

JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

Writ petition no.4741/2022

Faiq Ali Jamali
Versus
Federation of Pakistan through Secretary, Ministry of
Law and Justice, GoP and another

Petitioner by: Mr. Salman Akram Raja, Advocate

Respondent no.1 by: Hafiz Ahmed Rashid, learned AAG

Respondent no.2 by: Mr. Muhammad Rafay Maqsood, Special
Prosecutor, NAB

Date of decision: **15.06.2023**

Sardar Ejaz Ishaq Khan, J:- The petitioner pleads that section 15(a) of the National Accountability Ordinance, 1999 (the **Ordinance**) is *ultra vires* Article 63(1)(h) of the Constitution.

2 Mr. Salman Akram Raja appearing for the petitioner submitted that Article 63(1)(h) of the Constitution gives the right to a person to contest elections to the Parliament who has been convicted of an offence involving moral turpitude where 5 years have elapsed since his release, whereas section 15(a) of the Ordinance stipulates a period of 10 years instead, entailing disqualification from contesting elections for a person convicted of an offence under the Ordinance from contesting elections for a period of 10 years from the date of his release, and that section 15(a) of the Ordinance to the extent of its prescription of a ‘purge period’ longer than that prescribed under Article 63(1)(h) of the Constitution is liable to be struck down as ultra vires the Constitution.

3 The test for vires is whether a sub-constitutional legislation can stand together with a Constitutional provision¹. Section 15(a) of the Ordinance prescribing a disqualification for 10 years from the date the convict is released after serving his sentence has to yield to Article 63(1)(h) of the Constitution prescribing a period of 5 years to have elapsed since his release for him to be deemed purged enabling him to stand for election.

¹ LDA vs Imrana Tiwana - 2015 SCMR 1739

4 Learned counsel for NAB asked this Court to take into account the colossal embezzlement for which the petitioner was convicted, but that is an irrelevant consideration for the purposes of deciding the vires of section 15(a). His reference to the recommendatory paragraph of the judgment in *Khan Asfandiyar Wali*², recommending³ the reduction of the erstwhile 21 years as the purge period to 10 years, too cannot enable this Court to hold that the 10 year period prescribed in section 15(a) of the Ordinance will prevail despite the 5 year term provided in Article 63(1)(h). NAB's learned counsel's attempt to draw a distinction between conviction under the Ordinance and 'conviction for an offence involving moral turpitude' for the purposes of Article 63(1)(h) is, with respect, rather naïve, for it indirectly asks this Court to take the view that a conviction for embezzlement of public funds does not entail moral turpitude. We do not need to open up dictionaries to understand what moral turpitude means, for it is an expression of common use employed by statutory draftsmen on innumerable occasions. If a pedantic obeisance to precedent for the meaning of common English phrases is nonetheless craved, one can refer to the footnoted citation⁴. Article 63(1)(h) is not expressed subject to any law that may be made; the 5 year term prescribed therein can neither be curtailed nor enlarged by a statute.

5 If the Parliament in its proverbial infinite wisdom (that is often quite unfathomable) has stipulated a purge period of 5 years in the Constitution enabling convicted embezzlers of public funds to return to the Parliament with the possibility of another go at the public purse, and to entrust to the convicts the keys to the public purse when they would not entrust their private purses to them even for a moment, then it is not for this Court to stand in the way, for this Court does not have the jurisdiction to do so. If the public chooses to elect him back again for another jackpot, then again it is not for this Court to stand in the way. The Court can convict him yet again if he embezzles again, just as it did the last time round, but it cannot question the yet unproven hypothesis of the purge in 5 years of convicted members of the Parliament regardless of the severity of their criminal conduct. The petitioner was convicted by the Accountability Court for embezzlement of the funds that

² Khan Asfandiyar Wali and others vs. The Federation of Pakistan and Others (PLD 2001 SC 607)

³ The recommendation was duly implemented by an amendment to section 15(a) vide Ordinance no.XXXV of 2001.

⁴ Divisional Superintendent versus Nadeem Raza (2023 SCMR 803)

belonged to the Workers Welfare Board. If the Parliament has not amended the Constitution in the last 50 years to preclude such criminals from returning to Parliament for good, then the Parliament of course has to carry any recriminations in this regard, and it is not for the Court to incur any recrimination by failing to uphold the rule of law whereby the period of purge stipulated in Article 63(1)(h) cannot be enlarged by a sub-constitutional legislation.

6 However, instead of declaring it *ultra vires*, section 15(a) of the Ordinance is to be read down⁵ to harmonize it with Article 63(1)(h) of the Constitution so that the two can stand together. Resultantly, this petition is **allowed**, and it is declared that the 10 years term for the disqualification to contest elections stipulation in section 15(a) of the Ordinance is to be read down to 5 years since the convict's release after serving his sentence.

(Sardar Ejaz Ishaq Khan)
Judge

Fazal Elahi

⁵ Haroon-ur-Rashid versus Lahore Development Authority (2016 SCMR 931)