An Uncounted Confidence Vote

The Risks of the Pakistani Supreme Court's Anti-Floor-Crossing Stance Become Evident

Andras Csontos

05.08.2022 doi: 10.17176/20220805-181922-0

On 22 July, the Provincial Assembly of the Punjab, Pakistan's largest province, convened to elect a new Chief Minister. Former Prime Minister Imran Khan's Pakistan Tehreek-e-Insaf (PTI) had come to an agreement with the Pakistan Muslim League – Quaid-e-Azam Group (PML-Q) (a minor party holding the balance in the legislature between the two main political blocks) to support the candidature of a senior member of the latter, Assembly Speaker Chaudhry Pervez Elahi. The two parties' combined strength gave Elahi a majority of 186 votes, defeating the incumbent Hamza Shehbaz Sharif of the Pakistan Muslim League – Nawaz (PML-N), who garnered 179. The PML-N is the largest party in the federal government headed by Hamza's father, Prime Minister Shehbaz Sharif.

However, Deputy Speaker Dost Mohammad Manzari announced a result of 176 for Elahi and 179 for Hamza, keeping the latter in office despite his clear lack of majority. Manzari arrived at this outcome by refusing to count the PML-Q's ten votes, based on a letter to the chair by party president Chaudhry Shujaat Hussain stating that he had "issued directions to all my provincial members to cast their votes in favour of [...] Hamza". The assembly was promptly prorogued.

The Supreme Court of Pakistan convened on the evening of 22 July to hear Elahi's challenge to the result and issued an interim order limiting Hamza's powers. In a final decision delivered on the 22nd,[1] it quashes the deputy speaker's ruling, restoring the PML-Q legislators' votes and confirming Elahi as Chief Minister. The Court acted with alacrity and impartiality, which compares favourably to its past handling of political instability. A presiding officer thwarting the legislative majority from recalling the executive, the Court stepping in to avert an undemocratic outcome and enabling the change in government – at first glance, this episode seems to simply be a farcical echo of April's constitutional crisis, down to its procedural details.

This time, however, the Court itself played the primary role in bringing about the possibility of such a situation. Punjab's political turmoil is the first trial run of the Court's drastic reconfiguration of Pakistan's political regime with a judgement this May that completely eliminates legislators' ability to vote against the party line in confidence matters. Departing from essential principles of parliamentarism, the Court has incorporated the notion of executives remaining in office without the confidence of the House into Pakistan's constitutional framework. The difficulties that already have arisen from working this party-centric parliamentarism demonstrate its dangers for democratic consolidation and underline the need for the Court to reconsider its position.

The Demolition of Governmental Accountability by Anti-Defection Provisions

The current chain of events was put into motion in March by a reference to the Supreme Court by President Arif Alvi – at the behest of Imran Khan's government, then fearing desertion by some PTI legislators – for an interpretation of the constitution's "anti-defection clause" (Article 63A). This provision stipulates that legislators who switch parties or defy the party line in votes on confidence or budgetary matters and constitutional amendments lose their seats. Such restrictions on the independence of legislators are already concerning, as they limit the accountability of

[1] *Chaudhary Parvez Elahi v. Deputy Speaker, Provincial Assembly of Punjab and Ors.*, Supreme Court, Constitution Petition 22/2022. The detailed reasons for the present "Short Order" will be published later.

the executive to parliament. In the *Reference* case, however, the PTI government sought a further, massive expansion of the scope of Article 63A. First, they advanced the view, without any support in the text and all but unprecedented in any parliamentary democracy, that votes cast by dissenting legislators should be nullified. (The original version of the constitution included a much more limited nullification provision, with a sunset clause; no other country ever seems to have enacted such a provision.) Second, they argued that an *ex post* disqualification from a legislative seat under Article 63A should constitute one of the grounds for an *ex ante* disqualification from standing for election under Article 62 of the Constitution.

The feasibility of this argument – in other anti-defection jurisdictions, the validity of votes cast by defectors remains uncontroversial – is the product of an extreme hostility to floor-crossing on the part of the judiciary. Pakistan's courts have come to conceive of floor-crossing as synonymous with corrupt "horse-trading" and barely consider the possibility that legislators might dissent for legitimate reasons. This view, though reflecting recent experience, has been entrenched with the notion that defection is "un-Islamic" as a failure to honour one's commitments – problematic both for the needless invocation of religion, and the designation of parties as the highest objects of political commitment. Finally, the judiciary considers floor-crossing the main reason for Pakistan's inability to achieve political stability and democratic consolidation. This disregards the central role played by the country's military-bureaucratic establishment and successive heads of state in purposely wrecking the democratic process, until the 2000s without judicial opposition.

This philosophy has manifested itself since the 1990s in a string of case law consistently favourable to anti-defection provisions, facilitating the erosion of governmental accountability and the independence of legislators.[2] In its ruling delivered in late May, the majority of the bench hearing the *Reference* case chose to take this development to an extreme and came down largely in favour of the PTI position.[3] Article 63A is to be "interpreted in a purposive and robust manner" with a view to achieving an "ideal situation" in which "no member of a Parliamentary Party ever has to be declared a defector". It is described as guaranteeing a "fundamental right of political parties [... to] cohesion"; the Court goes on to hold, disturbingly, that in cases of "conflict between fundamental rights of the collectivity [...] and an individual member thereof it is the former that must prevail". Votes cast against party directions in matters covered by Article 63A are to be disregarded. While the Court refrained from declaring defectors disqualified from future elections, it strongly encouraged the legislature to do so.

The judgement takes the already pernicious erosion of governments' accountability by anti-defection clauses to a terminal conclusion. It gives party leaders a legal monopoly on the votes of their legislators in the most crucial matters, reducing the number of those with an effective right to vote to a handful. Absent sufficient resignations, the motion of no confidence completely ceases to exist as a legal possibility in the case of single-party majority governments. (The dissenting opinions of Justices Miankhel and Mandokhail underline other flaws in the majority judgement as well.) The Court has demolished a central component of parliamentarism, taking Pakistan closer to a hybrid of presidential and parliamentary government combining elements of executive power from both, but lacking the accountability mechanisms of either.

Procedural Anarchy in Government Formation After the Reference Case

More immediately, this shift has also compounded Pakistan's political instability with legal uncertainty by upending established procedures relating to changes of government without offering a clear

[2] Most importantly, *Humayun Saifullah Khan v. Federation of Pakistan*, PLD 1990 SC 599; *Wukala Mahaz Barai Tahafaz Dastoor and Anr. v. Federation of Pakistan and Ors.*, PLD 1998 SC 1263; *District Bar Association, Rawalpindi v. Federation of Pakistan*, PLD 2015 SC 401; *Sardar Sher Bahadar Khan v. Election Commission of Pakistan*, PLD 2018 SC 97.

[3] *Reference by the President of Islamic Republic of Pakistan under Article 186 of the Constitution, seeking interpretation of Article 63-A of the Constitution*, Supreme Court, Reference No. 1 of 2022, decided (by Short Order) 17.05.2022.

replacement. The Punjab saga is the first instance of this. The spring's political manoeuvring on 16 April resulted in the fall of the PTI government in the province and the election of Hamza Sharif with the support of a contingent of twenty-five dissident PTI legislators. When the *Reference* ruling arrived, extensive litigation began to adjudicate the application of the changed legal circumstances to this situation.

The Lahore High Court ruled on 30 June that the nullification of defectors' votes was applicable retrospectively to Hamza's election. With the dissenting votes excluded, no candidate had reached an absolute majority; in line with the constitutional requirements, the Court ordered a second round. The Supreme Court delayed this for weeks, until after the by-elections in the constituencies of twenty of the disqualified defectors. (The remaining five held reserved seats for non-Muslims and women; the procedure for filling their seats also required litigation.) It is uncertain whether this is controlling precedent for future elections. Will the assembly need to adjourn until by-elections have been completed, necessitating months of interim administration? Alternatively, will a second round take place with a simple plurality requirement after the exclusion of the defectors – possibly producing the very outcome that might have occurred otherwise, but with extra uncertainty due to looming by-elections?

Presiding officers, whose roles were previously well-defined and limited, have been invested with crucial discretionary authority – a dangerous development in a political landscape where their impartiality is uncertain. As Reema Omer points out, in second-round elections the number of those present and voting, which in turn defines the necessary majority, has become open to interpretation in certain cases. Some presiding officers are likely to claim a power not merely to disregard dissenting votes, but to automatically count a tally for each party corresponding to its strength in the assembly. Uncertainty remains about the legal consequences of indicative "letters to the chair" in the absence of direct instructions to legislators.

The central issue in the Punjab election was whether the leader of the parliamentary party or the "Party Head" was entitled to issue binding voting directions to legislators. The *Reference* case stuck closely to the text of Article 63A (1) (b), which invokes "direction[s] issued by the Parliamentary Party". However, in the past the Supreme Court had repeatedly treated the role of the "Party Head" extremely broadly, describing it as "central, pivotal and decisive [...] within the party [...] and [...] the Parliamentary Party, which he directly controls". Deputy Speaker Manzari thus faced a genuine dilemma when the entirety of the PML-Q's parliamentary party came into conflict with its president.

The Court's Way Out of Legal Uncertainty

In *Elahi v. Deputy Speaker*, the Supreme Court continued to follow a textualist approach and resolved that dilemma in favour of the parliamentary party. This outcome is far from satisfactory. If the guiding philosophy of the court's anti-defection case law is to maintain stable governments corresponding to the will of the voters on election day, the Court has severely undermined it by generating potential for conflict between parliamentary and organisational leaders, the former of whom might be non-entities lacking in democratic legitimacy. The reasons the Court cited in dismissing some of its earlier pronouncements on the matter are contestable. Finally, without explanation, it shreds the rationale for an earlier holding that disqualifications on public office must apply to the leadership of political parties due to the latter's control over the parliamentary party through Article 63A. This was the basis for Nawaz Sharif's disqualification as president of the PML-N – one of the most controversial political decisions of the Court, now discredited.

The judiciary's efforts to protect political stability at the expense of accountability – dangerous to begin with – have led Pakistan into a damaging quagmire. Rather than risking years of acrimonious litigation over changes in government, the judiciary should take the opportunity of the upcoming review hearings on the *Reference* case to reconsider its misguided approach to floor-crossing and restore the traditional mechanisms of parliamentary democracy.

ABOUT THE AUTHOR

Andras Csontos
Andras Csontos is a Politics & Government major at Sciences Po Paris and the London School of Economics.

SUGGESTED CITATION

Csontos, Andras: An Uncounted Confidence Vote: The Risks of the Pakistani Supreme Court's Anti-Floor-Crossing Stance Become Evident, Verfassungsblog, 05.08.2022, doi: 10.17176/20220805-181922-0.

Licensed under CC BY-SA 4.0.

Langzeitarchiviert bei IntRechtDok unter: doi.org/10.17176/20220805-181922-0.