

# **Chosen by the People: Articles 62, 63 and the Issue of Qualification and Disqualification of Public Representatives**

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## **Abstract**

In democracies people have the inalienable right to choose their representatives but this right is sometimes suppressed in the name of 'national interest' formed by a particular state ideology which in effect upholds the interests of a particular elite coalition. In such cases the exercise of election becomes rather a mundane process of electing from a monotonous lot of 'electables' without a hope for a substantive change towards a pluralistic and tolerant polity. In this context, this paper is an attempt to analyze the eligibility criteria for the members of Parliament in Pakistan as given in the Articles 62 and 63 of the Constitution of Pakistan (1973). It seeks to answer the following questions:

- How far the required qualifications for the legislators as given in Articles 62 and 63 of the Constitution of Pakistan resemble or differ from those established in other democratic systems of the world?
- How far Articles 62 and 63 are compatible with Article 25 which establishes the equality of all citizens of Pakistan?
- What are the implications of practice of these two articles for the electoral system in Pakistan?

The paper is organized in three major parts which discuss the theoretical aspects, the historical background along with the rationale given to include the above mentioned articles in the constitution and their implications for the electoral process and democracy at large. The conclusion will evaluate the rationale and practicability of the two articles in the light of the research findings. The article follows a theoretical and analytical approach which includes a brief literature survey, an overview of electoral systems in some democracies around the world, reports of Election Commission Pakistan and other agencies, print and electronic media reports, and interviews with concerned people.

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The beauty of representative democracy lies in the collective intelligence of the people who are the principal custodians of political power, choosing their representatives to govern the state according to their wishes. Nevertheless, the government, even if it is formed by the people's representatives, in its very essence has been regarded as a

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formation against the natural equality of human beings. When the people delegate their right to represent themselves to someone else they actually sacrifice a part of their sovereignty and their natural equality to their representatives. Thus who has the right or who is qualified to represent the common people has always been a vital question for the political thinkers. Since the beginning of representative democracy in the West, there have been a variety of qualification criteria for the public representatives. Some of these criteria, as presently adopted by many western and eastern countries, are purely objective including the age, citizenship and residence of the candidate. On the other hand some countries have preferred more subjective, rather moralistic criteria for a person to be a public representative.

The purpose of this paper is to analyze the criteria given in the Constitution of Pakistan for the qualification and disqualification of the public representatives, as given in the Articles 62 and 63 in the light of democratic practices around the world and the implications of these criteria for electoral system in Pakistan. The paper is organized in three main sections. The first section is a conceptual study to ascertain several theoretical aspects of the issue; second, highlights the historical background and the rationale for the inclusion of the Article 62 and 63 in the Constitution of Pakistan, and the third studies the implications of these articles for the political culture of Pakistan.

## I

### **Conceptualizing public representation and its qualifications**

This section will focus on the meaning and significance of the office and job of the elected representatives and, hence, the required qualifications for such an office. For this purpose a brief overview of the historical development of the concept as well as the present global practice is imperative.

Representation, as Hanna Pitkin puts it, is simply ‘to make present again’. Hence a public representative is the person who makes ‘citizens’ voices, opinions and perspectives ‘present’ in the public-policy making processes’.<sup>1</sup> For all practical purposes political representation is supposed to have four essential components: the representative (an individual, a political party, an organization, a movement, etc); the represented group (the constituency, the clients etc.); something that is being represented (opinions, aspiration, perspectives, interests, etc.), and

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<sup>1</sup> Hanna F. Pitkin, *The Concept of Representation* (Berkeley: University of California, 1967), p.8.

a setting within which the activity of representation takes place (a parliament, a provincial assembly, a district council etc.).<sup>2</sup>

Legislatures have been understood as the only elected institutions of the state which make laws for the attainment of the ideal of 'good life' for the citizens and hence been granted a vital niche in democratic set ups since the time of ancient Greco-Roman polities. Consequently there has been a consensus among the political thinkers to assess the legislators with some special qualifications above the mere vote bank. Socrates sees no worth in the rule of 'many' (i.e. democracy) who according to him lack the genius and the ability to govern. 'How can a society be saved or be strong, except it be led by its wisest men?' he asks.<sup>3</sup> Plato in his *Republic* which he owes much to Socratic thought, further develops the concept of a philosopher king questioning the basic principle of democracy viz. 'the equal right of all to hold office and determine public policy'. To Plato this system though seemed 'delightful' was in fact 'disastrous' as 'the people are not properly equipped by education to select the best rulers and the wisest courses'.<sup>4</sup> Hence he rejects the 'folly' of bestowing the mob with the power to select the political officials. Aristotle sees the city-state as a kind of community (*kiononia*), a collection of parts such as households, economic classes or the local political units (*demes*), and ultimately the individual citizens. The community can possess order only if it has a governing authority whose composition and role are defined by the constitution 'which sets criteria for political offices, particularly the sovereign office'.<sup>5</sup> To Aristotle this constitution is made by the 'lawgivers' or politicians (*nomothetes*) such as Solon of Athens or Lycurgus of Sparta whom he compares with 'craftsmen' (*demiourgos*) like weavers or shipbuilders who fashion material into finished products. Aristotle's law givers or politicians make laws for the objective of 'good life' for the city-state. He also perceives ultimate good and happiness of human beings in 'perfection' 'i.e., activity in accordance with the most perfect virtue or excellence'.<sup>6</sup> It may be inferred that following these great philosophers' criteria the lawgivers or politicians must bear the qualities

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<sup>2</sup> *Stanford Encyclopedia of Philosophy*, <http://plato.stanford.edu/entries/political-representation/>, accessed on 20 March 2015.

<sup>3</sup> Plato's *Protogoras*, section 320, cited in Will Durant, *The Story of Philosophy* (Washington: Washington Square Press, 1953), p.8.

<sup>4</sup> Plato's *Republic* section 588 cited in Will Durant, *ibid*, p.20.

<sup>5</sup> Aristotle's *Politics*, cited in *Stanford's Encyclopedia of Philosophy*, <http://plato.stanford.edu/entries/aristotle-politics/index.html#supplement2>, accessed on 20 March 2015.

<sup>6</sup> *Ibid*.

‘wisdom’, ‘education’ and ‘the required skill or craft’ par-excellence which is necessary for the attainment of ‘good life’ of the state at large.

Likewise, the Muslim political thought emerging in the medieval period also emphasized a centralized authoritative state where the ‘caliph’ (or *khalifah*) means the representative of God and his last Prophet on earth and not the representative of the people. For this kind of job, naturally a high qualification level was required. Al-Farabi (870-950 CE), envisions his ‘City of Virtue’ (comparable with St. Augustine’s City of God) with its *Rais* (ruler) as an embodiment of perfection, possessing twelve inbuilt qualities including perfect physical and mental health, perfect understanding of matters and people, perfect memory, perfect intelligence and intellect, perfect communication skills, a genuine desire for learning, a love for truth and truthful people, abstention from sins and worldly pleasures, high spirit and honor with no love for money, love for justice and hate for oppression, and above all a firm and dauntless determination.<sup>7</sup> Al-Mawardi (d. 1058 CE) was among the first to clearly define the features required of a caliph, as follows: justice, knowledge of Muslim law, absence of any physical and mental defects, wisdom, courage and origin from the Quraysh tribe. This last requirement is against the fundamental Islamic principle of equality among believers, but in fact it follows precedence from the early days of Islam rather than a principle.<sup>8</sup> To Al-Mawardi, the *imam*’s (leader’s or caliph’s) duties include the defense of Islam and the Islamic state, strict implementation of *Shariah* (Islamic cannon law), justice, tax collection, and setting norms for implementing decisions.<sup>9</sup> Similar qualifications have been later enshrined in the works of Al-Ghazali (1058-1111) though his criteria become less idealistic as informed by the political conditions of Muslim world at that time. In order to avoid *fitna* and *fasad* (civil war and chaos), he seems to compromise on the perfection of qualities and accepts the possibility of absolute obedience to a secular *sultan* (local autonomous ruler) even in the case when the sultan violated the *Shariah* regulations and exercised an unjust rule provided the sultan recognized

<sup>7</sup> Richard Walzer, *Al-Farabi—On the Perfect State of Al-Farabi* (Oxford: Oxford University Press, 1985), pp.229-39.

<sup>8</sup> Al Mawardi, like many other Sunni Jurists followed the precedence from the first Islamic state of Medina and the early caliphate of the four pious companions of Prophet Mohammad. The requirement for the caliph to be from the Quraysh tribe was considered useful in preventing dissident groups particularly ‘Kharajites’ from gaining power.

<sup>9</sup> Al Mawardi, *Ahkam-us-Sultanyah*, cited in M.A. Faksh, ‘Theories of State in Islamic Political Thought’, *Arab Journal of Social Sciences*, 1987, pp.2-16.

the authority of the caliph.<sup>10</sup> This shows that the idealism of Muslim theorists mostly during a period of relative socio-political decline was motivated by exigencies of situation and remained opened to compromise.

The 18<sup>th</sup> century European Enlightenment led many western thinkers to meditate further into the concept of political representation and its procedures and limitations. However, most of the relevant work produced in that period seems to focus on two issues: the significance of political representation and the parameters of a representative's role and duties. Unfortunately, the question 'who should be a representative' does not occur clearly in this discourse. Hence, John Locke asserts '...and whenever the People shall chuse (choose) their Representatives upon just and undeniably equal measures suitable to the original Frame of the Government, it cannot be doubted to be the will and act of the Society, whoever permitted, or caused them so to do'.<sup>11</sup> Edmond Burke, even more precisely, formulates his model of 'trusteeship' to explain his perception of representative government. He sees public representatives in the role of 'trustees' who are appointed to work for the benefit of the trust as a whole regardless of the wishes of the electorate.<sup>12</sup> On the contrary, James Mill views a representative in its strict sense as a 'delegate' of the people he represents – 'a place-holder for the constituent body'.<sup>13</sup> Rousseau's 'General Will' expresses the genuine interests of the people that exists whether or not people perceive or endorse it.<sup>14</sup> Tocqueville appreciates the American democracy though with reservations on the concept of equality. Kant occasionally asserts the importance of citizens' consent in the matters of choosing representatives through elections which makes the former 'co-legislators' though he seems closer to Burkean model of trusteeship advocating that

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<sup>10</sup> Nur Kirabaev, 'The Philosophy of Power: Al-Mawardi and Al-Ghazali' <http://www.crvp.org/book/Series04/IVA-30/chapter-18.htm>, accessed on 30 April 2015.

<sup>11</sup> John Locke, Second Treatise, p.158, *The Founders' Constitution*, Volume 1, Chapter 13, Document 2, the University of Chicago Press, 1987 at <http://press-pubs.uchicago.edu/founders/documents/v1ch13s2.html>, accessed on 1 May 2015.

<sup>12</sup> *The Works of the Right Honourable Edmund Burke*, Vol.1 (London: Henry G. Bohn, 1854), pp.446-48.

<sup>13</sup> Bowie Norman E, *Ethical Issues in Government* (Philadelphia: Temple UP, 1981), p.3.

<sup>14</sup> Doughty Howard A, 'Rousseau and Representative Democracy Reconsidered', *The Public Sector Innovation Journal*, 19:1 (2014), accessed on 2 May 2015.

representatives must follow ‘reason’ rather than following blindly the wishes of the electorate in law-making process.

Any true republic is and can only be a system of representing the people in order to protect its rights in its name, by all the citizens acting through their delegates.<sup>15</sup>

Quite conversely, Hegel views political representation as a system based on the ‘estate-corporative representation of major interests of civil society in the political state’.<sup>16</sup> Marx criticizes Hegelian participatory approach and seems to favor the representative democracy where the representatives work according to their own free will rather than that of the constituents.<sup>17</sup>

The 20<sup>th</sup> century discourse on representation poses two pertinent questions: ‘who is a representative?’ (or who should be a representative?); and ‘what a representative does?’ (or what he or she should do?) For the purpose of this study we are more concerned with the first question which calls for setting up minimum criteria for an electoral candidate to be the public representative through an election. Nevertheless, the second question must not be ignored as it highlights the job description of the potential representative thus underscoring the significance of the job as well as the need of some required qualifications for the potential representative. Shumpeter sees democracy as ‘that institutional arrangement for arriving at political decisions in which the individuals acquire the power to decide by means of a competitive struggle for the people’s vote’.<sup>18</sup> He evaluates democracies on the basis of existence of some prerequisites for the democratic system to work, viz. ‘availability of *qualified political leaders* [emphasis added], assurance that experts and not the public decide matters requiring special knowledge or talents; a well-trained bureaucracy, and a public whose members are tolerant of one another and are prepared to allow politicians a relatively free hand in governing’.<sup>19</sup> In this thesis he describes eloquently the societal preconditions but takes little pain in elaborating his idea of ‘qualified political leaders’.

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<sup>15</sup> Reidar Maliks, ‘Kant and the Exercise View of Representation’ *Public Reason*, 1:1 (2009), [www.publicreason.ro/pdfa/2](http://www.publicreason.ro/pdfa/2), accessed on 3 May 2015.

<sup>16</sup> Domogoj Vujeva, ‘Hegel’s Theory of Political Representation’ (Abstract), *Croatian Political Science Review*, 49:3 (October 2012).

<sup>17</sup> Patricia Springborg, ‘Karl Marx on Democracy, Participation, Voting and Equality’, *Political Theory*, 12:4 (November 1984), pp.537-56.

<sup>18</sup> Joseph A. Schumpeter, *Capitalism, Socialism and Democracy* (London: Allen and Unwin, 1976), p.269.

<sup>19</sup> Frank Cunningham, *Theories of Democracy – A critical introduction* (London: Routledge, 2002), p.10.

The most comprehensive and oft-cited study of this period is *The Concept of Representation* (1967) by Hanna Pitkin who theorized political representation as a multidimensional structure that can only be understood according to the context in which it is placed. To her representation can be judged with 'formalistic' or 'substantive' views. Formalistic representation can be 'authorized' wherein the represented constituents 'authorize' the representative to act on their behalf according to his or her own reason; or 'accountable' wherein the representative is accountable for his or her actions to the constituents who can punish him or her by rejection in the next elections. On the other hand the substantive representation also comprises two dimensions: First, where the representative 'stands for' his or her constituency either 'symbolically' by virtue of the acceptability he or she has among the constituents, or 'descriptively' where the representative is the 'mirror image' of the constituents. Second, where the representative 'acts for' promoting the interests of the constituents in law-making and policy decisions.<sup>20</sup>

Hence in every representative-democratic system the election for any constituency will experience two inherent conflicts: one between the rival candidates for the political office; other between the interests of the whole country and those of the particular constituency. For instance, it can be asked whether the representative-to-be possesses qualities which not only make him fully aware of the problems and interests of both the constituency and the country but also be judicious enough to reconcile both in the law-making process. For another instance, should the candidate be a mirror representative of his constituency (similar to the description of his or her constituents) or be content with the substantive representation by just acting for the interests of the constituents? As Hanna Pitkin asserts that 'descriptive representation opposes accountability' which means that the constituents often ignore the misdemeanors of their 'mirror-representatives' particularly in countries where sub-group identities are strong. This is more evident in the politics of developing countries like Pakistan where the ethnic, linguistic, caste and creed identities play a large part in electoral politics.

### **Contemporary global practice**

Here a third question arises: Should the state set some minimum criteria for the electoral candidates so that the elected legislature exhibits at least some common characteristics? This question has been least discussed by the western thinkers whereas the medieval Muslim philosophers' criteria

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<sup>20</sup> Hanna Pitkin, *op.cit.*

seems too idealistic. However, as a general practice almost all the present democratic systems in the world have established some essentially required pre-qualifications for the public representatives which are more or less same as those for the voters. Generally, there are two types of qualifications: constitutional and statutory. The former are directly a part of the constitution while the latter may be (but not essentially) obligatory as a part of some other laws like the penal codes, customs laws, or some laws enacted under special circumstances such as anti-terrorism laws in some states.

Two most common of the constitutional qualifications are ‘age limit’ and ‘citizenship’ of the respective country. Another but not a universal one is the permanent residence in the state (or province) he or she has chosen to represent. Hence Article I, Section 2 of the Constitution of the United States of America entails the requirement of at least 25 years of age (30 for Senate); citizenship of the US for at least seven years prior to elections; and the residence in the state chosen for representation by the candidate. However, after the Civil War (1868) the 14<sup>th</sup> Amendment to the Constitution was introduced which disqualified a representative who takes the requisite oath to support the constitution, but later engages in rebellion or aids the enemies of the United States’. However disqualified member may serve if he or she gains approval of two-thirds of both houses of Congress.<sup>21</sup> Other disqualifications include ‘dual office holding’ i.e. person holding any other office under the US government. Similarly, candidate for the British parliament must be at least 18 years of age and a citizen either of Britain, Republic of Ireland or an eligible Commonwealth citizen. There is no requirement for the candidate to be a registered elector in UK.<sup>22</sup> While the disqualification list includes membership of civil services, armed forces, European Parliament, etc. and the ineligibility by virtue of declared bankruptcy, default, conviction in a court of law, imprisonment for more than a year,

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<sup>21</sup> 14<sup>th</sup> Amendment to the Constitution of United States, Section 3. The US Congress has waived this inability several times for specific persons and twice adopted the legislation requiring two-third majority in both houses. See Note discussion in Congressional Research Service, Library of Congress, The Constitution of the United States Of America, Analysis And Interpretation, S. Doc. 108-17 (2004), pp.2034-35, and 17 Stat. (1872), p.142 and 30 Stat. (1898), p.432.

<sup>22</sup> An eligible Commonwealth citizen is one who does not need leave to enter or remain in UK or, has an indefinite leave to remain in UK. The Electoral Commission UK Parliamentary General Election, Guidance for Candidates and Agents, Part 1 of 6, ‘Can You Stand For Elections’, 2015, pp. 2-4 at [www.electoralcommission.org.uk](http://www.electoralcommission.org.uk), accessed on 1 May 2015.

a reported illegal electoral practice, or an offense related to donations.<sup>23</sup> In Canada, a candidate must be at least 18, a citizen of Canada, and a resident of the country, not necessarily in the constituency of his or her candidacy. The disqualification is imposed on persons guilty of any corrupt or illegal electoral practice, candidates in previous election who failed to file an auditor's report or statement of election expenses, or some members of civil services, judiciary, sheriffs, and clerks of the peace etc.<sup>24</sup> Similarly the candidates for the election of Russian *Duma* must be a qualified voter, minimum 21 years of age, and a Russian citizen, while disqualification includes 'holding office or engaging in an activity deemed incompatible with parliamentary status' for instance legal incompetency and imprisonment following a criminal conviction.<sup>25</sup>

Almost similar qualifications and disqualifications have been set in many Asian democracies. Hence the candidate for Indian *Lok Sabha* must be an Indian citizen, at least 25 years of age, and an elector in any parliamentary constituency.<sup>26</sup> The constitutional disqualifications include membership of civil services, insanity as declared by a competent court, un-discharged insolvency (bankruptcy), or any other disqualification under any parliamentary law. The statutory disqualifications include conviction of an offence punishable for promotion of enmity between different groups on ground of religion, race, place of birth, residence, language, etc. and acts prejudicial to maintenance of harmony, bribery, undue influence or personation (to impersonate somebody in order to deceive or default) at an election, offenses related to rape or cruelty towards a woman, or offense of making statement creating or promoting enmity, hatred or ill-will between classes, advocating untouchability, smuggling, or participation in an unlawful association etc.<sup>27</sup> Similarly in

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<sup>23</sup> The Constitution of the United States of America, Article I, Section 2.

<sup>24</sup> The Canadian Electoral System at <http://www.parl.gc.ca/content/lop/researchpublications/bp437-e.htm#candidates>, accessed on 4 May 2015.

<sup>25</sup> Russian Federation at [http://www.ipu.org/parline/reports/2263\\_B.htm](http://www.ipu.org/parline/reports/2263_B.htm), accessed on 20 April 2015.

<sup>26</sup> In case of candidates running for reserved seats, for instance those for the scheduled castes or tribes, or some particular region like Sikkim, membership of such caste or tribe or being an elector in that particular region is essential and so on. Handbook for the Candidates Qualifications and Disqualifications, India at [http://eci.nic.in/archive/handbook/CANDIDATES/cch2/cch2\\_1.htm](http://eci.nic.in/archive/handbook/CANDIDATES/cch2/cch2_1.htm), accessed on 20 April 2015.

<sup>27</sup> Such offenses are punishable under Indian Penal Code, Customs Act, Protection of Civil Rights Act, etc. See Election Commission of India, *Handbook for the Candidates: Qualifications and Disqualification*, [http://eci.nic.in/archive/handbook/CANDIDATES/cch2/cch2\\_5.htm](http://eci.nic.in/archive/handbook/CANDIDATES/cch2/cch2_5.htm)

Sri Lanka apart from having the required age, citizenship and the status of a registered voter, no particular requirements are applicable while disqualification may be affected by declared insanity, bankruptcy, membership of civil or military services etc., or acceptance of bribe or gratification offered with view to influencing judgment as MP in preceding seven years.<sup>28</sup> Bangladesh constitution also engenders almost similar criteria.<sup>29</sup>

On the contrary the states which profess some kind of religion-based state ideology have shown a tendency to include some specific qualifications and disqualifications in this regard. Hence the Israeli Basic Law disqualifies candidates or candidate lists<sup>30</sup> whose ‘objectives or actions, expressly or by implication, include negating the existence of the State of Israel as a Jewish and democratic state; incitement to racism; or support of armed struggle by a hostile state or a terrorist organization, against the State of Israel’, or visit to a hostile state (Amendment 39).<sup>31</sup> On account of these provisions, every time the competent authority i.e. the Central Elections Committee (CEC) bars many candidates particularly the Arabs from the elections. On the other hand the Constitution of Iran takes some extraordinary steps in guaranteeing conformation to the state ideology based on the Iranian brand of Islam. The candidate must be a practicing Muslim (unless representing minorities) have a Masters degree and be a supporter of the Islamic Republic, pledging loyalty to the constitution and *Velayateh-Faghih* – the guardianship of the jurispudent and the foundation of the Constitution. Disqualifications include bad reputation, corrupt practices, conversion to ‘other faiths’ in or outside Islam, violation of *Shariah* (the Islamic Canon Law), treason etc. In this context extra-ordinary powers are bestowed upon the supreme constitutional body – the Guardian Council. The Council formed to safeguard the ‘rule of Islam’ is authorized to scrutinize the electoral candidates and reportedly takes arbitrary decisions to disqualify a large number of candidates particularly

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<sup>28</sup> Sri Lanka Parliament, IPU Parline Detabase at [www.ipu.org/parline/reports/2295](http://www.ipu.org/parline/reports/2295), accessed on 25 April 2015.

<sup>29</sup> Constitution of Bangladesh, Part V, Chapter I Article 66 at <http://bdlaws.minlaw.gov.bd>.

<sup>30</sup> In Israel candidates cannot contest independently but as a part of candidate list given by a party.

<sup>31</sup> Basic Law, The Knesset at [www.adalah.org](http://www.adalah.org), accessed on 6 May 2015.

those who intend to reform the existing system on the charge of ‘not respecting Islam’.<sup>32</sup>

At this juncture the question arises that who sets and who checks the criteria for the electoral candidates or elected representatives and what are their implications for the political process or the political culture at large? Obviously the constitutional and statutory qualifications are set by the state legislatures themselves. However, in the ideological states there is often some superior power such as the Guardian Council in Iran, or the CEC in Israel, or the military or civil establishment in some other countries like Pakistan acting on behalf of the state. When some subjective or vague criteria are adopted it reflects either the aspirations of the majority in that state or the intentions of the ruling elite which wants the majority to act and think in a particular way. Such a policy is definitely likely to violate human rights and to impact the culture of democracy and the relationship between the electors and the representatives in the long run. How far such a policy affects the political culture in Pakistan which is also considered as an ‘ideological state’ is the topic of the next section.

## II

### **Qualifications and disqualifications for the public representatives in Pakistan**

Pakistan came into existence as a result of the constitutional struggle between the Muslims of South Asia led by All India Muslim League and the Indian majority following the secular nationalist Indian National Congress. This struggle which started as the demands for socio-political safeguards for the Muslim minority turned into a demand for a separate Muslim state for which the religion Islam was invoked as a *raison d’être*. In this backdrop the newly carved Islamic Republic became the battle ground between the champions of Islam and the proponents of a pluralistic political system. While the constitution was delayed, the role of religion in the state became one major issue in the political contest. The Objective Resolution passed by the Constituent Assembly in 1949 was meant to decide once and for all the political status of Islam by proclaiming that ‘sovereignty over entire universe belongs to Allah alone’ who has delegated the authority ‘to the state of Pakistan through its people for being exercised within the limits prescribed by Him’. Amidst ambiguity and chaos the direction was set to define and defend the ‘limits prescribed by Him’. Conversely, the limits set for the conduct

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<sup>32</sup> D. Parvaz, ‘What it takes to run for Iranian Parliament?’ [www.aljazeera.com](http://www.aljazeera.com), accessed on 6 May 2015.

of political opponents betray personal vendetta rather than the will of Allah. Even before the Objective Resolution, the promulgation of Public Representative Offices Disqualification Act (PRODA) in January 1949, targeted against ‘misconduct’, ‘malpractices’ and misuse of power by some of the public representatives, which included ‘bribery, jobbery, corruption, favoritism, nepotism, willful maladministration etc.’ proved to be a ‘legal resource’ used to disqualify opponents.<sup>33</sup> The first two constitutions of Pakistan (1956 and 1962) though tried to highlight the ‘Islamic Ideology through various clauses, on the question of setting criteria for the public representatives rather followed the global practice being contended with clear and basic objective qualifications and disqualifications, including age, mental health and citizenship etc.’<sup>34</sup> However, General Ayub Khan did not hesitate to root out the rival or ‘undesirable politicians’ by promulgating a new law – Elective Bodies Disqualification Ordinance (EBDO) in 1959, apparently to ‘weed out corruption and chicanery from domestic politics’.<sup>35</sup> The sword of disqualification thus continued to hang on the heads of opponent politicians and non-conformist rivals.

Neither the Islamic ideology nor the *khaki* saviors could prevent the greatest humiliation faced by Pakistan—the surrender and the breakup in 1971. The remaining Pakistan needed a new constitution that came in 1973 under the government of Zulfikar Ali Bhutto. Once again the qualifications and disqualifications lists, as provided under Articles 62 and 63 of the Constitution, conformed to the normal international practice.<sup>36</sup> The political government was once again overthrown by another military general who was shrewd enough to get himself safely perched in power by eliminating his rivals one by one from the ousted Prime Minister Bhutto to the potential opponents from the civil society. Once again the representative democracy and the potential representatives were defunct. No other ruler of Pakistan utilized Islamic ideology more tactfully than General Zia-ul-Haq. A so-called Islamization process was ensued to eventually grant the people of Pakistan the fulfillment of the forgotten promise of a truly Islamic state

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<sup>33</sup> PRODA 1949, cited in Chapter 4, ‘Political Competition among the Political Elite...’ at [pr.hec.gov.pk/chapters/2230-4](http://pr.hec.gov.pk/chapters/2230-4).

<sup>34</sup> See Constitution of Pakistan 1956, Articles 45, 78 and 143 and Constitution of Pakistan 1962, Article 1903.

<sup>35</sup> Shahid Javed Burki, *Pakistan – Fifty Years of Nationhood* (Lahore: Vanguard, 1999), p.34.

<sup>36</sup> Also see the Representation of People Act 1976, c (IX) and Article 113 of the Constitution of the Islamic Republic of Pakistan (1973).

and a fortress of Islam from where a *jihad* was imposed on the internal and external enemies of Islam. Zia promised and postponed fresh elections several times until he ensured his own position as the President of Pakistan through a controversial referendum in 1984 after which the general parliamentary party-less elections were announced for 1985. Nevertheless some precautionary measures were essentially required to safeguard the previous martial law actions. Hence readily after the completion of the election process a presidential order, initiating drastic constitutional amendments, was issued. Thus came the fateful Eighth Amendment which along with many other changes added five new clauses to the original Article 62, and twelve new clauses to the original Article 63.<sup>37</sup> Some of the subjective and vague clauses added through the 8<sup>th</sup> Amendment are:

*Article 62(1): qualifications for the membership of Majlis-e-Shoora (Parliament)*

- (d) he (the representative) is of good character and is not commonly known as one who violates Islamic injunctions;
- (e) he has adequate knowledge of Islamic teachings and practices obligatory duties prescribed by Islam as well as abstains from major sins;
- (f) he is sagacious, righteous and non-profligate and honest and *ameen*,<sup>38</sup>
- (g) he has not been convicted for a crime involving moral turpitude or for giving false evidence;
- (h) he has not, after the establishment of Pakistan, worked against the integrity of the country or opposed the ideology of Pakistan.

*Article 63: Disqualifications for the membership of Majlis-e-Shoora (Parliament)*

- (g) he is propagating any opinion, or acting in any manner, prejudicial to the Ideology of Pakistan, or the sovereignty, integrity or security of Pakistan, or morality, or the maintenance of public order, or the integrity or independence of the judiciary of Pakistan, or which defames or brings into ridicule the judiciary or the Armed Forces of Pakistan.<sup>39</sup>

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<sup>37</sup> Revival of the Constitution of 1973 Order (President's Order No. 14 of 1985), (promulgated on 2 March 1985 and published in the Gazette of Pakistan, Extraordinary), pp.I, 101 – 4.

<sup>38</sup> (Arabic) A person who has sound moral and social integrity.

<sup>39</sup> The complete text of the articles is given as Appendix I.

Evidently, the motive behind the introduction of such vague and almost intangible qualifications and disqualifications was to block the undesirable elements or the opponents of the regime from contesting the elections in future and also to intimidate and control such politicians or any of the potential non-conformists who had somehow managed to enter the non-party parliament through the recent elections.<sup>40</sup> In addition, it served as a good publicity stunt to popularize Zia regime as the savior and true champion of Islam and ideology of Pakistan executing the promised Islamization of the laws in the country. Nevertheless, since that time the invocation of these clauses has been limited due to two reasons: First, some of these clauses might be substantive but have never or scarcely been invoked and hence their deficiencies and practicability cannot be sufficiently ascertained. A Pakistani lawyer Saad Rasool has mentioned these clauses with the opinion that these could have been added through a sub-constitutional legislation.<sup>41</sup> These laws include for instance 63(1-f) disqualification from election as member of the legislative assembly of Azad Jammu and Kashmir or 63-I (i,j,k,l etc). This proposition is quite agreeable as the Articles 63d and 63e of the original constitution allowed for further qualifications and disqualifications as may be prescribed by an Act of Parliament. Further, we have already seen such precedence in Indian constitution wherein a number of acts elaborate the criteria for qualifications and disqualification of the representatives.<sup>42</sup> Second, the task to interpret these articles (including their vague moralistic clauses) as a part of the constitution remained vested in the superior judiciary (the Supreme Court of Pakistan and the High Courts) which tended in most of the cases to treat these with extreme care to avoid any unjust decision which might have violated the principle of equality of citizens to contest elections for the legislature. The judiciary in the previous years had ‘resisted the temptation to give an extended meaning to the standards of Articles 62 and 63, and ... disqualifications on the basis of mere allegations or popular belief’ rather boldly declaring these as ‘not self-executory’ and thus likely to infringe the citizen’s right to represent.<sup>43</sup>

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<sup>40</sup> For instance Fakhr Imam from Jhang constituency.

<sup>41</sup> Saad Rasool, ‘Distilling Eligibility and Virtue: Articles 62 and 63 of Pakistani Constitution’, [http://lums.edu.pk/sahsol/lumslawjournal/article\\_3.php](http://lums.edu.pk/sahsol/lumslawjournal/article_3.php)

<sup>42</sup> Such Acts are mentioned above.

<sup>43</sup> Saad Rasool, *op.cit.* cites examples of *Rana Afiab Khan v Muhammad Ajmal*, PLD 2010, SC, pp.1066, 1076; *Dr Mobashir Hassan v Federation of Pakistan*, PLD 2010, SC, pp.265, 423; *Muhammad Jameel v Amir Yar*, PLD

The two articles almost went to oblivion in the post-Zia period, until the next military adventurer General Pervez Musharraf decided in 2002 to add along with three more disqualification clauses,<sup>44</sup> an additional controversial qualification for the electoral candidates to have a Bachelors degree.<sup>45</sup> With the restoration of democracy, the new PPP government eventually altered the constitution through the 18<sup>th</sup> Amendment (April 2010) wherein among many other substantial changes, Musharraf's encroachments in Articles 62 and 63 were washed away. Surprisingly, Zia-ul-Haq's more dangerous intrusions were left unaltered probably because of their proved redundancy and the judiciary's earlier restraint towards them.<sup>46</sup>

It all came to the fore-front with the arrival of a self-proclaimed savior of Pakistan, the Canadian national, Maulana Tahir-ul Qadri, who arrived with a tremendous fanfare vowing to cleanse the country particularly the elected bodies from corruption and misconduct as prescribed in the Articles 62 and 63 of the Constitution. His short movement though changed little but created a new hope for the common people that the corrupt and self-centered politicians could be evicted from the system. The subsequent agreement signed between the PPP government and Tahir-ul Qadri, on 19 January 2013, called for an early dissolution of National and Provincial Assemblies to facilitate the Election Commission of Pakistan (ECP) to scrutinize the prospective candidates and their nomination papers for an extended period of one month for the purpose of pre-clearance of candidates under Articles 62 and 63. The Chief Election Commissioner, Fakhruddin G. Ibrahim, welcomed the agreement which will allow a full length scrutiny of the candidates through data analysis from various state departments such as the State Bank of Pakistan (SBP), Federal Board of Revenue (FBR), National Accountability Bureau (NAB), Federal Investigation Agency, National Database and Registration Authority (NADRA), Higher Education Commission, Police and Anti-Corruption departments and so

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2010, Lahore pp.583, 602-05 and *Shahid Nabi Malik v Muhammad Ishaq Dar*, MLD 1996, p.295, Election Tribunal Punjab.

<sup>44</sup> Those were more or less similar to the clauses for which the judiciary had earlier decided to take cautious decisions.

<sup>45</sup> Musharraf's Chief Executive Order No.7/2002 mandated that in the 2002 election.

<sup>46</sup> 'With the passage of time fewer cases invoked those abstract clauses and they were thought to be only of cosmetic value', a lawyer said during an interview with the author on 5 February 2015.

on.<sup>47</sup> In addition the ECP was also to check the candidates more rigorously for their good character, observance of Islamic injunctions, sagacity, truthfulness, honesty (being *sadiq* and *ameen*), and adequate knowledge of Islam as required in the Articles 62 and 63.<sup>48</sup>

Interestingly, by that time, thanks to the successful lawyers' movement (2007-9), the superior judiciary of Pakistan had gained a new strength in the power-politics of the country and this time it was determined to assert this newly acquired strength as 'moral custodians of constitutional values' particularly against the politicians.<sup>49</sup> Earlier, the Supreme Court of Pakistan, in its unprecedented rulings, had already dismissed the formally elected Prime Minister from Pakistan People's Party (PPP), Yousuf Raza Gilani, under Article 63-1(g); disqualified a number of dual-national parliamentarians under 63-1(c); and theoretically invoked 62-I(f) several times against the legislators as not being *saadiq* and *ameen* (truthful and honest). In this backdrop the scheduled elections of May 2013 provided a new testing-ground for hitherto dormant Articles 62 and 63 as a principle source of scrutiny of the candidates' qualification to be a representative. The next section will discuss the impacts of this resurrection.

### III

#### Articles 62 and 63 reactivated—implications and consequences

Euphoria on the prospect of a 'massive cleansing' reigned the media and the society at large. However, the scrutiny process soon presented a picture of chaotic, inconsistent, subjective and rather whimsical interrogation. This section is an opinion-based study of the subject, using a survey of general opinion, and interviews with some concerned persons from academia, civil society and Election Commission of Pakistan. There are complains that after the reception of nomination forms it was at the disposal of the Returning Officers (ROs), all from lower judiciary, to interrogate, humiliate, and reject candidates on account of non-

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<sup>47</sup> In actual practice the major screening was done by four institutions viz. SBP, NAB, FBR, and NADRA through an internally linked 'Candidate Assessment System' (supported by a specially designed software) after which Assessment Certificates were sent to the Returning Officers to be conveyed to the candidates. Meanwhile the nomination papers were also uploaded on the ECP website for the public scrutiny. Meanwhile lists of fake degree holders were also being published.

<sup>48</sup> Ansar Abbasi, 'CEC welcomes one-month scrutiny of candidates', *The News International*, 19 January 2013.

<sup>49</sup> Saad Rasool, *op.cit.*

conformation to Articles 63 and 64.<sup>50</sup> Senseless debates in press, electronic and social media further elaborated the process through a kind of media trials of the prospective candidates. Amidst an upsurge of dogmatic obscurantism, some sane voices kept on registering their concern. According to I.A. Rehman, the former Chairman of Human Rights Commission of Pakistan, ‘Nothing explains this disastrous fall by Pakistan better than the charade staged under the misleading slogan of finding supposedly honest and clean candidates for the federal and provincial legislatures, without any reference to their intellectual capacity and qualities of political leadership’. He further complains ‘The election authorities are free to question the candidates about either category of [Islamic] duties [*duties towards Allah or towards people and also abstention from sins*].<sup>51</sup> But how is one to prove one’s ability to meet the criterion? The election officials do not have a complete record of how thousands of candidates have been spending their days (and nights). In the final analysis they have to examine a candidate’s eligibility on the basis of allegations by his rivals. The lot of anyone who has resolute opponents or who cannot buy his accusers will be truly unenviable’.<sup>52</sup>

The PPP Senator, Saeed Ghani, admitted his party’s mistake in succumbing to pressure of right wing parties against removing the controversial clauses from the constitution at the time when the joint Parliamentary Committee on Constitutional Reforms was deliberating over the 18<sup>th</sup> Amendment to the Constitution. Further, he complained that in the past, higher judiciary used to avoid the controversial clauses but recently it was intentionally influencing the election process as the ‘Chief Justice of Pakistan has been using Articles 62 and 63 frequently in his remarks and speeches lately. It encourages ROs, who come from the lower judiciary, to implement controversial clauses in letter and spirit’.<sup>53</sup>

Many observers were shocked on the ECP’s insistence on the vague and subjective and debatable clauses of Articles 62 and 63, which

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<sup>50</sup> The scrutiny of the nomination papers is held on the next working day after the completion of filing nominations. This is normally done only by the RO. At the scrutiny the candidate is allowed to bring four people including himself/ herself, his/ her proposer, his / her election agent, and one person preferably a lawyer authorized by the candidate. See Handbook for the Candidates, ‘Scrutiny of Nominations’, [www.ecp.gov.pk](http://www.ecp.gov.pk), accessed on 2 April 2015.

<sup>51</sup> Italics added by the author.

<sup>52</sup> I.A. Rehman, ‘Genesis’, *The News International*, Special Report, 14 April 2013, <http://jang.com.pk/thenews/apr2013-weekly/nos-14-04-2013/spr.htm>

<sup>53</sup> Aoun Sahi, ‘Dead Words Walking’, *ibid*.

should not be invoked until the candidate's integrity is challenged by a rival. And even then it is likely to 'make a farce of the electoral system by going into ever finer detail of who is or is not a practicing Muslim... Has Pakistan given up even the pretence of aspiring to be a pluralistic society?'<sup>54</sup> Some believed that instead of such vague and intangible criteria there must have been more emphasis on declaration of assets, having assets or interests in foreign countries, tax evasion, and dual nationality. In fact, as early as 1988, Advocate Asif Saeed Khosa (now a Supreme Court Judge) had pointed out the obscurities inherent in the clauses of Article 62 and 63 that were inserted in 1985.<sup>55</sup> He now reasserts that the nightmare of interpretation and application of those clauses is now '... gnawing the returning officers, election tribunals and the superior courts'.<sup>56</sup>

In 2013, while the ROs were applying these articles probably '... to impose their own foot-print as cleansing instruments to disqualify (even publicly embarrass) candidates vying to participate in the elections',<sup>57</sup> the public expectations for a 'clean and clear' legislature were rising. On the contrary, the illogical questions asked by ROs to candidates such as recitation of *dua-e-qunoot* or sixth *kalma*<sup>58</sup> resulted in a large number of disqualifications, constantly being appealed against in the superior courts. Contrary to one-month scrutiny period, hardly ten days were given for filing appeals against the ROs' decisions (either qualification or disqualification) whereas only seven days were assigned for the courts to follow the due process of law and decide the fate of all affected candidates failing which the original decision of the ROs would prevail. This wreaked havoc in the high courts where hundreds of candidates amassed awaiting hearings by the honorable judges.<sup>59</sup> Among some known examples of disqualifications are the names of the ex-President of Pakistan, General (retired) Pervez Musharraf who filing nomination papers for four National Assembly constituencies, got

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<sup>54</sup> 'The Ghost of Zia: Poll Scrutiny questions', 3 April 2013, <mailto:web@dawn.com>.

<sup>55</sup> Asif Saeed Khosa, 'Qualifications for Candidates: A Constitutional Puzzle', *Heeding the Constitution* (Lahore: PLD Publishers, 1995), pp.281-90.

<sup>56</sup> 'Vague terminology of Articles 62, 63 creating confusion', [http://epaper.dawn.com/DetailImage.php?StoryImage=04\\_03\\_2015\\_003\\_0\\_06](http://epaper.dawn.com/DetailImage.php?StoryImage=04_03_2015_003_0_06)

<sup>57</sup> Saad Rasool, *op.cit.*

<sup>58</sup> These are parts of an extended Islamic faith and practice but not included in the fundamentals of faith.

<sup>59</sup> Saad Rasool, 'Savior Instinct', *The News International*, Special Report, *op.cit.*

disqualified from three on the charges of tempering with the Constitution and sacking the superior judges, while got qualified from one (Chitral) constituency. Similarly Raja Pervez Ashraf, the ex-Prime Minister was disqualified on account of misappropriation of funds. Most shockingly, a renowned journalist and politician of good repute Ayaz Ameer was disqualified on charges of 'writing columns against the ideology of Pakistan'. These disqualifications according to some amounted to pre-poll-rigging.

A District Election Commissioner (DEC) in an interview with the author further elaborated the problems in the light of his personal experiences. Revealing that the Election Commission wields no practical control on the ROs and DROs (District Returning Officers), temporarily appointed by the ECP itself. Particularly the DEC's have little powers as the ROs are not accountable to them. Therefore, the latter suffer no restraint from the DEC's in the matters related to the scrutiny of candidates. He further revealed that the subjective and moralistic clauses of the Articles 62, 63 had 'zero implementation value' in most of the cases where these clauses scarcely helped the nomination of the so-called '*sadiq*' and '*ameen*' candidates. On the contrary, these provided a channel of prejudice and corruption wherein the ROs in some cases, arbitrarily disqualified candidates using the moralistic or religious criteria (such as 'adequate knowledge of Islam') after grabbing their share of bribe from the opponent candidates. In other cases, ROs personal prejudices against any particular candidate, or his sect or any group identity led to the disqualification. Conversely, in some other cases even known criminals managed to qualify through pressurization or bribery.<sup>60</sup> In other cases even the objective clauses like those related to criminal offense or loan defaults, wherein conviction by a competent court is required, the ROs decided arbitrarily without following the due process. For instance FIRs against candidates were taken as good as formal convictions.

*Post-election crises:* The assemblies thus elected under the sword of Articles 62 and 63 remained vulnerable to the claims of disqualification forever. Interestingly, the articles have been used only when the political leadership was targeted. Reportedly, the ECP had earlier facilitated the Presidential Election of General Musharraf by waiving the disqualification clauses through a secret amendment of the Presidential Election Rules on 10 September 2007, a few days before the election.

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<sup>60</sup> The DEC cited an interesting anecdote in which a known drug tycoon not only got nominated through bullying tactics but also became an MNA.

However, these were reincorporated in 2013 before the next Presidential Election that was contested by the civilian candidates.<sup>61</sup> Further, the *dharna* (sit-in) politics that commenced within a few months of the swearing in of the present legislatures shook the *raison d'être* for the sitting legislators. Maulana Tahir-ul-Qadri returned with a magnified vigor and Imran Khan with his self-righteous enthusiasm, both mesmerized thousands of people and shattered the peace of the capital city while denouncing the parliamentarians on the scales of 62, 63 and on the charges of rigging the elections. During those sensational days, the elected Prime Minister of Pakistan, Mian Nawaz Sharif, faced disqualification on the charges of mis-informing the joint session of the Parliament about his communications with the army chief, after which he was rendered 'not *sadiq* and *ameen*'. But thankfully the days of judicial activism had given way to judicial restraint under which Nawaz Sharif survived the charges of disqualification after a judicious court hearing. Justice Khosa's note included in the Supreme Court ruling is an eye-opener in this regard wherein he observed that the Articles 62 and 63 'had become a part of the national narrative' but still 'had so far failed to achieve their full potential or intended results'.<sup>62</sup> Interestingly, the articles were not referred to particularly in the Senate elections and the later by-elections as well as the Cantonment-Board Elections while the matter was raised in petitions to Lahore High Court for the proper implementation of 62 and 63.

### **Conclusions – theory, practice, problems and prospects**

The conceptual study in the first section of this paper shows the evolution of various objective and subjective criteria for representatives as based upon the significance of their job and interest of the society at large. At this junction it is important to rationally analyze Articles 62 and 63 of the Constitution of Pakistan in the light of the hitherto evolved concept of public representation keeping in view the general interest of the entire population of the country regardless of class, creed, caste or gender. In this context the inclusion and assertion of vague clauses of Articles 62 and 63 seems problematic due to following concerns:

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<sup>61</sup> The amendment was only revealed by the former Law Minister Dr. Sher Afgan, after the end of Musharraf era. See Iftekhar A. Khan, 'Articles 62, 63 to come into force', *Dawn*, 21 July 2013.

<sup>62</sup> Justice Khosa, 'Vague terminology of Articles 62, 63 creating confusion', *Dawn*, 4 March 2015.

*Tyranny of majority:* The idea of representative democracy is closely linked with the minorities' interests and fundamental human rights—the two principles on which all schools of thought agree. For instance, J. S. Mill's deliberations on democracy and liberalism highlight one main problem viz. the omnipotent majority observing that in previous eras the majority (common people) suffered oppression at the hands of a minority (elites), whereas in democracies there exists a danger of majority tyrannizing over itself, let alone over the minority.<sup>63</sup> In case of Pakistan, there has been an insistence on the official adoption and promotion of majority culture and religion from the beginning. Here the tyranny of majority is obvious not only over the minorities but also over itself. Articles 62 and 63 had been imposed by a dictator in the name of so-called Islamization. If the real criteria as evolved by the Muslim jurists such as Al-Farabi and Al-Mawardi were implemented most citizens, including General Zia and his cronies would have been disqualified. In effect it was only successful attempt to legitimize the position of the dictator in the eyes of the Muslim majority of Pakistan which, in the long run, culminated in illogical scrutiny, humiliation and disqualification of candidates belonging to the same majority.

*State paternalism:* In a democratic system state's prerogative to exercise forceful coercion must be under prescribed limits. As Mill further elaborates, 'the only purpose the power can be rightfully exercised over any member of a civilized community against his 'will', is to prevent harm to others. His own good ... is not a sufficient warrant', hence, rejects 'governmental paternalism' and 'overt tyranny'. In this context Plato's philosopher king, cannot be allowed to wield paternal control over the populace even for the sake of what he perceives as 'good life'. In other words state-paternalism is anathema to democracy which stands on the concept of 'pluralism' wherein the citizens pursue what they perceive as their own good in their own way.

*Ideological state syndrome:* We have seen in Section I that the only states in the world which adopt some special and subjective criteria for the selection of representatives are the so-called ideological states. For instance, disqualifications in every elections of Israeli *Knesset* (parliament) of many Arabs on the pretext of having objectives or doing actions 'expressly or by implication' including negation of the existence of Israel as a 'Jewish and democratic state' and visit to a hostile state, stand on such vague and subjective criteria which cannot be ascertained

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<sup>63</sup> Frank Cunningham, *op.cit.*, p.28.

without probability of injustice. Similarly, the qualifications for candidates to Iranian *Majlis* include not only loyalty to the state ideology, and *Vilayeteh Faghih* but also to a particular sect while conversion to other sects or religions disqualifies the representative. This in effect amounts to ‘political cleansing in the name of Islam’ and an old ‘device to win the elections through disqualification rather than political competition’.<sup>64</sup> Following the same pattern is the insistence on Pakistani candidates being ‘*sadiq*’ and ‘*ameen*’, and loyal to the state ideology and the armed forces. It is quite obvious that these countries have been suffering from inherent insecurities due to which they have adopted political systems based on particularistic ideologies as a part of their defense mechanisms, but such systems are found lacking in the basic principles of equality of citizens and fundamental human rights and result in disqualifications of many capable candidates.

*Fundamental rights and principles of policy:* The criteria on which the electoral candidates qualify or disqualify to run the elections and become the public representatives must also reflect the civil liberties and ‘equal respect’ for all citizens of a state and hence must be devoid of racial, ethnic or religious exclusion or totalitarian or paternalistic tendencies. Articles 8-28 of the Constitution of Pakistan expressly establish the sanctity of Fundamental Rights. Hence, Article 8 declares *Laws inconsistent with or in derogation of fundamental rights to be void*. Article 25(1) asserts, *All citizens are equal before law and are entitled to equal protection of law*. These two clauses are themselves self-explanatory and in their presence Articles 62(1) clauses d,e,f and g and 63(1)g stand in direct contradiction. For instance, qualifications of ‘good character’, ‘non-violation of Islamic Injunctions’, adequate knowledge and practice of Islamic teachings’ and ‘abstention from major sins’ are so vague and unascertainable that there exists a constant likelihood of mis-information, prejudice or mal-intention on the part of the adjudicating authority to work for or against any candidate and hence a violation of the principle of ‘equality of all citizens before law’. As argued by a senior advocate that these clauses ‘are not self-executory and there has to

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<sup>64</sup> Ali Khan, ‘Saving Islamic Democracy in Iran: The Governing Council should be Juristic, not Political’, at [www.jurist.org/forum](http://www.jurist.org/forum), accessed on 6 May 2015.

be a declaration of the Court of Law holding that the petitioner is not sagacious, righteous, non-profligate, honest and *ameen*'.<sup>65</sup>

Thus, notwithstanding the numerous reported procedural problems in the scrutiny of the electoral candidates,<sup>66</sup> the very idea of imposing such criteria is anathema to the hitherto evolved concept of representative democracy wherein the choice of candidates is the prerogative of the electorate and not of some organ of the state. To Mill for instance, the 'civil liberties typically and directly affect only those who enjoy them' and hence 'people should be exempt from any interference, paternalistic or otherwise, by others and especially by the state including the democratic state'.<sup>67</sup> Kant's proposition that individuals as autonomous agents deserve equal respect' also asserts the same principle.<sup>68</sup> These assertions need to be seen also in the context of electoral politics which later became the cornerstone of democracy. As Will Kymlicka puts it, 'because people's values are socially informed by their group memberships ... liberal democrats should support multicultural group rights since these memberships provide 'a context of choice' essential for autonomous action'.

Interestingly no modern state with an exclusive state ideology admits that its system is not congruent with the concept of democracy. Instead the ideologues of that state claim that their system fits perfectly with their own version of 'peoples' rule'. For instance, Israel claims to be a perfect democratic state but the ideological extremism has reportedly threatened the very basis of democracy in Israel. Ze'ev Jabotinsky, one of the founders of modern Israeli right, argues that the Jews' experiences including their persecution in Europe and later hostility of Arab states demand that Israel must have democracy and pluralism as 'essential values' and ensure 'that the minority will not be rendered defenseless'.<sup>69</sup> In fact the basic principles of representative democracy include the protection of the civil liberties and a private sphere free of state interference.

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<sup>65</sup> Supreme Court of Pakistan, Civil Petitions No. 240 and 241K or 2013, [http://www.supremecourt.gov.pk/web/user\\_files/File/C.P.No.240and241-Kof2013.pdf](http://www.supremecourt.gov.pk/web/user_files/File/C.P.No.240and241-Kof2013.pdf), accessed on 5 May 2015.

<sup>66</sup> ECP report.

<sup>67</sup> John Stuart Mill, *On Liberty and Other Essays*, 1859, cited in Cunningham, *op.cit.*, p.28.

<sup>68</sup> *Groundwork of the Metaphysics of Morals* (Cambridge: Cambridge University Press, 1998 [1785]), cited in Cunningham, *op.cit.*, p.32.

<sup>69</sup> Max Fisher, 'Israel's Dark Future', at [www.vox.com](http://www.vox.com), accessed on 6 May 2015.

*Political parties vs. individual candidates:* Generally in the presence of political parties the candidates are in fact chosen by the parties. This virtually minimizes the significance of individual candidates as people usually vote for the parties and not for the individual. Likewise the responsibility of assessment of the honesty and integrity of the candidate can be better judged by the party rather than the temporary ROs. Eventually it must be the final judgment of the electorate to favor or reject a prospective representative whose basic job is to ‘stand for’ and to ‘act for’ the people at large.

The situation is precarious but the moment is precious and demands immediate attention. The above instances clearly prove that the vague, subjective and moralistic clauses of Articles 62 and 63 have created more problems than these have solved and have led to arbitrary decisions disqualifying some and qualifying others with no standard evaluation scale. Unless one cherishes the Socratic, Platonic and Aristotelian ideals of wise, educated and perfect politicians, or Al Farabi’s super-human *Rais*, or Al-Mawardi’s pious of the pious ruler, the representatives must be required to have only objective and ascertainable qualifications and an effective accountability system for their acts. Such subjective criteria not only defy reason but also violate the basic principles of representative democracy as well as the fundamental rights guaranteed in the Constitution of Pakistan, particularly Article 8 which suggests that all such laws are void.