IN THE SUPREME COURT OF PAKISTAN
(Original/Advisory Jurisdiction)

PRESENT:
Mr. Justice Umar Ata Bandial, CJ
Mr. Justice Ijaz ul Ahsan
Mr. Justice Mazhar Alam Khan Miankhel
Mr. Justice Munib Akhtar
Mr. Justice Jamal Khan Mandokhail

CONSTITUTION PETITION NO.2 OF 2022
(Re: restraining Political Parties from holding Public Meetings in Islamabad before Voting on No-confidence Motion)

REFERENCE NO.1 OF 2022
(Reference by the President of Islamic Republic of Pakistan under Article 186 of the Constitution, seeking interpretation of Article 63-A of the Constitution)

CONSTITUTION PETITION NO.9 OF 2022
(Re: Imposing Life Time Ban from contesting Elections on defection from Political Party)

Supreme Court Bar Association of Pakistan
through its President, Supreme Court Building,
Islamabad
(in Const. P. 2 of 2022)
Pakistan Tahreek-e-Insaf through its Chairman
Imran Khan
(in Const. P. 9 of 2022)
...Petitioner(s)

vs

Federation of Pakistan through
M/o Interior Islamabad and others
(in Const. P. 2 of 2022)
The Election Commission of Pakistan,
Islamabad and others
(in Const. P. 9 of 2022)
...Respondent(s)

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Mr. Khalid Javed Khan, AGP(Former)
Ch. Aamir Rehman, Addl. AG
Mr. Sohail Mehmood, Addl. AGP
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For Balochistan	:	Mr. M. Asif Reki, AG Mr. M. Ayaz Sawati, Addl AG
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For Sindh	:	Mr. Salman Talibuddin, AG Sindh Mr. Fauzi Zafar, Addl. AG
	:	Mr. Hassan Irfan Khan, ASC
Date of Hearing	:	19, 21, 24, 25, 28 to 30.03.2022, 04.04.2022 to 07.04.2022, 18.04.2022 to 22.04.2022, 09.05.2022 to 11.05.2022, 16 & 17.05.2022.

JUDGMENT

Munib Akhtar, J.:

> "[We] must never forget that it is a *constitution* that we are expounding."
>
> --Chief Justice Marshall, *McCulloch v Maryland* (1819)

> "A *constitution* states or ought to state not rules for the passing hour, but principles for an expanding future."
>
> --Justice Cardozo, *The Nature of The Judicial Process*

Prologue

For the three decades or so that he was on the Bench, Chief Justice Marshall robustly applied the judicial philosophy embodied in the words quoted above. His judgments laid the foundations of US constitutional law, embedding in it rules and principles that, at least in some instances, could not be found in the express text of the Constitution. Perhaps the most famous example of this was the power of judicial review enunciated by the Chief Justice in the justly renowned case of *Marbury v Madison* 5 US (1 Cranch) 137 (1803). The jurisdiction, to review and strike down legislative action, is nowhere conferred in so many words by the Constitution. Nonetheless, the Chief Justice located it within the structures of the constitutional text, asserting for the judicial branch a broad power to strike down acts of Congress. At the time the decision was rendered it was denounced as a power grab by the then President (Thomas Jefferson, one of the Founding Fathers and the principal author of the Declaration of Independence) and the party in power in Congress. Now of course, this jurisdiction is settled and established law, and so much a part of constitutional orthodoxy that it is (quite rightly) set out in express terms in many constitutions, including ours. Yet, speaking extra-judicially in 1955, even Justice Frankfurter recognized that "The courage of *Marbury v. Madison* is not minimized by suggesting that its reasoning is not impeccable and its conclusion, however wise, not inevitable" (*Harvard Law Review* 69(2): 217, 219). So, in conferring upon itself the mantle of the guardian of the Constitution and asserting a power over the other branches of government, what was it that the Court was doing in 1803: interpreting? reading in? or, rewriting the US Constitution?

2. Remaining with the US Constitution, but fast forwarding 170 years: *Roe v Wade* 410 US 113 (1973). The right to have an abortion as a constitutional right, embodied in this 7:2 decision, was only the most well known of the several "penumbral" rights that, from time to time, the Supreme Court found to exist in the Constitution. None of these rights, almost by definition, were to be found in the actual constitutional text. Yet, there they were, so declared by the Court. So, what was going on: interpretation? reading in? or, rewriting? In 2022, after almost half a century, came what some regard as a (much needed) correction and others decry as an unwarranted rollback and reversal: *Dobbs v Jackson Women's Health Organization*. By majority, *Roe* and a companion case from 1992 were overruled, the former being described as "egregiously wrong from the start". So, what was the Court *now* doing: more interpreting? reading "out"? or re-rewriting the Constitution? What is also of interest for present purposes is the following passage to be found in the majority opinion (emphasis supplied):

> "We hold that *Roe* and *Case*y must be overruled. The Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision, including the one on which the defenders of *Roe* and *Casey* now chiefly rely—the Due Process Clause of the Fourteenth Amendment. *That provision has been held to guarantee some rights that are not mentioned in the Constitution*, but any such right must be "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty." *Washington* v. *Glucksberg,* 521 U.S. 702 (1997)"

As the words highlighted indicate, even the majority which so comprehensively overruled *Roe* and the companion case nonetheless accepted as settled constitutional doctrine that the Supreme Court did indeed have the power to discover constitutional rights even if such rights were not to be found in the actual text, subject to certain qualifications which were also judicially wrought. But whence came the power of the Court to so declare, with or without qualifications? So again, what is it that the Court has been doing: interpreting? reading in? or, rewriting the Constitution?

3. While examples along the lines as above can be multiplied in relation to the US Constitution, we move on and come to the common law jurisdiction next door. In *Justice K. S. Puttaswamy (Retd) and another v Union of India and others* AIR 2017 SC 4161 the Indian Supreme Court discovered a right of privacy in their Constitution, notwithstanding that no such right was to be actually found in the constitutional text. What is interesting is that twice before the Court had been invited to find such a right in the Constitution and on both occasions had declined to do so: see *M. P. Sharma v Satish Chandra* AIR 1954 300 and *Kharak Singh v State of Uttar Pradesh* AIR 1963 1295. The first decision was rendered by an eight member Bench, while the second was that of six members. Yet, in 2017 a nine member Bench held otherwise: the earlier decisions were expressly overruled (to the extent necessary) and the long denied right was found, after all, to be very much there. So, what was it that the Court was doing in 2017: interpreting? reading in? or, rewriting the Constitution? Interestingly, the Court itself considered this question in the principal judgment, perhaps sensitive to the possibility of critical commentary. While we will return to its reasoning later, at present it suffices to note what was held (Part T, para 3(D)): "Judicial recognition of the existence of a constitutional right of privacy is not an exercise in the nature of amending the Constitution nor is the Court embarking on a constitutional function of that nature which is entrusted to Parliament." Some might be excused for respectfully thinking: what is more important is what, in substance, the Court actually does rather than what it, in form, says it is, or is not, doing.

4. In our Constitution of course the right of privacy can be comfortably placed in the express words of the constitutional text, in the ringing declaration of Article 14 that the dignity of man shall be inviolable. But before we reach that provision it will be relevant to stop first at Article 9 which provides that no person shall be deprived of life or liberty save in accordance with law. As is well known, the term "life" has progressively been given an expansive, and expanding, meaning by this Court in a series of judgments of which *Shehla Zia v WAPDA* PLD 1994 SC 693 is perhaps the best known example. The stage has now been reached

that it can be said with some assurance that the constitutional meaning of “life” in Article 9 has little resemblance with what would be the dictionary meaning of the word in any language. And the end is by no means in sight. It is almost as though the term was but a seed cast in the constitutional text that has germinated into a mighty tree, which keeps growing and growing. And, we say, that is all for the good. But for present purposes the question can, and must, be asked: if the trajectory that the decisions have taken is sound constitutional law, then where does interpretation end and reading in begin? And as that trajectory continues when or where does interpretation or reading in shade into rewriting? Or is it that some constitutional provisions are so encompassing that essentially any meaning or interpretation or reading can be placed on them, to be enfolded and embedded into the fabric of constitutional law, and none of that would constitute reading in or rewriting? If so, why should this be true for only some provisions and not others, especially if they are intertwined with a fundamental right, just as Article 9 is such a right? Again, we emphasize that we do not deny the correctness of the cases which have considered and treated Article 9 in such terms. We simply note that settled constitutional doctrine leads to results and pathways far removed from mere interpretation (at least as ordinarily understood) and deep into what some regard as “proscribed territory”, i.e., the bogeymen of reading in and/or rewriting.

5. As with Article 9, so Article 14. It is to be recalled that our provision is not the first that expressly makes “dignity” a fundamental right. That honour perhaps belongs to the German constitution, known as the Basic Law, which was adopted in 1949. Article 1(1) provides as follows: “Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.” More recently, the Constitution of South Africa, adopted in 1996 after the end of apartheid, also contains a similar declaration in s. 10: “Everyone has inherent dignity and the right to have their dignity respected and protected.” Now, if the jurisprudence of the German and South African Constitutional Courts with regard to these provisions (sometimes referred to as the “dignity jurisprudence”) is considered, one thing becomes

clear: an expansive, and expanding, meaning has been adopted, much as this Court has done in relation to "life" in Article 9 (and indeed, the Indian Supreme Court has done in relation to the provision equivalent to the latter in their Constitution). While our jurisprudence in respect of Article 14 is perhaps less articulated as compared with Article 9 there is reason to think (and every reason to believe) that the arc of constitutional law may well develop along similar lines. Hence, for present purposes, the questions posed in the preceding para can easily be asked also in relation to Article 14. We do so ask.

6. We are here reminded of the famous "living tree" metaphor used by the Privy Council in relation to the Canadian Constitution in *Edwards v Canada* [1930] AC 124, 1929 UKPC 86. The Canadian Constitution was an Act of the (UK) Imperial Parliament and was then known as the British North America Act, 1867. (Since the "repatriation" of the constitution to Canada in 1982 it is known as the Constitution Act, 1867.) Writing for the Board, the Lord Chancellor said (emphasis supplied):

> "*The British North America Act planted in Canada a living tree capable of growth and expansion within its natural limits*. The object of the Act was to grant a Constitution to Canada....
>
> Their Lordships do not conceive it to be the duty of this Board—it is certainly not their desire— to cut down the provisions of the Act by a narrow and technical construction, but rather to give it a large and liberal interpretation so that the Dominion to a great extent, but within certain fixed limits, may be mistress in her own house...
>
> Their Lordships are concerned with the interpretation of an Imperial Act, but an Imperial Act which creates a constitution for a new country."

The question raised was interesting. Today, it seems positively quaint but it then required consideration not only by the Supreme Court of Canada but also the highest judicial tribunal in the British Empire. Canada has a bicameral federal legislature and the question was whether women were "persons", as that word was used in relation to members of the Senate in s. 24. Like this Court, the Supreme Court of Canada also has advisory jurisdiction and the Governor General referred in essence the following question: "Are women eligible for appointment to the Senate of Canada?" The

Supreme Court unanimously, though for differing reasons, answered the question in the negative, thus holding that women were not “persons” within the meaning of the section (see at [1928] 4 DLR 98, [1928] SCR 276). On appeal, the Privy Council, while recognizing that “[a] heavy burden lies on an appellant who seeks to set aside a unanimous judgment of the Supreme Court, and this Board will only set aside such a decision after convincing argument and anxious consideration”, reversed and during the course of its judgment used the “living tree” metaphor noted above.

7. For present purposes, two points may be made. Firstly, the judgment of the Privy Council was couched in terms of interpreting a section of the Canadian Constitution and it is to this day regarded not just in that jurisdiction but elsewhere as laying down important principles of interpretation of a constitutional text. But consider. The Canadian Constitution was then but an Act of the UK Parliament. It could be amended in manner essentially no different from any other Act of Parliament. The point in issue was peculiarly susceptible to a simple amendment of the Act. But of course, that would have amended not merely an Act but the Constitution of Canada. For whatever reason, this course was not adopted. Rather, the desired result was achieved by the Privy Council through the interpretative method (in the face of a unanimous decision to the contrary by the Supreme Court). For present purposes, the point is this: functionally, what was the difference between the two routes? Whether the Act was formally amended or the Privy Council interpreted it to be so, in the end “persons” in s. 24 included women. Had the first route been adopted, no one could have denied that the Canadian Constitution was being amended. Could it then be said that the route actually taken was just interpretation as ordinarily understood and nothing more?

8. While we will return to the question just posed a little later, it was perhaps because of considerations such as this that the Privy Council chose to use the “living tree” metaphor. (One is here reminded of the metaphors employed by the US Supreme Court when it discovered the “penumbral” rights in their Constitution.) The metaphor was obviously carefully crafted. It allowed for

change and development (the "growth and expansion" of the tree) but also constraint (the "natural limits"). This leads to the second point. Trees come in all shapes and sizes. So, what was the tree that the Privy Council had in mind? A limited vision leads to a stunted tree, hardly more than a shrub. A soaring vision leads to one mighty and towering, a veritable giant. Thus, to take an example from our Constitution a narrow vision of "life" in Article 9 would have resulted in a meaning little beyond that to be found in a language dictionary. A broad and soaring vision has led (jurisprudentially) to the mighty giant that stands today, and as to the growth of which there appear (as yet) to be no known limits, regardless of whatever the position in principle may be. The "living tree" metaphor may be a useful tool, but its utility lies very much in what is one's understanding of the constitution. We will return to this case later.

9. This brings us back for the moment to what has been said earlier with regard to the Indian and German Constitutions. In *Puttaswamy*, it will be recalled, the Indian Supreme Court expressly took the position that in discovering the right of privacy (in the face of its own two earlier decisions) it was not amending the Constitution. The reasoning adopted by the Court may now be looked at. It is to be found in Part I, paras 113-117 of the principal judgment. Para 116 is of particular interest for present purposes (emphasis supplied):

> "116 Now, would this Court in interpreting the Constitution freeze the content of constitutional guarantees and provisions to what the founding fathers perceived? The Constitution was drafted and adopted in a historical context. The vision of the founding fathers was enriched by the histories of suffering of those who suffered oppression and a violation of dignity both here and elsewhere. Yet, it would be difficult to dispute that many of the problems which contemporary societies face would not have been present to the minds of the most perspicacious draftsmen. *No generation, including the present, can have a monopoly over solutions or the confidence in its ability to foresee the future. As society evolves, so must constitutional doctrine*. The institutions which the Constitution has created must adapt flexibly to meet the challenges in a rapidly growing knowledge economy. Above all, constitutional interpretation is but a process in achieving justice, liberty and dignity to every citizen."

One thing is clear: if it ever did take that approach, the Indian Supreme Court has effectively jettisoned any adherence to the "living tree" metaphor, or, at the very least, to the "natural limits" part that round it off. Para 116 represents the core of the Court's reasoning on the point. And so, once again, the questions earlier asked: where does interpretation end, and reading in begin? And where does interpretation or reading in shade into rewriting? Simply because the Court (or for that matter, and with respect, the Privy Council) chooses to regard what it is doing as interpreting, does that alter the reality and substance of what is happening? We will again return to *Puttaswamy*.

10. The approach taken by the German Constitutional Court to the dignity provision of the Basic Law has not been without its critics. Some of that criticism is noted in a leading (English language) treatise on German constitutional law, *The Constitutional Jurisprudence of the Federal Republic of Germany* by Professor Donald P. Kommers et al. (3rd ed., 2012) at pg. 373 as follows (internal citations omitted):

> "Justice Wolfgang Zeidler, a former president of the Federal Constitutional Court, was most resistant to what he had always regarded as the essential subjectivity implicit in this concept of dignity—or freedom. According to *Tobacco Atheist* [12 BVerfGE 1 (1960)], dignitarian jurisprudence has evolved out of the Basic Law's "general order of values," an order of values that, in Zeidler's view, is presupposed, not substantiated. Phrases equivalent to "general order of values" that turn up repeatedly in constitutional cases involving the application of the principle of human dignity include "supreme basic values," "basic decisions of the Basic Law" and "unwritten elementary constitutional principles." Zeidler and other critics see these broad terms and phrases as a kind of "scaffold" superimposed on the original structure of the constitution, a scaffold that permits interpreters to wash the structure in religious and ideological solvents of their own choosing. In Zeidler's view, the ritual incantation of these broad—and indeterminate—standards of review too often leads to the triumph of general values over positive rights and liberties. "Whoever controls the [meaning of the] order of the values," he once remarked, "controls the constitution.""

11. The foregoing consideration of cases and Constitutions from various jurisdictions, including our own, is but a fraction of the examples that could be marshalled for present purposes. Before

proceeding further, one thing must be made clear: we do not doubt the correctness of most of the decisions referred to or noted above (and, certainly, none from our own jurisprudence), nor wish to engage with the approaches taken or methodologies adopted by the various Supreme and Constitutional Courts and the Privy Council. Our purpose here is more limited. It is to show the deficiencies and difficulties of a classificatory scheme that creates and relies upon the categories of interpretation, reading in and/or rewriting. Such an approach, with respect, fails to properly appreciate the constitutional function performed by Courts of final adjudication which are conferred the power and, much more importantly, tasked with the duty and responsibility of authoritatively pronouncing on the constitutional text and giving its provisions meaning and content in a manner that is legally binding. That such a duty rests on this Court cannot be gainsaid; it lies at the very heart of the judicial function and resonates at the deepest levels of constitutional structures. But what it is that a Supreme Court does, in fulfilling its constitutional role in this context, must be clearly understood in its true perspective. It cannot be shoved into the straitjacket of a classificatory scheme such as now under consideration. While there are multiple reasons why this is so, it is possible only to take up a few within the constraints of giving judgment.

12. Firstly, it must be kept in mind that there is a distinction between “interpreting” a statute and “interpreting” a constitution. While the tools developed for the former exercise (the rules of statutory interpretation) can be, and are, deployed while undertaking the latter, and much the same language used in the case law, the function of the Court is different. In the first, the Court is concerned primarily with ascertaining the legislative intent of a particular statute. In the second it is tasked with discovering the meaning of a text that is not merely the source and creator of the subject matter of the first (i.e., the laws) but even of the very organ that has the competence to issue them. Laws, in this sense, are transient no matter how long a particular statute may last, or the subject matter remain on the statute book. Constitutions on the other hand are to last a while. The distinction is aptly made in further quotes from the two sources

with which this judgment begins. The first is taken from Justice Cardozo's work and the second from *McCulloch v Maryland* 17 US (4 Wheat.) 316 (1819). "Statutes are designed to meet the fugitive exigencies of the hour" whereas "a Constitution [is] intended to endure for ages to come, and consequently to be adapted to the various crises of human affairs". Constitutions are the anvil on which, in the final analysis, everything must be tested and pass muster. For present purposes, it is also important to remember (to quote this time from *Marbury v Madison* 5 US (1 Cranch) 137 (1803)) that in either case "[it] is emphatically the province and duty of the Judicial Department to say what the law is". What, unfortunately, is apt to confuse is the use of the same term ("interpret") in relation to the exercise undertaken in relation to both sorts of "law", if the qualitative difference between the two is not kept in mind. Such use should not mask the essentially different tasks that the Court undertakes when embarking on either kind of journey, nor mislead and misguide as to the true (and differing) nature of the judicial function in relation to each. The constitutional concept of "interpretation" is, in other words, something different from the use, more generally, of the term in relation to statutes. Even if the form is similar and the same judicial tools employed, the substance is distinct. Secondly, if the classificatory scheme now under consideration were the correct approach one great difficulty would be to devise a bright (or, if we may put it so, even dim) line test to distinguish interpretation from reading in, and either (or both) from rewriting. The one would shade into the other often by imperceptible degree, and the Court would become bogged down in the minutiae of attempting to draw distinctions that would inevitably become more and more artificially refined. In truth, this problem reveals the real difficulty, and we say this without intending any disrespect. At its heart, the classificatory scheme may well amount simply to this: if I agree with or like what the Court is doing, the exercise is (permissible) interpreting; if not, then it is (impermissible) reading in or rewriting. Maybe not quite the Chancellor's foot or maybe even worse, but either way an eminently unsatisfactory manner of approaching, appreciating and discovering the meaning and content of constitutional text.

13. What then is the correct approach, that properly reflects in its true perspective what it is that the Court is called upon to do when asked to expound upon (i.e., "interpret") a provision of the Constitution? Rather than using the filter of the classificatory scheme, it is more appropriate to think in terms of understandings. The use of the plural is deliberate. It is of course settled constitutional doctrine that the Constitution is a living document, which must be approached in a dynamic manner that evolves over time, as fresh resolutions and solutions are called for and required to meet contingencies old and new. What the Court does in interpreting the Constitution at any given time, i.e., in giving binding and authoritative meaning and content to a provision, is to reach and present an understanding of the constitutional text. In the constitutional sense, to interpret is to understand the Constitution, and that means not just the constitutional text in its express form but also the underlying principles, rules and bases that together constitute constitutional law. It is to discover and give authoritative and binding voice and force to (i.e., be an understanding of) its spirit and intent intermingled with the text. But that understanding is not static. Over the sweep of time the understanding itself develops, deepens, evolves and alters, sometimes expanding sometimes contracting. Hence the use of the plural. Some understandings (or interpretations) of the past may suffice for the present, others may not. And an interpretation (or understanding) that satisfies the present may not survive the future. However, this emphatically does not mean that the Constitution presents, at any given time, a sort of *tabula rasa* on which any understanding can be written (i.e., interpretation cast) nor does it mean that constitutional principles and doctrines are malleable and fluid to the point of lacking any certainty. The present builds on the past, just as the future will build on what is now the present. A present understanding may do no more than add to, develop or refine an understanding already reached. Or, a past understanding may simply continue, essentially unaltered (perhaps subject to judicial "tweaks" over the years and decades), and be applied in the present. Indeed, many constitutional questions tend to be resolvable in such terms, presenting a new situation to which an existing understanding is regarded as readily applicable, and is so

applied. An example of what has just been said can be taken from the equality provision, now Article 25. The basic framework—understanding—was provided by *Jibendra Nath Achharyya Chowdhury and others v Province of East Pakistan and others* PLD 1957 SC 9 and *Waris Meah v State and another* PLD 1957 SC 157, applied many times subsequently (see, e.g., *Brig (Ret'd) F B Ali and another* PLD 1975 SC 506) and restated in *I. A. Sharwani and others v Government of Pakistan* 1991 SCMR 1041, which continues to provide the understanding in terms of which the equality clause is considered and applied. And sometimes an understanding evolves and develops till it reaches the deepest levels of the Constitution, touching as it were its innermost core and reaching a point where it seems veritably immutable. One can think here of the salient features doctrine, which is currently embedded in our understanding of the Constitution at its most fundamental level. But, in truth, neither time nor the nation nor the problems and questions that confront the country stand still. And so, it may be that jurisprudentially speaking from time to time a constitutional "tipping point" is reached, and a new understanding arises (perhaps phoenix-like from the ashes of the past). Precisely because it is a constitution that is being interpreted (i.e., expounded) the constitutional understanding of today is linked to the past but is not (and cannot be) shackled by it. If one may be allowed a musical metaphor, if mapped over time understandings of the Constitution do not present a cacophony but perhaps are something more akin to a fugue; and sometimes it may be that a whole new composition emerges. Interpretation in the ordinary sense, in relation to run-of-the-mill legislation, must in the end remain bogged down by the here and now, constrained ultimately by the language of the text, though even here branches of the law may periodically undergo shifts that may even seem seismic. But in the constitutional sense it is always an understanding, which is something much more. A provision may textually remain the same but it may be found to encompass within its bounds a meaning far beyond the mere language.

14. Two further points may be made. One additional merit of thinking of an interpretation of a constitutional provision in terms of an understanding is that it focuses attention on what the Court

is actually doing, regardless of the label that it may attach to the exercise. It goes to the substance without being distracted by the form. Secondly, one drawback of thinking in classificatory terms is that it is all too easy to (figuratively) throw up one's hands and balk at trying to find a solution for a problem (whether new or long standing) that may not seem available if one were to simply read the bare text. But in real life problems don't just disappear simply because a solution is not conveniently at hand. They remain and fester and accumulate. On the other hand, if the approach to the constitutional text is of an understanding of it, it may well be possible to find the solution to the problem. A stunted vision stunts the Constitution's ability to provide an answer. A soaring vision may well lead to a dramatically different conclusion.

15. The points made above can be illustrated by revisiting two decisions considered above, the *Edwards* case and *Puttaswamy*. In the former, as noted, the Privy Council used the language of interpretation. The question before it was readily susceptible to a treatment that, at least in form, cleaved closely to an issue of statutory interpretation: did the term "persons" used in s. 24 of the British North America Act include women? But consider. It was noted in the judgment that just a few years earlier, the House of Lords (in its Committee of Privileges) had decided that hereditary peeresses could not sit in that House: *Viscountess Rhonda's Claim* [1922] 2 AC 339. The viscountess had based her claim to do so on a recent Act of Parliament, the Sex Disqualification (Removal) Act, 1919. This statute, as its short title implied, removed certain disqualifications of women from holding public office. The words of the statute, on its proper interpretation, were held not to apply to the right of hereditary peeresses to sit in the Lords, one member of the Committee observing (at pg. 405) that "it is inconceivable that Parliament should have made such a wide and far-reaching constitutional change by general words of vague and doubtful import". It was further observed (*ibid*): "Had the intention been to confer the important right now claimed, surely Parliament would have inserted an express provision to that effect". That is indeed what Parliament finally did do (though decades later) by the Peerage Act, 1963. Thus, as per the (famously unwritten) British

Constitution, as understood at that time, women could not sit and vote in the chamber that was (at least in some ways) the equivalent to the Canadian Senate, and an important though "ordinary" Act of Parliament could not be interpreted and applied as having altered a rule of the Constitution. Now, contrast this with what the Privy Council did in *Edwards* (reversing, it is worth repeating, a unanimous Supreme Court). As the passages extracted above show, it recognized that it was not merely interpreting an Act of Parliament but one that was the Constitution of Canada. Different considerations therefore applied, and the Act could not be approached in the same manner as "ordinary" legislation. A different interpretative method, one that could not be used for ordinary purposes, had to be devised; hence the "living tree" metaphor. Couching this approach in terms noted above, in our view, what the Privy Council did in "interpreting" s. 24 of the Canadian Constitution was to present an understanding of the holistic approach to be taken when considering and applying the constitutional text. Once viewed from this perspective, the distinction between constitutional "interpretation" and that used, and suitable, for ordinary legislation at once becomes clear, and the fallacy of treating the two as essentially the same is revealed. The understanding of an Act of Parliament that was a constitution led to a result diametrically different from that reached on an interpretation of another that was just ordinary legislation.

16. It is pertinent also to note how this Court has used the "living tree" metaphor. In a passage cited many times, Ajmal Mian, J. (as his Lordship then was), writing for the Court in *Al-Jehad Trust and others v Federation of Pakistan and others* PLD 1996 SC 324 put it in the following terms (pg. 429):

> "At this juncture, it may be stated that a written Constitution is an organic document designed and intended to cater the needs for all times to come. It is like a living tree, it grows and blossoms with the passage of time in order to keep pace with the growth of the country and its people. Thus, the approach, while interpreting a Constitutional provision should be dynamic, progressive and oriented with the desire to meet the situation or suppress the mischief, which has arisen, effectively. The interpretation cannot be narrow and pedantic. But the Court's efforts should be to

> construe the same broadly, so that it may be able to meet the requirements of ever-changing society. The general words cannot be construed in isolation but the same are to be construed in the context in which they are employed. In other words, their colour and contents are derived from their context."

The passage has been cited in judgments of the Court as well as plurality and concurring opinions: see *Syed Masroor Ahsan and others v Ardeshir Cowasjee and others* PLD 1998 SC 823, 1005, *Sardar Farooq Ahmed Khan Federation of Pakistan and others* PLD 1999 SC 57, 93, *Sardar Bahadur Khan Bangulzai and others v Sardar Attaullah Mengal and another* 1999 SCMR 1921, 1933 (in the specific context of considering Article 63A), *Munir Hussain Bhatti and others v Federation of Pakistan and another* PLD 2011 SC 407, 454 and *District Bar Association and others v Federation of Pakistan and others* PLD 2015 SC 401, 726. What is of interest is that the focus of the passage cited above is very much on "growth" and "blossoming" (i.e., "expansion"); there does not appear to any reference to a limiting feature. In *Civil Aviation Authority and others v Supreme Appellate Court Gilgit Baltistan and others* PLD 2019 SC 357, the *Edwards* case is specifically referred to (at pg. 378). The metaphor is used, but in an adapted and modified manner (emphasis underlined is supplied, otherwise in original):

> "It is now well settled that this constitutional power, within the scope of the grant, is not just plenary; it is also dynamic and flexible. Indeed, if we may adapt (*in a somewhat modified manner*) for present purposes a famous metaphor used by the Privy Council in relation to the Canadian constitution, in granting fundamental rights the Constitution has planted a "*living tree capable of growth and expansion*". Understandings of both the nature of fundamental rights, and what must be done to ensure their meaningful enjoyment in full, have developed and evolved over the decades and will undoubtedly continue to do so in times to come. Thus, to take but one example, the meaning of the right to life conferred by Article 9 of the Constitution has developed in a manner that would, perhaps, be breathtaking for previous generations. The categories and varieties of cases involving or raising issues of fundamental rights of public importance can never be closed. They are shaped by the human condition and the vagaries of the human experience, which by its very nature is limitless. This is not to say that the scope of the constitutional power is, as a matter of law, boundless, but only to stress that any artificial straitjacketing, based on preconceived notions or whatever

> passes for orthodoxy or received wisdom in a particular age, is to be avoided. Now, precedent is too often perceived as a limitation. Certainly, at least in the common law tradition, it is a defining characteristic of judicial power. It should however, perhaps also be given greater recognition as a useful tool in the judicial arsenal. It must never be forgotten that while we are certainly tied to the past we are not shackled by it."

Here again, the emphasis is very much on the "growth and expansion" part of the metaphor and while there is a passing nod to there being, at least in principle, a limit on the scope of the relevant constitutional power, that is very much only in the background.

17. Turning now to *Puttaswamy*, the question in issue—whether there was a fundamental right of privacy—was much more diffuse and such that it was not susceptible to treatment that could, even in form, be similar to the manner in which the Privy Council dealt with the question in *Edwards*. An added difficulty of course was that twice before the Indian Supreme Court had already held that there was no such right. No wonder, then, that it took the Court some time to come to the contrary conclusion: the principal judgment in its pdf version ran to 266 pages (and if the concurring judgments are included the total came to 547 pages). The key passage from the reasoning of the Court as presently relevant (para 116) has been set out above. We reproduce some sentences from the para, with the term "understanding" inserted in square brackets (emphasized for convenience):

> "116 Now, would this Court in interpreting [*understanding*] the Constitution freeze the content of constitutional guarantees and provisions to what the founding fathers perceived? ... No generation, including the present, can have a monopoly over solutions or the confidence in its ability to foresee the future. As society evolves, so must constitutional doctrine [*understanding*]... Above all, constitutional interpretation [*understanding*] is but a process in achieving justice, liberty and dignity to every citizen."

Again, the insertions highlight the distinction between constitutional "interpretation" and interpretation of ordinary legislation, and make clear the nature of the former as an understanding of the Constitution. Ordinary legislation would scarcely be interpreted in terms as broad as laid down in para 116,

unless perhaps some constitutional question or principle was involved. Indeed, this passage, once so read, also makes clear the reason behind the overruling of the two decisions from the past. Those decisions represented the then understandings of the Indian Constitution. The discovery of the long denied right of privacy in 2017 is the understanding of the present. Jurisprudentially, a constitutional "tipping point" was reached and, if we may respectfully put it so, a new understanding arose from the ashes of the understandings of the past. To regard this as merely as an exercise in interpretation such as would suffice for ordinary legislation would be to seriously misunderstand the judicial function of a Supreme Court entrusted with the task and responsibility of authoritatively determining the meaning and content of constitutional text.

18. This brings us, finally, to Justice Cardozo's well known work, *The Nature of the Judicial Process* (1921). The passage from which the sentence set out at the beginning of this judgment is taken may now be referred to (internal citations omitted; pp. 82-85; emphasis in underlining supplied):

> "From all this, it results that the content of constitutional immunities is not constant, but varies from age to age. "The needs of successive generations may make restrictions imperative today, which were vain and capricious to the vision of times past." [*Klien v. Maravelas* 219 NY 383 (1917)] "We must never forget," in Marshall's mighty phrase, "that it is a *constitution* we are expounding." Statutes are designed to meet the fugitive exigencies of the hour. Amendment is easy as the exigencies change. In such cases, the meaning, once construed, tends legitimately to stereotype itself in the form first cast. A <u>constitution states or ought to state not rules for the passing hour, but principles for an expanding future. In so far as it deviates from that standard, and descends into details and particulars, it loses its flexibility, the scope of interpretation contracts, the meaning hardens. While it is true to its function, it maintains its power of adaptation, its suppleness, its play</u>.... So Kohler: "It follows from all this that the interpretation of a statute must by no means of necessity remain the same forever. To speak of an exclusively correct interpretation, one which would be the true meaning of the statute from the beginning to the end of its day, is altogether erroneous".... I have no doubt that [this method of interpretation] has been applied in the past and with increasing frequency will be applied in the future, to fix the scope and meaning of the broad precepts and immunities in state and national constitutions. I see no reason why it may not be applied to statutes framed upon line similarly general,

> if any such there are. We are to read them, whether the result be contraction or expansion, in "*le sens évolutif.*""

19. As Justice Carodozo emphasizes, a constitution lays down principles for the "expanding future" and not rules for the "passing hour". Its provisions must not be read in any narrow or pedantic manner; to be bogged down by "details and particulars" is to "harden" and "contract" its meaning and interpretation (i.e., understanding in the sense described above). A constitution must remain true to its function, retaining its suppleness and the "power of adaptation". Now, it is a peculiar feature of the constitutional provision with which we are here concerned, Article 63A, that it has attributes of both these characteristics. It contains in some detail, in the express terms of the text, the manner in which a member of a parliamentary party can lose his seat if he is declared a defector. But to regard this to be all that there is to it is, in our respectful view, to seriously misread the provision. It was this partial approach that, with respect, led some to accept a point much pressed upon the Court during the course of the hearing: that Article 63A is confined to its express terms, which constitute a "complete code" in itself. The proper constitutional interpretation, i.e., understanding, of the provision, especially when (as it must) be read with Article 17(2), is rather different. The provision holds within its compass an understanding much broader and far suppler and subtler. The essence of that understanding was set out in our short order; the details are given below.

The Short Order

20. The Short Order is reported in full as *Supreme Court Bar Association v Federation of Pakistan and others* PLD 2022 SC 488. Three matters were disposed of by it. One was a reference filed by the President pursuant to Article 186, Reference No. 1 of 2022 ("Reference"). The other two were petitions filed under Article 184(3), being CP 2/2022 and CP 9/2022 (together, the "Petitions"). For convenience the short order that was made by the majority, which constitutes the decision of the Court and for which this judgment provides the detailed reasons, is reproduced below:

"For detailed reasons to be recorded later and subject to what is set out therein by way of amplification or otherwise, by majority of three to two (Justice Mazhar Alam Khan Miankhel and Justice Jamal Khan Mandokhail dissenting) these matters are disposed of together in the following terms:

1. The first question referred by the President relates to the proper approach to be taken to the interpretation and application of Article 63A of the Constitution. In our view, this provision cannot be read and applied in isolation and in a manner as though it is aloof from, or indifferent to, whatever else is provided in the Constitution. Nor can Article 63A be understood and applied from the vantage point of the member who has earned opprobrium and faces legal censure as a defector by reason of his having acted or voted (or abstained from voting) in a manner contrary to what is required of him under clause (1) thereof. Rather, in its true perspective this Article is an expression in the Constitution itself of certain aspects of the fundamental rights that inhere in political parties under clause (2) of Article 17. The two provisions are intertwined. In its essence Article 63A functions to protect, and ensure the continued coherence of, political parties in the legislative arena where they are the primary actors in our system of parliamentary democracy, which is one of the salient features of the Constitution. Political parties are an integral aspect of the bedrock on which our democracy rests. Their destabilization tends to shake the bedrock, which can potentially put democracy itself in peril. Defections are one of the most pernicious ways in which political parties can be destabilized. Indeed they can delegitimize parliamentary democracy itself, which is an even more deleterious effect. Defections rightly stand condemned as a cancer afflicting the body politic. They cannot be countenanced.

2. It follows that Article 63A must be interpreted in a purposive and robust manner, which accords with its spirit and intent. Ideally, the Article should not need to be invoked at all; its mere existence, a brooding presence, should be enough. Put differently, the true measure of its effectiveness is that no member of a Parliamentary Party ever has to be declared a defector. Article 63A should therefore be given that interpretation and application as accords with, and is aligned as closely as possible to, the ideal situation. The pith and substance of Article 63A is to enforce the fundamental right of political parties under Article 17 that, in particular in the legislative arena, their cohesion be respected, and protected from unconstitutional and unlawful assaults, encroachments and erosions. It must therefore be interpreted and applied in a broad manner, consistent with fundamental rights. It also follows that if at all there is any conflict between the fundamental rights of

the collectivity (i.e., the political party) and an individual member thereof it is the former that must prevail. The first question is answered accordingly.

3. Turning to the second question and keeping in mind the answer to the first, it is our view that the vote of any member (including a deemed member) of a Parliamentary Party in a House that is cast contrary to any direction issued by the latter in terms of para (b) of clause (1) of Article 63A cannot be counted and must be disregarded, and this is so regardless of whether the Party Head, subsequent to such vote, proceeds to take, or refrains from taking, action that would result in a declaration of defection. The second question referred to this Court stands answered in the foregoing terms.

4. As regards the third question, it is our view that a declaration of defection in terms of Article 63A can be a disqualification under Article 63, in terms of an appropriate law made by Parliament under para (p) of clause (1) thereof. While it is for Parliament to enact such legislation it must be said that it is high time that such a law is placed on the statute book. If such legislation is enacted it should not amount to a mere slap on the wrist but must be a robust and proportionate response to the evil that it is designed to thwart and eradicate. The question stands answered accordingly.

5. The fourth question referred to this Court is stated in terms that are vague, and too broad and general. It is therefore returned unanswered.

This short order disposes of pending matters under Article 186 as well as Article 184(3). What has been said herein above is to be read and understood as a simultaneous exercise of (and thus relatable to) both the jurisdictions that vest in this Court under the said provisions, read also in the case of the latter with the jurisdiction conferred by Article 187."

The events: the Reference and the Petitions

21. On 08.03.2022, the Government of the day at the federal level was formed by the Pakistan Tehreek-e-Insaf ("PTI") and certain allied parties. That day 142 members of the National Assembly, from the then Opposition parties, filed a notice for moving a resolution for a vote of no confidence against the then Prime Minister, Mr. Imran Khan. Along with the said notice, another notice was filed requisitioning a session of the National Assembly by the then Speaker. As can be imagined this move

immediately created political turmoil in the country. For present purposes it suffices to note that soon thereafter allegations started emerging that certain members of the National Assembly belonging to the PTI parliamentary party had approached (or had been approached by) the Opposition with intent to vote against the Prime Minister on the no confidence motion. Allegations and counter allegations started flying in all directions. There were reports that the aforesaid members had been given some sort of "safe haven" in various places including in particular Sindh House in Islamabad, which is located within the Red Zone. The Government and the Opposition began squaring off and the political rhetoric and temperature started rising. There were moves and counter-moves. From the Government's side came allegations of offers of inducement of various sorts and in various ways by the Opposition to persuade members of the PTI parliamentary party in particular to switch sides and vote against the Prime Minister. These allegations were robustly denied and counter allegations made that the Government intended to use all means possible to prevent those it regarded as suspect members of the PTI parliamentary party, and even others, from reaching Parliament House to cast their votes when the no confidence motion was put before the National Assembly. In its turn, the Government spurned all such allegations as political manoeuvring. The Prime Minister called for a public rally and meeting at D-Chowk in Islamabad for 27.03.2022, which was one day before the last day by which the National Assembly had to meet in session as requisitioned. The Opposition parties also gave a call to their workers and supporters to reach the capital on the same day.

22. It was in these circumstances that the Supreme Court Bar Association ("SCBA") decided to intervene by filing a petition in this Court under Article 184(3) of the Constitution. That petition, CP 2/2022 ("SCBA Petition"), was filed on or about 18.03.2022 and put up in Court on 19.03.2022 before a two member Bench headed by the Chief Justice. By then another event had occurred. An untoward and unpleasant incident had occurred on the evening of 18.03.2022 at one of the gates of the Sindh House, which temporarily led to a law and order situation there. All of this

was caused by the heightened political tensions in the country boiling over as a result of the moves going on since 08.03.2022. The learned Attorney General, who was present in Court on 19.03.2022, expressed regret as to what had happened and apprised the Court of the steps taken to deal with the situation, including the registration of an FIR. The learned Attorney General also stated that the Government had decided to advise the President to move the Court in its advisory jurisdiction under Article 186, "seeking delineation of the scope and meaning of certain provisions contained in Article 63A of the Constitution" (to quote from the order of 19.03.2022). The reference was, the Court was informed, expected to be filed by 21.03.2022. After giving certain directions with regard to the law and order situation referred to and the issuance of notices to various parties the hearing of the SCBA petition was adjourned to 21.03.2022, with the direction that it be listed along with the reference, if any, filed under Article 186.

23. In its petition, the SCBA, after narrating certain facts and circumstances since the filing of the notice to move a motion of no confidence, stated categorically that it was a disinterested party desirous only of upholding the Constitution and the rule of law. In particular, it was desirous, regardless of the outcome of the same, of ensuring that the entire exercise in relation to the motion of no confidence was carried out in accordance with the Constitution. It was averred that statements and counter-statements, and allegations being made and hurled between the competing sides, raised grave concerns as to whether the mandate and command of the Constitution would be fulfilled and acted upon as required. The SCBA accordingly sought the following reliefs from the Court:

i. Direct all State functionaries to act strictly in accordance with the Constitution and the law and they be restrained from acting in any manner detrimental to and unwarranted by the Constitution and the law;

ii. Direct the Respondents and/or their officials and/or anyone else acting on their instructions/orders charged with the duty to maintain law and order in the Islamabad Capital Territory to prevent any assembly, gathering, public meetings and/or procession, which can create any hindrance or has the effect of

preventing the Members of the National Assembly from reaching the Parliament House and Parliament Lodges;

iii. Restrain the Respondents and/or their officials and/or anyone else acting on their instructions/orders from hindering or preventing or creating any obstacles to any Member of the National Assembly from attending the session of the National Assembly, as and when summoned;

iv. Restrain the Respondents and/or their officials and/or anyone else acting on their instructions/orders from taking any coercive measures/actions against and including, arrest and detention of the Members of the National Assembly;

v. Direct the Speaker of the National Assembly to discharge his duties, perform his functions and dispose of the proceedings on the motion for no-confidence against the Prime Minister strictly in accordance with the Constitution of the Islamic Republic of Pakistan, 1973 and the Rules of Procedure and Conduct of Business in the National Assembly, 2007;

vi. During the pendency of the Petition, the Respondents may kindly be restrained from taking any politically motivated executive decision that can fuel the anarchy and further aggravate the law and order situation;

vii. Any other relief that this Honourable Court may deem appropriate.

24. On 21.03.2022, the President moved the Reference, seeking the advice of the Court in respect of the following questions:

"1. Whether keeping in view the scheme and spirit of the Constitution which enshrines democratic values, customs and norms and provides for parliamentary form of government conducted through the chosen representatives of the people being carriers of Amanat, which of the following two interpretations of Article 63A of the Constitution is to be adopted and implemented to achieve the constitutional objective of curbing the menace of defections and purification of the electoral process and democratic accountability namely:

(a) Interpretation of Article 63A in a manner that Khiyanat by way of defections warrant no preemptive action save de-seating the member as per the prescribed procedure with no further restriction or curbs from seeking election afresh; or

(b) A robust, purpose oriented and meaningful interpretation of Article 63A which visualizes this provision as prophylactic enshrining the constitutional goal of purifying the democratic process, inter alia, by rooting out the mischief of defection by creating deterrence, inter alia, by neutralizing the effects of vitiated vote followed by lifelong disqualification for the member found involved in such constitutionally prohibited and morally reprehensible conduct;

2. Where a Member engages in constitutionally prohibited and morally reprehensible act of defection, can the member nevertheless claim a vested right to have his vote counted and given equal weightage or there exist or is be read into the Constitution restriction to exclude such tainted votes from the vote count?

3. Where a member who could but did not hear the voice of his conscience by resigning from his existing seat in the Assembly and has been finally declared to have committed defection after exhausting the procedure prescribed in Article 63A of the Constitution including appeal to the Supreme Court under Article 63A (5), he can no longer be treated to be sagacious, righteous, non-profligate, honest and ameen and, therefore, stands disqualified for life?

4. What other measures and steps can be undertaken within the existing constitutional and legal framework to curb, deter and eradicate the cancerous practice of defection, floor crossing and vote buying?"

25. As ordered earlier, the Reference was taken up along with the SCBA Petition on 21.03.2022. After hearing submissions by the learned Attorney General and the learned counsel for the SCBA, it was declared that the first four of the reliefs sought in the SCBA Petition could be disposed of in terms of the categorical statement made and undertaking given by the Attorney General. As regards the fifth relief, it was observed that it was linked to the questions referred to the Court in terms of the Reference and could therefore be taken up along with the same. (The last relief was only for certain interim orders.) Further notices were issued and the matter was adjourned for hearing to 24.03.2022, when it was placed before and taken up by the present Larger Bench constituted by the Chief Justice, which Bench took the hearing to disposal in terms of the Short Order.

26. The hearing of the Reference and the SCBA Petition began on the date last mentioned and continued on 29 and 30.03.2022, when it was adjourned to 04.04.2022, a Monday, for further

proceedings. Before that date however, another event—a constitutional crisis—erupted. During all this while proceedings under Article 95 of the Constitution on the motion of no confidence moved by then Opposition had been proceeding apace. Finally, the date on which the motion was to be voted upon in the National Assembly, 03.04.2022, arrived. On that day when the session started, one of the then Federal Ministers rose and sought a ruling from the chair, which was occupied by the then Deputy Speaker. The latter gave an immediate ruling that dismissed the very resolution on which the Assembly was to vote, i.e., the no confidence motion. Within hours the President dissolved the Assembly on the advice of the Prime Minister, and called for the holding of general elections. On the same day, after consultation with such of his colleagues as were in Islamabad, the Chief Justice decided to invoke the suo motu jurisdiction of the Court under Article 184(3). A Bench was convened, which held court later the same day, even though it was a Sunday. Petitions were also at once filed under Article 184(3) challenging the ruling of the Deputy Speaker. Hearing in those matters started immediately the next day (i.e., 04.04.2022) before a Larger Bench, which comprised of the same members who were up till then hearing the Reference and the SCBA Petition. As could only be expected, the immediacy of the crisis, which had led to the very dissolution of the National Assembly, put these proceedings on hold. The other proceedings continued on a day to day basis throughout the week and ultimately, by a short order dated 07.04.2022, the ruling of the Deputy Speaker was set aside as were all subsequent acts and events, including the dissolution of the National Assembly. The short order is reported as *Pakistan Peoples Party Parliamentarians (PPPP) and others v Federation of Pakistan and others* PLD 2022 SC 290. The detailed reasons for the short order were released on or about 13.07.2022 (now reported at PLD 2022 SC 574). In consequence of the decision of the Court, the vote on the no confidence motion was held on 9-10.04.2022. It was carried and Mr. Imran Khan and the PTI led Government ceased to hold office. In their stead, Mr. Shahbaz Sharif assumed office as Prime Minister, forming a Government comprising of a heterogeneous mix of parties most of which had been in the Opposition but

which also included some that had been allied to the PTI in the previous Government.

27. Substantive hearing in the Reference and the SCBA Petition resumed on 18.04.2022 and continued thereafter on several dates. Just prior to the resumption of the hearings, on or about 16.04.2022 the PTI also filed a petition under Article 184(3), being CP 9/2022 ("PTI Petition") seeking the following relief:

> "It is therefore most respectfully prayed that instant petition may kindly be allowed and it may kindly be declared that any sort of defection would amount to imposing a life time ban from contesting elections, in the interest of justice."

As is clear, this relief was of a nature similar to the third question that had already been referred to this Court in terms of the Reference. The PTI Petition was therefore also listed along with the other two matters. Eventually, on the conclusion of the hearings on 17.05.2022, the matters were disposed by a majority of 3:2 in terms of the Short Order, which has already been referred to and set out above in its terms as presently relevant.

Submissions

28. Given the course taken by the present proceedings, it is not surprising that the Reference was the focus of attention of the learned counsel who appeared before us. The SCBA Petition and the PTI Petition were regarded as being adjuncts to the questions raised in the Reference. Another, highly unusual, feature of the proceedings was that when the hearings had begun the Government of the day was formed by the PTI led coalition, and the President had in fact sent the Reference to this Court on the advice of the then Government. Submissions were opened by the then Attorney General, Mr. Khalid Jawed Khan. Midway through the Government changed. The then Attorney General resigned and Mr. Ashtar Ausaf Ali was appointed to that office by the newly incumbent Government. He also made submissions before the Court. We therefore had the benefit of hearing two successive holders of the office and there were divergences and differences in

the submissions made by them. Valuable submissions were also made by other learned counsel and we would at the very outset like to pay tribute to, and express our appreciation for, the assistance provided.

29. Mr. Khalid Jawed Khan, the learned Attorney General, read the questions of law referred to the Court by the President. It was submitted that the Constitution provided for a parliamentary form of government, in which political parties played an important, and indeed pivotal, role. Reference as to this vitally important role in the system of governance envisaged was emphasized by a reference to Articles 17(2) and 91 of the Constitution and, in particular, to the seminal decisions of *Benazir Bhutto v Federation of Pakistan* PLD 1988 SC 416 and *Mian Muhammad Nawaz Sharif v President of Pakistan* PLD 1993 SC 473. The learned Attorney General submitted that at any election to a seat in the House (here meaning the National Assembly or a Provincial Assembly) and in particular a general election, candidates who contest the same on a party ticket and get elected are bound to support the directives of the parliamentary party in respect of all matters and in particular those set out in Article 63A. It was emphasized that without party discipline no government could function in a system of parliamentary democracy. If a member elected to a House on a party ticket eventually concluded that he could not, in good conscience, continue to support and vote for party policy in the House then the honourable way forward was for him to resign from both the House and the party. The learned Attorney General sought to draw a distinction between what he called political and legal consequences. An act or omission by an elected member of a party contrary to Article 63A definitely resulted in the latter; however, that such consequences were not so spelt out for other act or omission did not mean that there were none. Article 63A provided for the conditions as well as laid down an elaborate procedure whereby a parliamentarian in default (here meaning members of both Houses of Parliament and a member of a Provincial Assembly) could be disqualified.

30. Continuing with his submissions, the learned Attorney General submitted that it was well settled that the Constitution

was an organic document, which had to be read and applied as such. Some of its provisions were aspirational in character, while others were more akin to machinery provisions. It was submitted that Articles 62 to 63A were among the most important provisions of the Constitution. Referring to Article 63 the learned Attorney General submitted that the disqualifications contemplated by it could be divided into two categories. In the first were those that led to disqualification simpliciter, simply by reason of or with reference to an act or event spelt out. The second were those where the disqualifying act or event was followed by a time bound period or bar. The learned Attorney General took the Court through the various clauses/paras of Article 63 to make his point. Turning to Article 63A, the learned Attorney General gave in brief the history of anti-defection measures adopted, starting with the insertion of s. 8-B in the Political Parties Act, 1962 and then the insertion of Article 63A first by the 14th Amendment (1997) and its subsequent iterations/versions that culminated in the provision as it now stands, as substituted by the 18th Amendment (2010). The relationship between Articles 17(2), 95 and 63A was also sought to be established and highlighted. The relationship between a candidate returned to a seat in a House as a result of an election and the voters who elected him on the one hand, and the elected parliamentarian and the political party were also explained and highlighted. It was submitted, through recourse to parliamentary debates/proceedings, dictionary meanings, and judgments of this Court, that defection, proscribed by the said Article, was universally condemned as a political disease wholly destructive of the parliamentary form of government. Attention was drawn in particular to certain passages from *Kh. Ahmad Tariq Rahim v Federation of Pakistan and others* PLD 1992 SC 646 and *Wukula Mahaz Barai Tahafaz Dastoor v Federation of Pakistan* PLD 1998 SC 1263, which in fact prefaced the Reference. It was submitted that on its true construction and appreciation, the consequences that could, and indeed were required to, flow from an act or omission proscribed by Article 63A were not limited to what was set out in the text, i.e., the de-seating of the parliamentarian in default. Rather, such act or omission, i.e., defection entailed far greater consequences. Among those was the duration of the disqualification which ensued when a

parliamentarian was de-seated. Referring to various provisions of the Constitution, the learned Attorney General submitted that four possibilities could be canvassed for disqualification: (i) no period; (ii) for the remaining term of the Assembly; (iii) for the "constitutional" term of the Assembly, which was a period of five years; or (iv) a lifetime disqualification. The learned Attorney General took the Court through each possibility and advanced the submission that on a holistic reading of the Constitution and in particular the set of provisions of which Article 63A was a part, it was the fourth possibility that was the constitutionally correct answer. Strong reliance was placed in this regard on Article 62(1)(f). Referring to various aspects and a number of decisions of this Court, the learned Attorney General pressed the Court for concluding that a parliamentarian who was de-seated as a result of a defection within the meaning of Article 63A incurred a lifetime ban by way of disqualification. Finally, the learned Attorney General submitted that morality could not be dissociated from the Constitution and certainly not in respect of the provisions and acts and omissions presently under consideration, i.e., the morally repugnant act or omission as led, or amounted, to defection, which was rightly condemned as a cancer eating at the vitals of the body politic. Strong reliance in this regard was placed on *Samiullah Baloch v Abdul Karim* PLD 2018 SC 405, from which several passages were read out before the Court.

31. Mr. Makhdoom Ali Khan, learned counsel who appeared on behalf of the then Leader of the Opposition (Mr. Shahbaz Sharif) and latterly also the Pakistan Muslim League (N) ("PML(N)", then in Opposition), took up the case from the other side. Referring to the Constitution as originally adopted, learned counsel submitted that it did not have any anti-defection provision, save as contained in the then Article 96 (since omitted). That Article was the one that then dealt with a vote of no-confidence against the Prime Minister. Clause (5) of this Article had provided, inter alia, that such a vote, if passed by the total membership of the Assembly resulted in the Prime Minister ceasing to hold office. It had contained a proviso which was in the nature of an anti-defection clause, and which read as follows:

> "**Provided** that, for a period of ten years from the commencing day or the holding of the second general election to the National Assembly whichever occurs later, the vote of a member, elected to the National Assembly as a candidate or nominee of a political party, cast in support of a resolution for a vote of no-confidence shall be disregarded if the majority of the members of that political party in the National Assembly has cast its votes against the passing of such resolution."

Learned counsel emphasized that this provision was omitted when the Constitution was revived by, inter alia, the 8th Amendment (1985), at the conclusion of the interregnum brought about by the Gen Zia ul Haque imposed Martial Law, and that it was never thereafter re-inserted.

32. Learned counsel made his submissions in respect of the following aspects: (i) the maintainability of the Reference; (ii) the advisability of answering the questions referred; (iii) the structure and subject matter of Article 63A, past and present, emphasizing that the only consequences that flow from any violation thereof were as expressly provided in the text thereof and did not, and could not, therefore include any possibility of a lifetime ban/disqualification and/or the disregarding of the vote of a parliamentarian acting in breach thereof; and (iv) that if at all such consequences were to be envisaged that could only be done by way of, or upon, an appeal to the electorate and an amendment of the Constitution, and that there was therefore no legal question before the Court as could, or ought to, be answered. Referring in particular to the questions referred to the Court, learned counsel submitted that the first question was whether a literal or a purposive approach was to be taken and/or more appropriate while interpreting and applying Article 63A in particular. The second and third questions were, according to learned counsel, subsumed in the first. The fourth question was in any case too vague, general and all encompassing to be answered by the Court.

33. Referring to Article 63A, learned counsel submitted that the provision was not self-executory but needed a "trigger" which would be a direction by the parliamentary party and then action by the Party Head. Referring to paras 19 and 20 of the Reference, learned counsel questioned as to why the President had waited up

till then (i.e., the date of the filing thereof), and no action by way of seeking the opinion of the Court or otherwise was taken earlier. The timing, i.e., after the giving of notice by the Opposition made the filing of the Reference political and questionable. In this context, learned counsel also took issue with the delay in the requisitioning of the session of the National Assembly beyond the period as contemplated by the Constitution. It was submitted that in the facts and circumstances of the case, the questions referred to were not "ripe" for adjudication and answering but were speculative in nature, and the Reference being pre-mature and vague were academic in nature. No specific instances of any defection were given; indeed, it was contended, there was no specific factual basis, matrix or context at all for referring the questions. It was further submitted that in any case any exercise of answering the questions referred required the Court to descend into the political thicket. The questions being political in nature ought to be returned unanswered. Reference in this regard was made to *In the matter of Ref. 1/2020* PLD 2021 SC 825, from which various passages were identified. Learned counsel submitted that he had so far dealt with the preliminary issues of maintainability etc and reserved his right to address the Court on the merits after the other learned counsel made their submissions. That address was made on a subsequent date but the submissions are being noted here to maintain continuity. It may be noted that those submissions were made after the vote of no confidence motion had been passed and there was a change in Government, with the PML(N) now leading a coalition of parties under the prime-ministership of Mr. Shahbaz Sharif.

34. Learned counsel submitted that if the conditions laid down in Article 63A were met, it resulted in the parliamentarian having defected. But, what were the consequences that followed? Were they only as laid down expressly in the Article, i.e., de-seating only or was a lifetime ban/disqualification also to follow? Reference was made to the PTI Petition. Learned counsel submitted that the only relief sought there was of a lifetime ban/disqualification. No relief was at all sought to the effect that the vote cast should be disregarded. The timing of the filing of the Reference was again questioned and it was submitted that in any case the entire

scenario had undergone a material factual alteration. Furthermore, it was submitted, referring to *Imran Khan Niazi v Ayesha Gulalai* 2018 SCMR 1046, that some factual basis was required for answering the questions referred and none existed, or was shown to exist, in the present case. Learned counsel also submitted that if at all the Reference was answered in relation to the lifetime ban/ disqualification and/or disregarding of the casting of the vote that would be tantamount to an amendment of the Constitution, which was beyond judicial reach and jurisdiction. Neither of these results could be obtained by, or followed, any interpretation of the Constitution, which was all that was within the domain of the Court. It was submitted that the real motive behind the filing of the Reference was to suppress (if not altogether eliminate) dissent from political parties and discourse, and the questions, in effect, were an attempt to "liquidate" dissenting parliamentarians from political life. Mere criticism of government or its policies, or even the head of government/party, by members of the same party was not defection on any understanding of the term. Furthermore, because of the political divide in the country, the questions were political in nature and could, and ought, not to be answered. Finally, it was submitted that Article 63A did not at all engage any questions or issues of morality. It was a morally neutral provision, which had to be interpreted and applied as it was, and that was all there was to it. A number of cases were also cited or relied upon by learned counsel in support of his submissions.

35. The then Advocate General Islamabad (appointed by the PTI led Government), Mr. Niazullah Khan Niazi, adopted the submissions made by Mr. Khalid Jawed Khan, learned Attorney General. Strong reliance was placed in particular on the two cases already noted above in the submissions of the latter.

36. The then Advocate General Sindh (where the Government at all material times was formed by the Pakistan Peoples' Party, which was then in the Opposition at the federal level), Mr. Salman Talibuddin, submitted that the Reference was an attempt to draw the Court into the political thicket. The casting of a vote contrary to the directives of the party to which the parliamentarian

belonged, it was submitted, was not ipso facto a sign or indication of dishonesty or disloyalty. Even if defection under Article 63A were established, that did not take the matter within the scope of Article 62(1)(f). It was contended that if that were to be so, the former provision would be "finished". Article 63A was certainly a step towards political maturity, but it had to be applied in its own terms and nothing else or beyond that. It was prayed that the Reference be returned unanswered.

37. Mr. Farook H. Naek, learned counsel for the Pakistan Peoples' Party Parliamentarians (PPPP) (who were then in Opposition but subsequent to the passing of the vote of no confidence, part of the Government led by Mr. Shahbaz Sharif) strongly opposed the Reference and the questions raised therein. Learned counsel submitted that there were two questions before the Court: (a) what, if any, was the period of disqualification if a parliamentarian defected (i.e., for the duration of the House or lifetime), and (b) whether the vote cast contrary to the direction of the parliamentary party could be disregarded. Referring to the relevant Articles of the Constitution, learned counsel submitted that it could, if at all, be for the duration of the term of the House, but also clarified that that was not, in fact, the position adopted by him. His position was that there was no period of disqualification at all. In support of his submissions, learned counsel referred also to (the since omitted) Article 58(2)(b) and the various iterations through which Article 63A had gone since its insertion in the Constitution in 1997. Referring to Articles 62 and 63, learned counsel highlighted the difference between qualifications and disqualifications and submitted that disloyalty (which could be indicated by defection) was not at all the same as dishonesty. Hence, it was argued, Article 62(1)(f) was not engaged in any act/event or omission that could come within the scope of Article 63A and no question of a lifetime ban arose. Various cases were cited in this regard. Learned counsel also referred to the nomination forms that candidates have to file at the time of contesting elections. It was submitted that no undertaking was given by any candidate to anyone, whether the Election Commission or the Party Head as to how he would vote if elected. Nor was any such undertaking given, expressly or implicitly, in

the constitutionally mandated oath of office that was administered to parliamentarians before they could take their seats in any House. Learned counsel further submitted that there could be no reading in into the Constitution and referred to various cases. There was thus no place for any conclusion in terms of Article 63A that a vote cast contrary to a direction given was to be disregarded. Article 63A had to be applied only in terms of its express text and read literally, and nothing more. It was emphasized that a parliamentarian who lost his seat in terms of Article 63A was eligible to contest the ensuing bye-election.

38. Mr. Raza Rabbani, a Senator belonging to the PPPP and a Senior Advocate of this Court, was also heard. Learned counsel submitted that the historical transition of Article 63A in its various iterations showed that the trajectory was to take the "bite" out of the provision and to protect a parliamentarian who disagreed with, or dissented from, the party position from vindictive action by the Party Head. The various acts/events covered by the two clauses of Article 63A(1) were taken up and examples given as would show how a parliamentarian ostensibly in breach thereof was in fact not in violation of the constitutional provision. It was emphasized that disloyalty and dishonesty were not the same thing, and that the relationship between a parliamentarian and his party was not a one-way street. Learned counsel also read out several paragraphs from the written arguments submitted by him at the opening of his submissions.

39. Mr. Ali Zafar, who appeared for the PTI, submitted that there were two primary questions before the Court: (1) whether there could be a lifetime ban by reason of the application of Article 62(1)(f), for a violation of Article 63A, and (2) whether the vote of a parliamentarian in breach of the Article was to be counted or not, and sought to draw a distinction between the casting of a vote and its being counted. Learned counsel submitted that Article 63A had to be given a purposive meaning and such as was effective in eliminating the mischief for which the provision was inserted into the Constitution. Different views and approaches to constitutional interpretation were highlighted, and reliance placed on case law and treatises. The historical background to the problem and vice

of defection since Independence was also highlighted. The reason for the insertion of the proviso in clause (5) of Article 96 (referred to above) was also referred to. Learned counsel also traced the history of various anti-defection measures, including the various iterations of Article 63A, and relied strongly on *Kh. Ahmad Tariq Rahim* and *Wukula Mahaz*. It was submitted that there was a direct connection between what was sought to be achieved by Article 63A and disloyalty and breach of trust. Reliance was placed in this regard on the principle of unjust enrichment which, learned counsel submitted, would ensue if the parliamentarian who defected was, as it were, allowed to get away with it. An act or omission in violation of Article 63A was a fiduciary betrayal. It was submitted that Article 63A in fact brought these concepts to the constitutional plane. One consequence of a violation of the provision was that the parliamentarian in default would be able to enjoy the fruits of his disloyalty and illegality if the vote cast by him was counted (though he could not be prevented from casting it). Learned counsel also emphasized the role of political parties in a system of parliamentary democracy, referring to several passages from *Benazir Bhutto* and *Mian Nawaz Sharif*. It was submitted that the questions referred to ought to be answered, and in essentially the manner as suggested by Mr. Khalid Jawed Khan, the then Attorney General.

40. Dr. Babar Awan appeared on behalf of the petitioner in the PTI Petition. It was submitted that Article 63A had to be read with Articles 62 and 63, as the purposes of these provisions were linked. The various clauses of the last two mentioned Articles were referred to in light of the relevant case law, in particular Article 62(1)(f). Then Article 63A was examined in the light of the case law developed in relation thereto. It was submitted that if Article 63A became applicable that attracted a lifetime bar/disqualification and the PTI Petition and the third question in the Reference ought to be decided and answered accordingly.

41. Mr. Mansoor Usman Awan, learned counsel for the SCBA, strongly contested the Reference and the PTI Petition. It was submitted that the terms of Article 63A were clear and applied only as per what was expressly laid down therein and not

otherwise. In particular the votes cast by parliamentarians had to be counted even if otherwise the matter came within the scope of the express text of the provision; there could be no disregarding thereof. Likewise, there could be no bar/ disqualification, lifetime or otherwise, as the same was not contemplated by the provision. Learned counsel also contested the proposition that Article 17(2) was in relation to the fundamental rights of political parties. As presently relevant, the only "right" of the political party was to deny the parliamentarian in default its ticket for contesting the elections for the seat vacated by an application of Article 63A, whether it be a bye-election or otherwise.

42. Mr. Mustafa Ramday, learned counsel for the Balochistan National Party (Mengal) ("BNP(M)") (which was then in Opposition but subsequent to the passing of the vote of no confidence, part of the Government led by Mr. Shahbaz Sharif) focussed attention on the question of a lifetime ban. Learned counsel submitted that Article 63A had to be read in context, along with Articles 62 and 63, and that there was a grave danger that the position of the Prime Minister or Chief Minister would be turned into an elective dictatorship if the Reference was answered in terms as proposed by Mr. Khalid Jawed Khan and learned counsel appearing for the PTI. There was a clear distinction between defection and disagreement (or dissent). No presumption of dishonesty or mala fides could be made against a parliamentarian who voted/abstained in violation of what was required of him in terms of Article 63A. There could be no reading in into the Constitution and reference was made to case law in support. Indeed, learned counsel went to the extent of contending that answering the Reference as proposed by the other side would be tantamount to legislative "enslavement". A detailed analysis of Article 63A was also carried out.

43. Mr. Shumail Butt, learned Advocate General KPK (where the Government was at all material times formed by the PTI) supported the submissions and arguments advanced by Mr. Khalid Jawed Khan. It was submitted that an answer to the questions referred to in the manner proposed would not be the result of any reading in into the Constitution. The answers flowed

naturally when Article 63A was read and applied harmoniously with Articles 62 and 63. The provisions of Article 62(1)(f) were fully attracted. The relevant case law was also referred to.

44. Mr. Muhammad Azhar Siddiqui, learned counsel who appeared for the Pakistan Muslim League (Q) ("PML(Q)") submitted that Article 63 as it now stood rested on the Charter of Democracy and read out certain clauses from the latter document. Learned counsel adopted the submissions made by Mr. Ali Zafar. It was emphasized that party allegiance and loyalty were required of parliamentarians, and any breach thereof, as came within the scope especially of Article 63A stood proscribed. Reference was made to various other provisions, including the oath of office taken by elected candidates before they took their seats in a House. It was contended that Article 62(1)(f) was fully applicable.

45. Mr. Kamran Murtaza, learned counsel who appeared for the Jamiat-e-Ulema-e-Islam (F) ("JUI(F)") (which was then in Opposition but subsequent to the passing of the vote of no confidence, part of the Government led by Mr. Shahbaz Sharif) filed a written synopsis in which it was contended that questions referred to in the Reference were beyond the scope of Article 186 and therefore it ought to be returned unanswered. Other contentions, which reinforced those made by Mr. Makhdoom Ali Khan, were also stated and reiterated.

46. This brings us, finally, to the submissions made by Mr. Ashtar Ausaf Ali, who succeeded to the office of Attorney General when there was a change of Government and Mr. Shahbaz Sharif took up the office of Prime Minister. The learned Attorney General contended that a reference under Article 186 could only be filed if there was any ambiguity or other such or similar issue raising constitutional questions. That was not the case at hand. The provisions of Article 63A were perfectly clear on the face of it, and could be so applied without any difficulty. For analytical purposes, it was submitted, the subject matter of Article 63A could be divided into political parties, of which their respective parliamentary parties were a subset, and of which the individual parliamentarians of each parliamentary party were a further

subset. The purposes behind, and timing of, the Reference was seriously put in question. The history of defections and anti-defection provisions was traced, from the Political Parties Act, 1962 through the present Constitution as originally adopted (i.e., with reference to the then Article 96) and then Article 63A in its various iterations. Relevant extracts from parliamentary debates in relation to the adoption of the present Constitution were also relied on. Reference was made to the relevant case law. The learned Attorney General emphasized that the application of Article 63A did not contemplate or result in any kind or type of bar, whether a lifetime disqualification or otherwise. Likewise, a vote cast in violation of a direction or directive in terms of Article 63A could not be disregarded. It had to be counted and given due effect.

The relevant provisions

47. It will be convenient to gather in one place the relevant provisions, to the extent presently material. Article 17 has come in for its share of amendments and alterations since the adoption and commencement of the Constitution. It presently stands as follows:

> "**17. Freedom of Association**.-- (1) Every citizen shall have the right to form associations or unions, subject to any reasonable restrictions imposed by law in the interest of sovereignty or integrity of Pakistan, public order or morality.
>
> (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.
>
> (3) Every political party shall account for the source of its funds in accordance with law."

48. Turning to Article 63A, it was first inserted into the Constitution by the 14th Amendment (1997), which was the only

change made by the said Amendment. The preamble to the Amendment recited as follows (emphasis supplied): "Whereas it is expedient further to amend the Constitution of the Islamic Republic of Pakistan *in order to prevent instability in relation to the formation or functioning of Government*". The Article itself provided as follows:

> "**63A. Disqualification on the ground of defection, etc**.- (1) If a member of a Parliamentary Party defects, he may be means of a notice in writing addressed to him by the Head of the Political Party or such other person as may be authorized in this behalf by the Head of the Political Party, be called upon the show cause, within not more than seven days of such a notice, as to why a declaration under clause (2) should not be made against him. If a notice is issued under this clause, the Presiding Officer of the concerned House shall be informed accordingly.
>
> **Explanation:** A member of a House shall be deemed to defect from a political party if he, having been elected as such, as a candidate or nominee of a political party or under a symbol of political party or having been elected otherwise than as a candidate or nominee of a political party, and having become a member of a political party after such election by means of a declaration in writing –
>
> (a) commits a breach of party discipline which means a violation of the party constitution, code of conduct and declared policies, or
>
> (b) votes contrary to any direction issued by the Parliamentary Party to which he belongs, or
>
> (c) abstains from voting in the House against party policy in relation to any bill.
>
> (2) Where action is proposed to be taken under the Explanation to clause (1), sub-clause (a) the disciplinary committee of the party on a reference by the Head of the Party, shall decide the matter, after giving an opportunity of a personal hearing to the member concerned within seven days. In the event the decision is against the member, he can file an appeal, within seven days, before the Head of the Party, whose decision thereon shall be final, in cases covered by the Explanation to clause (1), sub-clauses (b) and (c), the declaration may be made by the Head of the Party concerned after examining the explanation of the member and determining whether or not that member has defected.
>
> (3) The Presiding Officer of the House shall be intimated the decision by Head of the Political Party in addition to intimation which shall also be concerned member. The Presiding Officer shall within two days transmit the decision to the Chief Election Commissioner. The Chief Election Commissioner, shall give effect to such decision, within

seven days from the date of the receipt of such intimation by declaring the seat vacant and amend it under the schedule of the bye-election.

...

(6) Notwithstanding anything contained in the Constitution, no court including the Supreme Court and a High Court shall entertain any legal proceedings, exercise any jurisdiction, or make any order in relation to the action under this Article."

49. Article 63A was substituted by the Legal Framework Order, 2002, which was ratified by the 17th Amendment (2003). As so substituted, it provided as follows:

"**63A. Disqualification on grounds of defection, etc.**-- (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 relations 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;

he may be declared in writing by the Head of the Parliamentary Party to have defected from the political party, and the Head of the Parliamentary Party may forward a copy of the declaration to the Presiding Officer, and shall similarly forward a copy thereof to the member concerned:

Provided that before making the declaration, the Head of the Parliamentary Party shall provide such member with an opportunity to show cause as to why such declaration may not be made against him.

(2) A member of a House shall be deemed to be a member of a Parliamentary Party if he having been elected as a candidate or nominee of a political party which constitutes the Parliamentary Party in the House or, having been elected otherwise than as a candidate or nominee of a political party, has become a member of such Parliamentary Party after such election by means of a declaration in writing.

(3) Upon receipt of the declaration under clause (1), the Presiding Officer of the House shall within two days refer the

declaration to the Chief Election Commissioner who shall lay the declaration before the Election Commission for its decision thereon confirming the declaration or otherwise within thirty days of its receipt by the Chief Election Commissioner.

(4) Where the Election Commission confirms the declaration, the member referred to in clause (1) shall cease to be a member of the House and his seat shall become vacant.

(5) Any party aggrieved by the decision of the Election Commission may within thirty days, prefer an appeal to the Supreme Court which shall decide the matter within three months from the date of the filing of the appeal...."

50. Finally, by the 18th Amendment (2010) it was substituted to take its present form:

"**63A. Disqualification on grounds of defection, etc.**-- (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 relations 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.

Explanation.—"Party Head" means any person, by whatever name called, declared as such by the Party.

(2) A member of a House shall be deemed to be a member of a Parliamentary Party if he having been elected as a candidate or nominee of a political party which constitutes the Parliamentary Party in the House or, having been elected otherwise than as a candidate or nominee of a political party,

has become a member of such Parliamentary Party after such election by means of a declaration in writing.

(3) Upon receipt of the declaration under clause (1), the Presiding Officer of the House shall within two days refer, and in case he fails to do so it shall be deemed that he has referred, the declaration to the Chief Election Commissioner who shall lay the declaration before the Election Commission for its decision thereon confirming the declaration or otherwise within thirty days of its receipt by the Chief Election Commissioner.

(4) Where the Election Commission confirms the declaration, the member referred to in clause (1) shall cease to be a member of the House and his seat shall become vacant.

(5) Any party aggrieved by the decision of the Election Commission may, within thirty days, prefer an appeal to the Supreme Court which shall decide the matter within ninety days from the date of the filing of the appeal...."

Analysis and Discussion

51. As is clear from our answers to the first two questions referred to the Court, as set out in paras 1-3 of the Short Order, there can be no proper understanding of Article 63A without appreciating that it is intertwined with Article 17(2). This is so, inter alia, because the former is an expression in the Constitution of certain aspects of the fundamental rights that inhere in political parties in terms of the latter. In order therefore to properly understand Article 63A there must be a proper appreciation of Article 17(2), and that must be the starting point of the analysis and discussion. What then is the proper understanding of Article 17(2)?

Towards understanding Article 17(2): The first step: the *Benazir Bhutto* cases

52. Article 17(2) on a bare textual reading, confers a fundamental right on citizens, other than those in the service of Pakistan, "to form or be a member of a political party". In *Benazir Bhutto v Federation of Pakistan* PLD 1988 SC 416 ("*Benazir Bhutto*") the vires of several provisions of the Political Parties Act,

1962 ("1962 Act"), most of which were changes made during the Gen Zia ul Haq interregnum (including, in particular, s. 3-B) and the Freedom of Association Order, 1978 (which was likewise a creation of that era) were challenged. The challenge centred around (but was not exclusively limited to) the questions of the formation and registration of political parties. The matter was heard by the Full Court, and several judgments delivered, the learned Chief Justice (Muhammad Haleem, CJ) giving the judgment of the Court. In both the principal and concurring judgments powerful observations were made as to the role of political parties in the constitutional and political system of the country and, in particular, the system of parliamentary democracy which is now regarded as a salient feature of the Constitution. Thus, the learned Chief Justice observed as follows (emphasis supplied; pp. 515-20):

> "A political party has its significance in the context of the political system provided by the Constitution. *Our Constitution is of the pattern of Parliamentary democracy with a Cabinet system based on party system as essentially it is composed of the representatives of a party which is in majority*....
>
> Our Constitution envisages democracy as ethos and a way of life in which equality of status, of opportunity, equality before law and equal protection of law obtains. It has its foundation in representation; it is not a system of self-government, but a system of control and the limitations of government. A democratic polity is usually identified by the manner of selection of its leaders and by the fact that the power of the government functionaries is checked and restrained. In a democracy the role of the people is to produce a government and, therefore, *the democratic method is an institutional arrangement for arriving at political decisions in which individuals acquire the power to decide by means of a competitive struggle for the people's vote*. Fundamentally democracy rests upon the idea of freedom.
>
> *Parliamentary Government is a government of the party and a party government is a vital principle of a representative government*. The political party is a connecting link between the Executive and the Legislature, between the Cabinet and the Parliament. It is also a connecting link between the Cabinet and the people and between the Parliament and the people. *For this reason the political parties are necessary and important features in a Parliamentary democracy. They are important because the group victorious at a general election becomes the government. In a nutshell a Parliamentary democracy depends for its success on the organization of political parties and its disciplined support of Parliamentary*

majority is sine qua non of Cabinet Government composed of the Prime Minister and the Ministers from the majority party. They thus provide leadership to public offices through the elections. *They are now necessary part of a democratic government. Rival parties make elections meaningful by giving voters a choice among candidates who represent different interests and points of view*. The party or parties that are out of power serve as a "loyal opposition" as understood in Parliamentary democracy. That is, they criticise policies and actions of the party in power. In this way the party in power is called on to justify its actions and is made responsible to the people.

...

[“]*Political parties are institutions of very great importance under our form of government. They are, in fact, the effective instrumentalities by which the will of the people may be made vocal, and the enactment of laws in accordance therewith made possible. So potent have they become in determining the measures and in administering the affairs of government that they are now regarded as inseparable from, if not essential to, a republican form of government*.

The people have an inherent right to form, organize, and operate political parties and to reorganize an old political party. This is included in the right of suffrage. It has been characterised as "an inalienable right guaranteed by the Constitution." (25 Am Jur 2d 800-8010)

...

"Political party" in section 2(c) of the Political Parties Act, 1962, is defined as including a group or combination of persons who are operating for the purpose of propagating any political opinion or indulging in any other political activity.

In this definition there is no elaboration of what political opinion or political activity means. Cornelius, C.J., however, spoke of it in the case of Abul A'la Maudoodi v. Government of West Pakistan, (PLD 1964 S C 673) at page 692 in these words:

> "The ordinary conception of a political party includes a right within the framework of the Constitution to exert itself through its following and organization, and using all available channels of mass communication, to propagate its views in relation to the whole complex of the administrative machine, including the Legislature, in respect of matters which appear to it to require attention for the amelioration of conditions generally throughout the nation, for improvements particularly in administrative procedures and policies, as well as in the legislative fields, even to the extent of proposing and pressing for amendment of the Constitution itself."

The role of political parties is also recognized in other judicial opinions. S.A. Rahman, J., in his separate opinion in the case of Abul A'la Maudoodi said:

> "In a democratic set-up such as is visualised by our present Constitution, *the presence of political parties is regarded as an essential feature* so that it is conceivable that the opposition of today may be the Government of tomorrow."

Fazl-e-Akbar, J., in his opinion in the same case expressed:

> "Indeed the very foundation of a constitutional government is healthy opposition. Progress of a country depends to a certain extent by the opposition of the new to the old, and in so far as it is within the law, such opposition is recognized as a symbol of independent though[t] containing the promise of progress."

Elections are a recognized means of providing succession in leadership. The problem of political succession is common to all Parliamentary democracies. At a minimum an election provides a legal means for validating a claim to govern. *It is a party system that converts the results of a Parliamentary election into a government. The opinion of the individual voters is further curtailed and controlled by the working of the party which has an organization which controls the elections, educates its members in the policies and professions of the party and exercises discipline over its members so as to prevent defection*.

Having highlighted the importance of political parties in a Parliamentary democracy such as envisaged in the Constitution, the framers of the Constitution while guaranteeing the right to every citizen to form associations or unions *also provided separately "to form or be a member of a political party", as its existence is essential for the maintenance of other rights guaranteed to the individuals by the Constitution*....

...

Article 17(2) visualises plurality of political parties and so does the definition of the "Political Party" in the Act as plurality has a direct bearing to the Parliamentary system of Government. This right has a positive and a negative aspect. The words "right to form" in this sub-Article is not only confined to the commencement of association but the right includes the right of continuance of the association as well....

B. Z. Kaikaus, J., in Abul A'la Maudoodi's case, held, in relation to Article 7 of the 1962 Constitution: "*It may be pointed out here that though the words used in Article 7 refer only to forming of associations they necessarily imply carrying on the activities of an association for the mere forming of association would be of no avail*." Similarly Cornelius, C.J.,

in his opinion in the same case expressed that where a party is formed, its functioning is implicit and it comes to an end when a contingency occurs."

The learned Chief Justice further held as follows (emphasis supplied; pg. 531):

"Reading Article 17(2) of the Constitution as a whole *it not only guarantees the right to form or be a member of a political party but also to operate as a political party. As earlier held, the words "right to form" is not only confined to its formation but to its function as a political party*. The political party, according to its texture, of being an aggregate of citizens composing the party can exercise the other rights guaranteed under the Constitution like an individual citizen. *Again the forming of a political party necessarily implies the carrying on of all its activities as otherwise the formation itself would be of no consequence. In other words the functioning is implicit in the formation of the party*. (See the opinions of B.Z. Kaikaus, J., and Cornelius, C.J., in Abul A'la Maudoodi's case)."

53. Nasim Hasan Shah, J. (as his Lordship then was) in his concurring judgment held as follows (emphasis supplied; pg. 566-7):

"I now come to the question whether any of the Fundamental Rights of the petitioner is infringed by the provisions of the impugned amendments made in the Political Parties Act, 1962, providing for the compulsory registration of the Political Parties and the prescription to submit accounts. In this connection, according to the petitioner her fundamental right to form a Political Party (conferred under Article 17(2)) is frustrated as her political party, the PPP not being a registered party is prevented from functioning and participating in the elections as a party. However, according to the other side, *the right conferred under Article 17(2) is only to form a political party or to be its member and that none of the impugned provisions of the Political Parties Act, 1962 places any restriction on the petitioner from forming a political party or from being its member. So far as participation in the elections is concerned, even if her Party is not registered she would be entitled to vote at the elections and can also stand in the elections in her personal capacity.*

I cannot agree with the learned Attorney-General. The term "right to form" a party not only merely means the right to form or start an association, *but includes therein the right of continuing it. The word "form" is not confined only to the initial formation of an association but also implies its continuation, namely, that the association shall have the right to continue its activities and propagate its political opinions without any restriction which could result its suspension or discontinuance of its activities*....

...

> The argument raised by the learned Attorney-General that deregistration of a political party does not put an end to its functioning as it can still continue to function like any other political party subject merely to the limitation that it will only not have the right to contest elections as a party, cannot be accepted. *Persons elected to the legislature in their personal capacities have hardly any importance. They just toss around on the political scene, rudderless and without a destination. It is only when they band themselves into a group, as a party, that they become a force exercising some influence by their activities. It is only as members of a political party and not as individual members of the legislature; can they achieve their objectives*...."

54. Reference may also be made to the concurring judgment of Zafar Hussain Mirza, J., who observed as follows (emphasis supplied; pg. 620):

> "The elimination of a political party from contesting election was considered by the learned Attorney-General as no invasion on the fundamental right conferred under Article 17(2), because despite refusal to register a party or the cancellation of its registration, it will still exist as a party until it is dissolved under section 6. *This argument overlooks the very basis of the system of Government providing for parliamentary democracy, in which various parties in the country are formed with a view to capture the seat of power in order to implement the policy and programme which they consider beneficial for the progress and advancement of the country*. Under the Constitution the achievement of this objective is through the means of election. Therefore, if a political party is barred and kept away from the election, its existence would hardly remain meaningful and effective. *It may be pointed out that Article 17(2) does not guarantee a right to form a party but a "political" party*. Consequently the right to contest the election to the National and Provincial Legislatures is inherent in the right guaranteed. Depriving a party of its right to participate in election would be its virtual dissolution."

55. *Benazir Bhutto* was decided on 20.06.1988. A few months later, the Full Court had occasion to consider another matter, similarly titled, which can be regarded as a companion case and which was decided on 02.10.1988. This was *Benazir Bhutto and another v Federation of Pakistan and another* PLD 1989 SC 66 ("*Symbols* case"). In this matter the challenge was to s. 21(1)(b) of the 1962 Act, which (as amended by the Gen. Zia ul Haq regime) allowed the election authorities considerable latitude in allocating

election symbols to candidates for a constituency. In essence, the argument was that as elections were to be held on a party basis, a result already obtained in *Benazir Bhutto*, the candidates of a particular party ought to be allocated the same symbol in all constituencies, whether for the federal or the provincial assemblies. Giving the judgment of the Court, Shafi ur Rehman, J. relied on *Benazir Bhutto* to hold as follows (pg. 73; emphasis supplied):

> "Our conclusion therefore, is that section 21 of the Act as amended by Ordinances Nos. 11 and VIII of 1985, *is violative of Fundamental Right contained in Article 17(2) of the Constitution in so far as it fails to recognize the existence and participation of the Political Parties in the process of elections, particularly in the matter of allocation of symbols and is for that reason void to that extent*. Every Political Party is eligible to participate in the Elections to every seat in the National and the Provincial Assemblies scheduled to be held on the 16th of November, 1988. The Political Parties shall be entitled to avail of the provisions of sub-rule (2) of rule of the Rules to seek allotment of any of the prescribed symbols...."

In a concurring judgment, Nasim Hasan Shah, J. recalled what he had said earlier in *Benazir Bhutto* (at pg. 566) and, after reproducing the passage already extracted above, observed by way of continuation as follows (pp. 74-5; emphasis supplied):

> "...including, I might add, *the right to contest elections as an association i.e. as a Political Party*.
>
> Given this right, the question is whether the Political Party also has a right to obtain a symbol to identify its candidates at the elections? Now, since this Court has held that elections may take place on party-basis, the participants therein, in our milieu, are identified not merely by their names or the names of their parties but in a larger measure by their party flag and by their party symbols. *The latter elements are as important, if not more important, as the name of the candidate himself*....
>
> ...
>
> The term "election" is a comprehensive term and includes all the stages of the election commencing from the calling of the electorate to vote until the declaration and notification of the final result. Obviously casting of votes for the candidates is the most important stage in the process of elections. Now while Rule 9 of the Rules permits a political party to obtain a common symbol to facilitate the voter to identify his party candidate, section 21 of the Act omits to recognize this right. *But this Court has found that elections*

> *may be held on party basis in every constituency by virtue of the Fundamental Right conferred on the citizens of this country by Article 17(2) of the Constitution*. Thus, an inconsistency exists between Section 21 of the Act and the Fundamental Right aforesaid. *Section 21, as it now stands, is neither cognizant of the existence of political parties nor accords any recognition to them. Indeed the failure therein to make any provision for allocation of any symbol to a political party, which alone can enable it to effectively participate in the process of elections, renders nugatory the right to form a political party and accomplish its objectives, namely, to organize and fight an election with a view to capturing political power*...."

56. While the passages from both judgments essentially speak for themselves, some important takeaways may be highlighted. Firstly, the significance of enshrining, in Article 17, the right to form and be a member of a political party as a separately articulated right under clause (2), and not just merely as part of the "generic" right to form and be a member of an association or union under clause (1), was specifically noted. And it was not just a right to form a party; the right was to form a "political" party. Secondly, certain aspects of the nature of political parties, in relation to their vital importance for the functioning of parliamentary democracy under the Constitution were elaborated. The (constitutionally pathetic) results that would obtain if mere individuals contested elections as opposed to political parties entering the electoral fray and their candidates being returned to elective office was forcefully brought out. It is interesting to note that even at this early stage, concern was expressed as to the menace (if not downright evil) of defection, even though the judgment that has become the *locus classicus* was still some years in the future. Thirdly, it was also noted (and this is, as will presently become clear, of particular importance for present purposes) that Article 17(2) recognized the necessity of there being a plurality of political parties for the effective functioning of the system of parliamentary democracy. We may add that the constitutional provision is wide enough (as indeed is the situation in practice) to accommodate even a multiplicity of such parties. Finally, even though the matter before the Court in *Benazir Bhutto* was, in the main, in relation to the formation and registration of political parties, it was recognized that the right enshrined in Article 17(2) went, and indeed had to, go much beyond that.

Political parties were the necessary (indeed, absolutely essential) means for the acquisition of political power by way of a competitive struggle for the vote of the electorate. It was the electoral "struggle" (of course, always and only through constitutional and lawful means) between rival parties that gave full meaning and effect to the process of elections. The mere formation of a political party was of no avail; it also had to have the right to "continue its activities and propagate its political opinions", and the most important way of doing so was by contesting elections. The point though expressly articulated but in a sense incipient in *Benazir Bhutto* was taken further in the companion *Symbols* case which related to an actual (and practically speaking, vital) issue in respect of elections, i.e., the allocation of symbols. The point is well articulated in the concurring judgments of Nasim Hasan Shah, J. in both cases, in the passages extracted above.

57. The two *Benazir Bhutto* cases were crucial in establishing the basic understanding of Article 17(2) and in articulating the position and role of political parties and their vital importance for the system of parliamentary democracy that the Constitution envisaged, and laid down, for the governance of the country. Certain crucial aspects, such as the need for (at least) a plurality of political parties, their "rivalry" in the electoral arena for the acquisition of political power and the formation of government, and even the need to prevent defections were also expressed, if only (in a sense) as "seeds" that would subsequently flower into fully developed aspects of the fundamental right. It is to this that we now turn.

Towards understanding Article 17(2):
The second step: the *Nawaz Sharif* case

58. In 1988 Gen. Zia ul Haq, then President, dissolved the National Assembly (and Governors appointed by him in the Provinces took similar action in relation to the Provincial Assemblies). Fresh elections were called for. This was in purported exercise of a power conferred on the President by Article 58(2)(b) of

the Constitution (later omitted), a provision that had been inserted therein by the General himself. The dissolution was challenged, and in *Federation of Pakistan v Haji Muhammad Saifullah* PLD 1989 SC 166 the challenge was upheld by the Full Court, the order of dissolution being declared unconstitutional. However, relief by way of restoration of the Assemblies was denied, and the country moved to the election of fresh Assemblies and formation of new Governments (of course, on a party basis) at both the federal and provincial levels, in what was widely regarded as finally being the full restoration of democracy after the Martial Law interregnum. The Federal Government was formed by a PPP led coalition, whose leader Mohtarma Benazir Bhutto entered office as Prime Minister. Two years later the then President, Mr. Ghulam Ishaq Khan, invoked Article 58(2)(b) and dissolved the Assemblies, again calling for general elections. This time the challenge to the dissolution did not succeed, and all relief was denied by the Full Court: *Kh. Ahmad Tariq Rahim v Federation of Pakistan and others* PLD 1992 SC 646. Now, in both matters the litigation had started by way of a writ petition in the High Court (which was, coincidentally, the Lahore High Court), and they came to this Court in exercise of its appellate jurisdiction under Article 185(3). In 1993, Mr. Ghulam Ishaq Khan again took recourse to Article 58(2)(b). The Federal Government was at that time formed by a PML(N) led coalition, with Mr. Muhammad Nawaz Sharif as Prime Minister. This time the dissolution was challenged directly in this Court in terms of a petition under Article 184(3) of the Constitution. As before, the Full Court sat to hear the matter and, in *Mian Muhammad Nawaz Sharif v President of Pakistan* PLD 1993 SC 473 ("*Nawaz Sharif*"), allowed the petition, which led to the restoration both of the dissolved Assemblies and the respective Governments.

59. Article 184(3) can of course be invoked only if the petition raises a question of public importance with reference to the enforcement of any one or more fundamental rights. The petitioner relied, in the main, on Article 17(2) and an objection as to maintainability was taken by the respondents (led by the learned Attorney General and learned counsel engaged to represent the Caretaker Prime Minister). It was contended that Article 17(2) had

no application in the facts and circumstances of the case, and that the petition was liable to be dismissed on this ground alone. It is this reliance on Article 17(2), the objection taken and the answers given by the Court that are relevant for present purposes.

60. A number of judgments were given, and the preliminary objection was noted and addressed in each. The nature of the objection was set out in the judgment of Saeed uz Zaman Siddiqui, J. (as his Lordship then was) in the following terms (pp. 843-4; emphasis supplied):

> "The learned Attorney-General and Mr. S.M. Zafar, the learned counsel for the Care-taker Prime Minister have jointly challenged the maintainability of these petitions under Article 184(3) of the Constitution. The learned Attorney-General contended that by dismissal of the Federal Cabinet and dissolution of National Assembly no fundamental right of any of the petitioners guaranteed under Chapter 1 of Part II of the Constitution has been violated, so as to attract the jurisdiction of this Court under Article 184(3) of the Constitution. It is also contended by the learned Attorney-General that the freedom of Association guaranteed under Article 17 of the Constitution is restricted in its application to the formation of a political party and its membership *which does not include the right to get elected to Parliament or to continue as member thereof*.... With reference to rights guaranteed under Article 17 of the Constitution to form a Political Party and to be a member thereof, Mr. S.M. Zafar, contended that *so long a Political Party is not obstructed in taking part in the political process, which, according to learned counsel, terminates with the holding of election and induction of elected persons into Assemblies as members thereof, there cannot conceivably be any complaint* regarding violation of the right of freedom of Association guaranteed under Article 17 of the Constitution...."

The reply given by learned counsel for the petitioner was recorded as being as follows (pg. 844; emphasis supplied):

> "Replying to the above preliminary objections of the respondents, Mr. Khalid Anwar, the learned counsel for former Prime Minister contended that sub-clause (2) of Article 17 of the Constitution which guarantees the right to form and to become a member of a Political Party is a peculiarity of our Constitution, as no other Constitution of the world guaranteed such a right specifically under the Fundamental Right of freedom of Association. The learned counsel contended that specific mention of the right to form and to become a member of a Political Party in Article 17 of the Constitution, therefore, has to be given a special treatment in the scheme of our Constitution. On the above

> premises, Mr. Khalid Anwar contended that it would not be correct to equate this specific right with the ordinary right of freedom of Association guaranteed under Article 17 (supra).... *According to learned counsel the political activity of a Political Party does not terminate with the election of its members to the Assembly as election to Assembly is only a means and not the end for the objects of a Political Party*. The learned counsel in support of his above contentions relied on the two decisions of this Court reported as Miss Benazir Bhutto v. Federation of Pakistan PLD 1988 SC 416 and Miss Benazir Bhutto v. Federation of Pakistan PLD 1989 SC 66."

61. The learned Chief Justice (Nasim Hasan Shah, CJ) noted in relation to the preliminary objection (at pg. 555) that the judgment of Shafi ur Rahman, J. had, in draft, been circulated to all the members of the Bench. The learned Judge had rejected the preliminary objection and the learned Chief Justice was in agreement with the same. We may pause here to note that Saad Saood Jan, J. upheld the objection (see at pg. 646) but since the majority of the Court rejected it the learned Judge proceeded to consider the petition on the merits, and allowed it. Sajjad Ali Shah, J. (as his Lordship then was) also upheld the preliminary objection (see at pg. 766) and, in the event, dismissed the petition. Thus, it was by majority that both the preliminary objection was overruled and the petition allowed.

62. Since the learned Chief Justice found the position taken by Shafi ur Rahman, J. entirely persuasive in relation to the preliminary objection, we begin with considering how the latter dealt with it. After noting the preliminary objection (at pg. 571), his Lordship observed as follows (pg. 572):

> "The Fundamental Rights guaranteed in any Constitution, an organic instrument, are not capable of precise or permanent definition. They cannot be charted on a piece of paper delineating their boundaries for all times to come. The treatment of this preliminary objection would be more comprehensive, conceptually more readily intelligible and complete once the substance of the impugned Constitutional order has been examined in the context of our political freedoms and Parliamentary system of Government, as brought out in a written Constitution of our own."

After considering the petition on the merits (and, in essence, allowing it), his Lordship returned to the preliminary objection. It was held as follows (pp. 638-9; emphasis supplied):

> "Now coming to the competence of the petition, the grounds of objections have already been noted. During the hearing of the arguments I used an unusual expression "flowering of the Fundamental Rights in other provisions of the Constitution"....
>
> The expression "flowering of an idea, artistic style, or political movement is its successful development" (BBC English Dictionary, page 44-2)....
>
> *The provisions of the Constitution which enable Political parties to reach the Government and after reaching the Government to continue their political purpose unimpeded are all directed towards ensuring fruition of this Fundamental Right*.
>
> *It is difficult to agree with the contention that clause (2) of Article 17 of the Constitution has a restricted field. If the Constitution-makers chose to treat it separately, compendiously and expressly, unlike any other known Constitution of the world, why should we restrict and limit it. For an extensive interpretation of it there is a positive indicator in the word "operating". There is healthy operating, there is unhealthy operating. By taking care of unhealthy operating, healthy operation has been kept free of all limitations to flourish and flower inside the Government as well as outside it*.
>
> I hold that petition is competent not only because Fundamental Right 17 is directly involved but also because the first part of Article 14 of the Constitution stands violated by attributing subversion to the ousted Prime Minister...."

63. The learned Chief Justice dealt with the preliminary objection in the following terms (pp. 557-8; emphasis in italics supplied, otherwise in original):

> "Fundamental Rights in essence are restraints on the arbitrary exercise of power by the State in relation to any activity that an individual can engage. Although Constitutional guarantees are often couched in permissive terminology, in essence they impose limitations on the power of the State to restrict such activities. Moreover, Basic or Fundamental Rights of individuals which presently stand formally incorporated in the modern Constitutional documents derive their lineage from and are traceable to the ancient Natural Law. *With the passage of time and the evolution of civil society great changes occur in the political, social and economic conditions of society. There is, therefore, the corresponding need to re-evaluate the essence and soul of the fundamental rights as originally provided in the Constitution. They require to be construed in consonance with the changed conditions of the society and must be viewed and interpreted with a vision to the future*. Indeed, this progressive approach has been adopted by the Courts in the United States and the reason given for doing so is 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 fuller import to its meaning: (Hurtade v. California -- 110 U.S. 516)."

...

This progressive approach has also found favour with this Court and has been endorsed by it. Speaking for the Court, the learned Chief Justice (Muhammad Haleem, CJ.) observed in Benazir Bhutto's case (PLD 1988 SC 416 at page 490) as under:--

"The liberties, in this context if purposefully defined will serve to guarantee genuine freedom, freedom not only from arbitrary restraint of authority, but also freedom from want, from poverty and destitution and from ignorance and illiteracy --------- This approach is in tune with the era of progress and is meant to establish that the Constitution is not merely an imprisonment of the past, but is also alive to the unfolding- of the future". (Emphasis supplied).

In consonance with this progressive approach, it was held in this case that the right conferred by Article 17 includes not merely the right to form a political party but comprised also other consequential rights.

This approach was again in evidence in the Symbol's case (PLD 1989 SC 66) wherein it was observed that the "Fundamental Right" conferred by Article 17(2) of the Constitution whereby every citizen has been given "the right" to form or to be a member of a political party comprises the right to participate in and contest an election" (see page 75 of the Report).

The learned Chief Justice then held as follows (pp. 559-60; emphasis supplied):

Thus, in the scheme of our Constitution, the guarantee "to form political party" *must be deemed to comprise also the right by that political party to form the Government, wherever the said political party possesses the requisite majority in the Assembly*. As was explained by Chief Justice Muhammad Haleem in the same Judgment [i.e., *Benazir Bhutto*]:-

> "Our Constitution is of the pattern of parliamentary democracy with a Cabinet system based on party system as essentially it is composed of the representatives of a party which is in majority------- It is a party system that converts the results of a Parliamentary election into a Government."

Accordingly, the basic right "to form or be a member of a political party" conferred by Article 17(2) comprises the right of that political party not only to form' a political party, contest

elections under its banner but also, after successfully contesting the elections, the right to form the Government if its members, elected to that body, are in possession of the requisite majority. The Government of the political party so formed must implement the programme of the political party which the electorate has mandated it to carry into effect. Any unlawful order which results in frustrating this activity, by removing it from office before the completion of its normal tenure would, therefore, constitute an infringement of this Fundamental Right.

In this connection, the interpretation of the word "operating" in Article 17(2) given by my learned brother Shafiur Rahman, J. further clarifies this aspect of the matter. *He has rightly pointed out that the term "operating" includes both healthy and unhealthy operation of a political party*. While Article 17 contains limitations and checks against unhealthy operation of the political party; no provision exists therein in relation to its healthy operation. *However, the mere omission to make any specific provision in regard to this aspect does not imply that Fundamental Right 17 does not also comprise this aspect of the matter*. Indeed, a positive right implies, as part of the same right, a negative right and vice [versa]... Hence, if the lawful functioning of a Government of political party is frustrated (by its dismissal) by an unlawful order, *such an order is an impediment in the healthy functioning of the political party and would, therefore, constitute an infringement of the fundamental right conferred by Article 17(2)*. A petition under Article 184(3) for its enforcement would, accordingly, be maintainable.

In this view of the matter, the submission of the learned Attorney-General that rights guaranteed under Article 17(2) extend only to the right to form a political party and the right to become a member of a political party or for that matter the submission of Mr. S. M. Zafar that the right guaranteed under Article 17(2) extends only to all the political processes culminating in the election of its member to the National Assembly and no more cannot therefore be accepted. The preliminary objection, accordingly, fails and is rejected."

64. Ajmal Mian, J. dealt with the preliminary objection in paras 16 and 17 of his judgment (pp. 673-4; emphasis supplied):

"16. 1 am inclined to hold that the right to form a political party and to be a member of a political party enshrined in clause (2) of Article 17 does not culminate upon winning of the elections as was contended by the learned Attorney-General and Mr. S.M. Zafar *but it is a continuous political process which includes the right of the petitioner to remain as a member of the National Assembly or as a Prime Minister till the time the life of the Assembly or the tenure of the Prime Ministership is terminated lawfully in accordance with the provisions of the Constitution*. It is true that nobody can claim any vested right to remain a member of the National Assembly or to be a Prime Minister for the period of five

years but an MNA or a Prime Minister can claim that he should be allowed to function so long as the life of the Assembly or his tenure is not terminated in accordance with the provisions of the Constitution. Any infraction of the above right without legal basis will inter alia attract Article 17 (2) of the Constitution besides being violative of the relevant Constitutional or statutory provision....

17. *I may also observe that there is a marked distinction between interpreting a Constitutional provision containing a Fundamental Right and a provision of an ordinary statute*. A Constitutional provision containing Fundamental Right is a permanent provision intended to cater for all time to come and, therefore, while interpreting such a provision *the approach of the Court should be dynamic, progressive and liberal keeping in view ideals of the people, socio-economic and politico-cultural values (which in Pakistan are enshrined in the Objectives Resolution) so as to extend the benefit of the same to the maximum possible. This is also called judicial activism or judicial creativity*. In other words, the role of the Courts is to expand the scope of such a provision and not to extenuate the same. The construction placed by me on Article 17 of the Constitution hereinabove in para 16, seems to be in consonance with the above rules of construction."

65. Afzal Lone, J. dealt with the preliminary objection as follows (pg. 737; emphasis supplied):

"7. *In every democratic set-up, in the world, the political parties compete for the right to form a Government. It is the basic assumption of Parliamentary democracy that the party winning a majority of seats in the House should have complete control of Government*. For democracy gives the majority the right to rule. Constitutionally, this power, admits of no impediment. In British politics the "doctrine of mandate" signifies that the party which wins the general election has the right to implement its programme. In fact it is true of every country following Parliamentary democracy. If a party attaining power fails to give effect to its manifesto it may be accused of deluding the electorate in catching the votes. It may be observed that for an effective functioning of a political system, the dominant institutions catered thereby though geared by the idea of contemporary social attitudes must not be oblivious of moral and historical aspirations of the nation. The reasons being that neither Constitutional principles nor political attitudes can properly be appreciated without understanding their roots in the historical experiences of the society...."

66. In his judgment Saleem Akhtar, J. took up the preliminary objection in the following terms (pp. 807-8; emphasis supplied):

"The law is thus well-settled that Article 17(2) guarantees the right to form, or to be a member of a political party *and to operate as the formation and operation of a political party are*

two such spheres which by a process of legal path as provided by the Constitution and law the party attains its goal inside and outside the Assembly. *The political functioning and activities of a political party do not end once its members are elected to any Assembly. It has multifarious activities within the Assembly and outside the Assembly*. Election is merely a process to choose its representatives by the political sovereign, i.e., the electorate to authorise them to continue their political activity inside the Assembly. Election is merely a road leading a successful member to enter the Assembly but it does not end there. The process continues transforming into formation of the Ministry or becoming a Minister or to be a leader of the Opposition or member of the Opposition Party, to participate in the debates and discharge all such Constitutional and legal duties which are enshrined in the Constitution, responsibility of which is cast on the members. The elected members have far more responsibility than the members of the political parties working outside the Assembly as an unelected representative. The Minister is not only collectively responsible to the National Assembly, but he is also accountable to the people. Thus, if the political right as conferred by Article 17 is violated in breach of the provisions of the Constitution, Article 184(3) can be invoked for violation of Fundamental Rights."

67. This returns us, finally, to the judgment of Saeed uz Zaman Siddiqui, J. His Lordship held as follows (pp. 848-9; emphasis supplied):

"*From the preceding discussion, it clearly emerges that a Political Party is a voluntary association of persons, formed with the object of propagating a definite political opinion/view on a matter of public importance, having an ultimate aim to get into the power seat of a Government, through the process of election, in order to give effect to its programme*. At this stage it will be beneficial to reproduce here the provisions of Article 17(2) of the Constitution which is as follows:- ...

From the language of Article 17(2) (supra) it is quite clear that not only the formation and membership of a Political Party is within the contemplation of this Article *but its operation and functioning is also within its purview*. This is quite evident from the latter part of Article 17(2) which provides that when the Federal Government declares that a Political Party has been formed or is operating in a manner prejudicial to the sovereignty or integrity of Pakistan, it shall refer the matter to this Court for decision. The word "operation" is defined in Concise Oxford Dictionary as follows:--

"operate;

(1) be in action, produce an effect, exercise influence....

(2) perform surgical or other operation (on); (try to) execute purpose; (Mil) carry on strategic movements; (of stockbroker etc.) buy and sell esp. with a view to influencing prices.

(3) bring about, accomplish; manage, work, conduct...."

In Black's Law Dictionary, the word "operation" is defined as under:--

"operate. To perform a function, or operation, or produce an effect.

Operation.

Exertion of power; the process of operating or mode of action; an effect brought about in accordance with a definite plan; action; activity."

There is nothing in the language of Article 17(2) (supra) to suggest that the word "operation" is to be given any restricted meaning. I am, therefore, of the view that the operation of a political party in its ambit includes the entire political process beginning from the formation of the party, propagation of its views on matters of public importance, taking part in elections and when voted to power by a popular vote to form the Government of its choice and to complete its terms in the office in accordance with the provisions of the Constitution. It needs no mention here that a long, vigorous and sustained effort is needed by a Political Party to win public support to its programme and sometimes it may require a lifetime effort by a Political Party to educate public opinion on issues of public importance propagated by it. *Therefore, to get elected to Assemblies and to form the Government of its choice, in the event of success, is not only the paramount and cherished goal of every Political Party but it is inherent in its operation and functioning*.

Considering in the above context, the right to form a Political Party guaranteed under Article 17(2) of the Constitution *necessarily includes in it, the right to continue in power, if duly elected by the people, for the full tenure, subject to other provisions of the Constitution*. It, therefore, necessarily follows that a duly elected political Government if ousted or interrupted from continuing in power through unconstitutional means, can legitimately make a grievance that its Fundamental Right under Article 17(2) of the Constitution has been violated. If the contention of learned Attorney-General and the counsel for respondent No.3 is accepted, *the role of Political Parties will be reduced to a mere debating societies engaged in academic discussions on political issues of public importance, which in my humble opinion was not in the contemplation of the framers of the Constitution while specifically guaranteeing the right to form a Political Party under Article 17(2) of the Constitution*."

68. The extracts reproduced above vividly establish the comprehensive manner in which the majority briskly and robustly disposed of the preliminary objection. The attempt to limit and restrict the reach of Article 17(2) to only the formation and membership of political parties was rejected out of hand. But the judgments went beyond that. A conceptual breakthrough was achieved, one that marks *Nawaz Sharif* as a seminal decision in the deepening and maturing of the understanding of Article 17(2). For what the Court held was this. Once a political party had been formed (i.e., the mechanics of its creation achieved), the substantive bundle of rights enshrined in Article 17(2) were then to be carried forward by and through the political party itself. In other words, a political party was more—much more—than merely the sum of its parts, being the members thereof. It transcended the members, and thus *it was the political party itself that was entitled to, and held, the fundamental rights enshrined in Article 17(2)*. This is most fully articulated in the judgment of the learned Chief Justice, but is a conclusion that is derived from a reading of the judgments as a whole, especially the portions highlighted in the extracts reproduced above. Put differently, the understanding of Article 17(2) reached in *Nawaz Sharif* can be stated as follows. The provision contemplates two sets of fundamental right-holders. One is the citizens, who have the fundamental right to form and/or be members of a political party of their choice. But the other is the political party itself. It is true that in *Benazir Bhutto* it had been observed by the learned Chief Justice (at pg. 520) that the rights of a political party in relation to the other fundamental rights enshrined in the Constitution were not greater than an aggregate of the rights of the members thereof. Two points may be made here. Firstly, given that a political party must at all times have members who hold such other rights, the political party also, almost by definition, has such rights. But secondly, and much more importantly, the understanding that *Nawaz Sharif* developed is that in respect of the rights contemplated by Article 17(2), it is the political party itself that is the right-holder. And what are those rights? It is a composite or bundle which is, in essence, aimed at one goal or objective. It is, to put it simply, the pursuit, acquisition, retention and exercise of political power. That such pursuit, etc is to be done by constitutional and lawful means is a

given, as already noted above. That political power is not, and cannot be, an end in itself but rather a means to a greater goal and objective, namely the ability of the political party to implement its program for the welfare of the people and well being of the country (usually, but not necessarily, as set out in the manifesto published before a general election), is also a given. But all that is to be done, in the context of our system of parliamentary democracy, by a political party (or alliance or combination of such parties) which is given the mandate (i.e., political power) by the people through elections contested by the said party. That was, and is, at all times the goal of every functional political party, properly so called. In practical terms, as emphasized by both *Benazir Bhutto* and *Nawaz Sharif* that means that the fundamental right under Article 17(2) is of, and for, the political party to contest elections in its capacity as such, and win the mandate of the electorate in such measure, great or small, as the people are willing to grant it, thereby being in a position to have its candidates returned to the Assemblies, both National and Provincial. (The Senate, being indirectly elected, presents the same situation though in somewhat altered form. Such considerations need not trouble us here.) The political party must succeed in the political arena, and such success will be the acquisition of political power in the legislative arena. And, given that our system of governance is parliamentary democracy, the political party, depending on its strength in an Assembly, could have the right (also part of the bundle of rights enshrined in Article 17(2)) of further acquiring and wielding the power of the executive organ of the State, by forming the Government of the day. What *Nawaz* Sharif conclusively establishes is that these rights, inherent in and of the very essence of Article 17(2), inhere in the political party itself as the right-holder and not in its members for the time being. The party is no placeholder for the members. It holds the rights under Article 17(2) in its own right. The unique aspect of the present Constitution in specifically and separately conferring the rights enshrined under clause (2) of Article 17 on political parties requires just such an understanding. The ground and foundation for this was laid in the *Benazir Bhutto* cases, but clarity of exposition and application was reached in *Nawaz Sharif*. The role that the Constitution contemplates for political parties, so

forcefully and repeatedly stated in the various judgments noted above, is for them to be institutions, and not mere associations. And such institutions are to exist and last across decades if not generations, and not merely flicker into life momentarily and then disappear, perhaps having a lifespan no more than the political life of the founder(s). And this is as it should be. It must also be kept in mind that the membership of a political party will vary over the sweep of time and generations; the political party itself must go on. If we may adapt Salmond's famous formulation, the living members may come and go, but the political party ought to remain. For it is only in this way that the continuity required for the proper exercise of the vitally important fundamental rights enshrined in Article 17(2) can be guaranteed.

69. The second important aspect of *Nawaz Sharif*, and its contribution in developing our understanding of Article 17(2), lies in the comprehensive manner in which the term "operating" has been understood. The importance of "healthy" operating of political parties is absolutely essential. The point is made by Shafi ur Rahman, J. and elaborated especially in the judgments of the learned Chief Justice and Saeed uz Zaman Siddiqui, J. It is clear that even though (on a bare reading thereof) the text of the provision itself appears to be concerned only with the "unhealthy" operating of a political party, a party so operating is very much to be an exception. As *Nawaz Sharif* makes clear what is much more important is what is to be regarded as the norm, i.e., the "healthy" operating of the parties. The "healthy" operating has both an internal and an external dimension, and both of these are integral aspects of the rights enshrined in Article 17(2). This is a point that we will take further.

70. The stage has been reached where a mature understanding of Article 17(2) in relation to political parties has been achieved. However, as noted in the first section of this judgment, neither time nor understandings of the Constitution stand still. Nor should they. We must now move to what in our view is the current understanding of Article 17(2) and the role of political parties, especially in relation to defections. But first it is necessary to take a look at Article 17(2) relative to other fundamental rights, in

order to bring out certain aspects peculiar to the former in contrast to the latter.

Certain aspects of fundamental rights
(in relation, in particular, to Article 17(2))

71. The fundamental rights enshrined in a constitution, whether to be found expressly in its text or as may be discovered therein as a result of developing understandings of it, represent one of the most important and complex features of constitutional law. It is vast and fertile jurisprudential field. However, we need consider fundamental rights only in narrowly focussed terms in order to bring out and highlight both those aspects which are in common but also such as are peculiar to Article 17(2).

72. The first aspect of fundamental rights is that in the case of each such right it is conferred in equal measure on all the right-holders. Every person entitled to the freedom of speech or expression, or of movement, or of assembly, etc. is entitled to such right in equal measure as any other such right-holder. (Of course some citizens or persons are excluded from having the benefit of this or that particular right or even (in certain stated contingencies) of the whole of the said rights; we are not concerned with those categories here. Nor are we concerned with the reasonable restrictions that may be imposed by the State in relation to many of the rights.) Clearly, this is something that Article 17(2) has in common with other fundamental rights. Each citizen (or more precisely group of citizens) has in equal measure the right to form a political party, being the first set of right-holders having the benefit of that provision. And each political party so formed has in equal measure the bundle of rights that exist in terms thereof, being the second set of right-holders recognized by Article 17(2). That each right is held in equal measure does not however mean it must translate in equality of result when the right is exercised. A simple example may help to illustrate the point. If two persons wish to exercise the right of expression under Article 19, it may be that one is regarded as the greatest poet of his generation, while it may require poetic licence to describe the other as a poet at all. But that outcome is a matter

of literary taste and merit. Constitutionally speaking, the right of expression (here by way of poetry) inheres in each in equal measure. In the context of political parties, it may be that some are mass based, operating at the national level and all across the country, while others are provincially or even locally bound. It may be that at each general election the former more often than not has dozens, if not hundreds, of its candidates returned at both the federal and provincial levels, whereas the other is limited to, if at all any, a few handful. Again, constitutionally this variation does not matter. The rights envisaged by Article 17(2) inhere in each political party in equal measure. Whether the right-holders are whales or minnows, in this sense at least the Constitution requires equality.

73. The second aspect of fundamental rights is that, in general, each right is exercised by a right-holder independently of the others. Put differently, in general, a right-holder is indifferent to whether any other right-holder is exercising that right or not, and if so to what extent. Again, this is the constitutional position. What happens in practice may be quite different. To revert to the example given above, the great poet may be indifferent to all others and especially the “minnows”, whereas the latter may well be acutely aware of the former. And it may be that a right is expected to be simultaneously exercised by a number of right-holders in the same manner (i.e., in concert). Indeed, it may have real meaning essentially only if so exercised. The right of assembly is a ready example. But as a matter of law, and this result flows in a sense from the equality of measure noted above, each right-holder is an independent “operator”. However, as will be seen in a moment this is not true for political parties in terms of Article 17(2) even on the constitutional plane.

74. The third aspect of fundamental rights is that, again in general, it is for the right-holder to decide whether he wishes to exercise it or not. For example, of all the persons who are entitled to the freedom of expression it is only a fraction that actually exercises the right, whether as poets or authors or artists, etc. Most right-holders do not avail the opportunity and are content enough to only be “consumers” of whatever is “produced” by those

who choose to express themselves. Likewise, if a group of right-holders of, e.g., the right to assemble are gathering, other right-holders are entirely free as to whether or not they wish to exercise the right in that manner. And it is also true that some rights are exercised by a much greater majority of the right-holders. However, the constitutional point is that it is for each right-holder to himself come to a decision in this regard. But as shall be seen, the position of political parties under Article 17(2) is not quite of this nature.

75. Finally (at least for present purposes) in general the nature of each fundamental right is such that each right-holder thereof can exercise it in any number of many different ways. The vast variety of the freedom of expression has been noted. But the same is true enough of many of the other rights. The rights of assembly and movement may be utilized for many different purposes, and the variety of opportunities under Article 18 is endless. But again, the position under Article 17(2) is somewhat different. It is those differences that we now need to consider.

76. The first difference between the right-holders under other fundamental rights and the two sets that exist under Article 17(2) is the singularity of purpose and objective that necessarily exists under the latter. As noted in the judgments cited above, Article 17(2) is not concerned, as regards the first set of right-holders, with the formation or membership of any party or association: it is concerned solely with a “political” party. No other type or form of association can be formed or have members under this clause; for that, the concerned citizens must take recourse to clause (1). And there, of course, there is that multiplicity of near endless possibilities as are to be found in relation to other fundamental rights. Citizens may unite for any purpose, goal, end or objective. Not so the citizens who unite under clause (2). There, there can be only one goal or objective, namely to form and/or be a member of a political party.

77. As with the first set of right-holders, so the second set, the political parties themselves. They too can have only one goal or objective, which has already been identified above: the pursuit,

acquisition, retention and exercise of political power. Thus, Article 17(2) is essentially monochromatic. It is designed for, and geared towards, only one kind of association and one set of goals and objectives. This brings us to the second manner in which Article 17(2) is differentiated from other fundamental rights. There, the right-holder may choose to exercise the right or not, as he deems fit. That is not the case with Article 17(2). The purpose of forming the political party—the association—the very *raison d'etre* for its creation and existence is the pursuit of political power. No political party, properly so called, can be sensibly regarded as such unless (of course in such measure as is open to it) it seeks political power in terms of and for the purposes that have already been noted, and are so elaborately set out in the judgments cited above.

78. This brings us to the third manner in which political parties, while exercising the bundle of rights enshrined in Article 17(2), differ from other right-holders acting (or not) in respect of other rights. As was seen earlier, there the right-holders in general act independently of each other and even indifferently to what the others are doing. Not so under Article 17(2). It is of the very essence of the provision that political parties cannot be indifferent to the others or act independently of them. Since all are in pursuit of the same goal or objective—political power—that simply cannot be so. In fact, again as highlighted in the judgments cited, they are competitors and rivals in the same (electoral) arena, seeking the same mandate of the people, which the latter may grant to them in such measure, great or small, as they deem appropriate. In this sense, what one political party does acts on the others and vice versa. This is not merely a matter of practice. It is an integral part of the political rivalry and competitiveness that drives the system of parliamentary democracy. It is something woven into the very fabric and nature of the rights bundled in Article 17(2).

79. Finally, notice must be taken of what may be called the cyclic aspect of the rights that inhere in Article 17(2). This is again a point of difference between this fundamental right and others. The point can be explained by comparing a political party on the one hand and an association or union formed under clause (1) of Article 17 on the other. Now, whatever the goals and objects of the

latter may be (and as we have seen the possibilities are endless), the association may continue to pursue them unimpeded and over whatever period of time as it may deem appropriate. Not so with political parties under clause (2). Here, the pursuit, acquisition, retention and exercise of political power are constitutionally circumscribed by time in the sense that the Constitution imposes an outside limit to the term of the Assemblies. Once the end is reached the Assemblies dissolve and must be re-elected. And this cycle continues and repeats, in the constitutional sense, endlessly. Each time the end is reached the grant of political power, to whichever is the party that had the electoral mandate, comes to an end. In terms of Article 17(2) the political parties must again restart the political rivalry and competition that drives the system of parliamentary democracy. In practice of course the political competition is a ceaseless, 24/7 endeavour among the parties. But in constitutional terms it is cyclical, with each election cycle having a definite starting point and terminus. This imposes a certain shape and constraint on the exercise of the rights bundled in Article 17(2), which is different from the situation under the other fundamental rights.

Article 17(2): the current understanding (and the problem of defection)

80. The analysis and discussion so far may be summed up as follows. Article 17(2) reaches far beyond what may appear to be suggested by the bare language of the text. The right inhering in citizens to form and/or be a member of a political party is but the starting point, and not the end-all and be-all of this fundamental right. Political parties so established are themselves right-holders in terms thereof, having the benefit of the bundle of rights encompassed in Article 17(2) in their own right and not simply as placeholders for their members for the time being. Furthermore, the rights so bundled inhere in each political party in equal measure. The constitutional requirement, necessary for the proper functioning of the system of parliamentary democracy, that there be a plurality of political parties who are competitors and rivals for political power on a cyclical basis, is duly reflected in, and is an integral aspect of, Article 17(2).

81. It is now necessary to consider in greater detail the second path-breaking aspect of *Nawaz Sharif* alluded to above, namely, that it is inherent in the nature of Article 17(2) that there be a "healthy" operating of political parties. As the judgments, in particular, of Shafi ur Rahman and Saeed uz Zaman Siddiqui, JJ, make clear this is an aspect that is to be understood comprehensively and not treated in a narrow or pedantic manner. In our view the "healthy" operating of a political party within the meaning of Article 17(2) has both an internal and an external aspect. The internal aspect pertains to matters within a political party whereas the external aspect relates to those that apply across the spectrum to, and among, all the political parties for the time being. The former is intra- while the latter is inter-party. But in each case, the requirement is that there be a "healthy" operating. This requirement, in both its senses, has a variety of facets and meanings. Some overlap while others are distinct and relate to whether it is the intra- or inter-party "health" that is being considered. Insofar as the external aspect is concerned, one obvious area where the requirement applies is the competition among the parties as they vie for political power. It must be kept in mind that the competition or rivalry is not limited only to the election phase, when the parties are seeking the mandate of the people. It extends also (and perhaps much more so) to after the electoral verdict has been given and members elected, and matters move to action within the Assembly concerned. To recall the words of Shafi ur Rehman, J., "healthy operation has been kept free of all limitations to flourish and flower *inside* the Government as well as *outside* it" (emphasis supplied). Put differently, the "healthy" operating of political parties in both its internal and external aspects relates and applies to all aspects and phases of political power: its pursuit, acquisition, retention and exercise.

82. The foregoing quite obviously has a direct bearing on the central issue raised by the questions referred to the Court, i.e., defection. While the problem of defection can be an issue even at the pre-election phase, it is all the more so when the people have given their verdict and the returned candidates of the various parties have taken their places in the Assemblies. The parties are there reflected in, and represented by, their respective

parliamentary parties. In a parliamentary democracy, it is in the legislative arena that the competition and rivalry for the acquisition, retention and exercise of political power continues. Indeed, it also moves into what might be called the next phase, in relation to the executive branch, i.e., the formation of the Government of the day, and the acquisition, retention and exercise of political power through, and in respect of, that organ of the State. If anything, the competition and rivalry tends to intensify, especially as a given election cycle draws to a close. It is therefore in the legislative and executive settings that the evil and vice of defection can have its most pernicious effect. And yet the constitutional requirement of "healthy" operating, as an integral aspect of the fundamental right in terms of Article 17(2), never ceases to apply. It continues to operate—as it necessarily must—in its external aspect throughout and, in particular, in relation to the legislative and executive arenas. As can be readily appreciated, defections are the antithesis of this aspect of the fundamental right. We have seen that each political party is in equal measure entitled to the bundle of rights comprised in Article 17(2). Defections tend to disrupt, if not destroy, this balance, which must at all times exist among political parties as they operate under the Constitution. It tends to demolish the "healthy" political competition and rivalry that is a *sine qua non* for Article 17(2). The parties may not be equal in practice but they are always equal in the eyes of the Constitution. The minnows must be able to swim freely with the whales, and neither should have to face even the threat of predatory attacks; there is no place for sharks in the waters that nourish Article 17(2). Defections are an attack on the integrity and cohesion of the political parties, and represent in an acute form the unconstitutional and unlawful assaults, encroachments and erosions which constitute a direct negation and denial of the rights encompassed in Article 17(2). There can be no "healthy" operating of, and among, the parties in the external aspect if defections are not thwarted and defeated. Indeed, the degradation—if not outright destruction—of "healthy" operating of parties in this manner is how and why the political bedrock established by the Constitution can become destabilized and parliamentary democracy itself delegitimized.

83. Similar considerations apply in relation to the internal aspect of the "healthy" operating of political parties. A defection in the ranks of a political party, and especially from amongst the members of its parliamentary party, tends to disrupt it from within. Again, this affects and attacks its cohesion and coherence and ability to be, and act as, a political party. It compromises—perhaps fatally so—the "health" of the political party; at the very least, it disables its "healthy" operating during the election cycle in which it occurs. No wonder then that defections have been likened to a cancer. Before proceeding further, there is another facet of the internal aspect of the "healthy" operating of a political party that must be referred to. This relates to the internal dynamics of the party, and more particularly (as presently relevant) the relationship between the parliamentary party and the Party Head. This facet will be considered in greater detail later in the judgment.

84. Defections attack and undermine Article 17(2) at its very root. Howsoever viewed, defections (and, again, especially of the parliamentarians who comprise a political party's parliamentary party) badly damage and can fatally compromise (at the very least, and almost certainly, during the ongoing election cycle) the "healthy" operating of political parties in all aspects of this requirement of the fundamental right that is set out in Article 17(2). Defections are a near absolute negation of this fundamental right. The conclusion therefore is clear: it is inherent in the very nature of Article 17(2) that it can be properly understood (and, to use the language of Article 184(3), enforced) if, and only if, it is applied in a strongly anti-defection manner that, if possible, deals (as it were) a deathblow to this evil and menace in all its manifestations. Put differently, it is hardwired into the very structure and design of Article 17(2). It is an important facet of the application of this fundamental right that defections are dealt with comprehensively and proactively.

85. The foregoing analysis is, and in our view must be, the current understanding of Article 17(2). With clarity having been reached as to this fundamental right and the absolute necessity of the "healthy" operating of political parties in both the internal and

external aspects, we move to consider Article 63A. But before we do so it will do well to remind ourselves of the statement of law that is now regarded as the *locus classicus* in respect of the vices of defection. In *Kh. Ahmad Tariq Rahim v Federation of Pakistan and others* PLD 1992 SC 646 ("*KTR*"), while giving the judgment of the Court (see at pg. 722), Shafi ur Rahman, J said as follows (pg. 666; emphasis supplied):

> "The preamble to our Constitution prescribes that "the State shall exercise its powers and authority through the chosen representatives of the people". *Defection of elected members has many vices*. In the first place, if the member has been elected on the basis of a manifesto, or on account of his affiliation with a political party, or on account of his particular stand on a question of public importance, his defection amounts to a clear breach of confidence reposed in him by the electorate. *If his conscience dictates to him so, or he considers it expedient, the only course open to him is to resign to shed off his representative character which he no longer represents and to fight a re-election*. *This will make him honourable politics clean, and emergence of principled leadership possible*. The second, and more important, the political sovereign is rendered helpless by such betrayal of its own representative. In the normal course, the elector has to wait for years, till new elections take place, to repudiate such a person. *In the meantime, the defector flourishes and continues to enjoy all the worldly gains*. The third is that it destroys the normative moorings of the Constitution of an Islamic State. The normative moorings of the Constitution prescribe that "sovereignty over the entire universe belongs to Almighty Allah alone, and the authority to be exercised by the people of Pakistan within the limits prescribed by Him is a sacred trust" and the State is enjoined to "exercise its powers and authority through the chosen representatives of the people". *An elected representative who defects his professed cause, his electorate, his party, his mandate, destroys his own representative character*. He cannot on the mandated Constitutional prescription participate in the exercise of State power and authority. *Even by purely secular standards carrying on of the Government in the face of such defections, and on the basis of such defections, is considered to be nothing but "mockery of the democratic Constitutional process"*. The other enumerated evils contained in first ground precede, accompany or follow the defection. That there had been taking defections has not been seriously disputed, nor the fact that the defectors were quite often rewarded with posts and prizes...."

The intertwinement of Articles 17(2) and 63A

86. We have seen that an integral aspect of Article 17(2), on its proper understanding, is a powerful anti-defection requirement,

which is necessary to fully and effectively secure the “healthy” operating of political parties in both external and internal aspects. This understanding emanates from a consideration of the fundamental right itself. Article 63A, to state the very obvious, is concerned with defections. It actualizes in the Constitution itself a matter referable directly to a fundamental right. There is therefore an obvious, immediate and natural connection between the two provisions. To try and apply Article 63A on a standalone basis, in isolation from and disregard of Article 17(2) gives at best only a partial solution to the problem of defections. Certainly, it does not strike this evil and menace at the root. This is so because the constitutional foundation, anchored in a fundament right, would not have been taken into consideration. On the other hand, once it is recognized that the two provisions are intertwined then Article 63A can be given full effect. Put differently, Article 63A comes into full flowering only when it is viewed from the perspective of Article 17(2) and the facets, aspects and requirements thereof.

87. Article 63A as it stands today has been reproduced above. Clause (1) contains two paras. The questions referred to us relate to the para (b) and to one aspect only, namely, when a member of a parliamentary party casts his vote contrary to a direction issued by the parliamentary party in respect of any of the enumerated matters. If so, then the consequence that may ensue in textual terms is a declaration of defection by the Party Head and, subject to application of the following clauses, a de-seating of the member in default. It is common ground that such a member may (again, if only the language is taken into account) contest the ensuing bye-election.

88. The foregoing is, in summarized fashion, what is suggested by the text of the Article. It was pressed on the Court that the provision had to be read as a code complete unto itself and given no meaning or understanding beyond the bare text. If that truly were the correct understanding of Article 63A then arguably that would be all that there is to it. However, we respectfully disagree. Such an approach misses, if not the whole of the point then, at least one-half of it.

89. Before proceeding further one point may be made. Para (b) of clause (1) of Article 63A treats the matter of defection in a specific manner. More precisely, it requires a direction of the parliamentary party to trigger the para. If there is no such direction then the para is not actuated and Article 63A has no application. (Para (a) is of course different in this regard, but we are not concerned with it here.) It is for this reason, among others, that it was clarified in the Short Order that the Article was an expression of certain aspects of the rights of political parties bundled in Article 17(2). However, the basic point remains: Article 63A cannot be fully understood in a manner detached from Article 17(2). It is only an approach and perspective that is moored in the latter that gives a true and proper understanding of the former.

90. If a parliamentary party gives a direction in terms of para (b) and a member thereof votes contrary to the same then (viewing the matter now from the perspective of Article 17(2)) two pathways immediately open within the folds of Article 63A. (We will take up the matter of the conscientious objector later.) One is provided by the bare text of the provision. This pathway leads, if the Party Head so decides, to a formal declaration of defection against the member in default and, subject to the remaining clauses, to his de-seating. He is removed from the parliamentary party (and may well also be expelled from the political party). It is at once clear that the bare text, and hence the first pathway, relates to the internal aspect of the “healthy” operating of a political party. A defector has been removed from the ranks of a party, i.e., it has been (internally) cleansed. But in the context of Article 17(2) this is not the whole solution because it does not address the real problem. The real problem is not the sullying of the ranks of a party by the continued presence of a defector. It is the vote cast, and the “external” effect of the vote. Until that is addressed, one aspect of the crucial requirement of the “healthy” operating of political parties remains unaddressed and unresolved. This is the reason why a second pathway also opens (and must open) within the folds of Article 63A on a true and proper understanding of it. For much more crucial than the internal aspect of the “healthy” operating is the external aspect. The defector’s proscribed vote seeks to disturb, and materially and adversely alter, the balance

among the political parties, which must necessarily be maintained if they are to compete and vie for political power in the manner contemplated by Article 17(2). Whether it actually has the effect, in a given situation, of so disturbing and adversely affecting the balance is not decisive; the mere attempt or possibility is enough. To limit Article 63A to the bare text then, is to limit an understanding of it only to the internal aspect while being oblivious to the external aspect. It would be to wilfully turn a blind eye to the full effect in constitutional terms (i.e., Article 17(2)) of the vote cast in defiance of the direction. Put differently, such an approach deals with only the first of the two pathways that open in the folds of Article 63A in the context of Article 17(2). It is assumed that the second pathway does not (and cannot) exist. This cannot be correct.

91. The matter can be looked at from another angle. Being an expression in the constitutional text itself of certain aspects of the fundamental right enshrined in Article 17(2) and therefore intertwined with it, Article 63A attains full meaning and effect only when it is applied in the shade of the former and takes colour from it. In other words, the elements and characteristics of the former must find expression in the latter. As seen above, the internal and external aspects of the “healthy” operating of political parties, derived from the *Benazir Bhutto* and *Nawaz Sharif* cases, are an integral feature of Article 17(2), and part of a proper understanding of its design and function. And this also leads directly to the strongly anti-defection manner in which this Article is to be applied. As Article 17(2), so Article 63A. It can only be properly understood and fully applied if it marches hand in hand with Article 17(2); the latter is to be mirrored in the former. And so, the internal and external aspects of the “healthy” operating of political parties must find place and expression in Article 63A. This happens only if two pathways exist within it, one dealing with the internal aspect and the other with the external aspect. This is the holistic understanding that makes Article 63A conform to the provision to which it is an adjunct, Article 17(2), and whereby the necessary balance is achieved on the constitutional plane. To consider Article 63A to be wholly bound by its text alone is to look only at one pathway, and is a stunted vision of the constitutional

provisions. To realize that it enfolds within it a second pathway also is to gain a full measure of the soaring vision mandated by the true understanding of Article 17(2).

92. This takes us to the obvious question: where does the second pathway lead? If the remedy provided by the first is the de-seating of the member in default and a cleansing of the party from within, what is the remedy provided by the second? In our view, the answer is clear. Once it is understood that a holistic approach must be taken to Article 63A, the solution is self-evident. The vote of the member in default is to be disregarded. It is only in this way that the external aspect of the "healthy" operating of political parties will be maintained. The balance among the political parties will not be disturbed. They will continue to compete and vie for political power in the manner required by Article 17(2). In this context it is important also to keep in mind that the second pathway opens and becomes applicable immediately and automatically once the member in default has cast his vote against the direction of the parliamentary party. No other act, resolution or direction is required. The second pathway self-activates.

93. The existence within the folds of Article 63A of two pathways, one dealing with the internal and the other the external aspect, allows for an integrated approach to be taken to the problem of defection. It also has the effect of increasing manifold the deterrent affect of the Article. Since the first anti-defection measures were adopted and, more particularly, the insertion of s. 8-B into the 1962 Act in 1985 and the subsequent insertion of Article 63A in the Constitution in 1997, the focus unfortunately has been only on the (first statutory and then constitutional) text alone. But the text has an affect on, at most, only the internal aspect of the "healthy" operating of a party. This, if we may respectfully put it so, constitutionally myopic approach of understanding has singularly failed to address the problem in its totality by ignoring the external aspect. Once, however, the full understanding of Article 17(2) is achieved in the light of *Benazir Bhutto* and *Nawaz Sharif*, and it is understood that this Article and Article 63A are intertwined matters reach a much more

natural, and higher, level of resolution. For, the deterrent effect of the second pathway is not just on the member contemplating defiance of the direction. It acts also on those external forces or parties which may seek or attempt to engineer, or hope for, such defiance. A defector seeks, to recall the words of Shafi ur Rahman, J in *KTR*, to flourish and enjoy all the worldly gains. That flourishing and enjoyment is invariably provided (or at least promised) by those who stand to gain from the effect of the vote cast in defiance of the parliamentary party's direction. But if the vote is to be disregarded as per the second pathway, and this is immediate and automatic, that is a huge deterrence to, and disincentive against, even trying to induce or seek or engineer the casting of the vote in defiance. Indeed, even if a member of a parliamentary party initiates such a move and himself approaches the external force or outside party, there is a good chance of his being rebuffed. After all, what is the charm, if we may put it so, in making promises of worldly gains to, and dangling rewards before, a member of a parliamentary party if his vote is to be disregarded? If at all there is a "market place" for defectors, the integrated approach that applies on a holistic understanding and application of Article 63A has a "chilling effect" on the "buyers", and not just the "sellers". It is this aspect that is set out in the Short Order, when in para 2 thereof we spoke of the mere existence of Article 63A being sufficient as a brooding presence. For, as we stated there, the ideal position is that the Article need not be actually invoked at all. By deterring not just "sellers" but also driving away the "buyers" Article 63A truly comes into its own. But that is not possible until it is recognized that it encompasses within its fold two pathways, and that the pathways exist only if it is understood that the Article is intertwined with Article 17(2), the true understanding of which relates, inter alia, to both the internal and external aspects of the "healthy" operating of political parties.

94. It will be recalled that Shafi ur Rahman, J gave three reasons in *KTR* as to why defections constitute an irredeemable and unmitigated evil and vice. The third reason related to the "normative moorings" of the Constitution of an Islamic State. Those moorings "prescribe that "sovereignty over the entire universe belongs to Almighty Allah alone, and the authority to be

exercised by the people of Pakistan within the limits prescribed by Him is a sacred trust" and the State is enjoined to "exercise its powers and authority through the chosen representatives of the people"". The references were to the Preamble of the Constitution, which has been given substantive effect by Article 2A read with the Annex. As the latter note the Preamble is but the Objectives Resolution adopted in 1949 by the Constituent Assembly, which is rightly regarded as one of the foundational texts of our constitutional law. What, then, is required and expected of the "chosen representatives" who are to exercise the powers and authority of the State? It is quite clear that the said representatives (being the members of the parliamentary parties of the political parties, but of course include also the inevitable assortment of independents) must display, and adhere to, qualities of honesty, trustworthiness, guardianship, knowledge and skill, as being the necessary attributes of persons holding public office involving trust and responsibility. Defections directly negate these qualities. Indeed, it can be said that the one who defects or attempts to do so (or seeks to engineer or bring about a defection) expresses contempt for these qualities. Thus, defections undermine and damage the normative moorings of the Constitution and can inflict a deathly blow to its foundational principles. However, our constitutional law should not be regarded as helpless in the face of such depredations and machinations. It can, and does, rise to the occasion. The intertwined understanding of Articles 17(2) and 63A set out in these detailed reasons is an expression of principles enunciated in, and derivable from, the precedent case law. It constitutes, as it were, the countervailing measure that (in the context of the questions referred to the Court) leads towards if not the eradication of defection then at least in its mitigation and abatement. But that is not all. It is important also to keep in mind that the understanding, in seeking to preserve and protect the normative moorings of the Constitution, has a nexus with the Objectives Resolution and is thus firmly anchored in roots that go back to the nation's founding.

95. It will also be appropriate to address here a point urged before the Court during the hearing, namely, that if the foregoing

were the true meaning and application of Article 63A that would render the provision redundant and redundancy cannot lightly be imputed in a legal instrument, least of all a Constitution. With respect, this is completely misconceived. A finding of redundancy means that the provision can be removed altogether from the legal instrument, without in any manner affecting its integrity or operation. This is the exact opposite of what we have concluded. Not only is Article 63A not redundant; its continued existence goes a long way to give practical shape in the Constitution itself to the requirements of the fundamental right enshrined in Article 17(2). Secondly, the questions referred to us, as noted above, relate only to one aspect of one of the paras of clause (1) of Article 63A. Para (a) and the other aspect of para (b) (i.e., abstention) also need to be addressed. Whether, and if so how and to what extent, the understanding and approach taken here in relation to the casting of a proscribed vote would apply also to give constitutionally correct answers to issues raised in relation thereto is something that must await a suitable case in the future. But, Article 63A certainly cannot be regarded as redundant on account of the resolution of the issues now presented to the Court and the answers given to the questions raised in the Reference.

96. It is necessary now to return to the internal aspect of the "healthy" operating of a political party. It will be recalled that it was stated earlier that one facet of this aspect relates to the internal dynamics of the party, and has a bearing on the relationship between the parliamentary party and the Party Head. It will be noted that in Article 63A, as it now stands, for purposes of clause (b) the power to issue the direction is vested in the parliamentary party and if there is a proscribed vote then, in terms of the first pathway, the declaration is to be made by the Party Head. There is thus a bifurcation of powers. If the matter is viewed, as it must, from the perspective of Article 17(2), this division is perfectly understandable for the internal aspect of the "healthy" operating. This is so because political parties are right-holders in their own right in terms of Article 17(2) and the expectation is that they will not just be associations but institutions far outlasting any member thereof for the time being in order to fully carry, as they must, the burden of the system of

parliamentary democracy envisaged by the Constitution. But there is an issue here. It must be determined how tightly or loosely bound a political party must be, and this is especially so in respect of the members of the party who are its parliamentarians in an Assembly (i.e., who constitute its parliamentary party). If all powers in, or in relation to, the party are concentrated in one organ or individual, the danger is that its members (and again, especially its parliamentarians) may be held in what, in effect, amounts to political thraldom. On the other hand, if a political party is too loosely bound then it may become atomized to such an extent that its parliamentarians, to adapt the words of Nasim Hasan Shah, J in *Benazir Bhutto*, "just toss around on the political scene, rudderless and without a destination", reduced to a rootless rabble that is an easy prey to those predatory tactics that are the antithesis of Article 17(2). It must be kept in mind that we are here considering what is required in constitutional terms for purposes of giving full effect to a fundamental right, and not with what may, at any given time, be going on in practice. The answer given to this problem, at least in terms of Article 63A, appears to be a division of powers between the parliamentary party on the one hand and the Party Head on the other. If this division is breached then, since Article 63A must on its true understanding be viewed from the perspective of Article 17(2), there would be an adverse affect on the internal aspect of the "healthy" operating of the political party. When so viewed, it is clear that each serves as a check and balance on the other. The parliamentary party may issue a direction in terms of para (b) of clause (1), thereby opening the first pathway if there is a proscribed vote. But the Article has installed a "gateway" on this pathway, by conferring a discretionary power in the Party Head as to whether the matter is to be taken further to a declaration of the member in default as a defector and his de-seating. There is also another important aspect of this division of power to which we will return later in the judgment.

97. It follows from the foregoing that the parliamentary party cannot delegate, transfer, assign or in any manner "outsource" the power conferred on it in terms of para (b) to anyone, including the Party Head. Nor can it act merely at the behest or on the dictate of

another. In constitutional terms, it is for the parliamentary party itself to decide whether the direction is to be issued. In practice of course, in most situations it may well be that the position of the parliamentary party on the one hand and the controlling organs of the political party including the Party Head are aligned so that in most cases it may not even be necessary for the formal issuance of a direction. This alignment may well be regarded, in practice, as the normal or ordinary state of affairs and suffice for most situations. But the constitutional position is as set out above.

98. One point that needs also to be addressed here is as to how the direction for purposes of para (b), if a decision in this regard is taken by a parliamentary party, is to be arrived at and communicated. A decision in terms of either of the paras of clause (1) of Article 63A, whether by a parliamentary party to issue a direction or the Party Head to proceed to the making of a declaration of defection, cannot be regarded simply as the exercise of a legal power in quite the same manner as the conferment of a statutory power on an authority or forum. The reason is that a decision under Article 63A has necessarily a strong political element to it. Furthermore, especially in relation to an election or a vote of confidence or no-confidence, the political situation may be fluid and change by the hour. The decision to exercise the power may have to be taken on the spur of the moment. Therefore, it may not be appropriate to insist on the full panoply of procedural formalities and requirements that usually attend to the exercise of a statutory power. Of course, to an extent clause (1) itself (in its proviso) lays down certain procedural requirements, and these are clearly intended to be of a mandatory nature. However, some care must be taken before insisting on other such requirements or formalities such as, e.g., the holding of a meeting of the parliamentary party before it takes a decision to issue a direction or an insistence that the internal procedures of the political party, if any, be rigidly followed. What is clear is that the parliamentary party of a political party in an Assembly is a well defined body, known to all concerned. Since it is a body of parliamentarians, any decision in terms of para (b) must have the support of (at least) the bare majority of the parliamentary party. The taking of the decision and its communication may therefore

be established in such credible manner as satisfies the forum concerned, and it would not be appropriate to lay down any hard or fast rule in this regard. The totality of the circumstances in each actual situation must be kept in mind and given due weight and regard. However, for guidance the following procedure may be suggested. A copy of the direction, duly supported by the signatures of the majority of the parliamentary party, should be deposited with the secretariat of the Assembly/House by or before the time it takes up for voting the matter to which it relates. While notice ought also to be given to the members of parliamentary party of the direction through any feasible means (including modern communication and messaging facilities), the deposit of the same in terms just stated will be deemed notice to them all. In any case it should at all times be regarded as the responsibility of a member of a parliamentary party to satisfy himself, before voting or abstaining to vote on any matter covered by Article 63A(1)(b), whether his party has (or has not) issued a direction in terms thereof.

99. One final comment may be made on the first pathway, provided by the bare text of para (b). As noted, this deals with the internal aspect of the “healthy” operating of a political party. But this pathway does not, like the second one, self-actualize and become automatically operational. The member in default, who cast the proscribed vote, is not ipso facto de-seated. The reason is that the Article has placed a “gateway” along this pathway, which is to leave it to the discretion of the Party Head whether to proceed to making a declaration of defection, which must precede the de-seating. So, it could be that the “gateway” never opens and the member in default continues to remain a parliamentarian and part of the parliamentary party concerned. It must be emphasized that this has no bearing on the second pathway; as explained, that self-actuates and the proscribed vote cast is automatically and immediately disregarded. But, the position could be that in its internal aspect the “healthy” operating of the political party remains jeopardized by the continued presence of the member in default. This apparently anomalous result can however be readily explained. The importance of the division of powers within the political party, and in the context of Article 63A between the

parliamentary party and the Party Head, for its "healthy" operation has already been identified and commented upon. The situation now under consideration is created by a choice having to be made between these two considerations: the importance of there being a division of powers on the one hand, and the continued presence within the parliamentary party of a member in default on the other. Article 63A clearly prioritizes the former over, and even at the expense of, the latter. That such choices have to be made from time to time is unexceptionable.

Interlude: *Wukala Mahaz* revisited

100. It will not be out of place to pause here and take a fresh look at one of the leading cases in relation to Article 63A, *Wukala Mahaz Barai Tahafaz Dastoor and another v Federation of Pakistan and others* PLD 1998 SC 1263 ("*Wukala Mahaz*"). In this judgment the Court considered Article 63A as it stood when first inserted by the 14th Amendment (1997). It is to be noted that this Amendment took effect on 03.07.1997. Two petitions were filed within a few months, on or about 25.10.1997, both under Article 184(3) of the Constitution. One was by the named petitioner, an association of lawyers, and the other by the veteran politician, (late) Nawabzada Nasrullah Khan. The matters were heard by a learned seven member Bench. The following points may be noted. Firstly, the matters were decided only by a bare majority of four, as is clear from the Order of the Court (pg. 1444):

> "By majority of 6 to 1 it is held that Article 63A of the Constitution is intra vires but by 4 to 2 subject to the following clarifications:
>
> (i) That paragraph (a) to be read in conjunction with paragraphs (b) and (c) to Explanation to clause (1) of Article 63A of the Constitution. It must, therefore, follow as a corollary that a member of a House can be disqualified for a breach of party discipline in terms of above paragraph (a) when the alleged breach relates to the matters covered by aforesaid paragraphs (b) and (c) to the above Explanation to clause (1) of the aforementioned Article and that the breach complained of occurred within the House.
>
> (ii) That the above paragraph (a) to Explanation to clause (1) of Article 63A is to be construed in such a way that it should preserve the right of freedom of speech of a

> member in the House subject to reasonable restrictions as are envisaged in Article 66 read with Article 19 of the Constitution.
>
> Whereas by minority view paragraph (a) in the Explanation to clause (1) of Article 63A and clause (6) in the said Article of the Constitution are violative of the fundamental rights and are to be treated as void and unenforceable."

Mamoon Kazi, J would have allowed the petitions by declaring certain clauses of Article 63A to be ultra vires the Constitution (at pg. 1444). The remaining six members held the Article to be wholly intra vires. However, by a majority of 4:2 it was declared that para (a) of the Explanation to clause (1) had to be read down, in the manner set out above. Now, the Order of the Court was as per the judgment of the learned Chief Justice (Ajmal Mian, CJ) (see at pp. 1318-9). Sh. Riaz Ahmed and Ch. Muhammad Arif, JJ simply agreed with the learned Chief Justice. Who then provided the fourth vote to make the latter's judgment the decision of the Court? Saeed uz Zaman Siddiqui and Irshad Hasan Khan, JJ disagreed with the learned Chief Justice as to the reading down of the relevant provision: see, respectively, their judgments at pp. 1363-5 and pp. 1393-4. Thus, the fourth vote was provided by Raja Afrasiab Khan, J, who also gave a concurring judgment.

101. Secondly, in neither petition was there any allegation at all that the Article had been applied (or attempted to be applied) to any parliamentarian, i.e., there was no allegation of defection. Rather, the challenge was to the *vires* of the constitutional amendment on the touchstone of being in violation of fundamental rights. There was, in other words, no factual *lis* as such before the Court. Nonetheless, the learned Chief Justice proceeded to consider the Article in its various aspects and made the declarations that became the decision of the Court "in order to avoid future unnecessary litigation and to provide guideline" (pg. 1318). It had also been observed earlier as follows (pg. 1301):

> "Since we have already entertained the above Constitution Petitions and have heard the learned counsel for the parties, I am inclined to hold that it would foster democratic norms if

> we were to render authoritative pronouncement as to the scope and import of above Article 63A."

Wukala Mahaz therefore came as close as a petition under Article 184(3) can to a consideration of a constitutional provision essentially in the abstract, without any underlying factual basis as such. Given that this is so, no objection at all can be taken to a consideration of, or the manner in which, the questions that have now been referred to the Court, i.e., in terms of the Reference. This is all the more so when in these proceedings there are at least allegations (which we do not finally decide, but which can certainly be regarded as credible information) of attempts at defection (whether proffered or invited, sought or engineered) in relation to the voting on the no confidence motion in the National Assembly. With these preliminary points in mind, we turn to consider what was held in the judgment of the Court.

102. It was observed, in words that also continue to resonate like the passage from *KTR* cited above, that "on account of the cancerous vice of floor crossing, Pakistan was unable to achieve stability in the polity of the country" (pg. 1295). The point was made again later in the judgment (pg. 1314):

> "The impugned Article will bring stability in the polity of the country as it will be instrumental in eradicating cancerous vice of the floor-crossing. It is also in consonance with the tenets of Islam and Sunnah as the same enjoined its believers to honour their commitments if the same are not in conflict with the teachings of Islam and Sunnah."

103. It was ultimately concluded as follows, firstly at pg. 1314 (emphasis supplied):

> "A member cannot be disqualified under Article 63A on the ground of his alleged misconduct committed outside the precinct of the Parliament, and for that an action is to be taken according to the party constitution and not under *Article 63A which regulates the conduct and behaviour of the members within the House of Parliament*."

> And then at pg. 1318 (emphasis supplied):

> "17. Syed Iftikhar Hussain Gilani, learned counsel for the petitioner in Constitution Petition No.25 of 1997, has

> submitted that the above paragraph (a) to Explanation to clause (1) of Article 63A is capable of being misused or exploited. *It will suffice to observe that if an individual case is brought before us the same will be examined, but at this juncture we cannot assume that the above clause would be exploited or would be misused by the leader of a political party*. There seems to be no conflict between paragraph (a) to Explanation to clause (1) of the above Article 63A with Articles 19 and 66 of the Constitution, as the above paragraph does not expressly provide that a member cannot express his views in exercise of his right under above Article 66 on any matter which is brought before the House. *The above paragraph (a) to above Explanation is to be construed in conjunction with Articles 66 and 19 and efforts should be made to preserve the right of freedom of speech on the floor of the House subject to reasonable restrictions, without which a Parliamentary form of Government cannot be run effectively. It may be pointed out that freedom of speech in a Parliamentary form of Government, subject to reasonable restrictions, is sine qua non; hence the above paragraph (a) cannot be construed in a manner which would defeat the basic feature of the Parliamentary form of Government*."

It is to be noted that the portion first highlighted again brings out that the consideration of Article 63A was essentially an abstract analysis of a constitutional provision, without there being a factual *lis*.

104. When *Wukala Mahaz* is read afresh in light of what has been said earlier in this judgment, i.e., from the perspective of Article 63A being intertwined with Article 17(2) and keeping in mind the requirement of the "healthy" operating of political parties in both the internal and external aspects, it is clear that the reading down of para (a) of the Explanation to clause (1) related primarily to the internal aspect, but with a leavening of the external aspect. The apprehension was that the internal dynamics of a political party may result in the provision read down being abused and exploited against a parliamentarian, thereby reducing his position to little more than political thraldom. This fear (though not before the Court in any concrete form) was neutralized by reading down the provision to that what was said in proceedings in a House/Assembly; anything beyond that was left to be dealt with by recourse to procedures and options other than Article 63A. Furthermore, and this related more (but not exclusively) to the external aspect, it was held that freedom of speech on the floor of the House being essential for the proper

functioning of parliamentary democracy, it was to be allowed and accepted but subject to reasonable restrictions in terms of Article 19. This brings us to the second point regarding *Wukala Mahaz*. Article 63A was read in the light of other provisions of the Constitution being not only, as just noted, Article 19 but also Article 63 (as to which see pg. 1314). The same view was taken in a subsequent case also decided by a seven member Bench: *Sardar Bahadur Khan Bangulzai and others v Sardar Attaullah Mengal and another* 1999 SCMR 1921 (see para 18 at pg. 1936). This also demonstrates that the view that Article 63A is to be treated and applied on a standalone basis and as a code complete unto itself is not, with respect, correct.

The conscientious objector

105. A point strongly pressed on the Court was the position of the conscientious objector. It was contended that his right to dissent from and disagree with the party position, and to publicly record and register such dissent and disagreement by casting a proscribed vote, could not be affected in any manner, as it would if, e.g., his vote were to be disregarded. Although it was not put in quite so many words, the sense was that the conscientious objector had the right to be a martyr to his own cause and if he chose, willingly and deliberately, to (as it were) hoist himself with his own petard and be branded a defector and de-seated, so be it. This right trumped all other considerations. With respect, we are unable to agree.

106. The first point to note is simply this. Although the hearings stretched over several dates, no example—not one—was ever given of an actual, real life conscientious objector who took the path of defection and de-seating under Article 63A. The Article has been part of the Constitution now for a quarter of a century, to which must be added the decade prior thereto (from 1985, when s. 8-B was inserted in the 1962 Act, to 1997). Not a single conscientious objector. And at the same time it was never denied either by the learned counsel who appeared before the Court or any member of the Bench that throughout this period and up to now the danger, the vice, the cancer of defection was, and is, very much alive and

afflicting the body politic. The example that came closest was that of one of the learned counsel who is also a Senator. He had, several years ago, to cast a vote for a constitutional amendment as required by his party but to which he strongly, indeed passionately, objected. On a query from the Court, the Senator (with a candour that must be appreciated) stated that in the end he did not have the courage of his convictions and cast his vote as the party required. Not one example.

107. Keeping in mind our constitutional and political history it can therefore be said with some confidence, and all due respect, that the "issue" of the conscientious objector is essentially an artificial construct. The conscientious objector is only a theoretical possibility, at most. The Constitution on the other hand is not empty theorizing; it is a document that is alive and real and must deal with and provide solutions for actual problems and issues such as dealing with the evil and cancer of defection. Can the "right" of a theoretical construct (even if such a "right" is postulated) be given precedence over the very real and alive fundamental rights of political parties, for their "healthy" operating in both its internal and external aspects? In *Wukala Mahaz* it was held that "if there is a conflict between the two provisions of the Constitution which is not reconcilable, the provision which contains lesser right must yield in favour of a provision which provides higher rights" (pg. 1315). We do not accept that there is any such "right" of a conscientious objector. But if for the sake of argument it may be hypothesized, even then, surely, the rights of the political parties, which underpin the functioning of parliamentary democracy itself, must take priority over the rather abstract (if not wholly speculative) "right" of the conscientious objector.

108. The position, and this is the second point, sought to be taken before us is all the more inexplicable when it is kept in mind (as learned counsel were reminded throughout the hearing) that the conscientious objector can in any case resign at any time to register his dissent and disagreement. It was never explained, at least to our satisfaction, why it had to be the case that he had to be allowed to act in a manner disruptive of, and dangerous for, the

functioning of the constitutional system. And we may here again recall the words of Shafi ur Rahman, J in *KTR*: "If his conscience dictates to him so, or he considers it expedient, the only course open to him is to resign to shed off his representative character which he no longer represents and to fight a re-election. This will make him honourable politics clean, and emergence of principled leadership possible".

109. "It is better", Blackstone famously said in his *Commentaries on the Laws of England*, "that ten guilty persons escape than that one innocent suffer" (Book IV, Chap. 27). This formulation has long since become received wisdom. What if we were to try and adapt what Blackstone said for the present context? The resulting "formulation" would perhaps look something like this:

> It is better that ten defectors are able to get away with it than that one conscientious objector (who can in any case honourably resign at any time) be "denied" the "opportunity" of acting in violation of Article 63A and, having himself been branded a defector, is thereupon de-seated.

Make sense? We think not. Solicitude for an endangered species is all very well. But the (metaphorical) wringing of hands and shedding of tears over a species long since extinct, and one that may in fact never have existed, is perhaps carrying things too far. A living Constitution gives, and must give, practical, "actionable" solutions to real-life problems. To obsess over the virtually (and perhaps actually) non-existent, while taking (and we say this without intending any disrespect) a rather ostrich like approach to reality is not conducive to a proper appreciation and understanding of the Constitution.

Counting versus casting of votes

110. Another point taken before the Court was with reference to Articles 55 and 95 of the Constitution. The first Article provides, in its clause (1), that subject to the Constitution, all decisions in a House/Assembly are to be taken by "majority of the members present and voting". Article 95, which deals with a motion of no confidence against the Prime Minister, contains an exception in its clause (4), which requires the votes of the total membership of the

National Assembly for the motion to carry. (The position in the Provinces is similar.) On the basis of how votes are required to be counted in terms of these provisions, i.e., of each parliamentarian individually, it was sought to be argued that in all cases parliamentarians could cast their votes in such manner as they deemed fit, free from any and all constraints and restrictions. It was also sought to be argued that if a proscribed vote cast contrary to a direction of the parliamentary party were to be disregarded that would lead to an elective dictatorship inasmuch as the Prime Minister or Chief Minister (as the case may be) could never be removed from office. With respect, we are unable to agree.

111. The whole argument, with respect, is based on a false premise: that the casting of a vote and the counting of it are one and the same thing. This is not so at all. That a vote is to be counted individually does not mean that it can (or must) therefore necessarily be cast in such manner. If that were so, it would be wholly destructive of our system of parliamentary democracy, based as is it on political parties. The various extracts taken from *Benazir Bhutto* and *Nawaz Sharif* and reproduced above are sufficient to demonstrate this, and demolish the submission now under consideration. The constitutional players in our system are the political parties. It is they, and not the individual members thereof who may be the candidates put up for election, who in terms of the fundamental right enshrined in Article 17(2) seek to pursue, acquire, retain and exercise political power. (Of course, individuals—the so-called “independents”—can and certainly do contest elections, but constitutionally speaking they are very much regarded as the fringe in the ordinary course of things. It is only in partyless legislatures, or those as are reduced to such, that “independents” thrive and come to the fore. That is the antithesis of our system of democracy.) Parliamentarians—the returned candidates—form the parliamentary parties which are the reflection in the legislative arena of the political parties. The majority party (or combination or alliance) forms the Government of the day. All of this, and the ensuing business in the legislative and executive arenas throughout the relevant election cycle, can only happen if the parliamentarians vote along party lines. All of

these points have already been elaborated and need not be rehearsed here. But, and this is the crucial point for present purposes, for all of this to happen smoothly and as constitutionally required, the casting of votes is, and has to be, on party lines and not otherwise. In this sense, the individuality of the member is to be subsumed in the party position. To hold otherwise is to sound the death-knell of our system of parliamentary democracy. No Government—formed, as it must be, on a party basis—would ever be able to carry out its legislative or executive agenda if, for each vote to be cast in a House/Assembly, it has to forever run after its parliamentarians. Nor, for that matter, would any Opposition be worth the name in such a situation. Howsoever votes are to be counted, their casting is a different thing altogether. One cannot be misled or beguiled by the former into an incorrect understanding of the Constitution regarding the latter.

112. Here, one further point may be made. Article 63A is concerned with the casting of a proscribed vote in certain specified situations. But that certainly does not mean that in relation to matters ("decisions" in the language of Article 55) other than those stipulated, a parliamentarian is free to cast his vote as he deems fit. It is simply that the consequences of casting a proscribed vote in relation to other matters may be different from those that would follow in terms of Article 63A. But in all cases the fundamental constitutional requirement of the "healthy" operating of political parties in both the internal and external aspects would have to be kept in mind, and applied as appropriate. It is true that the constitutional system can accommodate the occasional maverick or eccentric who is returned to elective office on a party ticket. But to turn the exceptional into the normal is to turn the system on its head. No system can survive such treatment for long. It is also true that occasionally a party (and, more particularly, the one forming the Government of the day) may itself allow its parliamentarians to cast their votes in such manner as they deem fit. It is telling that such so-called "free" votes are, in some jurisdictions where there is parliamentary democracy, also called "conscience" votes. But it is also worth emphasizing that we are here concerned only with the matter of how votes are to be cast.

The right of free speech of parliamentarians, expressly recognized and protected in *Wukala Mahaz*, is very much there, as is the right of (rigorous and vigorous) discussion and debate, and even dissent and disagreement, within the party itself (whether the political party at large, or the parliamentary party). However, when it comes to the casting of the votes then matters take a different turn.

113. We turn to the second limb of the submission—the danger of elective dictatorship. Whatever may be the position in practice, in constitutional terms at least it cannot survive scrutiny. The reason has already been set out above: the power to give a direction in terms of Article 63A vests in the parliamentary party and not the Party Head. If the latter, as Prime Minister (or Chief Minister in equivalent circumstances) loses the confidence of his party—more precisely the majority of the members of the parliamentary party—but refuses to make way for another leader to emerge, he may well face a vote of no confidence, or even be called upon by the President to take a vote of confidence under Article 91(7) (or, as the case may be, the Governor under Article 130(7)). If such a vote is called the parliamentary party which, as already noted, acts by majority decision may then refuse to issue the direction under para (b) of clause (1) of Article 63A. The parliamentarians would be free to cast their votes without the Article being triggered and the vote of confidence may well fail to carry, or the vote of no confidence may well succeed (as the case may be). Either way, the so-called “elective dictator” would cease to hold office. Of course, as long as the Prime Minister has the confidence of the majority of his colleagues in the parliamentary party his position, constitutionally speaking, would be secure and that may well remain the position throughout the relevant election cycle. And that, perhaps, is as it should be in any system that lays claims to being democratic. It would also not be out of place to state here that in any case at the end of the election cycle the “elective dictatorship” (if there be such) would inevitably and inexorably also come to an end.

Maintainability and suchlike matters

114. Certain objections as to the maintainability of the Reference and the questions referred, such as a descent into the political thicket and the questions being vague, academic, abstract etc. were taken. These objections stand answered with reference to, and in terms of, *Wukala Mahaz*, as noted above. The objections therefore fail and are hereby rejected.

The questions answered

115. The first two questions referred to the Court stand answered in terms as stated herein above read with paras 1-3 of the Short Order.

116. The fourth question has been returned unanswered for the reasons set out in para 5 of the Short Order. No further elaboration is required.

117. As regards the third question, it is dealt with in para 4 of the Short Order. It is true that it is at least arguable that a defector may come within the scope of Article 62(1)(f). The question is that if this be the case what should be the punishment, i.e., the period of disqualification. As noted above, if a member who casts a proscribed vote is de-seated he can seek re-election in the bye-election. If he chooses to contest the same, he may do so as an “independent” or even on the ticket of those who sought, engineered, welcomed, brought about and/or rewarded the defection. If he loses then the ensuing humiliation is also a punishment of sorts, both for the defector and his puppeteers. However, the cyclical nature of the electoral process must also be taken into consideration. To impose a lifetime ban is to remove the defector for all cycles to come. Since Article 63(1)(p) confers the necessary competence on Parliament, on reflection it is our view that the matter is best left to the legislature, while keeping in mind what has been said in para 4. The question stands answered accordingly.

118. The Reference and the Petitions stand answered and disposed of in the above terms.

CHIEF JUSTICE

JUDGE

JUDGE

Islamabad, the
17th May, 2022
Approved for reporting