

IN THE SUPREME COURT OF PAKISTAN
(Original Jurisdiction)

PRESENT:

Mr. Justice Iftikhar Muhammad Chaudhry, C.J.
Mr. Justice Khilji Arif Hussain
Mr. Justice Tariq Parvez
Mr. Justice Sarmad Jalal Osmany

CONSTITUTION PETITION NO.31 OF 2011

(Imran Khan Vs. Election Commission of Pakistan & others)

CONSTITUTION PETITION NO.45 OF 2007

(Mohtarma Benazir Bhutto Vs. Election Commission of Pakistan & others)

CONSTITUTION PETITION NO.57 OF 2007

(Barrister Zafarullah Khan Vs. Election Commission of Pakistan & others)

For the petitioner:
(In Const. P. No.31/2011)

Mr. Hamid Khan, Sr. ASC
Mr. Muhammad Waqar Rana, ASC

For the petitioner:
(In Const. P. No.45/2007)

Sardar Khurram Latif Khan Khosa, ASC
Mr. Jehangir Badar, Secy. Gen., PPPP

For the petitioner:
(In Const. P. No.57/2007)

Br. Zafarullah Khan, In person

Voluntarily appeared:

Begum Nasim Chaudhry, MNA/Chairperson
Standing Committee of National Assembly on Law,
Justice and Parliamentary Affairs

For the Federation:

Mr. Dil Muhammad Alizai, DAG

For Election Commission:

Syed Sher Afgan, D.G. (Election)
Mr. Muhammad Nawaz, Director

For NADRA:

Mr. Afnan Karim Kundi, ASC
Mr. Mehmood A. Sheikh, AOR

On Court Notice:

For the Parliamentarians:

Mr. Naseer Ahmed Bhutta, ASC
(On behalf of Sardar Mumtaz Khan, MNA, Sardar
Muhammad Shafqat Hayat Khan, MNA and Ch.
Tassaduq Hussain Khan, MNA)

Mr. Ibadur Rehman Lodhi, ASC
(On behalf of Syed Ahmed Mujtaba Gillani, Mr.
Ijaz Ahmed Kahlon and Malik Ghulam Raza MPAs)

Mr. Mehmood A. Sheikh, AOR
(On behalf of Mr. Jamshed Dasti, MNA)
Mrs. Rana Rizvi, MPA.)

Qari Abdul Rashid, ASC
(On behalf of Mr. Ghulam Qadir Bhetani and Mr.
Rashad Khan, MPAs, KPK)

Mr. Zulfiqar Ahmed Bhutta, ASC
(On behalf of Syed Sajid Hussain Zaidi, Senator
and Haji Khuda Bux Rajavi MNA)

Mr. Shah Khawar, ASC (Absent)

(On behalf of Mrs. Rana Rizvi, MPA Punjab)
Ch. Asghar Ali Jutt, MNA (In person)

Absent Parliamentarians:

Mr. Abdul Hafeez Sheikh, Senator
Dr. Asim Hussain, Senator

Mst. Khadija Aamir Yar Malik, MNA
Sardar Awais Ahmed Khan Leghari, MNA
Mr. Muhammad Akhtar Kanju, MNA

Syed Basit Ahmed Sultan, MPA Punjab
Mian Muhammad Ajmal Asif, MPA Punjab
Sardar Meer Badshah Qaisrani, MPA Punjab
Malik Saif-ul-Malook Khokhar, MPA Punjab
Mst. Humaira Awais Shahid, MPA Punjab

Mr. Saifuddin Khalid, MPA Sindh
Mr. Arif Masih, MPA Sindh
Mr. Rasheed Khan Bhahi, MPA Sindh
Mr. Chettan Mal, MPA Sindh

Molvi Muhammad Sarwar, MPA Balochistan

Date of hearing 06.02.2012

ORDER

It is a matter of great concern that Bye-elections of the following Members of Senate, National Assembly and Provincial Assemblies were conducted by the Election Commissioner although after the 18th Constitutional Amendment such elections were to be organized under Article 219 (b) of the Constitution of Islamic Republic of Pakistan 1973 by the Election Commission.

1. Mr. Abdul Hafeez Sheikh, Senator
2. Syed Sajid Hussain Zaidi, Senator
3. Dr. Asim Hussain, Senator
4. Ch. Asghar Ali Jutt, MNA
5. Mr. Jamshed Ahmed Dasti, MNA
6. Mr. Muhammad Akhtar Khan Kanju, MNA
7. Sardar Muhammad Shafqat Hayat Khan, MNA
8. Ch. Tassadaq Masud Khan, MNA
9. Haji Khuda Bux Rajar, MNA
10. Mst. Khajida Aamir Yar Malik, MNA
11. Sardar Mumtaz Khan, MNA
12. Sardar Awais Ahmed Khan Leghari, MNA
13. Syed Basit Ahmed Sultan, MPA, Punjab
14. Mian Muhammad Ajmal Asif, MPA, Punjab
15. Mr. Ahmed Mujtba Gilani, MPA, Punjab
16. Sardar Meer Badshah Qaisrani, MPA, Punjab
17. Malik Saif ul Malook Khokhar, MPA, Punjab

18. Mr. Ijaz Ahmad Kahloon, MPA, Punjab
19. Malik Ghulam Raza, MPA, Punjab
20. Mst. Humaira Awais Shahid, MPA, Punjab (Reserved Seat)
21. Mrs. Rana Rizvi, MPA, Punjab (Reserved Seat)
22. Mr. Saifuddin Khalid, MPA, Sindh
23. Mr. Arif Massih, MPA, Sindh (Reserved Seat)
24. Mr. Rasheed Khan Bhai, MPA, Sindh (Reserved Seat)
25. Mr. Chettan Mal, MPA, Sindh (Reserved Seat)
26. Mr. Ghulam Qadir Khan Bettani, MPA, KPK
27. Mr. Muhammad Rashad Khan, MPA, KPK
28. Moulvi Muhammad Sarwar, MPA, Balochistan

2. According to Article 218 (2) of the Constitution, the Election Commission shall consist of (a) the Commissioner who shall be the Chairman of the Commission; and (b) four Members, each of whom has been a Judge of a High Court from each Province. There is no two opinions that the above elections were not organized by the Commission however time and again it was pointed out to the afore said representatives by issuing notices to them and also hearing the learned counsels appearing on behalf of some of them inasmuch as on 19th May, 2011, learned Attorney General appeared before this Court and candidly stated that after 20th April, 2010 it was the duty of the Commission, which was charged with the duty of organizing and conducting the elections, to fill the casual vacancies. He further stated that since the Commission had not so far been constituted, elections were not held by the Commission in respect of the casual vacancies; he added that in view of such position it is up to the persons who were declared elected members of the Senate, National Assembly or the Provincial Assemblies to defend their notifications. We could have passed any order on the said day but exercising restraint passed the following order :-

"We could have passed an order in this regard but, at this point of time we exercise restraint with an understanding that the Government of Pakistan and the Election Commissioner shall themselves find out to a way to over-come this difficulty as the Senate, National Assembly and the Provincial Assemblies, etc. are functioning under the Constitution and there should not be any problem to find out the solution of this matter. However, if it is not done so, then the Court being the custodian of the Constitution, if required so, would be bound to pass some appropriate order, in order to save

the system from erosion and to ensure that all the organs of the State are following the Constitution in letter and spirit."

3. The matter was referred to the Election Commission but unfortunately no solution was found out. As such again this issue was taken up on 21st December, 2011 after a lapse of considerable period but no progress was shown. Accordingly in the same manner as the case remained pending when on 19th January, 2012 the learned Attorney General pointed out that to rectify the bye elections of the representatives after the 18th Constitutional Amendment a bill has been introduced in the National Assembly on 18th January, 2012. As such the case was adjourned for today's hearing (6th February, 2012). Apparently no progress has been made except pointing out that some efforts are being made to lay the 20th Constitutional Amendment before the National Assembly and the Senate. We have pointed out to the learned counsel appearing on behalf of some of the representatives as some of them despite notices are not in attendance, that all the citizens particularly the representatives are bound with the mandate of the Constitution because of their oath and Judges of this Court are also bound to protect and preserve the Constitution, here it is a case where despite a lapse of about six to seven months when this fact was pointed out to the Election Commission, the representatives through their counsels as well as the learned Attorney General whose stand we have already pointed out hereinbefore that unless by a Constitutional amendment the rectification cannot be made subject to all just exceptions, they cannot be considered to be duly elected representatives therefore efforts should have been accelerated by the time, if the parliamentarians were so keen to provide protection to them, but today the request is being made for further time to do the needful. We have already shown lot of latitude in the instant case as it is evident hereinabove. We are of the considered opinion that in such like situation when the parliamentarians noted hereinabove had come to know that elections of above referred members are not in accordance with the Constitution they would have voluntarily stayed themselves from functioning in either capacity in order to uphold the command and the supremacy of the Constitution till the rectification by incorporating the 20th Constitutional Amendment. However, keeping in view the facts and circumstances narrated above we are again exercising restraint and instead of declaring their

elections unconstitutional at this stage direct that the notifications issued by the Election Commission in respect of the above Parliamentarians and members of Provincial Assemblies shall remain suspended with all constitutional and legal consequences till the time the rectification has not been obtained through a Constitutional Amendment. However no sooner process of passing Constitutional Amendment is completed in accordance with the Constitution their membership shall stand revived without any order by this Court and the case shall be fixed for further hearing and passing of appropriate order, if need be, after two weeks.

4 On the last date of hearing we have clarified that bye elections in some of the constituencies shall not be organized on the basis of the bogus voter list as such elections shall be against the command of Article 218 (3) of the Constitution which casts a duty upon the Election Commission to conduct election and to make such arrangements as are necessary to ensure that election is conducted honestly, justly and fairly and in accordance with the law and that corrupt practices are guarded against. Essentially in the electoral lists, a good number of the voters have been found bogus and illegal therefore election cannot be held on the same. However Election Commission is bound to ensure that the elections shall be held in these constituencies according to the unpolluted and free from bogus/verified electoral list. This Court has never restrained the Election Commission from holding bye-elections but has always insisted that the elections should be held on the basis of the verified and unpolluted electoral list in terms of Article 218 (3) of the Constitution. Today we have received the report from NADRA wherein following statement has been made: -

“That the Election commission of Pakistan in its recent meeting has decided to hold by-elections for various casually vacant National Assembly and Provincial Assembly seats. After the directions of this august Court and as instructed by ECP, a separate activity parallel to the on-going Project has been undertaken by NADRA specifically for these casually vacant seats and currently NADRA is updating and printing the Electoral Rolls for by-elections in ten constituencies of the country. The Electoral Rolls of these constituencies will be updated by 5th February,

2012 as directed by ECP. At present, Electoral Rolls of six (06) constituencies for by-election has been updated with 5 X copies of their Electoral Rolls printed and dispatched. These six constituencies include Mardan, Kasur, Vehari, Rahim Yar Khan, Attock and Badin. The Electoral Rolls of remaining 4 X constituencies will be handed over to ECP as per their instructions."

5. We appreciate the efforts made by the NADRA and the Election Commission is directed to conduct the process of bye-elections on the fresh unpolluted and the verified electoral list as per the schedule which has already been issued by it.

Chief Justice

Judge

Judge

Judge

Islamabad, the
6th February, 2012
Atif*/