In the Supreme Court of Pakistan
(Appellate Jurisdiction)

Present
Mr. Justice Mushir Alam
Mr. Justice Syed Mansoor Ali Shah
Mr. Justice Munib Akhtar

Civil Appeals No.1498 & 1499 of 2018
(On appeal under section 9(5) of the Election Act, 2017 against the order dated 1.10.2018 passed by the Commission of Pakistan in Cases No..30(26)/2018- Leg & 1(19)/2018)

And

Civil Petitions No.972-L & 973-L of 2019
(On appeal from the judgment dated 26.2.2019 passed by the Lahore High Court, Multan Bench in WP Nos.14893/18 & 16234/18)

Muhammad Salman (in all cases) Petitioner(s)

vs.

Naveed Anjum, etc. ...Respondent (s)
Shoaib akmal qureshi Hashmi etc.
Commission of Pakistan etc.

For the appellant/petitioner (s)	:	Mr. Muhammad Shahzad Shaukat, ASC (in call cases)
For respondent No.1 (in CA 1498/18)	:	Mr. Tahir Munir Malik, ASC Kh. Waseem Abbas, ASC Mr. Imran Humayun Cheema, ASC
For respondent No.4 (in CA 1498/18)	:	Mr. Waqar Ahmed Rana, ASC
For respondent No.1 (in CA 1499/18	:	Mr. Hamid Khan, Sr. ASC Syed Rifaqat Hussain Shah, AOR
For respondent No.5 (in CP 972-L, 973-L/18)	:	Mr. Sajeel Shehryar Swati, ASC
On Court Notice	:	Ch. Aamir Rehman, Addl. AGP On 28 & 29/1/2020
Dates of hearing	:	28th and 29th January & 3rd February, 2020

JUDGMENT

Munib Akhtar, J.: The four cases (being two appeals and two leave petitions) before us relate to an election dispute arising out of the General Election of 2018

in respect of a seat in the Punjab Assembly, PP-217 (Multan-VII). All of these cases have been filed by Mr. Muhammad Salman who was the winning candidate (and who is herein after referred to as "the appellant"). The issues at hand involve, inter alia, a consideration of s. 9 of the Elections Act, 2017 ("2017 Act") and the powers and jurisdiction of the Election Commission of Pakistan ("Commission") in terms thereof, as well as, more generally, under clause (3) of Article 218 of the Constitution.

2. It appears that after the appellant was declared the winner one Mr. Shoaib Akmal Qureshi ("Mr. Qureshi") filed a petition before the Commission under Article 218(3) read with ss. 4, 8 and 9 of the 2017 Act, alleging that the appellant was underage (being less than 25 years old) on the date of the filing of his nomination papers. It was claimed that the record had been manipulated to show that he was eligible to contest the election. Certain other allegations were also made, and it was prayed that his election be set aside under two paragraphs of clause (1) of Article 62 of the Constitution. In the petition, Mr. Qureshi identified himself as being resident in, and a registered voter of, the constituency. At around the same time, one Mr. Naveed Anjum ("Mr. Anjum"), who also identified himself as a registered voter of the constituency, filed a constitutional petition in the Lahore High Court (WP 11388/2018) on 07.08.2018 making substantially the same allegations against the appellant. It was stated in the petition that the Commission had been approached under ss. 8 and 9 of the 2017 Act, but no action was forthcoming. It was prayed that the appellant's election be set aside. On this petition, an order was made on 08.08.2018 in the presence of counsel for Mr. Anjum and the Commission (though in the absence of the appellant, who was respondent No. 4 therein) that the petition filed by Mr. Anjum before the Commission be heard and decided.

3. The Commission clubbed the two matters and after notice to the appellant and others and hearing the parties, made the impugned order dated 01.10.2018. The petitions were allowed and the election of the appellant was set aside. The operative part of the impugned order was in the following terms (emphasis supplied):

> "16. In the light of the entire discussion above, the Commission holds that the respondent Muhammad Salman, on the date of filing nomination papers on 6.6.2018 was not eligible to contest election being below the age

> of 25. That his date of birth throughout shown as 28.1.1994, was correct and the one now changed to 1.2.1993, is a result of manipulations and interpolations. *The election of Muhammad Salman returned candidate from PP-217 Multan-VII is hereby declared void, under section 9 of the Election Act, 2017 and all enabling provisions of the Constitution and the law.* His notification as returned candidate is withdrawn and it is hereby directed that re-election be conducted in the whole constituency PP-217 Multan-VII."

4. The appellant thereupon filed two constitutional petitions in the Lahore High Court. WP 14893/2018 was filed on or about 11.10.2018, and was in relation to the petition filed before the Commission by Mr. Qureshi. WP 16234/2018 was filed on or about 27.10.2018 and was in relation to the petition that had been filed by Mr. Anjum. In both the appellant assailed the aforesaid order of the Commission dated 01.10.2018. The learned High Court heard the petitions together, and by judgment dated 26.02.2019 dismissed them. Against this judgment the appellant has filed the two leave petitions now before us. Along with filing petitions before the High Court, the appellant also filed two appeals, under s. 9(5) of the 2017 Act, directly in this Court assailing the order of the Commission. As before, one appeal related to the petition filed by Mr. Qureshi and the other to the one filed by Mr. Anjum. These are the two appeals that are before us. Learned counsel for the appellant explained that this two-track approach was taken only out of abundant caution, since (as we will see) the principal part of the appellant's case is that the Commission had no jurisdiction under s. 9 to declare the appellant's election as void, and hence it was unclear whether an appeal lay under subsection (5) thereof. Be that as it may, all four matters now fall to be decided.

5. Before proceeding further, we may note that both before the Commission and the High Court, the matter was contested also by Mr. Makhdoom Shah Mehmood Qureshi ("Mr. Makhdoom Qureshi"), who had been one of the candidates in the constituency (and who had, of course, lost the election, although garnering the next highest number of votes). Indeed, one of the objections taken by learned counsel for the appellant was that both Mr. Anjum and Mr. Qureshi were nothing but men of straw, being merely nominees of Mr. Makhdoom Qureshi. In the event, the principal submissions before us for the private respondents were made by learned counsel who appeared for the latter.

6. It will presently become clear that along with the provisions of the 2017 Act, we will also have to consider certain provisions of (one of) the predecessor statutes, the Representation of the People Act, 1976 ("1976 Act", commonly referred to as "ROPA"). In particular, s. 103AA thereof, which was the provision corresponding to s. 9 of the 2017 Act, will have to be looked at. It will be convenient to set out at the outset (to the extent material) some of the provisions from the two statutes in tabular form:

2017 Act	**1976 Act**
9. Power of the Commission to declare a poll void.—(1) Notwithstanding anything contained in this Act, if, from facts apparent on the face of the record and after such enquiry as it may deem necessary, the Commission is satisfied that by reason of grave illegalities or such violations of the provisions of this Act or the Rules as have materially affected the result of the poll at one or more polling stations or in the whole constituency including implementation of an agreement restraining women from casting their votes, it shall make a declaration accordingly and call upon the voters in the concerned polling station or stations or in the whole constituency as the case may be, to recast their votes in the manner provided for bye-elections. *Explanation.*—If the turnout of women voters is less than ten percent of the total votes polled in a constituency, the Commission may presume that the women voters have been restrained through an agreement from casting their votes and may declare, polling at one or more polling stations or election in the whole constituency, void. … (3) Notwithstanding the publication of the name of a returned candidate under section 98, the Commission may exercise the powers conferred on it by sub-section (1) before the expiration of	**103AA. Power of Commission to declare a poll void**.—(1) Notwithstanding anything contained in this Act, if, from facts apparent on the face of the record and after such summary inquiry as it may deem necessary, the Commission is satisfied that, by reason of grave illegalities or violation of the provisions of this Act or the rules, the poll in any constituency ought to be declared void, the Commission may make a declaration accordingly and, by notification in the official Gazette, call upon that constituency to elect a member in the manner provided for in section 108. (2) Notwithstanding the publication of the name of a returned candidate under sub-section(4) of section 42, the Commission may exercise the powers conferred on it by sub-section (1) before the expiration of sixty days after such publication; and, where the Commission does not finally dispose of a case within the said period, the election of the returned candidate shall be deemed to have become final, subject to a decision of a Tribunal. (3) While exercising the powers conferred on it by sub-section (1), the Commission shall be deemed to be a Tribunal to which an election petition has been presented and shall, notwithstanding anything contained in Chapter VII, regulate its own procedure….

sixty days after such publication; and, where the Commission does not finally dispose of a case within the said period, the election of the returned candidate shall be deemed to have become final, subject to the decision of an Election Tribunal on an election petition, if any. (4) While exercising the powers conferred on it by sub-section (1), the Commission shall be deemed to be an Election Tribunal to which an election petition has been presented and shall, notwithstanding anything contained in Chapter IX, regulate its own procedure….	
4. Power to issue directions.—(1) The Commission shall have the power to issue such directions or orders as may be necessary for the performance of its functions and duties, including an order for doing complete justice in any matter pending before it and an order for the purpose of securing the attendance of any person or the discovery or production of any document. … (3) Anything required to be done for carrying out the purposes of this Act, for which no provision or no sufficient provision exists, shall be done by such authority and in such manner as the Commission may direct.	**104. Directions of Commission in certain matters**.—Anything required to be done for carrying out the purpose of this Act, for which no provision or no sufficient provision exists shall be done by such authority and in such manner as the Commission may direct.

We may note that subsection (1) of s. 4 of the 2017 Act corresponds to s. 6(1) of the Election Commission Order, 2002 ("2002 Order"). This Order, along with the 1976 Act and a number of other statutes relating to elections, of course stand repealed by s. 241 of the 2017 Act. The present statute now deals with all matters relating to elections to both the Houses of Parliament and the Provincial Assemblies.

7. Learned counsel for the appellant, after stating the facts substantially as above, and referring to the litigation in the forums below, submitted that there was a substantial difference between s. 9 on the one hand, and s. 103AA on the other. It was submitted that while the latter had specifically conferred jurisdiction on the Commission to declare the poll in any constituency to be void and call for a bye-election in terms of s. 108, the former expressly limited its powers to calling upon

the voters of the affected polling stations (or even, in appropriate cases, the whole of the constituency) to "recast their votes in the manner provided for bye-elections". Learned counsel submitted that the reference to bye-elections in s. 9 was only procedural, i.e., it specified that the manner in which the votes were to be recast and nothing more. Learned counsel submitted that Parliament, which was of course fully aware of the state of the earlier legislation, had deliberately restated the language of s. 9 and eschewed the use of the term "void". Thus, the impugned order made by the Commission, which purported to void the appellant's election, was beyond jurisdiction and had to be set aside on this ground alone. Learned counsel further submitted that the earlier case law (considered below) in relation to s. 103AA could not be directly applied to the provisions of the 2017 Act. As regards the judgment of the High Court, it was submitted that it essentially turned on the observation by the learned Single Judge that since the appellant had a right of direct appeal to this Court under s. 9(5), a writ petition was not maintainable. It was contended that the impugned judgment did not really stand in the appellant's way as long as the fate of the impugned order of the Commission was decided. It was prayed that it be set aside as being beyond jurisdiction.

8. Learned counsel who appeared for Mr. Makhdoom Qureshi submitted that the Commission had a constitutional duty to hold elections freely, fairly and honestly and to guard against corrupt practices. This was so set out in clause (3) of Article 218 and this provision had to be construed and applied in a broad manner in order to enable the Commission to fulfill its constitutional mandate. It was submitted that this provision was comprehensive enough to empower the Commission to annul the election in any constituency in appropriate circumstances. Learned counsel also referred to Article 222 of the Constitution, which lists the various kinds of electoral laws that Parliament can enact. Learned counsel strongly emphasized the last part of this Article, which states that "no such law shall have the effect of taking away or abridging any of the powers of the Commissioner or the Commission under this Part". It was submitted that in order to ensure that s. 9 of the 2017 Act was consistent with the constitutionally ordained powers of the Commission, its subsection (1) had to be so construed that the election to a constituency could be declared void in terms thereof. Learned counsel also submitted that the constitutional powers of the Commission were distinct from those that were vested in the election tribunals set up to decide election disputes, as contemplated by Article 225. It was submitted that the

recasting of votes referred to in s. 9(1) did not substantively change the law from the earlier position. It was reiterated that the position under, and hence interpretation of, both s. 9 and s. 103AA remained the same. Learned counsel referred to various judgments of this Court, as well as a decision of the Indian Supreme Court, in support of his submissions. It was submitted that the impugned order was very much within jurisdiction and learned counsel prayed that the appeals and leave petitions be dismissed.

9. Learned counsel who appeared for Mr. Qureshi in one of the appeals (CA 1499/2018) submitted that s. 9 had to be read and applied liberally. Its clear purpose, unchanged from before, was to allow the Commission to summarily deal with the sort of election disputes as came within its scope, and at the earliest stage. It was submitted that the law was now settled that in case a returned candidate had made misdeclarations or falsely stated material particulars in the nomination papers, then he should not be allowed to hold office. The matter of the right/eligibility of such a person to be a member of the concerned legislature had to be dealt with swiftly and hence a broad and liberal interpretation had to be accorded to s. 9. It was submitted that the Commission was fully empowered to act in this regard under s. 9 and that the impugned order was within jurisdiction. Certain decisions of this Court were relied upon. It was prayed that the appeals and leave petitions be dismissed.

10. The learned AAG, who appeared in Court notice, submitted that the impugned order was within jurisdiction. It was submitted that s. 9 could not be given a narrow or pedantic reading. The learned AAG also referred to certain decisions of this Court, and drew particular attention to a passage from one of those cases, which is considered below.

11. Learned counsel who appeared for Mr. Qureshi in one of the leave petitions (CP 972-L/2019) submitted that the constitutional provisions, being principally the various clauses of Article 218, were an interlocking whole which had autonomous effect independently of any statutory provisions. In this regard reference was also made to Article 222 of the Constitution. It was submitted that the Commission had full powers and ample jurisdiction directly conferred by these constitutional provisions to declare, in appropriate circumstances, any election void. As regards s. 9, it was submitted that, in substance, it was no different from s. 103AA and had to be given similar effect. The provision was to

be construed and applied broadly. Various judgments of this Court were also cited. It was prayed that the appeals and leave petitions be dismissed.

12. Learned counsel for Mr. Anjum adopted the submissions made by other learned counsel appearing for the private respondents as also the learned AAG.

13. We have considered the submissions by learned counsel, the record as produced before us and the case law cited. We begin by noting that the matters proceeded (with the consent of learned counsel) purely on the legal plane and in jurisdictional terms, i.e., whether the Commission had the jurisdiction to declare the election of a returned candidate void under s. 9 of the 2017 Act and/or more generally under Article 218(3) of the Constitution. They are being so decided.

14. It happens from time to time that the legislature, having earlier enacted a law on a particular subject matter, decides to take a fresh look at the same and place new legislation on the statute book. This is what has happened with electoral laws. By 2017, the 1976 Act, and certain allied laws such as the Electoral Rolls Act, 1974, the Delimitation of Constituencies Act, 1974 and the Senate (Election) Act, 1975 had been on the statute book for well-nigh four decades. They had been amended from time to time (indeed, the last amendment to the 1976 Act was done in 2017) and had also been considered many times by the courts, including this Court, and thus accumulated a significant body of case law. It appears that Parliament decided to take a fresh look with the view of producing omnibus legislation that dealt comprehensively with matters relating to elections to the National Assembly and the Senate, as well as the Provincial Assemblies. The result was the 2017 Act, whereby the existing body of statute law was repealed and replaced with new legislation.

15. When the provisions of the 2017 Act are compared with the corresponding provisions of earlier legislation, we find that the former contains language that is sometimes exactly the same as before, and sometimes has been altered. Obviously, the legislature, when enacting fresh legislation, is presumed to know the previous state of the law, including the case law that gives the inevitable judicial gloss to statutory language. Considered against this background it is our view that where a provision in the 2017 Act uses modified language when compared with the corresponding earlier provision, it ought to be presumed, at least in the first instance, that the legislative intent was to alter the law. Of course, it may be that in the end the Court concludes that the change in language has no

modifying effect, and the law remains exactly the same as before. But this is not a conclusion to be drawn lightly. If it is sought to be shown that the law remains the same as before the onus must lie on the person making this claim. And depending on the nature of the change this may be a heavy burden to discharge. (Of course, even where the language is exactly the same as before, it may take on a new color and have a different effect than before, in the overall context of the new statute.) This, in our view, is the correct approach to take when, in interpreting and applying the 2017 Act, one of the parties before the Court seeks to have recourse to the earlier legislation, and make out a case that the law has not been changed.

16. Now, the language of s. 9, when compared with that of s. 103AA has clearly been altered in part and left unchanged in some respects. Focusing for the time being on the first subsections in the two provisions, we find that s. 103AA stipulated two conditions in which the Commission could exercise its jurisdiction, being either (i) grave illegalities, or (ii) violation of the provisions of the 1976 Act or the rules. Section 9 specifies three conditions. We will come to the third condition later. Looking at the first two, it is clear that the language used is the same as before, but with the additional requirement that the result of the poll at one or more polling stations or in the whole constituency must have been "materially affected". Whether this additional requirement applies only to the second of the conditions or to both is a matter that does not require determination here. But it would seem that the additional words used are intended to alter the situation in which the Commission can exercise its jurisdiction. What is crucial for present purposes is what it is that the Commission can do if either of the conditions is fulfilled. Under s. 103AA, it could declare the poll in the constituency to be void. A judicial gloss put on these words was that the poll for the whole constituency need not be voided: a declaration could even be made in respect of one or more polling stations (see, e.g., *Ch. Muhammad Ashraf Warraich and another v. Muhammad Nasir Cheema and others* 2016 SCMR 998 (para 23) and *Aftab Shaban Mirani and others v. Muhammad Ibrahim and others* PLD 2008 SC 779, 817). The relevance of this gloss will become clear presently. Under s. 9 however, the language used is different. The Commission can now "call upon the voters in the concerned polling station or stations or in the whole constituency as the case may be to recast their votes in the manner provided for bye-elections". Is it the legislative intent to alter the law by this change in language? In our view, the answer must be in the affirmative. There is a difference between the voters being asked simply to recast their votes on the one

hand, and the election to be declared void on the other. Learned counsel for the appellant was, in our view, correct in submitting that under s. 9 everything (and especially, for present purposes, the list of candidates) remains the same. Voters simply get another chance of choosing the person who is to represent them, but from the same slate as before. Under s. 103AA the entire election (subject to the judicial gloss just mentioned) was, as it were, scrapped and the whole exercise done afresh. Obviously, if the matter were limited to one or more polling stations, the practical result under both s. 103AA (on account of the judicial gloss) and s. 9 (on account of the statutory language) would be more or less the same. However, if the poll in the entire constituency was to be redone then there would be a fundamentally different position, as just indicated. In our view, this clearly shows that Parliament intended to bring about a change when it used the modified language. To hold that the law has been left unaltered would be to defeat the legislative intent.

17. The conclusion just arrived at is bolstered when one looks at the third condition in which the jurisdiction under s. 9 can now also be invoked. It is that there be an agreement (which has been implemented) to restrain women from casting their votes. This condition is new and was not to be found in s. 103AA (unless, tangentially, it could have been regarded as constituting a "grave illegality", on which point we need not express an opinion). What is of relevance for present purposes is not the condition itself (which could not have arisen in the facts and circumstances before us) but rather what the Explanation to subsection (1) has to say about it.

18. The manner in which an "explanation" found in a statutory provision is to be interpreted is well understood. In this Court, it was observed as follows in *Naveed Textile Mills Ltd. v. Assistant Collector (Appraising) Custom House Karachi and others* PLD 1985 SC 92 (at pg. 96; emphasis supplied):

> "We have heard the learned counsel at length. We are in agreement with him that the ordinary function of an explanation is to clarify, to facilitate the proper understanding of a provision, to serve as a guide, as held in the case of *Muhammad Hussain Patel* [PLD 1981 SC 1]. *Nevertheless, it does not exhaust or complete the function and the purpose of an explanation*. In the Privy Council case of *Krishna Ayyangar:In re* ([1920] ILR 43 Mad. 550), it was held that "The construction of the Explanation must depend upon its terms, and no theory of the purpose can be entertained unless it is to be inferred from the language". In another case from Indian Jurisdiction, *State of Bombay v. United Motors* (AIR 1953 SC 252), the

> Explanation was found to contain a legal fiction, to provide a simpler and workable test directed at facilitating the operation of the statute itself."

The cited decision was a leave refusing order. We agree that it correctly states the law. The relevant passage from the judgment of the Indian Supreme Court referred to therein also merits being reproduced (at pg. 258):

> "It may be that the description of a provision cannot be decisive of its true meaning or interpretation which must depend on the words used therein, but, when two interpretations are sought to be put upon a provision, that which fits the description which the legislature has chosen to apply to it is, according to sound canons of construction, to be adopted provided, of course, it is consistent with the language employed, in preference to the one which attributes to the provision a different effect from what it should have according to its description by the legislature."

19. It is in the foregoing manner that, in our view, the Explanation to s. 9(1) is to be construed and applied. For present purposes, it can be regarded as having two parts. The first part ("If the turnout … casting their votes") permits the Commission, if the votes cast by women are less than 10% of the total, to conclude ("may presume") that there was an agreement of the sort proscribed by the third condition. Had this been the whole of it, the Explanation would be one in the "traditional" mould, i.e., merely clarifying or facilitating the third condition. However, it does not end there. The Explanation also specifies what the Commission can do once the situation set out therein is found to exist. The Commission can then declare the "polling at one or more polling stations or election in the whole constituency, void". As it at once obvious, this accords with the language of s. 103AA(1), when that provision is read in light of the judicial gloss noted above. In our view, the Explanation, when read in its totality constitutes a special case. In contrast to what is set out in the main part of subsection (1) it allows for the election to be voided, in whole or in part. Thus, in the same subsection different outcomes are possible as and when the various conditions become applicable. For the most part, the Commission can only order a recasting of votes. In one special case, it can declare the election to be void. That Parliament considered it expedient to set out a special case in this manner and repeat therein alone the language that had been used in s. 103AA(1) while eschewing it in the main part of s. 9(1) also, in our view, makes the legislative intent clear. By allowing the Commission power only to order a recasting of votes in the main part of the subsection Parliament intended to bring about a substantive

change in the law. The jurisdiction earlier conferred on the Commission now applies only in respect of the special case, and not otherwise.

20. The conclusion therefore is inescapable. Since the Commission no longer has the power to declare the poll in a constituency (or in any one or more polling stations) void except in the special case, in making such a declaration with regard to the appellant's election it made a fundamental error of law and clearly went beyond its jurisdiction. No such declaration was permissible under s. 9 on the facts and circumstances of the present case.

21. This does not however end the matter. Although s. 9 is the only specific provision relied upon in the operative part of the impugned order, the Commission has also referred generally to the Constitution and the law. The latter reference (i.e., to the "law") is so broad and vague that it can be ignored as failing to provide, in any meaningful sense, a basis for declaring the appellant's election void. The same cannot however be said of the reference to the Constitution. There, as noted above, learned counsel for the private respondents have relied strongly on Article 218(3). It is to consider this constitutional provision that we now turn.

22. Clause (3) of Article 218 provides as follows:

> "It shall be the duty of the Commission to organize and conduct the election and to make such arrangements as are necessary to ensure that the election is conducted honestly, justly, fairly and in accordance with law, and that corrupt practices are guarded against."

Learned counsel for the private respondents relied on certain observations made by one of us (Munib Akhtar, J.) when in the High Court, in *Waheeda Shah v. Commission of Pakistan and others* PLD 2013 Sindh 117, at paras 17-19 (pp. 137-140). In addition thereto, Article 222 was also relied upon. This empowers Parliament to make laws (subject to the Constitution) in respect of various sorts of electoral matters as listed therein, but expressly states that "but no such law shall have the effect of taking away or abridging any of the powers of the Commissioner or the Commission under this Part". Learned counsel relied on these words to submit that the powers of the Commission under s. 9(1) had to be the same as before (i.e., under s. 103AA(1)) but stressed that these provisions were just a statutory manifestation of the constitutional powers conferred by Article 218(3), which operated autonomously and independently of any

legislation. Finally, reliance was also placed on s. 4(2) of the 2017 Act, which corresponds to s. 104 of the earlier law.

23. Before proceeding further, the point in dispute between the parties may be looked at again. The allegation of the private respondents is that the appellant was not of proper age (set at 25 by the Constitution) to contest the election at the time he filed his nomination papers. This meant that he was not qualified to be elected a member of the Provincial Assembly, as required by Article 62(1)(b) (read with Article 113). It is alleged that in order to show himself as being of eligible age, the appellant tampered with and/or manipulated the relevant record, which brought him in breach also of Article 62(1)(f). A perusal of the impugned order shows that this is the sole allegation considered by the Commission and, as noted, accepted by it. Thus, for present purposes, the submissions by learned counsel for the private respondents may be recast in the following terms. It is contended that it is inherent in the jurisdiction and powers conferred by Article 218(3) on the Commission, and the constitutional duty so cast on it, that it be empowered to adjudicate on whether a candidate (or member of the legislature) is qualified (or, by extension, disqualified) in terms of Articles 62 and/or 63 respectively. Now, this question is one that be raised on an independent, standalone basis, or it can be part of an election dispute. Learned counsel submitted that in either case, the Commission had inherent jurisdiction and powers under Article 218(3). Thus, in the present case, it was fully empowered to consider and decide the applications filed by Mr. Qureshi and Mr. Anjum, independently of s. 9 or any other provision of law.

24. When put this way, the submissions require us to consider Article 218(3) without taking into consideration any statutory provision at all such as, e.g., s. 9 or s. 103AA. Such an exercise does, one must confess, take on a certain air of abstractedness. The reason is that inevitably the jurisdiction of the Commission to consider questions of qualification or disqualification is not invoked in terms of Article 218(3) alone. Rather, it is inextricably interlinked with statutory provisions (especially those just mentioned), and the Commission itself tends to consider the matters before it in such terms. Indeed, that is how it treated the appellant's case in the impugned order. In order to consider the position under Article 218(3) on a standalone basis, i.e., on the constitutional plane alone, as we are invited to do, requires us then to look at the other relevant provisions in the Constitution in this regard.

25. Now, the Constitution itself confers a jurisdiction on the Commission with regard to the disqualification of members of the Federal and Provincial legislatures. This is contained in clauses (2) and (3) of Article 63 (read, as appropriate, with Article 113), which provide as follows:

> "(2) If any question arises whether a member of Majlis-e-Shoora (Parliament) has become disqualified from being a member, the Speaker or, as the case may be, the Chairman shall, unless he decides that no such question has arisen, refer the question to the Election Commission within thirty days and should he fail to do so within the aforesaid period it shall be deemed to have been referred to the Election Commission.
>
> (3) The Election Commission shall decide the question within ninety days from its receipt or deemed to have been received and if it is of the opinion that the member has become disqualified, he shall cease to be a member and his seat shall become vacant."

A special type of disqualification, by defection, is provided for in Article 63A. Clauses (3) and (4) specifically empower the Commission to rule on the validity of the declaration of defection against a member. (Clause (5) allows for a direct appeal to this Court against the decision of the Commission.) Thus, the Constitution is not silent on whether or when (and if so, under what circumstances) the Commission has the power to consider the issue of disqualification. The question therefore becomes whether this specific conferment of power is exhaustive. In other words, if the Constitution has itself conferred a limited, and not general, power and jurisdiction on the Commission in terms as noted above, can a general power nonetheless be discovered as inhering in Article 218(3)? In our view, the answer ought to be in the negative. The reason is that that would render the relevant provisions of Article 63 and 63A redundant. These provisions can only be invoked in a special manner and on fulfillment of certain conditions. If a general power inhered in Article 218(3) then the constitutional safeguards contained therein would be rendered meaningless. They could be bypassed at will and at any time. Furthermore, the well known legal maxim, *expressio unius est exclusio alterious*, may also be relevant in the present context. No doubt the maxim must be applied cautiously: it has been said to be a valuable servant but a dangerous master. But even within such limitations it provides a useful aid in addressing the question now under consideration. In our view, to the extent that the Constitution considered it appropriate to itself confer a jurisdiction on the Commission to examine questions of qualification or disqualification on an independent, standalone basis, it expressly provided for the same in the Articles

noted above. Anything other than that, unsupported by statute law (i.e., in terms of a jurisdiction conferred by Parliament itself by enacting a law in terms of Article 222) would be beyond the power of the Commission. More particularly, no such power can be discovered in terms of Article 218(3) or said to inhere in the Commission in terms thereof.

26. Insofar as the question of qualification or disqualification, arising as part of an election dispute and being considered by the Commission directly in terms of Article 218(3), is concerned, the provisions of Article 225 need to be kept in mind. This provides as follows: "No election to a House or a Provincial Assembly shall be called in question except by an election petition presented to such tribunal and in such manner as may be determined by Act of Majlis-e-Shoora (Parliament)". To hold that there is an independent power inhering in the Commission in terms of Article 218(3) would trench upon this constitutional provision which, it is to be noted, is cast in strongly negative terms. This indicates that those election disputes as properly come within the scope of Article 225 are to be considered by an election tribunal and not elsewhere and before some other forum such as, e.g., the Commission purporting to exercise a jurisdiction said to inhere in it under Article 218(3). It is no doubt for this reason that both in terms of s. 103AA and s. 9, the Commission was, and continues to be, "deemed to be an Election Tribunal to which an election petition has been presented". And even here, interestingly, the jurisdiction conferred on the Commission came, and comes, with a sunset provision: it must decide the matter within the stipulated 60 days, else "the election of the returned candidate shall be deemed to have become final", subject to a petition (if any) before the election tribunal constituted in terms of s. 57 of the 1976 Act and now s. 140 of the 2017 Act. (The question, whether a law can at all deem the Commission to be an election tribunal is one that, though interesting, need not trouble us here.)

27. It follows from the foregoing discussion that in our view there is no power or jurisdiction inherent in the Commission itself in terms of Article 218(3) to consider the qualification/disqualification of a candidate/member, whether as an independent, standalone issue or as part of an election dispute. Can such a jurisdiction nonetheless be conferred by Parliament under a statute enacted in terms of Article 222? For purposes of this judgment, we assume (without deciding) that Parliament may enact such a law (whether by, or without, deeming the Commission to be an election tribunal being immaterial for purposes of the

present discussion). What now needs to be considered, as the immediately relevant question, is whether such a power was indeed conferred in terms of s. 103AA and/or is conferred by s. 9. It will be appreciated that this question is distinct from the one already considered above in relation to these statutory provisions, i.e., what could have happened (or now can happen) if the provision was, or is, successfully invoked. In order to address the question now posed, we turn to look at the case law.

28. Learned counsel for the parties cited, it seems, almost every case of this Court involving s. 103AA or s. 9. With respect, every such case is not relevant. We will therefore only look at some of the cases cited, particularly those where the question of qualification (or disqualification) was involved, and Article 218(3) and/or s. 103AA were said to have been invoked as conferring the necessary jurisdiction on the Commission.

29. We begin with *Sher Alam Khan v. Abdul Munim and others* PLD 2018 SC 449 (decided on 23.02.2018) and *Raja Shaukat Aziz Bhatti v. Major (R)Iftikhar Mehmood Kiani* PLD 2018 SC 578 (decided on 22.05.2018). (Incidentally, both are decisions of the same Bench of the Court.) Taking up the first case (herein after "*Sher Alam Khan*"), the matter arose out of the General Election of 2013, in relation to a seat of the KPK Assembly. The first respondent (Abdul Munim) was declared the returned candidate. On 28.12.2016, the petitioner filed an application before the Commission, under Article 6 of the 2002 Order read with Articles 63 and 218(3) of the Constitution on the ground that the first respondent had been disqualified from contesting the election on account of a disability (under Article 63(1)(k)) at the time that he filed his nomination papers. Article 62(1)(f) was also invoked. The Commission concluded that the first respondent was indeed disqualified as alleged and made an order declaring his election to be null and void. He challenged this declaration before the Peshawar High Court by way of a constitutional petition, which was allowed. The order of the Commission was set aside. Against this decision, the petitioner filed a leave petition before this Court.

30. It will be seen that this matter did not as such come by way of s. 103AA. However, it was observed in this Court as follows (at pg. 456):

> "13. The primary bone of contention between the parties was with regard to the jurisdiction of the ECP to pass an order of de-notifying a Returned Candidate several years after the elections. By referring to the various provisions of ROPA of 1976 especially Section 103AA(2) and the

> Constitution, more particularly, Article 225 of the Constitution, it has been held by way of the impugned judgment that a pre-election disqualification or lack of qualification is to be adjudicated upon by various fora at various points of time…."

It was also observed as follows (pg. 458):

> "17. The question of availability of the jurisdiction with the ECP to decide the complaint and de-notify a Returned Candidate after the lapse of a period of sixty days provided in Section 103AA(2) of ROPA of 1976, is not without difficulty. The contentions of the learned counsel for the Petitioner cannot be simply brushed aside as frivolous. However, this aspect of the matter as canvassed by the learned counsel for the Petitioner needs not to be adjudicated upon in the instant case."

It was then observed, after referring to various decisions, that it was well settled that one type of proceedings before this Court could be converted into another type of proceedings. It was noted that the matter had come by way of a leave petition (i.e., under Article 185(3)). However, the Court was pleased to convert it into suo moto proceedings under Article 184(3) (see at pg. 465). After this conversion, the Court then proceeded to consider the facts and circumstances of the case on the merits in terms of this jurisdiction, and concluded that the first respondent had indeed been disqualified as claimed by the petitioner. The judgment of the High Court was set aside and the order of the Commission declaring the election to be null and void upheld and restored.

31. As is clear from the foregoing narration, this decision is not, with respect, any binding authority for deciding the question now before us, i.e., whether either Article 218(3) or s. 103AA conferred a jurisdiction on the Commission to decide the qualification or disqualification of a candidate/member in terms of an application filed directly before the Commission. There is perhaps a passing reference in a sentence in para 18 (pg. 458) that could be pressed into service as being relevant for the question at hand. However, this tangential reference is certainly not part of the *ratio decidendi* of the judgment and hence, with respect, need not be considered in any detail.

32. We move to the next case, *Raja Shaukat Aziz Bhatti v. Major (R)Iftikhar Mehmood Kiani* PLD 2018 SC 578 (herein after "*Raja Shaukat Bhatti*"). This also arose out of the General Election of 2013, in relation to a seat in the Punjab Assembly. The petitioner before this Court was the returned candidate. An application was filed with the Commission seeking to have him declared disqualified in terms of Article 62(1)(f) for the reason that in the previous general

election (of 2008) he had made false declarations. The jurisdiction of the Commission was also invoked on the basis of a judgment of this Court, *Muhammad Rizwan Gill v. Nadia Aziz and others* PLD 2010 SC 828. The Commission made the declaration prayed for on or about 20.06.2017, and the petitioner appealed to this Court under a provision of the 1976 Act that corresponded to s. 9(5). At the same time, he challenged the order before the Islamabad High Court, which dismissed his constitutional petition. Against this decision, the petitioner filed a leave petition.

33. The case of the petitioner was, inter alia, that the order of the Commission was without jurisdiction as having been made many years after the stipulated period of 60 days. It was held as follows (pg. 586; emphasis supplied):

> "15. At the very outset, the Appellant/Petitioner called into question the jurisdiction of the ECP to pass the impugned Order de-notifying him as a Member of the Provincial Assembly. In pith and substance, it is the case of the Appellant/Petitioner that with regard to an alleged pre-election disqualification or lack of qualification of a candidate or an illegality in the conduct of the elections, the jurisdiction of the ECP to pass orders under Section 103-A of RoPA can only be exercised prior to the expiry of 60 days from the notification of the result of the elections. In the instant case, it is contended, that the impugned Order of the ECP has been passed several years after the original Notification declaring the Appellant/Petitioner as an elected Member of the Provincial Assembly was issued.
>
> 16. A perusal of the impugned Order of the ECP dated 20.06.2017 reveals that pursuant to the judgment of this Court reported as Muhammad Rizwan Gill (supra) the ECP and the HEC inquired into the validity and authenticity of the educational qualification of the Members of the Parliament and the Provincial Assemblies. It is in pursuance to the aforesaid directions of this Court that the ECP conducted the requisite inquiries and purportedly passed the impugned Order dated 20.06.2017. The aforesaid is clear and obvious from paragraph 2 of the Order of the ECP dated 20.06.2017. *Thus, it appears that the contentions of the learned counsel for the Appellant/Petitioner pertaining to the assumption of jurisdiction of the ECP after the lapse of 60 days may not be strictly applicable as the ECP was purportedly acting in compliance of the directions of this Court*."

It was further observed as follows (pp. 587-590; emphasis supplied):

> "17. Furthermore, it is the case of the Respondents and as is also evident from the Order of the ECP dated 20.06.2017 that Article 218(3) of the Constitution must necessarily be read and interpreted in its broadest amplitude thereby conferring jurisdiction on the ECP to pass appropriate orders at any stage unfettered by technical restrictions imposed by any sub-Constitutional legislation pertaining to the conduct of elections including RoPA. In this behalf, Article 225 of the Constitution must also

> be read in harmony with Article 218(3) of the Constitution…. However, the question of jurisdiction of the ECP to pass such order de-notifying the Member of the Parliament or the Provincial Assembly on account of a pre-election disqualification or lack of qualification after a lapse of 60 days from the original Notification is not free from difficulty.
>
> 18. Be that as it may, this Court when confronted with the issue of jurisdiction, the ECP with regard to pre-election disqualification or lack of qualification in its judgment dated 23.02.2018 passed in Civil Petition No.3131 of 2017 [i.e., the decision reported as *Sher Alam Khan v. Abdul Munim and others* PLD 2018 SC 449], after examining various judgments of this Court …. concluded as follows: [and then paras 27 to 29 of the reported judgment were reproduced].
>
> 19. In view of facts and circumstances narrated above and as the settled law referred to above we cannot abdicate our responsibility by brushing the issues floating on the surface under the carpet. *Hence, we have no other option but to convert the instant proceedings into suo motu proceedings under Article 184(3) of the Constitution so as to examine the cases of the parties on the basis of the material available on record so as to examine the Order of the ECP dated 20.06.2017 by determining as to whether the Appellant/Petitioner was disqualified or not qualified for being a Member of the Provincial Assembly under the Constitution*."

After considering the merits of the case, it was concluded that the petitioner was indeed disqualified in terms as alleged. Accordingly, the order of the Commission was upheld and the petitioner's direct appeal and leave petition were dismissed.

34. We have quoted somewhat extensively from the cited case because the state of the proceedings was rather similar to the situation at hand. However, in the end, this judgment also is not, with respect, any binding authority for the question at hand. The reason is that like the *Sher Alam Khan* case, this also was decided by converting the appeal and leave-petition into suo moto proceedings under Article 184(3). Any references to s. 103AA or Article 218(3) were not, with respect, part of the *ratio decidendi* of the decision. We may also note that the application before the Commission had been made sometime in April 2016, i.e., many years after the elections of 2013. In this respect this case was similar to the *Sher Alam Khan* case. Hence, insofar as s. 103AA was concerned the facts of this case also suffered from the infirmities that have been noted in respect of the situation in that decision.

35. This brings us to *Muhammad Rizwan Gill v. Nadia Aziz and others* PLD 2010 SC 828 ("*Rizwan Gill*"). This decision has been cited from time to time in various decisions but, with respect, requires to be looked at closely. When the

judgment is considered, the following points emerge. Firstly, although the notation on the title page (i.e., pg. 828) appears to suggest that this was a decision on a miscellaneous application, para 3 (pg. 833) makes clear that it was the main appeal that was heard and decided. Secondly, the appeal was an ordinary election dispute, and arose out of a decision of the Election Tribunal. In other words, the proceedings did not start by way of an application before the Commission. The matter arose out of the General Election of 2008. The appellant was the returned candidate. The respondent, a losing candidate, challenged the election by filing an election petition on the ground that the graduate degree presented by the appellant was false and bogus. The Election Tribunal accepted this allegation and declared the election null and void. Against this decision, the appellant exercised his statutory right of appeal to this Court.

36. The Court considered the appeal on the merits, and agreed with the Election Tribunal that the degree presented by the appellant was "fabricated, interpolated, forged and fictitious". Accordingly, the appeal was dismissed with costs: see para 11 (pg. 838). Now, it is obvious that at that point the judgment on the appeal came to an end. Whatever followed thereafter could not therefore be part of the *ratio decidendi* of the decision. In the subsequent paragraphs (paras 12 to 19) the Court proceeded to consider elections in general terms and in particular the problem of candidates presenting degrees or other papers/record that were forged or bogus. What jurisdiction was the Court exercising in these paras? Obviously, it was not appellate jurisdiction: as noted, the appeal already stood decided. Since the then Chief Justice was himself a member of the Bench it was, in our view, nothing other than an exercise of suo moto jurisdiction under Article 184(3). It was in these terms that the Court gave certain specific directions and orders, directed towards the Commission, at paras 17-18 (pg. 840). Para 18 was in the following terms:

> "18. The Election Commission is, therefore, directed to initiate action against all such persons who are accused of commission of corrupt practices; of committing forgery and of using, as genuine, documents which they knew or at least had reason to believe to be forged. The Election Commission shall ensure that the investigations in these matters are conducted honestly, efficiently and expeditiously and shall depute one of its senior officers to supervise the same. The learned Sessions Judges to whom these trials shall then be entrusted, are also directed to conclude the same without any delay, in consonance with the spirit of the Elections laws as displayed, inter-alia, by the Provisos newly-added to subsection (I-A) of section 67 of the said Act of 1976 through the Amending Act No.IV of 2009 promulgated on 2-11-2009. In any case, it should not take each

> learned Sessions Judge who gets seized of the matter, more than three months to conclude the same."

It will be seen from the foregoing that the directions given by this Court moved within a specific and rather narrow locus. It was simply to determine whether forged or fabricated degrees or documents had been used by the (successful) candidates and if so, then to send their cases for criminal trial of the offences thereby committed under the 1976 Act. Subsequently, the matter returned to this Court in other proceedings, of a miscellaneous nature, in an appeal that had already been decided (being *Mian Najeeb-ud-Din Owais v. Aamir Yar and others* 2011 SCMR 180). On the miscellaneous application (CMA 1712/2013) in the aforesaid matter, an order was made on 01.04.2013, which is reported as *Mian Najeeb-ud-Din Owasi and another v. Amir Yar Waran and others* PLD 2013 SC 482. The data and details regarding fake degrees of parliamentarians were placed before the Court. It was found that there were 189 such persons. Para 18 of the *Rizwan Gill* case was referred to and it was noted that in the said para "direction was only given for the prosecution of such like persons" (pg. 486). After considering the entire matter, the Court directed (pp. 488-89) that all 189 of them be given an opportunity of getting their degrees verified by or before the date specified but that if it was then found that the degree of anyone was fake, it would be tantamount to him having made an incorrect declaration and his election could be annulled. It was in this context that it was observed as follows (pg. 489):

> "14. We may again point out that the ECP must adopt a distinction in between making, of a declaration, which is against the provisions of Articles 62 and 63 of the Constitution and the process of Criminal proceedings as a result of making mis-representation. Once a person has filed a declaration under his signatures declaring that he fulfils the conditions of Articles 62 and 63 of the Constitution and he undertakes that the statement is correct and if such declaration is incorrect the ECP, shall de-notify him for such misrepresentation, retrospectively."

Unfortunately, the Commission, in our view wholly erroneously, appears to have taken a rather expansive view of the directions given earlier in the *Rizwan Gill* case and those as just noted, and took them to mean that this Court had conferred some open-ended powers on it, exercisable at any time in the future, to consider the question of qualification/disqualification autonomously and on its own, and make declarations accordingly. This was patently not so.

37. Before proceeding further, it is pertinent to take a look at a passage from the *Sher Alam Khan* case, to which our attention was drawn in particular by the learned AAG. It was observed as follows (pg. 464-5; emphasis supplied):

> "29. Consequently, where a disqualified or unqualified person slips through the cracks sneaks into the Majlis-e-Shoora or the Provincial Assemblies, his presence in the said House can always be challenged through exercise of the Constitutional jurisdiction of this Court under Article 184(3) of the Constitution and before the learned High Court under Article 199 of the Constitution by way of a Writ in the nature of quo warranto. Even where a matter comes before this Court regarding the qualification or disqualification of a Member of the Majlis-e-Shoora or the Provincial Assemblies *otherwise by way of proceedings other than under Article 184(3) of the Constitution, this Court not only has the jurisdiction to convert such proceedings to proceedings under Article 184(3) of the Constitution but is bound to do so*, as to permit an unqualified or disqualified person to continue to defile and desecrate the Majlis-e-Shoora or the Provincial Assemblies and [masquerade] as a chosen representative of the people would amount to frustrating the Constitutional provisions. In such an eventuality, if this Court looks other way, it would perhaps constitute a failure to protect and preserve the Constitution."

The learned AAG submitted that even if it was concluded that the impugned order could not have been made under Article 218(3) and/or s. 9, it was always open to us to convert these matters into suo moto proceedings under Article 184(3), as had been done in both the *Sher Alam Khan* and *Raja Shaukat Bhatti* cases. As we understood it, the learned AAG submitted, on the basis of the passage extracted above (and especially the portion emphasized), that this was the procedure that ought to be followed as a matter of course in suchlike cases. With respect, we are unable to agree. Firstly, as noted in para 13 above, these cases are (with the express consent of learned counsel) being decided solely on the point of jurisdiction. Secondly, and more importantly, if the submission by the learned AAG were to be accepted, then in cases of qualification/disqualification of candidates/members, it would be mandatory for the Court to convert any type of proceedings before it into suo moto proceedings under Article 184(3), if the matter could not otherwise be attended to. In other words, the jurisdiction of the Court would cease to be discretionary. With respect, this cannot be accepted. It is of the essence of this jurisdiction that it is, and must remain, discretionary. The para from the *Sher Alam Khan* case set out above certainly puts the point it seeks to make in (if we may say with respect) very strong terms. However (and again, with respect), matters relating to the jurisdiction of the Court cannot, and ought not, to be approached in this manner. It is a bedrock principle of the judicial function that all discretion must be exercised judiciously and in accordance with

well settled principles, and not otherwise. The jurisdiction of the Court that is discretionary cannot be calcified into an inflexible and unyielding rule that must always produce the same result no matter what the actual facts and circumstances before the Court may be. The Court cannot adopt such a position automatically and as a matter of course. The passage being relied upon must be read in the overall context of the judicial function and the methods not just of law but also of equity with which the Courts have such familiarity. It is of the essence of discretionary jurisdiction that it is, and must remain, flexible. The reference to any presumed "duty" cannot, with respect, obliterate or alter the discretion that must always vest in the Court when considering whether to "covert" one type of proceedings into another. To hold otherwise would be not just to bring about a fundamental change in the practice and procedure of the Court; it would affect the very essence of the judicial function.

38. It remains only to notice *Allah Dino Khan Bhayo v. Election Commission of Pakistan and others* 2013 SCMR 1655. This was a leave refusing order dated 09.07.2013, whereby a leave petition (CP 1033/2013) against a judgment of the Islamabad High Court was dismissed. This case need not be considered in any detail. The reason is that firstly, a review petition (CRP 218/2013) was filed against the leave refusing order. This review petition was allowed on 04.02.2020. The leave refusing order has thus lost its position as an authority. Secondly, and in any case, as per the jurisprudence of this Court, a leave refusing order does not constitute binding authority.

39. We now turn to look at two decisions of this Court in relation to s. 9. The first case is *Shaukat Ali v. Election Commission of Pakistan and others* 2018 SCMR 2086. The matter arose out of the General Election of 2018 and in relation to a seat in the KPK Assembly. An application was filed with the Commission under s. 9 to the effect that the votes cast by women were less than 10% of the total, and this was because of an agreement to restrain them from exercising their right of franchise. Thus, the Explanation to s. 9(1) was invoked. The Commission came to the conclusion that the grievance was made out, and ordered a re-poll for the entire constituency. The appellant, being the successful candidate, appealed to this Court under s. 9(5). Interestingly, at the time of hearing learned counsel for the appellant sought to challenge s. 9(1) as being ultra vires the Constitution. After considering submissions in detail on this point, the attack was repelled. On the merits, it was found that the Commission had properly exercised its

jurisdiction and powers, and the appeal was dismissed. Putting this decision in terms as set out herein above, it involved the special case of the Explanation to s. 9(1) where, as noted, the Commission is empowered to declare the poll in one or more polling stations or the whole of the constituency to be void.

40. The other case is *Sardar Masood Khan Luni v. Election Commission of Pakistan and others* 2019 SCMR 61. It also arose out of the General Election of 2018, in relation to a seat in the Balochistan Assembly. On two separate applications made under s. 9 the election was declared null and void and a re-poll was ordered. The successful candidate appealed to this Court, and after considering the impugned order in the facts and circumstances on record, the appeals were dismissed. What is relevant for present purposes is that the facts alleged for invoking s. 9 were clearly relatable to what have been called the first two conditions of subsection (1) herein above. Yet, the election was declared to be "null and void" by the Commission and this order was upheld by this Court. In our view, with respect, the election could not have been declared "null and void" for the reasons set out above. However, in the reported decision the difference between the previous position, under s. 103AA, and the present language of s. 9 was not in issue nor considered by the Court. The point made earlier in this judgment can be regarded as having passed *sub silentio*. While the decision was undoubtedly correct on the facts it does not, with respect, constitute an authority as would preclude us, in terms of the well known principles of precedent, from reaching any of the conclusions arrived at herein above.

41. It would therefore seem that there is no direct authority, at any rate as would be binding on us, in which the question under discussion was considered or decided directly. The question, nonetheless, remains: did Parliament confer a jurisdiction in terms of s. 103AA (and/or s. 9) on the Commission to consider the qualification or disqualification, under Articles 62 and/or 63, of a candidate for election or a member of the legislature? In our view, the answer must be in the negative. We begin with an obvious point: neither of the sections expressly or explicitly conferred (or confers) any such jurisdiction. If at all it exists, it has therefore to be read into the provisions, and discovered collaterally or by implication. Now, the question of whether a candidate is qualified or disqualified goes to his status, i.e., ability to contest the election. Both the sections however are primarily (though not exclusively) directed towards what happens on the polling day, i.e., towards the process of the actual conduct of the election itself.

Obviously, this remains unaffected by the status (qualified/disqualified) of the candidates. Section 9(1) even otherwise makes this clear, in two ways. Firstly, by adding the test of materiality: the "result of the poll" should have been affected. Even if (and secondly) the test applies only to second condition (a point on which we form no definite opinion), the last part of the subsection, which allows only for a recasting of votes to be ordered, makes it clear that the slate of candidates remains the same. Although s. 103AA was worded in a more open-ended manner, empowering the Commission to decide whether the poll in the constituency (or, by way of judicial gloss, any one or more polling stations) ought to be declared void, the purpose behind the section was still the same. It remained essentially focused on the day of the election itself. The facts and circumstances in which almost all the reported cases came to be decided also testify, and point, to this conclusion.

42. It is also to be remembered that in the entire process leading up to the day of the election, the question of whether the candidate was qualified or disqualified has already been scrutinized. This scrutiny, of the nomination papers, is done by the Returning Officers. However, they are not the only ones allowed by law to scrutinize the nomination papers. They are also open to objections by others. Under the 1976 Act this right was of a somewhat restricted nature: see s. 14(1). Under s. 62 of the 2017 Act the right has been extended to any voter of the constituency. There is a right of appeal to an appellate forum comprising of High Court judges. Under the 1976 Act this right of appeal was restricted to candidates only, whereas the 2017 Act has expanded it to include the objector as well. After this appellate forum there can be (though not of course as of right) constitutional petitions under Article 199 and even petitions to this Court under Article 185(3). In other words, the question of qualification/disqualification is thoroughly tested by a dedicated procedure before the day of the election. And of course, after the election a losing candidate can always file a petition before the election tribunal and again bring the question into issue. There is a direct appeal to this Court against the decision of the election tribunal. When such a framework is available, it is difficult to see why any such jurisdiction should be impliedly read into s. 103AA and/or s. 9 so as to empower the Commission. In our view, if at all Parliament has the legislative competence to confer such a jurisdiction on the Commission in terms of a law made under Article 222 (an assumption we make for purposes of this judgment, without deciding), then it must be done explicitly

and by express conferment, and the use of clear language. The provisions of s. 103AA and s. 9 fall far short of this.

43. In view of the foregoing discussion, the two appeals succeed and are allowed. The impugned order of the Commission dated 01.10.2018 is quashed as being beyond, and without, jurisdiction. It is declared to be of no legal effect. The two leave petitions are converted into appeals and allowed. The judgment of the learned High Court is set aside, with the (formal) result that the writ petitions before that Court also stand allowed.

I have appended my dissenting note separately

Judge

I will attach my additional note separately

Judge

Judge

ORDER OF THE BENCH:

By majority of two-to-one (Mushir Alam, J. dissenting), these appeals are allowed in terms of paragraph-43 above.

Judge

Judge

Judge

Announced today,
the 17th August, 2021 at Islamabad

Judge

Approved for reporting

JUDGMENT

MUSHIR ALAM, J.- I have carefully gone through the opinion authored by my learned brother Munib Akhtar, J. in the matter before us and respectfully disagree for the following reasons:

The Appellant, Muhammad Salman, contested the election to PP-217, Multan VII. He secured 35,300 votes and was declared returned candidate by the Election Commission of Pakistan *vide* notification dated 07.08.2019.[1] He consequently entered as the Member of Provincial Assembly.

2. Mr. Shoaib Akmal Qureshi, a registered voter of the constituency, filed a Petition before the Election Commission of Pakistan[2] under section 218(3) of the Constitution, 1973 read with section 4, 8 and 9 of the Elections Act, 2017, challenging the very eligibility of the appellant under Article 113 read with Article 62 of the Constitution, being under-aged (less than 25 years of age),on the last date of submission of his nomination paper, registered as *Case No. 30/ (26)/2018-Law.*[3]

3. Meanwhile, Mr. Naveed Anjum, another registered voter of the constituency, also challenged the eligibility of the Petitioner, but adopted a different course by invoking writ jurisdiction of the Lahore High court filing Constitutional Petition No. 11388/2018[4] before the Lahore High Court.

4. The Lahore High Court, by consent of the parties, namely Mr. Anjum and the Election Commission of Pakistan, vide order dated 8.8.2018,[5] transmitted the copy of the Constitutional Petition to *the Commission*, for decision after hearing all the parties. *The Commission* assigned the

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[1] Page 78 of CPLA 973/19
[2] Herein referred to as "The Commission"
[3] Page 61-70 CPLA 973/19
[4] Page 81- of CPLA 973/19
[5] Page 80 ibid

transmitted Constitution Petition, Case *No. 30(26)/2018-Legal.*

5. *The Commission*, after due notice and hearing all the parties, accepted both the cases *vide* short order,[6] as well as the reasons[7] recorded separately,[8] dated 1.10.2018. *The Commission* concluded that the Appellant had indeed amended his age, which was a non-bona fide mistake. Therefore, the election of the Appellant was set aside with an order for re-election in the whole constituency *vide* order dated 01.10.2018.[9] The relevant paragraph of the detailed order is reproduced below:

> *"16. In the light of the entire discussion above, the Commission holds that the Respondent, Muhammad Salman, on the date of filing nomination papers on 06.06.2018 was not eligible to contest elections being below the age of 25. That his date of birth throughout shown as 28.01.1994, was correct and the one now changed to 01.02.1993, is a result of manipulations and interpolations. The election of Muhammad Salman, returned candidate from PP-217 Multan-VII is hereby declared void, under Section 9 of the Elections Act, 2017 and all enabling provisions of the Constitution and the law. His notification as a returned candidate is withdrawn and it is hereby directed that re-election be conducted in the whole constituency PP-217 Multan-VII. These are our reasons for the short order announced on 01.10.2018."*

6. Thereafter, the current Appellant was de-notified and the election schedule was notified vide notification dated 08.10.18[10] and a bye-election was scheduled to be held on 28.11.18. Aggrieved by the aforementioned consequence, the Appellant then made a quadruple challenge. He filed two Writ

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[6] Page 20 CA No. 1498/18
[7] Page 21 to 27 ibid
[8] Dated 01.10.2018 as well.
[9] Page 54 ibid
[10] Page 85 ibid

Petitions in the Lahore High Court Multan Bench. The *First*[11] being W.P No. 14893/2018 filed on 01.10.18, challenging the *Short Order* of the Election Commission dated 01.10.18 and the consequential notification for re-election on grounds that the Election Commission is not empowered under S.9 of the Elections Act, 2017 to declare an election to be null and void in view of the bar contained in Article 225 of the Constitution of Pakistan. The Lahore High Court, *vide* order dated 12.10.2018,[12] suspended the impugned notification dated 08.10.18 as an interim relief to the current Appellant.

7. The *Second* W.P No. 16234/2018[13] was filed on 27.10.2018 before the Lahore High Court, Multan Bench, Lahore, challenging the detailed reasons recorded separately on same date[14] by the Election Commission on similar grounds as raised in *W.P No. 14893 of 2018*.

8. Finally, the third and fourth challenge was made against the order dated 1.10.2018, passed by the commission, before this court through two direct Appeals[15] under S.9(5) of the Elections Act, 2017. The first appeal before us is *CA 1498/2018*, arising out of case 30(26)/2018-Law,[16] is filed directly in the Commission by Shoaib Akmal and the second appeal is *CA. 1499/18*, in Case No. 1(19)/2018-Legal, arose out of W.P.[17] filed by Naveed Anjum which was sent to the Commission by the Lahore High Court.

9. Since the orders impugned were sub-judice before this Court in direct appeals, as noted in preceding para, the High Court dismissed both the Writ Petitions No. 14893/2018

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[11] Filed on 1.10.2018
[12] Page 87 ibid
[13] Page 111-125 CMA 2169 in CA No.1499/18
[14] i.e dated 01.10.18 page 20 CA 1498/18
[15] Filed on 05.11.18
[16] Pages 29-38 of CA No.1499/18 filed on 27.10.18
[17] WP 11388/18 @ Pages 28-31 in CA No.1498/18, filed on 7-8-2018. Remitted by the HC to ECP on 8.8.18 (Order of HC Page 32)

& No.16234/2018 vide consolidated judgment dated 26.02.19[18] as being non-maintainable.

10. Therefore, we are now confronted with two sets of twin proceedings emanating from one and same order dated 01.10.18. The First of the twin proceedings are against the orders of the High Court dismissing the matter as being sub-judice before this Court under the direct appeal filed by the operation of Section 9(5) of the Elections Act, 2017. These are *CPLA 972/2019* against common judgement dated 26.02.19 passed in WP 14893/18 and *CPLA 973*/2019 arising out of WP 16234/18 challenging dismissal of Writ petitions by the Multan Bench of the Lahore High Court.

11. The second set of the direct appeals, being *CA 1498/2018*, are arising out of case 30(26)/2018-Law filed directly before ECP by Shoaib Akmal and *CA 1499*/2018, in Case No. 1(19)/2018-Legal, are arising out the W.P[19] filed by Naveed Anjum which was sent to the commission by the Lahore High Court to be decided in accordance with Article 218(3) of the Constitution of Pakistan.

12. Therefore, there are two questions that arise from instant proceedings. The first pertains directly to the maintainability of the Constitutional Petitions filed by the current Appellants and Respondents. The second, whether the Election Commission can declare an election void under S.9 and other enabling provisions of Constitution, 1973 and Elections Act, 2017.

I. THE MAINTAINABILITY OF CONSTITUTIONAL PETITIONS BEFORE THE HIGH COURT:

13. As noted above, the Appellant/petitioner Muhammad Salman, has essentially adopted two-

[18] Page 26-37 CPLA 973-L/2019
[19] WP No. 11388/2018 remitted to ECP vide order dated 8.8.2018 @ 80 of CPLA 973/19

pronged approach against one and the same set of orders dated 1.10.2018 passed by the *Commission* in a purported exercise of powers under Article 218 (3) of the constitution read with sections 4, 8 and 9 of the Elections Act, 2017. The remedy against the declaration made by the *Commission*is provided by way of statutory appeal under sub-section (5) of Section 9 of the Act, 2017 itself.

14. In order to ascertain the maintainability of the Constitutional Petitions before the High Court, we must first delve into question as locus standi of the Petitioner. Perusal of Article 199 of the Constitution of Pakistan provides twin test approach for the High Court to take cognizance of a matter firstly, '*if it is satisfied that no other adequate remedy is provided by law.'*[20] Secondly, *"on application of any aggrieved party"*[21]. Therefore, the two requirements that need to be met are there has to be an application of an aggrieved party and secondly, lack of alternate remedy under the law.

15. Under the scheme of the Elections Act, 2017 there are two stages of challenge to the election process. These can be bifurcated into a pre-election and post-election stages. Currently we are confronted with a post-election challenge. A contesting candidate can avail the remedy to challenge the election of a returned candidate before the Election Tribunal[22] by way of Election Petition under *Article 225* of the constitution read with *section 139* of the *Elections Act, 2017*.[23] The appeal against the order of the Tribunal will be before the Supreme

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[20] Article 199(1) of the Constitution of Pakistan, 1973
[21] Article 199(1)(a) ibid;
[22] Election Tribunal appointed under Section 140 of the Elections Act, 2017.
[23] On the grounds, inter-alia, provided under section 156 to 158 and section 167 of the Elections Act, 2017

Court.[24] From the Scheme of the *Elections Act, 2017*, the remedy to a voter of the constituency to challenge the candidature of returned candidate is not provided in clear terms in comparison to the remedies provided to a contesting candidate.

16. In the instant case, we are confronted with two remedies invoked by the two different voters of the constituency. Firstly, by one of the voters challenging the election by invoking *Article 199 of the Constitution* before the High Court and, second by another voter through an Election Petition the under *Article 218(3)* of the *Constitution* read with *section 9* of the *Elections Act, 2017*.

17. We will now begin to examine the validity, or otherwise, of each of the remedies invoked by the voters and what is the proper mechanism in the light of *Article 218(3),* of the Constitution of Pakistan read with the *Elections Act, 2017*.

i. The remedy of the voter to bring a Constitutional Petition post-election:

18. A *voter* has been defined under *section 2(xli)* of the Elections Act, 2017:

> a) in relation to an Assembly or a local government, a person who is enrolled as a voter on the electoral roll of any electoral area in a constituency; and
>
> b) in relation to the senate, a person who –
>
> (i) for election to a seat from a Province, is a Member of the Provincial Assembly;
>
> *(ii) for election to seats from the Islamabad Capital Territory, is a Member of the National Assembly; and*

[24] Section 155 of the Elections Act, 2017

(iii) for election to a seat from the Federally Administered Tribal Areas, is a Member of the National Assembly elected from the Federally Administered Tribal Areas.

19. On a bare perusal of the *Elections Act,2017*, it is manifest that *a voter* has only been provided remedy to object candidature of a candidate, prior to commencement of elections and at the time of scrutiny of Nomination Papers under *section 62* of the *Elections Act, 2017*. The appeal against the acceptance or rejection of nomination papers by the Returning Officer is available to the contesting candidate and/or to the Objector, as the case may be, under *section 63* of the *Act of 2017* before the Tribunal as may be constituted by *the Commission*. If the *appeal*[25] or *suo-moto*[26] cognizance, if any, taken by the Tribunal, is not decided within the time notified by the *Commission,*[27] the order of the Returning Officer is deemed final and further remedy against the order of the Tribunal at the pre-election stage of the controversy under the *Act of 2017* is sealed. The candidature of the returned candidate, post-election, prima facie could only be challenged under section 139 of the Elections Act, 2017 by a contesting candidate through an Election Petition.

20. Interestingly, the *Elections Act 2017* provides two distinct powers for the exercise of *suo moto* jurisdiction. The first *suo moto* jurisdiction is bestowed upon the *Appellate Tribunal* at the pre-election stage by the exercise of which they may reject the nomination papers.[28] The second *suo moto* jurisdiction is vested on *the Commission,* which becomes exercisable at the post-

[25] Sub-section (1) of section 63 of the Elections Act, 2017
[26] Sub-section (4) section 63 *ibid*
[27] Sub section (2) section 63 *ibid*
[28] In terms of sub-section (4) of section 63 *ibid*

election stage to examine the proprietary of elections,[29] on the grounds enumerated therein, on the basis of information or material that may form the basis or foundation to adjudge that *"... by reason of grave illegalities or such violations of the provisions of this Act or Rules as have materially affected the result of poll at one or more polling station or in the whole constituency... it shall make a declaration accordingly and call upon the voters in the concerned polling station or stations or in the whole constituency as the case may be, to recast their votes in the manner provided for bye-elections".*

21. However, such powers could be exercised before the expiration of sixty days after the publication of notification of returned candidate.[30] The declaration so made by the *Commission* is amenable to appeal before the Supreme Court[31] within 30 days of such declaration. In case the decision could not be made by the *Commission* within the period prescribed, the fate of the notification of returned candidate becomes final and the election of a returned candidate could be challenged only by the contesting candidate before the *Election Tribunal,* constituted under *section 139 of the Act, 2017*.

22. The voter's remedy, at the pre-election stage, extends only up to appeal[32] for the scrutiny of nomination papers under the Elections Act 2017. However, it has been observed that in certain exceptional cases, the voter may invoke the Constitutional Jurisdiction of the High Court under Article 199 post-election since he lacked an alternate remedy.

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[29] Under sub section (1) of section 9 *ibid*
[30] Sub-section (3) of section 9 *ibid*;
[31] Sub-section (5) of section 9 *ibid*
[32] Under Section 63 of the Elections Act, 2017

23. Even this Court has assumed the jurisdiction under Article *184(3)* of the *Constitution* to examine the eligibility of a returned candidate. This Court, in the case of **Dr. Raja Aamer Zaman v. Omar Ayub Khan**,[33] while examining the power and jurisdiction of the Election Commission and Election Tribunal in a post-election matter has held that "*power of Election Tribunal based on Article 225 of the constitution are judicial and adjudicatory subject to appeal under the Representation of Peoples Act*".[34]

24. Prior to delving on the current set of facts, we find it proper to enumerate how the Courts have dilated upon instances where the voter has invoked the remedies of a Constitutional Petition under *Art. 199(b)(ii)* and *Article 184(3)* of the Constitution[35] for illegalities committed by returned candidates post-election.

25. Normally, in light of *Article 225* of the Constitution, a voter cannot invoke the Constitutional Jurisdiction of the Court under Article 199. This Court affirmed the bar in the case if ***Election Commission of Pakistan through its Secretary v. Javaid Hashmi,***[36] wherein it was held that:

> "*In enacting Article 225 in the Constitution the purpose of Legislature is obvious that it did not contemplate two attacks on matters connected with the election proceedings; one while the election process is on and has not reached the stage of its completion by recourse to an extraordinary remedy provided by Article 199, and another when the election has reached the stage of completion by means of an election petition. It is also of utmost consideration that in the case of two attacks on a matter connected with the election proceedings there is likelihood of*

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[33] 2015 SCMR 1303
[34] The analogous provision is now under Section 139 of the Elections Act, 2017
[35] See Workers Party Pakistan v Federation of Pakistan PLD 2012 SC 681
[36] PLD 1989 SC 396

> *there being two inconsistent decisions; one given by the High Court and the other by the Election Tribunal which is also an independent Tribunal and this could not be the intention of the Legislature. Again the words "except by an election petition" in Article 225 of the Constitution do not refer to the period when it can be called in question but point to the manner and the mode in which it can be called in question. It is, therefore, that the constitutional provision is expressed in the negative form to give exclusive jurisdiction to the Tribunals appointed by the Election Commissioner and thus to exclude or oust the jurisdiction of all Courts in regard to election matters and to prescribe only one mode of challenge. The purpose is not far to seek as in all democratic constitutions such as is ours the Legislatures have an important role to play, and, therefore, it is of utmost importance that the election should be held as scheduled without being unduly delayed or prolonged by challenging matters at an intermediate stage."*

26. The rule derives further strength from the case of ***Aftab Shahban Mirani v. President of Pakistan and others***,[37] later reiterated in ***Lt. Gen. (R) Salahuddin Tirmizi v. Election Commission of Pakistan***,[38] wherein it was held as follows:

> *"In consequence to the above discussion, we hold that the scope of interference of the High Court in its jurisdiction under Article 199 of the Constitution in election cases is very limited to the extent of matter which do not exclusively fall within the ambit of jurisdiction of election Tribunals or Election Commission of Pakistan or in respect of the orders which are coram non judice, without jurisdiction or mala fide. The interference of the High Court in the orders passed by Election Commission of Pakistan in discharge of its duty in terms of Articles 218 & 219 of the Constitution read with sections 103 and 103-AA of Act, 1976 in the normal circumstances is not justified."*

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[37] 1998 SCMR 1863
[38] PLD 2008 SC 735

27. The aforementioned rule was later affirmed in the case of ***Ayatullah Dr. Imran Liaquat Hussain v. Election Commission of Pakistan, Islamabad***,[39] as:

> *"Exercise of power under Art. 199 cannot be placed on any higher footing than that emanating from Art.225. Article 225 is expressed in the negative form to give exclusive jurisdiction to the Tribunals appointed by the Election Commission and thus to exclude or oust the jurisdiction of all Courts in regard to election matters and to prescribe only one mode of challenge. The Election Tribunals are final judges of facts as well as of law, including the interpretation of law and, it would be incorrect to say that their determinations are "without lawful authority" because the High Court does not agree with them. All questions of law which have to be decided for determination of the election disputes must be decided and finally decided only by the authorities mentioned in Article 225. The Article is intended to protect the determinations of the authorities designated in it from being subjected to judicial review by the High Court under Article 199 on grounds such as an error of law apparent on the face of the record."*

28. An exception to this rule was carved out by this Court in the case of ***Ghulam Mustafa Jatoi v. Addl. District & Sessions Judge/Returning Officer***,[40] where it was held that any interference under Article 199 during the election process can only be done so under exceptional circumstances. The relevant extract is reproduced below:

> *"The upshot of the above discussion is that generally in an election process the High Court cannot interfere with by invoking its Constitutional jurisdiction in view of Article 225 of the Constitution. However, this is subject to an exception that where no legal remedy is available to an aggrieved party during the process of election or after its completion, against an order of an election*

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[39] PLD 2005 SC 52
[40] 1994 SCMR 1299 (Paragraph 26)

> *functionary which is patently illegal/without jurisdiction and effect of which is to de-franchise a candidate, he can press into service Constitutional jurisdiction of the High Court."*

29. The rule and its exception was aptly summarized by this Court in the case of ***Federation of Pakistan v. Mian Muhammad Nawaz Sharif***,[41] as:

> *"After the judgment of Javaid Hashmi's case, this Court had provided a limited window in writ jurisdiction under Article 199 of the Constitution to challenge an order passed by a functionary of the Election Commission during currency of the election process or after the said process is over, provided the said order is patently illegal, the law does not provide remedy either before or after the election process and if the order relates to disqualification of a candidate, the alleged disqualification is floating on the surface requiring no further probe.*

30. The bar was also endorsed by this Court in the case of ***Rana Aftab Ahmad Khan v. Muhammad Ajmal***,[42] as:

> *"... under command of Article 225 of the Constitution which is couched in the form of a prohibition, if a dispute of any kind or nature arises out of the election/election process, may it be of a pre or post-poll stage, and is earlier either not resolved as permissible under the law or non-resolvable, due to its peculiar nature or reasons or inadequacies of the Act to meet the exigencies at the relevant time, it shall not be called in question except through an election petition presented to such a tribunal and in such manner as may be determined by Act of Parliament, which obviously is that Act of 1976."*

31. Under the Elections Act, 2017, the voter and contesting candidates are provided with a remedy under the Elections Act, 2017 to scrutinize the nomination papers of other contesting candidates. However, time and again

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[41] PLD 2009 SC 644 (Paragraph 47)
[42] PLD 2010 SC 1066 at Paragraph 9

this Court has been confronted with scenarios where the voter or candidate does not avail the remedy available to them at the pre-poll stage and chooses to invoke the constitutional jurisdiction of the High Court at the post-poll stage to achieve the same means. It must be noted that the availing of the remedy of constitutional jurisdiction is not without limitations, with the most salient one being the availability of an 'other remedy' to the aggrieved party. The question then becomes, should an objector who has not availed the alternate remedy available to them within the prescribed time period be allowed to invoke the extraordinary jurisdiction of the High Court?

32. This matter was also addressed by this Court in ***Rana Aftab Ahmad Khan v. Muhammad Ajmal***[43] where the objector had no plausible explanation as to why they had not availed the remedy available to them at the pre-poll stage and instead chose to exercise the constitutional jurisdiction of the High Court. It was concluded that:

> *"11. We have considered the above and are constrained to hold that the constitutional jurisdiction (reference Article 199) of the High Court in all the cases cannot be invoked as a matter of right, course or routine, rather such jurisdiction has certain circumventions which the Court is required to keep in view while exercising its extraordinary discretionary powers, as the conditions mentioned in Article 199 of the Constitution are obviously meant for the purposes of regulation of the Courts jurisdiction and the availability of "other remedy" is one of such limitations. When the petitioner has no explanation to offer, as to why the "other remedy", which is a definite one in nature; is time bound and is, specifically designed and prescribed by the legislature keeping into consideration time constraints in the election process, but has*

[43] PLD 2010 SC 1066 at Paragraph 11

> *not been availed for any good reason, by the petitioner. Whether still the High Court should have imperatively interfered in the matter and the refusal thereof, should be construed as an erroneous or patently illegal order or an order suffering from any jurisdictional defect calling for the intervention by this Court in its instant jurisdiction? The answer is in negative.*
>
> *12. Resultantly, in the circumstances of the case, the High Court had rightly refused to interfere in its constitutional jurisdiction, when an appropriate, efficacious and adequate alternate remedy available to the petitioner has not been availed by him without any justification...”*

33. The rationale for the writ to not be maintainable in the first instance in matters pertaining to elections is provided in the case of ***The Presiding Officer v. Sadruddin Ansari and Lal Muhammad Bin Yousuf***[44] which states that:

> *“Ordinarily the Court in exercise of its writ jurisdiction would decline to interfere in cases of election, because, it is desirable that the decision on a matter of disputed elections should as soon as possible become final and conclusive. But this is not the only reason. Another valid reason for 'so declining to interfere is because by so doing it would involve itself into a field of investigation which is more appropriate for a tribunal rather than for a Court exercising the prerogative power. The fact, therefore, that an alternative remedy is provided by law should not only upon the above principles but upon general principles too disincline a Court to invoke its extraordinary jurisdiction in a case where such a remedy is still available.”*

34. In the current scenario, a voter of the constituency, namely Mr. Anjum, filed a Writ Petition before the Lahore High Court, Lahore. The High Court has rightfully declined to exercise jurisdiction as an appropriate, alternate, and efficacious remedy was available to the voter who had not availed it without any

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[44] PLD 1967 SC 569

justification and the matter was, therefore, referred to the Election Commission via consent order.

35. The Elections Act, 2017 has expanded the domain of remedies available to the voter as the voter may now avail the remedy available under Section 9 of the Elections Act, 2017 by bringing the facts constituting grave illegality which, at the discretion of the commission, may warrant the exercise of the suo moto jurisdiction by the commission itself.

36. Another aspect that requires consideration is the fact any objector laying information before the commission under Section 9 of the Elections Act, 2017 is also extended the appellate forum of this Court under Section 9(5) of the Elections Act, 2017 read with Article 218(3) of the Constitution. Therefore, under the current regime, and in light of the alternate and efficacious remedy available to the voter, or any other objector alike, the criteria enumerated under Article 199 of the Constitution cannot be fulfilled. Furthermore, the remedy of appeal to this Court reinforces the argument that an alternate and efficacious remedy exists whereby the declaration of the commission can be challenged under Article 218(3). Hence, in light of the current scheme, while the voters, and other objectors alike, have been extended the benefit of Section 9 of the Elections Act, 2017, it appears that the above-mentioned jurisprudence whereby the voters invoked the Constitutional jurisdiction of the superior courts can be distinguished and, therefore, is inapplicable to the current set of facts.

37. In light of the aforementioned discussion, the voter had an alternate and efficacious remedy in terms of *section 9* of the *Elections Act, 2017* and the High Court

was correct in not assuming the jurisdiction and remitted the matter to the *Commission*. However, the next question then becomes whether the High Court had the authority to transfer such a matter to the commission.

ii. Whether Jurisdiction can be conferred by consent of the parties:

38. It is well entrenched constitutional mandate that no Jurisdiction can be conferred on the Court by the consent of the parties unless the jurisdiction is "*conferred on it by the constitution or by or under any law.*"[45] Such principle has been often reiterated by this Court in a string of authorities including ***Multan Electric Power Company Ltd. through Chief Executive and another v Muhammad Ashiq and others,***[46] wherein it was held that:

> *"Jurisdiction on Court or Tribunal would be conferred by law and not by consent of parties, express or implied, Consent could not confer or take away jurisdiction."*

39. Indeed, jurisdiction cannot be conferred on any Court or judicial adjudicatory forum by consent of the parties. However, in a number of cases, it has been held by superior Courts that there is no legal impediment in the way of court or tribunal to decide its own jurisdiction.[47] There are numerous authorities whereby the superior courts have converted one form of proceedings filed in a wrong from and remitted, transferred the same to a court and or forum of competent jurisdiction.

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[45] Article 175 (2) of the Constitution, 1973.

[46] PLD 2006 Supreme Court 328, 'Said alias Khurshid and others v Deputy Commissioner, Settlement Department and others' (PLD 2003 Lahore 617), 'Syed Muhammad Hussain Shah v Abdul Qayyum and others' (2011 SCMR 743) Government of Sindh and others versus Saiful Haq Hashmi and others' (1993 SCMR 956) Ali Muhammad etc. v Muhammad Shafi etc.' (PLJ 1996 SC 560) etc.,

[47] See Government of Punjab v. Sanosh Sultan PLD 1995 SC 541 and Raunaq Ali v.Chief Settlement Commissioner PLD 1973 SC 236

40. The power to convert and or treat one kind of proceeding into another is derived from the doctrine of "***ex debito justitiae***", wherein, the Court owes a debt to the litigant to correct an error in judicial dispensation. This authority is inherently possessed and exercised by the Court not only to advance the cause of justice but also to prevent the injustice. The Superior Courts cannot be barred or restrained to convert one type of proceeding into another and either proceed to decide the matter itself, provided the court itself having jurisdiction over the *lis,* or may remit the *lis* to the court/forum of competent jurisdiction for decision on its own merits. The Superior Courts have been treating and/or converting appeal into revisions and vice versa and Constitution Petitions into appeal or revisions. In the case of ***Jane Margrete William v. Abdul Hamid Mian***,[48] a CMA under section 151 CPC filed in the High Court was treated as cross objection. In the case of ***Capital Development Authority v. Khuda Baksh and 5 others***,[49] the High Court converted the CMA filed in a disposed of Writ Petition as a separate Writ Petition and decided the same accordingly. There is no legal bar to such conversion of proceedings.

41. The doctrine is construed liberally as there have been several instances where even the time consumed by pursuing the appropriate remedy before a wrong forum or jurisdiction in appropriate cases is condoned as in ***Shamsul Haq and others v. Mst. Ghoti and 8 others***.[50]

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[48] 1994 SCMR 1555
[49] 1994 SCMR 771
[50] 1991 SCMR 1135

42. In a case cited as ***Muhammad Anis and others v. Abdul Haseeb and others***,[51] the eligibility to consider promotion was successfully challenged in writ jurisdiction of the High Court. On appeal, this Court came to a conclusion that such question falls within the competence of Service Tribunal, therefore, the writ is not maintainable. Consequently, the impugned judgment passed by the High Court, in exercise of writ jurisdiction, was set aside and in paragraph 16 of the judgment this Court, the Writ Petition filed by the litigant before the High Court was treated as a Service Appeal pending before the Service Tribunal and transmitted to it with direction to decide the same after notice to the parties concerned in accordance with law.

43. Similarly, in a judgment recently reported as ***Province of Sindh and another v. Muhammad Ilyas and others***,[52] a dismissal from service order was challenged before the learned Sindh High Court through a Constitution Petition. The Constitution Petition was treated by the High Court as a service appeal and sent to the Service Tribunal which was decided by the Service Tribunal on merit and this Court declined leave in the matter.[53]

44. An identical course was followed by the learned Division Bench of Peshawar High Court in a case reported as ***Engineer Musharaf Shah v. Government of Khyber Pakhtunkhwa through Chief Secretary and 2 others***.[54]

45. In the instant matter, the Lahore High Court, in consideration of fact that another voter, Shoaib Akmal

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[51] PLD 1994 SC 539
[52] 2016 SCMR 189
[53] See also Thal Engineering Industries Ltd and another v. The Bank of Bahawalpur Ltd. and another (1979 SCMR 32)
[54] 2015 PLC (C.S) 215

Qureshi, had made a similar challenge on the candidature of the Appellant before the *Commission*, transmitted the Writ Petition along with the annexures "*for hearing and deciding the grievance of the Petitioner strictly in accordance with law, rules and policy, after affording an opportunity of hearing to the petitioner and other concerned"*.[55] In view of the string of authorities noted above, we see no wrong to such course adopted by the High Court of transmitting the Writ Petition to the Commission for decision in accordance with law.

46. In the case of ***Lt. Gen. (R) Salahuddin Tirmizi vs. Election Commission of Pakistan***,[56] the controversy was with respect to a challenge against polls held at NA-20, Mansehra-I, before the *Commission*, which was dismissed. The controversy was then taken to Islamabad High Court in writ jurisdiction, which sent the matter back to the Election Commission to be decided '*as to whether a case is made out under section 103-AA of RoPA, 1976'.* The *Commission* in exercise of power under *section 103-AA* of *Representation of People Act, 1976* [57] directed a re-poll at two polling stations of the constituency. Subsequently, the order of the *Commission* was unsuccessfully challenged before the Before the Abbottabad Bench of Peshawar High. The controversy came up before this court. While approving the exercise of powers by the *Commission*, this court held that:

> *"It may be pointed out that in the light of principle laid down by this Court regarding the exercise of jurisdiction in such situation, the order passed by the Election Commission of Pakistan which functions at Islamabad in respect of the constituency of Province of N.-W.F.P., would be challengeable both before*

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[55] Order dated 8.8.2018 in WP No. 11388 of 2018 (Naveed Anjum v. ECP and others) page 80 of CPLA 973/2019.
[56] PLD 2008 Supreme Court 735
[57] Corresponding section 9 of Elections Act, 2017

> *the Islamabad High Court and Peshawar High Court. This concurrent jurisdiction is, however, subject to the rule -5- of propriety according to which a High Court having jurisdiction in a matter if has exercise such jurisdiction, the other High Court which has also jurisdiction in the matter may restrain from exercising its jurisdiction."*

47. This Court, in the case of ***Dr. Raja Aamer Zaman vs. Omar Ayub Khan and others***,[58] examined the power of the *Election Tribunal,* under Section 70 of the RoPA[59] and powers of the *Commission* under Section 103 and 103AA to "*to declare the election as a whole void*". It was held by this court held as follows:

> *"Moreover, when the provisions of Sections 103 and 103AA are examined, it becomes abundantly clear that the Commission has been granted administrative and policing functions for the purpose of conducting elections honestly, fairly, justly and in accordance with law. There administrative powers are not judicial in nature and are exercisable without any deep probe of facts as may be ascertainable on "the face of the record" or after a "summary inquiry" if deemed necessary by the Commission...The powers of the Election Tribunal on the other hand are based on Article 225 of the Constitution and are of a judicial and adjudicatory nature subject only to an appeal, in accordance with the provisions of ROPA and the rules."*

48. It may be observed that when the case of *Lt. Gen. (R) Salahuddin Tirmizi* (supra), was decided and when the case of *Dr. Raja Aamer Zaman (supra)* was decided on 19 June 2015 questioning the election held on 11.5.2013, there existed no remedy or appeal against the decision of *Commission* under *section 103AA of RoPA 1976*. The right of appeal was provided at a subsequent

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[58] 2015 SCMR 1303

[59] Corresponding to section 139 of the Elections Act, 2017

stage by inserting *sub-section (4) to section 103AA* through *RoPA (Amendment Act), 2017* dated 9.1.2017. Another aspect that supplemented the aforementioned decision is the constitutional mandate putting fetters even on the legislature in later part of *Article 222* of the Constitution which categorically provides that *"no such law shall have the effect of taking away or abridging any of the powers of the Commission or an Election Commission under this part."*

49. In the case of ***Ameer Haider Sangha and another v. Mrs Sumaira Malik and others***,[60] this court examined the power of the Election Commission as conferred under the Constitution. It was held that:

> *"Article 222 of the Constitution enables the concerned legislature to make laws in respect of election matters, however, this Article concludes by stipulating that, "no law shall have the effect of taking away or abridging any of the powers of the Commissioner or the Election Commission." Therefore, we need to examine the powers of the Election Commission. The Election Commission is required to hold local government elections (Articles 140A and 219(d) of the Constitution) and to organize and conduct them by making "such arrangements as are necessary to ensure that elections are conducted honestly, justly, fairly and in accordance with law, and that corrupt practices are guarded against" (Article 218(3) of the Constitution). The powers of the Election Commission which are mentioned in the Constitution neither stipulate nor require nor are dependant on the legislature granting, amongst others, specific powers to the Election Commission to order a re-poll. Section 103AA of the Representation of the People Act, (which is applicable in respect of elections to the National Assembly and the Provincial Assemblies) grants the Election Commission the specific power to order a repoll. Much has been made of the fact that such specific power has not been given to the Election Commission by the Act.*

[60] 2018 SCMR 1166

> *However, from this it cannot be inferred that the Election Commission does not have such power, particularly when the Constitution gives the Election Commission general and wide powers to conduct elections (as noted above). The Act does grant the Election Commission the power to order a re-poll, not in such specific terms as mentioned in the said section 103AA, but by exercisinggeneral powers granted by the Act and the Rules which bring about the same result...”*

50. In light of the discussion above, it can be conclusively ascertained that the courts have the prerogative to ascertain the true nature of proceedings, convert them into the appropriate form, and either decide the *lis* themselves, subject to whether the superior court has the jurisdiction itself, or remit the matter to the appropriate forum for adjudication in accordance with law.

II. THE POWERS OF THE COMMISSION UNDER S.9 OF THE ELECTIONS ACT:

51. The second limb of the proposition revolves around the scope of powers entrusted to the Election Commission of Pakistan. The Election Commission is a constitutional authority under Article *218(1)*, of the *Constitution* and is entrusted with the duty to *“organize and conduct the election and to make such arrangement as are necessary to ensure that the election is conducted honestly, justly, fairly and in accordance with law, and that corrupt practice are guarded against.”*[61]

52. *Article 222 of the Constitution*, confers legislative authority, subject to Constitution, on the Parliament to make law in respect of “*all other matter as may be necessary to hold and conduct elections for due constitution of two houses, the Provincial assemblies and*

[61] Sub Article (3) of Article 218

local government.'' However, we observe that such legislative authority is curtailed with respect to the independent authority of *Election Commissioner* and the *Election Commission*, which are saved from the legislative trapping in the concluding part of Article 222. Therefore, fetters are placed on the legislature to the effect that *"no law shall have the effect of taking away or abridge any of the powers of the Commissioner or Election Commission"*.

53. It is manifest from the scheme of the Constitution that the *Commission* has been created *"to organize and conduct the election and to make such arrangement as are necessary to ensure that the election is conducted honestly, justly, fairly and in accordance with law, and that corrupt practice are guarded against".* This view finds support from para 10 of the recent pronouncement of this Court in the case of ***Aamir Haider Sangha v. Sumaira Malik***.[62] In the cited case, it was held *"The power of election commission, which are mentioned in the Constitution neither stipulate nor require nor are dependent on the legislature granting amongst other, specific powers to the Election Commission to order repoll"*.[63]

54. *Section 9* of *The Elections Act, 2017* is reproduced below:

> *"9. Power of the Commission to declare a poll void.*
>
> *1) Notwithstanding anything contained in this Act, if, from facts apparent on the face of the record and after such enquiry as it may deem necessary, the Commission is satisfied that by reason of grave illegalities or such violations of the provisions of this Act or the Rules as have materially affected the result of the poll at one or more polling stations or in*

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[62] 2018 SCMR 1166
[63] Para 10 At page 1175 ibid.

the whole constituency including implementation of an agreement restraining women from casting their votes, it shall make a declaration accordingly and call upon the voters in the concerned polling station or stations or in the whole constituency as the case may be, to recast their votes in the manner provided for bye-elections.

Explanation. – If the turnout of women voters is less than ten percent of the total votes polled in a constituency, the Commission may presume that the women voters have been restrained through an agreement from casting their votes and may declare, polling at one or more polling stations or election in the whole constituency, void.

2) Notwithstanding the powers conferred on it by sub-section (1), the Commission may order filing of complaint under this Act before a court of competent jurisdiction against persons who entered into the agreement referred to in sub-section (1).

3) Notwithstanding the publication of the name of a returned candidate under section 98, the Commission may exercise the powers conferred on it by sub-section (1) before the expiration of sixty days after such publication; and, where the Commission does not finally dispose of a case within the said period, the election of the returned candidate shall be deemed to have become final, subject to the decision of an Election Tribunal on an election petition, if any.

4) While exercising the powers conferred on it by sub-section (1), the Commission shall be deemed to be an Election Tribunal to which an election petition has been presented and shall, notwithstanding anything contained in Chapter IX, regulate its own procedure.

5) Any person aggrieved by a declaration of the Commission under this section may, within thirty days of the declaration, prefer an appeal to the Supreme Court.

55. *Section 9* of the Elections Act 2017, is enabling power emanating from the noted constitutional mandate of

Article 218(3), together with concluding part of *Article 222* of the *Constitution,* is to be read generously. The *Commission* may take cognizance of a matter "*if from facts apparent on the face of the record and after such enquiry as it may deem necessary, the Commission is satisfied that by reason of grave illegalities or such violations of the provisions of this Act or the Rules as have materially affected the result of the poll*". Furthermore, the Commission *'shall make a declaration accordingly and call upon the voters in the concerned polling station or stations or in the whole constituency as the case may be, to recast their votes in the manner provided for bye-elections.'*

56. Such powers are exercisable by the *Commission* in consonance with the constitutional duty, as conferred under *sub article (3) of Article 218* of the *Constitution*,[64] read with the saving of the Constitutional insulation against legislative enslavement[65] under Article 222[66] of the Constitution, to ensure that the election *is conducted honestly, justly, fairly, in accordance with law*, and that *corrupt practices are guarded against*. The *Constitution* has conferred a sacred duty on the *Commission* to guard against corrupt practices, specifying the parameters where the *Commission* may exercise the powers to make a declaration and call upon the voters in the concerned polling station/stations, or in the whole constituency to recast their vote.
57. Another manner in which the *Commission* can take cognizance is in cases where information is laid before

[64] Article 128(3) "It shall be the duty of the Election Commission to organize and conduct the election and to make such arrangements as are necessary to ensure the election is conducted honestly, justly, fairly and in accordance with law and the corrupt practices are guarded against"
[65] See last part of Article 222 of the Constitution
[66] Last part of Article 222 ibid; ''But no such law shall have the effect of taking away or abridging any of the powers of the Commissioner or an Election Commission under this part.''

as regard such *grave illegalities or the violations of the Elections Act, 2017*. Even in such a scenario, the authority of *Commission* is not dependent on any formal complaint but the *Commission* is obligated to exercise its inherent powers to issue such declarations and order repolling when on the basis of any information before it, having conducted an enquiry through, which *it is satisfied that by reasons of grave illegalities or such violations of the provisions of Elections Act, 2017 or the Rules as have materially affected the result of the poll…"*

58. The enabling power under *section 9* of the *Elections Act 2017* is further reinforced by *section 4(1) of the Act 2017,* which provides for the Commission to issue directions. The following section has been reproduced below:

> "4. Power to issue directions. —
>
> *The Commission shall have the power to issue such directions or orders as may be necessary for the performance of its functions and duties, including an order for doing complete justice in any matter pending before it and an order for the purpose of securing the attendance of any person or the discovery or production of any document.*
>
> *1) Any such direction or order shall be enforceable throughout Pakistan and shall be executed as if it had been issued by the High Court.*
>
> *2) Anything required to be done for carrying out the purposes of this Act, for which no provision or no sufficient provision exists, shall be done by such authority and in such manner as the Commission may direct."*

59. In the current matter, the *Commission* was adjudicating on a matter brought to its surveillance under the authority vested in it by virtue of *Article 218 (3)* read with *Article 222* of the Constitution and with *section 4*

as well as *section 9 of the Elections Act, 2017.* Though the *Commission* is deemed to be an Election Tribunal by the operation of *section 9(4) of the Elections Act, 2017*, yet the independence of *Commission* is not compromised, and it is not enslaved to procedural trapping of *Chapter IX, of the Act of 2017*, unlike the Election Tribunal.

60. *The Commission* not only exercised the enabling power contained under *section 9 of the Elections Act 2017*, as backed by the Constitutional mandate noted above, by enquiring into the matter through information laid before it by a voter, Mr. Shoaib Akmal Qureshi, and on another complaint of similar nature in the form of writ Petition, as transmitted to it by the Lahore High Court filed by Mr. Anjum. The *Commission*, in exercise of jurisdiction as conferred under the constitutional mandate noted above, read with *section 9(4)* of the *Elections Act, 2017*, is deemed to be an *Election Tribunal* within the contemplation of *sub-section (4) of section 9,* and may issue any one of the declarations provided for under *section 154(b)* of the *Elections Act, 2017* respectively or issue orders accordingly in exercise of powers conferred through *section 4* of the *Elections Act, 2017*. The declarations provided in *section 154(b)* of the Election, 2017; are reproduced as follows:

> *"154. Decision of the Election Tribunal.—*
>
> *(1) The Election Tribunal may, upon the conclusion of the trial of an election petition, make an order—*
>
> *(b) declaring—*
>
> *(i) the election of the returned candidate to be void and directing that fresh poll be held in one or more polling stations;*
>
> *(ii) the election of the returned candidate to be void and the*

> *petitioner or any other contesting candidate to have been elected; or*
> *(iii) the election as a whole to be void and directing that fresh election be held in the entire constituency."*

61. Given the insertion of the word *'notwithstanding'* in *section 9(4)*, and read with *section 4(3)* of the *Elections Act, 2017,* the *Commission* may also pass any orders it deems are necessary to do *'complete justice',* so long it is within the precinct of the constitutional mandate coupled with *Elections Act, 2017*, in the matter before it. However, this would not be the case for Election Petitions, where the *'Election Tribunal'* does not enjoy comprehensive powers as the *'Election Commission'* does.

62. Therefore, the *'Election Commission'*, exercising jurisdiction under *section 9* of the *Elections Act, 2017* can act on a matter, if it is itself satisfied, or if information is laid before it, under the criteria mentioned within *section 9(1),* of the *Act of 2017* can take cognizance of a matter, *albeit* deemed to be an Election Tribunal as legal fiction, and pass orders, notwithstanding anything contained in *Chapter IX*, including declarations provided for under *section 154,* and the powers under *section 4* whereby it has the authority *'to issue such directions or orders as may be necessary for the performance of its functions and duties, including an order for doing complete justice in any matter pending before it*'.

63. In conclusion, as discussed in preceding paragraph, it has been held that one kind of proceeding can always be converted and treated into another kind of proceedings, therefore, we take no exception to order of the learned High Court transmitting the Writ Petition

filed by Mr. Anjum for decision to the *Election Commission*, which was already seized of a matter similar in nature through the complaint by Mr. Shoaib, another registered voter, and to decide the same in accordance with law.

64. Similarly, since a direct Appeal under the *Elections Act, 2017* was already pending before this Court when the Constitutional Petitions were filed, the High Court has rightfully dismissed the Writ Petitions filed by the current Appellant and remitted the Writ Petition filed by the current Respondent as being non-maintainable. The alternate and efficacious remedy, for the purposes of Article 199, for the returned candidate, being the *aggrieved person*, is a direct appeal to this Court against the order of the Commission. Whereas, the alternate and efficacious remedy, for the purposes of Article 199, for the voter, or objector, being the *aggrieved person*, at the post-election stage is the remedy before the commission under section 9 of the Elections Act, 2017.

65. Now adverting to merits of the case, in CA 1498/18 and CA 1499/18, as noted above, the *Commission* is the constitutional authority, which draws its unfettered power and authority directly from the *Constitution* itself and is not dependent on legislative embellishment, like other authorities.

66. It is clearly demonstrated through the facts and information laid before the *Commission* directly, and as remitted by the Lahore High Court, that the enquiry conducted into the allegation against the appellant regarding his qualifying age (i.e 25 years of age)[67] is a

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[67] Clause (b) to Article 62 of the Constitution, 1973, read with Section 156 (1)(b) of the Elections Act, 2017.

valid ground for declaring election of a returned candidate void. The Commission has exercised its constitutional function and declared the election void and the same cannot be struck down unless it is demonstrated that the declaration made by the Commission, after holding enquiry into his age and obtaining CNIC card with different age to earn eligibility age to contest election is nothing but, *mala fide* in law on the face of it. The Commission has thoroughly examined the claim of the Appellant, scrutinized the official record of the NADRA in depth, as reflected from paragraph 4 to 16 of the impugned decision, followed by declaration contained in Paragraph 16 of the impugned judgment, after hearing the Appellant, and having satisfied itself that has declared the election of the Appellant as returned Candidate from PP-217 Multan VII as void. We are not convinced that the Commission had no jurisdiction to embark to examine the inherent disqualification of a returned post-election. Finding no merits appeals are dismissed.

Judge

Approved for Reporting.