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Coping with party-hopping

REFLECTING ON THE LAW
By SHAD SALEEM FARUQI

If a new federal law against defections by Members of Parliament is desired, several possibilities come to mind.

THE grapevine is abuzz with rumours of defections from Barisan Nasional and the possible defeat of the Government on a motion of no-confidence in the Dewan Rakyat.

Even the Election Commission chief has cautioned his officers to be prepared for a snap election. All this draws attention to a number of critical issues of constitutional politics.

No security of tenure: Unlike the system of "independent government" in the US with a fixed term of four years for an elected President, our system of "responsible government" does not offer the political executive any security of tenure.

The Prime Minister and the Cabinet remain in office as long as they command a parliamentary majority. If there is a vote of no confidence or if defections from its fold rob the ruling party of its majority, then under Article 43(4) the prime minister has two choices.

> First, to resign and pave the way for the King to appoint someone else as prime minister.

> Second, to advise the Yang di-Pertuan Agong to dissolve the Dewan Rakyat and call fresh elections.

Role of the King: Under Article 40(1) the King is a constitutional monarch who is bound to act on advice. But in a number of enumerated situations he is constitutionally entitled to act in his own discretion. Dissolution of the Dewan Rakyat is one such area: Article 40(2)(b). The King may pick from a whole range of possibilities.

> First, he may accept the advice to dissolve the Dewan Rakyat and, in keeping with a long-standing constitutional convention, allow the prime minister to remain in office as a caretaker leader pending the election and the summoning of the new Dewan Rakyat. This period can last 120 days from the date of dissolution: Article 55(4).

> Second, the King may accept the advice to dissolve the Dewan but insist that the prime minister and Cabinet must vacate their office. The King may then appoint a neutral, caretaker government from within the previous Parliament to pilot the nation through the election period. This exceptional course of action has never been resorted to in Malaysia. But it has legal basis in Article 43(2).

> Third, the King may reject the advice to dissolve the Dewan Rakyat. Instead he may explore the possibility of appointing a new prime minister who, in his judgment is likely to provide a stable and viable government.

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There are fascinating possibilities as to who may be chosen.

Motion of no-confidence: The Federal Constitution in Article 43(4) clearly envisages the possibility of a government being defeated on a motion of no-confidence. However, the Standing Orders of the Dewan Rakyat have no specific provision for such a motion.

It is a matter of interpretation by the Speaker as to which Standing Order must be invoked to table this motion. What is certain is that what the Constitution permits, no lesser law can forbid. Depending on which Standing Order is invoked, a notice of 14 or 7 or 1 day(s) must be given.

If a motion of no-confidence passes, then under Article 43(3) & (4) the entire Cabinet and not just the prime minister must step down: *Datuk Amir Kahar vs Tun Mohd Said* (1995).

A government facing a motion of no-confidence can hit back by advising the King under Article 55(1) to prorogue the Dewan for a period up to six months. It is a contentious issue whether a constitutional monarch can refuse such partisan, undemocratic advice.

Party-hopping: Defection refers to the phenomenon of Members of Parliament elected by the rakyat on one party ticket, switching camps during mid-stream.

A variety of measures exist to curb this evil. In some countries any one who defects loses his seat but is allowed to return to the electorate at a by-election to regain his mandate. In other countries a defector is barred from holding any remunerative political post for the remaining tenure of the legislature unless he is re-elected.

In some countries the size of the Cabinet is prescribed by law so that there is no temptation of offering Cabinet posts as incentives to cross the floor.

In Malaysia, veteran politician Lim Kit Siang in 1978 introduced – unsuccessfully – a private MP's Bill to require an MP to vacate his seat within 30 days of his resignation or expulsion from his party. The Bill required a by-election at which the MP would be eligible to seek a new mandate from the electorate.

An anti-hopping law on similar lines was passed by the Sabah Assembly in 1986 and was upheld by the courts in *Abdul Karim Abdul Ghani vs Legislative Assembly of Sabah* (1988).

Kelantan followed suit in 1990. Regrettably, the Kelantan law was challenged by Barisan supporters in the courts: *Nordin Salleh vs Dewan Undangan Negeri Kelantan* (1992).

The High Court and the Federal Court held that the Kelantan law was unconstitutional on several grounds. First, that the law was a violation of the constitutional guarantee of freedom of association in Article 10(1)(c).

Second, that the forum for passing the law was wrong. Fundamental rights in Article 10 can be restricted by the federal Parliament and not by State Assemblies.

Third, to the argument by Kelantan that freedom of association in Article 10(1)(c) can be restricted on the permissible ground of "morality" in Article 10(2)(c), the court expressed the astounding view that "morality" in Article 10 refers to sex morality and not "political morality".

Modality of change: In the light of the above, if a new, federal law against defections is desired, how may it be enacted? There are three possibilities.

First, the federal Parliament may act under the authority of Article 10(2)(c) to ban party-hopping. This Article provides that "Parliament may by law

impose on the right (to form associations) such restrictions as it deems necessary or expedient in the interest of 'morality'. General laws on morality require a simple, and not a two-thirds, majority.

The law will, however, be challenged on the basis of the Nordin Salleh ruling. The High Court and the Court of Appeal will be bound by the Federal Court decision. But the Federal Court is competent to overrule itself. It is likely that it will depart from the bizarre ruling in 1992 that morality in Article 10 refers merely to sexual morality.

Second, the government could seek bi-partisan support to ban defections by enacting constitutional amendments to Article 10(2)(c) (freedom of association) and Article 48 (disqualification for membership of Parliament). The Eighth Schedule could also be amended in Paragraph 6 to apply the anti-defection law to all State Assemblies. These amendments will require a two-thirds majority.

Third, Article 150 on emergency powers could be invoked to promulgate an Emergency Ordinance to outlaw party-hopping. Legally speaking, the country is still in a state of emergency. In *Stephen Kalong Ningkan vs Government of Malaysia* (1968) the Privy Council had ruled that the word "emergency" includes "collapse of civil government".

Without doubt, party-hopping causes political instability and collapse of the duly elected government of the day.

The Ordinance will be outside parliamentary processes and can be promulgated quite quickly. It will require the consent of the Yang di-Pertuan Agong. In this matter the King will be bound by Article 40(1) and 40(1A) to act on advice.

If these laws are enacted, they will apply to both the ruling party and the opposition, and to the federal and state governments. They will promote some stability and some integrity in political life. Whether they should be enacted and through what modalities are, ultimately, political questions.

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