

JUDGMENT

MAZHAR ALAM KHAN MIANKHEL, J.-- I remain kept on waiting for the majority judgment by my learned brother Judges (Umar Ata Bandial, C.J., Ijaz ul Ahsan and Munib Akhtar, JJ.) but the same has not been delivered till date. I am going to be superannuated on 13.07.2022; therefore, I decided to release my judgment (dissent note) comprising reasons in support of my short order dated 17.05.2022 (**PLD 2022 SC 488**), accordingly.

2. Briefly, Dr. Arif Alivi, the Hon'ble President of Islamic Republic Pakistan ("**the President**") has filed this reference under Article 186 of the Constitution of the Islamic Republic of Pakistan ("**the Constitution**") for the opinion of this Court on the following 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 to 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?"
3. We have heard the learned counsel for the parties and have gone through the available record.

Historical Background of Advisory jurisdiction

4. The concept of advisory jurisdiction of the Supreme Court goes back and originates from section 213 of Government of India Act, 1935, under which Governor-General could send a question of law, which was of such a nature and of such public importance to the Federal Court for consideration, if it was considered by him to be expedient to do so. After partition, article 162 of the first Constitution 1956 provided the advisory jurisdiction of the Supreme Court to enable the President to obtain opinion from the Supreme Court of Pakistan if it appeared to him that question of law has arisen or is likely to arise, which is of such a nature and of such public importance. Thereafter, the article 59 of the Constitution 1962 provided that the President, if he considers desirable to obtain the opinion on any question' of law which he considers of public importance he may refer the question to the Supreme Court for consideration. Similarly, the article 186 of the Constitution 1973 provides the advisory jurisdiction of the Supreme Court. The advisory jurisdiction of the Supreme Court is different and distinct from the jurisdiction under Articles 184 and 185 of the Constitution. Therefore, it would not be fair to say that the opinion expressed by this Court on Presidential Reference under Article 186 of the Constitution has no binding. Reference may be made to judgment reported as Reference No.2 of 2005 by the President of Pakistan (PLD 2005 Supreme Court 873).

5. No doubt, there was a need for introducing an anti-defection provision in the Constitution and it was considered necessary to do so because of a desire to strengthen and bring about stability in our parliamentary democracy. The purpose behind this was to regulate the party discipline in the business of parliament.

This exercise, initially, was done by introducing Article 63A in to the Constitution by way of the Constitution (Fourteenth Amendment) Act, 1997. Till 2010, defection was to be attracted only by, a member who, *inter alia*: "1(b) votes or abstains from voting in the House contrary to any direction issued by the Parliamentary Party to which he belongs, in relation to, (i) election of the Prime Minister or the Chief Minister; or (ii) a vote of confidence or a vote of no-confidence; or (iii) a Money Bill." For ready reference, the provisions of the same are reproduced herein below:

"63A(1). Disqualification on grounds of defection, etc.--*If a member of a Parliamentary Party composed of a single political party in a House-*

- (a) *resigns from membership of his political party or joins another Parliamentary Party; or*
- (b) *votes or abstains from voting in the House contrary to any direction issued by the Parliamentary Party to which he belongs, in relation to--*
 - (i) *election of the Prime Minister or the Chief Minister; or*
 - (ii) *a vote of confidence or a vote of no-confidence; or*
 - (iii) *a Money Bill or a Constitution (Amendment) Bill;*

he may be declared in writing by the Party Head to have defected from the political party, and the Party Head may forward a copy of the declaration to the Presiding Officer and the Chief Election Commissioner and shall similarly forward a copy thereof to the member concerned:

Provided that before making the declaration, the Party Head shall provide such member with an opportunity to show cause as to why such declaration may not be made against him.

Explanation. - *"Party Head" means any person, by whatever name called, declared as such by the Party.*

(2) *A member of a House shall be deemed to be a member of a Parliamentary Party if he, having been elected as a candidate or nominee of a political party which constitutes the Parliamentary Party in the House or, having been elected otherwise than as a candidate or nominee of a political party, has become a member of such Parliamentary Party after such election by means of a declaration in writing.*

(3) *Upon receipt of the declaration under clause (1), the Presiding Officer of the House shall within two days refer, and in case he fails to do so it shall be deemed that he has referred, the declaration to the Chief Election Commissioner who shall lay the declaration before the Election Commission for its decision thereon confirming the declaration or otherwise within thirty days of its receipt by the Chief Election Commissioner;*

(4) *Where the Election Commission confirms the declaration, the member referred to in clause (1) shall cease to be a member of the House and his seat shall become vacant.*

(5) Any party aggrieved by the decision of the Election Commission may, within thirty days, prefer an appeal to the Supreme Court which shall decide the matter within ninety days from the date of the filing of the appeal.

(6) Nothing contained in this Article shall apply to the Chairman or Speaker of a House.

(7) For the purpose of this Article,

(a) "House" means the National Assembly or the Senate, in relation to the Federation; and a Provincial Assembly in relation to the Province, as the case may be;

(b) "Presiding Officer" means the Speaker of the National Assembly, the Chairman of the Senate or the Speaker of the Provincial Assembly, as the case may be.

(8) Article 63A substituted as aforesaid shall come into effect from the next general elections to be held after the commencement of the Constitution (Eighteenth Amendment) Act, 2010:

Provided that till Article 63A substituted as aforesaid comes into effect the provisions of existing Article 63A shall remain operative."

6. The vires of this article were challenged before this Court in the case of Wukala Mahaz Barai Tahafaz Dastoor v. Federation of Pakistan (PLD 1998 Supreme Court 1263) and a 7-member Bench (by Majority 6-1) of this Court held that "the Article 63A of the Constitution is *intra vires*" of the Constitution as it addressed a prevalent malaise and was, therefore, helpful in furthering the principles of democracy. Later on, some changes brought about in Article 63A by the Constitution (eighteenth Amendment) Act, 2010 i.e. in clause (1)(b)(iii), the words "or a Constitutional (Amendment) Bill" have been added after the words "a Money Bill". Secondly, "a party head" has been invested with the power to make a declaration that a parliamentarian has defected. A party head has been described in Article 63A as "any person, by whatever name called, declared as such by the party". Again, newly amended Article 63A of the Constitution came for consideration before this Court in the case of District Bar Association, Rawalpindi v. Federation of Pakistan (PLD 2015 Supreme Court 401), the Court, while dismissing all the Constitutional Petitions challenging the validity of Eighteenth Amendment, held that the changes brought in Article 63A of the Constitution by the Eighteenth Amendment appears to be reasonable and also necessary for the maintenance of party discipline, stability and smooth functioning of democracy in Parliament.

7. Now again this Article is under consideration before this Court through the advisory jurisdiction. I am fully aware of the legal position that the opinion by this Court on the reference by the President is not a decision between the parties but the Court, while answering the reference, undertakes an extensive judicial exercise particularly when there is a question of interpretation of a constitutional provision is involved. For this reason, it has been given esteemed utmost by all the organs of the State. Our Constitution is a great social document, almost revolutionary in its aim of transforming a medieval, hierarchical society into a modern, egalitarian democracy. Its provisions can be comprehended only by a spacious, social-science approach, not by pedantic, traditional legalism. When a country is endowed with a Constitution, there is an accompanying promise which stipulates that every member of the country right from its citizens to the high constitutional functionaries must idolize the constitutional fundamentals. This duty imposed by the Constitution stems from the fact that the Constitution is the indispensable foundational base that functions as the guiding force to protect and ensure that the democratic setup promised to the citizenry remains unperturbed. The constitutional functionaries owe a greater degree of responsibility towards this eloquent instrument for it is from this document that they derive their power and authority and, as a natural corollary, they must ensure that they cultivate and develop a spirit of constitutionalism where every action taken by them is governed by and is in strict conformity with the basic tenets of the Constitution.

Interpretation of provision of Constitution

8. The democratic nature of our Constitution and the paradigm of representative participation are undoubtedly comprised in the "spirit of the Constitution". The spirit of the Constitution has its own signification. As I have used the words "spirit of the Constitution", it becomes my obligation to clarify the concept pertaining to the same. The canon of constitutional interpretation that glorifies the democratic concepts lays emphasis not only on the etymology of democracy but also embraces within its sweep a connotative expansion so that the intrinsic and innate facets are included. Thus, while interpreting the provisions of the Constitution, the safe and most sound approach is to read the words of the Constitution in the light of the avowed purpose and spirit of the

Constitution so that it does not result in an illogical outcome which could have never been the intention of the Constituent Assembly or of the Parliament while exercising its constituent power. Therefore, a Court, while adhering to the language employed in the provision, should not abandon the concept of the intention, spirit, the holistic approach and the constitutional legitimate expectation which combinedly project a magnificent facet of purposive interpretation. The Court should pose a question to itself whether a straight, literal and textual approach would annihilate the sense of the great living document which is required to be the laser beam to illumine. If the answer is in the affirmative, then the courts should protect the sense and spirit of the Constitution taking aid of purposive interpretation as that is the solemn duty of the courts as the final arbiters of the Constitution. It is a constitutional summon for performance of duty. The stress has to be on changing society, relevant political values, absence of any constitutional prohibition and legitimacy of the end to be achieved by appropriate means.

9. The task of interpreting an instrument as dynamic as the Constitution assumes great import in a democracy. The Courts are entrusted with the critical task of expounding the provisions of the Constitution and further while carrying out this essential function, they are duty bound to ensure and preserve the rights and liberties of the citizens without disturbing the very fundamental principles which form the foundational base of the Constitution. Although, primarily, it is the literal Rule which is considered to be the norm which governs the courts of law while interpreting statutory and constitutional provisions, yet mere allegiance to the dictionary or literal meaning of words contained in the provision may, sometimes, annihilate the quality of poignant flexibility and requisite societal progressive adjustability. Such an approach may not eventually subserve the purpose of a living document.

10. The most important aspect of modern constitutional theory is its interpretation. Constitutional law is a fundamental law of governance of a politically organized society and it provides for an independent judicial system which has the onerous responsibility of decisional process in the sphere of application of the constitutional norms. The resultant consequences do have a vital impact on the well-being of the people. The principles of constitutional interpretation, thus, occupy a prime place in the method of

adjudication. In bringing about constitutional order through interpretation, the judiciary is often confronted with two propositions -- whether the provisions of the Constitution should be interpreted as it was understood at the time of framing of the Constitution unmindful of the circumstances at the time when it was subsequently interpreted or whether the constitutional provisions should be interpreted in the light of contemporaneous needs, experiences and knowledge. In other words, should it be historical interpretation or contemporaneous interpretation. In this regard, I think it appropriate to have a bird's eye view as to how the jurists and academicians of different jurisdictions have contextually perceived the science of constitutional interpretation. The theory of historical perspective found its votary in Chief Justice Taney who categorically stated in *Dred Scott v. Sanford* 60 U.S. (19 How.) 393 (1857) that as long as the Constitution continues to exist in the present form, it speaks not only in the same words but also with the same meaning and intent with which it spoke when it came from the hands of the framers. Similar observations have been made by Justice Sutherland in *Home Building and Loan Association v. Blaisdell*, 290 U.S. 398 (1934). Propagating a different angle, Chief Justice Marshall in *McCulloch v. Maryland* 17 US (4Wheat) 316 (1819) has observed that the American Constitution is intended to serve for ages to come and it should be adopted to various crises of human affairs. Justice Hughes in *State v. Superior Court* (1944) at 547 observed that the constitutional provisions should be interpreted to meet and cover the changing conditions of social life and economic life. Justice Holmes in *Gompers v. US* 233 (1914) observed that the meaning of the constitutional terms is to be gleaned from their origin and the line of their growth. Justice Cardozo once stated in *Benjamin N. Cardozo, The Nature of the Judicial Process, Yale University Press, 1921* that a Constitution states or ought to state not Rules for the passing hour but principles for an expanding future.

11. It would be interesting to note that Justice Brandeis of the Supreme Court USA in *Burnett v. Coronado Oil and Gas Co.*, 285 US (1932) tried to draw a distinction between interpretation and application of constitutional provisions. The Constitution makers in their wisdom must have reasonably envisaged the future needs and attempted at durable framework of the Constitution. They must not

have made the Constitution so rigid as to affect the future. There is a difference between modification and subversion of the provisions of the Constitution through interpretation. The view is that there is sufficient elasticity but fundamental changes are not envisaged by interpretation. Thus, there is a possibility of reading into the provisions certain Regulations or amplifications which are not directly dealt with. There is yet another angle that the libertarian's absolutism principle never allows for restrictions to be read into the liberties which are not already mentioned in the Constitution.

12. Similarly, Dickson, J., in Hunter v. Southam Inc [1984] 2 SCR 145, rendering the judgment of the Supreme Court of Canada, expounded the principle pertaining to constitutional interpretation made the important observation that, *"the task of expounding a constitution is crucially different from that of construing a statute. A statute defines present rights and obligations. It is easily enacted and as easily repealed. A constitution, by contrast, is drafted with an eye to the future. Its function is to provide a continuing framework for the legitimate exercise of governmental power and, when joined by a Bill or a Charter of Rights, for the unremitting protection of individual rights and liberties. Once enacted, its provisions cannot easily be repealed or amended. It must, therefore, be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers. The judiciary is the guardian of the constitution and must, in interpreting its provisions, bear these considerations in mind. Professor Paul Freund expressed this idea aptly when he admonished the American courts 'not to read the provisions of the Constitution like a last will and testament lest it become one'."*

13. The Supreme Court of India in Kalpana Mehta and Ors. vs. Union of India (UOI) and Ors. (AIR 2006 SC 3127) held that, *"it may be desirable to give a broad and generous construction to the Constitutional provisions, but while doing so the rule of "plain meaning" or "literal" interpretation, which remains "the primary rule", has also to be kept in mind. In fact, the rule of "literal construction" is the safe rule unless the language used is contradictory, ambiguous, or leads really to absurd results."* Also, In Manoj Narula v. Union of India (2014) 9 SCC 1, the Supreme Court of India, while interpreting Article 75(1) of the Constitution, opined that reading of implied limitation to the said provision would tantamount to prohibition or adding a

disqualification which is neither expressly stated nor impliedly discernible from the provision. Eventually, the majority expressed that when there is no disqualification for a person against whom charges have been framed in respect of heinous or serious offences or offences relating to corruption to contest the election, it is difficult to read the prohibition into Article 75(1) by interpretative process or, for that matter, into Article 164(1) to the powers of the Prime Minister or the Chief Minister in such a manner. That would come within the criterion of eligibility and would amount to prescribing an eligibility qualification and adding a disqualification which has not been stipulated in the Constitution. In the absence of any constitutional prohibition or statutory embargo, such disqualification cannot be read into Article 75(1) or Article 164(1) of the Constitution. In Padmasundara Rao (dead) and Ors. v. State of Tamil and Ors.(2002) **255 ITR 147 (SC)**, the Supreme Court of India, while interpreting a provision, held that, "*the Court only interprets the law and cannot legislate it. If a provision of law is misused and subjected to the abuse of the process of law, it is for the legislature to amend, modify or repeal it, if deemed necessary.*"

14. This Court has had almost similar approach regarding interpretation of a Constitutional provision. As in Al-Jehad Trust v. Federation of Pakistan (PLD 1996 Supreme Court 324), it was held that, "*...a written Constitution, is an organic document designed and intended to cater the need for all times to come. It is like a living tree, it grows and blossoms with the passage of time in order to keep pace with the growth of the country and its people; Thus, the approach, while interpreting a Constitutional provision should be dynamic, progressive and oriented with the desire to meet the situation, which has arisen, effectively. The interpretation cannot be a narrow and pedantic. But the Court's efforts should be to construe the same broadly, so that 'it may be able to meet the requirement of ever changing society. The general words cannot be construed in isolation but the same are to be construed in the context in which, they are employed. In other words, their colour and contents are derived from their context.*" More importantly, this Court in Begum Nusrat Ali Gonda V. Federation of Pakistan and others (PLD 2013 Supreme Court 829) culled out the following basic principles for the interpretation of Constitution:

- a. That the entire Constitution has to be read as an integrated whole;
- b. No one particular provision should be so construed as to destroying the other, but each sustaining the other
- c. provision. This is the rule of harmony, rule of completeness and exhaustiveness;
- d. Interpretation to be consistent with the Injunctions of Islam;
- e. It must always be borne in mind that it is only where the words are not clear, or the provision in question is ambiguous, that is, it is fairly and equally open to diverse meanings, that the duty of interpretation arises;
- f. Intention to be gathered from the language of the enactment, otherwise known as the 'plain meaning rule';
- g. It is elementary rule of construction that it is to be assumed that the words and phrases of technical legislation are used in their technical meaning, if they have acquired one, and otherwise in their ordinary meaning. Critical and subtle distinctions are to be avoided and the obvious and popular meaning of the language should, as a general rule, be followed;
- h. **It is a cardinal rule of construction of statutes that no words are to be added or omitted or treated as surplus age or redundant;**
- i. That the words of written Constitution prevail over all unwritten conventions, precedents and practices to the contrary; and
- j. Legislative history is relevant for interpreting constitutional provisions.

Emphasis supplied.

15. The making of Article 63A as well as other provision of the Constitution, in my view, is impelled by the trinity of the preambular vision that the Constitution makers gave to this country. Drafting the text of a Constitution or a Statute is not just an art but is a skill. It is not disputed that a good legislation is that the text of which is plain, simple unambiguous precise and there is no repetition of words or usage of superfluous language. The skill of a draftsman in the context of drafting a Constitution or a Statute lies in brevity and employment of appropriate phraseology wherein superfluous words or repetitive words are avoided. It appears that the aforesaid principle was kept in mind while drafting the provisions of Article 63A. Moreover, the authority to exercise judicial power is inherent in the Superior Courts only to interpret, construe and apply the law as a result of a system of division of powers. One cannot stretch jurisdiction and power of the Supreme Court beyond the known Constitutional limits. Clause (2) of Article 175 of the Constitution says that no Court shall have any jurisdiction save as is or may be conferred on it by the Constitution or by or under any law as held in State v. Zia-ur-Rehman (PLD 1973 SC 49). One of the

principles of Constitutional interpretation enunciated was, that the Courts are creatures of the Constitution, they derive their powers and jurisdiction from the Constitution and must confine themselves within the limits set by Constitution. Reference may be made to Mrs. Shahida Zahir Abbasi and 4 Others vs. President of Pakistan (PLD 1996 Supreme Court 632).

16. The Constitution should be read as a whole giving every part thereof meaning consistent with the other provision of the Constitution. As far as possible each provision of the Constitution should be construed so as to harmonize with all the others. But, in applying these rules we however have to remember that to harmonies not to destroy. In the interpretation of the Constitutional provision the courts always presume that the legislature inserted every part thereof for a purpose and the legislative intention is that every part of the statue should have effect. An argument founded on what is claimed to be the spirit of the Constitution is always attractive, for it has a powerful appeal to sentiment and emotion; but a court of law has to gather the spirit of the Constitution from the language of the Constitution. What one may believe or think to be the spirit of the Constitution cannot prevail if the language of the Constitution does not support that view.

17. By applying the above quoted as well as discussed principles of interpretation of a Constitutional provision, I would now proceed to determine the questions as referred to us by the President through this Reference for opinion.

Question No.1

18. From a bare perusal of the reference, it transpires that the same is founded on the preconceived notion that every member who abandons his party or who disagree with the desire of the party head particularly in matters as enumerated under clause 1(b) of Article 63A of the Constitution would be dishonest and has committed *Khyanat* for some monetary gain or material consideration. Any interpretation or opinion on this presumption would be destructive of intention of the Constitution makers. Moreover, the argument on behalf of the President that 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 is not tenable under the law and is overruled, being misconceived.

19. Moreover, Article 63A also provides penal consequences of defection in the terms that if the declaration of defection made by the Party Head against a member is confirmed by the Election Commission, the member so declared shall cease to be a member of the House and his seat shall become vacant by virtue of sub-para 4 of the Article 63A. Any party aggrieved by the decision of the Election Commission may prefer an appeal to this Court under sub-para 5 of Article 63A supra see Imran Khan Niazi v. Ayesha Gulalai (2018 SCMR 1043). It is a well-settled principle of interpretation that a penal provision should be construed strictly and its scope should not be extended unless it is so required by the clear language used therein or by necessary intendment. Reference here may be made to the case of Wukala Mahaz Barai Tahafaz Dastoor v. Federation of Pakistan and others (PLD 1998 Supreme Court 1263). For this reason, a member, cannot be held disqualified lifelong on the ground of his defection under Article 63A of the Constitution merely through the process of interpretation as proposed or expected by the President. It would amount to re-write or read in "a penal" phrase in a Constitutional provision and would also affect the other provisions of the Constitution. It would not be out of context to state that the Courts only interpret the law and cannot legislate it. If a provision of law is misused and subjected to the abuse of the process of law, it is for the legislature to amend, modify or repeal it, if deemed necessary. (See Padmasundara Rao (dead) and Ors. v. State of Tamil and Ors.(2002) 255 ITR 147 (SC)). It is also to be borne in mind that Constitution envisages the trichotomy of powers amongst three organs of the State, namely the legislature, executive and the judiciary. The legislature is assigned the task of law making, the executive to execute such law and the judiciary to interpret the laws. None of the organs of the State can encroach upon the field of the others. Reference may be made to the cases of Jurists Foundation v. Federal Government (PLD 2020 SC 1), Executive District Officer (Revenue) v. Ijaz Hussain (2011 SCMR 1864), Dr. Mobashir Hassan v. Federation of Pakistan (PLD 2010 SC 265), Sindh High Court Bar Association's case (PLD 2009 SC 879), Nazar Abbas Jaffri v. Secy: Government of the Punjab (2006 SCMR 606), Syed Zafar

Ali Shah v. General Pervez Musharraf (PLD 2000 SC 869), Liaquat Hussain v. Federation of Pakistan (PLD 1999 SC 504), Mahmood Khan Achakzai v. Federation of Pakistan (PLD 1997 SC 426), Government of Balochistan v. Azizullah Memon (PLD 1993 SC 341), Federation of Pakistan v. Saeed Ahrnaci Khan (PLD 1974 SC 151), State v. Zia ur Rahman (PLD 1973 SC 49), Smt. Indra Nehru Ghandi v. Raj Narain (AIR 1975 SC 2299) and Minerva Mills Ltd. v. Union of India (AIR 1980 SC 1789). The question No.1 is, therefore, answered in negative.

Question No.2

20. Coming to the question No.2 of the reference. It revolves around the consequences of defection on the vote being cast by the defector. The learned counsel for the President forcefully asserted that where a member engages in constitutionally prohibited and morally reprehensible act of defection he cannot claim a vested right to have his vote counted and given equal weightage, and as such his vote should not be counted. Article 55 of the Constitution contemplates that all the decisions of the National Assembly shall be taken by majority of the members present and voting. Voting is formal expression of will or opinion by the person entitled to exercise the right on the subject or issue in question. In **Black's Law Dictionary** by Henry Campbell Black, M.A (Sixth Edition) at p.1576, the term vote is explained as, "*the expression of one's will, preference, or choice, formally manifested by a member of a legislative or deliberative body, or of a constituency or a body of qualified electors, in regard to the decision to be made by the body as a whole upon any proposed measure or proceeding or in passing laws, rules or regulations, or the selection of an officer or representative*". Right to vote means right to exercise the right in favour of or against the motion or resolution. Such a right implies right to remain neutral as well. For this, I, with respect, do not agree with the majority opinion 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 63A cannot be counted and must be disregarded, and this is so regardless of whether the Party Head, subsequent to such vote, proceeds to take, or refrains from taking, action that would result in a declaration of defection. I am utterly unable to understand how the vote (being cast contrary to the direction of the Parliamentary Party in a House), on the basis of which he would be proceeded against for defection,

would not be counted in the absence of an express provision of the Constitution. If, for the sake of arguments, the Article 63A is interpreted in the way as suggested by the President then any formal session of House for voting in the matters enumerated in para (b) of clause (1) of Article 63A would not be required because it is a matter of record that how much votes a Party Head has had in the House and as such the Party Heads or any one authorized by them alone can cast all the votes on behalf of others.

21. I am of the considered view that the Article 63A does not prohibit any member of a House from violating the direction issued by a Parliamentary Party to which he belongs. All that Article 63A prescribes is that when such a direction is violated by a member he incurs disqualification for continuing as a member of the House. Undoubtedly, the object, sought to be achieved by Article 63A, is to ensure loyalty of the members to a political party, which sponsored the candidature of such a member at the election. It was a remedy, which the Parliament sitting as Constituent Assembly, thought fit to provide in order to curb the evil of widespread practice of unprincipled floor crossing motivated by the concerns of personal benefit. The Parliament could as well have declared that such an act of voting (which attracts the consequence of termination of the membership of such a member) should also be ignored for the purpose of deciding the issue on which the voting took place. But it did not. Though, it would be difficult to speculate the reasons for such omission, I hazard a guess that it is in recognition of the possibility of an honest dissent. It is, thus, a balancing act between the party discipline and the convictions of individual members. However, the fact that the Constitution does not contemplate such a step of ignoring the vote given in violation of the party direction does not necessarily mean that Legislature in exercise of its authority under Article 67, is debarred from making such a provision in the absence of any Constitutional prohibition. Moreover, the interpretation as offered by majority would render the provisions of the Article 95 & 136 (vote of no-confidence against Prime Minister & Chief Minister) as redundant as no resolution for no-confidence would ever succeed. The argument that there is a vacuum which necessitates interference of this Court is untenable as the provisions of Article 63A are simple, clear and unambiguous. Strict and faithful adherence to the words of the Constitution, specially so where the

words are simple, clear and unambiguous is the rule. Any effort to supply perceived omissions in the Constitution being subjective can have disastrous consequences as recently held in the case of Gul Taiz Khan Marwat v. the Registrar, Peshawar High Court (PLD 2021 Supreme Court 391).

22. If blunders are found in legislation, they must be corrected by the Legislature, and it is not the function of the Court to repair them. (see *Halsbury's Laws of England, 3rd Edition, Volume 36 page 390*). As a general rule a Court of law is not authorized to supply a *cassus omissus*, or to alter the language of a statute for the purpose of supplying a meaning, if the language used in the statute is incapable of one, even though they may be of opinion that a mistake has been made in drawing the Act (see *Caries on Statute Law, 6th Edition, page 520*). The purpose of construction or interpretation of a statutory provision is no doubt to ascertain the true intention of the Legislature, yet that intention has, of necessity, to be gathered from the words used by the Legislature itself. If those word are so clear and unmistakable that they cannot be given any meaning other than that which they carry in their ordinary grammatical sense, then the Courts are not concerned with the consequences of the interpretation however drastic convenient the result, for, the function of the Court is interpretation, not legislation. Reference here may be made to Muhammad Ismal v. the State (PLD 1969 SC 241). However, it is only very exceptional and challenging circumstances where this Court does consider to read into a provision of Constriction. The question No.2 is thus answered in negative.

Question No.3

23. Through this question, it has been stressed that 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 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. At the cost of repetition, it is again stated that the object, sought to be achieved by Article 63A, is to ensure loyalty of the members to a political party. It was a remedy, which the Parliament sitting as Constituent Assembly, thought fit to provide in

order to curb the evil of widespread practice of unprincipled floor crossing motivated by the concerns of personal benefit. The Parliament could as well have declared that the defector no longer be treated to be sagacious, righteous, non-profligate, honest and Ameen and, therefore, stands disqualified for life. But it did not. I, with respect, do not find myself in agreement with what has been held by the majority in their short order that a declaration of defection in terms of Article 63A can be a disqualification under Article 63, in terms of an appropriate law made by Parliament under para (p) of clause (1) thereof. Article 63A itself provides penal consequences for defection and a penal provision should be construed strictly and its scope should not be extended unless it is so required by the clear language used therein or by necessary intendment. The question No.3 is, therefore, answered in negative.

Question No.4

24. As regard to this question, it has been found that this question is too general in nature. Answering this question would be in the teeth of the doctrine of separation of powers and would be contrary to the provisions of the Constitution.No doubt, our legislature is fully competent to enact laws on the subject keeping in view all the necessities to curb, deter and eradicate the practice of defection. The question is, therefore, answered in negative.

Conclusion

25. Article 63A after the 18th Amendment *supra* is very much there and the legislature after that has never deemed it appropriate to go for further changes and amendments in it. All the questions referred to this Court, with the cumulative effect, are of the type that answer to any question in affirmative would lead this Court to exceed and overstep its domain. This in other words would mean that this Court is putting something new in the text of the Article which is even not the mandate of the Constitution. The argument that the defection/house trading is a cancer and we have to eradicate the same by curbing it with an iron hand. I may agree to certain extent with this proposition but this menace could not be curbed by the stroke of my pen. Again, it is for the Constitution makers to remove this cancerous tumor through a surgical operation. To me, the entire provision of Article 63A as reproduced above is very plain and simple and I find nothing which could hardly need any interpretation other

than what its language provides. In my view, it's a complete code in itself, which provides a comprehensive procedure regarding defection of a member of Parliament. It does not admit interpretation and as such the questions asked through this Presidential Reference are answered in negative. However, if the Parliament deems fit or appropriate may impose further bar or restriction upon the defectors.

26. Similarly Constitution Petitions No.2 and 9 of 2022 are dismissed, accordingly.

Judge

"Approved for reporting"