**The Crisis in Constitutionalism**

On **Aug 1, 2022** [Shahrukh Mehboob](https://nation.com.pk/authorpost/columnist/shahrukh-mehboob/)

The Constitution and its Preamble are built on a trichotomy that separates powers between the Legislature, the Executive, and the Judiciary, and each one must operate within its respective domain. Thus, whilst the Legislature is fully empowered to make laws or amend the Constitution, it is the superior Courts that will ascertain their constitutionality and interpret them because the Constitution itself has empowered them. Every few decades, the country witnesses political wrangling of a similar sort. Nationalist sentiments are evoked, and political rivals are dubbed security risks – something that only causes mayhem and undermines democracy. Over the past few months, the country once again finds itself mired in a constitutional and political crisis that has deepened the social and political divisions among the masses. The whole political drama has once again put the turncoats in the spotlight.
Political instability began with the motion of vote of no confidence. What followed led to political and constitutional chaos in the country when the Deputy Speaker of the National Assembly rejected the motion of vote of no confidence through his ruling, which later on, was declared ultra vires by the Honourable Supreme Court through a detailed judgment, and later on, the motion of vote of no confidence was succeeded, bringing the political atmosphere in Pakistan to a boiling point. Meanwhile, a Presidential Reference was filed, and Article 63A of the Constitution of Pakistan 1973 was interpreted by the Honourable Supreme Court in a 3-2 split judgment rendered on 17th May 2022. The majority held that votes cast by members of an assembly in violation of a direction by their party would stand disregarded in an election or vote of no-confidence regarding the prime minister or a chief minister. In its interpretation, the court held which is reproduced hereunder:- It is our view that the vote of any member (including a deemed member) of a Parliamentary Party in a House that is cast contrary to any direction issued by the latter in terms of para (b) of clause (1) of Article 63-A cannot be counted and must be disregarded, and this is so regardless of whether the Party Head, after such vote, proceeds to take, or refrains from taking, the action that would result in a declaration of defection. In case the Election Commission of Pakistan confirms the declaration sent by a Party Head against a member, he/she shall cease to be a Member of the House.
Another political fuss accrued when Deputy Speaker of Punjab Assembly Dost Muhammad Mazari on the election of Chief Minister misconstrued the Supreme court order and under the letter issued by the party head, and passed the ruling that the votes of defecting lawmakers will not be counted. The ruling of Deputy Speaker Dost Muhammad Mazari triggered an intense debate on whether his decision in the light of PML-Q head Chaudhry Shujaat Hussain’s letter asking his MPAs to vote for Hamza in a volte-face at the eleventh hour was legally valid, especially in light of the Supreme Court’s interpretation of Article 63-A. The ruling was challenged in the Supreme Court and the same was set aside and was declared void, without lawful, through short order dated 26.07.2022 issued by the apex court.
Article 63A of the Constitution of the Pakistan 1973, is drafted in remarkably clear language. It contains two distinct parts. The first part states that there may be consequences for disobeying the directions of the parliamentary party to which a member belongs when such directions pertain to certain specified matters, including the election of the prime minister or the chief minister or a vote of confidence or no-confidence to both. The second part states that in the event of such disobedience the party head, in his discretion, may move a reference for de-seating against the disobedient members before the ECP, which is required to determine whether a direction of the parliamentary party had been disobeyed or not. After the amendment made to Article 63A by the 18th Amendment the party head, who may or may not be a member of the parliamentary party, would decide whether to take action against a minority acting in defiance of the directions of the majority of the parliamentary party.
Meanwhile, the court observation clearly said that when a parliamentarian deviates from the position espoused by his or her parliamentary party and cast his or her vote in a manner inconsistent with the directions issued by the parliamentary party, such votes ought to be disregarded. “Moreover, the party head may thereafter declare such parliamentarian to have defected and seek such parliamentarian’s disqualification.” The directions envisaged under Article 63-A of the Constitution could only be issued by the parliamentary party and not a party head whose role, especially “where the party head is not a member of the parliamentary party, may merely be that of a post office.
It is relevant to mention here that the reference against the 25 dissidents referred to the ECP by the party head of the PTI, Mr. Imran Khan, was based on a letter of April 1 signed by Mr. Asad Umar which stated that the party head had decided that PTI members in the Punjab Assembly would vote for Chaudhry Pervaiz Elahi in the election for the post of the chief minister. The plea on the part of the dissident appellants for suspending the by-elections on July 17 was not granted. The court’s reading of the democratic, parliamentary structure of the constitution and the judicially developed fundamental right of political parties not to be unlawfully ousted from power has resulted in the finding that votes of members of a parliamentary party cast in defiance or disobedience of the directions of the parliamentary party are not to be counted, regardless of the party head taking any action or not. No language to this effect exists in Article 63A. It is a deduction that has embraced controversy at birth and awaits examination by a larger bench of the Supreme Court.
The question and controversy of constituting a full court has also come across when the opposition parties raise objections on the decision and credibility of the honorable judges. It is at the discretion of the Chief Justice to constitute the full court, the ruling which brings chaos and political instability in the whole province, through which public rights were involved became the matter of public importance and it was presumed to be determined and resolved by the full court. But the supreme court declined the request for the formation of the full court in its worthy short order, and this question is to be answered in the detailed judgment which is still on wait/pending. Both cases (Presidential Reference & Speaker Ruling) have different facts and circumstances, and the interpretation of Article 63-A by the Supreme Court was misconstrued and non-read by the Provincial Assembly speaker which caused confusion and uncertainty in the whole province. The two short judgments have rewritten the rules of Pakistan’s parliamentary democracy. Understandably, the opposition political parties should pin their hopes on constitutionalism. Not only political parties but a progressive civil society and intellectuals, too, believe that the Constitution is our North Star. Our constitution works because of its generalities, and because of the good sense of the Judges when interpreting it. It is that informed freedom of action of the Judges that helps to preserve and protect our basic document of governance. The history of Pakistan is evidence that when constitutional limits are violated, the consequences are bad governance and lead to further erosion of the rule of law.