

Election Commission of Pakistan and others vs. Pakistan Tehreek-i-Insaf and others

PLD 2024 SC 267

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Pakistan’s superior judiciary has historically remained quite active during the times leading up to and preceding any general elections in the country. The 2024 General Elections were no different in this regard, as exemplified by the judgement — authored by Chief Justice Qazi Faez Isa — in *Election Commission of Pakistan vs. Pakistan Tehreek -e- Insaf*.

The brief facts leading up to this suit were that the Election Commission of Pakistan (“ECP”) issued multiple notices to the Pakistan Tehreek-e-Insaf (“PTI”) to conduct its intra-party elections as mandated by the Elections Act, 2017 (“Elections Act”). Initially, on account of Covid-19, an extension was sought from the ECP which was duly granted. However, as per the ECP, intra-party elections were still not held. The PTI persistently contended that it did conduct intra-party elections and that the complainants alleging otherwise were no longer a part of the PTI, and therefore were ineligible to contest the same. The PTI also apparently submitted a certificate as required under Section 209 of the Elections Act. However, after serving a show-cause notice, the ECP stripped the PTI of its famous “cricket bat” symbol under Section 215 of the Elections Act, which authorises the ECP to deny an electoral symbol to any political party which fails to fulfil its obligations under Sections 209 and 210 of the Elections Act. This order was challenged in the Lahore High Court and the Peshawar High Court simultaneously, also raising issues of *res sub judice*.

In appeal before the Supreme Court (“Court”), it was argued by PTI’s counsels that ECP’s order violated their party’s fundamental rights guaranteed under Article 17(2) of the Constitution of the Islamic Republic of Pakistan, 1973 (“Constitution”). They further alleged that the ECP did not guarantee them sufficient time to conduct elections, disregarded the certificate provided to it by the PTI as proof of intra-party elections, and, considering the political tensions built up in the country, acted in a *mala fide* manner by singling out the PTI.

A three-member bench of the Court — comprising Chief Justice Isa, Justice Hilali, and Justice Mazhar — dispelled all of PTI’s contentions stating that repeated notices had been served (over the course of a year) to the PTI by the ECP. Furthermore, the Court reasoned that

the PTI was unable to furnish any proof with regards to its alleged intra-party elections, and in the absence of convincing evidence, a bare certificate could not be considered conclusive proof and could even be tantamount to fraud. Moreover, while giving a broad application to Article 17(2) of the Constitution, the Court held that democracy forms the bedrock of our political system, and denying any candidate the right to contest elections amounts to a violation of their fundamental right. Therefore, that a constitutional amendment removed the provision mandating intra-party elections under Article 17(2) is not a conclusive reason to disregard such elections altogether as they are crucial to the functioning of a democratic system. Lastly, the Court held that there was no evidence to show any *mala fide* intent on the part of the ECP: the latter was doing its job, and it was well within its mandate to inquire into the authenticity of any certificate furnished to it with regards to intra-party elections.

There is a lot to unpack in the approach that the Court took in this case. Firstly, the Court notably deviated from its holding in *Benazir Bhutto vs. Federation of Pakistan* wherein it was firmly established that stripping a party of its electoral symbol violates Article 17(2) of the Constitution because it effectively hampers the functioning of a political party.¹ The right of association guaranteed under Article 17(2) is not limited to the mere formation of a political party, but extends to its efficacious functioning as well. In the case at hand, the Court made superficial distinctions between the legislative history and purposes of the Representation of the People Act, 1976 (“ROPA”) and the Elections Act. The *ratio decidendi* in *Benazir Bhutto* was about a fundamental right violation that directly arose from the denial of an electoral symbol to a political party. While the intent behind the drafting of the ROPA and the Elections Act may have been different, with the latter being more conducive to democracy, this fact alone does not sufficiently distinguish the core of the dispute in both these cases, and the Court unjustifiably deviated from a well-established legal precedent.

A close reading of Section 208(5) of the Elections Act makes it clear that the only penalty prescribed for failing to conduct intra-party elections is a fine ranging from one to two hundred thousand rupees. The conscious omission of a consequence as strict as the denial of an electoral symbol points to the legislative intent of the Parliament in crafting this law, which the Court swiftly ignored in its judgement. Furthermore, ECP’s reliance on Section 215 of the Elections Act — affirmed by the Court — to deny the PTI its electoral symbol was flawed. It was noted in the judgment that representatives of the PTI submitted their party’s Section 209

¹ PLD 1989 Supreme Court 66.

certificate on two different occasions. To reconcile this fact with its conclusion, the Court took an unnecessarily expansive approach whereby it has authorised the ECP to conduct an independent investigation into the authenticity of intra-party elections. A strict reading of the law confers no such jurisdiction upon the ECP.

It is reasonable to contend that a mere certificate without actual intra-party elections would frustrate the object of the Elections Act. However, in the absence of any express jurisdiction conferred upon the ECP to investigate the authenticity of such elections, the Court must look at *prima facie* evidence. In this case, the Court disregarded all *prima facie* evidence provided by the PTI while affording disproportionate weightage to the claims made by alleged former members of the PTI. Besides, in the absence of a comprehensive investigation, the Court wrongly allowed the ECP to expansively exercise its jurisdiction and impose a consequence that violated the fundamental rights of the PTI.

Lastly, the Court applied an extremely restrictive approach to Article 17(2) of the Constitution, which is supposed to be the benchmark for evaluating any subsequent legislation. The Court in *Benazir Bhutto*, and in fact Justice Isa himself in this case, recognised that electoral symbols play an extremely crucial role in societies where illiteracy is rampant and that an electoral symbol is the most prominent identifier of a political party for much of the population. Stripping a political party of its electoral symbol not only violates the fundamental rights of that political party, but also of millions of voters who now feel disenfranchised from the electoral process. For a Court that has repeatedly stressed on the vital importance of democracy, this judgement gave too small a consideration to the political disenfranchisement created by ECP's order just weeks before the 2024 General Elections.

This judgement must be viewed in the context of a period when the PTI was being structurally dismantled through state institutions to incapacitate it from participating in the 2024 General Elections. The Court's order played its role in stripping the PTI of its political identity and creating mass confusion among a large majority of the voters across Pakistan. The political ramifications of this judgement will reverberate through Pakistan's electoral landscape for decades to come.