

JUDGMENT SHEET
LAHORE HIGH COURT, LAHORE
(JUDICIAL DEPARTMENT)

Writ Petition No.34648 of 2022

Zainab Umair.

Vs.

Election Commission of Pakistan & others

Petitioner by:- M/s M. Azhar Siddique, Ahmad Imran Ghazi, Fareeha Arif, Barrister Nudrat B. Majeed and Dr. Ali Qazalbash, Advocates.

Federation of Pakistan by: Mr. Nasar Ahmad, Additional Attorney General for Pakistan.
Mr. Khawar Bashir, Assistant Attorney General for Pakistan.

Province of Punjab by: Mr. Muhammad Shahzad Shaukat, Advocate General.
Mr. Muhammad Arif Raja, Additional Advocate General, Punjab.

ECP by: M/s Barrister Haris Azmat, Barrister Mariam Riaz and Sarim Shahid, Advocates.
Mr. Imran Arif Rnjha, Advocate/Legal Advisor of ECP with Umar Hayat, Director (Legal) and Hafiz Adeel Ashraf, Legal Assistant, ECP.

PML(N) by: Mr. Khalid Ishaq, Advocate.

Writ Petition No.34645 of 2022

Samuel Yaqoob & another

Vs.

Election Commission of Pakistan & others

Petitioners by:- M/s Syed Ali Zafar, Amir Saeed Rawn and Zahid Nawaz Cheema and Fareeha Arif, Advocates.

Petitioner No.2 by: M/s Malik Zeeshan Ahmad and Rao Zafar Iqbal, Advocates.

Federation of Pakistan by: Mr. Nasar Ahmad, Additional Attorney General for Pakistan.

Province of Punjab by: Mr. Khawar Bashir, Assistant Attorney General for Pakistan.
Mr. Muhammad Shahzad Shaukat, Advocate General.
Mr. Muhammad Arif Raja, Additional Advocate General, Punjab.

ECP by: M/s Barrister Haris Azmat, Barrister Mariam Riaz and Sarim Shahid, Advocates.
Mr. Imran Arif Rnjha, Advocate/Legal Advisor of ECP with Umar Hayat, Director (Legal) and Hafiz Adeel Ashraf, Legal Assistant, ECP.

PML(N) by: Mr. Khalid Ishaq, Advocate.

Date of hearing: - 27.06.2022

JUDGMENT

SHAHID WAHEED, J:- These two constitutional petitions are amenable to common disposal as they aim to target the consolidated order dated 2nd of June, 2022 which was issued by the Election Commission of Pakistan (“ECP”) on three different applications in which the matter directly and substantially in issue excited the construction of the provisions of the Constitution of the Islamic Republic of Pakistan, 1973 (“the Constitution”) about the procedure of filling the seats reserved for women and non-Muslims in the Provincial Assembly, Punjab.

2. It will conduce to analytical clarity of the moot if I briefly relate the occurrences giving rise to these two petitions. So I do it. In 2018, a general election to the Provincial Assembly, Punjab was held in which the Pakistan Tehreek-e-Insaf (PTI) secured 142 general seats and the Pakistan Muslim League (N) [PML(N)] secured 130 general seats. It is apposite to state here that the said result included those independent candidates who had joined political parties within three days in terms of Article 106(3)(c) of the Constitution. Based on these results, the ECP worked out quota of reserved seats for women and non-Muslims of the

political parties. The PTI bagged 33 seats reserved for women and 4 seats for non-Muslims, while the PML(N) seized 30 seats reserved for women and 4 seats for non-Muslims. These reserved seats were accordingly filled from the list of candidates provided by the PTI and the PML (N). Since the PTI had won a majority of the total membership of the Punjab Provincial Assembly, it formed the government. The PTI government served until 28th March, 2022, when its Chief Minister resigned. The Governor of Punjab accepting the resignation summoned the Punjab Provincial Assembly to elect a new Chief Minister. In this election, 25 members of the PTI voted against the direction of their party, and thus, they were declared to have defected, as a result of which they ceased to be members of the Provincial Assembly and their seats became vacant. Accordingly, the ECP on 23rd May, 2022 de-notified these defected members under Article 63A(4) of the Constitution through three different notifications. It is important to note that out of the 25 who defected, 5 were elected to reserved seats. The PTI then applied to the ECP for the issuance of notification of members against reserved seats from its priority list. The PTI Parliamentary Leader, Punjab also filed a separate application for the issuance of notification of PTI's nominees for the seats reserved for women and non-Muslims. On the contrary, the PML(N) also filed an application asking the ECP to recalculate the quota of reserved seats. All these applications sparked controversy as to whether the vacant reserved seats would be filled from the party list or on the basis of the changed strength of political parties in the Assembly.

3. To untangle the controversy, the ECP first consolidated the three above-stated applications and then framed the following questions to make it more easier, and to find out a comprehensive answer: -

- i. Whether the reserved seats for women and non-Muslims in an Assembly won by each political party on the basis of general seats in a general election are subject to change on account of subsequent increase or decrease of general seats of a political party in an Assembly due to death, resignation or disqualification of members of a political party?
- ii. Whether the electoral college in the Provincial Assembly, Punjab is complete for the purpose of filling of vacant reserved seats after the denotification of twenty members of the Assembly?
- iii. Whether the proportional representation mentioned in Article 106(3)(c) will not be defeated if the vacant reserved seats are filled despite change in the strength of general seats of the political parties in the Assembly?

4. The questions formulated by the ECP made the true construction of Article 106 and Article 224(6) of the Constitution critically important as their fate depended on it. I think so too. So let's take a look at them. The provisions of Article 106 of the Constitution are like this:

106. (1) Each Provincial Assembly shall consist of general seats and seats reserved for women and non-Muslims as specified herein below: -

	General Seats	Women	Non- Muslims	Total
Balochistan	51	11	3	65
Khyber Pakhtunkhwa	115	26	4	145
The Punjab	297	66	8	371
Sindh	130	29	9	168

(1A);
(1B);
(2) -

(a);
(b)

- (c)
- (d)

(3) *For the purpose of election to a Provincial Assembly,-*

- (a)
- (b) *each Province shall be a single constituency for all seats reserved for women and non-Muslims allocated to the respective Provinces under clause (1);*
- (c) *the members to fill seats reserved for women and non-Muslims allocated to a Province under clause (1) shall be elected in accordance with law through proportional representation system of political parties' lists of candidates on the basis of the total number of general seats secured by each political party in the Provincial Assembly;*

Provided that for the purpose of this sub-clause, the total number of general seats won by a political party shall include the independent returned candidate or candidates who may duly join such political party within three days of the publication in the official Gazette of the names of the returned candidates.

The second Article is in the following terms:

224.

- (1A)
- (1B)
- (2)
- (3)
- (4)
- (5)

(6) *When a seat reserved for women or non-Muslims in the National Assembly or a Provincial Assembly falls vacant, on account of death, resignation or disqualification of a member, it shall be filled by the next person in order to precedence from the party list of the candidates to be submitted to the Election Commission by the political party whose member has vacated such seat.*

Provided that if at any time the party list is exhausted, the concerned political party may submit a name for any vacancy which may occur thereafter.

5. Mindful of the above provisions of the Constitution the lawyers for both sides ventured their respective arguments before the ECP. Incidentally, save the one argument about which I will refer to in the latter part of this judgment, the lawyers have presented the same set of arguments to me. The standpoint of the PTI was that the quota of reserved seats is calculated once after every general election, and is not subject to change subsequently notwithstanding an increase or decrease in the strength of general seats of a political party, whereas the stance of the PML(N), in contrast to the PTI, was that the Constitution does not bar recalculation of quota at a subsequent stage due to the increase or decrease of general seats of a parliamentary party in the Assembly. The ECP, however, espoused the argument of the PML(N) and concluded that, firstly, Article 224(6) of the Constitution does not provide any methodology for filling of vacancies of reserved seats on account of mass scale de-seating of the members of the general seats in the Provincial Assembly, and it is not automatic and is dependent upon strength of general seats in the Provincial Assembly, secondly, in the present scenario the electoral college of the Punjab Assembly is not complete due to disqualification and subsequent de-seating of twenty members of general seats of the PTI, and thirdly, the proportional representation of political parties, election and filling of reserved seats have close nexus with each other, and thus, if the number of general seats goes down then it directly affects the proportional representation of the political party mentioned in Article 106(3)(c) of the Constitution. Based on the above conclusion, the ECP through its consolidated order dated 2nd June, 2022 deferred the filling of the vacant reserved seats till the outcome of bye-election on twenty general seats in the Punjab Provincial Assembly, and accordingly disposed of the said three applications.

6. After hearing the lawyers of the parties as well as the Additional Attorney General for Pakistan and the Advocate General, Punjab and reviewing the provisions of the Constitution, I do not agree with the opinion expressed by the ECP in its order dated 2nd June, 2022. The first question to be determined in this case is whether the reserved seats for women and non-Muslims in the Assembly won by each political party on the basis of general seats in a general election are subject to change on account of subsequent increase or decrease in general seats of a political party in the Assembly due to death, resignation or disqualification of members of a political party. It can be easily gleaned from the order dated 2nd June, 2022 that the ECP agreeing with the argument of the PML(N) returned its answer to this question in the affirmative on the ground that the Constitution does not prohibit recalculation of quota at a subsequent stage due to an increase or decrease of a political party in the Assembly. This answer, in my view, is not consistent with the letter and spirit of the Constitution; particularly with its substantive provisions of Articles 106(3)(c) and 224(6). It is putative principle that public bodies and private persons are both subject to the Rule of Law. For private persons, the rule is that everything that is not forbidden is allowed¹. But for public bodies like the ECP, the rule is opposite. It is that everything that is not allowed by the substantive provisions of the law and the Constitution is forbidden². In the light of this position of law, when we make a conjoint reading of Article 106(3)(c) and Article 224(6), it emerges that they suggest three things, that is to say, firstly, calculation of quota for the seats reserved for women and non-Muslims shall be made on the basis of the total number of general seats secured by each political party in the general election to the Provincial Assembly, secondly, the members to fill seats

¹ R v. Somerset County Council ex p Fewings (1995) 1 All ER 513

² The Constitutional Balance by John Laws, Edition 2021, Page 80

reserved for women and non-Muslims shall be elected through proportional representation system of political parties' lists of candidates, and thirdly, when a seat reserved for women or non-Muslims in a Provincial Assembly falls vacant, on account of death, resignation or disqualification of a member, it shall be filled by the next person in order of precedence from the party list of the candidates, submitted to the ECP in terms of Article 106(3)(c) upon the compilation of the results of general seats secured by each political party in the general election, whose member has vacated such seat. So, the mention of these three things in clear terms in the Constitution necessarily implies that due to subsequent variation in the strength of the political party on the general seats, the recount or recalculation of quota at any later stage is excluded¹.

7. There is another good reason on which the opinion of the ECP must be repelled. The ECP is of the opinion, and so are the arguments of its lawyer, supported by the Additional Attorney General for Pakistan and Advocate General, Punjab, that if mass scale de-seating reduces the strength of a political party in general seats, it necessarily requires a recount of its quota of reserved seats. That begs the question. Suppose that two years after the commencement of the term of the Provincial Assembly or in its last year only the members elected to the general seats of a political party are largely de-seated. Does that mean that the quota of reserved seats of this party will be re-fixed and if it is reduced then the members elected to the reserved seats will have to be automatically de-seated? The answer is definitely "No", because the principle of retrenchment does not apply to members of the

¹ - Expressio unius, exclusio alterius
- Khawaja Ghulam Sarwar v. Pakistan through the General Manager, PWR Lahore (PLD 1962 SC 142)
- R(Veolia ES Nottinghamshire Ltd) v. Nottinghamshire County Council (2010) EWCA Cir 1214
- Construction of Statutes by Earl T. Crawford, section 195

Assembly, nor does the Constitution support the idea that any member should be de-seated before the end of the tenure of the Provincial Assembly when he or she does not exhibit any of the conduct that falls under Article 63 or 63A of the Constitution, and, in the result, it underpins the stance of the PTI that the quota of reserved seats is calculated once after every general election, and any subsequent variation in the strength of general seats of a political party cannot be allowed to be made a basis to change it, otherwise, it will create a constitutional imbalance.

8. We may examine the first question from another angle. Let us put this question on the test of the rule of harmony and find out its answer. It is now well recognized that the Constitution is to be construed in a manner which may give effect to each and every word of the same, and which may harmonize the working of the same, and which may achieve the object underlined in the relevant provisions¹. This is the rule of harmony, rule of completeness and exhaustiveness and the rule of paramountcy of the written Constitution². In the case at hands, the pivotal provisions for the question under consideration are provided in clause (6) of Article 224 of the Constitution which proclaims that when a seat reserved for women or non-Muslims in the Provincial Assembly falls vacant, it shall be filled by the next person in order of precedence from the party list of the candidates submitted to the ECP by the political party whose member has vacated such seat. On the contrary, a perusal of the impugned order dated 2nd June, 2022 gives the impression that the ECP while returning its findings did not notice the implication of the expression “*whose member has*

¹ D. Ginsberg & Sons v. Popkin 285 US 204
Canada Sugar Refining Co. Ltd. v. R (1898) AC 735
Al-Jehad Trust through Raeesul Mujahideen Habib-ul-Wahabb-ul-Khairi and others v. Federation of Pakistan and others (PLD 1996 SC 324)
Syed Masroor Ahsan and others v. Ardeshir Cowasjee and others (PLD 1998 SC 823)

² Mian Muhammad Nawaz Sharif v. President of Pakistan and others (PLD 1993 SC 473)

vacated such seat” mentioned in Article 224(6) of the Constitution and through its interpretation made it redundant. This was highly improper and against the rule of harmony. In my view, the said expression is a sinew of Article 106(3)(c) and Article 224(6) of the Constitution, and, for the situation with which we are confronted here, its use provides us a solid foundation to suggest a complete pragmatic answer to the question under consideration, that is, once the quota of reserved seats is determined after every general election, it becomes indissoluble for the whole tenure of the Assembly, secondly, any subsequent change in the total number of general seats won by a political party will be inconsequential to fill the vacant reserved seats, and thirdly, it will be a ministerial function of the ECP, of course, subject to compliance with certain formalities of law by the candidate, to fill the vacant reserved seats from the party list of the candidates submitted to it by the political party whose member has vacated such seat.

9. I will now turn my attention to the argument that the respondents did not present to the ECP but did put before me. They said that the reserved seats had become vacant due to the defection of PTI members and since defection is not disqualification as per Article 63 of the Constitution, the procedure prescribed in Article 224(6) cannot be resorted to filling the vacant reserved seats. Explaining this argument, their lawyers argued that the instant matter does not fall under the purview of Article 224(6) of the Constitution as it applies to vacancies arising on account of death, resignation or disqualification of a reserved seat member and not de-seating of a member, and secondly, that Article 63A(4) of the Constitution stipulates that upon confirmation of a declaration by the ECP, the defected member shall cease to be a member of the House, and his seat shall become vacant; this entails de-seating of the defected member as opposed to triggering the

distinctive disqualifications enshrined in Article 63 of the Constitution. This argument just does not hold water. Article 224(6) of the Constitution indeed talks about the seats that fall vacant on account of disqualification, but by any means, it does not mean that it envisages only that disqualification that has been enumerated in Article 63 of the Constitution. If I were to accept this argument, it will run counter to the well-settled principles of interpretation of constitutional provisions, bring irreconcilable anomalies, and also make certain provisions of the Constitution redundant, so it would be prudent to ignore it and to find out some other valid practical solution to it. It is a matter of fact that the word disqualification is not defined in the Constitution, and thus, it must be given simple, natural, general, and grammatical meaning consistent with the purpose of the Constitution and also to bring harmony in its all clauses¹. It is common knowledge that the word disqualification is a noun and it simply means the act of preventing somebody from doing something because he has broken a rule or is not suitable². The use of this plain meaning² makes it clear that a person stands disqualified to act as a member of the Assembly either on the basis of matters listed in Article 63 of the Constitution or on the ground of defection provided in Article 63A of the Constitution. So, it can be safely concluded that when a reserved seat becomes vacant on account of any kind of above-stated disqualifications, it shall be filled in accordance with the procedure laid down in Article 224(6) of the Constitution.

¹ Ripon (Highfield) Housing Conformation Order, 1938
White & Collins v. Minister of Health (1939) 2 KB 838
Bibi Gurdevi v. Chaudhri Muhammad Bakhsh and others (AIR 1943 Lah. 65)
Ghulam Murtaza v. Muhammad Ilyas and 3 others (PLD 1980 Lahore 495)
Understanding Statutes
(Cannons of Construction) by S.M.Zafar, Edition 2016, Page 88

² Oxford Advanced Learner's Dictionary of Current English, Seventh Edition, Page 441
Cambridge International Dictionary of English, Edition 1995, Page 397

10. In the position of law described above, there is little need for further deliberation, and to address the other two questions formulated by the ECP, suffice is to say that, in the given circumstances, there is no barrier to filling the vacant reserved seats from the list of candidates furnished by the PTI, and in doing so, the proportional representation system mentioned in Article 106(3)(c) will not be defeated.

11. The foregoing were the reasons that persuaded me to reverse the order dated 2nd June, 2022 of the ECP and to accept these two constitutional petitions through the following short order:-

“For the reasons to be recorded later, this constitutional petition and the connected petition i.e. W.P.No.34645 of 2022 are allowed, the order dated 2nd June, 2022 of the Election Commission of Pakistan, Islamabad is set aside and declared to have been passed without lawful authority and of no legal effect, and as a consequence, the application of Pakistan Tehreek-e-Insaf (PTI) for issuance of notification of members of the Provincial Assembly, Punjab against reserved seats from its priority list and application of Muhammad Sibtain Khan, MPA, Parliamentary Leader of Pakistan Tehreek-e-Insaf (PTI), Punjab, for issuance of notification of nominated members of Pakistan Tehreek-e-Insaf (PTI) for reserved seats for women and non-Muslims are allowed, while the application of Pakistan Muslim League (N) for recalculation of quota of reserved seats after disqualification of members of Pakistan Tehreek-e-Insaf (PTI) under Article 63-A of the Constitution of the Islamic Republic of Pakistan, 1973 is dismissed. The Election Commission of Pakistan is directed to issue notification of members of Provincial Assembly, Punjab against the vacant reserved seats from the priority list of Pakistan Tehreek-e-Insaf (PTI).

2. The Additional Registrar (Judicial) of this Court shall communicate this order to the Election Commission of Pakistan for compliance.

3. Office is directed to place the photostat copy of this order in connected W.P.No.34645 of 2022.”

(SHAHID WAHEED)
JUDGE

APPROVED FOR REPORTING

JUDGE