**[Judicial chemo](https://www.dawn.com/news/1690427/judicial-chemo)**

[Mirza Moiz Baig](https://www.dawn.com/authors/8431/mirza-moiz-baig)

 May 19, 2022

*“The court must care to speak and act in ways that allow people to accept its decision on the terms the court claims for them, as grounded truly in principle, not as compromises with social and political pressures having, as such, no bearing on the principled choices that the court is obliged to make.” — Justice O’Connor*

AFTER weeks of deliberation, the Supreme Court [announced its verdict](https://www.dawn.com/news/1690120/article-63-a-sc-says-defecting-lawmakers-votes-will-not-be-counted) in the presidential reference concerning the interpretation of Article 63A of the Constitution. Terming defections “a cancer afflicting the body politic”, the court with a majority of three against two held that a parliamentarian’s vote inconsistent with his parliamentary party with respect to an election to the office of a prime minister or chief minister, a vote of no-confidence, and a finance bill ought to be disregarded. Should the verdict be hailed for performing judicial chemotherapy of the body politic or should the same be critiqued for diluting the separation of powers and for its overreach, however well-intentioned the endeavour may be?

Express command of the Constitution: Article 63A triggers a detailed procedure in the event that a parliamentarian departs from the position espoused by his parliamentary party. The party head, after providing a parliamentarian with an opportunity to show cause for his defection, may issue a declaration of defection and may transmit the same to the presiding officer of their House. The presiding officer subsequently transits such declaration to the chief election commissioner who lays the same before the Election Commission for the latter to decide the same within 30 days.

The spirit of the article was to curb the menace of horse trading and obviate the possibility of political parties being artificially amputated by extraneous actors. Resultantly, the article struck a balance between the right of individual legislators and democratic stability by allowing the former to depart from their party position.

Such legislators, however, defected at the peril of being de-seated and facing their voters so as to allow the electorate to express its support for the act of defection or condemn the same. Nonetheless, in holding that the votes of such legislators may not be counted, the verdict renders Article 63A entirely redundant, thus, substituting the express command of the Constitution with the moral values of the members of the bench.

**Editorial:** [*SC on defections*](https://www.dawn.com/news/1690260/sc-on-defections)

Can the ‘spirit of the Constitution’ prevail over its express command?

The power of dissent: Critical for democracy to deepen, for local grievances to be allayed, and for grassroots leaders to emerge is the need to have political parties with open channels of communication that foster dissent. Precluding members from expressing dissenting views not only erodes the fundamental rights of such members but also arrests the evolution of political parties into robust instruments of democracy and paves the way for party heads to treat political parties as personal fiefdoms, thus, accelerating our descent into fascism.

Recent events have highlighted the perils concomitant with vesting the office of a party head with such unbridled powers and besmirching those who question his policies as morally compromised. Keeping the channels of dissent open allows political parties to deliberate over critical choices, sift through morally and politically questionable choices, foster greater transparency, and increase political participation.

**Read:** [*After SC opinion on Article 63-A, what's the status of Punjab CM election?*](https://www.dawn.com/news/1690136/after-sc-opinion-on-article-63-a-whats-the-status-of-punjab-cm-election)

Judicial overreach: The principle of separation of powers constitutes the cornerstone of our constitutional dispensation. The principle presumes that the chosen representatives of the people, given their proximity to the electorate, are best suited to represent the nation’s aspirations. Judges with security of tenure and sequestered from the public, on the other hand, are entrusted to interpret and apply the law impartially and without prejudice to the sentiments that such interpretation may engender.

Nonetheless, in holding that it was “high time that such a law is placed on the statute book” and observing that such a law is not a “mere slap on the wrist”, the court appears to have arrogated to itself the role of parliament, thus challenging the latter’s monopoly over representing the body politic’s aspirations.

As courts give short shrift to the express command of the Constitution in an attempt to search for the nebulous ‘spirit of the Constitution’, questions emerge as to whether the Constitution is what it says it is or if it is what the court feels it says. Can the ‘spirit of the Constitution’ prevail over its express command? Can the court curb a menace, however abhorrent, when parliament has conspicuously refused to do the same? More importantly, can the court perform chemotherapy to treat what it terms a “cancer afflicting the body politic” even where the tools for such procedure vest with parliament?

As we search for answers to these questions, let us remember that “liberty finds no refuge in the jurisprudence of doubt.”

*The writer is a lawyer.*

**Twitter:** [**@MoizBaig26**](https://twitter.com/MoizBaig26)

*Published in Dawn, May 19th, 2022*