

IN THE SUPREME COURT OF PAKISTAN
(Advisory Jurisdiction)

Reference No.01/2022

**REFERENCE BY THE PRESIDENT OF ISLAMIC
REPUBLIC OF PAKISTAN UNDER ARTICLE 186 OF THE
CONSTITUTION OF PAKISTAN.**

Respectfully sheweth:

In exercise of power conferred under Article 186 of the Constitution of Pakistan, I, Dr. Arif Alvi, President of the Islamic Republic of Pakistan, consider it desirable to obtain the opinion of the Supreme Court of Pakistan on the questions of law of public importance as mentioned hereunder:

“Defection of elected members has many vices. In the first place, if the member has been elected on the basis of a manifesto, or on account of his affiliation with a political party, or on account of his particular stand on a question of public importance, his defection amounts to a clear breach of confidence reposed in him by the electorate. If his conscience dictates to him so, or he considers it expedient, the only course open to him is to resign to shed off his representative character which he no longer represents and to fight a re-election. This will make him honourable, politics clean, and emergence of principled leadership possible.....”

Shafiur Rehman J

**Khawaja Ahmad Tariq Rahim v Federation of Pakistan. PLD
1992 SC 646**

“It will not be out of context to mention that on account of cancerous vice of floor crossings, Pakistan was unable to achieve stability in the polity of the country....”

Ajmal Mian CJ

**Wukala Mahaz Baral Tahafaz Dastoor vs Federation of Pakistan
PLD 1998 SC 1263**

QUESTIONS OF LAW

1. Whether keeping in view the scheme and spirit of the Constitution which enshrines democratic values, customs and norms and provides for parliamentary form of government conducted through the chosen representatives of the people being carriers of **Amanat**, which of the following two interpretations of Article 63A of the Constitution is to be adopted and implemented to achieve the constitutional objective of curbing the menace of defections and purification of the electoral process and democratic accountability namely:
 - (a) Interpretation of Article 63A in a manner that **Khiyanat** by way of defections warrant no preemptive action save de-seating the member as per the prescribed procedure with no further restriction or curbs from seeking election afresh; **or**
 - (b) A robust, purpose oriented and meaningful interpretation of Article 63A which visualizes this provision as prophylactic enshrining the constitutional goal of purifying the democratic process, inter alia, by rooting out the mischief of defection by creating deterrence, inter alia, by neutralizing the effects of vitiated vote followed by lifelong disqualification for the member found involved in such constitutionally prohibited and morally reprehensible conduct;
2. Where a Member engages in constitutionally prohibited and morally reprehensible act of defection, can the member nevertheless claim a vested right to have his vote counted and given equal weightage or there exist or is be **read into the Constitution** restriction to exclude such tainted votes from the vote count?
3. Where a member who could but did not hear the voice of his conscience by resigning from his existing seat in the Assembly and has been finally declared to have committed defection after exhausting the procedure prescribed in Article 63A of the Constitution including appeal to the Supreme Court under Article 63A(5), he can no longer be treated to be sagacious, righteous, non-profligate, honest and ameen and, therefore, stands disqualified for life?
4. What other measures and steps can be undertaken within the existing constitutional and legal framework to curb, deter and eradicate the cancerous practice of defection, floor crossing and vote buying?

FACTS

1. That the questions of law of public importance revolving around interpretation of Article 63A of the Constitution have arisen in the context of the unending malaise of floor crossing and defections that have sullied and damaged the purity of the democratic process in the country for decades. As happened on many occasions in past, the stage is yet again set for switching of political loyalties for all sorts of illegal and mala fide considerations including vote buying which by its very nature rarely leave admissible or traceable evidence. Some of the presently defecting members have even publicly admitted to defection in interviews to the media with evident pride and further commitment to stay engaged in this immoral trade as the prima facie consequence is innocuous while gains in cash and kind may be colossal without any possibility of loss of membership of Parliament for life.
2. That unless this menace is timely and forcefully rooted out, a truly democratic polity shall forever remain an unfilled distant dream and ambition.
3. That the constitutional objective of eradicating the cancer of defection and horse trading which has long evaded the nation can finally be redeemed by a robust and purposive interpretation of the provisions of Constitution, in particular Articles 17, 62 and 63A of the Constitution of Pakistan by this Hon'ble Court in the present proceedings.
4. That it is an indisputably established constitutional principle that the ultimate jurisdiction and authority to interpret the provisions of the Constitution vests in this Hon'ble Court.
5. That as has repeatedly been held by this Hon'ble Court, the Constitution of Pakistan is not a random collection of legal principles but a fundamental normative document which provides a comprehensive scheme for enforcement of fundamental rights of the citizens and democratic governance by the people through their duly elected representatives acting for their welfare rather than enrichment of the members.
6. That Article 17 of the Constitution guarantees to the citizens a fundamental right to form or be member of political parties. In parliamentary democracy,

political parties are the lynchpin and vehicles to translate the desires of the electorate into legislation. The political parties acting as composite units based on common ideology, party discipline, platform and commitment for reform and progress as set out in their respective manifestoes present their candidates to the voters for election from their constituencies.

7. That political parties are the backbone in a parliamentary form of government and are ultimately accountable to the people through periodic elections in accordance with the provisions of the Constitution.
8. That while choosing their representatives for the National and Provincial Assemblies, the voters evaluate different candidates on the basis of political ideology and manifesto of the party to which the candidates belong. They primarily vote for the political parties, which eventually form government at the national and/or provincial level. The credentials of the individual candidate, though important, are rarely the determining factor in this exercise save in those exceptional cases where independent candidates outvote all other candidates including those contesting on party platforms. That still remains a rarity as overwhelmingly it is the party vote bank which propels the majority of the candidates to the Assemblies.
9. That in the scheme of the Constitution the elected members of the Assemblies are not absolutely free agents of their will as such. Having been elected on party ticket, they are bound by party discipline and remain accountable as per the party manifesto. At the same time, these elected members, though elected on party tickets and manifesto, are not mere rubber stamp devoid of any capacity or ability to think and act independently and conscientiously. Each member of the Assembly is ultimately bound by his conscience and when he is compelled to vote or act contrary to his conscience by his party, he must hear the voice of conscience and resign from the membership of the party and the Assembly and seek the mandate of the electorate afresh independently or of any other party ticket. This is the most sublime act an elected member can undertake in the given circumstances.
10. That there is sufficient room for honest and genuine dissent by the elected members on many legislative matters. The Constitution does not completely prohibit members from deviating from party lines on multiple issues. In fact such conduct may occasionally make political parties more

responsive and democratic. However, on certain matters as specified in Article 63A of the Constitution, the freedom of the members to disagree with party head's direction is restrained and circumscribed. This is all the dominant objective for enactment of Article 63A was to root out the curse of horse trading as witnessed historically. The history of legislative efforts to eradicate this from the body politic has been traced in the landmark judgment of the Hon'ble Supreme Court in the case of Wukala Mahaz Baral Tahafaz Dastoor vs Federation of Pakistan PLD 1998 SC 1263.

11. That it is evident from the overall constitutional scheme that defection / floor crossing is a morally reprehensible and destructive act which shake the confidence of the public in the democratic process. Owing to the weak interpretation of Article 63A entailing no prolonged disqualification, such members first enrich themselves and then come back to remain available to the highest bidder in the next round perpetuating this cancer.
12. That the true spirit of the Constitution's anti defection provision could be redeemed by treating the vote of defecting member as a "challenged or disputed vote" liable to be excluded from vote count till the determination of the issue of defection of the voting member in the manner provided in Article 63A of the Constitution.
13. That the concept of "challenged or disputed vote" is a well known concept in law including Sections 86 and 90 of the Elections Act, 2017.
14. That there is presently no specific period of disqualification provided in respect of members found guilty of defection. This Hon'ble Court has observed in many cases that defection or floor crossing is nothing short of cancerous to the entire body politic and it destroys the spirit of democratic governance. Therefore, there can be no valid or cogent reason or justification to treat this cancer as an innocuous and pardonable requiring no more than de-seating of the incumbent and allowing him fresh opportunity to get re-elected soon thereafter.
15. It is submitted that this is precisely what has been happening in the country owing to the ineffective implementation of the constitutional principle enshrined in Article 63A of the Constitution. It may be pointed out that the constitutional qualifications and disqualifications enshrined in Articles 62 and 63 of the Constitution were also lying dormant and honored more in breach till the time that this Hon'ble Court adopted a robust, meaningful

and purpose oriented interpretation of these constitutional qualifications and disqualifications.

16. That if the constitutional disapproval and prohibition against defection is effectively enforced with deterrence for future as well, many such members shall stand disqualified for life under Article 62(1)(f) and will never be able to pollute democratic streams. Such a robust and purpose oriented interpretation of Articles 62 and 63A by this Hon'ble Court would advance a highly desirable constitutional goal by shutting the doors of Parliament for habitual turncoats who have converted the honourable, elevated and trustworthy status of a Member of Parliament or Provincial Assembly into a tradable commodity eternally soliciting highest bidders.
17. That it is submitted that Article 63A itself provides appeal to the Supreme Court. In any case where the apex Court sustains a finding of defection against a particular member, it clearly amounts to a declaration by a Court within the meaning of Article 62(1)(f) entailing lifelong disqualification for those declared as defectors.
18. That mere de-seating from present membership of the Assembly or denying them access to the Assemblies for any shorter duration especially close to the end of the terms of the Assembly would not really deter such members reared in the culture of shifting loyalties for self enrichment. They would be ready to surrender their existing seats for shorter duration if the gains of defection outweigh the benefits of retaining their membership for shorter duration. The true deterrence would only come where their tainted vote is not counted and they are disqualified for longer duration. Indeed for true and meaningful eradication of horse trading, nothing short of life disqualification would have desirable effect.
19. That only those who learn lessons from their mistakes can progress while the complacent are doomed. It was barely a year ago in the wake of elections for the Senate that compelling evidence in the form of audit and video recordings showing horse trading emerged leaving the identities of perpetrators in no doubt yet nothing meaningful has been done in that respect till date.
20. That if appropriate steps had been taken earlier to counter this menace of vote buying, the present marketplace where loyalties of members of the Assembly are being openly traded, procured on a larger scale for colossal

amount could have been avoided. It is submitted that a robust interpretation of Articles 62 and 63A of the Constitution by this Hon'ble Court at this critical juncture would not only salvage the representative institutions but also the democratic process itself and restore the faith of the people in democracy. There appear no alternate forum for saving the people's trust from being betrayed so blatantly for such foul and malicious considerations.

21. It is submitted none of the many disqualifications mentioned in Article 63 resulting in disqualification for a specified period is more damaging, pervasive and reprehensible than the return of a declared and habitual defector to parliament again and again. While all other disqualifications enumerated in Article 63 have limited and measurable consequence, the damage caused to democratic process and polity by defectors is not only immeasurable but constantly recurring as one defection rewarded by fresh election is a self feeding menace. Therefore, the most suitable and appropriate disqualification for a declared defector is disqualification for life as provided under Article 62(1)(f). Such members must never be allowed to return to Parliament nor their tainted votes be counted in any constitutional or democratic exercise.

In view of the foregoing as well as the submissions during hearing of the title Reference, this Hon'ble Court may be pleased to answer the questions of law so as to purify and strengthen the democratic process worthy of people's respect and trust and forever eradicate the menace of defections.

Dr. Arif Alvi
President,
Islamic Republic of Pakistan

Dated: March _____, 2022