**The neutrality of neutrals**

BY S A L A H U D D I N A H M E D 2022-03-24

IN terms of numbers, Imran Khan has lost the noconfidence vote. You don`t need to count the dissidents in PTI or parse the statements of his allies.

Just listen to the prime minister and his cabinet.

Barely a year ago, while seeking a confidence vote from the Assembly, the prime minister confi.

dently told PTI members, `it is your democratic right to say you are not with Imran Khan. I will respect you` and `if you raise your hand against me, I will go and sit in opposition`. Today, his attorney general argues exercise of this `democratic right` shall destroy democracy itself. His ministers say it amounts to `prostitution` and `pimping`.

Khan, in his turn, swings between warning dissident party members `no one will want to marry your children`, and begging them to return to his paternal embrace. These are not the statements of a party that is winning.

In 2018, Imran Khan won power because of the non-neutrality of those who should have been neutral. Today, his only hope of avoiding ouster remains the non-neutrality of those who should be neutral. It is why he now terms neutrality as a trait of `animals`.

It is in this backdrop one must view the president`s reference to the Supreme Court. In the reference, he asks whether it is possible to pre-emptively de-seat defecting parliamentarians and exclude their `tainted vote` from the count and disqualify them for life. In other words, will the court help PTI wield a stick through which to coerce the loyalty of its MNAs? It is not the first time PTI has sought to use the judiciary in aid of its political objectives.

Last year, apprehensive of adverse results in the Senate elections, the government moved a similar reference. Article 226 of the Constitution provides `[a]ll elections under the Constitution, other than those of the Prime Minister and the Chief Minister, shall be by secret ballot`. Since the Senate elections are held under Article 59 of the Constitution, the ECP declared they would be conducted (as always) through secret ballot. Nonetheless, the attorney general spent 17 days arguing Senate elections were not held under the Constitution and could, therefore, be conducted through open balloting. His arguments evoked the same moral panic.

Allegedly, people were changing loyalties of parliamentarians by offering them Rs20 crore in cash.The eventual opinion of the court was so assiduously ambiguous it allowed both government and opposition to claim success. The ECP also claimed vindication and held elections through secret ballot. Since PTI, despite all, became the largest party in Senate, nothing further was heard about the secrecy of ballots. Nor did we hear any more about the people who had given or received money and if they were prosecuted.

The present reference is equally specious. Article 63-A is crystal clear. Someone who votes or abstains from voting contrary to the directions of his party head in a no-confidence vote may lose his seat (but only if his party head declares him a defector after a hearing and such declaration is confirmed by the ECP). That is all. The Constitution does not say (although it easily could have) his vote will not be counted nor does it term him non-sadig or nonameen. Through the reference, the court is being invited without the benefit of evidence to arrive at a moral judgement about defectors and their motives and use that to add non-existent words to the Constitution. Even otherwise, it stems from a myopic understanding of electoral systems and parliamentary democracy.

Barring the reserved seats, Pakistan has a constituency-based, first-past-the-post (FPTP) electoral system. In such systems, a legislator does not primarily represent his party. He may (or may not) belong to a party but is directly elected by his constituents and represents them. The situation is different in party-list, proportional representation (PR) electoral systems. In those systems, parties are awarded seats in the legislature proportionate to their total votes and they fill those seats with nominees from their party-list. In those systems, there may well be a stronger argument for party loyalty.

But for an elected representative in a constituency-based FPTP system to declare his vote belongs solely to his party-leader is not an act of piety or virtue. It is an abdication of his responsibility to his constituents to exercise his own mind and conscience. It is also a waste of taxpayers` money used to maintain his presence in the Assembly. Thus, in most countries operating this system including the UK, US, Canada and Australia legislators are legally free to cross the floor. Indeed, many politicians (including Churchill, who did so twice) earnedtheir prominence from their willingness to defect on points of conviction.

But, it is argued, these principles cannot be directly applied in Pakistan with its history of horse-trading for sordid motives. It is a frivolous argument. Firstly, trading one`s vote for money or other gratification is a `corrupt practice` under the Election Act 2017. If anyone is proved to have done so, he not only loses his seat but becomes ineligible to contest elections infuture and is liable to threeyear imprisonment. But can all acts of defection by a parliamentarian be automatically equated with `corrupt practice` or `dishonesty`? A parliamentarian may genuinely believe, for example, that passage of a particular budget or amendment to the Constitution or the continuation of a certain prime minister shall be disastrous for his constituents and outweighs his loyalty to the party-leader. Should unelected judges choose courses for elected parliamentarians and tell them what their constituents want? And is it wise to make it constitutionally impossible for a ruling party with a simple majority to ever lose a budgetary vote or a confidence motion? Article 63-A, therefore, treads a sensible middle path between unhindered floor-crossing and unthinking party loyalty. It balances the traditions of constituency-based systems with the peculiar history of Pakistan. You can vote against your party but in the more important matters you may pay a price. The government argues, however, it is morally reprehensible for someone elected on strength of his party`s ticket to turn his back on the party. If so, why does it wish to bar the vote of (and permanently disqualify) members who were elected independently and joined PTI afterwards? Moreover, can anyone actually assert whether a particular constituency was won by candidate X because PTI chose him as their candidate or whether PTI only won that seat because candidate X (and his biradari) chose to join PTI? Who actually owes whom? Constitutions cannot be interpreted on the basis of speculative assumptions. Let political virtues of our representatives be left to the judgement of voters not judges. The writer is a lawyer.