unify laws relating to the conduct of elections' was introduced in the Senate. After being passed by the Parliament on 2<sup>nd</sup> November 2017, the Act received Presidential assent on the same day.<sup>5</sup> The law, *inter alia*, repealed the earlier 2002 Order. Section 5 of the erstwhile 2002 Order and section 203 of the Act, however, were in *pari materia*. Section 203 of the Act provides:

203. Membership of political parties. — (1) Every citizen, not being in the service of Pakistan, shall have the right to form or be a member of a political party or be otherwise associated with a political party or take part in political activities or be elected as an office-bearer of a political party.<sup>6</sup>

A perusal of the aforementioned two provisions in juxtaposition reveals that section 5 of the 2002 Order, save its proviso, was reproduced in section 203 of the Act. It is this difference that constitutes the edifice of the petitioners' challenge and is thus of significance as it forms the basis of the litigation under discussion.

### **Facts and Ruling**

Delivering a unanimous judgment, the Supreme Court held that notwithstanding the exclusion of the aforesaid proviso from the text of the Act, a person disqualified from being a member of Parliament remained disqualified to become an office-bearer in a political party. Thus, it declared that the said omission had no effect on the interpretation and scope of section 203 of the Act.<sup>7</sup>

The Court observed that the principles of Islam form the bedrock of our constitutional dispensation. The Constitution, thus, reflects the desire to establish an order that embodies the

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<sup>5</sup> Elections Act 2017.

<sup>6</sup> Elections Act 2017, s. 203.

<sup>7</sup> PLD 2018 SC 370.

values espoused by Islam. Since public representatives exercise the sovereignty of Almighty Allah as His delegates by way of a sacred trust', it is only inevitable that the qualifications prescribed for public representatives are couched in religious connotations.<sup>8</sup> Political parties, the Court held, are the vehicles that take individuals to their destination of membership to the legislatures in organized polities. The Supreme Court further opined that "Owing to the importance of political parties in the electoral process, laws have been put in place from time to time relating to conduct of elections and matters connected therewith and ancillary thereto."<sup>9</sup> Typically, the role of a political party's head may entail, *inter alia*, appointing members of the Central Executive Committee and constituting its parliamentary board. Moreover, the Court held that a party head enjoys certain special powers, in view of Article 63A of the Constitution.<sup>10</sup>

Owing to the powers bestowed on the party head under Article 63A, the Supreme Court held that it would be anomalous if a person disqualified from being a Parliamentarian dictated the actions of those who did not suffer from any similar infirmities. Thus, it held that the stringent and onerous qualifications that pertain to elected representatives would be equally applicable to party heads. In declaring so, the Court held that morality falls within the rubric of the expression: 'integrity of Pakistan'. It is pertinent to mention that the said expression is expressly stipulated as a restriction on the right to form and lead political associations under Article 17(2) of the Constitution.<sup>11</sup>

Additionally, the Supreme Court considered the issue of section 203 of the Act only being inserted to benefit Mian Muhammad Nawaz Sharif. It is a trite law that person-specific legislation is untenable and is thus liable to be struck down. The Court held that it was inescapable that the aforementioned section was person-specific, incorporated to shield certain individuals from the consequences of their disqualification from Parliament. While not striking down section 203 of the Act, it interpreted the same in a manner that would harmonise it with Articles 62, 63, and 63A of the Constitution.<sup>12</sup> The omission of the aforementioned proviso, hence, was of no legal effect.

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<sup>8</sup> Ibid, 32.

<sup>9</sup> Ibid, 37.

<sup>10</sup> The Constitution of the Islamic Republic of Pakistan 1973, art. 63A. "Article 63A (1). 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

<sup>11</sup> The Constitution of Islamic Republic of Pakistan 1973, art. 17(2).

"Every citizen, not being in the service of Pakistan, shall have the right to form or be a member of a political party, subject to any reasonable restrictions imposed by law in the interest of the sovereignty or integrity of Pakistan and such law shall provide that where the Federal Government declares that any political party has been formed or is operating in a manner prejudicial to the sovereignty or integrity of Pakistan, the Federal Government shall, within fifteen days of such declaration, refer the matter to the Supreme Court whose decision on such reference shall be final."

<sup>12</sup> (n 9) 60(7).

## **Analysis**

There are certain aspects of the judgment delivered in *Zulfiqar Ahmed Bhutta's* case that warrant attention, particularly because this is the first case where the Supreme Court has conclusively pronounced that the qualifications and disqualifications constitutionally spelt out for public representatives are equally applicable to office-bearers of political parties.

Firstly, it is pertinent to shed light on the right to form and join a political party, as provided in Article 17(2) of the Constitution.<sup>13</sup> In the seminal case of *Hurtado v California*,<sup>14</sup> the US Supreme Court held that while the language of the constitution does not change, the changing circumstances of a progressive society for which it was designed yield a new and full import. Relying on the aforesaid principle of interpretation, our Supreme Court in *Nawaz Sharif v Federation of Pakistan*<sup>15</sup> held that the right to form and join a political party encompasses numerous peripheral rights or rights in the penumbra. In a democracy, most if not all citizens should be involved in political activities. However, a direct democracy where every citizen is directly involved in all political decisions is not possible within modern mass societies. This is why a modern democracy needs institutions and organisations that represent the will and the interests of the citizens as authentically as possible.<sup>16</sup> In nascent democracies such as Pakistan, an overbroad interpretation of the restrictions imposed on the right to form political parties paves the way for the State to restrict such right for, *inter alia*, politicians espousing dissident views.

As regards the second aspect of the right enshrined under Article 17(2), i.e., the right to join a political party, implicit in such right is the right to join a party led by a leader of one's choice. In view of political parties' role as vehicles through which individuals canvass their views, ideology, and vision in organized democracies, an interpretation to the contrary would negate the freedom provided under the aforementioned Article. Moreover, any restrictions imposed on the right to form and join a political party must emanate from the Article itself. This view has found favour with the superior judiciary in myriad cases. For instance, in *Abdul Wali Khan* it was held that the right to form a political party was only subject to reasonable restrictions imposed by the law in the interest of the sovereignty or integrity of Pakistan (emphasis added).<sup>17</sup>

Similarly, in *Benazir Bhutto v Federation of Pakistan*,<sup>18</sup> it was held that the word "morality" could not be read as a separate limitation in Article 17(2) where there is a conscious omission of the same as a limitation in the right itself.<sup>19</sup>

It is settled law that fundamental rights are restraints on the capricious exercise of power by the state in relation to any activity that an individual may engage in.<sup>20</sup> While the

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<sup>13</sup> The Constitution of the Islamic Republic of Pakistan 1973, art. 17(2).

<sup>14</sup> 110 U.S. 516 (1884).

<sup>15</sup> PLD 1993 SC 473.

<sup>16</sup> *Awais Younis v Federation of Pakistan* PLD 2016 Lahore 1.

<sup>17</sup> *Islamic Republic of Pakistan v Abdul Wali Khan* PLD 1976 SC 57, 99.

<sup>18</sup> PLD 1988 SC 416.

<sup>19</sup> PLD 1988 SC 416, 526.

<sup>20</sup> *Government of Sindh v Najma* 2001 SCMR 8, 13.

Constitutional guarantees are often embedded in permissive language; in essence, they impose limitations on the power of the state to restrict such activities. Holding that morality is part and parcel of the expression: 'integrity of Pakistan', therefore, dilutes the import of constitutional safeguards, allowing the state to curtail fundamental rights on grounds not expressly stipulated within the text of the Article. In a judgment authored by Justice Munib Akhtar, the Sindh High Court held:

24. It could be that a restriction may pass muster if considered on the basis of the more generally stated power to impose reasonable restrictions in the interests of the public and yet fail to cross the hurdle when considered only in the light of a condition that is specifically set out on its own and is not a particular instance of a more general power. The distinction may appear to be slight and even subtle. Yet it may make all the difference. As will become clear, it has an important bearing on the resolution of the core controversy.<sup>21</sup>

It is conspicuous from a bare reading of Article 17(2) of the Constitution that it does not vest the state with the general power to impose reasonable restrictions in the interest of the public. Rather, Article 17(2) expressly provides for two situations which may necessitate restrictions on the right to form or join a political party. Thus, reading morality within the expression 'integrity of Pakistan' betrays the intention of the framers of the Constitution, who consciously chose to restrict the state's power to regulate the right to join or form a political party.

Dilating upon the authority vested in the party head by virtue of Article 63A, such authority does not render a party head omnipotent, allowing him to dictate the actions of other Parliamentarians of his party. Chief Justice Saqib Nisar, who is the author of the judgment in the *Zulfiqar Ahmed Bhutta* case, also supported this view in *District Bar Rawalpindi v Federation of Pakistan*.<sup>22</sup> He held:

Firstly, even the party head must give a show cause notice to the alleged defector. Secondly, his decision is not final and binding. His declaration is simply referred to the Election Commission (via the Chief Election Commissioner) and it is for the latter to decide whether a defection has occurred or not. Thirdly, an appeal lies to the Supreme Court. Finally, there is no ouster of jurisdiction clause, and the matter is therefore justiciable at every stage.<sup>23</sup>

Additionally, the role envisaged for the party head under Article 63A is merely a manifestation of the ground realities of Pakistani politics. Aspirants of political office voluntarily join and seek electoral tickets from political parties. The party and its leader's popularity translate into votes for a successful candidate. A candidate voluntarily seeking a party ticket not only benefits from the popularity of its leader but also owes certain obligations to his benefactor. It is these obligations that have been enunciated in Article 63A. It may be pertinent to mention that the Supreme Court was seized of the constitutionality of the said Article in *District Bar Rawalpindi*

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<sup>21</sup> *School Fees Case* CP D-5812/2015, 18.

<sup>22</sup> PLD 2015 SC 401.

<sup>23</sup> PLD 2015 SC 401, 885.

*v Federation of Pakistan*.<sup>24</sup> Upholding its constitutionality, Justice Azmat Saeed who was writing for the Supreme Court held:

The shifting of the emphasis from the Parliamentary Leader to the Party Head is in consonance with the ground realities of Pakistani Politics which are self-evident and need not be set forth in too much detail. Suffice it to say, a Political Leader whose personal popularity translates into votes may have outgrown the Parliament or be a Member of a Provincial Assembly in case of a regional party or may otherwise choose not to contest the election.

The upshot of the above reasoning is that the authority vested under Article 63A is not unfettered, nor does it grant omnipotence to the party leader. A declaration to the contrary is, thus, not only erroneous in law but also marks a departure from precedents of the superior judiciary.

Adverting now to the issue of person specificity, it is worth delving into the history of the proviso to section 5 of the 2002 Order. The 2002 Order was promulgated by the then Chief Executive, on the eve of the General Elections conducted in October 2002. The leaders of the two major opposition parties – Benazir Bhutto and Nawaz Sharif – had already been disqualified from becoming members of Parliament. Resultantly, the proviso to section 5 of the 2002 Order became a tool for the regime to stifle dissent and preclude dissident politicians from leading their political parties in the election campaign. Additionally, it would be germane to state that the 2002 Order was not deliberated by the Parliament. Rather, the Parliament that came into existence after the General Elections provided indemnity to the 2002 Order along with a myriad of other laws promulgated by the Chief Executive.

Juxtaposed with the aforementioned 2002 Order, the Act was passed after considerable debate and deliberation. Moreover, the Elections Bill 2016 ('Bill') was introduced before the Parliamentary Committee on Election Reforms on 20<sup>th</sup> December 2016. Section 202 of the said bill excluded the proviso to section 5 of the erstwhile 2002 Order. Hence, section 203 of the Act was simply a reproduction of section 202 of the Bill presented on 20<sup>th</sup> December 2016. The decision to exclude the proviso to section 5, therefore, predates the disqualification of Mian Muhammad Nawaz Sharif. The decision to exclude the proviso marks a vindication of the democratic project, whereby laws defaced during dictatorial regimes are improved so as to advance the fundamental rights of citizens. To hold that the exclusion of the proviso does not change the scope of section 203 of the Act perpetuates a person-specific law promulgated during an undemocratic regime. Moreover, the judgment also significantly curtails the right to join a political party, as enshrined in Article 17(2) on the basis of the aforesaid proviso. In his judgment in *Jibendra Kishore's case*,<sup>25</sup> Justice Cornelius held:

The very conception of a fundamental right is that it being a right being guaranteed by the Constitution cannot be taken away by the law, and it is not only

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<sup>24</sup> *Ibid*, 713.

<sup>25</sup> *Jibendra Kishore v Province of East Pakistan* PLD 1957 SC 9.

technically inartistic but a fraud on the citizens for the makers of the Constitution to say that a right is fundamental but that it may be taken away by the law.<sup>26</sup>

### **Conclusion**

The judgment in *Zulfiqar Ahmed Bhutta v Federation of Pakistan* marks an important point in the legal history of Pakistan. By holding that the right to join or form a political party is also subject to restrictions not expressly enunciated therein, the Court may have paved the way for the State to trample upon the rights of the citizens. Furthermore, perpetuating a law promulgated to artificially amputate unwanted elements from the body politic during dictatorial rule jeopardises the organic evolution of the political process.

Fundamental rights are not static but are pregnant with vitality to address the complexities of modern democracies. The unwritten constitutional nuances, the invisible meanings lurking under the written text of our Constitution make it an evergreen, living document. Right to form or be a member of a political party is not limited to the clerical formation of a political party but instead carries within it the right of a political party to be able to actively participate in the political life of the country, to be able to freely profess and propagate its political ideology.<sup>27</sup> With the Court blocking the Parliament's attempt to allow individuals disqualified from being Parliamentarians to lead political parties, the fate of both political parties and fundamental rights now hangs in the balance.

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<sup>26</sup> (n 29) 41.

<sup>27</sup> (n 16) 25.