

# ELECTION COMMISSION OF PAKISTAN

PRESENT

Mr. Sikandar Sultan Raja, Chairman  
Mr. Nisar Ahmed Durrani, Member  
Mr. Shah Muhammad Jatoi, Member  
Mr. Justice (R) Ikram Ullah Khan, Member

Case No. F. 23(71)/2021-Law

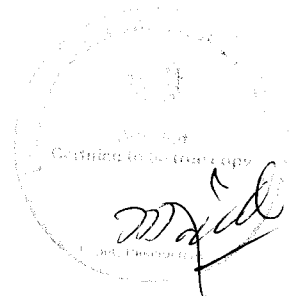
Subject: OBJECTIONS TO THE DRAFT AMENDMENT IN PROVISIO TO  
RULE 58 OF THE ELECTION RULES, 2017 NOTIFIED VIDE  
NOTIFICATION NO.F.23(71)/2022-LAW DATED 9<sup>TH</sup> DECEMBER,  
2022

Sr. No.	Objector's name	Constituency & party
1.	Mr. Muhammad Ali Aziz	MPA, PS-105, Sindh from PTI
2.	Ms. Rabistan Khan	MPA, PS 122, Sindh from PTI
3.	Ms. Sidra Imran	MPA, PS..... Sindh from PTI
4.	Syed Muhammad Abbas Jafari	MPA, PS-125, Sindh from PTI
5.	Raja Azhar	MPA, PS-....., Sindh from PTI
6.	Shahzad Qureshi	MPA, PS-...., Sindh from PTI
7.	Muhammad Riaz Haider	MPA,PS-....., Sindh from PTI
8.	Ms. Sanjay Gangwani	MPA, PS-....., Sindh from PTI
9.	Syed Ali Haider Zaidi	Ex-MNA from PTI
10.	Rabia Azfar	MPA, PS-....., Sindh from PTI
11.	Malik Shahzad Awan	MPA, PS -116 Sindh from PTI
12.	Bilal Ahmed Ghafar	MPA, PS-....., Sindh from PTI
13.	Ms. Adebba Hassan	MPA, PS-..... Sindh from PTI
14.	Malik Sajid Mehmood	Secretary General of PTI, Islamabad Region
15.	Mr. Hassan Sabir, Secretary General	Pak Sarzamen Party
16.	Mr. Arif Sultan Minhas, Naib-Ameer/Chairman Election Cell, Karachi	Jamat-e-Islami

### For the objectors

1. Ms. Syeda Abida Bokhari, Advocate for objectors No. 3, 7, 8, 9 and 12.
2. Mr. Atique Ur Rehman Siddiqui & Sardar M. Masroof Khan, Advocates for Objector No. 13
3. *Nemo* for the other objectors

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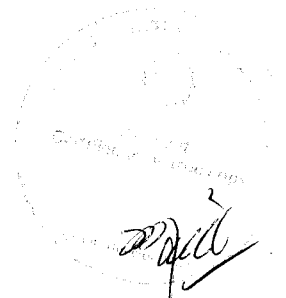
Date of hearing: 11<sup>th</sup> January, 2023

## ORDER

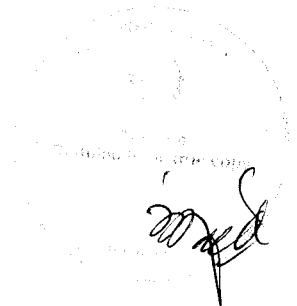
Sikandar Sultan Raja, Chairman- Through the instant Objections, the Objectors at serial No. 1-14, who belong to Pakistan Tehreek-e-Insaaf and are also members thereof, have made challenge to the draft amendment to Rule 58 of the Election Rules, 2017, whereby a proviso has been added by the Commission in the Rule to the effect that "*polling agent or agents so appointed under section 77 shall be the voter of the constituency*". Apart from them, two other political parties i.e. Jamat-e-Islami & Pakistan Sarzameen Party through their representatives, have also thrown challenge to the proposed amendment. Notices of hearing were issued to all the objectors. However, only Objectors No. 3, 7, 8, 9, 12 and 13 turned-up to support their objections. By this common Order, we propose to decide all the listed Objection Petitions.

2. Ms. Syeda Abida Bokhari, Advocate appearing on behalf of the Objectors No. 3, 7, 8, 9 and 12, has argued the Objections at length. We have observed that all the five objection petitions have same facts and grounds which the learned counsel has argued before us today. Other Objection petitions filed on behalf of other members of Pakistan Tehreek-e-Insaaf, who are not before us, also contain similar facts and grounds. The crux of arguments made by the learned counsel for Objectors No. 3, 7, 8, 9 and 12 is as under:-

- i. The proposed amendment has no legal rationale as it would affect the core duty of the Commission which is to ensure and promote free, fair and transparent election;
- ii. The proposed amendment is a whimsical decision as against the existing provision i.e. Rule 58, no challenge was ever made by any political party nor political parties have been consulted on the proposed amendment;
- iii. That this fundamental change cannot be imposed through an administrative measure i.e. through a Rule. It is an established principle of law that a rule cannot override or overstretch beyond the basic stature. This change can be introduced through legislation after debating the same in the National Assembly;



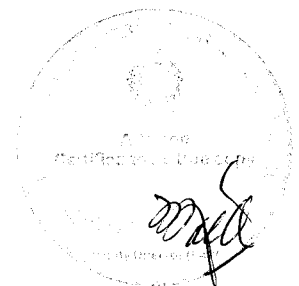
- iv. The amendment is also ultra -vires to Fundamental Rights as enshrined in Articles 4, 8,9, 15, 16, 25, 62 and 113 of the Constitution;
- v. That there are instances where residents living in areas infested by mafias and gangs especially in mega cities having No Go areas for particular political dispensation or particular ethnic stock or religious sect, it would be impossible to find polling agents for opponents political party or ethnic groups or religious sects as they will be exposed to the hazards of Mafias and gangsters endangering their lives;
- vi. That the Candidates appoint his close friends and relatives as their polling agents. This amendment would deprive them to exercise their free will for selecting their polling agents;
- vii. That this amendment is likely to favour the mafias, gangs, and influential electable which is antithetical to the Articles of Constitution cited above and out of their fear voters of areas could not endanger their lives by exposing themselves as polling agents for the candidates contesting against these rogue elements;
- viii. That the Constitution does not place any bar for the contesting candidates to be voter of that constituency or that province than why this highly discriminatory proviso added to Rule 58 of the election Rules 2017 just to favour influential characters to prevail over the entire electoral process;
- ix. That the Proposed amendment is malafidely based on prejudice and biases aimed to sabotage holding fair, free, peaceful and transparent Elections;
- x. The draft amendment is vehemently against Natural Justice coupled with complete violation of the fundamental rights as ensured by the Constitution of Pakistan, 1973. The same should be legislated instead of superimposed by the administrative measures taken by the bureaucrats. The same proposed amendment should be withdrawn immediately.



3. In order to support her comprehensive arguments, the learned counsel has placed reliance on case laws i.e. 1982 SCMR 522, 2022 SCMR 1787, 2001 PTD 2380, PLD 1957 Lahore 925.

4. The learned counsel appearing on behalf of the Objector No. 13, who is Secretary General of Pakistan Tehreek-e-Insaaf, Islamabad Region has adopted the arguments for the learned counsel Ms. Syeda Abida Bokhari, Advocate. In furtherance he further argued that the proposed Rule is in conflict with the judgment of the Hon'ble Lahore High Court dated 16.07-2022, passed in Writ Petition No. 44479 of 2022 titled as "*Dr. Yasmeen Rashid versus Election Commission of Pakistan*". He maintained that the Elections Act, 2017, is an Act of the Parliament and sections 77 & 78 thereof contain specific and categorical procedure for appointment of an Election Agent and the Polling Agent and the Election Commission has mandate only to work under the Act of Parliament in terms of Article 218 (3) of the Constitution of Islamic Republic of Pakistan. Thus, Election Commission cannot add or omit any provision of the Act of the Parliament.

5. No one has appeared on behalf of Pak Sarzameen Party. The objection petition filed on behalf of the political party which is available on record states that the Commission is duly empowered under section 239 of the Elections Act-2017 to make rules for carrying out the purpose of the Act but surprisingly from bare reading of notification in question, amendments were made in Rule 58 of the Election Rules, 2017, which is against the Commission's mandate. It has further been mentioned in the petition that Pak Sarzameen Party always appreciates and appraised amendments made within the mandate granted by the Constitution. As far as amendment in section 77 of the Act is concerned it may kindly be appreciated that the Commission has no authority and mandate given by the Parliament to make amendments in the Act. However, in section 239 of the Act which is very much clear that the Commission may by notification in the official Gazette and publication make rules for carrying out the purposes of this. Moreover, Section 77 of the Act is very much clear regarding the appointment of the polling agents by the contesting candidates or his election agent therefore, there is no need to amend, alter or change without any reason. If the Elections Act, 2017, requires any amendment, the proper forum for the purpose is the Parliament and the Commission may refer such proposal to it for legislation. It has been further stated that the Rules are meant for carrying out the purposes of the Elections Act, 2017, but the proposed amendment would create hurdles and difficulties for the contesting candidates and voters of the constituency and thousands of voters of the constituency shall suffer from their right of vote and there is also serious apprehension that this amendment shall create serious problems instead of providing free and fair environment to the voters.



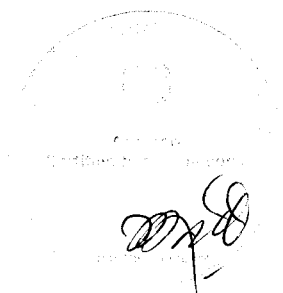
6. Mr. Saifullah Gondal, Advocate appeared on behalf the Jamat-e-Islami has contended that before proposing the amendment in question, the Commission should have made deliberation on it and have taken feedback of the stakeholders i.e. political parties. He then made a request to the Commission to the effect that to which election the proposed amendment would made applicable as 2<sup>nd</sup> phase local government elections in Karachi and Hyderabad Divisions are scheduled shortly for 15.01.2023, and amendment's applicability in said elections may create numerous issues and hurdles.

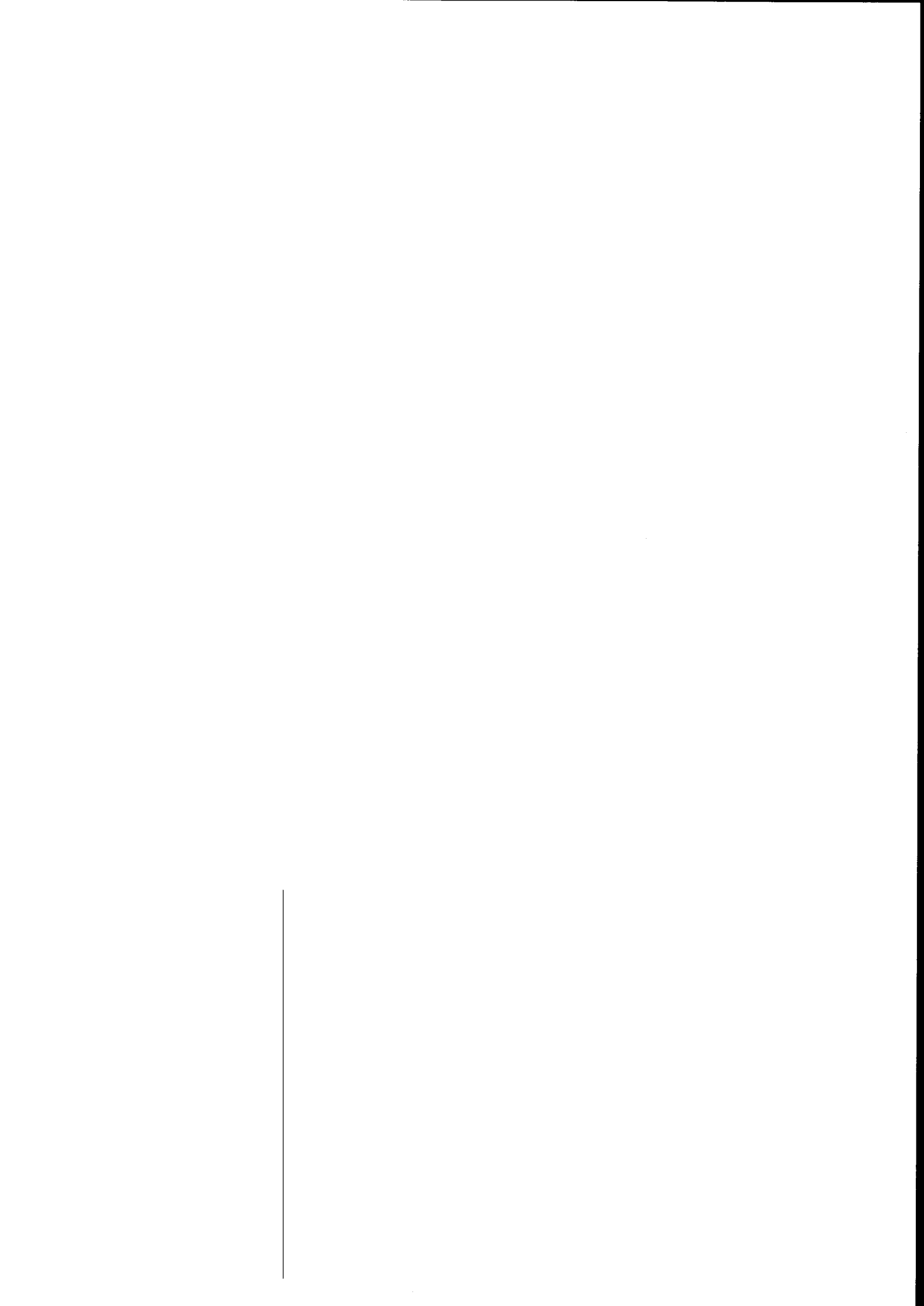
7. We have heard the learned counsel for the parties and have given due consideration to their submissions. Before deliberating upon the above submissions, it is important to throw light on objectives which necessitated the Commission to bring amendment in Rule 58 of the Election Rules, 2017, in shape of a proviso, which had provided as under:-

"Provided that the polling agent or agents so appointed under section 77 shall be a voter of the constituency."

8. The primary duty of a polling agent under the law is to identify the voters at the polling stations, check their particulars in the electoral rolls, safeguard against personation and to ensure the smooth conduct of poll. It is the right of a polling agent to object the identity of a voter and challenge it in terms of section 86 of the Elections Act. In case, the nomination of a polling agent is allowed outside the constituency, the political parties, contesting candidates, election agents may bring polling agents from other constituencies, districts and provinces creating a number of complications. The nomination of polling agents outside the constituency may create issues qua the identification of voters, challenging of voters on any ground including personation. This Commission vide order/notification dated 15.07.2022, had issued instructions that the "polling agent shall be a voter in the constituency: hence no candidate/election agent shall appoint any polling agent outside the constituency, he must be a voter of the constituency too." The said order of the Commission was assailed before the Hon'ble Lahore High Court, Lahore by Dr. Yasmin Rashid through Writ Petition No. 44479/2022, referred to above in the submission. The Hon'ble High Court vide its judgment dated 16.07.2022, was pleased to suspend the Commission's order for the bye-elections to be conducted on 17.07.2022 in twenty constituencies of the Punjab Province and allowed the Writ Petition. However, with regard to appointment of Polling Agent from the constituency, the Hon'ble High Court was pleased to observe the following:

"7. Issuance of the impugned Notification dated 15.07.2022 has, per se, established the concern brought before this Court through earlier petition as well as this petition that Polling Officers were acting on verbal instructions from the Election Commission. The Court has already declared in the earlier





decision that verbal instructions, being detrimental to fair and transparent process can neither be issued nor be acted upon by the Polling Officers, staff and all the agencies deputed at the polling stations. Such instructions even having force of law would lead to uncertainty and chaos, which shall certainly defy the Constitutional command of conducting fair and free election under Article 218 of the Constitution of Islamic Republic of Pakistan, 1973 ("the Constitution").

The direction under Section 4(3) of the Act of 2017 cannot be taken as an exception. Besides having comprehensive powers under the Constitution and dominant duty of conducting free, fair and transparent election, the Election Commission has to act under the law. The instructions under Section 4(3) should be issued, if circumstances so requires, at the time of Election Schedule or well before the date of election so that none of the parties is taken by surprise while making its preparations for the polling day.

8. This Court once again observes judicial restraint from interpreting the provisions referred by both the sides and give any decision on the interpretations made by Election Commission in impugned order. For any anomaly on a matter, while collectively reading different provisions, the Legislator has power to clarify through Rule making and the Election Commission, invoking its powers under Section 3 of the Act of 2017, can also address an issue not expressly provided within the provisions of relevant law. Nevertheless such power cannot be exercised in a way that one of the candidates is placed at a disadvantageous position, having been taken by surprise. Reiterating the decision in Writ Petition No.44244 of 2022 that Polling Officer and his staff deputed at Polling stations cannot act on verbal instructions, it is also held that issuance of the Notification dated 15.07.2022, few days before the polling day, has rendered the level playing field uneven, for a candidate who has already worked out on the Polling Agents, therefore, it is suspended for the election to be conducted tomorrow (17.07.2022) in twenty constituencies of the Province.

9. On Court's question, Mr. Ahmad Awais, Senior Member of petitioners' party, after taking instructions, has undertaken on his political party's behalf that peace and tranquility shall be maintained if administration is directed to remain within the sphere of law and implement the judgment by Apex Court in letter and spirit.

The Advocate General, present in Court, is directed to ensure that directions by the Apex Court and this Court, to Police and Civil Administration, shall

be followed and complied with in letter and spirit. The administration shall respond to Polling Officer's direction, general/special powers, if any attempt or act of disrupting the election process is brought to their notice.

Any instance of breach of undertaking, by petitioner's political party, shall also be taken as contempt of Court, if formally brought before this Court.

In case the Poling Agent is from outside the constituency and not voter, his complete identification and particulars shall be provided to the Presiding Officer alongwith nomination, If so required by him.

The Petition is allowed to the extent and in the manner noted above."

[Emphasis added]

9. The above judgment clarifies that the Election Commission has comprehensive powers under the Constitution and has a dominant duty of conducting free, fair and transparent election. The instructions under Section 4(3) of the Elections Act, 2017, for which the Commission is duly empowered could be issued by it at the time of Election Schedule or well before the date of election so that none of the parties is taken by surprise while making its preparations for the polling day. It was further clarified by the Hon'ble Court that for any anomaly on a matter, the Legislator (herein Parliament) has power to clarify through Rule making and the Election Commission, invoking its powers under Section 3 of the Act of 2017, can also address an issue not expressly provided within the provisions of relevant law. However, such power cannot be exercised in a way that one of the candidates is placed at a disadvantageous position, having been taken by surprise.

10. The objection of the learned counsel for Malik Sajid Mehmood that the proposed Rule is in conflict with the judgment of the Hon'ble Lahore High Court dated 16.07.2022, has no force as it in an unambiguous term holds that the Commission in terms of Section 3 and 4(3) of the Elections Act has full competence and empowerment to issue instructions and can also address an issue not expressly provided within the provisions of relevant law i.e. Elections Act, 2017.

11. The duties and mandate of the Commission envisaged in Article 218(3) of the Constitution have further been defined elaborately in a landmark judgment reported as PLD 2012 Supreme Court 681 "*Workers Party Pakistan vs. Federation of Pakistan & others*". The relevant extracts of the judgment are reproduced hereunder:-

"41. The Election Commission may also exercise its powers in anticipation of an ill that may have the effect of rendering the election unfair. In the case titled as In Re: Petition filed by Syed Qaim Ali

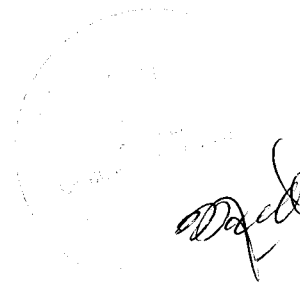


Shah Jellani (PLD 1991 Jour. 41) the Elections Commission exercised its powers under Article 218(3) pre-emptively, by making all necessary arrangements to ensure that a certain class of people would be allowed to vote. This case implies that where a violation of the standards mentioned in Article 218(3) has not as yet taken place, the Election Commission is legally empowered under Article 218(3) to exercise its powers pre-emptively in order to avoid a violation of these standards.

Furthermore, *Mst. Qamar Sultana v. Public at Large* (1989 MLD 360) and *In Re: Complaint of Malpractices in Constituency No. NA-57, Sargodha-V* (supra) both reinforce the argument that the Election Commission is fully empowered by Article 218(3) to make 'such orders as may in its opinion be necessary for ensuring that the election is fair, honest etc'. These decisions recognize that the Election Commission enjoys broad powers not only to take pre-emptive action but also to pass any and all orders necessary to ensure that the standards of 'honesty, justness and fairness' mentioned in Article 218(3) are met.

42. The Parliament has framed different laws to effectuate the above constitutional provision and to regulate elections to the National and Provincial Assemblies. ROPA reiterates and further vests the Election Commission with the responsibilities and powers to, inter alia, regulate and check intra-party affairs and actions taken by candidates and parties in anticipation of and on Election Day, resolve all election disputes, declare the election void and to award punishments for violating relevant election laws. In appreciation of the arduousness of its task, section 5(2) of ROPA further empowers the Election Commission to "require any person or authority to perform such functions or render such assistance for the purposes of this Act as...it may direct". The Election Commission may, under section 103(c) of ROPA also "issue such instructions and exercise such powers, and make such consequential orders, as may in its opinion, be necessary for ensuring that an election is conducted honestly, justly and fairly, and in accordance with the provisions of this Act and the rules". Article 220 of the Constitution also directs the Federal and Provincial machinery to assist the Election Commission in fulfilling its constitutional responsibilities. The law, therefore, entrusts the Election Commission with exclusive, broad and extensive powers to attend to all issues related directly and ancillary to the election process.

43. Article 218(3) also empowers the Election Commission to ensure that the election process does not suffer from any corrupt and/or illegal practices. Sections 78, 79, 80, 80-A, 81 and 83 of ROPA comprehensively define the terms "corrupt practices" and "illegal practices". ROPA in sections 82, 99 and 100 further elaborates the consequences of such practices and enunciate that the same form a sufficient basis for the Election Commission to, inter alia, imprison, fine and disqualify those who violate them. These



*M. Jellani*

provisions, therefore, subsume all those impugned activities as cognizable by the Election Commission. Similarly, Section 103(a) of ROPA instructs the Election Commission to ensure a "fair election". In doing so it implies that "large scale malpractices including coercion, intimidation and pressures, prevailing at the election" would negate the 'fairness' elections are to embody. While sections 78, 79, 80, 80-A, 81 and 83 specify activities that the Election Commission can regulate and check under Article 218(3), section 103(a), substantially enhances this defined spectrum of cognizable activities and reinforces the obligation to check them. In section 103(c) section it empowers the Election Commission to issue instructions, exercise its powers and make orders to effectuate the said standard."

12. A common objection in all the Objection Petitions is that the amendment brought in the Election Rules is of substantial nature and same is intentionally not provided in section 77 of the Act *ibid* by the Parliament. Therefore, the same cannot be made and imposed through Rules as Rules cannot override the main statute i.e. the Elections Act, 2017. It is imperative to mention here that under Article 218(3) of the Constitution, it is fundamental duty of the Election Commission to conduct elections and to make such arrangements as are necessary to ensure that the election is conducted honestly, justly, fairly and in accordance with law and corrupt practices are guarded against. The words "honestly", "justly" and "fairly" have been elaborated in the above judgment and have been interpreted in the following manner:

"40. A bare reading of Article 218(3) makes it clear that the Election Commission is charged with the duty to 'organize' and 'conduct the election'. The language of the Article implies that the Election Commission is responsible not only for conducting the election itself, but also for making all necessary arrangements for the said purpose, prior to the Election Day. By conferring such responsibility on the Election Commission, the Constitution ensures that all activities both prior, on and subsequent to Election Day, that are carried out in anticipation thereof, adhere to standards of justness and fairness, are honest, in accordance with law and free from corrupt practices. This Court in *Election Commission of Pakistan v. Javaid Hashmi and others* (PLD 1989 SC 396), observed that "(g)enerally speaking election is a process which starts with the issuance of the election programme and consists of the various links and stages in that behalf, as for example, filing of nomination papers, their scrutiny, the hearing of objections and the holding of actual polls. If any of these links is challenged it really (is) tantamount to challenging the said process of election". It interpreted that the phrase 'conduct the election' as having "wide import" and including all stages involved in the election process. These observations subject all election related activities that take place between the

commencement and the end of the election process to the jurisdiction conferred on the Election Commission under Article 218(3). The Election Commission therefore has to test all election related activities that are carried out in the relevant period, both individually and collectively, against the standards enumerated therein."

13. This Commission is mindful of its duties, powers and functions conferred on it by the Constitution and by the subordinate legislation. Under Article 17 of the Constitution, every citizen has the right to form associations or unions, subject to any reasonable restrictions imposed by law in the interest of sovereignty or integrity of Pakistan, public order or morality. Every citizen, not being in the service of Pakistan, has the right to form or be a member of a political party, subject to any reasonable restrictions imposed by law in the interest of the sovereignty or integrity of Pakistan. The Elections Act, 2017, provides different definitions of a "contesting candidate" and a "polling agent". Section 76 provides provisions for appointment of an Election agent who must be a voter of the constituency. On the same analogy, a polling agent should have been a voter of the constituency. For harmonious interpretation and in order to bring section 77 in conformity with the provisions of section 76 and Article 218(3) of the Constitution, the Commission being the regulator, has competence in terms of Sections 3 and 4(3) of the Elections Act to make rules for carrying out the purposes of the Act.

14. The august Supreme Court in PLD 2013 Supreme Court 406 "*Workers Party Pakistan vs. Federation of Pakistan, etc*" was pleased to hold that the Election Commission in compliance of Article 218(3) read with Article 222 of the Constitution and sections 103 and 104 of Representation of Peoples Act, 1976 (Old law) as well as the judgment in the case of Workers' Party Pakistan, can improve the standards of "honestly", "justly" and "fairly" provided in Article 218(3) of the Constitution. The relevant extract of the judgment provides as under:-

"17. In our order dated 12-3-2013, we had already made it clear that the ECP is required to perform its functions strictly in accordance with the Constitution. For sake of convenience, relevant paras from the judgment of Workers' Party were reproduced. No doubt the ECP has a Constitutional commitment and obligation to arrange and organize elections according to Article 218(3) and it also enjoys powers to do so as it has been described under Article 222 of the Constitution. Under the constitutional provision, ECP is responsible to arrange, organize and conduct elections honestly, justly, fairly and in according with law and emphasis is that corrupt practices should be guarded against. Thus, in view of such provision of Constitution a solemn object should be that no corrupt person is allowed to enter in Parliament. With this commitment of the Constitution, the ECP

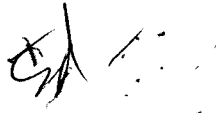
without changing the complexion or contents of Rule 3 of the Rules, 1977, has made improvements in the pro forma already appended with the ROPA. There is no hard and fast rule to make improvement in a pro forma of nomination paper, particularly when required object is to enforce Article 218(3) of the Constitution. A detailed information about a candidate is essential to be obtained as on his success he has to represent a constituency on behalf of more than hundred thousands electors, for a period of five years and on winning the election he shall be a most responsible person along with others who will govern the country. It is the mandate of the Constitution that the people of Pakistan shall be governed by the Chosen Representatives, therefore, a candidate who comes forward for election, is supposed to provide his complete credentials to the voters enabling them to cast votes in favour of such person who is honest and believes in fairness and is free from any disqualification under Article 63 of the Constitution and is also qualified under Article 62 of the Constitution. Mr. Hamid Khan, Senior Advocate Supreme Court has stated that no one has raised objection to the contents of nomination papers. We agree with him and believe that GOP is also of the opinion that there must be free, fair and honest elections as well as free from any corruption. Therefore, when all the stakeholders i.e. the ruling party and the other political parties, voters, whose number is about eight crore and the Nation as a whole is expecting that their representation in the Parliament should be made by honest person(s) who are not polluted by allegation of corruption in any manner. Thus, it is declared that ECP in compliance of Article 218(3) read with Article 222 of the Constitution and sections 103 and 104 of Representation of Peoples Act, 1976 as well as the judgment in the case of Workers' Party Pakistan (supra) has prepared/improved nomination papers for the forthcoming General Elections of Pakistan for National and Provincial Assemblies, in accordance with the Constitution and the law."

15. For what has been discussed above, it can safely be inferred that in terms of section 3, 4(3), readwith Article 218(3) of the Constitution and the judgments reported as PLD 2012 Supreme Court 681 & PLD 2013 Supreme Court 406, this Commission has full competence and empowerment to issue instructions and can also address an issue not expressly provided within the provisions of the Elections Act, 2017. To effectuate the above constitutional provisions and to regulate elections and their conduct in a free, fair and transparent manner, this Commission can issue instructions and guidelines.


16. However, the listed objection petitions which, inter alia, contain common objections to the effect that "amendment of a fundamental change through Rule cannot be imposed through an administrative measure as rule cannot override or overstretch beyond the basic stature and such a change can only be introduced through legislation after debating the same in the National Assembly" bear weight and seem logical. We therefore, allow all the listed objection petitions with observations that the proposed amendment in Rule 58 shall be taken up with the Parliament for enactment at a later appropriate stage as and when required.

17. Since, the local government elections of 2<sup>nd</sup> phase in Sindh have been held in the meanwhile on 15.01.2023, therefore, the petition of Jamat-e-Islami to that extent stands disposed of for having become infructuous.

18. All the listed objections and referred to above stand disposed of in the above terms.

  
Sikandar Sultan Raja  
Chairman

  
Nisar Ahmed Durrani  
Member

  
Shah Muhammad Jatoi  
Member

Justice (R) Ikram Ullah Khan,  
Member

Announced on 22<sup>nd</sup> .03.2023.

