

Election Commission of Pakistan vs. Barrister Umair Khan Niazi

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This case note examines the Supreme Court of Pakistan’s judgment on certain impugned provisions of the Elections Act, 2017 (“Act”), concerning the appointment of bureaucrats as Returning Officers (“ROs”) and District Returning Officers (“DROs”). The appellant, Election Commission of Pakistan (“ECP”), was contesting an order passed by the Lahore High Court that halted these appointments, arguing for the necessity to uphold the ECP’s autonomy and the uninterrupted conduct of elections.

Pakistan Tehreek-i-Insaf (“PTI”) had earlier challenged the appointment by the caretaker provincial government of bureaucrats as ROs and DROs, alleging frequent transfers and postings within the bureaucracy. PTI alleged that this was a deliberate attempt to disadvantage it in the larger plan of skewing the electoral landscape. The petitioner prayed that Sections 50(1)(b) and 51(1) of the Act be declared *ultra vires* the Constitution of the Islamic Republic of Pakistan, 1973 (“Constitution”). The Lahore High Court (“LHC”) granted PTI relief in this regard, halting the appointments of ROs and DROs. The Supreme Court (“Court”), while granting leave to appeal, suspended the LHC’s order. Before the Court, the issue was one of technicality to circumvent the progress towards the general elections. When the Court had earlier set February 8, 2024 as the date for holding general elections across the country, PTI and its members were a party to that order. The Court therein had held that “no one should now put forward any pretext to derail democracy.” With this command in field, the Court found that the LHC order was in contravention of its order and so were the actions of the petitioners who had brought the issue before the Court in the first place. Therefore, the LHC order was suspended, and the election plan was allowed to progress.

The judgment came in the backdrop of an ongoing debate regarding the institution which ought to be tasked with conducting general elections. In 2009, the then Chief Justice of Pakistan (“CJP”) Iftikhar Muhammad Chaudhry sought to place the judiciary outside the administrative

sphere of elections.¹ The opposite, however, happened during the 2013 general elections with the then Chief Election Commissioner (“CEC”) Fakhruddin G. Ebrahim deciding to induct members of the lower judiciary as electoral watchdogs.² The Act, by allowing both bureaucratic and judicial officers to act as ROs and DROs, tried to bridge this gap in electoral practices through its Sections 50 and 51. The ECP asserted before the Court that it had invited all High Courts to spare judicial officers but had received constant rejections. With that, the ECP argued that it could only induct bureaucrats as ROs and DROs. These appointments, the ECP argued further, could not be used by PTI to hamper the progress towards general elections.

Seen in this light, the judgment furthered the cause of democracy while penalising the late objector. By upholding the *vires* of Sections 50(1)(b) and 51(1) of the Act, the Court expressed its deference to the Parliament and signalled that a law enacted by the Parliament would not be struck down unless it violated constitutional dictates. However, it cannot be said that PTI’s challenge was completely without merit. With Commissioner Rawalpindi’s unsettling claims, hinting at bias and rot within the electoral system, the broader issue of ensuring free and fair elections in Pakistan remains unresolved.³ It seemed as if the Court was a little hasty in proceeding with the general elections (in the Court’s defence, this hastiness was probably because the elections had long been delayed). Any election under a caretaker regime whose tenure had been extended without any meaningful demur was a cause of concern for a battered party. However, these concerns did not merit a direct legal challenge for the Court to immediately redress. The controversy or the allegations were part of a larger cobweb of political thicket that the Court ought to steer away from (which it ultimately did).

It is pertinent to note that the judiciary has, by and large, supported the cause of free and fair elections. The most comprehensive judgment in this domain is that rendered in the *Workers Party* case wherein the Court had issued certain directions to the ECP to make the electoral arena free from malignant practices.⁴ The judgment notes a key fact relevant for our purposes: that the

¹ National Judicial Policy, 2009.

² Tariq Mahmud, ‘Should the judiciary conduct the elections?’ *The Express Tribune* (Karachi, 6 April 2018) <<https://tribune.com.pk/story/1678485/judiciary-conduct-elections>> accessed 24 August 2024.

³ Tahir Naseer and Adnan Sheikh, ‘Rawalpindi commissioner says poll results ‘manipulated’ under his watch; ECP rejects claims’ *Dawn* (Islamabad, 17 February 2024) <<https://www.dawn.com/news/1814959>> accessed 24 August 2024.

⁴ *Worker’s Party Pakistan vs. Federation of Pakistan* PLD 2012 SC 681.

Constitution confers on the ECP the mandate to conduct elections by virtue of Article 218(3). Any objection to its conduct must stem directly from the Constitution. Where the ECP has tried its best to uphold constitutional imperatives, but has suffered, owing to no fault of its own, administrative setbacks, then it cannot be held responsible. Even otherwise, by using the disjunctive word “or,” Sections 50 and 51 of the Act envisage a scenario where *either* bureaucrats *or* judges can be appointed as electoral watchdogs. The requirement is not one of “and” and therefore was not disobeyed. The ECP may be blamed for playing a part in delaying the elections beyond the constitutional deadline. However, in this *lis*, it was vindicated, and rightly so.

The Parliament needs to provide for an appropriate mechanism through which the issue of appointment of ROs and DROs from judicial and administrative streams can properly be addressed — leaving the matter simply to the ECP’s discretion does not fix the festering problem. A rigid judicial-bureaucratic ratio may not be needed. However, some goal posts are required or otherwise malpractices within the electoral sphere will continue to occur. Besides, a mechanism whereby other institutions facilitate the ECP in its electoral management is also the need of the hour.

The burden also lies on the ECP to publicly disclose the criteria for electoral appointments and engage in cross-party consultations to ensure a consensus, thereby reinforcing perceptions of fairness. An independent audit of the electoral process and publishing regular reports on the ECP’s decisions are salient to build trust among stakeholders and the public at large. This, in turn, will strengthen the democratic fabric of Pakistan.