**Senate elections through open ballot?**

[**Saad Rasool**](https://nation.com.pk/Columnist/saad-rasool)

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Prime Minister Imran Khan, along with several members of his political party, have argued in favour of holding the upcoming Senate Elections through ‘open ballot’—ostensibly for the purposes of shunning the abhorrent practice of electoral horse-trading in the upper house of our bicameral legislature.

However, the legal argument in support of conducting Senate Elections through ‘open ballot’ is less than simple.

Let’s start with the basics: The Constitution of Pakistan, through Article 59 thereof, creates the Senate, consisting of “one hundred and four members”. Per Article 59(2) of the Constitution, elections to the Senate take place through a “system of proportional representation by means of single transferable vote.” And members of the Senate hold office for a term of “six years” from the date of their election.

Importantly, elections to the Senate are conducted through the stipulated constitutional body—the Election Commission of Pakistan (ECP), created through Article 218 of the Constitution. Specifically, Article 218(1) of the Constitution states that ECP is empowered to conduct, inter alia, elections to “both Houses of Majlis-e-Shoora (Parliament)”, including the Senate. To this end, Article 218(3) of the Constitution embodies the overarching “duty” of the ECP to “organise and conduct the election and to make such arrangements as are necessary to ensure that the election is conducted honestly, justly, fairly and in accordance with law, and that corrupt practices are guarded against.” And Article 222 of the Constitution expressly states that the ECP is responsible for “organising and conducting election to the Senate”.

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Having specified the term of each Senator to be “six years” (Article 59), the Constitution, through Article 224(3) thereof, mandates that “election to fill the seats of the Senate”, which become vacant at expiry of term, “shall be held not earlier than thirty days” from the date on which the (regular) term is due to expire. However, per Article 224(5) of the Constitution, if a seat in the Senate becomes “vacant” prior to expiry of term, “an election to fill the seat shall be held within thirty days from the occurrence of the vacancy.”

The Constitution does not delineate a detailed mechanism for election to the Senate. However, importantly, Article 226 of the Constitution stipulates that “all elections”, which are conducted “under the Constitution”—except for election of the Prime/Chief Minister—“shall be by secret ballot.” Use of the word “shall”, in this provision, entails a mandatory command under established principles of our jurisprudence. Prima facie, there seems to be no space for the government’s proposal of “open ballot” elections; per the Constitution, so long as the election is being conducted “under the Constitution”, all balloting must be “secret” in nature, without any space for ‘open balloting’.

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However, reportedly, the government lawyers, led by the Attorney General of Pakistan, are arguing that use of the words “under the Constitution”, in Article 226, restricts ‘secret balloting’ to only such elections as are expressly done under provisions of the Constitution (i.e. election of the President, Speaker, Chairman Senate, etc.). And that, since the Constitution does not delineate a detailed procedure for election to the Senate, and the Senate elections are instead conducted through the procedure prescribed under the Elections Act, 2017, they fall outside the constitutional ambit of Article 226, and can thus be conducted through ‘open balloting’—so long as Elections Act, 2017 provides for the same.

To this end, the current mechanism for election to Senate has been provided in Chapter VII of the Elections Act, 2017. Specifically, Section 122(6) of the Elections Act, 2017 expressly states that “poll for election of Members of the Senate shall be held by secret ballot.” However, the government can amend this provision, through a Presidential Ordinance, so as to stipulate that elections to the Senate shall be conducted through “open ballot.” For this to happen, however, it must first be clarified whether or not the Senate elections fall within the ambit of being conducted “under the Constitution”, per Article 226 thereof.

[ECDC releases report on new COVID-19 strain](https://nation.com.pk/22-Dec-2020/ecdc-releases-report-on-new-covid-19-strain)

In support of Federal Government’s argument, the Attorney General of Pakistan is relying on a few precedents of the honourable superior Courts, which seem to have interpreted Article 226 in a narrow manner. Specifically, the honourable Sindh High Court, in the case titled MQM v. Province of Sindh (PLD 2017 Kar 169), relied upon an earlier judgment of the honourable Balochistan High Court, titled Ataullah v. Government of Pakistan (PLD 2014 Bal 206), to conclude that local government elections are held “under the Constitution”, and therefore must be held through secret ballot. In appeal against this Sindh High Court judgment, a three-member bench of the honorable Supreme Court, in CAs No. 760-765 of 2016 titled Province of Sindh v. MQM etc., declared that local government elections could be conducted through either secret or open ballot, so long as the applicable law stated its legislative preference. Unfortunately, this decision of the apex Court was rendered through a short order, without providing detailed reasoning in regards to the same. Be that as it may, the order serves as binding precedent in cases concerning local government elections, which have resultantly been placed outside the ambit of Article 226 of the Constitution.

[Coronavirus claims 82 more lives in single day](https://nation.com.pk/22-Dec-2020/coronavirus-kills-82-pakistanis-infects-1-704-in-one-day)

Would this rationale apply to the Senate elections? No one knows for sure. But the Attorney General’s argument merits judicial consideration—especially since the Senate election procedure has not been stipulated “under the Constitution”, and only finds mention in the Elections Act, 2017.

In the circumstances, the Federal Government has decided to approach the honourable Supreme Court of Pakistan, under its ‘advisory jurisdiction’ (Article 186), to seek the apex Court’s constitutional opinion on the matter. To this end, it is pertinent to note that, per Article 186 of the Constitution, “if, at any time, the President considers that it is desirable to obtain the opinion of the Supreme Court” on a “question of law” which the President “considers” to be of “public importance”, he may refer the matter “to the Supreme Court for consideration.” And after judicial consideration of the matter, the honourable Supreme Court shall “report its opinion on the question to the President.”

[UK virus shows no signs of causing more deaths: WHO](https://nation.com.pk/22-Dec-2020/uk-virus-shows-no-signs-of-causing-more-deaths-who)

As such, the Federal Government, through the President, is planning to seek the apex Court’s “opinion” on whether the Senate Elections, held under Elections Act, 2017, fall within the ambit of Article 226 of the Constitution, and therefore require “secret ballot” as its voting mechanism. Or, instead, whether Senate elections are not “elections under the Constitution”, and can thus be conducted through ‘open ballot’, after promulgation of the necessary amendment in Section 122 of the Election Act, 20167.

While a prima facie argument, per the language of Article 226, rests against the government’s point of view, there can be no denying the fact that the government has an arguable case, which merits consideration by the honourable Supreme Court. In the circumstances, it is hoped that a ‘larger bench’ of the honourable apex Court (consisting of more than 3 judges, which decided the MQM case earlier), will deliberate on the matter, and render an opinion that is divorced from our momentary political frenzy, and serves the lasting goals of our democratic constitutional promise.

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And in the process, it is hoped that this issue of ‘horse-trading’, which has marred our political fabric for far too long, will meet its legal and constitutional demise—at least to the extent of Senate elections