**Back to Square One**

**Caught in the middle is the Election Commi-ssion of Pakistan (ECP).**

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Pakistan is stuck up politically. Most legislators think that, in the presence of a parliament-friendly Chief Justice (CJ) at the Supreme Court (SC), it is an opportune time to introduce a constitutional amendment that could prevent the SC from trampling over the domain of parliament in the future. To do so, the time available is almost one month. However, a political party, the Pakistan Tehreke Insaf (PTI), thinks that such an amendment would militate against its political interests. The PTI sees the parliament-friendly CJ as opposed to its political presence.

Caught in the middle is the Election Commission of Pakistan (ECP), which is empowered to declare a political party ineligible for participating in general elections in case the party does not fulfill certain conditions. Hence, on the one hand, the ECP declared (on December 22, 2023) that the PTI was disqualified from participating in forthcoming general elections, whereas on the other hand, the SC expected the ECP to permit the PTI to contest elections. One wonders how it could be.

The detailed order of the 70-page judgment (8-5 majority) issued on September 23 offers an interesting insight. In the footnote of page 21, the SC reproduced Section 215 (5) of the Elections Act of 2017 dealing with the eligibility of a party to obtain election symbol. The section says, “If a political party … fails to comply with the provision of Section 209 (regarding intra-party elections) or Section 210 (regarding the sources of the party’s funds), the [Election] Commission may … declare it … ineligible to obtain an election symbol for election to Parliament,… and the Commission shall not allocate an election symbol to such political party in subsequent elections.”

The SC addresses Section 215 (5) in four main ways: First, in para 32, the SC says, “The word ‘may’ in Section 215 (5) indicates the discretion of the Commission in making the declaration, which discretion, like all other discretionary powers vested in public functionaries, is to be exercised justly, fairly and reasonably, considering the peculiar facts and circumstances of each case.” Here, the SC says that the word “may” should have a bearing on the words “shall not” present in the section. To elaborate, the SC says that the ECP should have used its discretion in favour of the PTI by overlooking the compulsions of Section 215 (5) and by not depriving the PTI of its election symbol.

Further, in para 32, the SC says, “As stipulated in Section 215(5) the consequence of making the declaration is that the Commission is not to allocate an election symbol to such political party in subsequent elections.” Here, the SC interprets the word “subsequent” as the elections next to the forthcoming elections. To elaborate, the SC thinks that the meaning of “subsequent” is not any approaching general elections but the general elections coming after these (February 8) elections. The SC has not mentioned which dictionary it consulted to extract the meaning of “subsequent”. Otherwise, the known meaning of “subsequent” is “following”, “succeeding” and “ensuing”, as per the Oxford Dictionary. By the way, the SC has not told, what is the sense of denying a political party an election symbol, if it were not for stopping the party from its electoral presence? If the job of the ECP is just to discharge warning shots and do nothing practically, the ECP is defunct.

Second, in para 33, the SC says, “any provision entailing penal consequence … must be construed strictly. This principle of strict construction of penal statutes is also called the principle against doubtful penalisation. It stresses that a person should not be penalised except under clear law and if, in construing the relevant provisions, there appears any reasonable doubt or ambiguity, it should be resolved in favour of the person who would be liable to the penalty. No penalty or penal consequence can be added to the one specified in law by inference or assumption. Penal actions can only be taken on the basis of express and clear provisions of law”. Here, the SC does not tell what ambiguity or doubt in law had ravaged the decision of the ECP. Nevertheless, the SC says that denying reserved seats to the PTI is an additional penalty, which is not permissible under law. The point is simple: what Section 215 (5) permitted the ECP to do, it did.

Third, in para 34, the SC says, “while the fundamental rights guaranteed in the Constitution are to be construed progressively and liberally, provisions in the Constitution or in any law that curtail the fundamental rights are to be construed restrictively and narrowly… Therefore, laws that curtail individual rights and liberties, particularly the fundamental rights guaranteed in the Constitution, are to be construed strictly.” Here, the SC says that the ECP of Pakistan should not have used the discretion available to it under Section 215 (5) in the name of respecting fundamental rights of people to vote for a political party.

Fourth, in para 35, the SC says, “Section 215 (5) must be construed strictly. No further penalty or consequence beyond the specified non-allocation of an election symbol can be inferred or assumed from Section 215 (5). Additionally, no other constitutional or statutory right of the political party can be denied on the basis of the non-allocation of an election symbol under this provision”. Here, the SC has accepted the discretionary powers of the ECP, but then in para 37, the SC says that the PTI or its candidates have a right to reserved seats.

It is para 37 that brings the issue back to square one: if Section 215 (5) invests the ECP with discretionary powers including denying an election symbol to a political party, how can the party participate in general elections with an election symbol personifying a unified representative entity to claim reserved seats after the elections?

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