

**Distilling Eligibility and Virtue:**  
**Articles 62 and 63 of the Pakistani Constitution**

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This article analyses the provisions regarding the qualifications and disqualifications for Parliamentarians set out in the constitution of Pakistan, and traces their evolution over the years. It establishes that the objective interpretation of these provisions in the past has given way to a more subjective and moralistic approach in the run-up to the 2013 general elections. It further argues that, for the most part, these provisions lay down unascertainable and subjective criteria for qualification and disqualification of a Parliamentarian. This in turn lends support to the main argument of this article that the fundamental right of an individual to contest for a public office, and an equal fundamental right of the citizenry to choose their representative cannot be refused, on the grounds of such ambiguous ideas. However, this is not to say that there should be no minimum criteria for qualifying to be a Parliamentarian; rather it is suggested that the present criteria suffer from serious defects which need to be remedied.

**Introduction**

The endeavour of law, in a democratic dispensation, is that of creating an ideal society – a society that is not simply a reflection of who we are, but, more importantly, of who we aspire to be. This endeavour, reflected in the corpus of our laws, emanates primarily from the legislature – the arm of the state that is entrusted with shaping the laws and freedoms that define the spirit of our society. In fidelity to the democratic *ethos* of a

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government ‘of the people, for the people, by the people’,<sup>1</sup> the legislature is frequently the only branch of the state that is ‘elected’, and thus has the mandate to represent the evolving will and aspirations of the people, the final custodians of political power. A natural question, therefore, that begs answering is: who amongst the citizenry deserves a place in the legislature? Is it simply anyone who garners a majority of the votes cast in a given constituency? Or is there a higher, more stringent, test that an individual must pass before being entrusted to shape those ‘wise restraints’<sup>2</sup> that make us free? And if there is a higher standard of qualification, what are its contours? How can we define this standard? How will it be judged? What role does morality play in the equation? And how can we strike a balance in the tussle between subjective moral qualifications, and objectively ascertainable personal freedoms?

These questions, important as they are in any democracy, have been the focus of much political and jurisprudential debate in Pakistan in the months leading up to the general elections that were held in May 2013. But before tackling these larger questions, specifically as they relate to Pakistan, this article sets out to delineate and understand the constitutional and legal paradigm that governs standards of parliamentary qualifications and disqualifications in our legal structure. The structure of this article is as follows. It begins with charting the history of qualification and disqualification provisions in the Constitution of Pakistan, 1973 (the ‘1973 Constitution’) as they have been amended repeatedly over the years, mainly by military-led *de facto* governments. The article then shows how the interpretation of these amended provisions, while restricted to broad objective criteria by the judiciary in the past, has assumed a palpably more subjective and moralistic approach in the run-up to the 2013

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<sup>1</sup> Abraham Lincoln, ‘The Gettysburg Address’ (Speech at Gettysburg Pennsylvania November 19, 1863) <[http://rmc.library.cornell.edu/gettysburg/good\\_cause/address\\_pic\\_p1\\_legible.htm](http://rmc.library.cornell.edu/gettysburg/good_cause/address_pic_p1_legible.htm)> accessed 12 June 2013.

<sup>2</sup> This phrase, first coined by MacArthur Maguire, has been used by Harvard Presidents when conferring degrees at Commencement since the late 1930s.

general elections. Finally, the article undertakes a detailed review of the constitutional provisions on qualification and disqualification of legislators in support of its main argument that the fundamental right of an individual to contest for public office, and an equal fundamental right of the citizenry to elect an individual of their choice, cannot be denied on the touchstone of subjective and unascertainable ideas. Conceptually, there is no cavil with the idea that the constitution (and the law) must provide qualification and disqualification standards for Parliamentarians in order to ensure that the solemn responsibility of legislation is entrusted to individuals possessing a certain measure of intellectual rigor, moral fibre and financial integrity. On one end of the spectrum, the argument by (some) Parliamentarians and their supporters that, so long as an individual has the confidence of the people and is 'elected' by them, no disqualification bar can be applicable, is flawed. The constitution provides for standards which must be adhered to. On the other end of the spectrum, the suggestion by self-appointed 'saviours' that fluid moral benchmarks and unascertainable standards can be used to hold people 'guilty' (and thus to disqualify them from contesting for elections), is equally incorrect.

### **History of the Constitutional Provisions on Qualification and Disqualification relating to Legislators**

Historically, the provisions relating to qualifications and disqualifications of Parliamentarians in the previous two constitutions of Pakistan (1956 and 1962) were objective in character, brief in content, and ascertainable in nature, dealing primarily with factors like age, solvency, citizenship and mental capacity of the individual concerned. In addition, the erstwhile constitutions enabled the legislature to add further criteria to these basic requirements, if the legislature so desired, through acts of the Parliament. The same brief, ascertainable and definitive model was reproduced in the original text of the 1973 Constitution, without the infusion of the present day subjective and moral scrutiny. All that, however, changed, as the sails of our 'ship of state' were taken over by successive generations (and genres) of 'national saviours'.

### The ‘righteous and ameen’ *khaki* saviors

Articles 62 and 63 of the 1973 Constitution contain the qualifications for membership of the Parliament and the disqualifications, respectively.<sup>3</sup> The same standards apply in the case of membership to the Provincial Assemblies.<sup>4</sup> In 1985, under the leadership of Pakistan’s quintessential ‘righteous and ameen’ General Zia-ul-Haq, Articles 62 and 63 were amended to add five new clauses to the former, and twelve new clauses to the latter, provision.<sup>5</sup> Zia, impressing his false sense of moral superiority and ethical purity, included within the qualifications of a Parliamentarian, requirements of personal character and reputation, including ‘good character’, ‘adequate knowledge of Islamic teachings’, ‘sagacious, righteous and non-profligate and honest and ameen’ and non-conviction of a crime involving ‘moral turpitude’. Similarly, disqualifications were allowed on the grounds of propagating an opinion ‘prejudicial to the Ideology of Pakistan’ or being convicted of an offence involving ‘moral turpitude’.

However, the superior judiciary (namely, the High Courts and the Supreme Court of Pakistan) interpreted these newly enacted constitutional provisions in a coherent and tangible manner. Specifically, the Courts made two very clear and deliberate declarations that contained and restricted the potentially pervasive impact of Articles 62 and 63: (1) that these provisions are not self-executory,<sup>6</sup> and (2) that any bar or disqualification pursuant to these provisions must be interpreted narrowly to ensure that the fundamental right to contest an election is not infringed without just cause. In so deciding, numerous judgments of the

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<sup>3</sup> The Representation of People Act 1976, c (IX) and the Conduct of General Elections Order 2002, s 8A and s 8B contain further details on the qualification and disqualification criteria.

<sup>4</sup> Constitution of the Islamic Republic of Pakistan 1973, art 113.

<sup>5</sup> Revival of the Constitution of 1973 Order, [1985] (President’s Order No. 14 of 1985), (promulgated on March 2, 1985 and published in the Gazette of Pakistan, Extraordinary) pt I 101 – 4.

<sup>6</sup> *Rana Aftab Ahmad Khan v Muhammad Ajmal* PLD 2010 SC 1066, 1076; *Dr Mobashir Hassan v Federation of Pakistan* PLD 2010 SC 265, 423; *Muhammad Jameel v Amir Yar* PLD 2010 Lahore 583, 602-605.

superior Courts resisted the temptation to give an ‘extended’ meaning to the standards of Articles 62 and 63, and resisted disqualifications on the basis of mere allegations or popular belief.<sup>7</sup>

Articles 62 and 63 went through another iteration of amendments when General Pervez Musharraf took over the political reins in 1999 and introduced the Legal Framework Order, 2002 (the ‘LFO’). The LFO added three provisions to the disqualification clause.<sup>8</sup> The Courts reasserted their earlier interpretation in favour of political candidates, and resisted expanding the ambit of these constitutional provisions.<sup>9</sup>

Finally, these articles were once again amended through the 18<sup>th</sup> Amendment to the 1973 Constitution (this time by a democratic Parliament) which, while removing Musharraf’s imprint to some extent, left Zia’s broader legacy untouched.

### **The new ‘robed’ saviours and the 2013 general elections**

In a fateful turn of events, just as Pakistan was clawing out of the shadows of Musharraf’s military-led government, a very different moral custodian of constitutional values appeared on the scene. The restored judiciary, fully conscious of its new-found position in the gaze of history, dismissed the former (elected) Prime Minister, Yousaf Raza Gillani under Article 63(1)(g), disqualified Parliamentarians with dual nationality under Article 63(1)(c), and – most ominously – at numerous occasions referred to Parliamentarians as not being ‘sagacious’ or ‘ameen’ in violation of the constitutional requirements of Article 62(1)(f).

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<sup>7</sup> See, eg, *Shahid Nabi Malik v Muhammad Ishaq Dar* 1996 MLD 295 Election Tribunal Punjab.

<sup>8</sup> The new provisions contained a clause regarding disqualification on grounds such as sentence for absconding from a competent court, non-payment of loan of a value of Rs. 2 million or more one year after it was due and in the event that there has been a non-payment of utility bills/government dues in the excess of Rs. 10,000 after six months of them being due by the candidate, their spouses or dependents.

<sup>9</sup> See, eg, *Waqas Akram v Dr Tahir-ul-Qadri* PLJ 2003 SC 9.

And these actions, while justified by the letter of the law, struck the match that lit an avalanche of fire.

Leading up to the 2013 general elections, the Returning Officers of the Election Commission of Pakistan (all judicial officers by profession) used Articles 62 and 63 to impose their own moral foot-print as cleansing instruments to disqualify (even publicly embarrass) candidates vying to participate in the elections. Prospective Muslim candidates, for instance, were tested on whether they could recite certain religious verses and prayers, and whether they could demonstrate their loyalty to the ‘ideology of Pakistan’ by identifying the author of the national anthem. All fundamental rights – including the right to privacy, conscience and speech – took a back seat to this witch-hunt, culminating perhaps most manifestly in the disqualification of the veteran politician Ayyaz Amir on the basis of views expressed in his journalistic writings.<sup>10</sup>

The Election Tribunals and the superior Courts were left with no option but to overturn a large number of these disqualifications. Some were overturned on the basis of the Returning Officers (the ‘ROs’) overstepping their authority, others on the touchstone of the larger fundamental right to contest elections, and still others on the ground that several requirements of Articles 62 and 63 necessitated convictions by a court of law through due process, which were ignored by the ROs. On the whole, the entire process left jurists, observers and candidates more confused and unsettled about the precise nature and application of the provisions of Articles 62 and 63. Barring a few exceptions, there is no real clarity as to how each of the clauses of these constitutional provisions will be applied and interpreted in the future.

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<sup>10</sup> The Human Rights Commission of Pakistan (‘HRCP’) also noted the disqualification of candidates and in a statement expressed their concerns with regard to the matter. Furthermore, Ayaz Amir’s disqualification was overturned by an Election Tribunal Bench Rawalpindi <<http://dawn.com/2013/04/10/ayaz-amir-allowed-to-contest-elections-musharraf-files-appeal/>>.

Thus, it is important to analyze the clauses within the qualification and disqualification provisions of the 1973 Constitution, in order to assess which among them need a rigorous judicial review or constitutional amendment, before the same can be enforced in a reasonable and judicious manner. This article now turns to a joint analysis of Articles 62 and 63 in light of the declaration of the superior Courts that the requirements in both these clauses have to be read together. The requirements of these constitutional provisions can be divided into the following categories, each of which is discussed below: (1) those that are *prima facie* and ascertainable, (2) those that have never (or scarcely) been used, (3) those which, in light of the established jurisprudence, have been deliberated upon and have thus attained clarity, (4) those that are still inconclusive and shrouded in controversy and (5) those that are subjective, moral and religious in nature, and thus devoid of any standard of determinability.

### **Types of Qualification and Disqualification Provisions and their Standards of Determinability**

#### **1. *Prima facie* and ascertainable requirements**

Certain clauses of the qualification and disqualification provisions require little more than a *prima facie* inquiry. In respect of Article 62 qualifications, these include the requirements that the candidate be: (i) a ‘citizen of Pakistan’ (Article 62(a)); (ii) ‘enrolled as a voter’ and ‘not less than twenty-five years of age’ in the case of the National Assembly (Article 62(b)); and (iii) ‘enrolled as a voter’ and ‘not less than thirty years of age’ in the case of the Senate (Article 62(c)).

Similarly, disqualifications under Article 63 include the requirements that the candidate or Parliamentarian must not: (i) be ‘of unsound mind’ as ‘declared by a competent court’ (Article 63(a)); (ii) be ‘an undischarged solvent’ (Article 63(b)); (iii) hold ‘an office of profit in the service of Pakistan other than an office declared by law not to disqualify its holder’ (Article 63(d)); or (iv) be ‘in the service of any statutory body or any body which is owned or controlled by the Government or in which the Government has a controlling share or interest’ (Article 63(e)).

While still contestable in certain instances, and controversial in others, the foregoing constitutional requirements are relatively straightforward and easily ascertainable. *Prima facie*, they are binary in nature: either a person is or is not a citizen of Pakistan, or of twenty-five years of age.

## **2. Never (or scarcely) used provisions**

Several other clauses of Articles 62 and 63 have never (or scarcely) been invoked. As a result, despite having been written into the text of the 1973 Constitution as substantive qualification and disqualification requirements, there is very little clarity as to their possible deficiencies or pitfalls. Any comment on what the standard of their application might be, or whether a determination by a court of law would even be required before their implementation, is merely speculative in nature.

Briefly and in general terms, these include a disqualification under Article 63 on the basis of: (i) disqualification from election as member of the legislative assembly of Azad Jammu and Kashmir (Article 63(1)(f)); (ii) dismissal, removal or compulsory retirement from the service of Pakistan or a government corporation on grounds of misconduct (Article 63(1)(i) and (j)); (iii) being in the service of Pakistan or a statutory body or any body owned or controlled by the government (Article 63(1)(k)); (iv) having a share or interest in a contract for supply of goods to or for performance of any service undertaken by the government (barring certain exceptional contracts) (Article 63(1)(l)); (v) holding an office of profit in the service of Pakistan (barring certain exceptions) (Article 63(1)(m)); and (vi) disqualification under any other valid and enforceable law (Article 63(1)(p)).

The fact that these provisions have never, or scarcely, been used speaks volumes about their redundancy. Even if they are to be included as substantive qualifications and disqualifications for Parliamentarians, it would perhaps have been better that they had been included through sub-constitutional legislation. Seemingly, it is for this very reason that the original 1973 Constitution allowed

for ‘other qualifications [or disqualifications] as may be prescribed by an Act of Parliament’ under Articles 62(d) and 63(e).

### 3. Judicially determinable standards

In recent years, the superior Courts, in particular the Supreme Court, have invoked and given authoritative interpretations to certain clauses of the qualification and disqualification provisions. Famously, these include disqualifications on the basis of dual-nationality and defaming or ridiculing the judiciary.

#### a) Dual Nationality

The disqualification clause (Article 63(1)(c)) on the issue of dual nationality mandates that anyone who ‘ceases to be a citizen of Pakistan, or acquires the citizenship of a foreign State’ [emphasis added] shall be disqualified from being a Parliamentarian in Pakistan. The legislative intent behind this provision, as observed by legal experts as well as the Supreme Court, seems to be that those who owe fidelity to another country cannot be entrusted with adequately safeguarding the interests of Pakistan.

Only months before the 2013 general elections, the Supreme Court disqualified eleven Parliamentarians on the basis of their having ‘acquired’ citizenship of another country.<sup>11</sup> In so doing, the Court dispensed with Article 63(2) which, in the first instance, requires a determination by the Speaker/Chairman of the House as to whether a ‘question’ has arisen regarding the disqualification of a member. If so, the matter is to be referred to the Election Commission of Pakistan (the ‘ECP’). The Supreme Court, however, directed the ECP to ‘de-notify’ the dual national Parliamentarians, directed that these individuals ‘refund all monetary benefits drawn by them for the period during which they occupied the public office’, and also observed that since these

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<sup>11</sup> *Syed Mehmood Akhtar Naqvi v Federation of Pakistan* Constitution Petition No. 05/2012.

Parliamentarians ‘had made false declarations before the Election Commission while filing their nomination papers and as such appear to be guilty of corrupt practice... the Election Commission is directed to institute legal proceedings against them...’<sup>12</sup>

In addition, in the case of the Interior Minister at the time, Rehman Malik, the Court went a step further, surrendering to the temptations of moral righteousness, and held that: ‘Mr. Rehman A. Malik... in view of the false declaration filed by him at the time of contesting the election to the Senate held in the year 2008, wherein he was elected, cannot be considered sagacious, righteous, honest and ameen...’<sup>13</sup>

In the aftermath of this judgment and the resulting disqualifications, a debate erupted across the political and intellectual airwaves of Pakistan about the language, effect, applicability and merits of the dual nationality disqualification clause. At its core, Article 63(1)(c) attempts to ‘quantify’ a person’s patriotism and loyalty to the State of Pakistan by pegging it to the concerned individual’s (sole) citizenship. While the sentiment is laudable, there can be little cavil with the contention that the language of the provision suffers from several defects in addressing the intended mischief. In this regard, it is important to assess whether dual nationality, under Pakistani law, is illegal *per se* or simply a bar for contesting and/or serving as a member of the Parliament. Does the law, as it stands today, address the very valid concern that those whose fidelity to Pakistan is questionable should not be members of the Parliament? Or do the law and the 1973 Constitution, while attempting to address this issue, miss the point entirely?

First of all, ‘citizenship’ in Pakistan, including dual citizenship or nationality, is governed by The Citizenship Act, 1951 (the ‘TCA’). Barring a few exceptions (relating to age and marriage), the TCA stipulates that a person shall cease to be a citizen of Pakistan’ upon acquiring another nationality, but at the

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<sup>12</sup> *ibid* para 20(c); (d).

<sup>13</sup> *ibid* para 20(g).

same time makes this stipulation inapplicable to any person who 'is also the citizen of the United Kingdom and Colonies or of such other country as the Federal Government may, by notification in the official Gazette, specify in this behalf'.<sup>14</sup> In essence, acquiring a second nationality does not strip a person of his/her Pakistani nationality, so long as the other (acquired) nationality is of a country that the Federal Government has so notified. Dual nationality, therefore, is not impermissible in all cases.

The language of Article 63(1)(c), however, seems to suggest that if a person has 'acquired' citizenship of a foreign state (or given-up/lost Pakistani citizenship), there is reason to believe that such a person's sense of belonging and allegiance to Pakistan is so weak as to be unworthy of being a member of the Parliament. Put another way, the idea of citizenship has been equated with a sense of 'patriotism' or 'nationalism'. The constitutional provision makes sense in the case of a person who 'ceases to be a citizen of Pakistan', but the language does not bar anyone who 'has dual nationality'. The bar is only against someone who 'acquires' a foreign citizenship. A number of issues flow from this.

First, the provision expressly disqualifies a person who 'acquires' a foreign nationality (for any reason, including compulsion or fear for life), while not someone who was born a foreign national and later 'acquires' Pakistani citizenship. The latter is carefully carved out of the disqualification clause, and such person's loyalty to the State is (apparently) deemed 'stronger' than the former. One must also ask whether holding a passport from a particular country alone is an appropriate measure of an individual's loyalty and patriotism to that State. Should other factors not trump (or at least supplement) the issue of nationality in measuring an individual's patriotism? What about a person who acquires a foreign citizenship but has all his/her assets in Pakistan, pays the full measure of taxes and generates employment, vis-à-vis someone who is not a foreign national but has all his/her assets abroad? Who is more loyal, and therefore better suited, to being a

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<sup>14</sup> The Citizenship Act 1951, s 14.

member of the Parliament? The truth is that there can be no objective measure of calibrating a person's loyalty to the State. Any attempt to ascertain loyalty and patriotism must necessarily look beyond the contours of a mere passport or nationality, towards a more comprehensive assessment. There is every reason for the legislature and the judiciary to revisit the language and application of Article 63(1)(c).

b) Defaming or ridiculing the judiciary

Of all the clauses of Articles 62 and 63, perhaps the most authoritative (and controversial) interpretation and application by the Supreme Court pertains to the disqualification of a person who has been 'convicted by a court of competent jurisdiction for propagating an opinion, or acting in any manner, prejudicial to...the integrity or independence of the judiciary of Pakistan, or which defames or brings into ridicule the judiciary'.<sup>15</sup> This clause has been interpreted quite literally, with the result that anyone who has been convicted of contempt of court or of ridiculing the judiciary, stands disqualified from being a Parliamentarian from the date of conviction. This clarity, however, was attained under the shadow of a politico-judicial chess match, culminating in the conviction, and subsequent disqualification, of the former Prime Minister Yousaf Raza Gillani on the basis of contempt of court.

The conviction and disqualification of Prime Minister Gillani emerged from the declaration of the Supreme Court in late 2009 that the National Reconciliation Ordinance, 2007 (the 'NRO') was unconstitutional. The Court, *inter alia*, ordered the Federal Government to once again initiate the cases pending against President Asif Ali Zardari in the Swiss courts.<sup>16</sup> When the

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<sup>15</sup> Constitution of the Islamic Republic of Pakistan 1973, art 63(1)(g).

<sup>16</sup> *Dr Mobashir Hassan v Federation of Pakistan* PLD 2010 SC 265. During his second term as Prime Minister in 1998, Nawaz Sharif initiated a case against Benazir Bhutto and Asif Ali Zardari before the Swiss courts for embezzling millions of dollars while in power in Swiss accounts. They were found guilty in 2003 though this was later suspended in appeal. In 2007, then President General Pervez Musharraf issued the National Reconciliation Ordinance ('NRO') absolving a number of politicians, including Asif Ali Zardari and Benazir

government declined to do so, the Supreme Court, frustrated with the lack of implementation of its judgment, specifically directed the Prime Minister to write a letter to the Swiss authorities, and upon his refusal to do so, convicted him in 2012 of ‘willful flouting, disregard and disobedience’ of the Court’s judgment, ridiculing the judiciary. In dire straits, as a last ditch effort to save the Prime Minister, the government adopted a nuanced interpretation of Article 63(2), advocating that the Speaker had the ‘discretion’ and the ‘sole prerogative’ to disqualify a member of the National Assembly. During the pendency of this ongoing bout between the government and the judiciary, the national focus suddenly shifted to the startling claim of a local business tycoon (Malik Riaz) that the Chief Justice’s son had extorted 340 million rupees from him (over a period of three years) on the promise of favourable verdicts from the apex Court. Many saw this allegation as a ploy by the government to undermine the judiciary. Whether or not the government had ‘conspired’ against the judiciary, the apex Court reacted with vehemence. Just a few days later, a three-member bench, headed by the Chief Justice (through an order that spans a total of two paragraphs!), bypassed the Speaker and the ECP to directly disqualify the Prime Minister.<sup>17</sup> In the process, the Court dispensed with the requirements of Article 63 (clauses (2) and (3)), according to which the Speaker/Chairman of the House makes a determination as to the possible disqualification and then ‘refers’ the issue to the ECP for a ‘decision’ within ninety days.

Leaving aside the politics, whether or not one agrees with the judgment of the apex Court, from a purely legal perspective, there is comfort in the certainty of application of the law. For provisions as elusive as Articles 62 and 63, such comfort is not immaterial.

#### **4. Inconclusive and controversial provisions**

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Bhutto, bureaucrats and many others of a wide range of charges such as corruption and money laundering.

<sup>17</sup> *Muhammad Azhar Siddique and others v Federation of Pakistan* Constitutional Petitions Nos. 40, 41, 42, 43, 44, 45, 46, 47 and 50 of 2012.

The general elections of 2013, and the controversial scrutiny process of electoral candidates leading up to this constitutional landmark, lay bare the ambiguity and unenforceability of several other clauses of Articles 62 and 63. Split between the summary disqualifications (convictions) by the ROs and a paddling back on these decisions by the Election Tribunals, several qualification and disqualification clauses remain shrouded in a veil of uncertainty. Notably, these include disqualification on the basis of ‘default’ and fake degrees.

a) Disqualification on account of being a ‘defaulter’

Two specific provisions of Article 62 relate to the disqualification of a candidate on account of being a ‘defaulter’. The essence of both these provisions is financial default, and the legislative intent behind them is clear. Where a person, either by himself, or through a dependent, obtains a loan and does not pay it back<sup>18</sup>, or uses public utilities but does not pay for the same<sup>19</sup>, is not eligible to contest for elected office (where he can legislate on the use of public money).<sup>20</sup>

The problems of uncertainty and non-implementation of these clauses spring instead from the way that the superior Courts have interpreted the word ‘defaulter’. The legal authority and jurisdiction to declare any person or company, or in exceptional circumstances, a director/shareholder of a company, as a ‘defaulter’, rests in the sole and exclusive ambit of a court of competent jurisdiction. A lender bank cannot, on its own, declare a borrower to be a ‘defaulter’.<sup>21</sup> For instance, a recent judgment of

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<sup>18</sup> Constitution of Islamic Republic of Pakistan 1973, art 63(1)(n).

<sup>19</sup> *ibid*, art 63(1)(o).

<sup>20</sup> The language of Article (63)(1)(n) has been reproduced in The Representation of People Act 1976, s 12(2)(3) and s 99(aA)(n), while the language of Article 63(1)(o) has been reproduced in The Representation of People Act 1976, s 99(1A)(o).

<sup>21</sup> See generally, *Syed Nasir Ali Rizvi v Mirza Nasir Baig* 1997 CLC 719 Election Tribunal Punjab; *Bhagwandas Chawala v Kishanchand Parwani* 1997 CLC 605 Election Tribunal Sindh; *Haji Ghulam Sabir Ansari v Returning Officer* 1993 MLD 2508 Election Tribunal Punjab; *Bank of Punjab v Messrs*

the Lahore High Court has held that a lender bank declaring any of its borrowers to be ‘defaulters’, without such a determination by a court of competent jurisdiction, amounts to the bank being a judge in its own cause. Furthermore, the Court has also declared that even the State Bank of Pakistan, upon a referral made to it by the lender bank, cannot declare any person to be a defaulter without a judgment of a court. The State Bank, according to the Court, is merely a regulator with no authority as an arbiter in regards to declaring a borrower as ‘defaulter’.<sup>22</sup> Further, such a determination of ‘defaulter’ even by a court of competent jurisdiction can only be made after following due process, which includes appraisal of evidence, right of hearing, and a reasoned judgment after the proper application of mind. Not surprisingly, in the current dispensation of justice, this process frequently takes several years, followed by numerous appeals. As a result, a person who, or the owner of a company that, has obtained a loan, which has not been paid back, can embroil the lender bank in several years of litigation, during which time such person or owner of a company is not yet a ‘defaulter’, and can thus evade the bar of disqualification under Articles 63(1)(n) and 63(1)(o).

Accordingly, several candidates for the 2013 elections who had not paid back their personal or corporate loans but were involved in litigation at the time, were declared ‘qualified’ for contesting the elections (by respective ROs of the Election Tribunals). It is hard, in light of the facts, to imagine how these qualifications are in consonance with the spirit and legislative intent behind Articles 63(1)(n) and 63(1)(o).

b) Disqualification on account of fake degrees

The requirement for a Parliamentarian to possess a ‘bachelor’s degree’ or equivalent is specified in Section 8A of the Conduct of General Elections Order 2002 (the ‘CGEO’) and Section 99(1)(c) of ROPA. This requirement was later amended

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*ACRO Spinning and Weaving Mills Ltd* 2012 CLD 1819 Lahore; and *United Bank Limited v Messrs Aziz Tanneries (Pvt) Ltd* 2004 CLD 1715 Lahore.

<sup>22</sup> See *Afzal Bari v Government of Pakistan* W.P. No. 16760/2012.

and removed through the Election Laws (Amendment Act), 2009, with effect from 21st April, 2008. As a consequence, the qualifications of candidates participating in the elections held in February 2008 still had to be adjudged under the un-amended bachelor's degree requirement of the law. Specifically, the law stipulates:

... a person shall not be qualified to be elected or chosen as a member of [Parliament]... unless he is at least a graduate possessing a bachelor degree in any discipline or any degree recognized as equivalent by the [Higher Education Commission].

In theory, the requirement seems simple. The Higher Education Commission of Pakistan (the 'HEC') maintained a list of accredited institutions, and a bachelor's degree from any of these institutions would suffice for the purpose of qualifying a candidate for contesting elections. This interpretation of Section 8A of the CGEO and Section 99(1)(c) of ROPA, even prior to the 2009 amendment, was relaxed by a full-bench judgment of the Sindh High Court, in the case of *Syed Ali Bux Shah*.<sup>23</sup> Reading the requirement of a bachelor's degree 'or' a degree recognized by HEC disjunctively, the Court declared that even a bachelor's degree that was not recognized by the HEC was sufficient to qualify a person to contest for elections.

Relaxing the ambit of the bachelor's degree requirement is perhaps justifiable. What is baffling, however, is the way that the Election Tribunals declared that disqualifications on the touchstone of the degree requirement, or on the basis of lying about the requisite degree, could only be determined after a sprawling and unlikely process. This meant that a degree could only be declared fake by the courts, and not by the educational institution that allegedly issued the degree. As a result, even in instances where the degree granting institution had conducted an inquiry and concluded that the candidate's degree was fake (with the HEC

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<sup>23</sup> *Dr. Fahmida Mirza and others v Federation of Pakistan and others* 2008 YLR 1493 Karachi.

reaching the same conclusion), the candidate was allowed to contest the elections because a court had not given a final judgment on the issue.

Beneficiaries of this protracted process included the former Education Minister himself. Despite the fact that the Minister's A-Levels certificate had been declared fake by the issuing authority (the Cambridge Education System (the 'CES')), and his bachelor's degree (obtained on the basis of the A-Levels) declared fake by the HEC, the Minister was declared qualified for contesting the general elections by the Election Tribunal.<sup>24</sup> Under what stretch of imagination could this have been the legislative intent of the lawmakers?

## **5. Moral, subjective, and religious clauses**

Perhaps the most controversial, and least quantifiable, clauses of Articles 62 and 63 are the ones that attempt to calibrate a candidate's patriotism, virtue and morality – more specifically, religious virtue and morality – and use the same as a test for being eligible to contest for elected office. These provisions were inserted by General Zia-ul-Haq for political victimization and witch-hunting of legislators. In this regard, Article 62 mandates that a person shall only be eligible to contest elections if: (i) 'he is of good character and is not commonly known as one who violates Islamic Injunctions' (Article 62(1)(d)); (ii) 'he has adequate knowledge of Islamic teachings and practices obligatory duties prescribed by Islam as well as abstains from major sins' (Article 62(1)(e)); (iii) 'he is sagacious, righteous, non-profligate, honest and ameen, there being no declaration to the contrary by a court of law' (Article 62(1)(f)); and (iv) 'he has not, after the establishment of Pakistan, worked against the integrity of the country or opposed the ideology of Pakistan' (Article 62(1)(g)).

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<sup>24</sup> Usman Manzoor, 'Clearance of Waqas Akram shocks nation' *The News* (Islamabad, 18 April 2013) <<http://www.thenews.com.pk/Todays-News-13-22318-Clearance-of-Waqas-Akram-shocks-nation>> accessed 12 June 2013.

Similarly, Article 63 stipulates that disqualifications may be made on the basis of a person having been: (i) '[convicted] for propagating any opinion, or acting in any manner, prejudicial to the ideology of Pakistan, or the sovereignty, integrity or security of Pakistan... unless a period of five years has lapsed since his release' (Article 62(1)(g)); or (ii) '[convicted] for any offence involving moral turpitude, sentenced to imprisonment for a term of not less than two years, unless a period of five years has elapsed since his release' (Article 62(1)(h)).

Since, as mentioned earlier, the superior Courts have held that the qualification and disqualification clauses of the 1973 Constitution are to be read together, any of these provisions of Articles 62 and 63 can be used at the time, before, or after an election to disqualify a person from being a Parliamentarian. Tremors of the possible impact of these subjective and morally pregnant clauses were felt in the run-up to the 2013 general elections, when the ROs, in a bid to fulfil the constitutional mandate, took it upon themselves to be the religio-moral police of the nation. To this end, the ROs – endowed with the divine ability to 'judge' a candidate's morality, piousness and patriotism – purported to grill prospective candidates about, amongst other things, their knowledge and ability to recite '*Dua-e-Qunoot*' and the fourth *Kalima*.<sup>25</sup>

In light of these developments, a national debate erupted as to the purpose and ambit of these clauses. Were the provisions of the law to be blamed? Or was it their interpretation, instead, that was flawed? Going forward, what path must one choose to ensure that (while electing individuals of integrity) one does not allow any individual, or group, to stamp his or their morality onto the fabric of democracy?

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<sup>25</sup> *Dua-e-Qunoot* was recited by the Holy Prophet during prayers, is said to teach obedience and humility and constitutes a mandatory part of the *Isha* prayer. The fourth *Kalima* emphasizes the oneness of God and stresses that He gives life and is Eternal with no companion.

## Distilling Eligibility and Virtue:

It is important to be mindful of the fact that the ROs are employees of the government and do not perform adjudicatory functions. As such, they cannot go beyond the ambit of scrutinizing the documents presented to them, and be both judges and executioners of the candidates. This is especially so when, as per several judgments of the superior Courts, it has been held that the proceedings before the RO (and the Election Tribunal) are merely 'summary' in nature, and an exhaustive appraisal of evidence cannot be undertaken in such proceedings.<sup>26</sup> Thus, a 'conviction' before the RO or the Election Tribunal, without following due process, amounts to violation of the right to fair trial under Article 10-A of the 1973 Constitution.<sup>27</sup>

Moreover, given the subjectivity of these clauses and their wide moral spectrum, they provide the greatest room for interpretation to the judiciary. In fact, as argued by many jurists, not only should such clauses be interpreted narrowly (in favor of the accused), but a purposive approach should be adopted, keeping in mind that these clauses have been incorporated in the 1973 Constitution by a non-democratic regime. This sentiment is aptly conveyed by Aharon Barak. He writes:

For statutes enacted during the undemocratic period, little weight should be attached to the intention of the undemocratic legislature. Indeed, consideration of legislative intent in statutory interpretation is based on the need to give expression to the intent of the democratic legislator. When a legislator is not democratic, there is no reason to give expression to his intent.<sup>28</sup>

Hence, up until these constitutional provisions can be amended, the immediate and important responsibility of containing

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<sup>26</sup> See, eg, *Illahi Bux Soomro v Aijaz Hussain Jakhrani* 2004 CLC 1060 Election Tribunal Sindh, 1074, 1079; *Haji Arshad Ali v Sardar Faisal Zaib* 2003 SCMR 1848, 1549.

<sup>27</sup> Constitution of the Islamic Republic of Pakistan 1973, art 10A.

<sup>28</sup> Aharon Barak, *The Judge in a Democracy* (Princeton 2006) 125-126.

their pervasive impact has to be that of the judiciary. Even otherwise, what needs to be analyzed is whether a court, judiciously, can make the moral determinations set out in Articles 62 and 63 about who is *ameen* or who is loyal to the ideology of Pakistan and the injunctions of Islam. What authority or expertise do judges have to make such determinations? Does this violate the fundamental rights of freedom of conscience<sup>29</sup>, freedom of speech<sup>30</sup>, and even assembly and association<sup>31</sup>? Does it, in a broader sense, violate the right to human dignity<sup>32</sup>? And even if such an exercise is undertaken by the judiciary, are there any objective and ascertainable standards that can be used to achieve dispassionate outcomes?

To assess these issues in greater detail, it is helpful to classify the moral and subjective clauses of Articles 62 and 63 into three distinct categories: (1) clauses concerning fidelity to Pakistan and her ideology, (2) clauses concerning morally appreciable social behaviour and (3) religiously inspired clauses.

a) Ideology of Pakistan

Articles 62(1)(g) and 63(1)(f) relate to disqualification on the basis of ‘propagating any opinion’ or ‘acting’ or ‘[working] against’ the ‘sovereignty, integrity, or security’ or the ‘ideology’ of Pakistan. There is little issue with determining the meaning and ambit of ‘propagating any opinion’ or ‘acting’ or ‘[working] against’. Problems arise, however, in judicially interpreting and determining the meaning of ‘sovereignty, integrity, or security’ as well as the ‘ideology’ of Pakistan. There is no real way of determining the ideology of Pakistan. Any collection of people – be it urban or rural, rich or poor, Muslim or non-Muslim, educated or uneducated – would differ on what the ideology of Pakistan is, or what constitutes working against the country’s integrity. Even people within a particular political party, or state institution, or a

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<sup>29</sup> Constitution of Islamic Republic of Pakistan 1973, art 20.

<sup>30</sup> *ibid*, art 19.

<sup>31</sup> *ibid*, art 16; 17.

<sup>32</sup> *ibid*, art 14.

uniformed force, would differ on the definition of these ideas. And in a democracy – one that affords freedom of speech, religion and association – no person or group has a monopoly over their meaning. Liberals would argue that secularism is in line with the ideology of ‘Jinnah’s Pakistan’, while others would say that *Pakistan ka matlab kiya, La Ilaha Il Allah*.<sup>33</sup> One side would argue that protesting against and breaking the military’s hegemony over Pakistan’s national security, and leaving it to be determined by the civilians, is what Pakistan’s ideology demands. While others would say that any such move would undermine the integrity, security and the ideology of Pakistan. Who is correct? How can anyone, other than history, be the judge of this?

In such a wide and subjective spectrum, it is unfathomable for an RO, or even the full bench of the Supreme Court, to determine who has acted foul of these constitutional provisions. What provision of the law or moral authority allows seventeen (unelected) individuals to be the final arbiters of this ethos?<sup>34</sup> Can a person do or say something that he or she honestly believes is in the interest of Pakistan (such as protest against the intelligence agencies or against the infusion of religion with the State), while others (even the majority) might think that such an act is against the ideology of Pakistan? Should voices of dissent be encouraged instead of being banned? Has dissent and discord not frequently marked the upward surge of nations? Was Muhammad Ali Jinnah, and the then Muslim League, working against the ‘integrity’ or ‘ideology’ of India in 1947? If so, should Jinnah have been banned from contesting in the 1946 elections? If General Yahya Khan had deemed that Zulfikar Ali Bhutto and Mujib-ur-Rehman were working against the ideology of Pakistan, should both have been banned from the elections in 1970? Were Ayyaz Amir’s critical writings of Pakistan’s mullahs, military and the judiciary, reason enough to disqualify him from contesting the elections? Could an

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<sup>33</sup> Translated, it means ‘What does Pakistan mean? There is no God but *Allah*.’

<sup>34</sup> Seventeen (unelected) individuals here refers to the maximum number of judges in the Supreme Court.

argument not be made that Amir was attempting to uphold, instead of destroy, the ideology of Pakistan?

b) Moral integrity

Even if one could justify that certain state institutions, by majority or consensus, can determine a reasonable criteria of what constitutes the ‘ideology’ of Pakistan, there is undoubtedly no objective way of establishing the exactitude of who is ‘sagacious, righteous, non-profligate, honest and ameen’<sup>35</sup> or has committed an offence of ‘moral turpitude’<sup>36</sup>.

In the years since 1985, when these provisions were made a part of the 1973 Constitution, the courts have had opportunities to interpret and apply these clauses. Nevertheless, as expected, no real authoritative definition or standard has emerged from the jurisprudence. The first attempt to interpret ‘righteous’ was made in the case of *Muhammad Yousaf*.<sup>37</sup> Shying away from a jurisprudential discourse on the issue, the Election Appellate Authority quoted the definition of ‘righteous’ from the Concise Oxford Dictionary as being someone who is ‘morally right, just, upright, virtuous, law-abiding’. Using this broad and generic definition, the Authority declared that a ‘convict’ [in a criminal case] is not ‘law-abiding’ and thus cannot qualify on the standard of Article 62(1)(f). More recently, in the case of *Bilal Ijaz*, the Lahore High Court did little more than provide a list of dictionary meanings for the words ‘sagacious’, ‘righteous’, ‘non-profligate’, ‘honest’ and ‘ameen’.<sup>38</sup> Ominously, in the case of *Muhammad Jamil*, the Lahore High Court, quoting the Oxford Advanced Learner’s Dictionary, held that these words entailed a ‘wide’ meaning ‘in order to ensure that the best of the best make it to these sacred Houses’.<sup>39</sup> The relevant part of the judgment reads as under:

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<sup>35</sup> Constitution of Islamic Republic of Pakistan 1973, art 62(1)(f).

<sup>36</sup> *ibid*, art 63(1)(h).

<sup>37</sup> *Muhammad Yousaf v M Irshad Sipra* 1988 CLC 2475, 2489.

<sup>38</sup> *Bilal Ijaz v Mudassar Qayyum Nahra* 2010 CLC 1962 Lahore, 1704-1705.

<sup>39</sup> *Muhammad Jamil v Amir Yar* PLD 2010 Lahore 583, para 29.

## Distilling Eligibility and Virtue:

... The words ‘sagacious....ameen’ have to be understood in the general parlance. Sagacious means ‘showing good judgment and understanding’. Righteous means ‘morally right and good’. Honest means ‘always telling the truth, and never stealing or cheating... Not hiding the truth about something’. Ameen means honest. The meanings given above are broad and wide enough to detect and catch even the smallest of taint or blemish appearing on or attached with the name of the aspiring candidate. Framers of the Constitution have intentionally kept these qualifications wide and simple in order to ensure that the best of the best make it to these sacred houses, which in turn would guarantee progress and development of our nation.<sup>40</sup>

During all this while, and wisely so, the Supreme Court had resisted the temptation to use the broad and unascertainable ambit of these provisions as a sword to threaten the disqualification of Parliamentarians. However, as the jurisprudence of passion (instead of wise restraint) found its way into the judgments of the apex Court during the epic saga of conflict between the judiciary and the government in 2010-2013, the Supreme Court gave in to the temptation. In the context of the issue of the Interior Minister’s (Rehman Malik) dual nationality, the Court held that the Minister could not be considered ‘sagacious, righteous, honest and ameen’ in view of the false declaration made by him at the time of contesting the Senate election in 2008.<sup>41</sup>

While it is true that certain actions (and no one has really been able to determine what these might be) would deem a person non-sagacious or ameen, it must be kept in mind that no human being (including generals and judges) can fulfil the standards of ‘Honest means ‘always telling the truth, and never stealing or cheating... Not hiding the truth about something’’. While it is true

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<sup>40</sup> *ibid.*

<sup>41</sup> *Syed Mehmood Akhtar Naqvi v Federation of Pakistan* Constitution Petition No. 05/2012 (short order, dated September 20, 2012), para 20 (g).

that a 'higher' standard should be set for those who are to be entrusted with determining our legislative destiny, we must resist the temptation to set the bar at a level which is so broad and pristine as to be unattainable.

c) Islamic injunctions

The idea of 'separation of Church and State', which is a dominant feature of several modern democracies, is wholly missing in Pakistan's constitutional paradigm. The 1973 Constitution expressly professes that 'Islam shall be the State religion of Pakistan'. Also, starting with the Preamble and Article 2A (Objectives Resolution), to an entire Part dealing with 'Islamic Provisions' (Part IX, Articles 227 – 231), the entire 1973 Constitution is flush with Islamic references and provisions.

In the same spirit, the qualification and disqualification clauses also contain provisions that stress the knowledge and practice of the tenets of Islam. Specifically, a person is only deemed qualified to be elected a Parliamentarian in case he or she 'is not commonly known as one who violates Islamic Injunctions'<sup>42</sup>, and has 'adequate knowledge of Islamic teachings and practices obligatory duties prescribed by Islam as well as abstains from major sins'<sup>43</sup>. As a start, what is missing in the explanation of Article 62(1)(d), and remains unsettled in the jurisprudence, is how it is to be determined whether someone is 'commonly known' to 'violate Islamic Injunctions'. It is unclear who determines the body of tenets that constitute 'Islamic Injunctions', and what these tenets are. Are they restricted to not praying five times a day, or do they also extend to not keeping a beard? Further, what does 'commonly known' mean? What evidence of testimony is to be produced for this standard? Must all aspirants of political office now advertise their religious inclinations and offer prayer in a place where they can be seen to ensure that they are not 'commonly known' to be otherwise?

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<sup>42</sup> Constitution of the Islamic Republic of Pakistan 1973, art 62(1)(d).

<sup>43</sup> *ibid*, art 62(1)(e).

Similarly, in terms of Article 62(1)(e), what is ‘adequate knowledge’? What is the corpus of injunctions that constitute ‘Islamic teachings’ or ‘obligatory duties’ or ‘major sins’? Even if a body of *ulema* is to enumerate such a list, will the same list be applicable to all sects within Islam? Or will different Muslims have to pass the test laid down by their respective schools of thought? Can these really be objectively determined? Or will random and discretionary questioning by the ROs be the yardstick in such matters? Going a step further, how does being a ‘better’ Muslim translate into the same person being a better legislator and representative of the people?

The Supreme Court has not given any definite answer in regards to these provisions, their scope and applicability. But eventually, the Court will be faced with these questions and have to render a deliberate and objective judgment – till such time that these clauses are amended by the legislature. For example, the requirement of knowledge of Islamic teachings could be tied to a pass grade in the *Islamiyat* exam for Matric or Intermediate (or their equivalents). While such a test is not ideal or perfect, at least it is objective and manageable.

### **Conclusion**

While having a set of minimum criteria for qualifying for election to the legislature is a noble and necessary requisite, Articles 62 and 63 of the 1973 Constitution, in their current form, suffer from countless deficiencies (only a few of which have been discussed above). There is an urgent need to amend these clauses, which is the job of the legislature. However, till that happens, a sensible and moderate judicial interpretation is necessary to check the possible insidious impact of these constitutional provisions. Sensibility has to be infused, through interpretation, into certain clauses of Articles 62 and 63, whereas objectivity and restraint have to be introduced in others. This can only happen through a detailed – even clause by clause – judgment and interpretation

rendered by the apex Court. In a parliamentary democracy, this, more than anything else, is an issue of ‘public importance’.<sup>44</sup>

In so doing, it must be kept in mind that at stake is not one, but two, fundamental tenets of our democracy. The first is the right of a person to contest for free and fair elections. The second (and more important), is the right of the people to vote for and elect a candidate of their choice, free from outside influence and hindrance. These freedoms, in line with other fundamental rights, are at the heart of our democratic paradigm and the very essence of the election process. An unwarranted disqualification of any candidate from contesting for elections not only deprives such a contestant of his fundamental right to seek elected office, but perhaps more importantly, infringes on the right of the constituents to vote for and elect a candidate of their choice.

Even otherwise, we must be mindful of the fact that sitting in judgment over another’s subjective values and morality falls outside the gates of judicial determination and societal judgment. These are not business of anyone, except the individual concerned. The endeavour of Articles 62 and 63 is to sift through and disqualify those who, for palpable and objective reasons, cannot be allowed to contest for elections. With the exception of such outliers, all others must be allowed to contest, placing faith in the ability of the people to choose the best representatives for themselves. Articles 62 and 63 cannot be made tools to shortlist those amongst us who – according to the subjective judgment of some members of the judiciary – are the most pious or morally conformist, regardless of their legislative wisdom and *gravitas*.

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<sup>44</sup> Article 184(3) of the 1973 Constitution grants the Supreme Court the jurisdiction to consider a question which it feels is of public importance with ‘reference to the enforcement of any of the Fundamental Rights conferred by Chapter I of Part II...’