[Salman Akram Raja](https://www.thenews.com.pk/writer/salman-akram-raja)

March 7, 2021

**Elections under fire**

German legal philosopher Carl Schmitt’s book ‘Legality and Legitimacy’, published in 1932 as the Weimer Republic crumbled towards its end, turned out to be one of the most consequential works of jurisprudence of the last century.

For Schmitt, parliamentary democracy was inherently a compromise-ridden structure of dispersed sovereignty that delivered hollow legality. Parliamentary majorities and super-majorities cobbled together by reaching out in compromise across political divides resulted in self-serving interest groups stifling the undiluted expression of the people’s will. What emerged was formal legality without legitimacy. Institutions of the state that fell under the sway of this legality deserved to be mocked. The people must await, celebrate and obey the charismatic leader who would encapsulate and express their will and their rage while expunging from the body politic carcasses of the ancien regime.

Listening to the prime minister’s speech the day after the Senate elections one could perhaps be forgiven a moment of dread. After all, things did not turn out well either for Schmitt’s vision of legitimacy or for the German people and their leader in the years that preceded the reassertion in Germany, a world war later, of parliamentary democracy and the inevitable compromises it entails.

The prime minister bemoaned a parliament that had failed to amend the constitution so as to provide for election to the Senate through open, rather than secret, balloting as proposed by him. He had nothing but contempt for the Election Commission of Pakistan that had turned up before the Supreme Court of Pakistan to oppose the open ballot that he had sought through a presidential reference. He asked the people directly, “Why would the Election Commission oppose an open ballot?” The dark implications packed in his question have since become a well-spring of derision for the ECP and for what is described by the faithful more generally as “the system that must go.”

For the record, the ECP opposed the prime minister’s desire for an open ballot because the constitution of Pakistan contains Article 226 which reads as follows: “Election by secret ballot. All elections under the Constitution, other than those of the Prime Minister and the Chief Minister, shall be by secret ballot.”

The constitution also contains Article 59 that establishes the Senate, provides for its membership and tenure and requires that election to fill the seats in the senate allocated to each province ‘be held in accordance with the system of proportional representation by means of the single transferable vote’.

The opposition to open balloting for Senate elections that the ECP resolutely presented before the Honourable Supreme Court of Pakistan was nothing more than a reading of the constitution and expression of an interpretation that had been held ever since the adoption of the constitution in 1973. There can be little doubt that the gold standard for democratic elections the world over is considered to be balloting that is absolutely and permanently secret, based on ballots that are neither identifiable nor traceable with respect to the voter.

The requirement for a secret ballot is set out in Article 21 of the 1948 Universal Declaration of Human Rights and Article 25 of the 1966 International Covenant on Civil and Political Rights. The 1994 Declaration on Criteria for Free and Fair Elections, adopted by the Inter-Parliamentary Council of the Inter-Parliamentary Union states that the “right to vote in secret is absolute and shall not be restricted in any manner whatsoever.”

The global veneration for secret balloting is based on the protection afforded by secrecy against voting on account of pressure or inducement. A person who seeks to buy the vote of another can never be sure that the vote cast in secrecy inside the polling booth will be in accordance with the bargain. Secrecy also allows for quiet, conscientious dissent. Global wisdom notwithstanding, it is clear that in Pakistan Senate elections based on secret balloting have caused controversy, concern and quite likely corruption – with many members of the national and provincial assemblies voting anonymously to defeat the candidates of their own political parties.

A strong case is made out for amending Article 226 of the constitution so as to exclude Senate elections from the requirement of secrecy in voting. The constitution itself provides the mechanism for its amendment through a two-thirds majority in both houses of parliament. The power to amend the constitution is the supreme attribute of democratic sovereignty. It requires calm deliberation and a near consensus.

Carl Schmitt’s typology of leaders is instructive. The dictator seeks to render the extant constitutional order irrelevant without replacing it with a new framework to constrain the exercise of power. The charismatic plebiscitarian leader seeks to himself lay down new constitutional norms and create exceptions to existing norms on the basis of authority claimed directly from the people. The democratic leader seeks to build coalitions and consensus within parliament that would allow the requisite majority for an amendment to the constitution.

The presidential reference that sought open balloting for Senate elections was a barely veiled attempt to escape the command of Article 226 without a formal amendment to the constitution. A new moral norm, ratified by the Supreme Court, that would render Article 226 redundant was envisaged. The resistance put up by the ECP to the attempt to render a part of the constitution illusory deserves the gratitude of all who profess fidelity to the constitution and its processes.

On March 1, 2021 the Supreme Court of Pakistan answered the presidential reference by opining that Senate elections were indeed elections under the constitution and were, therefore, required to be held through a secret ballot. The court also held that the secrecy envisaged by Article 226 of the constitution was not absolute. It was held that the ECP could employ technology to ensure that elections are conducted fairly and transparently.

With Senate elections scheduled for March 3, the ECP turned down the proposal made by the government that all ballot papers be embossed with a barcode that would enable identification of each voter in the event of commission of corrupt practices. The ECP followed established law in maintaining that no change to the conduct of election could be made after the announcement of the election schedule or without proper formulation of rules. If secrecy of the ballot was to be penetrated then the circumstances that would permit such penetration had to be clearly stated in rules framed under Article 218 of the constitution and the Election Act 2017. Rules are not made overnight. Simply the fact that a political party might have won fewer Senate seats than expected could not, on its own, be considered evidence of an offence meriting the disclosure of voter identity since the constitution does not require voting in accordance with party directives. Failure or refusal to do what the constitution does not demand can hardly constitute an offence meriting an exception to the secrecy mandated by Article 226.

In the eyes of the faithful, the refusal of the ECP to barcode ballot papers was its second sin within a week. On February 25, the electoral victory claimed by the ruling party in the Daska constituency for the National Assembly was set aside by the ECP. A violent, blood-soaked day had ended with twenty presiding officers, along with their police escorts and ballot bags, going missing for the entire night. All cell phones and wireless sets were found inoperative. When the chief election commissioner of Pakistan desperately attempted to locate his staff, he found that he had no access to the chief secretary, inspector general of police, the commissioner or the deputy commissioner concerned. A police officer that he had ordered removed from the constituency on account of patent bias against the opposition candidate had been appointed in charge of security for the election. When the presiding officers finally emerged from the fog, with ballot bags that reflected a turnout of over 80 percent, they were reported by the returning officer for the constituency as appearing ‘puzzled and terrified’ and unable to answer questions.

One hears the prime minister’s lament against the Election Commission of Pakistan. This is not the lament of a betrayed Lear on a desolate heath.

The writer is an advocate of the Supreme Court and appeared before the Election Commission for the opposition candidate in the Daska election.

Email: salmanr2002@hotmail.com

Twitter: @salmanAraja