**Should the ECP punish contempt?**

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The Election Commission of Pakistan has been given the power to punish someone for contempt under Section 10 the Election Act, 2017. A similar power was conferred upon it under Section 103A of the Representation of People Act, 1977. Since repealed, it was added to it by an amendment made thereto in May 1977 in the aftermath of the general elections of 1977.

The text of the afore-referred provisions shows that the Election Commission has been equated with a high court in the exercise of power to punish contempt of court. The ECP is deemed as a high court and its members as judges of a high court. This amounts to virtually amending the constitution, making inroads into constitutional powers by enacting deeming provisions through an ordinary law which is impermissible by the constitution.

It is interesting to note that the Indian election commissions asked for a similar power to punish contempt few years ago but the Indian parliament flatly refused to grant such a power on constitutional and legal grounds. The constitution of Pakistan also does not permit conferment of such powers on to the ECP. Therefore, Section 10 of the Election Act is unconstitutional and ultra vires of the constitution. The reasons are as follows.

The ECP is not a court and does not share judicial power with courts. It is a constitutional body created under Article 213 of the constitution. Its functions are provided in Article 219 of the constitution; of these, its primary function is to hold and conduct free and fair general and by-elections elections to the national and provincial assemblies, the Senate and local governments.

The ECP can be entrusted with any other function by parliament under the new clause (e) of Article 219. But there is a difference between a power and a function. The ECP has been given an additional power of deciding the caretaker prime/chief ministers in case there is no consensus over the name between the prime minister and the leader of opposition or the committees referred to in the newly added Article 224A of the constitution.

The very concept of a caretaker government is against the preamble and basic structure of the constitution since state authority can be exercised only through chosen representatives. Under the Election Act and the earlier election law, limited quasi-judicial power was conferred upon the ECP by enacting a deeming clause therein to treat it as a tribunal during a certain period. But it is prima facie ultra vires of Article 225 of the constitution which envisages independent tribunals run by members of the subordinate judiciary or retired judges to decide election disputes.

By exercising such a power, the ECP becomes a judge in its own cause particularly when allegations of corrupt and illegal practices are made and the election staff is involved therein. The mere fact that some deeming quasi-judicial function is conferred upon a body or institution would be wholly insufficient to confer upon it the power to punish contempt.

There are several bodies that are performing such functions but none of them has been given that extreme power to punish someone for its contempt. A power conferred upon an institution or body is to be judged against the liberties of the people and functioning of the state and its institutions and not to silence them for legitimate criticism. The right to freedom of speech provided in Article 19 of the constitution refers to contempt of court. The word “court” used therein has an obvious reference to Article 204 of the constitution and its scope cannot be expanded through an ordinary legislation. The ECP does not fit in there.

The constitution confers the power of contempt powers on courts under Article 204 of the constitution. The word ‘Court” is defined in the same article which means the Supreme Court and the High Court. The Contempt of Court Ordinance, 2003 defines ‘superior court’ as the Supreme Court and the high courts. Section 4(2) of the said ordinance states that every high court shall have the power to punish for the contempt of its subordinate court. It is doubtful if this power could be conferred even upon the high courts. In pursuance of legislative powers given in that article, the power to punish contempt cannot be given to the ECP.

Parliament has limited power to punish a person who refuses to give evidence or produce documents and even that power is to be exercised through courts. The constitution of Pakistan deviates from the English practice where parliament is also considered a high court in the constitutional sense. The Supreme Court has already held in Baz Muhammad Kakar’s case (2012) that the power to punish contempt is meant for the courts only.

The power of parliament to legislate upon a subject is provided in and controlled by Article 242 of the constitution. Parliament can legislate on a subject in respect of legislative fields provided in the Fourth Schedule to the constitution. The legislative list has two parts. In none of the entries of the said Fourth Schedule has parliament been given the power to provide for or confer the power of punishing contempt of court upon the election commission.

There are no general and unlimited legislative powers of the parliament. If that were so all other countries would have conferred similar powers on their election commissions. Even the UK parliament which has no constitutional limitations upon its legislative powers has never conferred such a drastic and punitive power upon its election commission. The status of an election commission is that of an administrative body even if it is manned by former judges of the Supreme Court.

It may be asked why the ECP would need such a power. The commission performs several functions including those mentioned in Article 219. It also entertains and decides questions referred to in respect of a member whether (s) he has become disqualified from being a member. This power was originally vested in the chief election commissioner, but through the 18th Amendment was given to the whole commission.

The ECP does not necessarily perform a judicial function. The decision of the referred question of disqualification is at the most a fact-finding inquiry. The post-election dispute in the context of Article 63(2) of the constitution and the reference it follows is a unique feature of our constitution. The matter of post-election disqualification is usually decided by a house of parliament or courts under different constitutions in parliamentary democracies.

The enforcement of decisions made by different institutions primarily rests upon the legality of decisions and impartiality of the tribunal. No institution can enforce or earn respect through coercive measures. Even the power of punishing contempt of court is falling to disuse. The interest of the constitutional institutions and people must converge. There is no greater guarantee of rights and assurance for respect than rule by consent obtained through free and fair elections.

The ECP should not shy away from being criticized. It must remember that it is a constitutional institution which does not need draconian powers, and it is run by humans and not angels. It will stand out above and high amongst all others only if it follows the constitution. The rest, including respect for it, will follow.

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