

IN THE PESHAWAR HIGH COURT,
PESHAWAR,
[Judicial Department].

Writ Petition No.958-A/2015

Date of hearing:- _____

Date of decision: _____

Petitioner(s):- Sardar Sher Bahadur & others by Barrister Babar Sattar.

Respondent (s):-Government of Pakistan through Secretary Ministry of Law, Islamabad and Govt of KPK, through Secretary to Govt of KP, Law & Parliamentary Affairs Department, by Mr. Abdul Latif Yousafzai, Advocate General, KPK.

JUDGMENT

ROOH-UL-AMIN KHAN, J:- Through this common judgment, we propose to decide the instant constitutional petition under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973 (**the Constitution**), filed by petitioners Sardar Sher Bahadar and others and connected Writ Petition No.3384-P/2015, filed by petitioners Maulana Asghar Ali and others, as in both the petitions, the vires of the Khyber Pakhtunkhwa Local Government (Third Amendment) Act, 2015, relating to disqualification of a Member of Political Party in a Council on the grounds of defection, are under attack. The impugned legislation i.e. section 78-A inserted in Khyber Pakhtunkhwa Local Government Act, 2013, (**the Act**) through the impugned legislation, read as under:-

“78A. Disqualification on grounds defection:-

(1) If a member of a party composed of a single political party in a Council:-

- (a) resigns from membership of his political party or joins another party in a Council; or
- (b) votes or abstains from voting in a Council contrary to any direction issued by the political party to which he is a member, in the Council, in relation to:-
 - (i) Election of the Nazim or Naib Nazim in a Council; or
 - (ii) A vote of confidence or a vote of non-confidence; or
 - (iii) Approval of annual budget,-

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 of the concerned Council 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: For the purpose of this section,-

- (i) **“Council”** means the Town Council, Tehsil Council or the District Council, as the case may be;
- (ii) **“Party Head”** means any person, by whatever name called or declared as such by the Party and included the nominee of the Party Head; and
- (iii) **“Presiding Officer”** means the Naib Nazim of the concerned Council.

(2) A member of a Council shall be deemed to be a member of a Political party if he, having been elected as a candidate or nominee of a political party which constitutes the party in the concerned council or has become a member of such political party as per provision of clause (a) of sub-section (7) of section 74 of this Act.

(3) Upon receipt of the declaration under sub-section (1), the concerned Presiding Officer, 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 sub-section (1) shall cease to be a member of the concerned Council 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 High Court which shall decide the matter within sixty days from the date of filing of the appeal.

(6) Nothing contained in this section shall apply to the Nazim or Naib Nazim of the Council,]

2. The instant writ petition was filed in Abbottabad Bench while the connected writ petition in Bannu Bench of this Court, but due to pendency of other Elections Appeals at the principal seat, both the petitions were transferred to the principal seat.

3. Petitioners of the instant writ petition are the residents of District Abbottabad and were elected as Members of their respective Tehsil/District Councils, in the Local Government Elections, held on May 30th, 2015. According to them, at the time of their joining Political Party viz Tehreek-e-Insaf (PTI) and taking part in the

election, the only law regulating the local Government election was the Khyber Pakhtunkhwa Local Government Act, 2013 wherein there was no clause of defection, however, subsequently, the Government of Khyber Pakhtunkhwa (**KPK**), in pursuance of Articles 37 and 140-A of the Constitution, enacted/introduced the law about disqualification on grounds of defection by inserting section 78-A in the midway on August 24th, 2015, i.e. after election held on May, 30th 2015. On casting of vote by the petitioners in the Council in favour of a candidate/ District Nazim, contrary to their party candidate, they were given show cause notices under the impugned law by the Head of their party (PTI), through its Provincial Organizer Khyber Pakhtunkhwa, and were resultantly, defected from the Party.

4. Petitioners in the connected writ petitions contested the Local Government Elections, held on 30th May, 2015 on the party ticket of JUI (F) and were elected as Members of District Council, Lakki Marwat. Upon casting of their votes to the candidate of District Nazim against the direction of their party head, they were also served with notices under the impugned legislation and ultimately defected from the party.

5. Petitioners of both the writ petitions seek issuance of appropriate writ in the following manner:-

“To declare the whole of Khyber Pakhtunkhwa Local Government (third Amendment) Act, 2015, as illegal, ultra vires, void ab initio, unlawful and without lawful authority as the same is fiat and is in opposition to the indispensable principle of freedom of speech and expression as well as the Constitution of Islamic Republic of Pakistan, 1973”.

To declare section 78-A of the Act, as inapplicable and inoperative retrospectively.

To declare the declaration of defection of the petitioners, issued in pursuance of impugned amendment, as illegal, null and void.

6. Qazi Muhammad Anwar, Advocate, learned counsel for the petitioners in the connected writ petition, after arguing the case at some length, not only conceded the legislative powers of the Provincial Government under Articles 37 and 140-A of the Constitution to legislate/enact laws for the Province, but also conceded the provision of the impugned law i.e. 78-A of the Act, to be intra vires, however, he strongly opposed its retrospective applicability on the ground that the impugned legislation has been introduced on August 24th, 2015 i.e. after the Local Government election held on May 30th, 2015; that since the Local Government Election was contested by the petitioners under the rules and regulations enshrined in the

Act of 2013, when the impugned law was not on the statute book, hence, its retrospective applicability on the petitioners would be against the nature of law, equity and justice.

7. Learned counsel for petitioners in the instant writ petition not only objected the retrospective effect of the impugned legislation, but also criticized the impugned law to be ultra vires being against the fundamental rights enshrined in Articles 8 to 28 and 17 (2) of the Constitution. He contended that the impugned law not only imposes embargo on the right of the citizen to vote according to their whims and wishes to freely elect their leader, but also does not provide any right of personal hearing or proper procedure and remedy of defence to the disqualifying Member which is against the natural justice and principle of audi alteram partem, which is jealously and vigorously followed by the Courts of the Country; that right to vote on the direction of the Head of the Party is against the fundamental rights, political norms and democratic values of the country which pave the way for the dictatorship of political parties and compel the member of a party to cast vote against his independent and free will; that the impugned legislation has been brought on 24.08.2014, after holding of the election, therefore, would not be applicable retrospectively, particularly, when it does not contain any express provision qua its retrospective

applicability and it is settled law that a statute would be deemed applicable from the date of its promulgation, unless retrospective effect has been given thereto with express provision. Lastly, he emphasized that the Provincial Government is not invested with the power to legislate for Election Commission. He sought that the impugned law be declared and ultra vires.

8. Conversely, learned Advocate-General contended that the provisions of section 78-A of the Act is not in conflict with any of the Fundamental Rights as guaranteed by the Constitution, rather are in consonance with the doctrine of the Constitution. He while referring to Proviso to sub-section (1) of section 78-A of the Act, contended that a proper opportunity of hearing in the shape of a show cause, has been provided to a member before declaration of his defection from the political party. He went on to say that impugned enactment is akin to Article 63-A of the Constitution, which has been held as a valid law by the Hon'ble Supreme Court in its authoritative judgment in case of **Wukala Mahaz Barai Tahafaz Dastoor and another vs Federation of Pakistan and others**" (PLD 1998 Supreme Court 1263). He further contended that the impugned legislation has been made on the analogy to bring stability in the polity of the country and to eradicate cancerous vice of floor crossing. The basic of the impugned enactment contained in Paragraphs (a) and (b)

to explanation to clause (1) thereof is to ensure that a member of the Council should not vote contrary to any direction of the Head of the party to which he/she belongs nor he/she should abstain from voting in the Council against the party policy in relation to a vote of confidence or a vote of no-confidence or approval of annual budget.

9. In respect of applicability of the impugned enactment, learned Advocate General contended that the Local Government election was divided and scheduled in two phases/parts. The first part was with regard to election for the categories/Seats viz (i) General Members (ii) Women Members (iii) Peasants and Worker (iv) Youth Member and (v) Non-Muslims Member in each Village Council, Neighborhood Council, Tehsil/Town Council and District Council of the Province, which was scheduled since 08.04.2015 till 07.06.2015 i.e. the date of final result. The second part of the election was qua the seats of Nazim and Naib Nazim of District/City/Tehsil/Town Councils, and as per schedule 30th August, 2015, was declared as a Polling day. He contended that, the first phase of the election was non-political and on non-party basis, while that of the second part was on the strength of Party slogan/ticket. He clarified that the impugned legislation has been made on August 24th 2015, i.e. before 30th August, 2015, (the day of polling for the seats of Nazim and Naib Nazim) for which the petitioners were

electorates, therefore, the legislation being prior than the Polling day of the election, is very much applicable to the petitioners. He sought dismissal of the petitions.

10. We have heard the exhaustive submissions advanced from both the sides and perused the record along with impugned legislation.

11. The democratic setup of our country is governed by three tiers system i.e. the Local Government, constituted at District, Tehsil and Union Councils level in each Province. Provincial Legislative Assembly, and Parliament at the Federal level, comprising the Upper House (Senate) and the Lower House, casually referred to (the National Assembly). A strong democracy, no doubt, preconceives of a strong party system, meaning thereby that the members belonging to a Party owe allegiance exclusively to the Party to which they belong. Though, in greater number of countries the democratic set-up is based on two party systems. Pakistan and its neighbours are some of the countries in which multi party democratic system exists. In this multi party system of democracy, besides consisting of the representatives having party affiliation, there are other independent legislature who are unattached with any Political Party. One of the malady engulfing such multi party system, is the instance of floor-crossing by the legislature, the dictionary meaning of which can be find in word "defection", which is synonymous to the word

“abandonment of loyalty”, and connotes a change in party affiliation or a shift of allegiance. This is a malady which exists as an integral part of every democracy and is an evil rooted within.

12. Since, there was no specific law governing the issue of defection or to deal with the problem of legislature, changing their allegiance from one party to another on consideration other than a call of conscience, therefore, it was decided to put the democracy on the right track, so a constitutional amendment was brought in the Constitution of Islamic Republic of Pakistan, 1973 by inserting Article 63-A. The evolutionary developments resulting into the above amendment are to be discussed in the later part of the judgment.

13. One thing has remained uncontested, rather one of the learned senior counsel in the connected writ petition, at the very outset, has categorically argued that he would not press his petition to the extent of the legislative competence of the Provincial Government, because Article 140-A of the Constitution of the Islamic Republic of Pakistan, 1973, cast duty on the Provincial Government to establish the Local Government system and devolve Political, Administrative and Financial responsibility and authority to the elected representatives of the Local Governments. Likewise, Article 32 of the Constitution emphasizes the role of the Federal Government in

promotion of the Local Government Institutions. Of course, the Article *ibid*, besides, the Federal Government under a laden duty to encourage the Local Government Institution composed of elected representatives of the areas concerned and in such Institutions special representation shall be given to Peasants, workers and women. As per provisions of Article 140-A(2) of the Constitution, on establishing of the Local Government system, the Election Commission of Pakistan, shall hold the election of the Local bodies.

14. From the bare reading of the above referred two Articles of the Constitution, it is manifest that each Provincial Government in the country “**by law**”, shall establish a Local Government System and the Federal Government shall promote the local Government Institution. The words “**by Law**” in Article 140-A of the Constitution, would reveal that the Provincial Legislature has exclusively vested with the powers to make law for establishment and running the affairs of the Local Government System in the Province. In pursuance of the provisions of Article 140-A of the Constitution, the Provincial Government of Khyber Pakhtunkhwa legislated and published the Khyber Pakhtunkhwa Local Government Act, 2013, for constructing and regulating the Local Government Institutions, strictly in accordance with the requisite of Articles 32, 37 and 140-A of the Constitution.

Chapter XIV of the Act *ibid* deals with the matter and manner of conducting Local Council Election, whereas section 78 provides the requisite qualification of a candidate for holding an elective office or membership of a Local Council. The under challenge section 78-A has been inserted in the Act, 2013, through third amendment Act, 2015, for regulating the disqualification of elected member from the Local Council on the basis of his/her resignation from membership of his/her political party or joining another party in the Council or floor crossing and political disloyalty. To cut it short, the incurring of disqualification of a person holding an elective Office or membership has been borrowed in verbatim from Article 63-A of the Constitution with a slight modification of providing an opportunity of defence to the defected/disqualified candidate/member.

15. In light of the above observation and legal as well as factual matrix of the validity of under challenge amendment, the following legal points require determination:-

1. Whether the impugned legislation i.e. section 78-A of the Local Government (third Amendment), Act, 2015, is ultra vires, if no,
2. Whether it would be applicable to the petitioners or not?

16. For determination of the aforesaid points, it would inevitable, rather advantageous to have a glance over the legislative history of the country regarding defection.

Because in the recent past, the democratic system of the country has undergone successful democratic transition and the Political Parties System is on the pavement of institutionalization of cancerous vice of floor-crossing, Pakistan was unable to achieve political stability, which necessitated the constitutional amendment. The earliest effort to seek a legislation on defection, found appearance in the two identical motions (Private Members Bill), introduced by two members of the then National Assembly of Pakistan, Messrs Ch. Azizuddin and Yusuf Haroon, in the Assembly on 05.09.1958, however, before any action could be taken on the Bills, the democratic train of the country was unfortunately derailed from its tracks on 07.10.1958, resulting in the dissolution of Assemblies and abrogation of the Constitution of 1956. The first legislative measure dealing with the vice of floor-crossing/defection was introduced by promulgating the Political Parties Act, 1962 (**the Act**), which came into effect on 15.07.1962, wherein section 8 of the Act of 1962 was the relevant law on the subject. For the sake of convenience, sub-section 2 of section 8 of the Act is reproduced below:-

“(2) If a person, having been elected to the National or a Provincial Assembly, as a candidate or nominee of a Political Party, withdraws himself from it, he shall, from the date of such withdrawal, be disqualified from being a member of the Assembly for the unexpired period of his terms as such member unless he has been re-elected at a bye-election caused by his disqualification”

At the time the Political Parties Act, 1962, was promulgated, the Constitution of 1962 was enforced in its original form. Section 8(2) of the Act of 1962, held the field until it was omitted with retrospective effect from 08.05.1974. In the meantime, Constitution of 1973 was adopted. While the Constitution Bill was being piloted in the Assembly, the then Law Minister Mr. Abdul Hafeez Pirzada, in his speech addressed in the Assembly stressed the need for discouraging the tendency of opportunism, adventurism and defiance by the members of Political Parties of the whip of the party whip.

17. After adoption of Constitution of 1973, though subsection (2) of section 8 of the Act, which provided for disqualification of an elected member of an Assembly who after his election on the ticket of a political party defects or withdraws from that party, was omitted from the Act, but proviso to Clause (5) of Article 96 of the Constitution of 1973, which provided that if a member of Assembly elected as a candidate or nominee of a Political Party casts his vote on a resolution of non-confidence contrary to the majority vote of that party, shall be disregarded, severed as an effective check against the defection of the elected members of the Assembly of a political party. Article 96 remained as part of the Constitution of 1973 until 02.03.1985, when it was omitted by the Presidential Order No.14 of 1985. After

omission of Article 96 of the Constitution of 1973, there was no law in the field in Pakistan dealing with floor-crossing or defection. To fill up this gap, Act XXII of 1985, was passed by the then National Assembly of Pakistan on 24.12.1985, wherein section 8-B relating to disqualification on ground of defection etc was inserted. Later on, through Ordinance No.X of 1990 dated 22.10.1990, explanation to section 8-B of the Act was added. Ordinance VIII of 1991 promulgated on 01.02.1991 repealed Ordinance X of 1990 and re-enacted the above explanation added to section 8B ibid on 22.10.1990. However, the Ordinance VIII of 1991 could not be placed before the Assembly as required by Article 89 of the Constitution of 1973, as a result it lapsed after four months of the date of its promulgation and consequently, stood repealed under the Constitution. With the repeal of Ordinance VIII of 1991, the explanation added to section 8-B of the Act also stood repealed from the statue book. Before the general elections of 1993, Ordinance XXX of 1993 was promulgated by the Caretaker Government on 07.10.1993, wherein amendments were made in section 8B of the Act. Since, the Ordinance XXX of 1993 expired on or about 6.02.1994, the original section 8-B of the Act stood revived. There was controversy about the legality and enforceability of the above section 8-B of the Act and

because of this reason the same could not be effectively pressed into service against the members of the Assemblies who indulged in floor crossing and political disloyalty.

18. The matter regarding interpretation of section 8-B(2) came up before the Hon'ble Supreme Court in 1990 in case of **Humayun Saifullah Khan Vs Federation of Pakistan (PLD 1990 SC 599)**, but could not be resolved as the case was remanded to this Court by majority view of the Hon'ble Judges for deciding the writ petitions from which the above appeal had arisen. Then in case of **Khawja Ahmad Tariq Rahim Vs the Federation of Pakistan (PLD 1992 SC 646)**, wherein dissolution of the National Assembly and the dismissal of Mohtarama Benazir Bhutto's government in 1990, were assailed and one of the points which was agitated was the effect of defection. In this authoritative judgment his lordship Mr. Justice Saif ur Rehman, emphasized the vice of defection in these golden words:-

“The preamble to our Constitution prescribes that the State shall exercise its powers and authority through the chosen representatives of the people. 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 a resign to shed off his

representative character which he no longer represents and to fight a re-election. This will make him honorable, politics clean, and emergence of principled leadership possible. The second, and more important, the political sovereign is normal course, the elector has wait for years, till new elections take place, to repudiate such a person. In the meantime, the defector flourishes and continues to enjoy all the worldly gains. The third is that it destroys the normative moorings of the Constitution of an Islamic State”.

19. After that, the effect of section 8-B of the Act was agitated once again before the Hon’ble apex Court in case of **Pir Sabir Shah Vs Shad Muhammad Khan, (PLD 1995 SC 66)**, in which on account of defection of two members of the NWFP (now Khyber Pakhtunkhwa) Assembly belonging to PML (N) and ANP, the Government of Pir Sabir Shah was toppled down and Mr. Sherpao’s Government belonging to PPP was installed. In the majority view of 7-5 Hon’ble Judges, it was held that the provisions of section 8-B (2) and (3) of the Act were in conflict with Article 63 (2) of the Constitution to the extent of forum which under the Act was the august Supreme Court, whereas in clause (2) of Article 63 of the Constitution, the Chief Election Commissioner was the forum provided, and thus the later shall prevail. On the other hand, in the majority view, it was held that there was no inconsistency between subsection (3) of section 8-B of the Act and clause (2) of Article 63 of the Constitution and that above section 8-B was intra vires and was intended to suppress the mischief

of floor-crossing which was for the good of the country. Because of the majority view in the case of **Pir Sabir Shah (supra)** the vires of section 8-B remained clouded. In the above referred era, floor-crossing and changing political loyalties, were very common, which played a pivotal role in destabilization of democracy as well as caused a great deal of damage to the reputation of political stalwarts of the country in the general public, as their acts were generally and commonly acknowledged and illustrated as horse trading, lotacrazy etc. The evil of political defection became a matter of national concern and it was decided that if it is not combated, it is likely to undermine the very foundation of democracy and the principles which sustain it, so it was a persistent public demand as well as observations in more than one judgment by the Hon'ble Supreme Court to the effect that there should be effective legislation to eradicate the vice of floor-crossing in order to bring about stability in the politics of the country which was only possible to deal with the defectors with no leniency.

20. In the above backdrop, Article 63-A was inserted in the Constitution of 1973 through (Fourteenth Amendment) Act of 1997. For the sake of convenience and comparison with the enactment regarding defection impugned before us, we would like to reproduce Article 63-A of the Constitution:-

“[63-A.Disqualification on grounds of defection, etc: (1) if a member of a Parliamentary Party defects, he may by means of a notice in writing addressed to him by the head of the political party or such other person as may be authorized in this behalf by the Head of the political party, be called upon to show cause, within not more than seven days of such a notice, as to why a declaration under clause (2) should not be made against him. If a notice is issued under this clause the Presiding Officer of the concerned House shall be informed accordingly.

Explanation: A member of a House shall be deemed to defect from a political party if he, having been elected as such, as candidate or nominee of a political party, or under a symbol of political party or having been elected otherwise than as a candidate or nominee of political party and having become a member of a political party after such election by means of a declaration in writing:-

(a) commits a breach of party discipline which means a violation of the party constitution, code of conduct and declared policies, or

(b) votes contrary to any direction issued by the Parliamentary party to which he belongs, or

(c) abstains from voting in the House against party policy in relation to a Bill

(2) Where action is proposed to be taken under the Explanation to clause (1), sub-clause (a) the disciplinary committee of the party, on a reference by the Head of the party, shall decide the matter, after giving an opportunity of a personal hearing to the member concerned within seven days. In the even the decision is against the member, he can file an appeal, within seven days before the Head of the Party, whose decision thereon shall be final. In cases covered by the Explanation to clause (1), sub-clause (b) and (c), the declaration may be made by the Head of the party concerned after examining the explanation of the member and determining whether or not that member has defected.

(3) The Presiding Officer of the House shall be intimated the decision by the Head

of the Political Party in addition to intimation which shall also be sent to the concerned member. The Presiding Officer shall within two days transmit the decision to the Chief Election Commissioner. The Chief Election Commissioner, shall give effect to such decision, within seven days from the date of the receipt of such intimation by declaring the seat vacant and announcing the schedule of the by-election.

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

(5) 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.

(6) Notwithstanding anything contained in the Constitution, no Court including the Supreme Court and a High Court shall entertain any legal proceedings, exercise any jurisdiction, or make any order in relation to the action under this Article.”

21. Taking in juxtaposition Article 63-A of the Constitution and section 78-A of the Local Government (Third Amendment) Act, 2015, one can observe and visualize that main object and purpose of both legislations are one and the same i.e. to eradicate the cancerous vice of floor-crossing. Except clause (a) Explanation to Article 63-A and sub-section (6), both legislations are akin in the language employed therein. It may be noted that vires of article 63-A of the Constitution were challenged before the Hon'ble Supreme

Court of Pakistan in case of **Wukala Mahaz Barai Tahafaz Dastoor and another Vs Federation of Pakistan and others**” (PLD 1998 1263), wherein the Hon’ble apex Court by majority of 6 to 1, declared Article 63-A excluding clause (a) to Explanation and subsection (6), to be intra vires and in consonance with the tenets of Islam and Sunnah and not violative of any of the basic structure of the Constitution. For the sake of convenience and ready reference, the crux of the view of the Hon’ble Judges gracing the Bench and declared Article 163-A to be a valid legislation is reproduced below:-

“His lordship Mr. Ajmal Mian, Hon’ble the Chief Justice:

“Provisions of Art.63 of the Constitution is in consonance with the tenets of Islam and Sunnah and is not violative of any of the basic structures of the Constitution, namely, representative form or government; Islamic concept of democracy and independence of Judiciary. The Article will bring stability in the polity of the country as it will be instrumental in eradicating cancerous vice of the floor crossing. The basic concept of the Article is to ensure that a member of the Parliament should not vote contrary to any direction issued by the Parliamentary Party to which he belongs nor he should abstain from voting in the House against the party policy in relation to any bill. The above basic object is not violative of any constitution provision or any constitutional principle.

His lordship Mr. Justice Saiduzzaman Siddiqui

“Provision of Article 63-A of the Constitution of Pakistan 1973, is a valid constitutional provision.

The Act of defection by elected members of the Assemblies is an immoral practice. The

defection by members of political parties after their election as members of Assemblies led to the dissolution of more than one elected Assemblies in the past. There was strong condemnation by the public of the immoral practice of floor crossing and defection by elected representatives of political parties after their election on party ticket as members of Assemblies. There was consensus amongst the political parties to eradicate the vice from the body politics of the country to restore the confidence of people in the political process. In this back set stringent legislative measures were needed to curb this immoral practice to keep the political process pure and clean. Defection in the political parlance, means an act of political opportunism to obtain immoral gains and worldly advantages by exploiting one's representative and political status. However, while enacting law or introducing amendements in the Constitution with the object of eradicating the vice of defection, the legislature was not bound to provide the same meaning to the word 'defection' as given in dictionary or it is understood in common parlance. The Legislature, therefore, while introducing Article 63A in the Constitution could give its own meaning to the word 'defection,' provided it bore reasonable nexus to meaning given in the dictionary or as it is understood commonly. The definition of 'defection' provided under the Explanation appended to Article 63A, bears reasonable nexus to its dictionary meaning and as this word is understood in common parlance.

A person when joins a political party and seeks election to the Assembly on the ticket of that party, holds out to the electorate that he is bound by the discipline, code of conduct and declared policies of the party. After his election to the Assembly, if he defies the party constitution or the code of conduct or the declared policies of the party, whether within the Assembly or outside the Assembly, he loses his representative character and the mandate to represent the people who elected him on the basis of his above representation. If an elected member of a political party feels so strongly that he cannot stand by the policies of his party on account of his convictions on some issues, he may shed his representative character which he acquired by getting elected on the ticket of that party, by resigning from his seat and seek a fresh mandate from the electorate on the basis of his conviction.

Restraints provided under Article 63A of the Constitution are not against the concept of polity in Islam.

Article 63A of the Constitution is a valid constitutional provision subject to clarifications detailed in the judgment.

His lordship Mr. Justice Raja Afrasiab Khan

Provision of Constitution (Fourteenth Amendment) Act, 1997, is not violative of any provisions of the Constitution.

Article 63-A of the Constitution does not in any way offend the provisions of Articles 16, 17 and 19 of the Constitution, rather it shall help the democratic system to run smoothly and successfully.

His lordship Mr. Justice Irshad Hasan Khan.

Constitution (Fourteenth Amendment) Act, 1997 is not violative of any provision of the Constitution.

Defection is like a contagious disease and needs proper treatment and Court cannot affix the seal of approval to an act of defection.

Clearly, the candidate elected on a party ticket represents to the electors that he will support the party and its general policies and programmes and that he will abide by the decision of the party once such decisions are taken. Thus, visualized, the right of dissent is greatly restrained otherwise the policies of the party cannot be carried on.

A Parliament-dependent Government implies party-supported Government; a support that in turn requires voting discipline along the party lines. Abstention from voting in the House against the party police in relation to any Bill or voting contrary to any direction issued by the Parliamentary Party to which a Member belongs, must equate with defection.

The scheme visualized under Article 63A of the Constitution is totally akin to the establishment of Supreme Judicial Council for inquiring into misconduct of any Judge.

The plea that Article 63A is violative of the principles of natural justice cannot be held to be supported by the provisions of the Constitution itself.

Provisions of Article 63A of the Constitution does not violate any of the

Constitution provisions or the principles of democracy and freedom enunciated by Islam and the Constitution.

His lordship Mr. Justice Mamoon Kazi.

Floor crossing by members of Parliamentary parties had come to be so menacingly engrained in the political system that shifting of loyalties by members had become a matter of common occurrence. Therefore, there was a growing public demand for bringing legislation to effectively control this practice. It was in such background that the said legislation was passed”.

22. The term “floor-crossing or defection” was first used to describe the process when a member of British House of Common, crossed the floor to join the group of people (members of another Political Party), that was seated on the opposite side of the floor, therefore, necessity was felt to prohibit the floor-crossing for sustaining the stability and smooth functioning of the government and with the passage of time, some countries having democratic form of government inserted anti-floor crossing law in their Constitutions. Only in Pakistan, the right of appeal was provided to the aggrieved person whereas the provision of the Constitutions of India and Bangladash are synonymous and alike in all respects. Besides, Pakistan, India, Israel, Bangladesh, Portugal and Tohago, in countires like Nepal, Fiji, Belize, Namibia, Nigeria, Seychelles, Sierra Leone, Singapore, Zimbabwe etc, the anti-floor crossing law is governed by the Constitution, out of which 14% of established democracies requires Parliamentary members to forfeit

their parliamentary seats, if they change political loyalties. The international study about defection shows that two democratic nations i.e. New Zealand and South Africa once had, but abandoned such law. Parliamentary research divulges that the practice of switching from one political party and joining another in Parliament has fostered bribery and corruption which was often disliked by the general public and accused of political opportunism and corruption. The act of defection definitely, violates the will of the voters and their rights as the defectors are often perceived as having their own agenda, outside the political party, trying to pursue their career objective on the cast of the voters and in broad spectrum of the nation.

23. Learned counsel for the petitioners contended that by inserting section 78-A in the Act of 2013, the legislature has given unfettered powers to the Party Head or his Nominee whereby the fundamental right of freedom of speech safeguarded by constitutional guaranties has been made superfluous; that under the impugned law the aggrieved person/member has not been provided a right of defence, which is against the principle of audi alteram partem. We are not persuaded by the argument of the worthy counsel, for the reason that section 78-A of the Act, does not empower the Party Head or his nominee alone to remove a member from the Council, rather it provides ample opportunity to aggrieved member/person

to show cause in writing for the act of his/her defection before the issuance of declaration of defection. If the Party head is not satisfied by the explanation of the incumbent, he may declare him/her to have defected from the Party and in such eventualities, the Party Head would forward a copy of the declaration of defection to the Presiding Officer of the concerned Council and the Chief Election Commissioner as well as the member. The ultimate authority of confirmation or otherwise of the declaration of defection is vested in the Chief Election Commissioner, that too, after hearing the stance of the member concerned. Section 78-A (3) of the Act, provides in unequivocal terms that upon receipt of the declaration, the Presiding Officer of the concerned Council, shall refer the same to Election Commission within two days for decision, which shall be decided within thirty days, by the Election Commission. From the bare reading of section 78-A of the Act, it is manifest that mere declaration by the Party Head in the matter of defection is not final and binding, rather, such declaration is required to be referred to the Chief Election Commissioner via the Presiding Officer of the Council concerned and it is for the Election Commission to decide defection or otherwise of the member. Again, the decision of the Election Commission is also not final and the aggrieved

member has the right of appeal before this Court under subsection (5) of Section 78-A of the Act.

24. Yet another crucial aspect of the case as observed in the preceding paragraphs of the judgment is that section 78-A of the Act is a transcription of Article 63-A of the Constitution i.e. the law relating to disqualification of a member of the Parliament. After insertion of Article 63-A in the Constitution, its vires were challenged before the august Supreme Court of Pakistan in **Wokala Mahaz case reported as (PLD 1998 SC 1263)**, but the petition was dismissed and anti-defection law i.e. Article 63-A was declared as a valid legislation. This Court in any manner would neither be able or justified to set as a Court of appeal on the judgment of the august Supreme Court nor can form an opinion otherwise, because the judgment of the Apex Court is binding on each and every organ of the State. When the change brought by Article 63-A of the Constitution through fourteenth amendment, has been declared necessary for the maintenance of Party discipline, stability and smooth functioning of democracy in the Parliament, then on the touchstone of principle enumerated by the Apex Court in judgment (supra), the Khyber Pakhtunkhwa Local Government (third amendment) Act, 2015, whereby section 78-A has been inserted in the Act of 2013, being verbatim copy of Article 63-A of the Constitution, can easily be declared a

valid legislation, necessary for curbing the mischief of Political instability, due to change of loyalties in the Local Council. Here it would not be out of context to mention that the avowed object behind insertion of Article 63-A has been introduced by way of a constitutional amendment, the scope of judicial review in the exercise of plenary power vested in this Court under Article 199 of the Constitution would be circumscribed. Likewise, on the analogy of constitutional amendment and introducing Article 63-A for curbing the menace in the National, Provincial Assemblies and Senate, the Khyber Pakhtunkhwa Provincial Assembly, by invoking the provision of Article 140-A of the Constitution, brought section 78-A in the Local Council Act, 2013, through an amendment Act, 2015. The endeavour of the Federal as well as the Provincial Governments i.e. introducing the anti-defection provisions in the Constitution and Local Government Act, respectively, relatable to disqualification is with the sole object of restraining floor-crossing/defection within the party. As regard to right of freedom of speech and expression under Article 19 of the Constitution, such right is not unfettered and unbridled, rather is subject to reasonable restrictions which may be imposed under the law in the interest of the glory of Islam, integrity, security of defence of Pakistan or any part thereof. Hence, no advantage could be drawn by the

petitioners on the anvil of Article 19 of the Constitution for it is only available against a State, whereas the declaration of defection is totally an intra party decision, which cannot be challenged on the threshold of Article 19 as it is a private transaction between Party Head and its members. The act of defection by elected member is an immoral practice because when a person joins a political party and seeks election to the Council on the ticket of that party, holds out to the electorate that he is bound by the discipline Code of conduct and declared policies of the party. After his election to the seat of Council, if he defies the party Leader's direction it would amount to such breach of bond. A person who gets elected as a candidate, setup by a political party, is so elected on the basis of programme of the political party. The provisions of section 78-A proceeds on the premises that political party and morality demand that if such person, after the election, change his affiliation, then he should give up his membership of the council and go back before the electorate. The same yardstick is applicable to the member who is elected as an independent candidate and joins a political party after the election. Islam also requires the believers to carry out their promises and commitments whenever made (except where such promises are made against any express injunction of Islam), and refrain from committing the breach of any trust. A person, who seeks

election as a candidate of a political party on its ticket, holds out to his party and the electorate his abiding faith on the manifesto of his party. His defection from the party after election, therefore, amount to his refusal to carry out his promise and commitment besides constituting a breach of the trust reposed in him by his electorate. Such an act of defection cannot be justified on any known principle of morality much less on any recognized Code of Islamic Polity.

25. Going through the legislative history of the law of defection of the country and deriving wisdom from the judgment of the Hon'ble Apex Court (supra), defection in its concept and political parlance refers to an act of political opportunism to obtain immoral gains and worldly advantages through exploitative approach of one's representative and political status. Such acts cannot be justified on any known principle of Islamic polity. A political party functions on the strength of shared beliefs. Its own political stability and social utility depends on such shared beliefs and concerned action of its Members in furtherance of those commonly held principles. Any freedom of its Members to vote as they please independently of the political party's declared policies will not only embarrass its public image and popularity but also undermine public confidence in it which in the ultimate analysis, is its course of sustenance. A divided

party is looked on with suspicion by the electorate. To abstain from voting when required by party to vote is to suggest a degree of unreliability.

26. In view of the above discussion, we are of the considered view that impugned law of defection is in accordance with the provisions of the Constitution of the country and is *intra vires*.

27. Reverting to the question of applicability of the impugned legislation on the petitioners, we observed that the Local Government election was divided and scheduled in two phases/parts. The first part was with regard to election for the categories/Seats viz 1. General Members 2. Women Members 3. Peasants and Worker 4. Youth Member and 5. Non-Muslims Member in each Village Council, Neighborhood Council, Tehsil/Town Council and District Council of the Province, which was scheduled since 08.04.2015 till 07.06.2015 i.e. the date of final result. The second part of the election was qua the election to the seats of Nazim and Naib Nazim of District/City/Tehsil/Town Councils, and as per schedule 30th August, 2015, was declared as a Polling day. The election of the first part was on non-party basis, while that of the second part, was on the basis of Party slogan/ticket. The impugned legislation has been made on August 24th 2015, i.e. before 30th August, 2015, (the day of polling for the seats of Nazim and Naib Nazim) for which the

petitioners were electorates and had joined the political parties, therefore, the impugned legislation being prior to the Polling day of the election, would be applicable to the petitioners.

28. For what has been discussed above, both the petitions being meritless are dismissed and the writ sought therein is hereby refused. Elections Appeals of the petitioners pending adjudication before this Court, shall therefore, be decided on merits in light of mandate of the newly enacted law i.e. section 78A of the Khyber Pakhtunkhwa Local Government (third Amendment) Act, 2015.

Announced:

Siraj Afridi P.S.

JUDGE

JUDGE